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

**RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO**

**NOTIFICATION OF AN OTHER APPEAL BY MEXICO  
UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES  
AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU),  
AND UNDER RULE 23(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW**

The following communication, dated 10 June 2015, from the Delegation of Mexico, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and Rule 23(1) of the *Working Procedures for Appellate Review*, the United Mexican States (Mexico) hereby notifies its decision to appeal to the Appellate Body certain issues of law and certain legal interpretations developed by the Panel in *Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products (Recourse to Article 21.5 of the DSU by Mexico)* (WT/DS386/RW) (Panel Report).

2. Pursuant to Rules 23(1) and 23(3) of the *Working Procedures for Appellate Review*, Mexico is simultaneously filing this Notice of Other Appeal and its Other Appellant Submission with the Appellate Body Secretariat.

3. The measure at issue in this dispute concerns the amended tuna measure which comprises: (i) Section 1385 ("Dolphin Protection Consumer Information Act") (DPCIA), as contained in Subchapter II ("Conservation and Protection of Marine Mammals") of Chapter 31 ("Marine Mammal Protection"), in Title 16 of the U.S. Code; (ii) U.S. Code of Federal Regulations, Title 50, Part 216, Subpart H ("Dolphin Safe Tuna Labeling"), as amended by the 2013 Final Rule; and (iii) the court ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

4. Pursuant to Rule 23(2)(c)(ii) of the *Working Procedures for Appellate Review*, this Notice of Other Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to Mexico's ability to refer to other paragraphs of the Panel Report in the context of this appeal.

**I. The Panel Erred in Finding and Concluding that Specific Requirements under the Amended Tuna Measure were Inconsistent with WTO Provisions Rather than the Measure as a Whole**

5. Mexico seeks review by the Appellate Body of, and requests the Appellate Body to modify, the findings and conclusions of the Panel that only two of the three elements of the amended tuna measure are inconsistent with Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) and Articles I:1 and III:4 of the General Agreement on Tariffs and Trade 1994 (GATT 1994).

6. While Mexico agrees with some of the reasoning and findings in the Panel's Report, the Panel should have explicitly concluded that the amended tuna measure as a whole is inconsistent with those provisions rather than limiting its ruling to specific elements.

7. The Panel should have concluded that the amended tuna measure as a whole is inconsistent with Articles 2.1 of the TBT Agreement, I:1 and III:4 of the GATT 1994 and, in the case of the GATT 1994, the inconsistencies were not justifiable under Article XX. The Panel's failure to do so is a legal error.<sup>1</sup>

## **II. The Panel Erred in its Findings Regarding the Fishing Method Eligibility Criteria when Assessing the Consistency of the Amended Tuna Measure with Article 2.1 of the TBT Agreement**

8. Mexico seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusion of the Panel, with respect to the fishing method eligibility criteria when assessing the consistency of the amended tuna measure with Article 2.1 of the TBT Agreement. The Panel's conclusion is an error and is based on erroneous findings on issues of law and legal interpretation.<sup>2</sup>

9. Particularly, the Panel erred in finding that the Appellate Body previously ruled on this issue. It further erred in finding that the eligibility criteria were applied in an even-handed manner. Instead, it should have found that the eligibility criteria lacked even-handedness and, therefore, by virtue of the eligibility criteria, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction.

10. Mexico also requests the Appellate Body to find that the panel failed to make an objective assessment of the matter before it in accordance with Article 11 of the DSU in relation to the following factual findings: (i) changing its factual findings regarding unobserved adverse effects for dolphin sets from the original proceedings without any new evidence to support such a change; (ii) finding that other fishing methods have no unobservable adverse effects and omitting consideration of contrary evidence on the record; and (iii) finding that the Appellate Body found that dolphin sets are particularly more harmful to dolphins than other fishing methods when no such finding was made by the Appellate Body.<sup>3</sup>

11. As a result of these errors, Mexico requests that the Appellate Body modify the reasoning of the Panel, reverse the Panel's finding that the eligibility criteria are applied in an even-handed manner and find, instead, that by virtue of the eligibility criteria, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction and, for this additional reason, the amended tuna measure is inconsistent with Article 2.1.

## **III. The Panel Erred in its Findings Regarding Independent Observers under the Certification Requirements when Assessing the Consistency of the Amended Tuna Measure with Article 2.1 of the TBT Agreement**

12. Mexico seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusions of the Panel, with respect to the findings regarding independent observers under the certification requirements when assessing the consistency of the amended tuna measure with Article 2.1 of the TBT Agreement. This conclusion is an error and is based on erroneous findings on issues on law and legal interpretation.<sup>4</sup>

13. Particularly, the Panel erred by not finding that (i) in respect of dolphin-safe certifications, captains in some cases may have an economic conflict of interest, making their certifications less

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<sup>1</sup> The Panel's errors in law are contained, *inter alia*, in paragraphs 7.97-7.108, 7.179, 7.233, 7.246, 7.258-7.259, 7.283, 7.382, 7.400, 7.428, 7.430, 7.442, 7.451, 7.455-7.456, 7.464-7.465, 7.492, 7.501, 7.503, 7.504, 7.541, 7.605, 7.607, 7.611, 8.2(b), 8.2(c), 8.3(b), 8.3(c), 8.5(b), 8.5(c) of the Panel Report.

<sup>2</sup> The Panel's errors in law are contained, *inter alia*, in paragraphs 7.117-7.134 and 8.2(a) of the Panel Report.

<sup>3</sup> The Panel's errors in law are contained, *inter alia*, in paragraphs 7.130, 7.135, 7.120, 7.130, 7.132, 7.134 and 7.135 of the Panel Report.

<sup>4</sup> The Panel's errors in law are contained, *inter alia*, in paragraphs 7.208-7.211, 7.241-7.242 and 7.595-7.597 of the Panel Report.

reliable, and (ii) the justification for differing requirements provided by the United States that circumstances in the Eastern Tropical Pacific (ETP) are unique is in fact contradicted by evidence that tuna associate with dolphins in other ocean regions, in particular the Indian Ocean. Mexico requests the Appellate Body to find that the Panel failed to make an objective assessment of the facts, as required by Article 11 of the DSU, with respect to these findings.

14. As a result of these errors, Mexico requests that the Appellate Body modify the reasoning of the Panel and find, for the additional reasons that dolphin sets are made outside of the ETP and captains' self-certifications create gaps in the dolphin-safe designation, that the certification requirements are not applied in an even-handed manner, and accordingly, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction, and for this additional reason the amended tuna measure is inconsistent with Article 2.1.

**IV. The Panel Erred in its Findings Regarding the Eligibility Criteria when Assessing the Consistency of the Amended Tuna Measure under the Chapeau of Article XX**

15. Mexico seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusions of the Panel, with respect to the findings regarding the eligibility criteria when assessing the consistency of the amended tuna measure under the chapeau of Article XX of the GATT 1994. This conclusion is an error and is based on erroneous findings on issues on law and legal interpretation.<sup>5</sup>

16. As a result of these errors, Mexico requests that the Appellate Body modify the reasoning of the Panel and find that for this additional reason that the eligibility requirements demonstrate that the amended tuna measure is applied in manner that constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail and, therefore, the requirements of the chapeau are not met.

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<sup>5</sup> The Panel's errors in law are contained, *inter alia*, in paragraphs 7.545, 7.577, 7.581-7.582, 7.584-7.585 and 8.5(a), of the Panel Report.