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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

Request for the Establishment of a Panel

The following communication, dated 14 November 2013, from the delegation of Mexico to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

On 13 June 2012, the Dispute Settlement Body ("DSB") adopted the Appellate Body Report on *United States - Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (WT/DS381/AB/R) and the Panel Report (WT/DS381/R), as modified by the Appellate Body Report.¹ The DSB ruled that the U.S. "dolphin-safe" labelling provisions were inconsistent with Article 2.1 of the TBT Agreement and recommended that the United States bring its measure, found in the Panel Report as modified by the Appellate Body Report to be inconsistent with the TBT Agreement, into conformity with its obligations under that Agreement.² The dolphin-safe labelling provisions comprised the U.S. Code, Title 16, Section 1385 (the "Dolphin Protection Consumer Information Act"); the implementing regulations at U.S. Code of Federal Regulations, Title 50, Section 216.91 and Section 216.92; and a ruling by a U.S. federal appeals court in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007) (the "Hogarth ruling").³

In its statement at the meeting of the DSB held on 25 June 2012, the United States announced its intention to implement the DSB's recommendations and rulings in this dispute and stated that it would need a reasonable period of time to do so.⁴ On 2 August 2012, Mexico and the United States informed the DSB that additional time was required to discuss a mutually agreed reasonable period of time ("RPT") for the United States to implement the recommendations and rulings of the DSB.⁵ On 17 September 2012, Mexico and the United States informed the DSB that they had agreed that the RPT was 13 months from 13 June 2012, the date of adoption of the DSB's recommendations and rulings. The RPT expired on 13 July 2013.⁶

On 9 July 2013, the United States published in its Federal Register a Final Rule entitled "Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products" (the "2013 Final Rule").⁷ The 2013 Final Rule made certain changes to the implementing regulations at Sections 216.91 and 216.93. Although the "effective date" of the Final Rule was stated to be July 13, 2013 (the deadline for compliance with the RPT), the notice accompanying

¹ Minutes of DSB Meeting held on 13 June 2012, WT/DSB/M/317, 31 July 2012, para. 37. See Appellate Body Report, *US – Tuna II (Mexico)*, WT/DS381/AB/R, 16 May 2012 and Panel Report, *US – Tuna II (Mexico)*, WT/DS381/R, 15 September 2011.

² Appellate Body Report, *US – Tuna II (Mexico)*, paras. 407(b) and 408.

³ Appellate Body Report, *US – Tuna II (Mexico)*, para. 172.

⁴ Minutes of DSB Meeting held on 25 June 2012, WT/DSB/M/318, 27 August 2012, para. 51.

⁵ Communication from Mexico and the United States concerning Article 21.3(c) of the DSU, WT/DS381/16, 6 August 2012.

⁶ Agreement under Article 21.3(b) of the DSU, WT/DS381/17, 19 September 2012.

⁷ 78 Fed. Reg. 40997 (July 9, 2013).

the publication of the Final Rule also stated that the United States would not require compliance until 1 January 2014.⁸

The United States made no changes to the Dolphin Protection Consumer Information Act or the Hogarth ruling.

The following measures comprise the "Amended Tuna Measure":

- i) Section 1385 ("Dolphin Protection Consumer Information Act"), 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;
- iii) The ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007);
- iv) Any implementing guidance, directives, policy announcements or any other document issued in relation to instruments (i) through (iii) above, including any modifications or amendments in relation to those instruments.

There is a disagreement between Mexico and the United States as to "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB in the *US – Tuna II (Mexico)* dispute. Mexico considers that the United States has not brought the dolphin safe labelling provisions into compliance with the DSB's recommendations and rulings. Moreover, the Amended Tuna Measure is not consistent with the United States' obligations under the covered Agreements.

The claims in respect of which Mexico is seeking the establishment of a panel include:

- i) The Amended Tuna Measure is inconsistent with Article 2.1 of the TBT Agreement because it continues to accord Mexican tuna products treatment less favourable than that accorded to like tuna products of the United States and to like tuna products originating in any other country;
- ii) The Amended Tuna Measure is inconsistent with Article I:1 of the GATT 1994 because it continues to confer on tuna products originating in other countries an advantage which is not accorded immediately and unconditionally to like tuna products originating in Mexico;
- iii) The Amended Tuna Measure is inconsistent with Article III:4 of the GATT 1994 because it continues to accord Mexican tuna products treatment less favourable than that accorded to like tuna products of United States' origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use;
- iv) The Amended Tuna Measure nullifies or impairs benefits that accrue to Mexico under the GATT 1994 within the meaning of GATT Article XXIII:1(b).

On 2 August 2013, Mexico and the United States concluded a Sequencing Agreement with a view to facilitating the procedures for a resolution of this dispute under Articles 21 and 22 of the DSU.⁹ Since "there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB between Mexico and the United States, Mexico requests that a panel be established under Articles 6 and 21.5 of the DSU, Article 14 of the TBT Agreement, and Article XXIII of the GATT 1994 with standard terms of reference, as set forth in Article 7.1 of the DSU, and that the DSB refer the matter to the original panel, if possible, pursuant to Article 21.5 of the DSU.

⁸ *Ibid.*, p. 40998.

⁹ Understanding between the United States and Mexico Regarding Procedures under Articles 21 and 22 of the DSU, WT/DS381/19, 7 August 2013.

Pursuant to paragraph 2 of the Sequencing Agreement, Mexico is not required to hold consultations with the United States prior to requesting the establishment of an Article 21.5 panel. Mexico asks that this request be placed on the agenda of the DSB meeting scheduled for 25 November 2013.
