WORLD TRADE ORGANIZATION

WT/DS381/32

12 April 2016

(16-2095)

Page: 1/3

Original: English

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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE UNITED STATES

Request for the Establishment of a Panel

The following communication, dated 11 April 2016, from the delegation of the United States to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

_____

On 3 December 2015, the Dispute Settlement Body ("DSB") adopted the reports of the Appellate Body and compliance panel (as amended by the Appellate Body) 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* (DS381). The DSB found that the "amended tuna measure"[1] was inconsistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* ("TBT Agreement") and Articles I:1 and III:4 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and was not justified under Article XX of the GATT 1994. Therefore, the DSB found that the United States had not brought the dolphin-safe labeling measure into compliance with the TBT Agreement and the GATT 1994, as recommended by the DSB in this dispute.[2]

As previously communicated to the DSB,[3] and as explained below, the United States has revised the amended tuna measure and brought the dolphin-safe labeling measure subject to the recommendations of the DSB into compliance with its WTO obligations. Mexico has not agreed with the United States that the US regulations revising the amended tuna measure are consistent with the covered agreements and bring the United States into compliance with the TBT Agreement and the GATT 1994. In the circumstances of this dispute, the United States considers it appropriate to seek recourse to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), including wherever possible resort to the original panel, to resolve the disagreement as to compliance.[4]

On 22 March 2016, the United States revised the amended tuna measure and brought the dolphin-safe labeling measure subject to the recommendations of the DSB into compliance with the TBT Agreement and the GATT 1994. Specifically, the US National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS) issued an interim final rule ("2016

---

[1] The "amended tuna measure" consisted of "the DPCIA, the implementing regulations, and the Hogarth ruling." Appellate Body Report, *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/AB/RW (adopted Dec. 3, 2015), paras. 6.7-6.8 ("*US – Tuna II (Article 21.5 – Mexico) (AB)*"); *see id.*, para. 1.9.

[2] Minutes of December 3, 2015 DSB Meeting, WT/DSB/M/371, para. 2.12 (Feb. 15, 2016); *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 8.1-8.2; Panel Report, *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 (adopted as modified by *US – Tuna II (Article 21.5 – Mexico) (AB*) Dec. 3, 2015), paras. 8.1-8.6 ("*US – Tuna II (Article 21.5 – Mexico) (Panel)*").

[3] Statement by the United States at the March 23, 2016 DSB meeting, *available at* https://geneva.usmission.gov/2016/03/30/statement-by-the-united-states-at-the-march-23-2016-dsb-meeting/

[4] *See, e.g.*, Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, adopted Nov. 14, 2008, para. 353 ("*US – Continued Suspension (AB)*").

IFR")[5] that revised the amended tuna measure. The 2016 IFR rectifies the inconsistencies of the amended tuna measure with the TBT Agreement and the GATT 1994 as found by the DSB in the proceeding under Article 21.5 of the DSU.

In that proceeding, with regard to the TBT Agreement, the Appellate Body found that, for purposes of the first step of an analysis under Article 2.1, the amended tuna measure modified the conditions of competition to the detriment of Mexican tuna products in the US market "by excluding most Mexican tuna products from access to the dolphin-safe label, while granting conditional access to such label to like products from the United States and other countries."[6] As to the second step of an analysis under Article 2.1, the Appellate Body found that the detrimental impact did not stem exclusively from legitimate regulatory distinctions because "the determination provisions" did "not provide for the substantive conditions of access to the dolphin-safe label to be reinforced by observer certification in all circumstances of comparably high risks, and that this may also entail different tracking and verification requirements than those that apply inside the ETP large purse-seine fishery."[7]

With regard to the GATT 1994, the Appellate Body found that "by excluding most Mexican tuna products from access to the dolphin-safe label, while granting conditional access to such label to like products from the United States and other countries," the amended tuna measure was inconsistent with Articles I:1 and III:4.[8] As to Article XX, the Appellate Body found that, while "the features of the amended tuna measure that gave rise to violations of Articles I and III 'relate to' the goal of conserving dolphins and, accordingly, are provisionally justified under Article XX(g),"[9] the measure did not meet the requirements of the chapeau. The Appellate Body found that "the determination provisions" did not "provide for the substantive conditions of access to the dolphin-safe label to be reinforced by observer certification in all circumstances of comparably high risk, and that this may also entail different tracking and verification requirements than those that apply inside the ETP large purse-seine fishery."[10]

The 2016 IFR amends the dolphin-safe labeling regulations and brings the dolphin-safe labeling measure subject to the DSB recommendations into compliance with the TBT Agreement and the GATT 1994 by rectifying the inconsistencies of the amended tuna measure with those agreements as found by the DSB in the proceeding under Article 21.5 of the DSU. The 2016 IFR, among other changes, revises the design of the determination provisions and certification, tracking, and verification requirements such that any detrimental impact stems exclusively from legitimate regulatory distinctions, for purposes of the second step of an analysis under Article 2.1 of the TBT Agreement, and that the measure meets the requirements of the chapeau of Article XX of the GATT 1994.

The United States and Mexico have consulted on this matter and on the 2016 IFR extensively, and the United States continues to be open to discussing the matter with Mexico.[11] The United States understands, however, that Mexico disagrees that the 2016 IFR revising the amended tuna measure is consistent with the covered agreements and brings the dolphin-safe labeling measure into compliance with the TBT Agreement and the GATT 1994.[12] Mexico has not sought the establishment of a compliance panel in the light of this disagreement. As noted, in the circumstances of this dispute, the United States accordingly considers it appropriate to seek

[5] *Enhanced Document Requirements and Captain Training Requirements to Support Use of the Dolphin Safe Label on Tuna Products*, 81 Fed. Reg. 15,444 (Mar. 23, 2016).

[6] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.238; *see also id.* para. 8.1.a.viii.

[7] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.266; *see also id.* para. 8.1.a.viii.

[8] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.340; *see also id.* para. 8.1.d.i.

[9] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.341 (citing *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.541).

[10] *See, e.g.*, *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.359 ("[T]he United States has not demonstrated that these aspects of the amended tuna measure do not constitute arbitrary or unjustifiable discrimination within the meaning of the chapeau of Article XX."); *see also id.*, para. 8.1.d.ii.

[11] *See, e.g.*, Request for Consultations by Mexico, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/1 (circulated 28 Oct. 2008); *Understanding Between the United States and Mexico Regarding Procedures Under Articles 21 and 22 of the DSU*, WT/DS381/19, para. 10 (circulated 7 Aug. 2013).

[12] As of this date, Mexico has not agreed to suspend the arbitration under Article 22.6 of the DSU pursuant to the U.S. objection to Mexico's request for authorization to suspend concessions or other obligations; *see also* Mexico's statement at the 23 March 2016, DSB meeting.

recourse to Article 21.5 of the DSU, including wherever possible resort to the original panel, to resolve the disagreement as to compliance.[13]

Mexico has requested authorization from the DSB to suspend concessions in the amount of US$ 472.3 million annually.[14] However, the DSB cannot grant authorization to suspend concessions in any amount where the Member concerned has come into compliance.[15] Therefore, as the United States has brought the dolphin-safe labeling measure subject to the recommendations of the DSB into compliance with the TBT Agreement and the GATT 1994, prompt findings by the DSB will assist the parties in securing a positive solution to the dispute.[16]

_____

[13] *See, e.g.*, *US – Continued Suspension (AB)*, para. 353.

[14] Recourse to Article 22.2 of the DSU by Mexico, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/29, at 2.

[15] DSU, Art. 22.4 ("The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.").

[16] DSU, Art. 3.7 ("The aim of the dispute settlement mechanism is to secure a positive solution to the dispute.").