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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 THE UNITED STATES

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

SECOND RECOURSE TO ARTICLE 21.5 OF THE DSU BY MEXICO

NOTIFICATION OF AN 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 20(1)
OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following notification, dated 1 December 2017, 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 20(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 Panels in *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products - Recourse to Article 21.5 of the DSU by the United States -- United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products - Second recourse to article 21.5 of the DSU by Mexico* (Reports of the Panels).

2. Mexico is restricting its appeal to those errors that it believes constitute serious errors of law and legal interpretation that need to be corrected. Where Mexico has not appealed an issue relating to the findings or the reasoning of the Panels, this does not signify agreement therewith or constitute any admission on the part of Mexico.

3. Pursuant to Rule 21(1) and 21(2) of the *Working Procedures*, Mexico is simultaneously filing this Notice of Appeal and its Appellant's Submission with the Appellate Body Secretariat.

4. The measure at issue in this dispute concerns the amended tuna measure, which comprises the following elements (referred to collectively as the "2016 tuna measure"): (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 in March 2016; and (iii) the court ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

5. Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review*, this Notice of Appeal includes an indicative list of the paragraphs of the Panel Reports 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 Panels Erred in their Interpretation of the Applicable Legal Analysis in the Second Step of the Assessment of "Treatment No Less Favourable" under Article 2.1 of the TBT Agreement

6. Mexico seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusions of the Panels with respect to the interpretation and application of the legal analysis in the second step of the assessment of whether the 2016 tuna measure accords "treatment no less favourable" to Mexican tuna products within the meaning of Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement).

7. In determining whether the detrimental impact caused by the 2016 tuna measure stems exclusively from a legitimate regulatory distinction, the Panels made errors in interpreting and applying the analytical methodology for assessing whether the regulatory distinctions giving rise to the detrimental impact are designed and applied in an even-handed manner. In particular, the Panels erred in: interpreting how the objectives pursued by the 2016 tuna measure are taken into account in the assessment of whether the relevant regulatory distinctions are "calibrated" to the overall relative risks to dolphins arising from different tuna fishing methods in different areas of the oceans, and failing to include an inquiry into the nexus between the relevant regulatory distinctions and the objectives of the measure, including consideration of whether the differences in regulatory treatment, and the resulting detrimental impact, are disproportionate in the light of the objectives pursued; and in determining and comparatively analyzing the risk profile of the AIDCP-compliant dolphin encirclement fishing method in the ETP and risk profiles of the other fishing methods for the purposes of the "calibration" test.

8. The Panels' errors are based on erroneous findings on issues of law and legal interpretation, including the following:

- a. The findings and conclusions of the Panels with respect to the relevance and the consideration of the risks to dolphins associated with inaccurate labelling information, including in relation to the absence of sufficient regulatory oversight, the reliability of reporting, the existence of illegal, unreported and unregulated (IUU) fishing, and the existence of transshipment and catch consolidation at sea in different areas of the oceans. In particular, the Panels erred in finding that the risks to dolphins associated with inaccurate dolphin-safe labelling are not relevant to the determination and comparative analysis of the risk profiles of the different fishing methods in different areas of the oceans.¹
- b. The findings and conclusions of the Panels in determining and comparatively analyzing the respective risk profiles (i.e., the overall relative risks or levels of harm to dolphins) of different fishing methods in different areas of the oceans. In particular, the Panels erred in drawing conclusions on risk profiles relating to different fishing methods rather than risk profiles relating to different fisheries (i.e., different fishing methods in different areas of the oceans).²
- c. The findings and conclusions of the Panels relating to the standards and benchmarks used for determining and comparing the respective risk profiles. In particular, the Panels erred in primarily using a "per 1,000 set" standard to determine and compare risk profiles, rejecting the use of "Potential Biological Removal" (PBR) data or absolute levels of adverse effects to supplement the analysis, using a qualitative description of the characteristics of the AIDCP-compliant dolphin encirclement method for the purposes of determining its risk profile, and using the risk profile of the AIDCP-compliant dolphin encirclement fishing method in the ETP as the benchmark for the comparative analysis of

¹ The Panels' errors in law are contained, *inter alia*, in paragraphs 7.102, 7.104-7.105, 7.107-7.127

² The Panels' errors in law are contained, *inter alia*, in paragraphs 7.169-7.170, 7.283-7.285, 7.310, 7.400-7.402, 7.450, 7.457, 7.475, 7.481, 7.494, 7.511, 7.517-7.525, 7.539, 7.541-7.542, 7.571.

all risk profiles and the assessment of whether the tuna measure is "calibrated" to the different risk profiles.³

II. The Panels Erred in their Findings when Assessing whether the Relevant Regulatory Distinctions in the Labelling Conditions of the 2016 Tuna Measure are Consistent with Article 2.1 of the TBT Agreement on the Basis that they are "Calibrated" to the Different Risk Profiles

9. Mexico seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusions of the Panels that the 2016 tuna measure is consistent with Article 2.1 of the TBT Agreement on the basis that the relevant regulatory distinctions in the labelling conditions are "calibrated" to the different risk profiles. The Panels' findings and conclusions are in error and based on incorrect findings of law and legal interpretations, including the following:

- a. The findings and conclusion of the Panels with respect to the eligibility criteria in assessing the consistency of the 2016 tuna measure with Article 2.1 of the TBT Agreement. In particular, the Panels erred in finding that the eligibility criteria are "calibrated" to the overall relative risks to dolphins arising from different fishing methods in different ocean areas.⁴
- b. The findings and conclusion of the Panels with respect to the certification criteria in assessing the consistency of the 2016 tuna measure with Article 2.1 of the TBT Agreement. In particular, the Panels erred in finding that the certification criteria are "calibrated" to the overall relative risks to dolphins arising from different fishing methods in different ocean areas.⁵
- c. The findings and conclusion of the Panels with respect to the tracking and verification criteria in assessing the consistency of the 2016 tuna measure with Article 2.1 of the TBT Agreement. In particular, the Panels erred in finding that the certification criteria are "calibrated" to the overall relative risks to dolphins arising from different fishing methods in different ocean areas.⁶ Mexico also requests the Appellate Body to find that the Panels failed to make an objective assessment of the facts, as required by Article 11 of the DSU, with respect to their findings and conclusion regarding the tracking and verification criteria. In particular, the Panels erred in expressly refusing to give any consideration to evidence adduced by Mexico that was directly relevant and material to the outcome of the legal analysis.⁷
- d. The findings and conclusions of the Panels with respect to the "overall assessment of the consistency of the 2016 tuna measure with Article 2.1 of the TBT Agreement". In particular, the Panels erred in finding that the 2016 tuna measure, as a whole, is "calibrated" to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.⁸

III. The Panels Erred in their Findings when Assessing whether the 2016 Tuna Measure is Consistent with the Chapeau of Article XX of the GATT 1994

10. Mexico also seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusions of the Panels that the 2016 tuna measure, although inconsistent with Articles I:1 and III:4 of the GATT 1994, is exempt from those obligations on the basis that it is justified under Article XX of the GATT 1994. This conclusion is an error and is based on erroneous findings on issues on law and legal interpretation.⁹ Mexico requests that the

³ The Panels' errors in law are contained, *inter alia*, in paragraphs 7.169-7.170, 7.185-7.186, 7.188-7.192, 7.195, 7.204-7.206, 7.211-7.214, 7.279-7.280, 7.281, 7.285, 7.329, 7.339, 7.345, 7.336, 7.373-7.374, 7.384-7.385, 7.89-7.90, 7.397-7.398, 7.419-7.420, 7.469-7.471, 7.473-7.475, 7.518-7.524.

⁴ The Panels' errors in law are contained, *inter alia*, in paragraphs 7.539-7.547.

⁵ The Panels' errors in law are contained, *inter alia*, in paragraphs 7.571-7.573, 7.600-7.611.

⁶ The Panels' errors in law are contained, *inter alia*, in paragraphs 7.650, 7.652, 7.671-7.676.

⁷ The Panels' errors in law are contained, *inter alia*, in paragraphs 6.57 and 7.656.

⁸ The Panels' errors in law are contained, *inter alia*, in paragraphs 7.703-7.717, 8.2, 8.6.

⁹ The Panels' errors in law are contained, *inter alia*, in paragraphs 7.739-7.740, 8.3, 8.7.

Appellate Body modify the reasoning of the Panel and find that the 2016 tuna measure is applied in manner that constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail.

IV. The Panels Erred in their Finding that they had the Authority to Conduct a Partially Open Meeting

11. Mexico also seeks review by the Appellate Body of, and requests the Appellate Body to reverse, the findings and conclusion of the Panels that they had the authority to conduct a partially open meeting of the parties without the consent of both Parties.

12. Pursuant to Rule 20(2)(c) of the *Working Procedures for Appellate Review*, the service address, telephone and facsimile numbers for Mexico are:

The Permanent Mission of Mexico to the WTO
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CH-1202 Geneva
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13. Mexico is providing a copy of this Notice of Appeal directly to the United States and to the third participants.
