United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products:

Recourse by the United States to Article 22.6 of the DSU

(DS381)

Opening Oral Statement of
the United States of America

October 25, 2016

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1. Mr. Chairman, members of the Arbitrator, and Secretariat staff – on behalf of the United States, thank you for your ongoing work in this arbitration.

I. Introduction

2. The central question in this proceeding is whether Mexico's request for authorization to suspend concessions is "equivalent" to the level of nullification or impairment caused by the 2013 measure, and if it is not, then what is the equivalent level.[1] To answer the first part of this question, the United States has shown that Mexico's request is not consistent with the requirements of the DSU. This is apparent just by looking at how badly Mexico must mischaracterize the U.S. market to arrive at its substantial figure – from having to invent a product that does not exist (so-called "generic" tuna), to alleging that the measure bars all yellowfin (which only Mexico can supply), to ignoring fundamental U.S. consumer preferences regarding how the tuna product has been produced.

3. As a result, it is appropriate to move to the second part of the question – what is the equivalent level. In examining this type of issue in the past, arbitrators have based their awards on models that rely on actual economic data to depict the reality of the market at issue and predict the impact of withdrawal of the measure.[2]

4. The U.S. analysis and calculations presented in this arbitration are consistent with such an approach. Our conclusion that the level of nullification or impairment should be no more than $8.5 to $21.9 million per year is based a WTO-consistent counterfactual, uses the best economic data available, and accounts for U.S. consumer preferences.

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[1] DSU Art. 22.7; *see also US – COOL (Art. 22.6 – US)*, paras. 4.1-4.6.

[2] *See, e.g.*, *EC – Hormones (Article 22.6 – US)*, paras. 48-79.

5. Mexico's analysis and calculations, by contrast, have no relationship to the appropriate counterfactual (or, for that matter, even Mexico's own counterfactuals), disregard the realities of the U.S. market, and ignore U.S. consumer preferences. Instead of estimating the value of the label, and modeling the effect its removal would have on its exports, Mexico models something entirely different – the impact of removing a ban on the domestic sale of a product for which there is tremendous assumed consumer demand. Under this hypothetical, Mexico predicts that its canned tuna exports to the United States will increase by 2,056 percent and account for over half of imports to the U.S. canned tuna market in the short term.

6. But this scenario is divorced from reality and serves no purpose other than to exaggerate the level of nullification or impairment. The measure, of course, does not ban canned yellowfin. The evidence clearly establishes that canned yellowfin produced by different Members (including Mexico) and by U.S. producers is sold in the U.S. market. The fact that only a limited amount of canned yellowfin is sold – regardless of whether it is labeled as "dolphin safe" or not – simply indicates that there is limited demand for canned yellowfin in general, and for any canned tuna produced by setting on dolphins in particular.

7. Mexico's model rests on a foundation of incorrect, unreasonable assumptions. As a consequence, Mexico's model is fatally flawed and incapable of accurately determining the level of nullification or impairment. It cannot be re-specified based on the evidence on the record and thus cannot be used to calculate a level of suspension that is "equivalent" to the level of nullification or impairment from the 2013 measure. In contrast, the U.S. approach does accurately predict a level of suspension that is "equivalent" to that level of nullification or impairment. We will discuss both approaches today, beginning with Mexico's model.

II. Mexico's Model Is Fundamentally Flawed and Is Not Capable of Accurately Estimating the Level of Nullification and Impairment

8. Mexico's model makes three critical assumptions: (1) that the dolphin safe labeling measure effectively bans canned yellowfin from the U.S. market; (2) that Mexico is the only possible supplier of canned yellowfin to the U.S. market; and (3) that the United States and Mexico represent a single canned tuna market with a strong preference for canned yellowfin over all other types of canned tuna. These assumptions drive the model to predict that Mexico would export nearly 100 percent of its current production of canned tuna to the United States at a much higher price than canned tuna imports from Mexico (or from almost any other country) currently receive, resulting in a level of nullification or impairment of US $472.3 million. However, the available evidence demonstrates that each of these assumptions is incorrect, and Mexico's calculation of nullification or impairment is grossly inflated.

A. The Dolphin Safe Labeling Measure Does Not Ban the Sale of Yellowfin Tuna Product in the United States

9. One of the key assumptions underlying Mexico's model is that the U.S. measure "effectively bans" sales of canned yellowfin in the United States.[3] Based on this assumption, Mexico estimates the level of nullification or impairment by modeling the introduction of a hypothetical new product in the U.S. market, instead of modeling the removal of the labelling standards. In doing so, Mexico ignores the data on actual U.S. imports and consumption of canned yellowfin and derives demand for the product based on incorrect assumptions.[4]

[3] Mexico's Response to Arbitrator's Question 72, para. 123; *see also* Mexico's Written 22.6 Submission, para. 172; Pouliot 2016, at 1 (Exh. MEX-2).

[4] Pouliot 2016, at 10-11, 14 (Exh. MEX-2).

10. Of course, the U.S. measure is neither a *de facto* nor a *de jure* prohibition on the sale of canned yellowfin in the United States. As the United States has explained, many countries around the world catch and process yellowfin. In fact, yellowfin is the second most produced tuna species, by volume, in the global tuna industry.[5] The majority of this catch is by purse seine vessels and, as such, is destined for the global canned market. And Exhibit MEX-15 lists canned yellowfin products produced domestically and by other Members being sold in the U.S. market. Moreover, Mexico itself argues that these other yellowfin producing Members are "not impacted" by the measure.[6]

11. Further, it is undisputed that Mexico itself exports tuna product to the United States. Indeed, the United States has imported canned tuna from Mexico every year for the past two decades.[7] By Mexico's own account, the vast majority of this tuna is yellowfin,[8] "virtually" all of which is produced by vessels setting on dolphins under the *Agreement on the International Dolphin Conservation Program* (AIDCP).[9] Mexico was the sixth largest source of U.S. canned tuna imports in 2014-2015, accounting for 3.6 percent of all canned tuna imports, by volume, and exceeding $40 million in total value,[10] and Mexico is simply wrong to assert that its exports are "near zero."[11] Mexico's share of U.S. imports of canned tuna is consistent with Mexico's

[5] *See* U.S. Response to Arbitrator's Question No. 51, para. 3.

[6] "U.S. Imports of Tuna Product from the World and from Mexico" (Exh. US-62).

[7] "U.S. Imports of Tuna Product from the World and from Mexico" (Exh. US-62).

[8] *See* Mexico's Response to Arbitrator's Question 43, paras. 72-73.

[9] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.73 (citing *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.105, 7.444).

[10] "Imports of Canned Tuna from All Countries Individually – 2010-2015" (Exh. US-36).

[11] *See* Mexico's Written Submission, para. 172.

share of U.S. imports of other major seafood products, such as shrimp, crab, and sardines.[12]

12. Yet Mexico continues to claim that the U.S. measure is an effective prohibition on the sale of both U.S.-processed and imported canned yellowfin because U.S. consumption of canned yellowfin is much lower today than it was prior to 1990, when the labeling regime first came into place.[13] However, the evidence establishes that a lack of demand, not lack of supply, is responsible for the fact that canned yellowfin accounts for only 1-2 percent of U.S. consumption of canned tuna today.

13. First, while yellowfin accounted for a larger percentage of U.S. cannery receipts in the 1980s than it does today, yellowfin sold in the 1980s was largely not marketed as "yellowfin," but was sold, combined with skipjack, as "light tuna" (just as it is today).[14] Thus, U.S. cannery purchases of yellowfin in the 1980s reflected the balance of tropical tunas in lightmeat tuna that U.S. tuna companies considered most profitable at the time, rather than a particular U.S. consumer demand for canned yellowfin. In short, the fact that U.S. canneries used to purchase more yellowfin does not mean that the demand that Mexico claims the U.S. measure has prevented from being met for the past 26 years ever existed.

14. Second, the steady decline in U.S. cannery purchases of yellowfin over the last three decades further confirms the lack of U.S. consumer demand for canned yellowfin. While U.S. cannery purchases of yellowfin, as a share of all tuna purchased, fell from 34 to 22 percent from

[12] U.S. Response to Arbitrator's Question 56, paras. 54-57.

[13] Mexico's Response to Arbitrator's Question 17, paras. 8-10; Question 72, para. 120.

[14] *See* Roger Corey et al., ITC, *Tuna: Current Issues Affecting the U.S. Industry*, at 1-1, 3-1 (Aug. 1992) (Exh. MEX-73).

the late 1980s to the 1990s, the percentage had declined to 11 percent by 2009, and to 5 percent by 2015.[15] These latter steep declines in U.S. cannery receipts are unrelated to the U.S. measure, the location of the U.S. fleet, or global supply of yellowfin (which has been relatively constant over the last 25 years).[16] They are, however, strongly indicative of a weakening U.S. consumer demand for canned yellowfin, compared to canned albacore or skipjack.

15. Third, the behavior of tuna producers in the U.S. market also confirms the lack of U.S. consumer demand for yellowfin. It is well known that U.S. consumers have a strong preference for albacore over other types of canned tuna.[17] The United States consumes 19 percent of the global production of canned tuna but 55-60 percent of world consumption of albacore.[18] Further, albacore's share of U.S. cannery tuna purchases has risen dramatically from 20-25 percent in the late 1980s and early 1990s to 40 percent today, confirming that tuna companies serving the U.S. market have adjusted product lines to respond to changes in U.S. consumer demand.[19]

16. Conversely, tuna companies have stated that they cannot sell all the yellowfin caught by U.S. vessels as all-yellowfin product and therefore mix it with skipjack and sell it as "lightmeat tuna."[20] Mexico's assertion that this phenomenon would be reversed if the price of yellowfin were higher than the price of albacore[21] is belied by the evidence, which shows that U.S.

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[15] *See* U.S. Response to Arbitrator's Question 68, para. 134.

[16] *See* U.S. Response to Arbitrator's Question 51, paras. 3, 10-12.

[17] *See* U.S. Written Submission, para. 21.

[18] *See* U.S. Written Submission, para. 21.

[19] "U.S. Tuna Cannery Receipts Rev" (Exh. US-22 rev).

[20] *See* U.S. Response to Arbitrator's Question 51, para. 13.

[21] *See* Mexico's Written Submission, paras. 131-132.

canneries have always mixed yellowfin and skipjack but have marketed albacore separately,[22] even when yellowfin products are selling at a higher average price, as they currently are.[23]

17. Finally, the behavior of U.S. tuna prices in the U.S. market during the early 1990s definitively refutes Mexico's claim that the decline in yellowfin purchases by U.S. canneries was caused by the U.S. measure restricting the supply of yellowfin. As Mexico admits in response to the Arbitrator's questions 17 and 72, a supply-side restriction would be accompanied by a significant increase in the price of cannery-grade yellowfin in the U.S. market.[24] But this did not occur in the early 1990s. To the contrary, as Exhibit MEX-73 confirms, "supply of this category of yellowfin declined, but demand declined even more; thus, the price dropped by 18 percent immediately after the [U.S. canners'] dolphin-safe announcement in April 1990."[25] Further, Exhibit MEX-73 refutes Mexico's strained suggestion that retail tuna prices could have increased even as cannery purchase prices declined, stating: "Wholesale prices of retail-size containers of chunk-light tuna packed in water . . . generally trended downward slightly during 1990-91."[26] Exhibit US-133 also confirms that there was "a downward trend in retail prices in 1990" even as U.S. imports of canned tuna declined.[27] If Mexico's novel theory of an ongoing supply restriction that has precluded the vast majority of yellowfin tuna product from being sold in the

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[22] *See* Corey et al. 1992, at 1-1, 3-1 (Exh. MEX-73); Bumble Bee, "What's the Difference Between the Various Types of Canned Tuna?" (Exh. US-13); FFA, Market and Industry Dynamics, at 254 (Exh. US-7); Sam Roe & Michael Hawthorne, "How Safe is Tuna?" *Chicago Tribune*, Dec. 13, 2005 (Exh. US-18).

[23] *See* "Yellowfin Market Review," at 2 (Exh. MEX-10).

[24] *See* Mexico's Response to Arbitrator's Question 17, para. 11; Mexico's Response to Arbitrator's Question 72, para. 122.

[25] Roger Corey et al. 1992, at 2-10 (Exh. MEX-73).

[26] Corey et al. 1992, at 2-13 (MEX-73).

[27] Roger Corey et al., ITC, *Tuna: Competitive Conditions Affecting the U.S. and European Tuna Industries in Domestic and Foreign Markets*, at 3-7 (1990) (Exh. US-113).

United States were correct, the opposite trend would have occurred.

18. As the United States has explained, there are several factors that have driven down demand for canned yellowfin. These factors include: (1) that yellowfin is the only type of tuna caught in association with dolphins, which U.S. consumers strongly do not prefer; (2) the growing awareness of and preference for albacore during the mid-1990s to early 2000s, particularly in the premium segment of the U.S. market; and, (3) in the lower end of the yellowfin market, a preference for light tuna containing exclusively or primarily skipjack, which has a lower mercury content than yellowfin and is less expensive.[28] In the end, Mexico fails to cite any evidence that supports the view that the low consumption of yellowfin is due to a restriction of supply, and that, *for the past 26 years*, there has been a significant, untapped demand for canned yellowfin in the United States to which the market has not responded with increased domestic or foreign production.[29]

19. The fact is that the available evidence refutes Mexico's claim that the U.S. measure effectively bars sales of canned yellowfin in the U.S. market. Consequently, the decision to disregard existing consumer data and to derive a demand function based entirely on the assumption of a tremendous unobserved preference for canned yellowfin, which is at the foundation of Mexico's model, is wrong.

[28] *See* U.S. Response to Arbitrator's Question 54, paras. 39-43.

[29] *See, e.g.*, Miyake et al., FAO, *Recent Developments in the Tuna Industry* (2010) (Exh. MEX-14); U.S. International Trade Commission, "Tuna: Current Issues Affecting the U.S. Industry," USITC Publication 2547 (Aug. 1992) (Exh. MEX-73); *see also* Amanda Hamilton *et al.*, Forum Fisheries Agency (FFA), *Market and Industry Dynamics in the Global Tuna Supply Chain* (2011) (Exh. US-7).

B. Mexico is Not the Only Possible Supplier of Canned Yellowfin to the U.S. Market

20. Another major assumption underlying Mexico's model is that Mexico is the only possible supplier of canned yellowfin to the U.S. market, or, as Mexico has recently revised it, the only possible supplier of low cost canned yellowfin to the U.S. market.[30] Based on this assumption, Mexico's model equates "canned yellowfin" (the hypothetical new product that it models) with Mexican canned tuna exports to the United States and ignores all other potential sources of canned yellowfin. Consequently, what Mexico actually models is U.S. consumers having a strong preference for *Mexican* canned yellowfin over all other types of canned tuna. In reality, however, Mexico is not the supplier of a unique product, either canned yellowfin or "low cost" canned yellowfin, and U.S. consumers, decidedly, *do not* have a preference for Mexican canned yellowfin over all other types of canned tuna.

21. As the United States has explained, Mexico is far from the only source of cannery grade yellowfin.[31] In fact, the most important source is the western and central Pacific Ocean (WCPO) purse seine fishery, which landed nearly 600,000 metric tons of yellowfin in 2014, more than 2.5 times the yellowfin landed in the eastern tropical Pacific Ocean (ETP) purse seine fishery.[32] Purse seine fisheries in the Indian and Atlantic oceans produced another 215,000 metric tons of yellowfin in 2014, roughly equivalent to the ETP landings. Major processing centers of cannery

[30] *See* Pouliot 2016, at 5-6, 8, 30 (Exh. MEX-2); Mexico's Written Submission, para. 175; Mexico's Response to Arbitrator's Question 18, paras. 14-15; *id.* Question 43, para. 73; *id.* Question 24, para. 26.

[31] *See* U.S. Response to Arbitrator's Question 51, paras. 3-5.

[32] "Yellowfin Catches by Gear Type and Ocean Area" (Exh. US-135).

grade yellowfin include Thailand, other WCPO countries, Ecuador, and Europe.[33]

22. The U.S. tuna product market is deeply integrated with this global tuna industry. A significant amount of tuna purchased by U.S. canneries has been caught by foreign flagged vessels,[34] and, over the past decade, imports have accounted for nearly half of all canned tuna on the U.S. market.[35] The sources of U.S. imports of cannery grade tuna and canned tuna include Members whose fleets are among the top harvesters of yellowfin and Members that purchase tuna from the top harvesters of yellowfin.[36] Not surprisingly, numerous tuna companies, both U.S. and foreign, market all- or partly-yellowfin products in the U.S. market.[37]

23. Thus there are many current suppliers of canned yellowfin to the U.S. market that have the capacity to supply significantly more canned yellowfin if U.S. demand were greater. Indeed, in its recent submission, Mexico acknowledged that this is the case, but continued to maintain its assumption that only Mexican canned yellowfin would enter the U.S. market under its proposed counterfactuals on the grounds that: 1) Mexico is a unique producer of low-cost yellowfin;[38] and 2) there is "no reason" that if the scenario Mexico models comes to pass that the domestic and foreign competitors of Mexico would increase their production of canned yellowfin for the U.S.

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[33] *See* FFA, Market and Industry Dynamics, at 184 (Exh. US-7); "EU Imports of Tuna Product in 2015"; "Yellowfin Tuna Capture Fisheries Production" (Exh. US-47).

[34] *See* U.S. Response to Arbitrator's Question 51, paras. 6-7.

[35] "U.S. Supply of Canned Tuna" (Exh. US-9).

[36] *See* U.S. Response to Arbitrator's Question 51, para. 6.

[37] *See* U.S. Response to Arbitrator's Question 51, paras. 8-9.

[38] *See* Mexico's First Written Submission, paras. 148-150; Mexico's Response to Arbitrator's Question 72, para. 122.

market.[39] The evidence on the record proves otherwise.

24. First, Mexico presents no evidence regarding the cost of production of its industry or the industries of other Members to prove that the Mexican industry is the lowest cost producer of canned yellowfin. In fact, the available evidence indicates that Mexico's cost of production for canned yellowfin is not lower than the cost of production of its competitors.

25. As the United States has explained, other countries have much greater advantages in terms of low-cost tuna processing.[40] Ecuador, for example, has nearly all the advantages Mexico claims to have. Indeed, Ecuador has many of these advantages to a greater extent than Mexico – installed processing capacity, vertical integration plus the ability to purchase tuna from less expensive fisheries, strategic location, and a relatively inexpensive but productive labor force. Further, and contrary to Mexico's claims,[41] Ecuador is both a significant exporter of canned tuna to the United States (the second largest) and a significant exporter of yellowfin tuna product.[42]

26. Mexico's claim is also contradicted by the fact that its model assumes that Ecuadorian yellowfin is interchangeable with Mexican yellowfin. Specifically, Mexico assumes that it can import from other ETP fishing nations cannery grade yellowfin sufficient to produce 20,000 metric tons of canned tuna, without affecting Mexican canneries' cost of production.[43] Thus, Mexico's own model assumes that Ecuador's cost of harvesting yellowfin does not exceed its

[39] Mexico's Response to Arbitrator's Question 18, paras. 14-15.

[40] *See* U.S. Response to Arbitrator's Question 66, paras. 118-122.

[41] *See* Mexico's Response to Arbitrator's Question 25, para. 29

[42] *See* "Imports of Canned Tuna from All Countries Individually – 2010-2015" (Exh. US-36); "Prices of EU Imports of Tuna Product in 2015" (Exh. US-144).

[43] *See* Pouliot 2016, at 22, 28-29 (Exh. MEX-2).

own. This particularly significant since the cost of the fish is the most important variable cost in tuna processing. Further, tuna prices in Ecuador and Thailand are generally similar, and Thailand's economies of scope and scale are greater than Ecuador's, further undermining Mexico's claim to be the lowest cost producer.

27. Mexico's claim is also undermined by the fact that Mexican products are not currently the least expensive canned yellowfin products on the U.S. market.[44] Both Exhibits MEX-15 and US-10 (BCI) confirm that some canned yellowfin products produced by other Members are *sold at lower average prices* than comparable Mexican canned yellowfin products. And Mexico has failed to explain how its canned yellowfin would be able to out compete all other yellowfin products, both foreign and domestic, in its proposed counterfactuals where everyone (or no one) has the label, when it cannot do so now, where its competitors' tuna product carries the label and the Mexican tuna product does not.

28. Second, Mexico is wrong when it claims that there is "no reason" that, if the scenario Mexico models comes to pass, other domestic and foreign tuna industries would not increase their production of canned yellowfin for the U.S. market. The basis of Mexico's claim is that other producers would not be affected by the removal of the U.S. measure (or one of Mexico's counterfactual scenarios).[45] But this is not what Mexico modeled. Rather, Mexico modeled the introduction of a new product for which there is significant, untapped consumer demand, such that the product sells at a significantly higher price and in much greater quantities than canned yellowfin currently does. It is simply unreasonable to assume, as Mexico does, that all producers

[44] *See* U.S. Response to Arbitrator's Question 66, paras. 123-124.

[45] *See* Mexico's Response to Arbitrator's Question 27, para. 32.

of canned yellowfin would not react to the untapped demand assumed in Mexico's model by dramatically increasing production of that product for the U.S. market.

29. The U.S. import price generated by Mexico's model is significantly higher than the current import price of Mexican canned tuna and of canned tuna from other countries that produce canned yellowfin, notwithstanding Mexico's repeated assertions that under its model canned yellowfin declines in price.[46] Mexico's model assumes that half of U.S. consumers are willing to pay a premium of at least $2 per kg. for canned yellowfin over other types of canned tuna. On this basis, Mexico's model generates an outcome where over 20 percent of U.S. consumers are purchasing canned yellowfin, and paying a premium of $2.84 per kg., at prices *above* current canned yellowfin prices, at which only 1-2 percent of consumers purchase canned yellowfin marketed as such.

30. Specifically, under Mexico's model, the import price of Mexican canned tuna nearly doubles, from $4.06 per kg. to $7.84 per kg., at the same time as canned yellowfin's share of U.S. canned tuna consumption increases by a factor of approximately 15.[47] Mexico assumes that all Mexican canned tuna is yellowfin and that all canned yellowfin is from Mexico, so under Mexico's model, the import price of yellowfin increases by 92 percent. The import price of $7.84 per kg is also significantly above the average price of canned tuna imports from Thailand, Vietnam, the Philippines, and Indonesia, all of which produce canned yellowfin.[48] But Mexico's

[46] *See, e.g.*, Mexico's Response to Arbitrator's Question 36, para. 59; *id.* Question 38, para. 63.

[47] *See* Pouliot 2016, at 6, 33, 34 (Exh. MEX-2); "52 Week Canned Tuna Sales, Summed by Type" (Exh. US-17); "Yellowfin Market Review," at 3 (Exh. US-10) (BCI).

[48] *See* Pouliot 2016, at 6, 33 (Exh. MEX-2).

model assumes that no other industries react to this change.

31. The import price generated by Mexico's model is also significantly more than the price that the EU is currently paying for canned yellowfin and yellowfin loins. In 2015, the EU imported nearly 77,000 metric tons of canned yellowfin at an average price of $5.31 per kg and 55,000 metric tons of yellowfin loins for canning at an average price of $5.55 per kg.[49] Thus, Mexico's model predicts that U.S. consumers will be consuming over 63,000 metric tons of canned yellowfin per year at an import price that, accounting for U.S. tariffs and charges, is 28 percent higher than the import price EU consumers are currently paying, but that none of the industries currently supplying the EU market will divert any of their supply to the United States. This assumption is unreasonable on its face. It is particularly unreasonable because the current EU imports of yellowfin tuna products come from over 20 countries, including top exporters to the United States such as Ecuador, Thailand, Vietnam, the Philippines, and Indonesia.[50]

32. For nearly all of these countries, it would be more profitable to export to the United States under the outcome generated by Mexico's model. For example, the average import price of the nearly 18,000 metric tons of yellowfin tuna products that Ecuador exported to the EU in 2015 was $5.17 per kg.[51] Adjusting this figure to reflect average duty rates and charges on U.S. canned tuna imports from Ecuador gives a price of $6.15 per kg. If the United States were willing to pay $1.69 more per kg. for this entire volume of yellowfin tuna products than the EU is currently paying, it would make economic sense to divert that volume to the U.S. market.

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[49] "Prices of EU Imports of Tuna Product in 2015" (Exh. US-144).

[50] *See* "Prices of EU Imports of Tuna Product in 2015" (Exh. US-144).

[51] *See* "Prices of EU Imports of Tuna Product in 2015" (Exh. US-144).

Mexico's assertion that Ecuador would react to this higher price for canned yellowfin in the United States by shipping the raw input to Mexico is unreasonable on its face.[52]

33. The same logic applies to numerous other countries, including the Philippines, Indonesia, Thailand, Mauritius, and many others. Adjusting for average U.S. tariffs and charges, the prices the EU is paying for yellowfin tuna product imports from all of these countries' yellowfin tuna product is well below $7.84 per kg.[53] In addition, EU import prices for yellowfin tuna product from many countries that do not currently export to the United States are also well below $7.84 per kg., again adjusting for average U.S. tariffs and charges.[54] If U.S. consumers were actually willing to pay the price for canned yellowfin generated by Mexico's model, a substantial quantity of this product would currently be exported to the United States. And if U.S. consumers *suddenly became* willing to pay that price, as Mexico hypothesizes, tuna industries in other countries would react and begin exporting canned yellowfin to the U.S. market.

34. In short, the available evidence directly contradicts Mexico's claim that it is the only possible supplier of canned yellowfin, low cost or otherwise, to the U.S. market. As a result, Mexico's decision to equate U.S. imports of canned yellowfin with Mexican canned tuna exports, so that the model essentially assumes a preference for Mexican canned tuna over all other types of canned tuna, is wrong, and cannot be an assumption that underlies the model used to calculate an accurate level of nullification and impairment. Indeed, the lack of exports to the EU market further confirms this conclusion, as Mexican tuna product seems unable to compete

[52] *See* Mexico's Response to Arbitrator's Question 45, para. 79.

[53] *See* "Prices of EU Imports of Tuna Product in 2015" (Exh. US-144).

[54] *See* "Prices of EU Imports of Tuna Product in 2015" (Exh. US-144).

there against its competitors from Europe, Asia, and elsewhere, despite the fact there is no EU-wide measure equivalent to the U.S. dolphin safe labeling measure and there is a well-established preference for yellowfin among EU consumers.

C. The United States and Mexico Do Not Constitute a Single Market with a Strong Preference for Canned Yellowfin

35. To depict demand in the U.S. and Mexican markets, Mexico uses a choice model. However, Mexico derived its demand equations based entirely on assumptions about U.S. and Mexican demand for canned tuna, rather than on the highly disaggregated consumer-level data or academic studies that would normally be used to construct such a model. In particular, Mexico's model assumes that the United States and Mexico constitute a single market where consumers have the same strong preference for canned yellowfin over other types of canned tuna.[55] On this basis, Mexico's model arbitrarily sets the willingness to pay for yellowfin and the distribution of willingness to pay equal in the two countries, and it does not model any other consumer preference in either market.[56] Therefore, the outcome of the model is driven almost entirely by the total consumption of canned tuna in the two countries because essentially the only variable that differs between the U.S. and Mexican demand equations is the "intensity of demand" parameter, which reflects the countries' total consumption of canned tuna in 2014.

36. The evidence on the record, however, demonstrates that the assumptions Mexico relied on to specify the demand equations are incorrect. In particular, the assumption of a single North American market where consumer preferences are identical, the assumption of a logistically

[55] *See* Pouliot 2016, at 10-16 (Exh. MEX-2).

[56] *See* Pouliot 2016, at 13-15 (Exh. MEX-2).

distributed $2 per kg. mean willingness to pay among U.S. consumers, and the assumption that all other consumer preferences can be represented by total consumption of canned tuna in the two markets are all refuted by the evidence and are demonstrably wrong. We discuss each of these incorrect assumptions in turn.

1. The United States and Mexico Do Not Constitute a Single Market with Identical Consumer Preferences for Canned Tuna

37. Mexico's assumption that the United States and Mexico constitute a single market for canned tuna, in which consumers have the same preferences, is unreasonable and contradicted by the evidence. Mexico has simply asserted – without proof – that there is "no reason for American consumers to have a different appreciation for canned yellowfin than Mexican consumers" and, on this basis, assumed a widespread preference for yellowfin among U.S. consumers equivalent to consumer preferences for yellowfin in Mexico.[57] But Mexico's assumption is directly contradicted by actual data on U.S. consumption, which suggests that only 1-2 percent of consumers of canned tuna choose canned yellowfin marketed as such. Mexico presents no evidence suggesting its assumption is reasonable and, indeed, when asked by the Arbitrator to provide evidence on this point, merely repeated the unsubstantiated assertion and stated that consumption of yellowfin in the United States is so small that Mexico "could not identify any direct evidence" for the alleged preference for canned yellowfin.[58]

38. As the United States discussed previously, the evidence on the record establishes that U.S. and Mexican consumers have different preferences concerning many different food

[57] Pouliot 2016, at 16 (Exh. MEX-2).

[58] Mexico's Response to Arbitrator's Question 24, paras. 26-27.

products, including canned tuna.[59] For example, U.S. consumers have a distinct preference for canned albacore that Mexican consumers do not share. A significant percentage of U.S. consumers have demonstrated a willingness to pay a premium for canned albacore, as albacore accounted for 34 percent of U.S. canned tuna consumption by volume and 52 percent by value in 2008 (and 29 percent by volume and 40 percent by value during the period covered by Exhibit MEX-15).[60] This preference is distinct from consumer preferences in other countries, as the United States accounts for twice as large a share of the world's canned albacore as the rest of the world.[61] On the other hand, albacore appears to only have (at most) a negligible share of the Mexican canned tuna market.[62] Mexico tries and fails to obscure this difference in consumer preferences by mischaracterizing all albacore and skipjack products sold on the U.S. market as one low-priced, low-quality "generic tuna" group of products.[63]

39. Moreover, Mexican consumers have a much stronger preference for canned yellowfin than U.S. consumers. As Mexico has stated, a majority of Mexican consumers have demonstrated a willingness to pay a premium for yellowfin (compared to 1-2 percent of U.S. consumers that purchase canned yellowfin marketed as such).[64] Further, in the Mexican market, canned tuna that contains yellowfin appears to be marketed on this basis, with labels advertising that the tuna is yellowfin ("amarilla"). Indeed, all of the brands shown in Exhibit MEX-29

[59] *See* U.S. Written Submission, para. 100.

[60] *See* U.S. Response to Arbitrator's Question 55, para. 40.

[61] *See* U.S. Response to Arbitrator's Question 55, para. 40.

[62] *See* Pouliot 2016, at 16 (Exh. MEX-2); "Tuna Brands" (Exh. MEX-29).

[63] *See, e.g.*, Mexico's Response to the Arbitrator's Question 24, para. 26.

[64] *See* Pouliot 2016, at 16 (Exh. MEX-2).

except for the tuna salad products seem to be marketed as "yellowfin."[65] In the United States, by contrast, less than half of all canned tuna containing yellowfin is marketed as such, with the rest being labeled simply as "lightmeat."[66] Mexican companies appear to recognize the difference between U.S. and Mexican preferences for yellowfin, as all the sales of Tuny brand products recorded in Exhibit MEX-15 are of "lightmeat" or of "whitemeat" tuna, *i.e.* albacore.[67]

40. Further, Mexico's claim that Mexican canned tuna is a "gourmet product" that is "competitively-priced" with so called "generic" products and that, therefore, U.S. consumers could not possibly *not* prefer it, is belied by the evidence.[68] In fact, Mexican canned yellowfin is not sold as a "gourmet" product in the U.S. market. As Mexico acknowledges, "gourmet" canned tuna products are usually sold in the form of solid pack or tuna fillets, typically packed in olive oil.[69] But all of the Mexican brand canned yellowfin sold during the period covered by Exhibit MEX-15 were in the form of chunk and were packed in water or vegetable oil.[70] Thus they would be more likely to compete with lower priced skipjack products than with the truly "gourmet" products. In this regard, however, the evidence establishes that Mexican yellowfin products are not priced competitively with the bargain-end products. For example, the top selling Dolores products were sold at a price that was, on average, 81 to 113 percent higher than

[65] "Tuna Brands" (Exh. MEX-29).

[66] *See* Sam Roe & Michael Hawthorne, "How Safe is Tuna?" *Chicago Tribune*, at 2, Dec. 13, 2005 (Exh. US-18).

[67] *See* "Imports of Tuny Brand Canned Tuna from Exhibit MEX-15" (Exh. US-145).

[68] *See* Mexico's Response to Arbitrator's Question 24, para. 26.

[69] Pouliot 2016, at 18 (Exh. MEX-2);.

[70] "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-136).

the comparable "light tuna" products.[71] Thus, the canned tuna that Mexico is exporting is neither a gourmet product nor priced competitively with the bargain products that appeal to budget-conscious American consumers.[72] It is unreasonable to predict that the removal or modification of the measure will impact these market realities.

41. Finally, U.S. consumers have demonstrated a preference for tuna not caught by setting on dolphins that seems to be absent among Mexican consumers. This preference formed in the 1980s and continues today.[73] The fact that major retailers and companies throughout the supply chain continue not to carry Mexican tuna product, while major Mexican retailers and supply chains do carry Mexican tuna product, and that so many companies serving the U.S. market have committed to Earth Island Institute (EII) not to produce or sell tuna product produced from setting on dolphins, while *zero* Mexican companies have made such a pledge, all point to the same conclusion – there is a significant difference in preference between U.S. and Mexican consumers with regard to whether tuna product was produced from setting on dolphins.[74]

42. Mexico's attempt, in its most recent submission, to refute the fact that U.S. and Mexican consumers differ on this fundamental point by pointing to a recently completed consumer survey fails. Most critically, the survey does not report asking *the* relevant question, namely: "Assuming no dolphin was observed to be killed in catching the tuna, would you prefer tuna caught by chasing and encircling dolphins or tuna caught by a fishing method that does not target

[71] "Average Prices of Top Selling Canned Tuna Products, by Type, from Exhibit MEX-15" (Exh. US-146).

[72] U.S. Written Submission, paras. 18-19.

[73] *See* U.S. Written Submission, paras. 28-29; U.S. Response to Panel Question 52, paras. 16-18; U.S. Response to Panel Question 54, para. 39.

[74] *See* U.S. Response to Arbitrator's Question 52, paras. 19-20.

dolphins at all?" In light of this striking absence, Exhibit MEX-71 provides no support for Mexico's key contention – that the model need not account for differing consumer preferences regarding setting on dolphins because (despite all the evidence to the contrary)[75]U.S. and Mexican consumers do not have different consumer preferences on this issue.[76]

43. Moreover, the United States would observe that this survey appears to have been otherwise designed improperly in a number of ways. For example, the questions on the dolphin safe label are designed to produce inaccurate responses because the actual meaning of the dolphin safe label – that dolphins were not chased and encircled *and* no dolphins were killed or seriously injured – is not given as an option.[77] In this regard, the September 2016 survey appears to reflect the measure as it existed *prior to* being amended in 2013, despite Mexico's position in this arbitration that the measure at issue is the measure as amended by the 2013 Final Rule.[78] Not surprisingly, the survey's sustainability questions are equally skewed, as the survey did not ask the respondents to choose between tuna that is sustainable *and* dolphin safe and tuna that is sustainable but *not* dolphin safe.

44. Overall, the evidence demonstrates that Mexico was wrong in assuming that the United States and Mexico are one market with the same preferences concerning canned tuna, namely a strong preference for canned yellowfin above other types.

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[75] *See, e.g.*, U.S. Response to Arbitrator's Question 53, paras. 21-28.

[76] Mexico's Response to Arbitrator's Question 27, para. 32; *see also id.* Question 41, para. 70.

[77] *See* Glen Bolger, "Dolphin Safe National Survey," at 6-11 (Sept. 2016) (Exh. MEX-73).

[78] *See* Mexico's Written Submission, paras. 4-7.

2. The U.S. Demand for Canned Tuna Is Not Accurately Represented by Mexico's Demand Equation

45. Second, Mexico's unsubstantiated assumption that U.S. demand for canned tuna is represented by a logistically distributed $2 per kg. mean willingness to pay for canned yellowfin over other types of canned tuna is inconsistent with a properly structured consumer choice model and refuted by the evidence on the record.[79] Mexico asserts that the results are "not sensitive to the choice of the distribution function" but the United States showed in its response to the Arbitrator's Question 71 that they are.[80] Correctly specifying a demand equation is essential for a model to be accurate, and, consequently, Mexico's model is, again, fatally flawed, and cannot accurately calculate the level of nullification or impairment.

46. As the United States explained previously, Mexico's decision to derive U.S. demand based entirely on assumptions is not consistent with the appropriate use of a consumer choice model.[81] The essence of a choice model is that it uses individual consumer behavior to derive demand for the entire market. Consequently, the correct way to define and parametrize the U.S. and Mexican demand functions would have been based on observations of consumer purchasing decisions with regard to canned tuna in the U.S. and Mexican markets, separately, based either on literature and prior economic analysis or survey results. But Mexico did not do this and instead simply assumed, without any basis, that there is a mean willingness to pay a premium for yellowfin of $2 per kg. that follows a logistic distribution in both the U.S. and Mexican markets.

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[79] *See* U.S. Written Submission, paras. 104-107.

[80] *See* Mexico's Response to Arbitrator's Question 71, para. 119; U.S. Response to Arbitrator's Question 71, para. 147.

[81] *See* U.S. Response to Arbitrator's Question 71, paras. 143-145.

47. Further, the evidence on the record concerning U.S. consumer behavior refutes both of these assumptions with respect to the U.S. market. Mexico asserts that its assumption of a $2 per kg. mean willingness to pay a premium for yellowfin is conservative because it is less than the premium calculated using its weighted OLS regression. But Mexico ignores the fact that the $2 per kg. is *more* than the premium calculated using the OLS regressions, which Mexico provides no reason for not using.[82] Moreover, currently only 1-2 percent of U.S. consumers are actually paying the premium and purchasing yellowfin over the lower cost skipjack. The assumption that 50 percent of U.S. consumers are willing to pay a premium that (based on the OLS regression) is *more* than the 1-2 percent of consumers who currently purchase yellowfin are paying, in the event that the measure is withdrawn or modified, is clearly wrong. Also, scaling the distribution function such that 6.6 percent of consumers are willing to pay a premium of $4.65 per kg. is wrong even aside from the question whether using the weighted OLS regression is appropriate, as only 1-2 percent of consumers are actually paying the current premium.[83]

48. Also, the fact that nearly half of all canned tuna in the United States is sold on sale confirms that the logistic distribution Mexico chose is not accurate for the U.S. market. Tuna is a loss leader for retailers, meaning that it is used to draw consumers into the store, and so retailers may actually sell it at a loss.[84] The fact that nearly half of all canned tuna sold is sold at a discount suggests that half of all U.S. consumers are not willing to pay *any* premium for

[82] *See* Pouliot 2016, at 20 (Exh. MEX-2).

[83] *See* Pouliot 2016, at 20 (Exh. MEX-2); "Yellowfin Market Review," at 2 (BCI) (Exh. US-10); "52-Week Canned Tuna Sales, Summed by Type" (based on Exhibit MEX-15) (Exh. US-17).

[84] U.S. Written Submission, para. 19.

canned tuna at all.[85] In fact, the U.S. market is known to be a bargain market, and studies have indicated that there is a price barrier in the U.S. market at about $1 per two cans or 70-80 cents per can.[86] This further contradicts the demand assumed by Mexico's model, which is scaled so that 88 percent of consumers are willing to pay a premium for canned yellowfin and half of all consumers are willing to pay a premium of $2 per kg.[87]

49. Finally, as discussed above, the import prices of yellowfin tuna products in the EU demonstrate that if U.S. demand for yellowfin were such that the United States would import 63,568 metric tons of canned yellowfin, if the U.S. import price rose to $7.84 per kg., many countries other than Mexico, including those currently exporting canned yellowfin to the EU, would supply the product.

50. In short, the evidence on the record shows that the demand Mexico attributes to the U.S. market, which was based entirely on assumptions, is not correct, and cannot be used to calculate the level of nullification or impairment.

3. U.S. Demand for Canned Yellowfin Is Not Accurately Modeled – Mexico's "Intensity of Demand" Parameter

51. Third, Mexico's "intensity of demand" parameter is inconsistent with the appropriate use of a consumer choice model and is contradicted by the available evidence. In Mexico's model, all consumer preferences other than the preference for yellowfin are represented by a single variable that reflects total consumption in the United States and Mexico.[88] Because this is

[85] *See* U.S. Written Submission, paras. 19, 105; U.S. Response to Arbitrator's Question 71, para. 145.

[86] *See* U.S. First Written Submission, para. 18.

[87] *See* Pouliot 2016, at 20 (Exh. MEX-2).

[88] Pouliot 2016, at 13, 15 (Exh. MEX-2) (Equations 5 and 12).

essentially the only variable that differs between the U.S. and Mexican demand, it is the main factor driving the outcome of the model. In short, Mexico's model is hard-wired to generate an outcome whereby Mexico will export to the United States approximately 80 percent of whatever its hypothetical production of canned yellowfin is.[89]

52. Mexico's use of the intensity of demand parameter is inconsistent with the appropriate use of a choice model. A properly specified consumer choice model would derive demand for a product based on the characteristics of the products valued by consumers, such as taste, texture, pack style, pack content, flavorings, sustainability, and, of course, whether the tuna is caught by setting on dolphins.[90] However, as Mexico confirms in response to the Arbitrator's Question 27, Mexico's model does not take account of differences in consumer preferences. Any such differences are assumed not to exist through the adoption of one of Mexico's two counterfactuals.[91] Because Mexico's model fails to appropriately derive U.S. demand, the outcome it generates is necessarily inaccurate.

53. Further, Mexico's use of the intensity of demand parameter is inconsistent with the evidence, since it is not correct that the entire U.S. canned tuna market represents the market for canned yellowfin. Canned yellowfin represents a tiny subset of the U.S. canned tuna market. Only 1-2 percent of all consumption of canned tuna is yellowfin, and at most only 6 percent of consumers, according to Mexico's own consumer survey, even look for canned yellowfin.[92] But Mexico's use of the demand intensity parameter assumes that the U.S. market for canned

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[89] Pouliot 2016, at 32 (Exh. MEX-2).

[90] *See* U.S. Response to Arbitrator's Question 71, para. 148.

[91] *See* Mexico's Response to Arbitrator's Question 27, para. 32; *see also id.* Question 41, para. 70.

[92] *See* U.S. Response to Arbitrator's Question 60, para. 82.

yellowfin is the same as the U.S. market for *all canned tuna*. Under Mexico's logic, if, for example, the United States consumes 75 percent of *all poultry* consumed in the two countries, Mexico should export roughly 75 percent of its *chicken thighs* to the United States, despite the fact that U.S. consumers overwhelmingly favor white meat, and there is limited demand for dark meat products, such as thighs.[93] That is clearly not correct, and Mexico's argument here is equally wrong. The fact that the U.S. market for all canned tuna is larger than the Mexican one does not mean that the U.S. market for canned yellowfin, as a distinct product, is proportionally as large. That is why, to accurately reflect consumer demand, a model must be based on actual economic data, not unreasonable assumptions.

D. Conclusion

54. Because Mexico's model is built upon assumptions that are incorrect and contradicted by the evidence on the record, Mexico's model is incapable of calculating an accurate level of nullification and impairment and thus is not a useful tool for purposes of this arbitration. This also confirms that Mexico's requested level of authorization is in excess of the level of nullification or impairment from the measure as amended in 2013.

55. The inaccuracy of Mexico's assumptions and errors in Mexico's conclusions are apparent if one examines each assumption individually, as we have done. But it is also true if one examines these assumptions in conjunction with one another. For example, on the one hand, Mexico argues that while all major canned yellowfin producers in Asia, Europe, and the United States are "not impacted" by the measure currently, the measure nevertheless severely restricts

[93] *See* U.S. Written Submission, para. 100.

the supply of *all* canned yellowfin.[94] On the other hand, Mexico argues that in the hypothetical where consumption of canned yellowfin increases exponentially, and there is a dramatic increase in the import price of Mexican canned yellowfin to $7.84 per kg., that *only* Mexican producers will be able to react to that change in U.S. demand because, again, other producers are "not impacted" by the measure currently.[95] Neither assertion is correct, and when viewed together, exemplify the logical flaws underlying Mexico's model.

III. The U.S. Model Provides a Reasonable Estimate of the Level of Nullification and Impairment

56. Having established that Mexico's request for authorization is inconsistent with the DSU, the question in this proceeding then becomes what is the level of nullification or impairment from the 2013 measure. The United States has presented a model that provides a reasonable estimate of the level of nullification and impairment. As the United States has explained, the disaggregated data necessary to construct and correctly specify a partial equilibrium model so as to give an accurate estimate of the level of nullification and impairment is not available.[96] In light of the evidence that is available, the most accurate methodology is to use Mexico's historical market share prior to the introduction of the measure to estimate the share of the U.S. tuna product market that Mexico would have today if the measure at issue were removed.

57. An approach recognizing the probative value of historical market data similar to the one the United States proposes has been used in several prior disputes. In *EC – Hormones*, for

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[94] *Compare* Mexico's Response to the Arbitrator Question 18, para. 14, *with id.* Question 17, para. 11.

[95] Mexico's Response to the Arbitrator Question 18, para. 14.

[96] *See* U.S. Written Submission, paras. 81-87, 124-125.

example, the arbitrator calculated the level of nullification and impairment by considering average U.S. exports of the covered products in the three years prior to the introduction of the measure, making a downward adjustment based on changing preferences, multiplying the estimated figure by the estimated price of the products, and subtracting actual current imports.[97] In *EC – Bananas*, the arbitrator calculated the level of nullification and impairment based on the assumption that Ecuador's exports to the EU would be equivalent to its "best-ever" level during the preceding decade.[98] In *US – Gambling*, the arbitrator used the revenues generated in the year prior to the measure coming into effect minus the actual average annual revenue in the following five years to calculate the level of nullification or impairment.[99]

58. Similarly, the U.S. approach uses Mexico's share of U.S. imports of all tuna during the three years prior to the measure's coming into effect to estimate what U.S. imports of Mexican tuna product would be if the measure were withdrawn.[100] It is necessary, however, to adjust this number to account for changing consumer preferences, as the arbitrator did in *EC – Hormones*, specifically the preference for tuna not caught by setting on dolphins. The United States accounts for these preferences by reducing the estimate by 47 percent, to reflect the share of total canned tuna consumption covered by retailers who have stated that they would not offer tuna caught by setting on dolphins even in the absence of the dolphin safe labeling measure and the retailers who have stated that their decisions concerning Mexican tuna product are entirely

[97] *EC – Hormones (US) (Article 22.6 – EC)*, paras. 66-78; *EC – Hormones (Canada) (Article 22.6 – EC)*, paras. 57-67.

[98] *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 169.

[99] *US – Gambling (Article 22.6 – US)*, paras. 3.177, 3.182, 3.184, 3.187-188.

[100] *See* U.S. Written Submission, paras. 130-133.

independent of the U.S. measure (*i.e.*, Walmart).[101]

59. After subtracting the average value of Mexico's actual imports to the United States over the past three years, the U.S. model finds that the level of nullification and impairment caused by the measure as amended in 2013 is $8.5 to $21.9 million.[102] As discussed previously, this is a *very* conservative adjustment given the overall impact of the EII commitments throughout the supply chains that serve the U.S. tuna product market.[103] In this regard, we would observe that many companies serving the EU canned market also have made commitments to EII not to produce or sell tuna product produced from setting on dolphins and Mexico has essentially no penetration in this market *even though there is no EU-equivalent of the U.S. dolphin safe labeling measure*.

60. Mexico has not shown that the period prior to the measure's coming into effect is inappropriate to use to estimate Mexico's market share if the measure were withdrawn. Mexico has made several arguments that the period is not appropriate, namely: that a voluntary export restraint was in place, the conclusion of NAFTA, decreasing U.S. production of canned yellowfin, the location and capacity of U.S. canneries, the capacity of Mexican canneries, and "many other reasons."[104] But, in reality, none of these circumstances suggests that Mexican tuna product would have a different market share today than in 1987-1989.

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[101] *See* U.S. Written Submission, paras. 134-137.

[102] *See* U.S. Written Submission, para. 137.

[103] *See* U.S. Response to Arbitrator's Question 57, para. 17.

[104] *See* Mexico's Written Submission, paras. 179-183; Mexico's Response to Arbitrator's Question 39, paras. 66-67.

61. First, as the United States explained in response to the Arbitrator's Question 56, the agreement between the United States and Mexico concerning U.S. imports of Mexican tuna between 1987 and 1989 did not restrict imports during the period.[105] In only one year, 1987, did U.S. imports of Mexican tuna product come close to the agreed level. In 1988 and 1989, U.S. imports from Mexico were only 29.7 and 47.5 percent of the agreed levels. Additionally, evidence of Mexico's share of U.S. imports of all tuna product during the period prior to the 1980 embargo confirms that Mexico's import share for 1987-1989 was representative of Mexico's share in the absence of any measure affecting Mexican exports to the United States.[106]

62. Second, the available evidence suggests that NAFTA would not make a significant difference in Mexico's market share of U.S. imports of all tuna product.[107] An examination of Mexico's market share of the products most similar to tuna product in terms of the scale and scope of U.S. imports reveals that NAFTA did not have a large or long-lasting effect on Mexico's share of U.S. imports. Mexico's share of U.S. imports of crab, shrimp, and sardines all rose to varying degrees in the years following the conclusion of NAFTA, although nothing close to the 2,056 percent increase in Mexico's share of canned tuna imports predicted by Mexico's model. But all subsequently declined to pre-NAFTA levels; all except sardines within 5 years of NAFTA coming into force.[108] Further, as the United States explained previously, data on U.S. imports of canned tuna from other countries that have experienced a change in tariff treatment

[105] *See* U.S. Response to Arbitrator's Question 56, paras. 50-52.

[106] *See* U.S. Response to Arbitrator's Question 56, para. 52.

[107] *See* U.S. Response to Arbitrator's Question 56, paras. 54-57.

[108] *See* U.S. Response to Arbitrator's Question 56, para. 55.

also suggests that using Mexico's pre-NAFTA market share is not unreasonable.[109]

63. Further, a look at Mexico's market share of the top seafood products imported by the United States demonstrates the wild implausibility of Mexico's estimation that canned tuna from Mexico would account for 54 percent of all U.S. imports of canned tuna. For none of the top 20 seafood products does Mexico's share of imports over the past 5 years reach even a tenth of that percentage.[110] Further, the same countries tend to account for U.S. imports of many seafood products – the sources of canned tuna and shrimp imports are particularly similar – and Mexico's share of imports is consistently below WCPO region producers such as Thailand, Vietnam, and Indonesia, as well as Ecuador.[111]

64. Third, the fact that U.S. cannery purchases of yellowfin have declined since the 1980s is not a basis for concluding that Mexico's market share would be different than in 1987-1989 because now there is some unsatisfied demand for canned yellowfin. As the United States discussed previously, the higher level of purchases of yellowfin by U.S. canneries in the 1980s was not indicative of a high demand for yellowfin-only canned tuna, given that the yellowfin the canneries purchased was often canned with skipjack and marketed as "lightmeat tuna," as it is today. Further, the steep decline in those purchases over the last thirty years establishes that U.S. consumer demand for yellowfin is certainly low today, whatever it was in the 1980s. Given that supply of cannery grade yellowfin to the U.S. market is not severely restricted, if this were not the case, cannery purchases would be higher. Thus there is no reason to believe that, in the short

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[109] *See* U.S. Response to Arbitrator's Question 56, paras. 58-59.

[110] *See* "Mexico's Historical Market Share of Top Seafood Products" (Exh. US-125).

[111] *See* "U.S. Imports of All Shrimp Products" (Exh. US-121); *see also* "U.S. Imports of All Sardines Products" (Exh. US-123).

term, Mexican canned tuna would satisfy some latent demand that already exists but is unmet.

65. Fourth, several of the other factors Mexico mentioned – namely the location and capacity of U.S. canneries and the capacity of Mexican canneries – are controlled for by using Mexico's market share of all tuna as the baseline. In the 1980s, when there were more U.S. canneries in the EPO region and Mexico's canning capacity was lower, Mexico exported tuna loins and frozen tuna to the U.S. market. As Mexico's canning industry developed, the balance shifted away from raw tuna towards canned tuna.[112] However, the U.S. model controls for shifts in the balance of Mexico's exports to the United States by using Mexico's historical share of imports of all tuna to estimate Mexico's share of tuna product imports in the absence of the measure, while multiplying the estimated quantity of imports from Mexico by the higher price of all tuna product rather than the lower price of raw tuna for canning.[113]

66. Finally, Mexico has not explained the "many other reasons" that the 1987-1989 period is different from 2014,[114] but, in reality, U.S. tuna product imports have been remarkably consistent over the past 25 years. Of the top sources of U.S. imports of tuna in airtight containers for 1987-1989, five of the top ten and three of the top five are the same today.[115] Thailand is the most important supplier in both periods, with 71 percent of imports in the late 1980s and 45 percent today. The Philippines, the third and fourth most important supplier in the two periods, accounted for 9 percent of imports in the late 1980s and 8 percent today. Indonesia remained static at 4 percent. Ecuador, the fifth and third most important supplier, accounted for 3 percent

[112] *See* "U.S. Imports of Tuna Product from the World and from Mexico," at 2-3 (Exh. US-62).

[113] *See* U.S. Written Submission, paras. 128-129.

[114] *See* Mexico's Written Submission, para. 182.

[115] *See* "U.S. Imports of Tuna in Airtight Containers from the Top Sources" (Exh. US-147).

of imports in the 1980s and 8 percent today. The most significant change was the emergence of Vietnam and China, which account for 9 and 8 percent of imports for 2013-2015. Overall, the market is remarkable for its stability. There certainly have been no changes close to the scenario Mexico imagines, in which a country with a less than 1 percent import share for 1987-1989 and a 2 percent share for 2013-2015 suddenly accounts for 54 percent of all imports, displacing the countries that have supplied the majority of U.S. tuna product imports for over 25 years.

67. Thus, the United States put forward a model that is consistent with models used in previous WTO arbitrations and that generates an outcome that is reasonable in light of Mexico's historical share of U.S. imports, Mexico's current share of U.S. imports of other seafood products, and the structure of the U.S. tuna product market over the past 25 years. Mexico has not presented any evidence suggesting the U.S. model is unreasonable. Accordingly, the estimated level of nullification and impairment it generates of approximately $8.5 to $21.9 million per year is also appropriate.

68. This concludes our opening remarks. We will be pleased to respond to the advance questions by the Arbitrator and any additional questions.