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)

Comments of Mexico on the Responses of the United Mexican States to the Arbitrator's Questions regarding the Preliminary Ruling Request

21 September 2016

Mexico's comments on the United States' responses to the Arbitrator's questions are presented below, following the questions addressed to the United States and the questions addressed to both Parties.

1. **The Arbitrator notes the United States' statement, in paragraph 42 of its written submission, that the measure addressed in Mexico's MP (2013 Final Rule) is "no longer in existence". The Panel also notes the United States' statement, in paragraph 46 of its written submission, that "the task in an Article 22.6 proceeding is to look at the measure as it currently exists and not the measure in an earlier form." (Emphasis added). Could the United States please clarify what it means by "no longer in existence", on the one hand, and "an earlier form", on the other? In particular, has the 2013 Final Rule been repealed and replaced by a completely new measure, or has it merely been modified, such that it now represents an earlier form of the current 2016 IFR?**

Mexico's Comments:

1. The United States' response seems to presuppose that the tuna measure is comprised solely of the regulations, as amended. In fact, the tuna measure consists of: Section 1385 ("Dolphin Protection Consumer Information Act" or "DPCIA"); the U.S. Code of Federal Regulations, Title 50, Part 216, Subpart H ("Dolphin Safe Tuna Labeling"); and the court ruling in Earth Island Institute v. Hogarth, 494 F.3d 757 (9th Cir. 2007) ("Hogarth ruling").[1] The statute and the Hogarth ruling, which are integral parts of the measure, remain completely unchanged from their original form and content.[2]

2. The 2016 IFR merely changed certain discrete aspects of the regulations, slightly modifying the existing regime rather than repealing and replacing it with something else.[3] The 2013 Final Rule was incorporated into the regulations and has become a permanent part of the U.S. tuna measure. To the extent that the 2016 IFR modified aspects of the regulations, it did so in the context of the regulations as amended by the 2013 Final Rule. Thus, it did not eliminate the 2013 Final Rule, but made additional changes to the regulations further to the changes made by the 2013 Final Rule.

3. Mexico's view is that the changes introduced under the 2016 IFR are superficial; most of the tuna measure remains unchanged, and the aspects that have been modified by the 2016 IFR generally retain the underlying function and purpose from the original tuna measure and the 2013 tuna measure (i.e., the tuna measure as amended by the 2013 Final Rule). For

[1] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 1.9, 6.7-6.8; Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 3.1, 7.11-7.12.

[2] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 1.7 ("On 9 July 2013, the United States published in its *Federal Register* a legal instrument entitled 'Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products' (2013 Final Rule). The 2013 Final Rule made certain changes to Sections 216.91 and 216.93 of CFR Title 50. Both the DPCIA and the Hogarth ruling remained unchanged" (underline emphasis added) (footnotes omitted)).

[3] See Mexico's responses to the Arbitrator's questions regarding the U.S. preliminary ruling request, paras. 28, 55-57.

example, the eligibility criteria, the certification requirements, and the tracking and verification requirements for tuna products made with tuna caught in the ETP are unchanged, and they remain the same as they were under the original tuna measure and the 2013 Final Rule. For tuna products containing tuna caught outside the ETP with purse seine nets, the 2016 IFR left untouched most of the requirements. The 2016 IFR did not change the requirements introduced under the 2013 Final Rule that captains' certifications must state that no dolphins were killed or seriously injured in the sets in which the tuna were caught,[4] or that tuna caught by non-purse vessels and by small purse seine vessels must be supported by a captain's statement that no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna were caught.[5]

4. Moreover, by its own terms, the 2016 IFR provides that the requirements of the 2013 Final Rule continue to apply to "tuna caught by a vessel on a fishing trip that began on or after July 13, 2013, and before May 21, 2016."[6] In other words, tuna products currently entering the United States containing tuna caught on voyages that began on May 20 or earlier remain subject to the 2013 Final Rule in all respects.

5. In summary, the tuna measure is composed of the DPCIA, the Hogarth ruling and the 2013 Final Rule. The 2016 IFR has slightly modified the 2013 Final Rule, and left untouched the DPCIA and the Hogarth ruling.

2. The Arbitrator notes the United States' argument, presented in paragraphs 43 and 44 of its written submission, that Articles 22.4 and 22.7 of the DSU do not refer to a "past" level of nullification or impairment. Could the United States please explain why it interprets these Articles as referring to the current or existing level of nullification or impairment, rather than to the level of nullification or impairment that existed when the RPT expired?

Mexico's Comments:

6. The United States' response attempts to interpret Articles 22.4 and 22.7 in isolation, omitting the relevant interpretive context provided by the other provisions of the DSU, which should be read together as a whole text. In particular, the provisions of Articles 21, 22, and 23 are relevant for the purposes of interpreting and applying Articles 22.4 and 22.7.

7. Where it is impracticable to comply immediately with the recommendations and rulings of the DSB, Article 21.3 provides that the Member concerned shall have a reasonable period of time (RPT) in which to comply. Article 22.1 contemplates the suspension of concessions or other obligations if the recommendations and rulings of the DSB are not implemented by the end of the RPT. All of the other suspension procedures in Article 22 flow from this date, namely the request for authorization within 20 days after this date (Article 22.2), the granting of authorization by the DSB within 30 days after this date (Article 22.6), and the arbitration within 60 days after this date (Article 22.6).

8. Although Article 22.4 does not explicitly reference this date, it applies directly to the "level of the suspension of concessions or other obligations authorized by the DSB" under

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4 Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 3.36.

5 Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 3.37-3.41.

6 16 CFR § 216.91(a)(3)(ii), in 2016 IFR, at 15448 (Exhibit US-4).

Article 22.6. Thus, the requirement in Article 22.4 that "[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment" refers to the "authorization to suspend" granted under Article 22.6 "within 30 days of the expiry of the reasonable period of time". This authorization is only granted further to an Article 22.2 request made by the complaining Member where "the Member concerned fails to … comply with the recommendations and rulings within the reasonable period of time".[7] Thus, these provisions are all based on "the event that the recommendations and rulings are not implemented within a reasonable period of time", as contemplated in Article 22.1.

9. Further, the mandate of the Arbitrator under Article 22.7 to "determine whether the level of such suspension is equivalent to the level of nullification or impairment" refers to the above-referenced requirement in Article 22.4. Thus, Article 22.7 is connected in the same way to the "authorization to suspend concessions or other obligations within 30 days of the expiry of the reasonable period of time" under Article 22.6, further to an Article 22.2 request, based on the failure of the Member concerned to comply with the DSB's recommendations and rulings before the expiry of the RPT.

10. The United States argues that "the reference in Article 22.7 of the DSU to the level of nullification or impairment also does not reference a past point in time".[8] However, in establishing the mandate of the Arbitrator, Article 22.7 expressly refers to the principles and procedures set forth in Article 22.3 that a complaining Member must apply in considering what concessions or other obligations to suspend. Article 22.3(a) sets forth the general principle that "the complaining party should first seek to suspend concessions or other obligations with respect to the same sector(s) as that in which the panel or Appellate Body has found a violation or other nullification or impairment" (underline emphasis added). This wording addresses a past situation, not a "present situation", wherein the responding Member has failed to comply with the DSB's recommendations and rulings within the RPT.

11. Accordingly, the end of the RPT is the relevant date for the assessment of the level of the nullification or impairment. This is further confirmed in the following passages of the Decision by the Arbitrator in *US – Gambling (Article 22.6 – US)*:

> We understand it to be part of our task to determine what the level of Antiguan exports of remote gambling services to the United States would have been had the United States come into compliance within the reasonable period of time, i.e. by 3 April 2006. As such, that date (or the time period coming closest to that date for which statistical information is available) seems to impose itself as the relevant point in time at which a comparison of actual and counterfactual exports is undertaken. Both Antigua and the United States are doing this in their model, projecting counterfactual levels of exports to the year 2006,

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[7] In this regard, the Arbitrator in *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)* confirmed that: "[t]he measure with respect to which the countermeasures are supposed to induce compliance is clearly the measure found inconsistent by the Panel. As can be seen from Article 22.2 DSU …, it is the non-compliance with the recommendations and rulings of the DSB that triggers the right to adopt countermeasures and the recommendations and ruling relate exclusively to the measure found to be illegal". Decision by the Arbitrator, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 3.109.

[8] United States' responses to the Arbitrator's questions regarding the U.S. preliminary ruling request, para. 5.

> since no observations at shorter intervals (quarterly, monthly) appear to be available.
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> We do not think that forecasts *beyond* that date should have an impact on the counterfactual level of Antiguan exports of remote gambling services to the United States that would have existed *at* that date in the absence of the United States measures. If forecasts of future exports were to be taken into account (and these would be assumed to be larger or even growing compared to historical values), the discounted and averaged value calculated in this manner may well be larger than the level that would actually have been observed had the United States come into compliance at the end of the reasonable period of time. Such a procedure may violate the equivalence standard we are mandated to pursue. In particular, different time horizons would result in different levels of nullification or impairment that bear no relation to questions of actual compliance.[9] (underline emphasis added; italics in original)

12. The United States continues to rely on the Arbitrator's decision in *EC – Bananas III (US) (Article 22.6 – EC)*[10] to support its argument that the level of the nullification or impairment relates to the amended measure as it exists. However, as Mexico has previously observed, the interpretation made by the arbitrator in that case was based on the irreconcilability of the timeframes required under Articles 21.5 and 22.6 in the circumstances of that case.[11] There is no similar problem in the present proceedings because that alleged irreconcilability is overcome by the existence of a sequencing agreement.

13. Finally, consistent with the interpretative context noted above, the end of the RPT has been chosen as the period of reference in previous arbitrations under Article 22.6 of the DSU.[12]

3. Is it the United States' view that each time the responding Member modifies the disputed measure and claims that it has brought itself into conformity with its WTO obligations prior to the DSB's authorization of a suspension of concessions or other obligations by the complaining Member, such authorization must not be granted by the DSB until after the completion of a new compliance proceeding under Article 21.5 of the DSU and adoption of the panel report and, where appropriate, Appellate Body report?

Mexico's Comments:

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9 Decision by the Arbitrator, *US – Gambling (Article 22.6 – US)*, paras. 3.143-3.144.

10 United States' responses to the Arbitrator's questions regarding the U.S. preliminary ruling request, paras. 6 and 7.

11 See Mexico's written submission, paras. 31 and 34. See also Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, footnote 11.

12 Decision by the Arbitrator, *US - Upland Cotton (Article 22.6 - US II)*, para. 4.118; Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, paras. 2.14-2.15; Decision by the Arbitrator*, US - Upland Cotton (Article 22.6 - US I)*, para. 3.37.

14. The United States is legally incorrect in its view that "the issue of compliance is one that could also be resolved in the course of an Article 22.6 arbitration".[13] The United States provides no authority to support this view. Article 22 of the DSU clearly describes the issues that may fall within the Arbitrator's mandate in an arbitration under Article 22.6, and there is nothing in the DSU that authorizes an Arbitrator to undertake the compliance analysis that falls expressly within the jurisdiction of a Panel pursuant to Article 21.5 of the DSU.

15. As Mexico explained in its responses to the Arbitrator's questions, Article 22.6 provides that a responding Member may (i) object to the level of suspension proposed by the complaining Member, or (ii) claim that the principles and procedures set forth in Article 22.3 have not been followed by the complaining Member.[14] In this way, Article 22.6 defines the issues that may be referred to arbitration. Whether or not a further measure taken to comply has brought the United States into compliance with its WTO obligations is not one of those issues. In turn, Article 22.7 specifically defines the Arbitrator's mandate,[15] providing that "[t]he arbitrator acting pursuant to paragraph 6 … shall determine whether the level of such suspension is equivalent to the level of nullification or impairment" and "if the matter referred to arbitration includes a claim that the principles and procedures set forth in paragraph 3 have not been followed, the arbitrator shall examine that claim". There is nothing in Article 22 that expressly authorizes the Arbitrator to depart from its mandate pursuant to Articles 22.6 and 22.7, or that otherwise suggests that "the issue of compliance is one that could also be resolved in the course of an Article 22.6 arbitration".

16. Further, no implicit or indirect authorization to determine compliance issues should be read into the Arbitrator's mandate under Article 22. In Mexico's view, the reasoning and the findings of the Appellate Body in *US – Continued Suspension*, as discussed in Mexico's written submission[16] and in Mexico's responses to the Arbitrator's questions,[17] are dispositive of this

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[13] United States' responses to the Arbitrator's questions regarding the U.S. preliminary ruling request, para. 12.

[14] Mexico's responses to the Arbitrator's questions regarding the U.S. preliminary ruling request, para. 31.

[15] See e.g., Decision by the Arbitrator, *US – Gambling (Article 22.6 – US)*, para. 2.31 ("the Arbitrator addressed the following communication to the European Communities: … the Arbitrator's mandate in these proceedings is defined in Article 22.7 of the DSU and is limited to matters arising from Antigua and Barbuda's request for suspension of concessions and other obligations and the US challenge to this request, in accordance with Articles 22.6 and 22.7 of the DSU. Specifically, the mandate of the Arbitrator includes a determination of whether the level of suspension of concessions and other WTO obligations proposed by Antigua and Barbuda is 'equivalent' to the level of nullification or impairment arising from lack of compliance by the US with certain DSB recommendations and rulings"). See also Decision by the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 3.19 ("our terms of reference are defined by Article 22.7 of the DSU, which requires us to determine whether the level of suspension of obligations sought by the European Communities, as defined in its request of 7 January 2002, is equivalent to the level of nullification or impairment sustained by the European Communities as a result of the 1916 Act. The Regulation [adopted by the European Communities and raised by the United States as an issue for consideration by the Arbitrator] is not referred to in the European Communities' request [to suspend under Article 22.2], and we see no basis in Article 22.7 on which the arbitrators could assume jurisdiction to consider it").

[16] Mexico's written submission, paras. 36-37.

[17] Mexico's responses to the Arbitrator's questions regarding the U.S. preliminary ruling request, paras. 38-40, citing Appellate Body Report, *US – Continued Suspension*, para. 403.

issue. Moreover, the DSU expressly authorizes a panel established pursuant to Article 21.5 to resolve a dispute as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB. A panel's findings pursuant to Article 21.5 are subject to the disputing parties' rights of appeal to the Appellate Body. In contrast, Article 22.7 provides that "[t]he parties shall accept the arbitrator's decision as final and the parties concerned shall not seek a second arbitration". Thus, if an Arbitrator were to decide a compliance issue, the disputing parties would be denied the rights of appeal available to them in Article 21.5 proceedings.

17. Finally, the United States' proposed approach is contrary to the provisions of the Sequencing Agreement signed by the United States and Mexico.[18]

4. With reference to paragraph 45 of the United States' written submission, is it the United States' position that a unilateral declaration by a responding Member that it has "removed" the measure "found to be inconsistent" (Article 22.8) triggers the obligation of the complaining Member to cease the suspension of concessions authorized by the DSB?

Mexico's Comments:

18. As discussed in Mexico's responses to the Arbitrator's questions regarding the U.S. preliminary ruling request, the Appellate Body's reasoning and findings in *US – Continued Suspension* directly address this issue.[19] There is no material difference between the situation in *US – Continued Suspension* and the situation currently at issue in this preliminary ruling request that would preclude the application of the Appellate Body's approach. Further, there is nothing in the Appellate Body's determination in *US – Continued Suspension* or in the provisions of the DSU that allows a Member to unilaterally override the recommendations and rulings of the DSB.

5. In the view of the United States, is the approach reflected in footnote 59 of the *US – COOL* Arbitration report relevant to the question at issue in the United States' preliminary ruling request in these proceedings?

Mexico's Comments:

19. Footnote 59 is relevant, but it does not support the United States' position. Mexico disagrees with the United States' allegation that "footnote 59 of the *US – COOL* arbitration decisions is consistent with the approach in the U.S. preliminary ruling request" merely because the Arbitrator's "conclusions and decisions were based on the COOL measure, as

[18] 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 Aug. 2013), para. 7 ("… the United States may object under DSU Article 22.6 to the level of suspension of concessions or other obligations and/or claim that the principles and procedures set forth in DSU Article 22.3 have not been followed, thereby referring the matter to arbitration pursuant to DSU Article 22.6"). See also Mexico's written submission, para. 24.

[19] Mexico's responses to the Arbitrator's questions regarding the U.S. preliminary ruling request, paras. 38-40, citing Appellate Body Report, *US – Continued Suspension*, para. 403.

amended, as it existed at the time of the arbitrations".[20] The fundamental differences that the United States ignores are that (i) the amended COOL measure — that is, the "COOL statute together with the 2009 Final Rule, as amended by the 2013 Final Rule"[21] — was the measure in place when the RPT expired (on 23 May 2013), and (ii) the DSB had made recommendations and rulings pursuant to Article 21.5 of the DSU, further to adopting the reports of the Appellate Body and the panel in the *US – COOL (Article 21.5 – Mexico)* compliance proceedings, that this amended COOL measure was not compliant with the United States' WTO obligations.[22] The corollary in this arbitration is the 2013 tuna measure (i.e., the original tuna measure, as amended by the 2013 Final Rule). In this regard, footnote 59 supports Mexico's position, and not the United States' proposed approach.

6. At paragraph 48 of its written submission, the United States points to the fact that the 2016 amendment to the Tuna Measure was adopted on 22 March 2016, "before the United States objected to Mexico's request for authorization to suspend concessions." (Emphasis original) Does the date of adoption of the 2016 IFR have any bearing on whether the Arbitrator should take that measure, and not the 2013 Final Rule, into account in determining the level of suspension of concessions or other obligations in these proceedings? If the 2016 IFR had been adopted after the United States' objection to Mexico's request for authorization to suspend concessions or other obligations, would the United States not have made this preliminary request? Why (not)? Please elaborate on the basis of the relevant provisions of the DSU.

Mexico's Comments:

20. As Mexico explained in its responses to the Arbitrator's questions, the United States published the 2016 IFR on 23 March 2016 and then declared it was retroactively effective on the day before it was published – the same day that the United States objected to Mexico's proposed level of suspension.[23] Moreover, most of the new aspects of the regulation were not made effective until May 21, 2016, and many aspects of the prior regulation continued in effect even after May 21, 2016.[24]

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[20] United States' responses to the Arbitrator's questions regarding the U.S. preliminary ruling request, para. 21.

[21] Decisions by the Arbitrator, *US – COOL (Article 22.6 – US)*, para. 1.3.

[22] Decisions by the Arbitrator, *US – COOL (Article 22.6 – US)*, para. 1.4.

[23] Mexico's responses to the Arbitrator's questions regarding the preliminary ruling request, paras. 10-11, 25-27, 55-56, 59.

[24] Mexico's responses to the Arbitrator's questions regarding the preliminary ruling request, paras. 11, 15, 28, 57. See also Mexico's comment on the United States' response to question 1, above (paras. 1-5).

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?

Mexico's Comments:

21. The United States' response confirms that the procedural consequence would be a delay. There is no legal basis for the Arbitrator to delay or otherwise suspend this arbitration. As Mexico has explained, other WTO Members have expressed concerns about the suspension of this arbitration.[25]

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?

Mexico's Comments:

22. Mexico and the United States agree on this point.[26]

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

Mexico's Comments:

23. As explained in Mexico's response to this question, Mexico disagrees that the 2016 IFR "was in force" on 22 March 2016[27] – in part because the regulations were not yet published on that day, and in part because a substantial portion of the regulations did not become effective until May 21, 2016. Mexico also disagrees that the 2013 Final Rule has "ceased to exist", as it continues to apply to all tuna products containing tuna caught during voyages

[25] See Mexico's responses to the Arbitrator's questions regarding the U.S. preliminary ruling request, footnote 39 to para. 48, citing Mexico's written submission, para. 29; 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.

[26] See Mexico's responses to the Arbitrator's questions regarding the U.S. preliminary ruling request, para. 54; see United States' responses to the Arbitrator's questions regarding the U.S. preliminary ruling request, para. 25.

[27] Mexico's responses to the Arbitrator's questions regarding the preliminary ruling request, paras. 11, 15, 27-28, 55-58, 59.

that started before 21 May 2016, and major portions of the 2013 (and original) regulations remain unchanged.[28]

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

Mexico's Comments:

24. Mexico has previously explained that the 2016 IFR was published on 23 March 2016, and that many of its provisions did not become effective until 21 May 2016.[29]

Conclusion

25. For the foregoing reasons, Mexico requests that the Arbitrator reject the United States' requests (i) for a ruling that the 2016 IFR is the relevant "measure", and (ii) that this arbitration be postponed.

[28] Mexico's responses to the Arbitrator's questions regarding the preliminary ruling request, paras. 55-58, 59. See also Mexico's comment on the United States' response to question 1, above (paras. 1-5).

[29] See Mexico's responses to the Arbitrator's questions regarding the U.S. preliminary ruling request, paras. 11, 15, 27-28, 55-58, 59.