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

Recourse to Article 22.6 of the DSU by the United States

(WT/DS381/ARB)

Responses of the United Mexican States to the Arbitrator's Questions on Preliminary Ruling

14 September 2016

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Introduction

1. Mexico submits the following responses to the questions from the Arbitrator that are directed to Mexico and to both parties. The Arbitrator's questions are reproduced below in bold font, with Mexico's responses following in regular font.

2. For the purpose of responding to the Arbitrator's questions, a brief summary of the procedural timeline in this dispute will provide important context. Mexico will refer to this timeline in its responses to the questions set out below. A careful review of the timeline will demonstrate the connection between the recommendations and rulings of the Dispute Settlement Body (DSB) pursuant to Article 21.5, further to the adoption of the Appellate Body and Panel Reports in the first compliance proceedings, and the current arbitration.

3. On 13 June 2012, the DSB adopted the Appellate Body Report and the Panel Report as modified by the Appellate Body Report in the original proceedings, finding that the U.S. dolphin-safe labelling provisions are inconsistent with Article 2.1 of the *Agreement on Technical Barriers to Trade* (TBT Agreement) and recommending that the United States bring the measure into conformity with its obligations under that Agreement.[1]

4. On 17 September 2012, the United States and Mexico informed the DSB that they had agreed that the reasonable period of time (RPT) for the United States to implement the recommendations and rulings of the DSB was 13 months from the date of adoption of the DBS's recommendations and rulings, expiring on 13 July 2013.[2]

5. On 9 July 2013, the United States published in its Federal Register a Final Rule entitled "Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products"[3] (2013 Final Rule), which amended the U.S. dolphin-safe labelling provisions (the "2013 tuna measure"). There followed a disagreement between Mexico and the United States as to the consistency of the 2013 tuna measure with the United States' obligations under the covered agreements.

6. On 2 August 2013, the United States and Mexico concluded the *Understanding between the United States and Mexico regarding Procedures under Articles 21 and 22 of the DSU* (the "Sequencing Agreement"),[4] to establish the agreed procedures for the resolution of the dispute under Articles 21 and 22 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) and to reduce the scope for procedural disputes.[5] The provisions of the Sequencing Agreement provide, *inter alia*, that: "[i]n the event that the DSB, following a proceeding under DSU Article 21.5, rules that measure taken to comply does not exist or is inconsistent with a covered agreement, Mexico may request authorization to suspend the application of concessions or other obligations under the covered agreements to the United States pursuant to DSU Article 22";[6] and "[t]he

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1 Appellate Body Report, *US – Tuna II (Mexico)*, paras. 299, 407(b) and 408.

2 See Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 1.6.

3 Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 1.13, 3.32.

4 Understanding between the United States and Mexico regarding Procedures under Articles 21 and 22 of the DSU, *US – Tuna II (Mexico)*, WT/DS381/19 (7 August 2013).

5 Sequencing Agreement, p. 2.

6 Sequencing Agreement, para. 6.

Parties will cooperate to enable the arbitrator under DSU Article 22.6 to circulate its decision within 60 days of the referral to arbitration".[7]

7. On 14 November 2013, Mexico requested the establishment of a compliance panel pursuant to Article 21.5 of the DSU.[8] The Panel Report,[9] circulated on 14 April 2015, was subject to an appeal by the United States and an other appeal by Mexico. On 20 November 2015, the Appellate Body Report was circulated, finding that the 2013 tuna measure is inconsistent with the covered agreements, and concluding that the United States has not brought its U.S. dolphin-safe labelling requirements for tuna products into compliance with the DSB's recommendations and rulings.[10]

8. On 3 December 2015, the DSB made the above-referenced recommendations and rulings pursuant to Article 21.5 of the DSU as a result of adopting the Appellate Body Report and the Panel Report as modified by the Appellate Body Report in the first compliance proceedings.[11]

9. On 10 March 2016, further to the DSB's recommendations and rulings pursuant to Article 21.5 and in accordance with the provisions of the Sequencing Agreement, Mexico requested authorization under Article 22.2 of the DSU to suspend application to the United States of tariff concessions and other related obligations.[12] Mexico's request expressly provided that "the level of suspension of concessions proposed by Mexico is equivalent on an annual basis to the level of the nullification or impairment of benefits accruing to Mexico under the covered agreements due to the United States' failure to bring its Tuna measure into compliance by 13 July 2013".[13]

10. On 22 March 2016, the United States objected to the level of suspensions proposed by Mexico, and the matter was duly referred to arbitration pursuant to DSU Article 22.6.[14]

11. Also, on 23 March 2016, the United States published in its Federal Register an "interim final rule" entitled "Enhanced Document Requirements and Captain Training Requirements to Support Use of the Dolphin Safe Label on Tuna Products"[15] (2016 Interim Final Rule), which further amended the U.S. dolphin-safe labelling provisions (the "2016

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7 Sequencing Agreement, para. 8.

8 Recourse to Article 21.5 of the DSU by Mexico, Request for the Establishment of a Panel, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, WT/DS381/20 (15 November 2013).

9 Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*.

10 Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 8.1-8.2.

11 Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU, Action by the Dispute Settlement Body, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, WT/DS381/28 (4 December 2015); Dispute Settlement Body, Minutes of Meeting (3 December 2015), WT/DSB/M/371 (15 February 2016) at paras. 2.1-2.12.

12 Recourse to Article 22.2 of the DSU, *US – Tuna II (Mexico) (Article 22.2 – Mexico)*, WT/DS381/29 (11 March 2016).

13 Ibid., p. 2.

14 Recourse to Article 22.6 of the DSU, *US – Tuna II (Mexico) (Article 22.6 – US)*, WT/DS381/30 (22 March 2016).

15 81 Fed. Reg. 15444 (23 March 2016) (Exhibit US-4).

tuna measure"). The 2016 Interim Final Rule provides that it was effective the day before its publication in the U.S. Federal Register, on 22 March 2016, except for "amendatory instruction 2" (consisting of the amendments to the certification requirements and the tracking and verification requirements for tuna products containing tuna harvested in fisheries outside the ETP), which came into effect on 21 May 2016.

12. On 11 April 2016, the United States requested the establishment of a compliance panel pursuant to Article 21.5 of the DSU.[16]

13. The foregoing continuum of events has important implications.

14. First, the level of suspension at issue in this arbitration is that proposed by Mexico in its request for authorization pursuant to Article 22.2 of the DSU, which was expressly based on the level of the nullification or impairment of benefits accruing to Mexico under the covered agreements due to the United States' failure to bring its Tuna measure into compliance before the end of the RPT on 13 July 2013.[17] At the time when the RPT expired, the 2013 tuna measure (i.e., the U.S. tuna measure as amended by the 2013 Final Rule) was in place. When considering counterfactual scenarios in the assessment of the level of the nullification or impairment, arbitrators in previous arbitrations have chosen the end of the RPT for implementation of a measure taken to comply as the relevant period of reference.[18] Therefore, the appropriate focus for the purposes of conducting the Article 22.6 assessment in this arbitration is the level of the nullification or impairment caused by the 2013 tuna measure following the expiry of the RPT on July 13, 2013, in respect of which the DSB has made recommendations and rulings pursuant to Article 21.5 of the DSU.[19] The 2016 tuna measure did not exist at the time when the RPT expired.

15. Second, the 2016 tuna measure did not exist at the time when Mexico requested authorization pursuant to Article 22.2 of the DSU. Further, the 2016 Interim Final Rule had not yet been published in the United States' own Federal Register when the United States objected under Article 22.6 of the DSU to the level of suspension proposed by Mexico. Contrary to the submissions of the United States, the 2016 tuna measure only partially came into effect on the same day that the United States objected under Article 22.6 to Mexico's proposed level of suspension, not before, and partially came into effect on 21 May 2016.[20] In particular, the amended certification requirements and the amended tracking and verification requirements for tuna products containing tuna caught outside the ETP did not come into effect until 21 May 2016. As a practical consequence, the certification

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[16] Request for the Establishment of a Panel, *US – Tuna II (Mexico) (Article 21.5 – US)*, WT/DS381/32 (12 April 2016).

[17] Recourse to Article 22.2 of the DSU, *US – Tuna II (Mexico) (Article 22.2 – Mexico)*, WT/DS381/29 (11 March 2016), p. 2.

[18] Decision of the Arbitrator, *US – Upland Cotton (Article 22.6 – US II)*, para. 4.118; Decision of the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 2.15; Decision of the Arbitrator, *US – Gambling (Article 22.6 – US)*, paras. 3.41, 3.143-3.144; Decision of the *Arbitrators, EC – Hormones (Canada) (Article 22.6 – EC)*, para. 37; Decision of the Arbitrators, *EC – Hormones (US) (Article 22.6 – EC)*, para. 38.

[19] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 8.1-8.2.

[20] 81 Fed. Reg. 15444 (Exhibit US-4), p. 15445 ("This interim final rule is effective March 22, 2016, except for amendatory instruction 2, which is effective May 21, 2016").

requirements and the tracking and verification requirements under the 2013 tuna measure were in effect and continued to apply until May 21, 2016.

To Mexico:

7. With reference to paragraph 46 of the United States' written submission, could Mexico please comment on the reliance by the United States on the Arbitration decision in *US – Upland Cotton (Article 22.6 – US I)*?

16. At paragraph 46 of its written submission, the United States cites the *US – Upland Cotton (Article 22.6 – US I)* arbitration in support of its position. The Arbitrator's decision in *US – Upland Cotton (Article 22.6 – US I)* was based on circumstances that are completely different from those in the current dispute.

17. In the original proceedings of the *US – Upland Cotton* dispute, the DSB ruled that the measure at issue — the "Step 2" subsidy programme — was inconsistent with the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement). Prior to the Article 21.5 compliance proceedings, but after the expiry of the RPT (referred to as the "implementation period"), the United States repealed and withdrew the WTO-inconsistent Step 2 subsidy programme, thereby eliminating the inconsistency with the United States' WTO obligations by eliminating the measure altogether. Thus, during the Article 21.5 proceedings, the compliance Panel declined to make any finding of WTO inconsistency with respect to the failure of the United States to bring the measure into compliance between the expiry of the RPT and the date on which the measure was repealed.[21] Brazil did not appeal this decision. As a consequence, there was never any DSB ruling pursuant to Article 21.5 that the United States had failed to bring the Step 2 subsidy program into compliance with the DSB's recommendations and rulings before the expiry of the RPT. Accordingly, the Arbitrator in the subsequent Article 22.6 arbitration declined to grant Brazil's request for authorization to implement "one-time countermeasures" in relation to the limited period of time between the expiry of the RPT and the repeal of the Step 2 subsidy programme.[22]

18. In contrast, neither the U.S. tuna measure nor any element thereof has been repealed throughout the current dispute, and there exists a clear DSB ruling pursuant to Article 21.5 that the United States failed to bring the tuna measure, as amended by the 2013 Final Rule, into compliance with the recommendations and rulings of the DSB prior to the expiry of the RPT on 13 July 2013. It is undisputed that the tuna measure continues to exist to this day, and continues to cause detrimental impact on the competitive opportunities of Mexican tuna products in the U.S. market. If the tuna measure had been repealed, then Mexico would have had no reason to request authorization to suspend concessions or other obligations pursuant to Article 22.2 of the DSU. As the tuna measure would no longer exist, it would no longer modify the conditions of competition in the US market to the detriment of Mexican tuna products, and there would no longer be any dispute as to whether or not such detrimental impact can be justified under the covered agreements. Stated simply, the dispute with respect to the U.S. tuna measure would be settled.

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21 Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, para. 3.20.

22 Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, para. 3.50.

19. Therefore, the reasoning and findings of the Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* have no application to this arbitration.

8. With reference to paragraph 48 of the United States' written submission, could Mexico please comment on the United States' contention that Mexico has not explained how the 2013 Tuna Measure is within the Arbitrator's terms of reference?

20. The allegations in paragraph 48 of the United States' written submission are made on the incorrect premise that Mexico is required to "explain" how the 2013 tuna measure is within the Arbitrator's terms of reference in this arbitration. Such an explanation is not necessary in this arbitration. From Mexico's point of view, the Arbitrator's mandate in this arbitration should not be a contentious issue. For the reasons set out below, the "terms of reference" — that is, the mandate of the Arbitrator under Article 22 of the DSU — were established in (i) Mexico's request for authorization to suspend concessions and other obligations pursuant to Article 22.2 of the DSU, which flowed directly from the recommendations and rulings of the DSB pursuant to Article 21.5 further to the adoption of the Appellate Body and Panel reports in the first compliance proceedings, and (ii) the United States' objection pursuant to Article 22.6 of the DSU. The fact that the United States waited to file its objection under Article 22.6 of the DSU until the day on which its 2016 Interim Final Rule comprising the latest amendments to the tuna measure partially came into effect should have no relevance or effect on this arbitration.

21. To start with, as indicated above in the procedural timeline in this dispute, Mexico requested authorization under Article 22.2 of the DSU to suspend application to the United States of tariff concessions and other related obligations on 10 March 2016.[23] Mexico proposed that the level of suspension is USD $472.3 million, and explained that "the level of suspension of concessions proposed by Mexico is equivalent on an annual basis to the level of the nullification or impairment of benefits accruing to Mexico under the covered agreements due to the United States' failure to bring its Tuna measure into compliance by 13 July 2013 [i.e., the end of the RPT]".[24]

22. This request was made expressly on the basis of the DSB's recommendations and rulings pursuant to Article 21.5 of the DSU on 3 December 2015,[25] and fully in accordance with the provisions of the DSU as modified by the Sequencing Agreement.[26] In particular, Article 22 of the DSU provides a complaining Member with the right to request authorization

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[23] Recourse to Article 22.2 of the DSU, *US – Tuna II (Mexico) (Article 22.2 – Mexico)*, WT/DS381/29 (11 March 2016).

[24] Recourse to Article 22.2 of the DSU, *US – Tuna II (Mexico) (Article 22.2 – Mexico)*, WT/DS381/29 (11 March 2016), p. 2.

[25] Ibid., p. 2. See also Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU, Action by the Dispute Settlement Body, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, WT/DS381/28 (4 December 2015); Dispute Settlement Body, Minutes of Meeting (3 December 2015), WT/DSB/M/371 (15 February 2016) at paras. 2.1-2.12.

[26] Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU, Action by the Dispute Settlement Body, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, WT/DS381/28 (4 December 2015); Dispute Settlement Body, Minutes of Meeting, (15 February 2016), WT/DSB/M/371, at paras. 2.1-2.12. See Sequencing Agreement, paras. 6 and 8.

to temporarily suspend the application of concessions or other obligations under the covered agreements "in the event" that the DSB's recommendations and rulings are not implemented by the responding Member within the "reasonable period of time" established under Article 21.3.[27] Thus, Mexico's right to suspend concessions or other obligations was triggered when the United States failed to bring its WTO-inconsistent measure into compliance with the DSB's recommendations and rulings before the end of the RPT on 13 July 2013.

23. The 2013 tuna measure was in place (i.e., the tuna measure as amended by the 2013 Final Rule), as the "measure taken to comply", when the RPT expired on 13 July 2013. There was disagreement between Mexico and the United States as to the consistency of the measure taken to comply with the covered agreements. Therefore, Article 22 procedures could not proceed unless and until the DSB made recommendations and rulings pursuant to Article 21.5 with respect to the question of whether or not the 2013 Final Rule had brought the WTO-inconsistent tuna measure into compliance by the expiry of the RPT. The purpose of the Sequencing Agreement was to modify the timelines contemplated under Articles 21 and 22 of the DSU so as to permit the necessary Article 21.5 compliance proceedings to be fully resolved with respect to the 2013 tuna measure before the rights and procedures under Article 22 were initiated. Thus, it is the 2013 tuna measure, and the disagreement as to its compliance with the recommendations and rulings of the DSU, that gave rise to the Sequencing Agreement, the first compliance proceedings under Article 21.5, and the recommendations and rulings of the DSB on which the current arbitration is based. The 2016 tuna measure did not exist when the RPT expired on 13 July 2013.

24. The United States' objected to Mexico's proposed level of suspension on 22 March 2016, and the matter was duly referred to arbitration under Article 22.6 of the DSU. The United States' objection provides as follows:

> Regarding Mexico's recourse to Article 22.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") in the dispute *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (DS381), my authorities have instructed me to inform you that, pursuant to Article 22.6 of the DSU, the United States objects to the level of suspension of concessions or other obligations under the *General Agreement on Tariffs and Trade 1994* proposed by Mexico in document WT/DS381/29.

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[27] Article 22.1 of the DSU provides that "the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time" (underline emphasis added). The reasonable period of time contemplated in Article 22.1 is set forth in Article 21.3 of the DSU, which provides that Members shall have a reasonable period of time in which to comply with the recommendations and rulings of the DSB, and sets forth the ways in which the reasonable period of time may be determined. Article 22.2 of the DSU provides that a Member may request authorization from the DSB to suspend the application of concessions or other obligations under the covered agreements if the parties have not agreed to satisfactory compensation with 20 days after the date of expiry of the reasonable period of time. Article 22.6 provides that, in the event of an objection to the proposed level of suspension, the matter shall be referred to arbitration, which shall be completed within 60 days after the date of expiry of the reasonable period of time.

> Accordingly, as required by Article 22.6 of the DSU the matter has been referred to arbitration.[28] (footnotes omitted; underline emphasis added)

25. Thus, the United States objected to the "level of suspension" proposed by Mexico, i.e., USD $472.3 million. Its objection made no mention of the 2016 tuna measure, the 2016 Interim Final Rule, and raised no objection to Mexico's statement that the level of suspension is equivalent to the level of the nullification or impairment of benefits accruing to Mexico under the covered agreements due to the United States' failure to bring its tuna measure into compliance before the end of the RPT on 13 July 2013. This fact was pointed out by Mexico at the DSB meeting on 23 March 2016.[29]

26. While the foregoing provides a complete response to the Arbitrator's question, Mexico will now respond to the other statements made by the United States in paragraph 48 of its written submission. The United States' allegations that the 2013 tuna measure "was no longer in existence when the matter was referred to arbitration", that the 2016 Interim Final Rule was adopted "before the United States objected to Mexico's request for authorization to suspend concessions", and "the tuna measure had been adopted before the matter was referred to arbitration"[30] are factually incorrect.

27. As noted above, the 2016 Interim Final Rule was published in the United States' Federal Register on 23 March 2016. Unusually, the date on which this regulation partially came into effect was back-dated to the previous day, 22 March 2016. This was the same day that the United States referred the proposed level of suspension to arbitration by filing its objection under Article 22.6 of the DSU. It is therefore factually incorrect that the 2016 tuna measure was "adopted" or came into force, partially or otherwise, before the United States objected to Mexico's Article 22.2 request and referred the matter to Article 22.6 arbitration.

28. Moreover, the 2016 Interim Final Rule did not entirely come into effect on 22 March 2016. Rather, its amendments to the tuna measure's certification requirements and tracking and verification requirements applicable to tuna products containing tuna caught in fisheries outside the ETP did not come into effect until 21 May 2016. Thus, the 2016 tuna measure was not entirely or fully in force until 21 May 2016.[31] In the meantime, the certification requirements and the tracking and verification requirements under the 2013 tuna measure continued to apply, as do most of the provisions of the original tuna measure, including the prohibition on use of the dolphin-safe label for products made with tuna that qualifies as dolphin-safe under the AIDCP. It is therefore untrue that the 2013 tuna measure "was no longer in existence when the matter was referred to arbitration".

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[28] Recourse to Article 22.6 of the DSU, *US – Tuna II (Mexico) (Article 22.6 – US)*, WT/DS381/30 (22 March 2016).

[29] See Dispute Settlement Body, Minutes of Meeting (13 May 2016), WT/DSB/M/376, para. 7.6.

[30] U.S. written submission, para. 48 (emphasis original).

[31] At the DSB Meeting held on 22 April 2016, Mexico explained that "the new regulations would not become totally effective until the end of May, and would have no effect on tuna products entering the US market until many months thereafter", Dispute Settlement Body, Minutes of Meeting (14 June 2016), WT/DSB/M/377, para. 7.5.

9. With reference to paragraph 22 of Mexico's written submission, could Mexico please elaborate on why it is "legally incorrect" in the context of an arbitration proceeding under Article 22.6 to "identif[y] a 'measure at issue in this proceeding'"? Is the level of nullification or impairment to be determined by the Arbitrator not the level of nullification or impairment caused by a "measure"?

29. The Arbitrator is correct that the level of the nullification or impairment to be determined by the Arbitrator is that which has been caused by a "measure". However, as a matter of necessity, the WTO-inconsistent "measure at issue" in an Article 22.6 arbitration has already been identified in the reports adopted by the DSB and to which the DSB's recommendations and rulings apply.[32] It would therefore be a legal error to engage in the exercise of re-"identifying" the "measure at issue" at the outset of an Article 22.6 arbitration, particularly where, as here, the United States suggests that the "measure at issue" should be different from that identified in the DSB's recommendations and rulings on which the current arbitration is based.

30. The term "measure at issue" is used in the context of both original proceedings and Article 21.5 compliance proceedings to identify the "measure" for which consistency with the covered agreements must be examined and determined, based on the claims of inconsistency raised by the complaining Member. Identifying the legal instruments that make up the "measure at issue" is a critical aspect of establishing a panel's terms of reference. In this respect, the question of whether or not the measure is consistent with the covered agreements is the "issue" to which the words "at issue" refer, and this issue relates directly to the measure itself. In contrast, the matter "at issue" in an Article 22.6 arbitration is whether the suspension of benefits proposed by the complaining Member is equivalent to the level of the nullification or impairment sustained by that Member as a result of the responding Member's failure to bring the measure that has already been determined to be WTO-inconsistent into compliance with the DSB's recommendations and rulings within the RPT.[33] Thus, it is neither the identification of the measure, nor the WTO-inconsistency of the measure, that is ever "at issue" in an Article 22.6 Arbitration; while these findings in the reports adopted by the DSB in the underlying proceedings are relevant, they are not "at issue" in the arbitration. Rather the detrimental effects of the WTO-inconsistent measure, in terms of the nullification or impairment that it has caused, as a result of the responding Member's failure to comply within the RPT are "at issue". Thus, to the extent that the Arbitrator refers to the "measure at issue" in an arbitration, it is simply in reference to the "measure at issue" that was examined and found to be WTO-inconsistent in the underlying proceedings.

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[32] As Mexico explains in its written submission, the dilemma faced by the arbitrators in *EC – Bananas III (US) (Article 22.6 – EC)* and *Brazil – Aircraft (Article 22.6 – Brazil)* was that authorization by the DSB of the suspension of concessions or other obligations presupposes the existence of a failure to comply with the DSB's recommendations or rulings, and the DSB had not yet made recommendations and rulings pursuant to Article 21.5 with respect to the existence of such a failure to comply in either of these disputes. See Mexico's written submission, paras. 30-33. That is not the situation here.

[33] See DSU Article 22.1 ("Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time") (underline emphasis added).

31. Article 22.6 provides that "if the Member concerned objects to the level of suspension proposed, or claims that the principles and procedures set forth in paragraph 3 have not been followed where a complaining party has requested authorization to suspend concessions or other obligations pursuant to paragraph 3(b) or (c), the matter shall be referred to arbitration". For the purposes of this arbitration, the United States may therefore object to Mexico's proposed level of suspension, or it may claim that Mexico has not followed the procedures set forth under Article 22.3 (which is not relevant in the current arbitration). Article 22.6 provides no basis for a responding Member to dispute the "measure at issue", that is, the very basis for the complaining Members' right to request authorization under Article 22.2. Again, that right is triggered when, as here, the responding Member has failed to bring its WTO-inconsistent measure into compliance with the recommendations and rulings of the DSB before the expiry of the RPT.

32. For the foregoing reasons, the United States' request for a preliminary ruling on the "measure at issue" is outside the Arbitrator's mandate in this arbitration and, thus, legally incorrect. The identification of the "measure at issue" is an important preliminary step in the second round of Article 21.5 proceedings, and this illustrates how the United States' is attempting to improperly conflate and merge the issues before the compliance Panels with the separate and distinct mandate of the Arbitrator in this arbitration.

10. With reference to paragraph 36 of Mexico's written submission, could Mexico please explain why it uses the term "potentially" in the phrase "the DSB has issued its recommendations and rulings pursuant to Article 21.5 that the current status of the inconsistency may *potentially* be changed" (Emphasis original).

33. Paragraph 36 of Mexico's written submission provides that: "[i]t is only when an Article 21.5 panel and, if necessary, the Appellate Body have ruled that the measure at issue has been brought into compliance, their reports have been adopted by the DSB, and the DSB has issued its recommendations and rulings pursuant to Article 21.5 that the current status of the inconsistency may *potentially* be changed".

34. The word "potentially" reflects that the DSB's ruling pursuant to Article 21.5 (i) may be that the measure at issue in the second round of compliance proceedings has been brought into compliance and is no longer inconsistent with the covered agreements, or (ii) may be that the measure has not been brought into compliance and continues to be inconsistent with the covered agreements. As either outcome is possible at the conclusion of the compliance proceedings, the "current status" of the measure as WTO-inconsistent pursuant to the standing recommendations and rulings of the DSB could *potentially*, but not necessarily, change to a status of WTO-consistent. Its status could also *potentially* remain WTO-inconsistent.

11. The Arbitrator notes that often complaining Members do not make any use, or prompt use, of authorizations granted by the DSB to suspend concessions or other obligations. Assuming for the sake of argument that Mexico did so in this dispute and the Article 21.5 proceedings in this dispute resulted in the DSB ruling that the United States has brought itself into conformity with its WTO obligations, could Mexico provide its position on whether it could in that hypothetical scenario implement retaliatory measures based on the DSB's prior authorization?

35. In Mexico's view, Mexico would no longer be authorized to suspend concessions or other obligations pursuant to Article 22 in the event that the second compliance proceedings

were to result in a DSB ruling pursuant to Article 21.5 that the 2016 Interim Final Rule has brought the U.S. tuna measure into compliance with the United States' WTO obligations.

36. A disagreement between the Parties as to whether or not a measure taken to comply brings the WTO-inconsistent measure into compliance can only be settled by the recommendations and rulings of the DSB further to the adoption of the compliance panel's report and, if necessary, an Appellate Body report pursuant to Article 21.5.[34] It is for precisely this reason that Mexico has sustained nullification and impairment by the WTO-inconsistent tuna measure since initiating the original dispute settlement proceedings in 2008, and could not even request authorization to suspend concessions and other obligations under Article 22 for more than two years after the end of the RTP on 13 July 2013. Mexico could seek no relief under Article 22 until after the DSB had ruled that the 2013 tuna measure was inconsistent with the covered agreements and non-compliant with the DSB's recommendations and rulings.

37. Mexico strongly disagrees that the 2016 Interim Final Rule has brought the tuna measure into compliance with the DSB's recommendations and rulings, but in any event this disagreement must be resolved in the separate Article 21.5 compliance proceedings. In the meantime, Mexico is entitled to suspend concessions and other obligations at a level equivalent to the level of the nullification and impairment that it has sustained as a result of the United States' failure to bring the tuna measure into compliance by the expiry of the RPT on 13 July 2013. The only purpose of this arbitration is to confirm or determine that level of suspension.

38. The United States seems to argue that it will suffer some form of injustice contrary to the DSU if Mexico is authorized to suspend the application of concessions and other obligations (at the level of the nullification and impairment caused by the 2013 tuna measure) while the second round of Article 21.5 compliance proceedings is in the process of resolving the disagreement as to whether or not the 2016 tuna measure is consistent with the covered agreements. The United States' position entirely ignores that: (i) the U.S. tuna measure has been inconsistent with the covered agreements for at least eight years; and (ii) Mexico has sustained nullification and impairment within the meaning of Article 22 from at least 13 July 2013 until 22 March 2016, and may very well be continuing to sustain such nullification and impairment on an ongoing basis, despite clear DSB rulings that the 2013 tuna measure is WTO-inconsistent. Where it was procedurally necessary for Mexico to await the resolution of the first compliance proceedings while sustaining nullification and impairment caused by the 2013 tuna measure, no injustice or prejudice can be said to result if the United States must face the suspension of concessions and other obligations pursuant to Article 22 while the parties await the resolution of the second compliance proceedings.

39. In this regard, the Appellate Body found in the context of Article 22.8 of the DSU as follows in *US – Continued Suspension*:

> [T]he DSB authorization of the suspension of concessions by the United States and Canada flowed from the inconsistency of Directive

[34] See Mexico's written submission, para. 36. In the context of DSU Article 22.8, the suspension of concessions continues to apply pending the outcome of the DSU Article 21.5 proceeding. See Appellate Body Report, *US – Continued Suspension*, paras. 305, 315, 338-345, 355.

> 96/22/EC and continued to be legally valid until the measure found to be inconsistent with a covered agreement in *EC – Hormones* was removed within the meaning of Article 22.8. Although the European Communities may have claimed to have removed the inconsistent measure and declared compliance, the United States and Canada disagreed that this was in fact the case. Thus, until the removal of the European Communities' inconsistent measure was determined through WTO dispute settlement, the United States' and Canada's authorization to suspend concessions did not lapse. Under these circumstances, the suspension of concessions applied pursuant to the DSB's authorization in respect of Directive 96/22/EC was maintained through recourse to, and abiding by, the rules and procedures of the DSU.[35] (underline emphasis added)

40. Accordingly, the Appellate Body has specifically addressed this very issue. Until such time as WTO dispute settlement determines that the 2016 tuna measure (or some subsequent further amendment) has removed all inconsistencies with the covered agreements, as a legal matter the measure remains inconsistent with the covered agreements.

12. With reference to paragraph 43 of Mexico's written submission, could Mexico please explain what it means when it argues that the Arbitrator should "dismiss" "[the United States'] submissions regarding the purported compliance of the 2016 measure", in addition to dismissing the United States' preliminary ruling request?

41. As previously explained by Mexico, the 2016 tuna measure is not "at issue" in this arbitration, and any claim regarding its consistency with the covered agreements or its compliance with the recommendations and rulings of the DSB is not within the Arbitrator's mandate in this arbitration. The 2016 tuna measure is "at issue" in the second round of Article 21.5 proceedings, and all claims relating to its consistency with the covered agreements or its compliance with the recommendations and rulings of the DSB will be properly and duly resolved in those entirely separate and distinct proceedings.

42. As Mexico has previously explained in response to Question no. 9 (above) and in its first written submission, the United States' preliminary ruling request is legally incorrect and inappropriate in relation to the Arbitrator's mandate in this arbitration.

43. Therefore, for the purposes of this arbitration, Mexico requests that the Arbitrator dismiss — that is, decline to grant — the United States' preliminary ruling request, and dismiss — that is, disregard and decline to take into consideration for the purposes of this arbitration — the United States' allegations regarding the purported compliance of its 2016 tuna measure with its WTO obligations.

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[35] Appellate Body Report, *US – Continued Suspension*, para. 403.

To both parties:

13. What, in the parties' views, would be the procedural consequences for these Article 22.6 proceedings if the Arbitrator were to grant the preliminary ruling requested by the United States?

44. As explained in Mexico's written submission, if the Arbitrator were to grant the preliminary ruling requested by the United States, there would be significant legal and procedural consequences.

45. The legal consequence would be that neither the DSU, nor the Sequencing Agreement in which the disputing parties agreed to depart from the explicit provisions of the DSU, would address the factual situation wherein the Article 22.6 arbitration is not completed within the time frames agreed upon in the Sequencing Agreement. The legal rights and obligations of Mexico and the United States would be undefined.

46. Second, the procedural consequences would include an unacceptable delay in the Arbitrator's decision in this arbitration and manifest procedural unfairness and prejudice to Mexico.[36] Such an outcome would render Article 22 of the DSU ineffective for complaining Members with meritorious claims and call into question the effectiveness of Sequencing Agreements for such Members.[37]

47. For example, if the Arbitrator determines that its assessment of the level of the nullification or impairment sustained by Mexico must be based on the 2016 tuna measure (instead of the 2013 tuna measure in place at the end of the RPT and found to be inconsistent and non-compliant with the covered Agreements), then it will be necessary for the Arbitrator to "stay" the arbitration until after the Article 21.5 compliance proceedings have been fully resolved. This is because the Arbitrator cannot assess the level of the nullification or impairment caused by a measure for which the DSB has made no rulings of WTO-inconsistency or non-compliance. However, there is no legal or procedural basis under the DSU or the Sequencing Agreement for the Arbitrator to impose such a 'stay' of this arbitration and, as explained in Mexico's written submission, no precedent in previous arbitration decisions that would be applicable in the circumstances of the current dispute.

48. As discussed in Mexico's written submission,[38] Article 22 of the DSU is a core element of the WTO dispute settlement mechanism. The suspension of concessions and other obligations is the sole recourse available to a complaining Member when the responding Member fails or refuses to bring its measure into compliance with the recommendations and rulings of the DSB within the designated RPT. The approach proposed by the United States in its request for a preliminary ruling threatens to undermine the utility and effectiveness of this recourse, as it would permit a responding Member to disrupt and indefinitely delay Article 22 procedures, avoiding the suspension of concessions and other obligations, merely by amending the measure at issue and repeatedly requesting the establishment of a compliance panel pursuant to Article 21.5. Therefore, the Arbitrator's decision with respect to the United States' preliminary ruling request has implications that are critically important to the effectiveness of the Article 22 mechanism in particular, and to

36 See Mexico's written submission, paras. 19-45.

37 Ibid., paras. 23-25, 27-29 and 34.

38 See ibid., paras. 43-45.

the WTO dispute resolution system in general.[39] This is particularly important to developing country Members facing non-compliance by developed country Members.

49. Mexico also considers the principle of *ubi ius ibi remedium* to be relevant to the current circumstances. In the event that the Arbitrator were to grant the United States' preliminary ruling request and suspend the Article 22.6 arbitration or its decision of same, its decision would not be subject to an appeal before the Appellate Body or involve consideration of third-party submissions, but it would result in a lack of *remedium* (i.e., the suspension of concessions or other obligations under Article 22 of the DSU) for Mexico and create a damaging precedent for all WTO Members.

50. Finally, contrary to Articles 3.2 and 3.5 of the DSU, the granting of the preliminary ruling requested by the United States would not be consistent with the covered agreements and would impede the attainment of the objective of providing security and predictability to the multilateral trading system.

14. Could the parties please provide their views regarding when (on what date) the matter before this Arbitrator was referred to arbitration under Article 22.6?

51. Mexico considers that this matter was referred to arbitration on 22 March 2016. On this date, the United States notified to the DSB of its objection to Mexico's proposed level of suspension and explicitly stated that "[a]ccordingly, as required by Article 22.6 of the DSU the matter has been referred to arbitration".[40]

52. In *US – COOL (Article 22.6 – US)*, Mexico and the United States agreed that the date on which a matter is referred to arbitration is the date on which the objection of the responding Member is filed:

> The parties agree that the matter at issue was referred to arbitration by virtue of the filing by the United States of its objection to Mexico's request.[41]

53. In *US – COOL (Article 22.6 – US)*, the Arbitrator considered whether the DSB must take action to refer the matter to arbitration or whether the matter is referred to arbitration automatically when a notice of objection to a proposed level of suspension is filed by the responding Member. The Arbitrator determined that it was the latter, explaining as follows:

> [T]he text of Article 22.6 does not explicitly require referral to arbitration by the DSB. … While agreeing that a resolution of this issue

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[39] Mexico notes that a number of WTO Members have expressed systemic concerns regarding the United States' proposed approach. See Mexico's written submission, para. 29. See also Dispute Settlement Body, Minutes of Meeting (14 June 2016), WT/DSB/M/377, paras. 7.6-7.15; Dispute Settlement Body, Minutes of Meeting (20 June 2016), WT/DSB/M/378, para. 1.5.

[40] Recourse to Article 22.6 of the DSU, *US – Tuna II (Mexico) (Article 22.6 – US)*, WT/DS381/30 (22 March 2016).

[41] Joint communication of Mexico and the United States, *US – COOL (Article 22.6 – US)*, 31 July 2015, cited in the Decision of the Arbitrator, *US – COOL (Article 22.6 – US)*, para. 2.9.

> by Members would be desirable, the Arbitrator sees no reason in the present case to read such a formal requirement into Article 22.6.[42]

54. Accordingly, the matter before the Arbitrator was referred to arbitration on 22 March 2016 when the United States' filed its objection under Article 22.6.

15. With reference to paragraphs 26, 31 and footnote 41 of Mexico's written submission and paragraph 46 and footnote 106 of the United States' written submission, could the parties please indicate:

a. whether the 2013 Tuna Measure was in force when (on the date) the matter was referred to arbitration under Article 22.6 or whether it had ceased to exist before that date (in the latter case, please also address whether the Arbitrator could then properly assess the nullification or impairment caused by that measure); and

55. As previously explained in Mexico's response to Question no. 8, the 2013 tuna measure did not "cease to exist" before the matter of the proposed level of suspension was referred to arbitration under Article 22.6 of the DSU.

56. First, the 2016 Interim Final Rule partially came into effect on 22 March 2016, which was the same day that the United States objected to Mexico's proposed level of suspension and the matter was thereby referred to arbitration. It is therefore incorrect to say that the 2016 tuna measure came into force, partially or otherwise, before the matter was referred to Article 22.6 arbitration.

57. Second, most elements of the 2013 measure were actually part of the original measure and continue to apply unchanged. For example, all of the aspects of the measure that apply to tuna harvested in the ETP remain as they were in the original measure. Moreover, key elements of the 2013 tuna measure that were the subject of the first compliance proceedings continued in force and effect, and continued to apply to U.S. tuna products and tuna products imported from countries other than Mexico. Specifically, the amendments made by the 2016 Interim Final Rule to the tuna measure's certification requirements and tracking and verification requirements applicable to tuna products containing tuna caught in fisheries outside the ETP did not come into effect until 21 May 2016. Thus, the most relevant aspects of the 2016 tuna measure were not in force until 21 May 2016. It is therefore untrue that the 2013 tuna measure "was no longer in existence when the matter was referred to arbitration" on 22 March 2016.

58. In any event, as explained by Mexico in its responses to the questions above and in its written submission, the Arbitrator cannot assess the level of the nullification or the impairment caused by the 2016 tuna measure in the absence of a DSB ruling that the 2016 tuna measure is inconsistent with the covered agreements and, thus, non-compliant with the DSB's recommendations and rulings. The level of the nullification and impairment that must be assessed in this arbitration is that sustained by Mexico as a result of the failure of the United States to bring its measure into compliance before the expiry of the RPT on 13 July 2013. The 2013 tuna measure was in place at the end of the RPT, and it is this version of the tuna measure that resulted in the Sequencing Agreement, the first Article 21.5

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[42] Decision of the Arbitrator, *US – COOL (Article 22.6 – US)*, para. 2.17.

compliance proceedings, and the recommendations and rulings of the DSB that are the basis of this arbitration. It is therefore the level of the nullification and impairment caused by the 2013 tuna measure that must be assessed in this arbitration.

b. what was the date of entry into force of the 2016 IFR?

59. As Mexico has explained above, the 2016 Interim Final Rule itself states that it partially entered into force on 22 March 2016, a day before it was made public. The amendments affecting the certification requirements and the tracking and verification requirements applicable to tuna products containing tuna caught in fisheries outside the ETP (which are at issue in the separate Article 21.5 compliance proceedings) did not enter into force until 21 May 2016. Therefore, the following two statements are accurate: (i) the 2016 tuna measure did not fully enter into force on 22 March 2016; and (ii) the new aspects of the 2016 tuna measure fully entered into force on 21 May 2016 (although there exists no evidence of any auditing framework, infrastructure, guidelines, or provisions for the purposes of implementing a regime to monitor and enforce the amended labelling conditions). Also, as noted above, the certification requirements and the tracking and verification requirements under the 2013 tuna measure continued in force and effect until 21 May 2016.