

WORLD TRADE ORGANIZATION

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

Notification of an Appeal by the United States under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 20 January 2012, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the *Working Procedures for Appellate Review*, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (WT/DS381/R) ("Panel Report") and certain legal interpretations developed by the Panel.

1. The United States seeks review by the Appellate Body relating to the Panel's findings and legal conclusion that the U.S. dolphin safe labeling provisions¹ constitute technical regulations within the meaning of the *Agreement on Technical Barriers to Trade* ("TBT Agreement"). This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations of the TBT Agreement, including:

- (a) the Panel's interpretation and application of the term "with which compliance is mandatory" in the definition of a technical regulation in Annex 1.1 of the TBT Agreement²; and

¹See Panel Report, para. 2.2. The U.S. dolphin safe labeling provisions include the Dolphin Protection Consumer Information Act ("DPCIA"), regulations promulgated in accordance with the DPCIA, as codified in Title 50, Section 216 of the Federal Regulations, and the ruling in *Earth Island Institute v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

²See Panel Report, paras. 7.100-7.111.

- (b) the Panel's finding that U.S. dolphin safe labeling provisions are mandatory within the meaning of Annex 1.1 of the TBT Agreement.³

As a result of the foregoing errors, the United States requests the Appellate Body also to reverse the Panel's legal conclusion in paragraph 8.1(b) of the Panel Report and its recommendation in paragraph 8.3 of the Panel Report.

2. If the Appellate Body were to reject the U.S. appeal set out in paragraph 1, then the United States requests the Appellate Body find that the Panel failed to make an objective assessment of the matter before it as called for by Article 11 of the DSU by concluding that the U.S. measures may only partially ensure that consumers are informed about whether tuna was caught by using a method that adversely affects dolphins.⁴ The Panel drew this conclusion based on factual findings that were without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation, including:

- (a) the Panel's conclusion that Mexico has demonstrated that the use of fishing techniques other than setting on dolphins outside of the Eastern Tropical Pacific ("ETP") may produce and has produced significant levels of dolphin bycatch⁵;
- (b) the Panel's finding that the U.S. provisions do not allow the consumer to accurately distinguish between tuna caught in a manner that adversely affects dolphins and other tuna⁶;
- (c) that the threats faced by dolphins outside the ETP are not demonstrated to be lower than similar threats faced by dolphins in the ETP⁷;
- (d) that the differences with respect to the depletion status of the dolphin stocks at issue inside and outside of the ETP are not sufficient to justify the differences in certification requirements under the U.S. provisions⁸; and
- (e) that the requirements applicable in different fisheries under the U.S. provisions are not calibrated to the likelihood of dolphins being killed or seriously injured.⁹

As a result of the foregoing errors, the United States also requests the Appellate Body to reverse the Panel's legal conclusion in paragraph 8.1(b) of the Panel Report and its recommendation in paragraph 8.3 of the Panel Report.

3. If the Appellate Body were to reject the U.S. appeal set out in paragraph 1, then the United States requests the Appellate Body find that the Panel failed to make an objective assessment of the matter before it as called for by Article 11 of the DSU by concluding that the U.S. measures may only partially fulfill their stated objective of contributing to the protection of dolphins by ensuring that the U.S. market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.¹⁰ The Panel drew this conclusion based on factual findings that were without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation, including:

- (a) the Panel's conclusions and findings as set forth in paragraphs 2(a)-(e) above¹¹; and

³See Panel Report, paras. 7.113-7.145.

⁴See Panel Report, paras. 7.592, 7.599.

⁵See Panel Report, paras. 7.517-7.531.

⁶See Panel Report, paras. 7.542-7.545.

⁷See Panel Report, para. 7.562.

⁸See Panel Report, paras. 7.550.

⁹See Panel Report, paras. 7.559-7.561.

¹⁰See Panel Report, paras. 7.592, 7.599.

¹¹See Panel Report, para. 7.590.

- (b) that the U.S. provisions do not calibrate the dolphin safe certification requirements to the likelihood of interaction and harmful effects to dolphins.¹²

As a result of the foregoing errors, the United States also requests the Appellate Body to reverse the Panel's legal conclusion in paragraph 8.1(b) of the Panel Report and its recommendation in paragraph 8.3 of the Panel Report.

4. If the Appellate Body were to reject the U.S. appeal set out in paragraph 1, then the United States seeks review by the Appellate Body of the Panel's legal conclusion Mexico identified a reasonably available, less trade-restrictive alternative that would achieve a level of protection equivalent to that achieved by the U.S. provisions.¹³ This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations of the TBT Agreement, including:

- (a) the conclusion that the extent to which consumer would be misled or deceived would be no greater under the proposed alternative than under the U.S. measures¹⁴;
- (b) that the proposed alternative would not create greater risks to dolphins in the ETP than the U.S. provisions, and would fulfill the U.S. objectives at a level equivalent to the U.S. provisions¹⁵;
- (c) that significant dolphin mortality arises outside of the ETP from fishing techniques other than setting on dolphins¹⁶;
- (d) that the U.S. provisions do not address adverse impacts from fishing techniques other than setting on dolphins outside the ETP¹⁷; and
- (e) that at least some of the dolphin populations affected by fishing techniques other than setting on dolphins are facing risks at least equivalent to those currently faced by dolphin populations in the ETP under Agreement on International Dolphin Conservation Program ("AIDCP") monitoring.¹⁸

As a result of the foregoing errors, the United States also requests the Appellate Body to reverse the Panel's legal conclusion in paragraph 8.1(b) of the Panel Report and its recommendation in paragraph 8.3 of the Panel Report.

5. If the Appellate Body were to reject the U.S. appeal set out in paragraph 1, then the United States seeks review by the Appellate Body of the Panel's legal conclusion that U.S. dolphin safe labeling provisions are more trade-restrictive than necessary to fulfill their legitimate objectives, taking account of the risks non-fulfilment would create. This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations of the TBT Agreement, including:

- (a) the Panel's conclusions as set forth in paragraph 4; and
- (b) that the proposed alternative would be less trade-restrictive than the U.S. provisions, in that it would allow greater competitive opportunities on the U.S. market to products with access to the AIDCP label.¹⁹

¹²See Panel Report, para. 7.600.

¹³See Panel Report, para. 7.578.

¹⁴See Panel Report, paras. 7.573-7.574, 7.577, 7.618-7.619.

¹⁵See Panel Report, para. 7.614, 7.617.

¹⁶See Panel Report, para. 7.613.

¹⁷See Panel Report, para. 7.613.

¹⁸See Panel Report, para. 7.617.

¹⁹See Panel Report, para. 7.568.

As a result of the foregoing errors, the United States also requests the Appellate Body to reverse the Panel's legal conclusion in paragraph 8.1(b) of the Panel Report and its recommendation in paragraph 8.3 of the Panel Report.

6. If the Appellate Body were to reject the U.S. appeal set out in paragraph 1, then the United States requests the Appellate Body find that the Panel failed to make an objective assessment of the matter before it as called for by Article 11 of the DSU by concluding that Mexico had identified an alternative that is less trade restrictive than the U.S. provisions. The Panel drew this conclusion based on factual findings that were without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation, including that the proposed alternative would allow greater competitive opportunities on the U.S. market to products with access to the AIDCP label.²⁰ As a result of the foregoing errors, the United States also requests the Appellate Body to reverse the Panel's legal conclusion in paragraph 8.1(b) of the Panel Report and its recommendation in paragraph 8.3 of the Panel Report.

7. If the Appellate Body were to reject the U.S. appeal set out in paragraph 1, then the United States seeks review by the Appellate Body of the Panel's finding that the AIDCP dolphin safe definition and certification constitute a "relevant international standard" within the meaning of Article 2.4 of the TBT Agreement. This conclusion is in error and is based on erroneous findings on issues of law and legal interpretations of the TBT Agreement, including the Panel's finding that the AIDCP is an international standardizing organization for the purpose of Article 2.4 of the TBT Agreement.²¹ The United States requests the Appellate Body find that the Panel failed to make an objective assessment of the matter before it as called for by Article 11 of the DSU by concluding that there are "institutional links" between the AIDCP and the Inter-American Tropical Tuna Commission.²²

²⁰See Panel Report, para. 7.568.

²¹See Panel Report, paras. 7.678-7.693.

²²See Panel Report, para. 7.684.

