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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 APPEAL BY THE UNITED STATES  
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 communication, dated 5 June 2015, from the delegation of the United States, is being circulated to Members.

1. Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and to Rule 20 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products: Recourse to Article 21.5 of the DSU by Mexico* (WT/DS381/RW) ("Panel Report") and certain legal interpretations developed by the Panel.

2. The United States seeks review by the Appellate Body of the Panel's findings and conclusion that the amended U.S. dolphin safe labeling measure is inconsistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* (the "TBT Agreement") because it accords less favorable treatment to Mexico's tuna and tuna product exports.<sup>1</sup> This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations, including:

- (a) the Panel's finding that the certification requirements of the amended measure modify the conditions of competition in the U.S. market to the detriment of like Mexican tuna and tuna products because they impose a lighter burden on tuna and tuna product caught outside the Eastern Tropical Pacific (ETP) large purse seine fishery than on tuna and tuna product caught within it.<sup>2</sup>
- (b) the Panel's finding that the detrimental impact caused by the certification requirements does not stem exclusively from legitimate regulatory distinctions because the requirements for tuna caught outside the ETP large purse seine fishery may result in inaccurate information being passed to consumers.<sup>3</sup>

<sup>1</sup> See, e.g., Panel Report, paras. 7.233, 7.263, 8.2(b) (with respect to the certification requirements); *id.* paras. 7.400, 8.2(c) (with respect to the tracking and verification requirements).

<sup>2</sup> See, e.g., Panel Report, paras. 7.162, 7.170, 7.178-179, 7.454, 7.500, 8.2(b). The United States considers that the Panel erred as a matter of law with respect to this finding. However, to the extent that the Appellate Body considers the question of the meaning of municipal law in this instance to be a question of fact, the Panel acted inconsistently with Article 11 of the DSU in concluding that the certification requirements apply to all tuna and tuna product.

<sup>3</sup> See e.g., Panel Report, paras. 7.233-7.234, 7.246, 7.598-7.602, 8.2(b).

- (c) the Panel's finding that the detrimental impact caused by the certification requirements does not stem exclusively from legitimate regulatory distinctions due to the design of the determination provisions.<sup>4</sup>
- (d) the Panel's finding that the tracking and verification requirements of the amended measure modify the conditions of competition in the U.S. market to the detriment of like Mexican tuna and tuna products because they impose a lesser burden on tuna and tuna product caught outside the ETP large purse seine fishery than on tuna and tuna product caught within it.<sup>5</sup>
- (e) the Panel's finding that the detrimental impact caused by the tracking and verification requirements does not stem exclusively from legitimate regulatory distinctions.<sup>6</sup>

3. The United States also seeks review by the Appellate Body of the Panel's findings and conclusions that the amended U.S. dolphin safe labeling measure is inconsistent with Articles I:1 and III:4 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994")<sup>7</sup> and, if the Appellate Body should not reverse the Panel's finding with respect to either Article I:1 or Article III:4, then the United States seeks review of the Panel's findings that the amended measure is not applied consistently with the Article XX chapeau.<sup>8</sup> These conclusions are in error and are based on erroneous findings on issues of law and legal interpretations, including:

- (a) the Panel's finding that the certification requirements of the amended measure are inconsistent with Article I:1 of the GATT 1994 because they require observer coverage for purse seine vessels in the ETP but not for vessels in other fisheries.<sup>9</sup>
- (b) the Panel's finding that the tracking and verification requirements of the amended measure are inconsistent with Article I:1 of the GATT 1994 because they impose a lesser burden on vessels outside the ETP large purse seine fishery than on vessels within it.<sup>10</sup>
- (c) the Panel's finding that the certification requirements of the amended measure are inconsistent with Article III:4 of the GATT 1994 because they impose a lighter burden on tuna caught outside the ETP large purse seine fishery than inside it.<sup>11</sup>
- (d) the Panel's finding that the tracking and verification requirements of the amended measure are inconsistent with Article III:4 of the GATT 1994 because they impose a lighter burden on tuna caught outside the ETP large purse seine fishery than inside it.<sup>12</sup>
- (e) the Panel's finding that the certification requirements of the amended measure impose "arbitrary and unjustifiable discrimination between countries where the same conditions prevail," contrary to the chapeau of Article XX of the GATT 1994, because the requirements for tuna and tuna product caught outside the ETP large purse seine fishery make it easier for non-dolphin-safe tuna to be incorrectly labeled as dolphin safe.<sup>13</sup>

<sup>4</sup> See *e.g.*, Panel Report, paras. 7.258-263, 7.283, 8.2(b).

<sup>5</sup> See, *e.g.*, Panel Report, paras. 7.369-7.372, 7.382, 7.462-7.463, 7.502, 8.2(c). The United States considers that the Panel erred as a matter of law with respect to this finding. However, to the extent that the Appellate Body considers the question of the meaning of municipal law in this instance to be a question of fact, the Panel acted inconsistently with Article 11 of the DSU in concluding that the tracking and verification requirements apply to all tuna and tuna product.

<sup>6</sup> See, *e.g.*, Panel Report, paras. 7.392, 7.395, 7.397-7.402, 8.2(c).

<sup>7</sup> See, *e.g.*, Panel Report paras. 7.455-456, 7.500-7.501, 7.504, 8.3(b) (with respect to the certification requirements); *id.* paras. 7.464-465, 7.502-7.504, 8.3(c) (with respect to the tracking and verification requirements).

<sup>8</sup> See, *e.g.*, Panel Report, paras. 7.603-7.605, 8.5(b) (with respect to the certification requirements); *id.* paras. 7.611, 8.5(c) (with respect to the tracking and verification requirements).

<sup>9</sup> See, *e.g.*, Panel Report, paras. 7.455-7.456, 8.3(b).

<sup>10</sup> See, *e.g.*, Panel Report, paras. 7.463-7.465, 8.3(c).

<sup>11</sup> See, *e.g.*, Panel Report, paras. 7.500-7.501, 8.3(b).

<sup>12</sup> See, *e.g.*, Panel Report, paras. 7.502-7.503, 8.3(c).

<sup>13</sup> See, *e.g.*, Panel Report, paras. 7.598-7.603, 7.605, 8.5(b).

- (f) the Panel's finding that the certification requirements of the amended measure impose "arbitrary and unjustifiable discrimination between countries where the same conditions prevail," contrary to the chapeau of Article XX of the GATT 1994, due to the design of the determination provisions.<sup>14</sup>
- (g) the Panel's finding that the tracking and verification requirements impose "arbitrary and unjustifiable discrimination between countries where the same conditions prevail" contrary to the chapeau of Article XX of the GATT 1994 because they impose a lesser burden on tuna caught other than in the ETP large purse seine fishery.<sup>15</sup>

4. The United States also requests the Appellate Body to find that the Panel failed to make an objective assessment of the matter before it, as called for by Article 11 of the DSU, with regard to the so-called "determination provisions."<sup>16</sup> The Panel drew its conclusions with regard to these provisions based on factual findings that were without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation.<sup>17</sup>

5. In the event that Mexico appeals the finding by the Panel that the amended measure, including the three challenged elements, is provisionally justified under subparagraph (g) of Article XX of the GATT 1994 and the Appellate Body reverses the finding with respect to any of the three challenged elements, the United States seeks review of the Panel's exercise of judicial economy with respect to the U.S. defense under Article XX(b) of the GATT 1994.<sup>18</sup> The United States submits that there are sufficient facts on the record for the Appellate Body to complete the analysis of the amended measure, including the three challenged elements, and find that the measure is provisionally justified under Article XX(b).

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<sup>14</sup> See, e.g., Panel Report, paras. 7.604-7.605, 7.607, 8.5(b).

<sup>15</sup> See, e.g., Panel Report, paras. 7.610-7.611, 8.5(c).

<sup>16</sup> See Panel Report, paras. 7.258-7.263, 7.604.

<sup>17</sup> See, e.g., Panel Report, paras. 7.258-7.263, 7.604.

<sup>18</sup> See Panel Report, paras. 7.543-7.545.