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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

REQUEST FOR CONSULTATIONS

The following communication, dated 13 May 2016, from the delegation of Mexico to the delegation of the United States and to the Chairperson of the Dispute Settlement Body, is circulated in accordance with Article 21.5 of the DSU.

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My authorities have instructed me to request consultations with the Government of the United States ("United States") concerning the most-recently amended Tuna Measure (the "2016 Tuna Measure") under Articles 21.5 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article 14 of the *Agreement on Technical Barriers to Trade* ("TBT Agreement"), and Article XXII of the *General Agreement on Tariffs and Trade, 1994* ("GATT 1994").

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* ("*US – Tuna II (Mexico)*") and the Panel Report, as modified by the Appellate Body Report, which found that the U.S. "dolphin-safe" labelling measures are inconsistent with Article 2.1 of the TBT Agreement and recommended that the United States bring its measures into conformity with its obligations under that Agreement.[1] The dolphin-safe labelling measures (collectively the "Tuna Measure") are composed of the *United States Code*, Title 16, Section 1385 (the "Dolphin Protection Consumer Information Act"); the *Code of Federal Regulations*, Title 50, Section 216.91 and Section 216.92 (the "implementing regulations"); 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").[2]

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 (RPT) to do so.[3] On 17 September 2013, 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.[4]

On 9 July 2013, the United States published in its Federal Register a revision to its regulations administering the Tuna Measure (the "2013 Rule").[5] Mexico and the United States disagreed as to "the existence or consistency with a covered agreement of measures taken to

[1] Appellate Body Report and Panel Report, Action by the Dispute Settlement Body, WT/DS381/15, 15 June 2012. 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)*, para. 172.

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

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

[5] 78 Federal Register 40997 (July 9, 2013).

comply with the recommendations and rulings" of the DSB in the dispute. On 15 November 2013, Mexico therefore requested the establishment of an Article 21.5 panel on the basis that the 2013 Final Rule was inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994.[6]

On 20 November 2015, the Appellate Body circulated its report on the Article 21.5 proceedings, concluding that the United States has not brought its dolphin-safe labelling regime for tuna products into conformity with the recommendations and rulings of the DSB, and recommending that the DSB request the United States to bring its measure into conformity with its obligations under the TBT Agreement and the GATT 1994.[7] On 3 December 2015, the DSB adopted the Article 21.5 Appellate Body report and panel report, as modified by the Appellate Body report.[8]

On 10 March 2016, Mexico requested authorization from the DSB to suspend concessions in the amount of US$ 472.3 million annually.[9] On 22 March 2016, the United States objected to the level of Mexico's proposed suspension of concessions, and the matter was referred to arbitration pursuant to Article 22.6 of the DSU.[10]

On 23 March 2016, the United States published a notice in its Federal Register revising the implementing regulations (the "2016 Rule").[11] On 11 April 2016, the United States – without first requesting consultations with Mexico – requested placement on the agenda of the 21 April 2016 DSB meeting a request for the establishment of another Article 21.5 panel to determine the consistency of the most recently revised Tuna Measure with the United States' obligations under the TBT Agreement and the GATT 1994.[12] The United States' request was referred to the panel at the 9 May 2016 meeting of the DSB.[13]

The following measures comprise the 2016 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 *United States Code*;

ii. *Code of Federal Regulations*, Title 50, Part 216, Subpart H ("Dolphin Safe Tuna Labeling"), as amended by the 2013 Rule and 2016 Rule;

iii. The court ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007) (the "Hogarth ruling");

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.

The United States has made no changes to the Dolphin Protection Consumer Information Act or the Hogarth ruling, and those measures remain an integral part of the 2016 Tuna Measure.

Mexico considers that the United States has failed to implement the DSB's recommendations and rulings and that the 2016 Tuna Measure is inconsistent with the covered agreements:

i. The 2016 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

[6] Recourse to Article 21.5 of the DSU by Mexico, Request for the Establishment of a Panel, WT/DS381/20, 15 November 2013.

[7] Appellate Body Report, *US – Tuna II (Article 21.5 – Mexico)*, WT/DS381/AB/RW, 20 November 2015, para. 8.2.

[8] Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU, Action by the DSB, WT/DS381/28, 4 December 2015.

[9] Recourse to Article 22.2 of the DSU by Mexico, WT/DS381/29, 11 March 2016.

[10] Recourse to Article 22.6 of the DSU by the United States, WT/DS381/30, 22 March 2016.

[11] 81 Federal Register 15,444 (March 23, 2016).

[12] Recourse to Article 21.5 of the DSU by the United States, Request for the Establishment of a Panel, WT/DS381/32, 12 April 2016.

[13] Daily bulletin, WT/DAILYB(16)/36, 10 May 2016, and Proposed Agenda for the 9 May 2016 DSB Meeting, WT/DSB/W/568, 4 May 2016.

to like tuna products of the United States and to like tuna products originating in any other country;

ii. The 2016 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 2016 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.

We look forward to receiving your reply to this request and to fixing a mutually convenient date for consultations.

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