UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS

(WT/DS381)

CLOSING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

December 17, 2010

1. Mr. Chairman, members of the Panel, thank you for the opportunity for closing remarks. We'll start by reviewing a couple of facts central to this dispute.

2. First, is the fact that it is not a requirement to access the U.S. market to have tuna products labeled dolphin safe, nor for them to be dolphin safe to enter U.S. market. In fact, there is substantial evidence that there are non-dolphin safe tuna products on the U.S. market and dolphin safe products not labeled dolphin safe on the U.S. market. Thus, there is clear evidence that a dolphin safe label is not a condition to access the U.S. market.

3. A second factual element of critical importance is that setting on dolphins is harmful to dolphins. There is clear evidence that it is harmful to dolphins, and Mexico has not contested this evidence. The only evidence that Mexico has contested is at what rate dolphin populations are growing. Mexico has concluded from the information it cites that dolphin populations are recovering. We have discussed why this is not correct. And, this relates to a broader issue regarding the facts presented by Mexico in this dispute.

4. Throughout this proceeding the United States has cited a suite of published scientific papers, which underwent rigorous peer-review and scrutiny, to describe the abundance and trends of ETP dolphin stocks and the impacts of intentional chase and encirclement on these stocks. The results of these papers, and the conclusions contained within, are robust and regarded

throughout the scientific community as setting a research standard, most notably for abundance estimation of dolphins using ship-based survey methods.

5. We have observed during these hearings and in its written submissions that Mexico has presented or interpreted available information in many cases without the necessary and proper context provided by the authors. Instead, Mexico has selectively used portions of papers or data that, when taken out of context or expressed without important uncertainties or caveats, appear to lend support to its arguments, but in fact do not.

6. One example that we reviewed today was the 2008 abundance estimate report, that Mexico cited while omitting very clear caveats included in that report by its authors. Mexico has attempted to devalue the scientific evidence presented by the United States in this dispute, but has not provided a basis for these criticisms that finds support in the scientific literature. In an instance where Mexico did present such criticism, in the form of a National Research Council (NRC) Report regarding pre-fishery abundance, Mexico omitted the fact that subsequent estimates of pre-fishery abundance have been produced that addressed and accounted for potential deficiencies in these earlier estimates.

7. The third important factual point is that the ETP is unique. The degree of occurrence and exploitation of dolphins when fishing for tuna and the impact on dolphins of that is orders of magnitude higher in the ETP than in other oceans. This is because unlike in any other ocean in the world, millions of dolphins are intentionally targeted to catch tuna; this simply does not occur in any other ocean in the world.

8. Turning to a few legal points, regarding GATT 1994 Article III.4, we have talked a lot about what less favorable treatment means. Mexico has not argued that the U.S. provisions on

their face discriminate against Mexican tuna products. And, while we do not disagree that a facially neutral measure can discriminate, Mexico has not shown that *de facto* discrimination exists in this dispute. The United States has pointed to other disputes where *de facto* discrimination was found and pointed out that the type of evidence that lead to the conclusions in those disputes has not been presented by Mexico in this dispute.

9. We have also provided the Panel with an analytical approach that we think is helpful in looking at these issues, and one that is consistent with approaches taken in prior WTO reports. In determining whether a measure affords less favorable treatment, one needs to determine what treatment is being afforded imported products, and what treatment is being afforded like domestic products. That treatment can then be looked at under a conditions of competition analysis to determine if the treatment afforded imported products is less favorable than the treatment afforded domestic products.

10. Mexico suggests starting with the conditions of competition analysis. Even if you followed Mexico's approach, the results would be the same. The U.S. provisions do not alter the conditions of competition to the detriment of imported products. It is true, that prior to the U.S. labeling provisions, no standard for labeling tuna products dolphin safe existed, and thus, the U.S. provisions when adopted introduced a change in the market. However, that measure did introduce a change that treated imported products any differently than like domestic products. The U.S. provisions afforded imported and domestic products the same opportunity to compete under the same conditions on use of the dolphin safe label. Mexico instead focuses on the impact of the U.S. measures. But even if that were an appropriate approach, the evidence on the record shows that the number of U.S. and Mexican purse seine vessels in the ETP that caught

tuna by setting on dolphins was relatively the same at the time the U.S. provisions were adopted. The fact that U.S. vessels and producers changed their fishing method or location, and that Mexican vessels and producers did not, is not evidence that the U.S. provisions altered the conditions of competition to the detriment of imported products.

11. With regards to Article I:1 of the GATT 1994, we have discussed in the context of Article III:4 why the approach Mexico has taken in attempting to show the U.S. provisions discriminate against Mexican tuna products is not valid, and Mexico's arguments under Article I:1 are without merit for similar reasons.

12. With respect to Mexico's claims under the TBT Agreement, we spent a lot of time discussing the definition of a technical regulation, what it means for compliance to be mandatory, and what it means to be a labeling requirement. For compliance with a labeling requirement to be mandatory, a measure must set out conditions under which a product may be labeled in a certain way, and require the product to be labeled to be placed on the market. Mexico on the other hand asserts that a labeling requirement is converted to a technical regulation when there is only a single set of conditions under which a product may be labeled in a particular way. Mexico is essentially saying that in order for the U.S. dolphin labeling provisions to be voluntary, the U.S. must permit products to be labeled dolphin safe even if they do not meet the conditions to be labeled dolphin safe. This leaves no room for a measure to be a "labeling requirement" and be voluntary. Yet, labeling requirements are covered under both the definition of a standard, which provides that standards are voluntary, and the definition of a technical regulation, which provides that technical regulations are mandatory.

13. Regarding Mexico's claims under Articles 2.2 and 2.4 of the TBT Agreement, I will not

discuss those in detail now, but do reiterate that Mexico has failed to establish that the U.S. provisions are inconsistent with those articles and refer the Panel to the U.S. written submissions.

14. Mr. Chairman, members of the Panel, and members of the Secretariat assisting you, thank you for your time and attention throughout these proceedings. This concludes my closing statement.