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

### RECOURSE TO ARTICLE 22.2 OF THE DSU BY MEXICO

The following communication, dated 10 March 2016, from the delegation of Mexico to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 22.2 of the DSU.

Mexico requests that a meeting of the Dispute Settlement Body (DSB) be held on 23 March 2016 to consider the following agenda item:

*United States – Measures Concerning the Importation, Marketing and Sale of Tuna  
and Tuna Products (DS381)*  
- *Recourse to Article 22.2 of the DSU by Mexico*

#### Background of this request

On 13 June 2012, the DSB adopted the Appellate Body report and the Panel report as modified by the Appellate Body report. In these reports, it was found that the tuna measure of the United States was inconsistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* (TBT Agreement).<sup>1</sup> The DSB recommended that the United States bring the measure into conformity with its obligations under the TBT Agreement.

The United States informed the DSB that it intended to implement the DSB recommendations and rulings for which it required a reasonable period of time (RPT). Mexico and the United States agreed under Article 21.3(b) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) that the RPT for the United States to implement the recommendations and rulings of the DSB in this dispute would expire on 13 July 2013.<sup>2</sup>

On 9 July 2013, the United States published in its Federal Register a legal instrument entitled "Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products", which the United States refers to as the "2013 Final Rule". The 2013 Final Rule made certain changes to Sections 216.91 and 216.93 of CFR Title 50. Both the Dolphin Protection Consumer Information Act and the Hogarth ruling remained unchanged. According to the United States, the 2013 Final Rule constituted the measure taken to comply with the DSB's recommendations and rulings pursuant to Article 21.5 of the DSU. In Mexico's view, the amended tuna measure did not bring the United States into compliance with the recommendations and rulings of the DSB.

By communication dated 2 August 2013, Mexico and the United States jointly informed the DSB of "Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding," under

<sup>1</sup> The measure at issue comprises:

a. *United States Code*, Title 16, Section 1385 (the "Dolphin Protection Consumer Information Act");  
b. *Code of Federal Regulations*, Title 50, Section 216.91 ("Dolphin-safe labelling standards") and Section 216.92 ("Dolphin-safe requirements for tuna harvested in the ETP [Eastern Tropical Pacific Ocean] by large pursue seine vessels");

c. The ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

Panel Report, para. 2.1.

<sup>2</sup> WT/DS381/17.

which the Parties agreed that Mexico would retain the right to challenge the amended tuna measure under Article 21.5 of the DSU at any time.<sup>3</sup> The Parties also agreed that if the DSB ruled that the amended tuna measure was inconsistent with a covered agreement further to proceedings under Article 21.5, then Mexico would have recourse to Article 22 of the DSU and could request the DSB's authorization to suspend the application of concessions or other obligations under the covered agreements. The United States affirmed that in such a situation, it would not assert that Mexico was precluded from obtaining the DSB's authorization on the grounds that the request was made after the 30-day time-period specified in Article 22.6 of the DSU.<sup>4</sup>

Mexico requested the establishment of a compliance panel, which was established on 22 January 2014. The compliance panel found that the amended tuna measure is inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the *General Agreement on Tariffs and Trade 1994* (GATT 1994).<sup>5</sup> The Appellate Body report circulated to WTO Members on 20 November 2015 upheld the Panel's conclusions on Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994.<sup>6</sup> On 3 December 2015, the DSB adopted the Article 21.5 Appellate Body report and the compliance panel report, as amended by the Appellate Body report.

### **Mexico's request under Article 22.2 of the DSU**

Because the United States' Tuna measure is not in compliance with the recommendations and rulings of the DSB and is inconsistent with the covered Agreements, and in light of paragraph 6 of the understanding reached between the Parties on Agreed Procedures under Articles 21 and 22 of the DSU, Mexico is entitled to redress under Article 22 of the DSU.

In accordance with Article 22.2, Mexico requests authorization from the DSB to suspend the application to the United States of tariff concessions and other related obligations in the goods sector under GATT 1994 in an amount of USD \$ 472.3 million annually. Mexico has applied the principles and procedures of Article 22.3(a) of the DSU in considering what concessions and obligations to suspend. As required by Article 22.4 of the DSU, the level of suspension of concessions proposed by Mexico is equivalent on an annual basis to the level of the nullification or impairment of benefits accruing to Mexico under the covered agreements due to the United States' failure to bring its Tuna measure into compliance by 13 July 2013 or to otherwise comply with the recommendations and rulings of the DSB in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*.

Mexico will implement the suspension of tariff concessions and other related obligations by imposing additional tariffs on a list of U.S. products to be established by Mexico in due course.

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<sup>3</sup> WT/DS381/19.

<sup>4</sup> Id., para 6.

<sup>5</sup> WT/DS381/RW.

<sup>6</sup> WT/DS381/AB/RW.