

WORLD TRADE ORGANIZATION

WT/DS381/11
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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

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.