

WORLD TRADE ORGANIZATION

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

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 notification, dated 25 January 2012, 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 covered in the Panel Report in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (WT/DS381/R) ("Panel Report"), certain legal interpretations developed by the Panel in this dispute, and the Panel's failure to make an objective assessment of the matter as required by Article 11 of the DSU.

2. 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. APPEAL OF THE PANEL'S CONCLUSION THAT THE U.S. DOLPHIN SAFE LABELLING PROVISIONS ARE NOT INCONSISTENT WITH ARTICLE 2.1 OF THE TBT AGREEMENT AND THE PANEL'S FAILURE TO MAKE AN OBJECTIVE ASSESSMENT OF THE MATTER BEFORE IT AS REQUIRED BY ARTICLE 11 OF THE DSU

3. Mexico seeks review by the Appellate Body of the Panel's findings that the U.S. dolphin-safe labeling provisions are not inconsistent with Article 2.1 of the TBT Agreement. This conclusion is in error and is based on erroneous findings on issues of law, related interpretations and the Panel's failure to make an objective assessment of the matter before it as required by Article 11 of the DSU, including:

- (a) the Panel erred in the interpretation and application of the phrase "treatment no less favourable" in Article 2.1 of the TBT Agreement by applying what Mexico's refers to as a "denial of access to an advantage" test¹;
- (b) the Panel erred in the interpretation and application of Article 2.1 of the TBT Agreement by ignoring the context of this provision including the preamble to the TBT Agreement and certain provisions in other WTO Agreements.² The Panel also erred in its findings and conclusions in respect of linking the less favourable treatment to the foreign origin of the product and the actions of private actors;
- (c) the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU with respect to the arguments and evidence put forward by Mexico in support of its claim that Mexican tuna products are being denied competitive opportunities by the U.S. dolphin safe labelling provisions³; and
- (d) If the Appellate Body finds that the Panel's denial of access to an advantage test is a permissible interpretation of Article 2.1, the Panel failed to make an objective assessment of the matter before it and thereby acted inconsistently with Article 11 of the DSU. The Panel failed to consider and take into account evidence put forward by Mexico that it was impossible for the Mexican tuna industry to change its fishing practices to adapt to the U.S. measures.⁴

As a result of the foregoing errors, Mexico requests the Appellate Body to reverse the Panel's legal conclusion in paragraph 8.1(a) of the Panel Report.

II. APPEAL OF THE PANEL'S DECISION TO EXERCISE JUDICIAL ECONOMY WITH RESPECT TO MEXICO'S CLAIMS UNDER ARTICLES I:1 AND III:4 OF THE GATT 1994 AND THE PANEL'S FAILURE TO MAKE AN OBJECTIVE ASSESSMENT OF THE MATTER BEFORE IT AS REQUIRED BY ARTICLE 11 OF THE DSU

5. Mexico seeks review by the Appellate Body of the Panel's decision to exercise judicial economy and decline ruling on Mexico's discriminations claims under Articles I:1 and III:4 of the GATT 1994.⁵ Mexico addresses the following errors in the Panel's decision to exercise judicial economy with respect to Mexico's claims under Articles I:1 and III:4 of the GATT 1994:

- (a) the Panel exercised false judicial economy by not addressing all the issues before it that were necessary for the effective resolution of the dispute. After finding no violation of Article 2.1 of the TBT Agreement, the Panel should have continued its analysis of the more general provisions contained in the GATT 1994; and
- (b) the Panel failed to examine Mexico's claims under the GATT 1994 led to its failure to conduct an objective assessment of the matter before it as required by Article 11 of the DSU.

6. As a result of the foregoing errors, Mexico requests the Appellate Body to reverse the Panel's legal conclusion in paragraph 8.2 and Section VII of the Panel Report and complete the analysis of Mexico's claims under Articles I:1 and III:4 of the GATT 1994.

¹See Panel Report, paras. 7.191-7.378, in particular, 7.269-7.284, 7.304-7.311, 7.333, 7.334, 7.345-7.350, 7.361-7.368, 7.374-7.378.

²See Panel Report, paras. 7.268-7.278.

³See Panel Report, paras. 7.365-7.368 and 7.374-7.378.

⁴See Panel Report, paras. 7.310, 7.323, 7.334, 7.343-7.344, 7.349.

⁵See Panel Report, paras. 7.741-7.748 and 8.2.

III. APPEAL OF THE PANEL'S CONCLUSION THAT THE U.S. DOLPHIN SAFE LABELLING PROVISIONS ARE NOT INCONSISTENT WITH ARTICLE 2.4 OF THE TBT AGREEMENT

7. Mexico seeks review by the Appellate Body of the Panel's findings that the U.S. dolphin-safe labeling provisions are not inconsistent with Article 2.4 of the TBT Agreement.⁶ This conclusion is in error and is based on erroneous findings on issues of law, related interpretations and the Panel's failure to make an objective assessment of the matter before it as required by Article 11 of the DSU, including:

- (a) the Panel erred in not evaluating whether the AIDCP standard would be effective and appropriate in fulfilling the U.S. objectives in fisheries outside the ETP. In doing so, the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU; and
- (b) the Panel applied an incorrect legal test in evaluating whether the AIDCP standard would be effective and appropriate to fulfill the U.S. objectives.⁷

8. As a result of the foregoing errors, Mexico requests the Appellate Body to reverse the Panel's legal conclusion in paragraph 8.1(c) of the Panel Report.

IV. CONDITIONAL APPEAL OF THE PANEL'S FINDING THAT THE SECOND OBJECTIVE OF THE U.S. DOLPHIN SAFE LABELLING PROVISIONS IS A LEGITIMATE OBJECTIVE WITHIN THE MEANING OF ARTICLE 2.2 OF THE TBT AGREEMENT

9. This appeal is conditional on the Appellate Body's reversal of the Panel's finding that the U.S. dolphin safe labeling provisions are inconsistent with Article 2.2 of the TBT Agreement.

10. Mexico seeks review by the Appellate Body of the Panel's finding that the second objective of the U.S. dolphin safe labeling provisions is a legitimate objective within the meaning of Article 2.2 of the TBT Agreement.⁸ The Appellate Body does not need to review this legal interpretation and conclusion if the condition to this appeal is not met.

V. CONDITIONAL APPEAL OF THE PANEL'S ERRORS IN THE LEGAL ANALYSIS ON WHETHER THE U.S. DOLPHIN SAFE LABELLING PROVISIONS ARE "MORE TRADE RESTRICTIVE THAN NECESSARY TO FULFILL THE LEGITIMATE OBJECTIVE"

11. This appeal is conditional on the Appellate Body's reversal of the Panel's finding that the U.S. dolphin safe labeling provisions are inconsistent with Article 2.2 of the TBT Agreement and the rejection of Mexico's conditional appeal that the second objective of the U.S. dolphin-safe provisions is not a legitimate objective.

12. Mexico seeks review by the Appellate Body of the Panel's legal errors in its analysis on whether the U.S. dolphin safe labelling provisions are more trade restrictive than necessary to fulfill the legitimate objective.⁹ In particular, the Panel erred in continuing its analysis under Article 2.2 of the TBT Agreement after it had concluded that the U.S. measures fulfill their objectives "only partially".¹⁰ The Appellate Body does not need to review these errors if the condition to this appeal is not met.

⁶See Panel Report, paras. 8.1(c) and 7.717-7.740.

⁷See Panel Report, paras. 7.717-7.740.

⁸See Panel Report, paras. 7.400-7.444.

⁹Panel Report, paras. 7.445-7.623.

¹⁰See, e.g., Panel Report, paras. 7.563 and 7.599.