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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)

Responses of the United States of America to Questions
from the Arbitrator Following the Meeting with the Parties

November 9, 2016

TABLE OF REPORTS

Short Form	Full Citation
Brazil – Aircraft (Article 22.6 – Brazil)	Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the* SCM Agreement, WT/DS46/ARB, 28 August 2000
EC – Hormones (US) (Article 22.6 – EC)	Decision by the Arbitrators, *European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU,* WT/DS26/ARB, 12 July 1999
US – 1916 Act (EC) (Article 22.6 – US)	Decision by the Arbitrators, *United States – Anti-Dumping Act of 1916, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS136/ARB, 24 February 2004
US – COOL (Article 22.6 – US)	Decision by the Arbitrators, *United States – Certain Country of Origin Labelling (COOL) Requirements - Recourse to Article 22.6 of the DSU by the United States*, WT/DS384/ARB, and Add. 1; WT/DS386/ARB, and Add. 1, circulated 7 December 2015
US – Gambling (Article 22.6 – US)	Decision by the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS285/ARB, 21 December 2007
US – Offset Act (Byrd Amendment) (Canada) (Article 22.6 – US)	Decision by the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Canada – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS234/ARB/CAN, 31 August 2004
US – Tuna II (Article 21.5 – Mexico) (AB)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico,* WT/DS381/AB/RW, adopted 3 December 2015
US – Tuna II (Article 21.5 – Mexico) (Panel)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico,* WT/DS381/RW, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW

US – Tuna II (Mexico) (AB)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012
US – Tuna II (Mexico) (Panel)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R

TABLE OF EXHIBITS

No.	Description
148	Remington Research Group, National Public Opinion Survey (2016)
149	"U.S. Weighted OLS Regressions Using the 12- and 52- Week Datasets from Exhibit MEX-15"
150	"U.S. Calculation of Average Willingness to Pay"
151	"ETP Purse Seine Catches of Yellowfin, by Country" (data drawn from IATTC, *Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015* (June 2016) (Exh. US-43))
152	"Mexican Purse Seine Catches of Tuna" (data drawn IATTC, *Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015*" (2016) (Exh. US-43). WCPFC, Yearbook – 2014 (Exh. US-85))
153	"Ecuador Purse Seine Catches of Tuna" (data drawn from IATTC, *Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015* (June 2016) (Exh. US-43))
154	"U.S. Imports of Tuna Product from Ecuador – 1996 to 2015) (data drawn from U.S. Census Bureau, accessed through Dataweb)
155	WCPFC, Conservation and Management Measure 2011-03 (Mar. 2012)
156	IOTC, Resolution 13/04 on the Conservation of Cetaceans (2013)
157	ICCAT, Draft Recommendation on Monitoring and Avoiding Cetacean Interactions in ICCAT Fisheries (2014)
158	16 U.S.C. § 1372
159	16 U.S.C. § 1362(13)
160	IDCP, "IDCP Dolphin Mortality Limits Requested for 2015-2017"
161	"Examples of Labels on Canned Tuna Sold on the U.S. Market"
162	Mexilink, "Dolores Tuna Products" (accessed Nov. 6, 2016)
163	"Prices of EU Imports of Tuna Product, 2014" (data drawn from Eurostat through Global Trade Atlas)
164	"Prices of EU Imports of Tuna Product, 2016" (data drawn from Eurostat through Global Trade Atlas)
165	"U.S. Canned Tuna Imports, by Type, 2014-2015" (data drawn from U.S. Customs Bureau)
166	"U.S. Imports of Seafood Products from the World and from Mexico" (data drawn from U.S. Census Bureau, accessed through USA Trade https://usatrade.census.gov/)
167	"Runs of Mexico's Model Specified Based on Available Information"
168a	Main Program File, U.S. Runs of Mexico's Model

168b	Program File, Equations for Mexico's Model
168c	Program File, Equations for Mexico's Model Restricted for the Corner Solution
169	"U.S. Imports of Canned Tuna in Water and in Oil" (data drawn from U.S. Census Bureau, accessed through Dataweb)
170	J. John Kaneko, Pacific Management Resources, "Rationalization of HACCP for the Fresh Tuna Industry" (1997)
171	Boston Sword & Tuna, "Buyer's Guide: Yellowfin Tuna" (accessed Oct. 30, 2016)
172	"U.S. Model with Alternative Pricing of Mexican Imports"
173	Prices of U.S. Canned Tuna Imports for 1989-2015" (data drawn from U.S. Census Bureau)
174	U.S. Department of Agriculture, Economic Research Service, "Measuring Transportation and Trade Markups on Imported Commodities with the Food Dollar Model"
175	"Share of Grocery Sales by the Top 20 Retailers" (data provided by USDA Economic Research Services)
176	Dhanya Skariachan, "Costco Gains Market Share; Profit Tops Street View," *Reuters* (Mar. 12, 2013)
177	Marine Stewardship Council, "MSC Certified Canned Tuna Brands Sold in the United States," https://www.msc.org/where-to-buy/product-finder/product_search?product_type=canned&species=tuna&country=US&view_all=1&layout=list (accessed Nov. 7, 2016)
178	Harmonized Tariff Schedule of the United States, Supplement 1, Ch. 16, at 8 (2016)
179	"Examples of Companies Producing Canned Tuna and Canned Sardines"
180	"U.S. Sardine Imports Since 1987" (data drawn from NMFS foreign trade database)
181	"Costa Rica Imports of Canned Tuna" (data drawn from Global Trade Atlas)
182	"Average Size of Yellowfin Caught in Different Ocean Areas"
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184	IOTC, *Report of the 17th Session of the IOTC Working Party on Tropical Tunas* (Oct. 2015)
185	ICCAT, Executive Summary of Report 2014-2015 (II)
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196	"U.S. Cannery Receipts and Imports of Fresh/Frozen Tuna, by Species" (data drawn from NMFS TTVP database)
197	"U.S. Fresh and Frozen Yellowfin Tuna Imports"
198	Amanda Hamilton *et al.*, Forum Fisheries Agency (FFA), *Market and Industry Dynamics in the Global Tuna Supply Chain*, Part 2 (2011)
199	"European Union Prices of Yellowfin Imports, by Type" (data drawn from EuroStat)
200	IATTC, "IDCP Dolphin Mortality Limits 2012-2014"
201	50 C.F.R. § 216.24 (2016)
202	NOAA Fisheries, "Tuna/Dolphin Embargo Status Update" (accessed Nov. 2, 2016)
203	"What's Fabulous: Tonnino Tuna," www.thecitycook.com (Mar. 25, 2015)
204	William Jacobson Witness Statement (May 26, 2014)
205	"Prices of Frozen Tuna Imports, by Species" (data drawn from U.S. Census Bureau)

QUESTIONS FROM THE ARBITRATOR TO THE PARTIES

2. TO THE UNITED STATES

128. Could the United States please provide information on mercury levels in (i) large yellowfin tuna (as used in high-end yellowfin tuna products) and (ii) albacore (as used in high-end albacore tuna products)?

1. The United States is not aware of any study examining the average mercury content of "high end" canned tuna compared to "low end" canned tuna. Rather, the evidence on mercury tends to be species specific. In this regard, it is well known that large marine predators have higher levels of mercury than smaller fish.[1] As such, the results of the U.S. Food and Drug Administration (FDA) study provided in Exhibit MEX-64 are not surprising, in that they indicate that skipjack, the smallest tuna species, has a much lower average mercury content[2] than larger species, such albacore or yellowfin,[3] which in turn have lower levels than even larger predators, such as bigeye tuna, sharks, and swordfish.[4]

2. As discussed in the U.S. written submission (and noted at the Arbitrator's meeting), actual mercury content will vary widely even within the same species, depending on how old the fish are.[5] Fishing methods that tend to catch younger, smaller fish will harvest fish with lower levels of mercury, while fishing methods that catch older, larger fish will have the contrary result. For example, troll-caught albacore, which tend to be younger and smaller, contain comparatively lower levels of mercury than longline-caught albacore.[6] Thus, setting on dolphins, which, as Mexico has repeatedly stated produces comparatively larger yellowfin tuna than sets on fish aggregating devices (FADs), will also produce yellowfin that is higher in mercury. As noted previously, canneries producing for the U.S. market tend to "pack[] large yellowfin (which has relatively higher mercury content) mixed with skipjack (which has very little mercury content)" rather than packing yellowfin tuna alone.[7]

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[1] *See* FDA, "Mercury Levels in Commercial Fish and Shellfish (1990-2010) (Exh. MEX-64).

[2] *See* FDA, "Mercury Levels in Commercial Fish and Shellfish (1990-2010), at 3 (Exh. MEX-64) (stating that canned light tuna and fresh/frozen skipjack have average mercury contents of 0.128 and 0.144, respectively).

[3] *See* FDA, "Mercury Levels in Commercial Fish and Shellfish (1990-2010), at 4 (Exh. MEX-64) (stating that canned albacore, fresh/frozen yellowfin, and fresh/frozen albacore have average mercury contents of 0.35, 0.354, and 0.358, respectively).

[4] *See* FDA, "Mercury Levels in Commercial Fish and Shellfish (1990-2010), at 5 (Exh. MEX-64) (stating that fresh/frozen bigeye, sharks, and swordfish have average mercury contents of 0.689, 0.979, and 0.995, respectively).

[5] U.S. Written Submission, n.57.

[6] *See* Rosalee S. Rasmussen & Michael T. Morrissey, "Effects of Canning on Total Mercury, Protein, Lipid, and Moisture Content in Troll-Caught Albacore Tuna (*Thunnus alalunga*)," *Food Chemistry*, vol. 101, at 1130, 1134 (2007) (Exh. US-20).

[7] FAO, Recent Developments in the Tuna Industry, at 89 (Exh. MEX-14).

3. Mercury content in canned tuna (and ocean fish more generally) has been an issue of concern for U.S. consumers for over 40 years.[8] Unfortunately, this issue appears to be worsening, rather than improving. A recent study indicates that mercury levels in Pacific yellowfin are estimated to be rising at 3.8% per year.[9] This runs contrary to Mexico's claim that there would be strong consumer demand for Pacific yellowfin, and for tuna product comprised of large yellowfin in particular.

129. What is the current degree of vertical integration in the United States tuna canning industry?

4. Approximately half of the U.S. canned tuna market is supplied by canneries located in the United States and its territories. These U.S. canneries are generally not vertically integrated in the sense that the companies that own the canneries also own the vessels that produce tuna for those specific canneries (contrary to the situation that exists in Mexico). This situation allows them to respond quickly to changes in U.S. consumer preferences (unlike those vertically integrated companies that must process what their own vessels catch). Moreover, it allows U.S. canneries to lower costs while optimizing quality, making them more competitive with their low cost Asian and Ecuadorian competitors.[10] Overall, U.S. canneries purchase the majority of their cannery-grade tuna from foreign flagged vessels.[11]

5. We also note that Ecuador's canning industry has become more globally competitive while at the same time becoming less vertically integrated. Becoming less vertically integrated has allowed Ecuadorian canneries to purchase more fish from the western and central Pacific Ocean (WCPO), particularly in years where ETP harvests were low.[12] The United States also observes that the Thai canning industry is a major competitor in both the U.S. and EU markets even though the Thai tuna fleet is comparatively small and, therefore, the Thai canning industry is not vertically integrated at all.

130. In Exhibit US-10, it is reported that [[ ]]. How should the Arbitrator interpret this statement in the light of Mexico's claim that low availability of yellowfin tuna in the United States tuna market is due to low supply of this product? Does this statement conflict with the United States' statement, in paragraph 27 of its written

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[8] *See* Ferdman, "How America Fell Out of Love with Canned Tuna" (Exh. US-5) (stating that the biggest reason for the per capita decline in consumption of canned tuna is health concerns).

[9] *See* Paul E. Drevnick, Carl H. Lamborg & Martin J. Horgan, "Increase in mercury in Pacific yellowfin tuna," *Environmental Toxicology and Chemistry*, vol. 34(4), at 932 (2015) (Exh. US-21).

[10] *See also* U.S. Response to Arbitrator's Question 66, para. 126 (noting that because they are not vertically integrated U.S. canneries can always buy more yellowfin if demand increased).

[11] *See* "U.S. Cannery Purchases of YF, Total and Share" (Exh. US-96) (showing that imports of tuna accounted for 68 percent of all tuna purchased by U.S. canneries over the past decade).

[12] *See* U.S. Response to Arbitrator's Question 66, para. 119 (citing FFA, Market and Industry Dynamics, at 198 (Exh. US-7)).

submission, that "low percentages of yellowfin being processed by U.S. canneries do not indicate lack of availability of dolphin safe yellowfin"?

6. The quoted statement from page 10 of Exhibit US-10 is not inconsistent with the statement at paragraph 27 of the U.S. written submission that current U.S. cannery purchases of yellowfin do not indicate lack of availability but, rather, lack of demand. In full, page 10 of Exhibit US-10 explains that [[

.[13]]] Other parts of Exhibit US-10, as well as other evidence on the record, confirm that the lack of demand for canned yellowfin in the United States is responsible for low levels of canned yellowfin consumption.

7. As the United States has noted previously, skipjack is the least expensive and most abundant of the tuna species in the world.[14] It is harvested in all four major ocean areas and is estimated not to be overfished or subject to overfishing in any of these areas.[15] It accounts for over half of all tuna caught in the world.[16] Thus, the fact that the supply of yellowfin is [[ ]] compared to skipjack does not suggest that supply is [[ ]] in the sense that Mexico claims, *i.e.*, that Mexico is the only potential supplier of canned yellowfin or cannery grade yellowfin to the U.S. market and that U.S. canneries could not gain access to yellowfin (including reasonably priced yellowfin) from other sources if U.S. consumer demand were greater. To the contrary, the available evidence demonstrates that this is not the case.

8. First, although less abundant than skipjack, yellowfin is still the second most produced tuna species and accounts for over a quarter of the global catch. Like skipjack, yellowfin is produced from all four oceans.[17] By far the most important source of yellowfin is the WCPO, which produced nearly half (46.3 percent) of all yellowfin landed globally in 2014.[18] Further,

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[13] [[

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[14] *See* U.S. Written Submission, para. 41.

[15] *See* "Yellowfin Market Review," at 11 (July 28, 2016) (Exh. US-10) (BCI).

[16] *See* WCPFC, *Yearbook – 2014*, at 134 (2015) (Exh. US-85); "Yellowfin Percent of Global Catch" (Exh. US-86).

[17] "Yellowfin Market Review," at 11 (Exh. US-10) (BCI); *see* U.S. Written Submission, para. 41, n.98.

[18] U.S. Response to the Arbitrator's Question 51, para. 4 (citing "Total Catches of Yellowfin in the Pacific Ocean and Globally" (Exh. US-48)). Many countries' vessels harvest yellowfin, including fleets that sell tuna to U.S. canneries, such as Taiwan, Indonesia, the Philippines, Japan, and Ecuador. *See* William Jacobson Second Witness Statement (July 21, 2014) (Exh. US-98) (showing that, for tuna and tuna product imported between 2005 and 2013, 13.3% of records were from Taiwanese vessels, 10.9% were from Indonesian vessels, 10.7% were from Philippines vessels, 8.2% were from Ecuadorian vessels, and 4% were from Korean vessels); "Yellowfin Tuna Capture Fisheries Production" (Exh. US-47) (showing that Indonesia and the Philippines accounted for the largest

yellowfin is the second most produced species (by volume) in the global tuna industry, accounting for 28 percent of total global tuna catch over the past decade.[19] In this regard, it is notable that the supply of yellowfin greatly exceeds that of albacore.[20]

9. Second, as the United States has explained, there is no supply shortage of canned yellowfin either globally or to the U.S. market. Most of the global catch of yellowfin is used for canning or processing. Specifically, purse seine vessels catch about two thirds of the total yellowfin harvest, including over 70 percent of the yellowfin caught in the WCPO, and nearly all purse seine catch is produced for canning.[21] EU import data demonstrate the large quantities of canned yellowfin that are available for importation where there is strong consumer demand.[22] In other words, there is no barrier to this global supply of cannery grade or canned yellowfin being directed to the U.S. market, if demand were strong[23] – a point also confirmed in [[

]][24]

10. Third, the statements and behavior of tuna companies serving the U.S. market demonstrate that the U.S. demand-side explanation is correct. [[

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11. These statements are consistent with the more general statements from tuna companies 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 generic "lightmeat tuna."[25] It is also consistent with

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and second largest catches of yellowfin in 2014, Korea, Japan, and Taiwan for the sixth, seventh, and eighth largest, and Ecuador for the twelfth largest).

[19] *See* WCPFC, *Yearbook – 2014*, at 134 (2015) (Exh. US-85); "Yellowfin Percent of Global Catch" (Exh. US-86).

[20] Over the past 10 years, over five times as much yellowfin was caught each year as albacore, and, during this time, albacore made up 40 percent of U.S. cannery purchases. WCPFC, *Yearbook – 2012*, at 140 (Exh. US-82).

[21] *See* U.S. Response to Arbitrator's Question 51, para. 5. Pole and Line and Handline fisheries in the WCPO and Indian Oceans also produce for canning. *Id.*

[22] In 2015, the European Union imported 76,604 mt. of canned tuna and an additional 54,719 mt. of yellowfin tuna loins. In addition, the Spanish and French purse seine fleets were the third and fifth most significant harvesters of yellowfin in the world. None of this yellowfin tuna product was from Mexico. *See "*Prices of EU Imports of Tuna Product in 2015" (Exh. US-144); "Yellowfin Tuna Capture Fisheries Production" (Exh. US-47).

[23] *See* U.S. Response to Arbitrator's Question 51, paras. 1-14.

[24] *See* "Yellowfin Market Review," at 1 (Exh. US-10) (BCI).

[25] U.S. Response to Panel Question No. 51, para. 13.

the selling decisions of Grupomar, which owns the Tuny brand, one of the two leading Mexican brands. The Tuny brand consists primarily of yellowfin products,[26] but when sold in the United States, it is sold as the more generically labeled "chunk light" product.[27]

12. Nor is this behavior from these sophisticated U.S. and Mexican companies irrational. In a recently completed national public opinion survey on this topic, only 2 percent of U.S. consumers surveyed stated that they "look for" yellowfin tuna at the store.[28] This result is broadly consistent with the 6 percent figure reported by Mexico's 2010 survey provided for in Exhibit MEX-63 (especially considering that the question in Exhibit MEX-63 did not mention lightmeat or whitemeat tuna, very common names on the U.S. market, as options).[29] It is also notable that Mexico did not ask this same question – or at least has not reported the result – in its most recent survey provided in Exhibit MEX-71.[30]

13. In short, the quoted statements in Exhibit US-10 do not conflict with the U.S. explanation of declining U.S. cannery purchases of yellowfin, and other statements in Exhibit US-10, as well as other evidence on the record, show the U.S. explanation is correct.

131. With regard to paragraph 2 of the United States' responses to the Arbitrator's questions, could the United States elaborate on how Mexico's model would need to be modified in order to relax the assumption that the supply of yellowfin to the US tuna market is severely limited and to assume, instead, that yellowfin is supplied in the US tuna market?

14. The assumption that the supply of canned yellowfin to the U.S. market is severely limited is foundational to Mexico's model. Consequently, to relax that assumption, the model would have to be substantially recalibrated with significant changes needed to be made to the demand equations and to how the model treats supply.

Changes to the Demand Equations of the Model

15. If the assumption of a severely limited supply of canned yellowfin to the U.S. market were relaxed, the calculation of U.S. demand would have to be changed. The way that Mexico's model derives U.S. demand is based on the assumption that all tuna in the U.S. market is

[26] *See* Pinsa and Tuny Webpages (Exh. MEX-29).

[27] "Imports of Tuny Brand Canned Tuna from Exhibit MEX-15" (Exh. US-145). Tuny also sells an albacore product. *See id.*

[28] *See* Remington Research Group, National Public Opinion Survey (2016) (Exh. US-148) (Question 2: When purchasing canned tuna, which of the following do you look for? Response: Whitemeat Tuna: 32%, Lightmeat Tuna: 13%, Albacore Tuna: 29%, Yellowfin Tuna: 2%, Skipjack Tuna: 1%, No preference: 23%) (emphasis added).

[29] *See* Public Opinion Strategies, National Survey Methodology, at 2 (Oct. 16, 2010) (Exh. MEX-63).

[30] *See* Glen Bolger, "Dolphin Safe National Survey," at 6-11 (Sept. 2016) (Exh. MEX-71).

"generic" and that there is no supply of canned yellowfin.[31] In Mexico's model, this assumption justifies the decision to model the introduction of canned yellowfin as a new product, for which there is assumed to be massive consumer demand, rather than using actual consumption data to derive demand.[32] Consequently, if one relaxed the assumption that the supply of canned yellowfin in the U.S. market is severely limited, it would be necessary to recalibrate the model to reflect current U.S. consumption before modeling any changes in the supply of yellowfin.

16. As a preliminary matter, we note that to accurately derive U.S. demand for canned yellowfin based on a discrete choice model, demand would need to be based on consumer-level data or economic literature on the U.S. canned tuna market. Discrete choice models are based on using individual consumer decisions regarding the consumption of substitute goods to derive demand equations.[33] The models typically contain multiple parameters based on the different features of the products at issue, each parameter with its own distribution. For tuna, these might represent texture, flavor, healthfulness, catch method, etc.[34] Therefore, a highly disaggregated dataset (or existing economic studies) is generally required for these models to produce accurate results. It is ***undisputed*** both that Mexico has not provided such evidence to support its model and such evidence is not otherwise on the record.

17. Even working with the data on the record, however, changes could be made to the U.S. demand equation to make it significantly more accurate, in light of the fact that the supply of canned yellowfin to the U.S. market is not severely limited. Specifically, calculations of U.S. and Mexican consumer mean willingness to pay for canned yellowfin could be based on actual data rather than assumptions. If this were done, the distribution of willingness to pay in the two markets would reflect the reality of what U.S. and Mexican consumers are actually purchasing.

18. Specifying U.S. and Mexican consumer willingness to pay for yellowfin based on actual consumption data would entail using the available data on U.S. and Mexican consumption to calculate the current premium being paid for canned yellowfin and, on that basis, calculating the

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[31] *See* Pouliot 2016, at 9-11 (Exh. MEX-2) (asserting that "total consumption of canned tuna in the United States . . . is lower quality generic tuna" and that current U.S. consumption (or lack thereof) of canned yellowfin does not reflect "demand for it in the United States" and proceeding to model consumer preferences based on consumer choice theory, without taking observed consumer choices into account).

[32] *See* Pouliot 2016, at 20 (asserting that the premium estimated based on Exhibit MEX-15 "cannot be interpreted as the average premium that consumers are willing to pay for yellowfin tuna" and proceeding to assume, without any justification, that "[t]he mean willingness for canned yellowfin tuna . . . is $2/kg" in the United States and Mexico): *id.* (scaling U.S. distribution so that 88 of all consumers are willing to pay a yellowfin premium and 6.6 percent of consumers are willing to pay the highest (incorrectly) calculated premium, when the available evidence shows that only 1-2 percent of consumers purchase yellowfin at the current premium); *id.* at 13, 32 (assuming that total tuna consumption in the U.S. market is a proxy for the demand intensity for yellowfin, when available data shows that canned yellowfin is a very small portion of the market); *see also id.* at 30 ("Equation 20 says that yellowfin tuna consumed in the United States comes from Mexico").

[33] *See* U.S. Response to Arbitrator's Question 63, paras. 99-101.

[34] In Mexico's model, by contrast, a single variable, based on the total amount of tuna consumed in each country (and not indicative of any of the characteristics of canned yellowfin or other canned tuna) is the sole driver of demand intensity.

mean consumer willingness to pay. The best available data on U.S. and Mexican consumption are Exhibit MEX-15 for the U.S. market and Exhibit MEX-2 for Mexico. Therefore, the most accurate approach would be to first derive the current premium being paid by consumers for yellowfin based on these datasets, and then using Equation 8 of Exhibit MEX-2 to calculate the mean willingness to pay in the two markets.

19. In the U.S. market, Exhibit MEX-15 suggests that U.S. consumers are demonstrating a willingness to pay for canned yellowfin over other types of canned tuna, at retail, of $1.13 per kg. or $1.93 (using OLS regressions for the 52- and 12-week datasets).[35] Using correctly weighted OLS regressions, the U.S. consumer willingness to pay is estimated to be $3.06 and $3.39,[36] at retail prices.[37] Using these figures to solve equation 8 from Exhibit MEX-2 for the mean U.S. consumer willingness to pay for yellowfin over other types of canned tuna gives values, for retail prices, of -$3.28, -$2.48, -$1.35, and -$1.02 per kg. (for the OLS and corrected WLS figures).[38] The U.S. mean willingness to pay is lower than the premium currently observed in the market because only 1-2 percent of consumers are paying the current premium. Thus, the premium the average consumer is willing to pay will be substantially less than the observed premium.

20. In the Mexican market, the data in Exhibit MEX-2 suggest that consumers are currently paying a premium of $1.10 for canned yellowfin over all other types of canned tuna.[39] Using this figure to solve equation 8 for the Mexican consumer mean willingness to pay for yellowfin gives a value of $1.78.[40] We note that the Mexican consumer mean willingness to pay is higher than the premium currently observed because, in stark contrast to the U.S. market, more than half

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

[36] *See* "U.S. Weighted OLS Regressions Using the 12- and 52- Week Datasets from Exhibit MEX-15" (Exh. US-149) (showing that, when the regressions are weighted based on the square root of total kilograms sold, the current yellowfin premiums are 3.386, based on the 12-week dataset, and 3.058, based on the 52-week dataset). As discussed at the hearing, Mexico's weighting of the WLS regressions is incorrect. Mexico weighted the regressions based on units sold. However, since the purpose of the analysis is to study the price of tuna by *weight*, not by number of units sold and the units vary substantially by size (can size, as well as packs of 4 or more), the weights in the WLS regression ought to also be in terms of kilograms rather than units. Also, it is widely accepted in the econometrics literature that the appropriate method of introducing weights into a least squares regression is by using the square root of the chosen weights rather than the full value of the weight as has been done by Mexico. *See infra* U.S. Response to Arbitrator's Question 141(b).

[37] As discussed at the hearing and further below in response to the Arbitrator's Question 141(b), when running Mexico's model, it is also necessary to account for the effect of the mark-up between import prices and retail prices in the United States and Mexico and the effect of this mark-up on the premium being paid for canned yellowfin, at import or wholesale, in the two countries. *See infra* U.S. Response to Arbitrator's Question 141(b).

[38] *See* "U.S. Calculation of Average Willingness to Pay" (Exh. US-150).

[39] *See* Pouliot 2016, at 27 (Exh. MEX-2).

[40] *See* "U.S. Calculation of Average Willingness to Pay" (Exh. US-150).

of all Mexican consumers are currently purchasing yellowfin and, therefore, paying a premium for it over other types of canned tuna.[41]

21. Thus, if the demand equations are to be based on actual consumption data, rather than on the incorrect assumption that the supply of canned yellowfin to the U.S. market is severely limited, the U.S. mean willingness to pay a premium for yellowfin over other types of canned tuna would range from -$3.28, -$2.48, -$1.35, to -$1.02 per kg., compared to the Mexican mean willingness to pay of $1.78.

22. We further note that, if U.S. and Mexican consumer mean willingness to pay were based on actual consumption data, Mexico's model would have a much better fit, based on standard methods of testing. It is standard in economic literature to test how well the model represents the current market by determining if it correctly estimates the current consumption patterns with regards to the products being studied (known as the "fit" of the model). If the model had a good fit, it would solve for 1-2 percent of U.S. consumers purchasing yellowfin at current U.S. prices[42] and 66 percent of Mexican consumers purchasing yellowfin at current Mexican prices.[43] But Mexico's model is scaled so that 88 percent of U.S. consumers are willing to pay a premium for yellowfin and 6.6 percent of consumers are willing to pay the premium calculated by the highest of Mexico's (incorrectly weighted) WLS regressions.[44] Thus, the fit of Mexico's model is very poor. If, however, the two demand equations were specified based on actual consumption data, they would reflect the realities of the market and, as such, would have a much better fit.

Changes to Supply in the Model

23. In general, when using a discrete choice model, supply, like demand, would be a function of the attribute of the product with marginal costs based on those attributes, including form, pack, container, and type of tuna. If supply were modeled in that way, it would be possible to relax the assumption that Mexico is the sole possible supplier of canned yellowfin to the U.S. market by adding supply equations for other potential yellowfin suppliers, ideally capturing the differing marginal costs across countries and whether the products between particular countries are direct substitutes.

24. That is not how Mexico's model is set up, however. In Mexico's model, there is only one possible supplier of canned yellowfin – Mexico – so the model would need to be substantially

[41] *See* Pouliot 2016, at 26 (Exh. MEX-2).

[42] *See* "52 Week Canned Tuna Sales, Summed by Type" (Exh. US-17) (showing that purchases of canned yellowfin accounted for 1.2 percent by volume and 1.5 percent by value of all purchases of canned tuna); "Yellowfin Market Review," at 4 (2016) (Exh. US-10) (BCI) [[

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[43] *See* Pouliot 2016, at 24, 26 (Exh. MEX-2).

[44] Pouliot 2016, at 20 (Exh. MEX-2).

restructured in order to allow for other suppliers.[45] Further, there is no information on the record concerning the cost structure of the Mexican tuna industry or other tuna industries that also produce yellowfin products. Consequently, it is not possible, within the confines of Mexico's model, to fully relax the assumption that Mexico is the only possible supplier of canned yellowfin to the U.S. market. This is a key reason that Mexico's model is fundamentally incapable of accurately calculating the appropriate level of nullification or impairment.

25. One way in which the assumption could be partly relaxed, with respect to supply, would be to limit Mexican production of yellowfin to its current levels. This would entail removing from the model Mexico's assumed ability to import, at no increasing marginal cost, yellowfin tuna equivalent to 20,000 metric tons (mt) of canned yellowfin.[46] This assumption is unreasonable for many reasons, including that Ecuador, the other major producer of yellowfin in the ETP is already a significant exporter of canned tuna, including canned yellowfin, to the United States and, therefore, would be expected to export canned yellowfin itself rather than shipping the raw input to Mexico.[47] (Further, with Ecuador out of the equation, Mexico would have to import nearly half of all yellowfin caught in the ETP in order to produce an additional 20,000 mt. of canned yellowfin, which would increase prices and might not be possible.[48]) Consequently, removing these additional 20,000 mt. from the model would partly account for the fact that other countries, including Ecuador, could produce canned yellowfin.

26. In conclusion, it is not possible, within the confines of Mexico's model, to fully relax the assumption that the supply of yellowfin to the U.S. market is severely restricted. The assumption is hard-wired into Mexico's model. Certain changes can be made to the U.S. and Mexican demand equations to account for the fact that the assumption is, in fact, wrong. Some, more limited changes, can also be made to the supply side of the model. These changes would make the model less inaccurate in terms of the level of nullification and impairment it estimates, but it is not possible to make the model fully reflect the reality that canned yellowfin is a widely available product supplied by many countries.

132. Historical data that the United States provides in Exhibit US-62 show that the composition of Mexico's exports to the United States has changed between 1989 and 2014. In 1989, imports of tuna from Mexico into the United States represented 22.1% of US imports of loin of tuna and 0% of US imports of canned tuna. In 2014, these shares were 0% and 3.6%, respectively. Furthermore, Mexico's share in the

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[45] *See* Pouliot 2016, at 30 (Exh. MEX-2) ("Equation (20) says that yellowfin tuna consumed in the United States comes from Mexico").

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

[47] *See* U.S. Written Submission, para. 118.

[48] Mexico and Ecuador together caught 65 percent of the 232,448 mt. of yellowfin tuna caught in the ETP over the past three years. The United States and Spain caught 1 percent. Excluding the yellowfin catches of these four countries, only 77,537 mt. of yellowfin per year was caught in the ETP over the past three years. *See* "ETP Purse Seine Catches of Yellowfin, by Country" (Exh. US-151). Using Mexico's conversion factor of .525, *see* Pouliot 2016, at 24 (Exh. MEX-2), Mexico would have to import 38,095 mt. of this catch – 49 percent of the total – in order to produce 20,000 mt. of canned yellowfin.

imports of canned tuna into the United States grew in the period 2013-2015. Could the United States comment on these figures and explain how these trends support an analysis based on historical data?

27. Neither of these circumstances mean that Mexico's overall share of the U.S. tuna product market in the late 1980s is not a reasonable estimate of what Mexico's share would be today, in the absence of the dolphin safe labeling measure.[49]

28. First, the fact that the composition of Mexico's tuna product exports to the United States changed between the late 1980s and today does not mean that Mexico's overall share of tuna product imports in 1987-1989 is not a reasonable estimate.

29. The potential output of Mexico's tuna industry is essentially the same today as in the late 1980s. Tuna product, the category of goods covered by the U.S. measure, comprises canned tuna and frozen tuna, much of which is purchased by canneries for canning.[50] Mexico's tuna product industry is based on the catch of its large purse seine fleet in the ETP.[51] That catch has been fairly constant over the past 25 years. Between 1987 and 1989, Mexican large purse seine vessels caught an average of 117,539 mt. of tuna per year.[52] Over the past 10 years, that average has been 111,054 mt., a decrease of 5.5 percent, and over the past 3 years, it has been 130,608 mt., an increase of 11 percent.[53] Mexico's yellowfin catch has been equally consistent.[54] Thus, the change in Mexico's tuna industry since 1989 is not that it has expanded, but simply that in the late 1980s Mexico exported loins and frozen tuna to U.S. canneries, and today Mexican canneries process the tuna and Mexico exports the finished product.[55]

30. This change in the form of the tuna product Mexico exports to the United States can be accounted for by taking Mexico's share of all tuna product imports in 1987-1989 and assuming that Mexico will have an equivalent share today except that it will export the higher value product. And, indeed, this is what the U.S. model did. Specifically, it used Mexico's share of all U.S. tuna product imports in 1987-1989 to estimate the volume of imports from Mexico that would give Mexico an equivalent share of U.S. tuna product imports today.[56] It then multiplied that estimated volume by the average price of all tuna product imports (which was higher than the price of canned tuna and which the United States used to make the model err on the side of

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[49] Throughout this submission, the phrase "dolphin safe labeling measure" refers to the measure, as amended at the end of 2013.

[50] *See* U.S. First Written Submission, para. 10, n.8.

[51] *See* Mexico's Written Submission, para. 148.

[52] "Mexican Purse Seine Catches of Tuna" (Exh. US-152).

[53] "Mexican Purse Seine Catches of Tuna" (Exh. US-152).

[54] *See* "Mexican Purse Seine Catches of Tuna" (Exh. US-152) (showing that catches over the past 10 years have been 9 percent lower than yellowfin catches for 1987-1989, and catches over the past 3 years have been 8 percent higher).

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

[56] *See* U.S. First Written Submission, para. 131; U.S. Model (Exh. US-81).

over-estimating the level of nullification and impairment).[57] Consequently, the model adjusted for the change in Mexico's tuna product industry by assuming, consistent with the evidence in Exhibit US-62, that Mexico would export entirely canned tuna rather than raw tuna for canning.

31. There is no reason to think that, in addition to the composition of its exports changing, Mexico's share of U.S. tuna product imports by weight would increase. In fact, the available evidence suggests it would not. Most of the value of canned tuna comes from the price of the fish it contains, and another major component is the price of vessel fuel.[58] In this regard, a country's competitiveness as a canned tuna producer would closely track the competitiveness of the fleets from which they purchase the cannery-grade tuna. Further, Mexico's asserted advantage of proximity to yellowfin resources and to the U.S. market applies no more to canned tuna than to tuna loins. Indeed, all the evidence on the record suggests that, as a canner, Mexico is not more efficient than its competitors, particularly not in the canning aspect of tuna processing, where many of the advantages Mexico asserts for itself apply with much more force to other countries such as Ecuador and Thailand.[59]

32. Moreover, the evidence available concerning other countries that have undergone tuna industry reorganizations confirms that a shift in the composition of U.S. tuna product imports from a particular country does not imply an increase in that country's overall tuna product market share. Ecuador's tuna product industry began to grow substantially in the late 1990s. The Ecuadorian fleet more than doubled its tuna catch between 1994 and 1997 and Ecuador began exporting more tuna product, including to the United States.[60] From 1996 through about 2001, when Ecuador's production of canned tuna was still relatively small,[61] but its fleet's harvest had increased, Ecuador exported an average of 29,000 mt. of tuna product to the United States, accounting for 12 percent of total imports.[62] Of this, 80 percent, an average of 23,951 mt.

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[57] *See* U.S. First Written Submission, para. 132; U.S. Model (Exh. US-81).

[58] *See* Campling et al. 2007, at 340 (Exh. US-114) (explaining that fish is the most significant cost in the production of canned tuna); FFA, Market and Industry Dynamics, at 58 (Exh. US-7).

[59] *See* U.S. Response to Arbitrator's Question 66, para. 119 (explaining that Ecuador has almost all of the advantages that Mexico asserts give it a cost advantage but to a greater degree, including greater installed processing capacity, a semi-vertically integrated canning industry, location near the fishing zones, and a relatively inexpensive, productive labor force); *id.* para. 120 (explaining that Thailand benefits from close proximity to the WCPO – the largest source of yellowfin for canning – and the Indian Ocean, as well as the best economies of scope and scale in the world, and a low-cost, highly productive labor force).

[60] *See* "Ecuador Purse Seine Catches of Tuna" (Exh. US-153) (showing that the tuna catch of Ecuador's purse seine fleet rose from 38,560 mt. in 1994 to 100,615 in 1997).

[61] *See* FFA, Market and Industry Dynamics A, at 195-196 (Exh. US-7) (showing that Ecuador's production of canned tuna grew from about 25,000 mt. of canned tuna per year in the mid-1990s to about 50,000 mt. per year in 1998-2001 before tripling between 2002 and 2003 to 150,000 mt. per year and continuing to grow thereafter).

[62] "U.S. Imports of Tuna Product from Ecuador" (Exh. US-154) (showing that, from 1996-2001, U.S. imports of tuna product from Ecuador were 173,588 mt., *i.e.*, 12 percent of the total of 1,504,819 mt).

per year, consisted of tuna loins.[63] Only 3,411 mt. per year (about 12 percent of the total) consisted of canned tuna, and the remainder was frozen.

33. As the Ecuadorian tuna canning industry developed in the early 2000s, and as duties on canned tuna were reduced under the Andean Trade Preferences Act (ATPA), the balance of Ecuador's tuna product exports to the United States shifted. Between 2004 and 2012, when the ATPA was fully in effect, Ecuador accounted for, on average 10 percent of all tuna product imports, by volume, or about 26,000 mt. per year.[64] Eighty-seven percent of this volume was canned tuna.[65] Only 11 percent was tuna loins. Thus, as the Ecuadorian tuna processing industry developed, and as tariffs on canned tuna were removed under the ATPA, Ecuador's share, by volume, of all U.S. tuna product imports remained relatively stable – 12 percent in the late 1990s to 2001 and 10 percent between 2003 and 2012.[66] However, the composition of Ecuador's exports changed considerably, from almost all loins to almost all canned. This example suggests that the U.S. model is a reasonable estimate of Mexico's share of U.S. imports based on the counterfactual of removal of the measure, because this is precisely what it predicts for Mexico – that Mexico's share of imports will remain stable but the composition will change.

34. Second, the fact that Mexico's share of canned tuna imports has increased (by 1.2 percent) between 2013 and 2015 similarly does not mean that Mexico's overall share of tuna product imports in late 1987-1989 is not a reasonable estimate of what it would be in the absence of the dolphin safe labeling measure.

35. As a preliminary matter, we would note that it is only a one percent change in the past three years and, therefore, not suggestive of a significant shift in Mexico's share of U.S. canned tuna imports. Also, Mexico's share of all tuna product imports has grown by even less over the past few years (the 2015 share was 0.3 percent over the 2012 share).[67] Moreover, if Mexico's exports to the United States are increasing slightly, it does not suggest that the level of nullification and impairment caused by the measure is increasing. If anything, it may be declining slightly. This is accounted for in the U.S. model by subtracting Mexico's current imports from the level generated by the measure. However, the U.S. model does not project a decrease in nullification and impairment going forward and consequently may overestimate the level of nullification and impairment somewhat.

36. We would also note that the U.S. model likely over-estimates Mexico's share of U.S. tuna product imports for 1987-1989 by using Mexico's share of all tuna imports as a proxy for Mexico's share of U.S. tuna product imports. Due to the lack of tuna product import data prior to 1989, the United States had to use Mexico's share of all tuna imports, which includes

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[63] "U.S. Imports of Tuna Product from Ecuador" (Exh. US-154) (showing that, for 1996-2001, 143,706 mt. of the total 173,588 mt. of U.S. imports of tuna product from Ecuador, 82.8 percent, were tuna loins).

[64] "U.S. Imports of Tuna Product from Ecuador" (Exh. US-154).

[65] "U.S. Imports of Tuna Product from Ecuador" (Exh. US-154).

[66] "U.S. Imports of Tuna Product from Ecuador" (Exh. US-154).

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

Mexico's share of the fresh tuna market.[68] Mexico generally has a higher share of U.S. imports for fresh than for processed seafood products because the advantage of proximity is greater for fresh products and other factors (other costs, economies of scale, labor force productivity, etc.) are less relevant.[69] Both estimates used by the U.S. model (3.9 percent and 5.8 percent) are above Mexico's share of tuna product imports for 1989 (3.8 percent), the only year for which such data is available.[70]

37. Finally, we would also note that the assumptions underlying the U.S. model are eminently more reasonable than the assumptions underlying Mexico's model, which are demonstrably false. For example, the evidence refutes that the U.S. measure prohibits all yellowfin from being sold on the U.S. market, that Mexico is the supplier of some unique canned yellowfin product, and that U.S. consumers have such a strong preference for that product that they would be willing to pay significantly more for it than EU consumers are currently paying for canned yellowfin.

133. Could the United States please comment on Mexico's argument that consumers distinguish, or would distinguish if they had access to proper information, between tuna caught by unregulated setting on dolphins, and tuna caught by regulated (AIDCP-compliant) setting on dolphins?

38. There is no evidence that U.S. consumers currently distinguish, or would in the future distinguish, between so-called "unregulated" setting on dolphins and "regulated" (*i.e.*, AIDCP-compliant) setting on dolphins. The evidence strongly indicates that U.S. consumers (and the producers, distributors, and retailers that supply tuna product to those consumers) do not prefer tuna product produced from setting on dolphins (whether "regulated" or "unregulated") over tuna product produced *without* setting on dolphins.

39. In its written submissions and oral argument, Mexico has attempted to frame the choice that the U.S. consumer is making when purchasing tuna product as being one between tuna product produced from "unregulated" setting on dolphins and "regulated" (*i.e.*, AIDCP-compliant) setting on dolphins.[71] But that is not the actual choice the U.S. consumer is currently making, nor would make under the counterfactuals proposed by the parties. "Unregulated"

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[68] *See* U.S. Written Submission, para. 128.

[69] *See* U.S. Written Submission, para. 129; "Fresh Tuna Imports from the World and from Mexico" (Exh. US-62); "U.S. Imports of Top Seafood Products from the World and from Mexico" (Exh. US-120) (showing that Mexico's largest market shares were generally in primarily fresh products, such as octopus, snapper, and oysters).

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

[71] *See, e.g.*, Mexico's Written Submission, para. 10 ("Under the United States' counterfactual, the market will be provided with information to distinguish between tuna products containing tuna caught in an AIDCP-certified manner and tuna caught in an unregulated manner. The availability of this information will immediately reshape the U.S. tuna product market because retailers and consumers will be made aware of the fundamental difference between the two types of fishing practices."); *id.* para. 76 ("Under Mexico's first counterfactual scenario and the United States' alternative counterfactual, the market misconceptions regarding unregulated fishing methods and AIDCP-compliant fishing methods would be immediately corrected.").

setting on dolphins is a fishing method that essentially does not exist as a commercial fishing method, and in any event, no tuna product produced by this method is sold in the U.S. market.

40. As discussed at the Arbitrator's meeting, "unregulated" setting on dolphins, as it occurred in the 1950s-80s in the ETP, has not existed as a fishing method in this fishery for decades. Indeed, by the time the La Jolla Agreement was concluded in 1992, many of the important requirements were already in place for the tuna fleets operating in this fishery. The 1997 AIDCP confirmed and reinforced these restrictions in a binding legal agreement among the parties. Outside the ETP large purse seine fishery, sets targeting marine mammals, including dolphins, occur at most infrequently, and certainly not on a commercial scale, and have never been shown to involve the type of chase or the number of dolphins that are elements of dolphin sets in the ETP.[72] Further, *any* setting on dolphins is banned in many other fisheries, including fisheries in the WCPO, the Indian Ocean, and all U.S. fisheries (on the high seas and territorial waters) except for the ETP.[73]

41. But, in any event, tuna product produced from "unregulated" setting on dolphins is not sold in the U.S. market. As discussed in response to Question 69, nearly all of the tuna product imported into the United States is eligible to be marketed as dolphin safe.[74] The notable exception is Mexican tuna product. Even countries that set on dolphins pursuant to the AIDCP export only dolphin safe tuna product to the United States (in recognition that there is a very limited market for tuna product produced from setting on dolphins). Ecuador is a prime example of this. As noted at the Arbitrator's meeting, ten Ecuadorian large purse seine vessels have been issued dolphin mortality limits (DMLs) for 2017, meaning that those vessels are authorized to set on dolphins pursuant to the AIDCP.[75] However, Ecuador choses to export to the United States tuna product caught by other fishing methods.

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[72] *See, e.g.*, *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.242 ("These statistics confirm for the Panel that although dolphins may occasionally and incidentally be set on outside the ETP, it is only inside the ETP that setting on dolphins is practiced consistently or 'systematically,' in the words of the original Panel.").

[73] *See* WCPFC, Conservation and Management Measure 2011-03 (Mar. 2013) (Exh. US-155) ("CMMs shall prohibit their flagged vessels from setting a purse seine net on a school of tuna associated with a cetacean in the high seas and exclusive economic zones of the Convention Area, if the animal is cited prior to commencement of the set."); IOTC, Resolution 13/04 on the Conservation of Cetaceans (2013) (Exh. US-156) ("Contracting Parties and Cooperating Non-Contracting Parties (collectively CPCs) shall prohibit their flagged vessels from intentionally setting a purse seine net around a cetacean in the IOTC area of competence, if the animal is sighted prior to the commencement of the set."); ICCAT, Draft Recommendation on Monitoring and Avoiding Cetacean Interactions in ICCAT Fisheries (2014) (Exh. US-157); 16 U.S.C. § 1372 (Exh. US-158) (stating that it is contrary to U.S. law for any person or vessel "subject to the jurisdiction of the United States to take any marine mammal on the high seas" or in waters under U.S. jurisdiction, except under certain limited circumstances specified in statute (of which purse seine fishing under the auspices of the AIDCP and the conduct of scientific research are examples); 16 U.S.C. § 1362(13) (Exh. US-159) (defining "take" as to "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill").

[74] *See* U.S. Response to Arbitrator's Question 69, para. 137.

[75] *See* IDCP "IDCP Dolphin Mortality Limits Requested for 2015-2017" (Exh. US-160). As noted in the document, one U.S. vessel was also granted a DML by the AIDCP International Review Panel. [[

42. Thus, the choice the U.S. consumer is making is not between tuna product produced from "unregulated" and "regulated" dolphin sets, but between tuna product produced by setting on dolphins and tuna product produced without setting on dolphins.[76] And as to that choice, the available evidence regarding U.S. consumer preferences is clear – U.S. consumers prefer tuna product that was not produced from the intentional chase and capture of dolphins. In addition to all of the other evidence on the record,[77] a recently completed nation-wide survey of U.S. consumers demonstrates that this is the case. The survey asked:

> "Other fishing methods do not involve intentionally targeting dolphins. Assuming that no dolphin was killed in catching the canned tuna you are choosing from, which type of canned tuna would you prefer?"

Seventy-four percent of the purchasers of canned tuna surveyed answered "Tuna caught by a fishing method that does not target dolphins"; only 8 percent answered "Tuna caught by chasing and capturing dolphins."[78]

43. Such results are consistent with the response to the question "What do you think the definition of dolphin safe should be for canned tuna?" Sixty-six percent of those surveyed responded that the definition of "dolphin safe" should exclude tuna product produced from setting on dolphins.[79] Notably, such results are ***not inconsistent*** with Exhibit MEX-71, which does not indicate that that survey asked whether, when given a choice, the U.S. consumer prefers tuna product produced without setting on dolphins or from setting on dolphins.[80] Indeed, the survey seemed to be designed to avoid providing any evidence regarding the choice that U.S. consumers actually make in the U.S. market – whether they have a preference for tuna product produced without setting on dolphins over tuna product produced from such dolphin sets, or as Mexico argues, no preference one way or the other.

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[76] *See also* U.S. Response to Arbitrator's Question 53, para. 26.

[77] *See* U.S. Written Submission, sec. III.B.1; U.S. Responses to the Arbitrator's Questions 52-54.

[78] Seventeen percent answered "Not sure." National Public Opinion Survey, Question 4 (2016) (Exh. US-148). Remington Research Group is a top polling company in the United States. *See* http://remingtonresearchgroup.com/. As noted on the first page of the exhibit, the survey was conducted October 25-26, 2016. 1,012 randomly selected adults participated in the survey. Remington Research Group reports that the margin of error is margin of error is +/- 3.6% with a 95% level of confidence. Results reported only reflect those 80% of those surveyed that reported purchasing canned tuna products and only those respondents were asked questions after the first question. *Id.* Question 1.

[79] The results to this question were as follows: "No dolphins were intentionally chased and captured in catching the tuna 27%"; "No dolphins were killed or seriously injured in catching the tuna 17%"; "No dolphins were killed, seriously injured, or intentionally chased and captured in catching the tuna 39%"; and "Not sure 17%." National Public Opinion Survey, Question 5 (2016) (Exh. US-148).

[80] Again, as noted at the meeting, unlike consumer surveys presented Exhibits MEX-63 and US-148, Exhibit MEX-71 is a power point presentation, not the survey itself, and it is unclear from that power point whether additional questions were asked in the survey that are not being reported in this power point.

44. As to the Arbitrator's reference to a future scenario where U.S. consumers may have "access to proper information" on the differences between "unregulated" and "regulated" setting on dolphins, the United States would emphasize again that the measure at issue is *only* a labeling measure.[81] U.S. law has never prevented Mexico or its producers from conducting educational or marketing campaigns on television, in print, or the Internet on the alleged benefits of AIDCP-sanctioned dolphin sets versus "unregulated" dolphin sets, purse seine fishing on FADs, or any other fishing method that Mexico's producers consider to be less appealing to the U.S. consumer than setting on dolphins. The United States is not aware that Mexico or its producers have ever engaged in such a campaign in the almost 20 years since the AIDCP was signed.

45. Finally, we would again note that Mexico's argument that the level of nullification or impairment is almost a half billion dollars is based on the theory that if the measure is withdrawn, the distributors and retailers that do not currently sell Mexican tuna product will suddenly change their purchasing policies and begin selling this tuna product.[82] That theory is premised on two points. First, that some significant, untapped demand exists in the United States for canned yellowfin produced from setting on dolphins. And second, the measure prevents distributors and retailers from selling such product.

46. Neither point is true. As to the first point, the United States has already explained in detail that there is very limited demand in the U.S. market for the type of tuna product that Mexico sells – *i.e.*, canned yellowfin produced by setting on dolphins. Secondly, it is critical to remember that the measure does not prohibit distributors and retailers from selling Mexico's tuna product. They have chosen not to do so *of their own accord*.[83] And there is *no evidence* that a significant number of distributors and retailers will change their current purchasing policies in the event that the measure were withdrawn. Again, these companies are not small, local

[81] 16 U.S.C. § 1385(d)(1) (Exh. US-1) ("It is a violation of section 45 of title 15 for any producer, importer, exporter, distributor, or seller of any tuna product that is exported from or offered for sale in the United States to *include on the label* of that product the term 'dolphin safe' or any other term or symbol that falsely claims or suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins if the product contains tuna harvested …").

[82] *See* Mexico's Response to the Arbitrator's Question 22, para. 24 ("For the purpose of assessing the level of the nullification or impairment caused by the tuna measure, what matters is the sensitivity of the principal distribution channels in the U.S. market (i.e., retailers and distributors) to dolphin-safe tuna in the light of the regulated definition of 'dolphin safe' …"); Mexico's Opening Statement, para. 32 ("More specifically, in the case of canned yellowfin tuna, Mexican products would become available in major retail chains while currently it is mostly available in Hispanic stores."); Mexico's Written Submission, para. 10 ("Under the United States' counterfactual, the market will be provided with information to distinguish between tuna products containing tuna caught in an AIDCP-certified manner and tuna caught in an unregulated manner. The availability of this information will immediately reshape the U.S. tuna product market because retailers and consumers will be made aware of the fundamental difference between the two types of fishing practices.").

[83] *See, e.g.*, "Dolphin Safe Statements from Retailers" (Exh. US-40) (statements from Costco, Kroger, and Trader Joe's, all of which acknowledge that they are legally permitted to sell Mexican tuna product produced from setting on dolphins, but have chosen not to on their own accord).

companies, but large, sophisticated companies that spend enormous resources understanding the products that they sell and the buying habits of their customers.[84]

47. All of the evidence on the record indicates that these companies would not change their purchasing policies because the measure is withdrawn. And Mexico has not provided any evidence that says differently.[85]

48. To be clear, the United States is not disputing the DSB recommendations and rulings that the dolphin safe label carries "significant commercial value" in the U.S. marketplace.[86] But this value derives from the fact that U.S. consumers have strong preferences as to tuna product produced that meets (or does not meet) those substantive dolphin safe standards – *i.e.*, whether the tuna was produced from setting on dolphins and whether a dolphin was killed or seriously injured in the harvest of that tuna. And those strong consumer preferences, and hence that "value," will not disappear from the market in the scenario where the measure is withdrawn.

134. With respect to the commitments discussed by the United States at paragraphs 31-35 of its written submission:

49. The commitments discussed in paragraphs 31-35 of the U.S. written submission discuss, broadly, two types of commitments: 1) the commitments that U.S. and foreign companies throughout the supply chain have made to Earth Island Institute (EII) to adhere to its "dolphin safe" standard; and 2) the commitments U.S. retailers have made publicly or have otherwise shared with the United States.

a. Could the United States please indicate whether these are commitments not to buy tuna products manufactured from tuna caught by setting on dolphins, or whether they are commitments not to buy tuna products manufactured from tuna that is (a) not dolphin-safe; or (b) ineligible under the Tuna Measure to receive a dolphin-safe label?

Commitments to EII (Exhibits US-35 and US-37)

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[84] *See, e.g.*, "Dolphin Safe Statements from Retailers" (Exh. US-40) (statements from leading U.S. retailers of tuna product); EII, Approved Dolphin-Safe Importers, Distributors, Brokers, Retailers, Agents (Dec. 2015) (Exh. US-37) (listing 53 U.S. importers, distributors, brokers, retailers, and agents that have committed not to sell tuna product produced from setting on dolphins).

[85] [[

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[86] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.236 ("As the original panel found and as both participants have acknowledged in these compliance proceedings, access to the dolphin-safe label constitutes an 'advantage' on the US market for tuna products by virtue of that label's 'significant commercial value.'") (quoting *US – Tuna II (Mexico) (Panel)*, paras. 7.289, 7.291; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.424).

50. The commitments that companies throughout the U.S. tuna product supply chain have made to EII are to adhere to EII's own definition of "dolphin safe."[87] This definition includes a commitment not to set on dolphins, or produce or sell tuna product that was produced in such a manner, but also includes a variety of other restrictions not included in the measure, such as not to intentionally encircle any marine mammal, not to fin sharks, and not to operate in marine sanctuaries.[88] The commitment to EII to adhere to its particular "dolphin safe" standard is thus a broader commitment than one not to buy tuna product that is ineligible for the label under U.S. law. This broad commitment includes a commitment not to purchase tuna product produced from setting on dolphins. Importantly, the commitment to EII is not contingent on the content – or continued existence – of the U.S. measure.

Retailer Commitments (Exhibit US-40)

51. With one exception, the commitments contained in Exhibit US-40 are all – at the very least – commitments not to purchase tuna product produced by setting on dolphins. Three of the statements represent commitments to EII, and for the reasons discussed above, a commitment to sell tuna product consistent with the EII definition of dolphin safe includes a commitment not to sell tuna product produced from setting on dolphins.[89] The same is true of the Food Lion and Publix commitments. While the statements, themselves, can be read as not a formal commitment to EII at the time of the writing, as discussed below in response to Question 146(c), both of these retailers are on the EII list of approved retailers, meaning that both of these companies are committed to only selling tuna product that meets the EII definition of "dolphin safe."[90]

52. Of the remaining dolphin safe commitments, eight specifically reference setting on dolphins, and can be read in no other way than as a commitment not to sell tuna product produced from this inherently dangerous fishing method.[91] The remaining dolphin safe commitment – Southeastern Grocers – does not explicitly refer to setting on dolphins or U.S. law, but to the concept of "dolphin safe" generally. Given that the measure has always denied eligibility to tuna product produced from setting on dolphins, this statement needs to be read in this light. Further, there is no basis to narrowly read such a statement, for example, as only applying to the other eligibility criterion – whether a dolphin was killed or seriously injured in

[87] *See* EII, Approved Dolphin-Safe Tuna Processing Companies & Fishing Companies (Dec. 2015) (Exh. US-35) (listing U.S. companies and non-U.S. companies producing tuna product for the U.S. market); EII, Approved Dolphin-Safe Importers, Distributors, Brokers, Retailers, Agents (Dec. 2015) (Exh. US-37) (listing U.S. companies and non-U.S. companies selling tuna product in the U.S. market).

[88] *See* EII, Draft Dolphin Safe Company Policy (Jan. 1, 2009) (Exh. US-33); EII International "Dolphin Safe" Standards for Tuna (Dec. 8, 2015) (Exh. US-34).

[89] *See* "Dolphin Safe Statements from Retailers" (Exh. US-40) (statements from Albertsons, Safeway, and Wegmans).

[90] EII, Approved Dolphin-Safe Importers, Distributors, Brokers, Retailers, Agents (Dec. 2015) (Exh. US-37) (listing five U.S. retailers: A&P, Albertsons, Publix, Food Lion, and Safeway).

[91] *See* "Dolphin Safe Statements from Retailers" (Exh. US-40) (statements from A&P, ALDI, Costco, HyVee, Kroger, Target, Trader Joe's, and Whole Foods).

that set – rather than to both eligibility criteria. And, of course, it is ***undisputed*** that *none* of these companies carry Mexican tuna product produced from setting on dolphins.

53. Finally, Exhibit US-40 contains U.S. purchasing policy for canned tuna of Walmart (and its subsidiary Sam's Club). As discussed, Walmart's purchasing policy does not hinge on whether the tuna product meets a criterion for "dolphin safe," but whether the tuna product meets Walmart's sustainability policy.[92] It appears undisputed that Walmart's U.S. stores do not currently sell Mexico's tuna product produced from setting on dolphins. Walmart's policy indicates that the withdrawal of the dolphin safe labeling measure would have no impact on Walmart's decisions vis-à-vis Mexican tuna product; Walmart would not begin purchasing Mexican products due to the measure's withdrawal. As such, Mexico cannot reasonably claim it will have market access to Walmart's U.S. stores for purposes of a calculation of the nullification or impairment it claims to incur *as a result of the measure*.

Conclusion

54. Overall, the commitments contained in Exhibits US-35, 37, and 40 directly support the U.S. position that the measure is causing a limited level of nullification or impairment, far below what Mexico unreasonably claims in this proceeding.[93] In this regard, we would note that the figures provided in paragraph 35 of the U.S. written submission – 66 percent of retail market share and 46.6 percent of total consumption – are *very conservative*. The vast majority of entities that supply tuna product to U.S. retailers have committed to EII not to sell tuna product produced from setting on dolphins. As such, it cannot be inferred that all retailers not listed in Exhibit US-40 would begin selling tuna product produced from setting on dolphins if the measure was withdrawn where they do not do so today.

55. This is especially true since all those companies that currently do not sell Mexican tuna product produced from setting on dolphins do so *voluntarily*. Again, no law prevents them from selling such tuna product now, and there is no reason why such companies will "immediately" change their long-standing purchasing policies in this regard if the measure is withdrawn, as Mexico simply assumes.[94] If Mexico's assertion were correct, Mexico should have been able to

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[92] *See* U.S. Written Submission, para. 34. As noted, according to this policy, canned tuna must be sourced from fisheries that are: 1) complying with the International Sustainable Seafood Foundation (ISSF) measures; 2) managing a program in accordance with the principles of the Sustainability Consortium or certified as sustainable by the Marine Stewardship Council (MSC); 3) using better management fishing practices such as fishing with pole and line or free-school purse seine sets; or 4) "[a]ctively working toward certification or involved in a Fisheries Improvement Project (FIP) that has definitive and ambitious goals, measureable metrics and time bound milestones." *See* "Dolphin Safe Statements from Retailers" (Exh. US-40) (statement of Walmart).

[93] As noted in footnote 85 of the U.S. written submission, the same is true for Exhibit US-42, which provides the label basis as to why the U.S. military, a substantial consumer of canned tuna, does not purchase Mexican tuna product produced from setting on dolphins. *See* 10 U.S.C. § 2533a (Exh. US-42) (stating that the U.S. military may only procure food with appropriated funds that is "grown, reprocessed, reused, or produced in the United States," meaning, that, *de facto*, the U.S. military only uses such funds to purchase tuna product that was produced from fishing methods other than setting on dolphins).

[94] Mexico's Written Submission, para. 10 ("Under the United States' counterfactual, the market will be provided with information to distinguish between tuna products containing tuna caught in an AIDCP-certified

provide documentation from such companies in the form of affidavits or other types of statements stating that this is so. But Mexico has not done so, and has repeatedly relied only on unsubstantiated, generalized claims – rather than actual documentary evidence – demonstrating that Mexico's assertions are, in fact, not correct.

56. In this light, the U.S. calculation of the level of nullification or impairment as being between $8.5 and $21.9 million per year is very conservative (and reasonable).

b. Do the commitments distinguish between unregulated setting on dolphins and regulated (AIDCP-compliant) setting on dolphins?

57. As discussed above in response to Question 133, "unregulated" setting on dolphins is a fishing method that essentially does not exist on a commercial basis, in the ETP or elsewhere, and in any event, no tuna product produced from this fishing method is sold in the U.S. market. Consequently, it is not surprising that none of the commitments discussed in paragraphs 31-35 of the U.S. written submission make such a distinction.

Commitments to EII (Exhibits US-35 and 37)

58. The EII dolphin safe policy is clear that it applies to all dolphin sets, regardless of whether "regulated" or "unregulated." Indeed, the commitment to EII is to "not intentionally deploy purse-seine nets on or to encircle marine mammals in its fishing operations *in any area of the world's oceans*."[95] Moreover, the United States would observe that the Draft Company Policy specifically mentions the ETP large purse seine fishery, and provides heightened requirements for tuna product being produced from that fishery.[96] Similarly, EII's dolphin safe

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manner and tuna caught in an unregulated manner. The availability of this information will *immediately* reshape the U.S. tuna product market because retailers and consumers will be made aware of the fundamental difference between the two types of fishing practices.") (emphasis added); *id.* para. 76 ("Under Mexico's first counterfactual scenario and the United States' alternative counterfactual, the market misconceptions regarding unregulated fishing methods and AIDCP-compliant fishing methods would be *immediately* corrected.") (emphasis added).

[95] EII, Draft Dolphin Safe Company Policy (Jan. 1, 2009) (Exh. US-33) ("2. NAME OF YOUR COMPANY will not intentionally deploy purse-seine nets on or to encircle marine mammals in its fishing operations in any area of the world's oceans, nor will it process, transship, carry, store or sell tuna products or any other seafood products caught by intentional encirclement of marine mammals in purse seine nets *in any of the world's oceans*.") (emphasis added).

[96] *See* EII, Draft Dolphin Safe Company Policy (Jan. 1, 2009) (Exh. US-33) ("3. For all tuna harvested *in the Eastern Tropical Pacific* (ETP), NAME OF YOUR COMPANY will ensure that the following information and/or documentation is issued to Earth Island Institute's International Monitoring Program (EII) by the harvesting vessel for each lot of tuna per each fishing trip: a) a copy of a written request from the owner of the fishing vessel for a statement from the Inter-American Tropical Tuna Commission ("IATTC"), as well as a statement from the government representative and owner of the fishing vessel, certifying that no Dolphin Mortality Limits (DML's) were awarded to the vessel that year, OR if the vessel was awarded DML's for that year, a statement from the IATTC certifying that the vessel did not use any of it's DML's during the entire fishing trip during which the tuna was harvested; b) a written statement executed by both the captain and the owner of the fishing vessel guaranteeing that at no time during the fishing trip were dolphins chased, nor were any nets intentionally deployed on marine mammals, that no shark finning was conducted by any crew member on board the vessel at any time, and that any sea turtles accidentally caught were released alive and unharmed to the maximum extent feasible; c) for purse seine

standard specifically notes that large purse seiners in the ETP must have an observer on board for their tuna product to meet the EII dolphin safe standard.[97]

Retailer Commitments (Exhibit US-40)

59. None of the statements distinguish between "unregulated" and "regulated" setting on dolphins. In this regard, the United States would note that all of the statements post-date not only the AIDCP (1997) but a time where there was, in fact, "unregulated" setting on dolphins in the ETP (which had largely ended by the time of the 1992 La Jolla Agreement).

c. Would retailers sell tuna products carrying a MSC or other sustainable fisheries certification label but not a dolphin-safe label?

60. Prior to the second day of the meeting of the Arbitrator, Mexico had never claimed that the MSC label was relevant to any of its arguments in the original proceeding, the compliance proceeding or the arbitration proceeding (until now). As such, the United States has not specifically researched this issue. We do know that there is at least one retailer (Walmart) whose purchasing policy could be read to mean that it would be willing to sell tuna product that qualifies for the MSC label but not the dolphin safe one. As such, and as discussed above, the market access of this retailer should not be used to calculate a level of nullification or impairment *caused by the measure*.

135. With reference to the United States' reply to the Arbitrator's Question No. 59, where the United States argues that it would be "more appropriate to use the most recent data available, which is for calendar year 2015" and that the "appropriate period will depend on a number of factors that may vary from case-to-case", please respond to the following questions:

a. How do you reconcile your argument about 2015, and not 2014, being the appropriate period for assessing the counterfactual with your agreement with Mexico's contention that the Arbitrator should use the short term for the assessment of the nullification or impairment?

61. Whether the arbitrator uses a short-run or long-run analysis in any dispute is a separate issue from what baseline year is used to calculate the level of nullification and impairment. The short-run vs. long-run analysis generally refers to the period of adjustment required for the market to reach equilibrium after the counterfactual scenario is undertaken. There is no specific period associated with the short run, but a long-run assessment is generally regarded as 10 years.[98] Thus, the Arbitrator could do a short- or a long-run analysis using either 2014 or 2015 data as the base year. The base year would not affect the decision on whether to do a short-run

vessels in the ETP, a certification or letter from a government official of the vessel's flag of origin that the vessel was equipped with no more than two speed boats during the entire fishing trip ...") (emphasis added).

[97] EII International "Dolphin Safe" Standards for Tuna (Dec. 8, 2015) (Exh. US-34).

[98] *US – COOL (Article 22.6 – US)*, n.472.

or long-run analysis. And the difference between a short-run and a long-run analysis would be in the decisions made about supply and demand elasticities and adjustments by suppliers.

b. Please elaborate on what are the factors that should be taken into account for assessing the appropriate period in this particular case. Please also provide your legal basis.

62. An Article 22.6 arbitration proceeding results in the calculation of a level of nullification and impairment that is "prospective."[99] One clear example of this is the arbitration in *US – 1916 Act*. There the measure at issue had not been applied to result in any restriction on imports from the complaining party. The arbitrator rejected the notion that "the" base year needed to be the year after the end of the reasonable period of time (RPT).[100] In fact, the arbitrator recognized that the use of that year would have resulted in a level of nullification or impairment that would have been zero. Instead, the arbitrator's decision was prospective. The decision sought to calculate the level of nullification or impairment in the future.

63. Furthermore, arbitrators have agreed that "any suspension of obligations in excess of the level of nullification or impairment would be punitive. We recall that both parties to this dispute accept the proposition, with which we fully agree, that punitive sanctions are prohibited by Article 22.4" of the DSU.[101]

64. Consequently, the factors to be taken into account for assessing the appropriate period would include which period produces data that would provide the most accurate determination of the level of nullification and impairment going forward, and which period best captures the actual market for canned tuna product from Mexico.

65. In this case, it would be more appropriate and accurate to use the most recent data available, which is 2015. And as noted above, to the extent that Mexico was suggesting in paragraph 16 of its Methodology paper that the first full calendar year following the expiration of the RPT must, as a hard and fast rule, be used as a base year for calculating the level of nullification and impairment, Mexico is incorrect. The arbitrator's report in *US – COOL*, where this was used, also does not suggest that this is a consistent rule, and other arbitrators have used different periods.[102]

66. This dispute is not one involving factors that might suggest a different year. For example, if the measure at issue were a ban, previous year data (*i.e.*, data from before the measure was enacted) might be the best basis for calculating the level of nullification and

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[99] *See EC – Hormones (Article 22.6 – Canada)*, paras. 37, 40; *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.23, 3.27; *US – Byrd Amendment (Article 22.6)*, para. 5.54; *EC – Bananas III (Article 22.6 – US)*, para. 5.45.

[100] *US – 1916 Act (Article 22.6)*, paras. 6.1, 6.5, 6.6, 6.14.

[101] *See, e.g., US – 1916 Act (EC) (Article 22.6 – US)*, paras. 5.5 (citing *EC – Bananas III (Article 22.6 – US)*), 5.8 and 5.22).

[102] See, for example, in addition to *US – 1916 Act*, the decisions of the arbitrators in *EC – Hormones (Article 22.6 – US)*, paras. 80-82 (where the measure was a ban and an average of past-year imports were used) and *US – Gambling (Article 22.6)*, para. 3.187 (where an average of past years was used).

impairment. Alternatively, if the trade data from the most recent year were not representative of the level of nullification and impairment, for some reason, using a previous year might be more accurate. For example, if there were a *force majeure* event (*e.g.*, a contamination scare in the United States or low global tuna catches) that severely restricted consumption of tuna in the U.S. market in 2015, driving down all consumption to uncharacteristically low levels, it would be more appropriate to use prior year data.

67. In this dispute, however, no event occurred that made the year 2015 not representative of the level of nullification or impairment caused by the U.S. 2013 measure. Further, in this dispute, using 2015 data is likely to be more accurate as to the prospective level of nullification and impairment because, as the United States has explained, tuna consumption in the United States has been declining steadily since 2003.[103] Moreover, there is simply better data available for the year 2015, such that a more accurate picture of the level of nullification and impairment can be generated. All of the most detailed data on prices on the record – Exhibit MEX-15, the U.S. exhibits based on Exhibit MEX-15, Exhibit US-144 (on import prices of canned yellowfin and other canned tuna in the EU), and Exhibit US-10 – cover 2015 (as well as 2014).[104]

68. We note, however, that the United States tried in the U.S. model to present a range of data, including 2014, 2015 and an average of 2013-2015, to enable the Arbitrator to decide, based on the evidence on the record, what would most accurately estimate the level of nullification and impairment, on a prospective basis.[105] We would further note that data on retail prices, which is essentially lacking for 2014, is most necessary if the Arbitrator adopts Mexico's model or some form of it.

136. With reference to the United States' assertion, in paragraph 72 of its written submission, that US producers would "market their tuna product as 'not produced from the intentional encirclement of dolphins'", is the United States arguing that this assertion should be taken into account in the Arbitrator's calculation of the level of nullification or impairment? If so, could the United States please indicate the evidence on which this assertion is based? Please also explain how this assertion could be factored into the Arbitrator's calculations?

69. As discussed in paragraph 72 of the U.S. written submission, and again in response to Question 53, under the counterfactual where the U.S. dolphin safe labeling measure has been withdrawn, it is likely that Mexican tuna product produced by setting on dolphins would be able to be marketed as being "dolphin safe" in some sense (for example, by using an "AIDCP

[103] "Historical Supply of Canned Tuna" (Exh. US-6).

[104] *See* Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Oct. 24, 2015) (Exh. MEX-15) (covering a 52-week periods ending October 24, 2015); "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-36); "Average Prices of Top Selling Canned Tuna Products, by Type, from Exhibit MEX-15" (Exh. US-146); "Prices of EU Imports of Tuna Product in 2015" (Exh. US-144); "Yellowfin Market Review" (2016) (Exh. US-10) (BCI).

[105] *See* "U.S. Model" (Exh. US-81).

certified dolphin-safe" label, as Mexico suggests).[106] However, even under that scenario, tuna product producers will still be able to distinguish their products from Mexico's tuna product by labeling their tuna product as "not produced from the intentional encirclement of dolphins," whereas Mexican producers could not label their product in such a manner.[107]

70. The evidence for this assertion is that, as a general matter, under the default U.S. law governing the marketing of products, producers may market their products in any way they see fit as long as such claims are not "unfair or deceptive,"[108] or otherwise not inconsistent with a more specific U.S. law.[109] Marketing statements of this type – the product is "not x" or "free of x" are routinely made in the U.S. market place. For example, canned tuna is currently being marketed in the United States as "no FAD" (or "FAD free"), "no longline," "no nets," "non BPA" (or "BPA free"), and "no salt added."[110] Positive statements are made as well. Canned tuna is currently being marketed in the United States as "pole and line caught" and "troll caught,"[111] "caught using circle hooks & nylon leads,"[112] caught in "school sets,"[113] and

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[106] *See* U.S. Written Submission, para. 72; U.S. Response to the Arbitrator's Question 53, para. 21 (referring to Mexico's Written 22.6 Submission, para. 8).

[107] And, of course, this is not the only way Mexico's competitors will be able to distinguish their product from Mexican tuna product. For example, and as discussed, much of the tuna product produced in the U.S. market meets the private standards for whether the tuna product is "dolphin-safe," such as the EII standard, and could continue to be labeled as such, whereby Mexico's tuna product could not make such a claim.

[108] *See* U.S. Written Submission, para. 70 (citing the default labeling rules provided in 15 U.S.C. § 45 (Exh. US-54)).

[109] For example, under U.S. Food and Drug Administration (FDA) rules, canned tuna cannot be marketed as "albacore," skipjack," or "yellowfin" unless the can comprises 100% of that species, and cannot be marketed as "white meat" unless the can comprises 100% albacore. U.S. Written Submission, para. 20 (citing 21 C.F.R. §§ 161.190(a)(4)(i), (a)(8)(viii) (Exh. US-12)).

[110] *See* "Examples of Labels on Canned Tuna Sold on the U.S. Market" (Exh. US-161) (showing, *inter alia*, a SAFCOL product and an Ocean Naturals product labeled as FAD-free); Whole Foods Chunk White (2016) (Exh. US-31) (showing a non-BPA label); Wild Selections White Albacore (2016) (Exh. US-32) (showing a "no salt added" label).

[111] *See* Whole Foods Chunk White (2016) (Exh. US-31); "Examples of Labels on Canned Tuna Sold on the U.S. Market" (Exh. US-161) (showing products by American Tuna, Wild Planet, Ocean Naturals, 356 (Whole Foods private label), and Ocean's labeled as pole and line or pole and troll caught). Pole and line is generally considered to be a fishing method that has a low level of bycatch, particularly of dolphins. *See, e.g.*, Mexico's Response to the 1st 21.5 Panel Question 11(d), para. 51 ("The parties are also in agreement that, *with the exception of pole-and-line fishing*, all fishing methods in all tuna fisheries result in observed dolphin mortalities and serious injuries.") (emphasis added).

[112] *See* Trader Joe's Albacore Tuna (2016) (Exh. US-29). Circle hooks are a type of hook used by longline vessels to reduce bycatch, particularly of sea turtles. *See, e.g.*, http://www.worldwildlife.org/initiatives/protecting-turtles-from-the-threat-of-bycatch (accessed on Nov. 13, 2016).

[113] *See* "Examples of Labels on Canned Tuna Sold on the U.S. Market" (Exh. US-161) (showing, *inter alia*, Kirkland (the Costco private label) and Safeway (a major U.S. grocery chain) chunk light skipjack products labeled as "free school caught" or "school caught").

"mercury tested,"[114] to name just a few examples. Of course, canned tuna that are labeled with such statements can also be labeled "not produced from the intentional encirclement of dolphins," "no dolphin chased," or "no dolphin targeted" if such statements are also true.

71. Again, under U.S. law, all of these types of statements can be made as long as they are not deceptive, and can be properly substantiated. And there is no reason to believe that a statement such as "not produced from the intentional encirclement of dolphins" would be deceptive for the vast majority of tuna product on the market (except for Mexican tuna product) now and there is no reason to believe that producers could not substantiate such a statement using the captain certifications in place now.

72. As we have discussed, the United States is not aware that this statement – "not produced from the intentional encirclement of dolphins" (or something similar) – is being used in the U.S. market currently. But, of course, there is no need to do so because the dolphin safe label distinguishes between different types of tuna product on this basis. However, this would likely change if the measure were withdrawn, as producers and retailers of tuna product would continue to seek to be responsive to their customers' strong preference to avoid purchasing tuna product produced by setting on dolphins, as confirmed in the nation-wide survey in Exhibit US-148 and as recognized by the original panel.[115] And, again, it is ***uncontested*** by Mexico that this statement – "not produced from the intentional encirclement of dolphins" (or similar) – could be used in the U.S. market under the counterfactuals proposed *by either party*.[116]

73. Thus, under the counterfactual, producers and retailers could continue to provide information regarding the tuna product that they produce or sell so as to "enable the US consumer to avoid buying tuna caught in a manner involving the types of observed and unobserved adverse impact on dolphins associated with this method."[117] As such, U.S. preferences regarding tuna product produced from setting on dolphins remains an important factor in calculating the level of nullification or impairment.

74. In paragraphs 134-137 of the U.S. written submission, the United States explained how U.S. consumer preferences are factored into the U.S. model. Simply put, the U.S. model factors in the retailer policies accounting for 46.6 percent of total consumption of tuna product in the U.S. market, by multiplying the estimated value of imports of Mexican tuna product, by 0.53, to

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[114] *See* "Examples of Labels on Canned Tuna Sold on the U.S. Market" (Exh. US-161) (showing Safe Catch product labeled as "mercury tested – 3 ½ x stricture Mercury limit than the FDA" in addition to being dolphin safe, pole & troll caught, BPA free, and more Omega 3s).

[115] *See, e.g., US – Tuna II (Mexico) (Panel)*, para. 7.288 ("We further note that it is *undisputed* that US consumers are sensitive to the dolphin safe issue. … [The purchasing policies of major tuna processors, first enacted in April 1990] are still in place: such companies will not purchase tuna *from vessels that fish in association with dolphins*.") (emphasis added).

[116] Mexico Written 22.6 Submission, para. 49 ("Mexico acknowledges the United States' assertion that Mexico's first scenario (and the United States' proposed counterfactual) allows producers of tuna products containing tuna caught using methods other than dolphin encirclement to promote that fact to distinguish their products from Mexican tuna products.").

[117] U.S. Written Submission, para. 72 (quoting *US – Tuna II (Mexico) (Panel)*, para. 7.505).

reflect the market share available to Mexico's tuna product, before subtracting the value of Mexico's actual imports. In doing so, the U.S. model calculates a level of $8.5 million, using the average actual value of U.S. imports of Mexican tuna product for 2013-2015, and $21.9 million, using Mexico's historical high import share.

75. In response to Question 141(b) below, the United States explains how U.S. consumer preferences could be factored into Mexico's model. Simply put, this would entail creating different intensity of demand parameters for U.S. demand for canned yellowfin and "generic" canned tuna and reducing the intensity of demand parameter for canned yellowfin (which, under Mexico's model, must all come from Mexico) by the percentage of consumption that would never be filled by tuna caught by setting on dolphins.[118]

137. Regarding the alternative labels that, in the United States' view, would continue to exist if the Tuna Measure were removed, could the United States please explain whether, under the applicable US law governing such labels, Mexican producers would be permitted to use labels that explain their fishing techniques, provided that such explanations are accurate?

76. Yes, the rules explained above in response to Question 136 apply equally to all products marketed in the United States, domestic and foreign alike. As such, Mexican producers can market their products as they so wish as long as such claims are not "unfair or deceptive,"[119] or not otherwise inconsistent with a more specific U.S. law. What this means is that under the default legal standard, Mexican producers could make any number of accurate claims on the label of their products, including: "purse seine caught," "product of intentional encirclement of dolphins," "caught consistent with international requirements," and "caught in the eastern tropical Pacific Ocean," to name but a few examples.

77. Of course, Mexican producers *could be making such claims on their labels now*, as nothing in the U.S. dolphin safe labeling measure (or any other U.S. law) prohibits them from doing so. However, Mexican producers do not make such claims,[120] presumably because they recognize that there is no particular segment of the U.S. market that would find such claims persuasive. Under the counterfactual where the measure is withdrawn, the United States agrees with Mexico that, in addition to the claims mentioned above, Mexican producers could begin to label their product as being "dolphin safe" in some sense (for example, by using an "AIDCP certified dolphin-safe" label, as Mexico suggests).[121]

78. Moreover, as explained in response to Question 133 above, the measure applies only to "dolphin safe" claims on the label. The measure does not restrict the ability of Mexico, or Mexican producers, to conduct educational/marketing campaigns on television, in print, or on the Internet on the alleged benefits of AIDCP-sanctioned setting on dolphins. Again, the United

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[118] *See infra* U.S. Response to Arbitrator's Question 141(b).

[119] *See* U.S. Written Submission, para. 70 (citing the default labeling rules provided in 15 U.S.C. § 45 (Exh. US-54)).

[120] *See, e.g.*, Mexilink, "Dolores Tuna Products" (accessed Nov. 6, 2016) (Exh. US-162).

[121] Mexico's Written 22.6 Submission, para. 8.

States is not aware that Mexico or its producers have ever conducted such a campaign in the nearly 20 years since the AIDCP was signed, suggesting that they agree that it would not change the minds of U.S. consumers concerning tuna caught by setting on dolphins.

138. Could the United States provide the Arbitrator with the information in Exhibit US-144 also for the year 2014, with a breakdown of canned yellowfin and high-end canned yellowfin products, by exporting country? Please explain whether the prices in Exhibit US-144, as well as the prices that you will provide in response to this question, are comparable to the price of canned yellowfin tuna in Mexico model (USD 7.84 in Table 12, Exhibit MEX-02).

79. With respect to the first part of the Arbitrator's question, data on European Union imports of yellowfin canned and loin tuna product are not available for 2014, as the first year for which canned and loin tuna product imports were reported by species is 2015. Again, as noted in response to Question 136(b), the time period covered by Exhibit US-144 is similar to the one that Mexico has elected to cover in Exhibit MEX-15, which is the only exhibit where Mexico provides detailed data on retail prices (upon which its model depends).[122] The available EU imports of all canned tuna and tuna loins for 2014 have been provided in Exhibit US-163,[123] along with data for January through August 2016 of EU imports of canned yellowfin tuna products in Exhibit US-164.[124]

80. With respect to the second part of the Arbitrator's question, the prices reported in the EU import data represent the price of the product without tariffs and transportation costs ("customs price"). This is equivalent to the value paid to the exporter when the product enters the EU. The figure $7.84 in Table 12 of Exhibit MEX-2 represents the import price of canned yellowfin in the United States and, therefore, represents the price paid to the exporter plus U.S. tariffs and transportation costs (charges).[125] In order to present figures based on the EU data that are comparable to the figure in Exhibit MEX-2, Exhibit US-144 adjusts the EU customs price to account for U.S. tariffs and charges. These adjusted figures are presented in the last column in the left-hand tables in the exhibit ("w/ U.S. tariff + charges"), and they are directly comparable to the price of canned yellowfin tuna in Mexico's model ($7.84 per kg).[126]

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[122] *See* Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Oct. 24, 2015) (Exh. MEX-15) (covering a 52-week periods ending October 24, 2015).

[123] *See* "Prices of EU Imports of Tuna Product, 2014" (data drawn from Eurostat through Global Trade Atlas) (Exh. US-163).

[124] *See* "Prices of EU Imports of Tuna Product, 2016 (data drawn from Eurostat through Global Trade Atlas) (Exh. US-164).

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

[126] For countries that currently export canned tuna or loins to the United States, the average tariff rate and charges on canned tuna product from that specific country were used to make this adjustment. For countries that do not currently export to the United States, average U.S. tariff and charges were used. *See* "Prices of EU Imports of Tuna Product in 2015" (Exh. US-144).

81. The EU prices, adjusted to account for U.S. tariffs and charges, show that, on average, actual canned yellowfin tuna import prices in 2015, with U.S. tariffs and transportation costs would be $6.37 per kg. for tuna in vegetable oil and $6.07 for tuna in other packs.[127] Thus, on average, the 76,604 mt. of canned yellowfin that the EU imported in 2015 could have been exported to the United States at $6.37 or $6.07 per kg.

82. If, as Mexico's model estimates, U.S. consumers would demand 63,568 mt. of canned yellowfin at $7.84 per kg.,[128] all (or at least a substantial amount) of the canned yellowfin exported to the EU in 2015 would have been exported to the United States. The fact that it was not proves that the demand equation constructed in Mexico's model does not reflect actual demand in the U.S. market.

83. We also note that the available data on EU and U.S. import prices demonstrate that the prices of canned tuna are comparable between the EU and U.S. markets. In 2015, the average customs price of imports of skipjack was $3.97 per kg.[129] In the United States, the average customs price of imports of canned tuna other than albacore, which is mostly skipjack, was $3.77 per kg.[130] Further, the average customs price of canned yellowfin imports in the EU in 2015, presented in Exhibit US-144, was $5.31 per kg., which was similar to the U.S. customs price of canned albacore imports, which was $5.43 per kg. in 2015 and $5.44 per kg. in 2014.[131]

139. Could the United States comment on Mexico's claim that a 1.2% share of yellowfin tuna in total United States' canned tuna consumption, and Mexico's 3.4% share in the United States' overall imports of canned tuna products, can be considered "de minimis"?

84. Mexico claims that U.S. consumption of canned yellowfin and imports of canned tuna from Mexico are *de minimis* to justify two unreasonable decisions it has made in constructing its model. First, Mexico has disregarded data on actual U.S. consumption of canned yellowfin and instead specified U.S. demand for yellowfin based entirely on assumptions that are inconsistent with the available evidence.[132] Second, Mexico has claimed that it is not possible to calculate a tariff equivalent of the U.S. measure, which would be the normal manner of using a partial

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

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

[129] *See* "Prices of EU Imports of Tuna Product in 2014" (Exh. US-163).

[130] *See* "U.S. Canned Tuna Imports, by Type, 2014-2015" (Exh. US-164).

[131] *See* "Prices of EU Imports of Tuna Product in 2015" (Exh. US-144); "U.S. Canned Tuna Imports, by Type, 2014-2015" (Exh. US-165).

[132] *See, e.g.*, Pouliot 2016, at 20 (Exh. MEX-2) (asserting, without support, that the premium estimated based on Exhibit MEX-15 that "cannot be interpreted as the average premium that consumers are willing to pay for yellowfin tuna" and setting the mean willingness to pay at $2 per kg, without any supporting evidence that this is actually the correct figure), *id.* (scaling the model such that "6.6 percent of consumers are willing to pay a premium of $4.65/kg" when the actual data available shows that only 1.2 percent of consumers are paying the current premium, which is significantly less than $4.65 per kg. based on Mexico OLS regressions and based on the correctly weighted WLS regressions explained in response to Question 141(b)).

equilibrium model in a trade dispute.[133] In reality, however, it is not accurate that U.S. consumption of canned yellowfin or U.S. imports of canned tuna from Mexico are *de minimis*. This is one reason that the way that Mexico calibrated its partial equilibrium model was incorrect and results in an inaccurate estimation of the level of nullification and impairment.

85. First, Mexico's claim that its exports of canned tuna to the United States are *de minimis* is contradicted by the available evidence. Over the past two years, Mexico has exported over $40 million of canned tuna to the United States, accounting for 3.2 percent of U.S. imports by value and 3.6 percent by volume.[134] Canned tuna was Mexico's second largest processed seafood export to the United States in 2014-2015, after only prepared crab, where U.S. imports from Mexico were $30 million and Mexico's market share was 4-5 percent.[135] It is also Mexico's fifth largest seafood export overall to the United States, following only frozen shrimp (where the U.S. market is five times as large as the canned tuna market), fresh fish not otherwise specified, prepared crab, and fresh or chilled fish fillets.[136]

86. Further, as the United States has mentioned previously, Mexico's market share of all U.S. imports of canned tuna is entirely consistent with its market share of other processed seafood products and its market share of U.S. fresh tuna imports. For *none* of the top 15 products does Mexico's import share even exceed 5 percent.[137] Similarly, Mexico's share of fresh tuna imports (where Mexico's proximity to the United States is significantly more important than in the prepared foods sphere) is only 6 percent.[138] Thus, if Mexico's share of U.S. canned tuna imports are *de minimis*, then Mexico's imports of all major seafood products are also *de minimis*, which is both obviously untrue and could not be explained by the U.S. dolphin safe labeling measure.

87. Second, U.S. imports of Mexican canned tuna are not *de minimis* in the sense that it would be impossible to calculate a price wedge that could accurately represent the value of the dolphin safe label.[139] As the United States discussed in response to Question 61 and at the Arbitrator's meeting, however, the same type of disaggregated data that is necessary to accurately specify Mexico's model would be necessary to accurately calculate a price wedge or tariff equivalent.[140] This level of data is not on the record in this proceeding, but could be available, in theory, based on the level of imports of canned tuna from Mexico.

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

[134] *See* U.S. First Written Submission, n.174; "U.S. Imports of Tuna Product from the World and from Mexico" (Exh. US-62); "Imports of Canned Tuna from All Countries Individually – 2010-2015" (Exh. US-36).

[135] *See* "U.S. Imports of Seafood Products from the World and from Mexico" (Exh. US-166).

[136] *See* "U.S. Imports of Seafood Products from the World and from Mexico" (Exh. US-166).

[137] *See* "U.S. Imports of Top Seafood Products from the World and from Mexico" (Exh. US-120).

[138] *See* "Fresh Tuna Imports from the World and from Mexico" (Exh. US-118).

[139] *See* U.S. Response to Arbitrator's Question 61, paras. 88-90.

[140] *See* U.S. Response to Arbitrator's Question 61, para. 89.

88. Similarly, U.S. consumption of canned yellowfin overall is also not *de minimis* in either sense Mexico suggests – as signifying that current consumption must reflect some supply restriction or as being inadequate to properly derive a U.S. demand equation.

89. First, U.S. consumption of canned yellowfin is not so small that it should be disregarded because it must reflect some supply restriction. As the United States has noted previously, the U.S. measure is neither a *de facto* nor a *de jure* prohibition on the sale of canned yellowfin in the United States.[141] There is, therefore, no reason to think that current consumption does not reflect actual U.S. demand for canned yellowfin. Moreover, and contrary to Mexico's assertions, U.S. consumption of 100 percent canned yellowfin has never been high. In the late 1980s, when U.S. cannery purchases of yellowfin were higher, yellowfin was generally not canned as all-yellowfin product but as lightmeat tuna, mixed with skipjack.[142] Statements of tuna producers serving the U.S. market confirm that U.S. consumers do not demand canned yellowfin even in the quantities that the producers currently could supply it.[143]

90. Further, all available evidence on the record suggests that the 1-2 percent market share is an accurate reflection of U.S. demand. Exhibit MEX-15 shows that during 2015 (specifically a 52-week period ending October 24, 2015), canned yellowfin labeled as such represented 1.2 percent of all sales of canned tuna, by volume, and 1.5 percent, by value.[144] [[

]][145] Again, the most recent consumer survey covering this question suggests that only 2 percent of consumers of canned tuna even look for canned

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[141] *See* U.S. Opening Statement, paras. 10-11.

[142] *See* Corey et al. 1992, at 1-1 (Exh. MEX-73) (stating that U.S. canneries "process tropical tuna, principally skipjack and yellowfin, which is marketed as lightmeat canned tuna . . . [and] also process albacore, which is the only species that can be marketed as canned whitemeat tuna in the United States"), *id.* 3-1 (stating that yellowfin tuna is "marketed in canned form as lightmeat tuna"); Bumble Bee, "What's the Difference Between the Various Types of Canned Tuna?" (Exh. US-13) (explaining the different between albacore and "light tuna," which "can be a mix of a variety of smaller tuna species, most often skipjack, but may also include yellowfin, tongol, or big-eye").

[143] Sam Roe & Michael Hadthorne, "How Safe is Tuna?" *Chicago Tribune*, Dec. 13, 2005, at 2 (Exh. US-18) (describing that officials of tuna companies serving the U.S. market have explained that "their boats catch more yellowfin tuna than they can sell as a gourmet product" and, therefore, "they sell it as regular light tuna"); "Yellowfin Market Review," at 1 (Exh. US-10) (BCI) [[

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[144] *See* "52 Week Canned Tuna Sales, Summed by Type (from Exhibit MEX-15)" (Exh. US-17); Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Oct. 24, 2015) (Exh. MEX-15).

[145] "Yellowfin Market Review," at 2 (Exh. US-10) (BCI).

yellowfin when purchasing canned tuna,[146] and Mexico's own consumer survey from 2010 shows that only 6 percent of U.S. consumers look for yellowfin.[147]

91. Second, U.S. consumption of canned yellowfin is not *de minimis* in the sense that it would not be possible to derive U.S. demand for yellowfin based on current consumption. The datasets on the record do not include the retailer- or consumer-level data that would allow the comparison between particular types of tuna product that is necessary to estimate U.S. preferences between such products.[148] Specifically, the dataset does not allow for even store-by-store analysis of the price difference between comparable yellowfin and non-yellowfin products. Thus the data on the record is not sufficient to specify a partial equilibrium model calculating the level of nullification and impairment associated with the dolphin safe labeling measure. That is why the United States presented another type of model. However, a more disaggregated version of the dataset in Exhibit MEX-15 likely could support an accurate derivation of a U.S. demand equation. Further, as discussed in response to Question 141(b) below, even based only on Exhibit MEX-15, it is possible to come up with a more accurate U.S. demand equation than the one Mexico created based entirely on incorrect assumptions.

140. With reference to paragraph 181 of Mexico's written submission, could the United States comment on Mexico's assertions that "[t]he U.S. fleet has moved out of the ETP and the U.S. canning industry has significantly changed so that it is no longer capable of processing large quantities of yellowfin tuna from the ETP" and that "aside from the tuna measure, the U.S. market was essentially emptied of canned yellowfin tuna in 2014 while between 1987 and 1989 competition for yellowfin tuna was stiff"?

92. Mexico's claim that its share of U.S. tuna product imports would be larger now than in 1987-1989 because there is a substantial "emptied" segment of the U.S. market that Mexican products would fill where the measure is withdrawn is based on incorrect assumptions. Specifically, Mexico's argument assumes: (1) that the U.S. fleet could not harvest yellowfin outside the ETP; (2) that the U.S. canning industry is dependent on the U.S. fleet or on the ETP for its supply of cannery-grade yellowfin; (3) that canneries must be specially capable of processing yellowfin; (4) that the U.S. canned tuna market is supplied entirely by U.S. canneries; and (5) that there was "competition for yellowfin tuna" in the U.S. market in the late 1980s but there is no such competition now. As discussed below, however, all of these assumptions are incorrect and refuted by the evidence.

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[146] National Public Opinion Survey, Question 2 (2016) (Exh. US-148).

[147] *See* Exhibit MEX-63. As noted elsewhere, in the survey from 2016 presented in Exhibit MEX-71, Mexico either elected not to ask this question, or did ask this question but has elected not to report the results of that question in this arbitration.

[148] *See* U.S. Response to Arbitrator's Question 61, paras. 88-89; U.S. Written Submission, paras. 84-85; *see also* Pouliot 2016, at p. 17 (Exh. MEX-2) (noting that only retail data are available); *id.* (noting that it "is . . . not possible to isolate the stores that sell canned yellowfin tuna from the data"); *id.* p. 18 (noting that the available data "are aggregated by regions and not all canned tuna products are offered in all stores"); *id.* (noting that the available store-specific data does not cover stores selling canned yellowfin).

93. First, Mexico's claim assumes that the U.S. fleet could not harvest yellowfin outside the ETP, but this is not the case. The ETP accounted for less than 20 percent of the global yellowfin harvest in recent years.[149] The WCPO accounted for more than twice as large a share of the global yellowfin catch – 46 percent in 2014. Unsurprisingly, the two fishing fleets that harvested the most yellowfin in 2010 to 2014 were those of two WCPO fishing nations, Indonesia and the Philippines.[150] For the global purse seine catch of yellowfin (a reasonably proxy for the catch destined for canning), the WCPO accounted for 57 percent of the total catch in 2014, compared to only 22 percent for the ETP/EPO.[151] The Atlantic and Indian oceans together accounted for 21 percent of the total, essentially the same as the ETP. The purse seine fleets of Spain, the third most significant yellowfin harvester, and France operate mainly in these ocean areas.[152]

94. Consequently, the fact that some U.S. purse seine vessels left the ETP – in fact, there are still 14-U.S. flagged large purse seine vessels authorized to fish there – does not mean that the fleet's catch of yellowfin must necessarily have ceased.[153] And, in fact, in the past decade yellowfin has accounted for 6 to 15 percent of all tuna received by U.S. canneries that was caught by U.S. vessels.[154] Further, as other fleets fishing in the WCPO and elsewhere outside the EPO are some of the most significant harvesters of yellowfin in the world, the fact the U.S. fleet does not choose to target yellowfin on the scale that these other fleets do is indicative not of the inability to catch yellowfin outside the ETP, but of a demand for yellowfin by U.S. consumers, as reflected in the purchasing decisions of canneries producing for the U.S. market.[155]

95. Second, Mexico's assumption that the U.S. canning industry is dependent on the catch of U.S. purse seine vessels is not accurate. As the United States has explained previously, tuna caught by U.S. vessels has accounted for only 22 to 40 percent of all the tuna purchased by U.S. canneries over the past decade.[156] Further, canneries serving the U.S. market have demonstrated the ability to purchase types of tuna that U.S. consumers demand but that U.S. vessels do not catch in large quantities. Specifically, over 95 percent of the albacore purchased by U.S.

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[149] *See* "Total Catches (tonnes) of Yellowfin in the Pacific Ocean and Globally" (Exh. US-48); "Yellowfin Catch by Ocean Area" (Exh. US-86).

[150] "Yellowfin Tuna Capture Fisheries Production" (Exh. US-47).

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

[152] "Yellowfin Tuna Capture Fisheries Production" (Exh. US-47); *see* FFA, Market and Industry Dynamics, at 104-107 (Exh. US-89) (stating that the "[EU] tropical tuna purse seine fleet is probably the most important in the world, despite this it is not a major player in the WCPO" and showing that the fleet has at least 47 industrial purse seiners in the Atlantic and 14 in the Indian Ocean out of a total of 88 vessels).

[153] *See* IATTC Active Purse Seine Vessel Register, https://www.iattc.org/VesselRegister/VesselList.aspx?List=AcPS&Lang=ENG; at IATTC, *Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015*, at 34-37 (Exh. US-43) (showing that U.S. purse seine vessels caught 22,326 mt. of tuna in the ETP in 2015, including 3,151 mt. of yellowfin).

[154] "U.S. Cannery Purchases of YF, Total and Share" (Exh. US-96).

[155] *See* "Yellowfin Catches by Gear Type and Ocean Area" (Exh. US-135) (showing that U.S. vessels caught 27,098 mt. of yellowfin in 2014).

[156] "U.S. Cannery Purchases of YF, Total and Share" (Exh. US-96).

canneries is caught by foreign vessels.[157] In fact, albacore caught by non-U.S. vessels accounted for over 40 percent of all tuna received by U.S. canneries in 2015.[158] Thus, if U.S. consumer demand for canned yellowfin were strong, U.S. canneries could and would respond by purchasing yellowfin from foreign-flagged vessels.

96. Third, it is not clear what Mexico means by the assertion that the U.S. canning industry "is no longer capable of processing large quantities of yellowfin tuna from the ETP."[159] The process for canning tuna is not different between yellowfin, skipjack, and albacore. Canneries, including U.S. canneries, receive either frozen tuna from fishing vessels or tuna loins from loining plants. The canneries then convert this tuna into the finished canned product. This process does not differ by the species of the tuna at issue. Consequently, U.S. canneries in California, Georgia, and American Samoa are not less equipped to handle cannery grade yellowfin than any other type of cannery grade tuna. And, indeed, it is known that these canneries do receive and process yellowfin.[160]

97. Fourth, Mexico's claim that the U.S. market was "emptied of canned yellowfin" due to the changes in U.S. cannery receipts assumes that U.S. canneries are suppling all or most of the canned tuna consumed in the United States, but this is also untrue. For the past 15 years, U.S. canneries have accounted for only about half of all U.S. consumption of canned tuna.[161] Consequently, even if U.S. canneries were somehow incapable of purchasing and processing canned yellowfin (which they are not) this would not mean that the U.S. market would be "emptied" of canned yellowfin if the product were actually demanded by U.S. consumers. Rather, the numerous other countries that produce and export canned yellowfin would meet that demand in the U.S. market.[162]

98. Fifth, Mexico's suggestion that there was more "competition" among canned yellowfin products in the late 1980s than there is today is based on a misunderstanding of how the yellowfin received by U.S. canneries in the 1980s was processed and sold. As the United States has explained, in the 1980s, when U.S. cannery purchases of cannery-grade yellowfin were higher, the yellowfin was generally not canned as all-yellowfin product but was mixed with skipjack and sold as lightmeat tuna.[163] There is no evidence that there was ever a period in

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

[158] "U.S. Tuna Cannery Receipts" (Exh. US-22 rev) (showing that, in 2015, U.S. canneries purchased 97,260 mt. of albacore from foreign-flagged, vessels – 41.2 percent of the total of 236,326 mt. of tuna received).

[159] *See* Mexico's Written Submission, para. 181.

[160] *See* "U.S. Tuna Cannery Receipts" (Exh. US-22 rev); Genova, "Our Products," (Exh. US-64).

[161] *See* "Historical Supply of Canned Tuna" (Exh. US-6).

[162] *See* "Prices of EU Imports of Tuna Product in 2015" (Exh. US-145).

[163] *See* Corey et al. 1992, at 1-1 (Exh. MEX-73) (stating that U.S. canneries "process tropical tuna, principally skipjack and yellowfin, which is marketed as lightmeat canned tuna . . . [and] also process albacore, which is the only species that can be marketed as canned whitemeat tuna in the United States"); *id.* at 3-1 (stating that yellowfin tuna is "marketed in canned form as lightmeat tuna"); FFA, Market and Industry Dynamics, at 254 (Exh. US-7).

which an all-yellowfin product occupied a significant portion of the U.S. market.[164] Further, there are numerous all-yellowfin canned tuna products sold on the U.S. market today, and every reason to believe that, if U.S. demand were greater, these products would be sold in greater numbers.[165] Thus, no available evidence suggests either that competition among all-yellowfin products was greater in the late 1980s or that it is not fierce today, although the products are competing for only the small percentage of consumers that prefer canned yellowfin.

99. In short, Mexico's suggestion that Mexican canned tuna would take over some "emptied" segment of the U.S. canned tuna market if the measure were withdrawn and, therefore, that its share of U.S. tuna product imports would be significantly different from what it was in 1987-1989 is based on incorrect assumptions about the structure of the U.S. tuna industry and the U.S. market in both the 1980s and today.

141. The Arbitrator notes that, in paragraph 5 of the United States' written submission, the United States asserts that "Mexico's model generates a wholly unreasonable solution, predicting that U.S. imports of canned tuna from Mexico will increase by 1,264 percent over 2015 levels and will account for 44.7 percent of all U.S. imports of canned tuna – over 12 times Mexico's share of U.S. canned tuna imports in 2015". The Arbitrator also notes that, in paragraph 5 of its opening oral statement, the United States asserts that "Mexico predicts that its canned tuna exports to the United States will increase by 2,056 % and account for over half of imports to the U.S. canned tuna market in the short term."

a. Please explain the discrepancy between these two figures.

100. The difference in the figures reflects the fact that the first set of figures refers to volume and use actual U.S. imports in 2015 as a basis for comparison, while the second set of figures refers to value and uses the 2014 data contained in Mexico's model as a baseline.

101. Under Mexico's model, U.S. imports of canned tuna from Mexico rise from 5,028 mt. real volume in 2015 to 63,586 mt. at the outcome of the model.[166] And 63,586 mt. is approximately 1,264 percent of 5,028 mt., and exponentially greater than any volume Mexico has exported to the United States in any year. Consequently, Mexico's model predicts that, by volume, U.S. imports of canned tuna from Mexico will be 1,264 percent of what they actually were in 2015. The estimated volume, 63,586 mt., represents 44.7 percent of what U.S. imports

[164] *See, e.g.*, Corey et al. 1990, at xv (Exh. MEX-73) ("higher shares of solid-styles and yellowfin packs go to the European market when compared with the U.S. market").

[165] *See* "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-136) (showing scores of different canned yellowfin products sold on the U.S. market during the period covered by Exhibit MEX-15).

[166] *See* "U.S. Imports of Tuna Product from the World and from Mexico" (Exh. US-62) (showing that in 2015, U.S. imports of canned tuna from Mexico were 5,028 mt); Pouliot 2016, at 33 (Exh. MEX-2) (showing that, at the outcome of Mexico's model, U.S. imports of canned tuna from Mexico were 63,568 mt).

of canned tuna were in 2015,[167] more than 12 times Mexico's actual import share of 3.5 percent, by volume.[168] Of course, under Mexico's model, U.S. imports of canned tuna decline, so that Mexico's share of canned tuna imports at the outcome of the model is even greater than its share based on the actual 2015 figures.

102. The second set of figures show the increase in U.S. imports of canned tuna from Mexico by value, based on 2014 data, as set out in Table 3 of Exhibit MEX-2. Under Mexico's model, U.S. imports of canned tuna from Mexico rise from $22.65 million in 2014 to $495.195 million at the outcome of the model.[169] Depending on how these figures are rounded, this reflects an increase of 2,052 to 2,086 percent over 2014 figures, by value.[170] Further, at the outcome of Mexico's model, Mexico accounts for 63,568 mt. of the total of 116,908 mt. of U.S. imports of canned tuna, *i.e.*, 54.4 percent of all U.S. canned tuna imports, by volume.[171] Mexico's share of all canned tuna imports by value is actually even higher – 65 percent – because Mexico's exports are valued at $7.84 per kg., compared to $5.00 per kg. for "generic" tuna.[172]

103. The reason there is such a significant difference between the first and second set of figures is that two things happen under Mexico's model. First, the volume of U.S. imports of canned tuna from Mexico increases by a factor of about 12 from 5,657 mt. in 2014 and 5,028 mt. in 2015 to 63,568 mt. under the model. Second, the price of U.S. imports of canned tuna from Mexico nearly doubles from an average of $4.00 per kg. in 2014 and $3.48 per kg. in 2015 to $7.79 per kg. under the model. Consequently, Mexico's exports to the United States increase by roughly 12-fold, by volume, and roughly 22-fold, by value.

104. As discussed further in the next subpart, both of these estimates are wholly disproportionate to Mexico's importance in the global tuna industry, Mexico's share of U.S. imports of other seafood products, Mexico's historical share of U.S. canned tuna imports, and the nature of the measure at issue, which does not prohibit the sale of canned yellowfin generally, or Mexican canned yellowfin in particular.

b. What in the United States' view would be a reasonable margin of increase in Mexico's exports of canned tuna products in Mexico's model?

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[167] *See* "U.S. Imports of Tuna Product from the World and from Mexico" (Exh. US-62) (showing that, in 2015, U.S. imports of canned tuna amounted to 142,145 mt). In this regard, 63,586 / 142,145 * 100 = 44.7 percent.

[168] *See* "U.S. Imports of Tuna Product from the World and from Mexico" (Exh. US-62) (showing that, in 2015, Mexico's share of U.S. canned tuna imports, by volume, was 3.5 percent).

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

[170] For example, (495,195 – 22,650) / 22,650 * 100 = 2,086 percent, showing that, using the level of rounding Mexico used in Exhibit MEX-2, Mexico's exports of canned tuna to the United States increase by 2,086 percent under the model.

[171] *See* Pouliot 2016, at 32-33 (Exh. MEX-2). Specifically: 63,568 / (63,568 + 53,340) * 100 = 54.4 percent.

[172] *See* Pouliot 2016, at 33 (Exh. MEX-2). In this regard: (63,568 * 7.84) / ((63,568 * 7.84) + (53,340 * 5.0)) * 100 = 65.1%.

105. As the United States has explained previously, the data are not available to correctly define and parametrize Mexico's model. However, even with the data that is available, it is possible to improve on the accuracy of Mexico's model by making changes that cause it to more correctly reflect the realities of the U.S. canned tuna market. When this is done, the model generates a margin of increase in Mexico's exports of canned tuna products to the United States of 0 to 168 percent over 2015 levels. Comparison with the results generated by the U.S. model further confirms that this is a reasonable margin of increase.

106. Specifying Mexico's model based on the best evidence on the record would entail making four major changes to the equations set out in Mexico's model. On the demand side the changes are: (1) using the data available to calculate the U.S. and Mexican retail mean willingness to pay, rather than assuming an identical mean $2 per kg. willingness to pay in both markets; (2) adjusting the demand equations to account for the mark-up between import and retail to properly estimate the premium at import; and (3) adjusting the U.S. demand intensity for yellowfin and "generic tuna" to account for the U.S. preference for tuna caught by not setting on dolphins. While data are not available to properly define the supply side of the model,[173] it is possible to ameliorate the disconnect between the assumption that Mexico is the only possible supplier of canned yellowfin and reality by (4) removing the additional 20,000 mt. of Mexican canned yellowfin tuna production over actual 2014 levels from the model, rather than assuming that Mexico could import tuna that is currently being processed and consumed by third countries at no increase in marginal cost.

107. Each of these changes, and the model results after they are made, is described below. In short, by calibrating the Mexican model based on the data on the record – rather than unreasonable assumptions – the model produces an estimate of nullification or impairment of between $0 and $50.1 million, which roughly approximates the results of the U.S. model, thereby confirming that the margin of increase generated by the U.S. model is reasonable.

i. Using Available Data to Calculate Mean Willingness to Pay

108. Since supply of yellowfin to the U.S. market is not limited,[174] U.S. and Mexican consumer mean willingness to pay for canned yellowfin over other types of canned tuna should be calculated based on actual consumption data and not just assumed to be $2 per kg. in both markets.[175] This calculation should be done using detailed data based on store by store sales of yellowfin versus other canned tuna products. While this data is not on record, the data that is on record as to actual consumption in the U.S. and Mexican markets, *i.e.*, Exhibit MEX-15 for the U.S. market and Exhibit MEX-2 for Mexico, could be used to derive the current premium being paid for canned yellowfin by consumers in each market. Then Equation 8 of Exhibit MEX-2 could be used to calculate the mean willingness to pay in the two markets.

[173] *See supra* U.S. Response to Arbitrator's Question 131.

[174] *See supra* U.S. Response to Arbitrator's Question 131.

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

109. As described in response to Arbitrator's Question 131 above, the data in Exhibit MEX-15 suggest that U.S. consumers have demonstrated a willingness to pay for canned yellowfin over other types of canned tuna, at retail, of $1.13 per kg. or $1.93 per kg. (using OLS regressions for the 52- and 12-week datasets)[176] and of $3.06 and $3.39 per kg. (using correctly weighted WLS regressions).[177] Using these figures to solve Equation 8 from Exhibit MEX-2 gives estimates for the mean U.S. consumer willingness to pay for a premium for canned yellowfin of -$3.28, -$2.48, -$1.35, and -$1.02 per kg. at retail prices.[178] The data in Exhibit MEX-2 suggests that Mexican consumers are currently paying a premium of $1.10 per kg. for canned yellowfin over all other types of canned tuna. Using this figure to solve Equation 8 for the mean Mexican consumer willingness to pay for yellowfin gives a value of $1.78 per kg.[179]

ii. Accounting for the Retail Mark-up

110. The mark-up and the difference in that mark-up between the products and between the United States and Mexico should be incorporated into the model.

111. In general, the price paid for goods at import is not identical to the price paid at retail. Rather, goods are "marked-up" between import and retail, due to a number of factors that occur in the importing country, such as the value added by transportation, wholesalers, and retailers. The level of nullification or impairment in this dispute should be based on the prices paid to the exporter in Mexico, *i.e.*, on the import price excluding tariffs and charges, because the value-added services that occur in the United States have no effect on Mexican exporters. Therefore, the canned tuna prices on which the level of nullification or impairment should be based are the prices at import. Similarly, the premium for canned yellowfin that is relevant to calculating the level of nullification or impairment is the premium at import, not at retail.[180]

112. However, discrete choice models are based on consumer demand, and the information on record for the willingness to pay for yellowfin is based on products' retail prices. Consequently, the values for mean willingness to pay a premium for yellowfin calculated in the preceding section (and assumed in Exhibit MEX-2) are the premiums at retail, not at import. It is,

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

[177] *See* "U.S. Weighted OLS Regressions Using the 12- and 52- Week Datasets from Exhibit MEX-15" (Exh. US-149). Mexico weighted the WLS regressions in its model based on the number of units sold. However, since the purpose of the analysis is to study the price of tuna by weight, not by number of units sold, and because units vary substantially by size (can size, as well as packs of 4 or more), the weights in the WLS regression ought to also be in terms of kilograms rather than units. Additionally, it is widely accepted in the econometrics literature that the appropriate method of introducing weights into a least squares regression is by using the square root of the chosen weights rather than the full value of the weight as has been done by Mexico. Correcting for both of these issues results in estimates for the price premium of yellowfin that are between 28 and 34 percent lower than those reported by Mexico's WLS estimates, with the price premium of yellowfin being between $3.06 and $3.39 (vs $4.63 to $4.65). *See* Pouliot 2016, at 20 (Exh. MEX-2).

[178] *See* "U.S. Calculation of Average Willingness to Pay" (Exh. US-150).

[179] *See* "U.S. Calculation of Average Willingness to Pay" (Exh. US-150).

[180] *See, e.g.*, Pouliot 2016, at 35 (Exh. MEX-2) (using the export price, which is generally comparable to the customs price, in calculating the level of nullification or impairment).

therefore, necessary to adjust these premiums to represent the premiums at import in order to accurately estimate the level of nullification and impairment. Mexico failed to do so, however, and instead simply assumed that the premium at retail and the premium at import are the same.[181] But this is not accurate and, as a consequence, Mexico significantly overestimated the premium for canned yellowfin at import.

113. In general, the mark-up from import to retail is based on the price of the product and is higher for gourmet products because these have fewer close substitutes and are purchased by consumers who have lower marginal utility of income. The information to properly determine the mark-up differences between canned albacore, skipjack, and yellowfin (or different low-end and high-end canned tuna products) based on these parameters are not on record. However, the data available do allow for the estimation of the average mark-up for all canned tuna product, by price, in Mexico and the United States.

114. As explained in more detail in response to Question 144 below, the retail price of canned tuna in the U.S. can be estimated to be 74 percent above the import price (or 1.74 times the import price).[182] MEX-2 presents information on the mark-up between wholesale and retail in the Mexican market, showing that from wholesale to retail the mark-up is less than 10 percent of the retail price.[183] This is substantially less than the retail mark-up in the U.S. market, which is 29 percent of the retail price.[184] We do not have information on the Mexican mark-up for transportation, or wholesale but if we assume that these represent the same share of the Mexican retail price as they do of the U.S. retail price, they can be estimated to be 6.4 percent ($0.24) and 4.9 percent ($0.27) of the final price respectively.[185] This would indicate a total Mexican mark-up from domestic production to retail of $1.06 ($0.54 + $0.24 + $0.27), or 23 percent above the production price (or 1.23 times the production price).

115. This information can then be incorporated into the model by treating the mark-up as an exogenous parameter that is distinct in the U.S. and Mexican markets. To do this, it is necessary

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[181] *See* Pouliot 2016, at 16 (Exh. MEX-2) ("Because the model applies at wholesale and only retail data are available, it is assumed that the wholesale-to-retail markup for generic and yellowfin tuna are the same. This is a reasonable assumption because it costs the same to take canned yellowfin tuna and canned generic tuna from wholesale to retail because these canned products are of similar sizes and weights. Thus, it is expected that the retail premium for canned yellowfin tuna is fully transmitted from retail to wholesale.").

[182] *See infra* U.S. Response to Question 144.

[183] *See* Pouliot 2016, at 27 (Exh. MEX-2) ("The regression finds a mark-up between wholesale and retail of $0.54/kg. This means that given an average retail price of $5.58/kg, the corresponding average wholesale price is $\bar{p}_{mx} = \$5.04/kg$.").

[184] *See* USDA, Economic Research Service (ERS), "Measuring Transportation and Trade Markups on Imported Commodities with the Food Dollar Model" (Exh. US-174) (showing that retail mark-up is 29 percent ($950 million of $3,278 million) of the final retail value for imported fish and seafood).

[185] *See* USDA, ERS, "Measuring Transportation and Trade Markups on Imported Commodities with the Food Dollar Model" (Exh. US-174) (showing that transportation accounts for 6.4 percent ($209 million of $3,278 million) of the retail price and wholesale accounts for 4.9 percent ($159 million of $3,278 million)); Pouliot 2016, at 27 (Exh. MEX-2) (showing the retail price of $5.58 for canned tuna in Mexico).

to replace each price term (p) with a retail price that equals import or domestic price, times one plus the mark-up (p' = m*p), within Equations 16 through 19 of the model.[186] This will account for the mark-up between import and retail and ensure that the model uses the estimated premium paid at import to generate the estimated level of nullification and impairment.

iii. Accounting for U.S. Consumer Preferences Concerning Setting on Dolphins

116. To further improve the accuracy of Mexico's model, it is necessary to account for the fact that many U.S. retailers would continue to not sell tuna caught by setting on dolphins if the measure were withdrawn. In a typical discrete choice model, this would be done by including a demand parameter for whether the tuna was caught by setting on dolphins, with a separate distribution indicating consumers' willingness to purchase based on this attribute along with additional demand parameters based on other attributes of different tuna (including form, pack, container, and type of tuna) products on the market. But the information on record and the simplicity of Mexico's model do not allow for this level of detail to be incorporated.

117. It is possible, however, to incorporate such consumer preferences by setting the U.S. intensity of demand parameter such that it is different for yellowfin than the category of "generic tuna." Since Mexico's model assumes that all Mexico's imports to the United States are canned yellowfin and that all U.S. imports of canned yellowfin are from Mexico, the model could thereby take into account that Mexican yellowfin would not be sold in all retail locations. This would entail specifying the intensity of demand parameter for yellowfin so that it represents only that portion of the market that Mexican yellowfin would have access to if the measure were withdrawn, *i.e.*, those retailers that have not announced that they would not carry tuna caught by setting on dolphins or that the U.S. measure has no impact on their decision whether or not to purchase Mexican canned tuna.[187]

118. Specifically, this would be done by removing 46.6 percent[188] of tuna consumption from the U.S. yellowfin intensity of demand parameter.[189] For U.S. demand for all tuna to remain consistent in the model, the U.S. intensity of demand parameter for "generic tuna" would then

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[186] *See* "Runs of Mexico's Model Specified Based on Available Information" (Exh. US-167). The parameters altered in order to make Mexico's model more closely reflect the realities of the U.S. and Mexican markets, and the output of the altered model, are contained inside Exhibit US-167. The model files that were used to create this exhibit, with the alterations to the original Mexican equations, have also been provided in three MATLAB files, Exhibits US-168(a)-(c). These were produced in MATLAB instead of R, since, prior to Mexico's submission of the R code, we reproduced the model inside of MATLAB, and this version of the model was cleaner and easier to manipulate than the R files. It should be noted the MATLAB model produces the same results as Mexico's R files prior to the parameters being changed.

[187] *See infra* U.S. Response to Arbitrator's Question 146.

[188] *See infra* U.S. Response to Arbitrator's Question 146; "Sales of Canned Tuna by Some Companies with Dolphin Safe Policies" (Exh. US-41) (BCI).

[189] *See* "Runs of Mexico's Model Specified Based on Available Information" (Exh. US-167). Specifically, this results in an intensity of demand parameter for U.S. demand for canned yellowfin of 881,804,880 (1,651,320,000 - .464*1,651,320,000), the parameter in Mexico's model).

need to be increased by the amount removed from the yellowfin demand intensity.[190] These adjustments would reflect the fact that, at a minimum, U.S. consumer preferences would decrease demand for *Mexican* canned yellowfin (*i.e.*, for tuna caught by setting on dolphins) by at least 46 percent.

iv. Removing the 20,000 mt. of Additional Mexican Production from the Model

119. As described previously, the way that Mexico chose to model supply makes it impossible to relax the incorrect assumption that Mexico is the sole possible supplier of canned yellowfin to the U.S. market. However, the model does allow for supply from Mexico to be limited to Mexican production of yellowfin at 2014 levels. This would entail removing from the model Mexico's assumed ability to import, at no increasing marginal cost, yellowfin tuna equivalent to 20,000 mt. of canned yellowfin. This assumption is unreasonable for many reasons, as explained above.[191] Consequently, removing these additional 20,000 mt. from the model would partly account for the fact that other countries, including Ecuador, produce canned yellowfin.

120. The four alterations described here fall far short of fixing all the aspects of Mexico's model that are based on demonstrably incorrect assumptions. However, they do replace many of the assumptions made to calibrate the Mexican model with estimates based on the data that is available. These changes result in an estimate of nullification or impairment of between $0 and $50.1 million, as detailed in the table below and set out fully in Exhibit US-167.[192]

	Retail Price Premium	Mu	Mexican Exports of Yellowfin	U.S. Price of Yellowfin	Mexican Price of Yellowfin	Damage Estimate ($Millions)
US (OLS 12 week)	$1.93	-$2.48	6,212	5.13	5.08	8.9
US (OLS 52 Week)	$1.13	-$3.28	3,568	5.01	4.96	0.0
US (WLS 12 Week)*	$3.39	-$1.02	13,512	5.43	5.38	50.1
US (WLS 52 Week)*	$3.06	-$1.35	11,613	5.35	5.30	38.9

121. Thus, making the changes that are possible to improve the accuracy of Mexico's model vis-à-vis the realities of the U.S. market results in levels of nullification and impairment that are roughly similar to those generated by the U.S. model. This further confirms that the margin of increase generated by the U.S. model is reasonable.

122. Further, the results of the model after these changes are more consistent with the evidence on record with regard to world prices of canned yellowfin. Data from Exhibit US-144 show that the average customs value (not accounting for tariffs and charges) of canned yellowfin imports in the European Union is $5.31 per kg., which equals $6.15 per kg. once adjusted to

[190] *See* "Runs of Mexico's Model Specified Based on Available Information" (Exh. US-167). That is, the intensity of demand parameter in Mexico's model, 1,651,320,000, would be increased by 769,515,120 (.466*1,651,320,000). This would result in an intensity of demand of 2,420,835,120.

[191] *See supra* U.S. Response to Arbitrator's Question 131.

[192] *See* "Runs of Mexico's Model Specified Based on Available Information" (Exh. US-167).

include U.S. tariffs and transportation costs.[193] Results from the modified Mexican model show a price of canned yellowfin tuna in the U.S. market of between $5.01 per kg. and $5.43 per kg. This is much more consistent with a decrease in the average price of canned yellowfin and a resulting in increased U.S. consumption, as Mexico claims its model shows,[194] than the price of $7.84 per kg. generated by Mexico's model.

123. The reasonableness of this estimate is further confirmed by the fact that it is similar to the estimate produced by the U.S. model. If U.S. consumer preferences did not limit the competitiveness of tuna caught by setting on dolphins, a reasonable margin of increase in Mexico's exports of canned tuna to the United States in the short run would be 65 to 167 percent, by volume, over 2014 levels, as shown by the U.S. model.[195] The reasonableness of this estimate is demonstrated by the fact that, under this increase, Mexico's share of U.S. tuna product imports is consistent with (1) Mexico's share of such imports during past periods of unrestricted market access;[196] (2) Mexico's share of U.S. imports of other major seafood products; and (3) the size of Mexico's tuna industry in relation to the global canned tuna industry.[197] However, given that U.S. consumer preferences *do* limit the market penetration of Mexican canned tuna exports, a reasonable increase, by volume, would be considerably lower.[198] Taking consumer preferences into account, the U.S. model estimated a margin of increase of 20 to 120 percent, by value, for imports of canned tuna from Mexico.[199]

142. Does the United States consider that, with the United States' MFN rate of 35% on canned tuna products in oil, Mexico would have a competitive advantage in the US yellowfin canned tuna market if the Tuna Measure were withdrawn?

124. It is undisputed that Mexican tuna products have a tariff advantage vis-à-vis most other imported canned tuna products in the U.S. market. That advantage is greater for canned tuna packed in oil, because the MFN tariff rate is higher than the 6 percent tariff rate on canned tuna products packed in water. However, as the United States has explained, a tariff advantage is not sufficient to give Mexican tuna product a "competitive advantage" on the U.S. market of the sort Mexico claims, *i.e.*, that it could export its entire canned yellowfin production to the United

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[193] "Prices of EU Imports of Tuna Product in 2015" (Exh. US-145).

[194] *See, e.g.*, Mexico's Response to Arbitrator's Question No. 38, paras. 62-65.

[195] U.S. Model (Exh. US-81).

[196] *See* "Historical U.S. Imports of All Tuna" (Exh. US-79); "U.S. Imports of Tuna Product from the World and from Mexico" (Exh. US-62).

[197] *See* "U.S. Imports of Top Seafood Products from the World and Mexico" (Exh. US-120); "Mexican Purse Seine Catch of Tuna" (Exh. US-152) (showing that Mexican purse seine vessels caught 2.5 percent of the global catch of tuna over the past 10 years).

[198] *See* U.S. Model (Exh. US-81); "Sales of Canned Tuna by Some Companies with Dolphin Safe Policies" (Exh. US-41) (BCI) (showing that retailers covering 47 percent of U.S. consumption have announced either that they would not purchase tuna caught by setting on dolphins or that the U.S. dolphin safe labeling measure has no impact on their decision whether to carry Mexican tuna products).

[199] *See* U.S. Model (Exh. US-81).

States without any competition from imported or U.S.-produced products. Rather, any competitive advantage Mexico gains from a disparity in tariff treatment has a very limited impact on the marketability of its product in the United States.

125. First, any competitive advantage that Mexican canned yellowfin in oil has over other imported canned yellowfin in oil products, it already has now. And withdrawal of the measure would not increase any such advantage. The withdrawal of the measure will not increase any disparity in tariff treatment between Mexico and other Members exporting to the United States, nor will it impact U.S. consumer preferences with regard to tuna product produced from setting on dolphins. As discussed previously, only 8 percent of U.S. consumers surveyed stated that they would prefer canned tuna caught by setting on dolphins (assuming no dolphin was killed), while 74 percent stated that they would prefer tuna caught *without* setting on dolphins (again, assuming no dolphin was killed).[200] This consumer preference formed thirty years ago and shows no signs of lessening. No retailer is currently prohibited from selling Mexico's tuna product with the measure in place, and, if the measure is withdrawn, no retailer would be required to sell Mexico's tuna product.

126. Second, any competitive advantage Mexico has with respect to canned tuna packed in oil is limited to a very small segment of the U.S. canned tuna product market. As noted in Exhibit US-169, 96 percent of imports of canned tuna are packed in water, not oil,[201] and, therefore, are subject to a MFN tariff rate of 6 percent.[202] U.S. consumers overwhelmingly favor water packed products, as such products have fewer calories than oil packed products and therefore are considered to be healthier.[203]

127. Third, not only is any competitive advantage Mexico could claim limited to the small market segment of canned tuna in oil, it is also limited to competition with other foreign producers. Mexican tuna products do not have a competitive advantage over canned tuna in oil produced by canneries located in the United States or its territories. In this regard, one of the leading canned tuna in oil brands is the Genova brand, which is owned by Chicken of the Sea, and is processed in a cannery located in the continental United States.[204] The other two "big

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[200] *See* National Public Opinion Survey, Question 4 (2016) (Exh. US-148). As discussed above, neither of Mexico's surveys contradicts these findings, which are entirely consistent with the evidence on the record that U.S. consumers have remained "sensitive" to this issue since in the late 1980s. *See US – Tuna II (Mexico) (Panel)*, paras. 7.288-289.

[201] *See* "U.S. Imports of Canned Tuna in Water and in Oil" (Exh. US-169) (showing that, in 2015, for example, the United States imported 142,145 mt. of canned tuna, of which 135,760 mt., 95.5 percent of the total, were packed in water).

[202] *See* Harmonized Tariff Schedule of the United States, Supplement 1, Ch. 16, at 9 (2016) (Exh. US-178).

[203] Corey et al. 1990, at 3-5 (Exh. US-113) ("Consumer preferences are another factor that determines the demand for canned tuna. U.S. consumers have become increasingly health conscious in recent years. This has increased the preference and demand for canned tuna packed in water at the expense of tuna packed in oil.").

[204] *See* "Average Prices of Top Selling Canned Tuna Products, by Type, from Exhibit MEX-15" (Exh. US-146) (showing that, of the top selling yellowfin products, one was Genova and one was Chicken of the Sea, both packed in olive oil). The cannery, which opened in 2009, is located in Lyons, Georgia.

three" companies – Bumblebee and StarKist – also make canned tuna in oil products and both operate U.S. canneries.[205]

128. In this regard, the United States would observe that Genova makes a truly high-end yellowfin product – canned yellowfin packed in olive oil and canned yellowfin packed in extra virgin olive oil in sea salt.[206] The Mexican oil-packed products imported into the United States, on the other hand, are not truly high-end products, as they are chunk products packed in vegetable oil.[207] Based both on Exhibit MEX-15 and the websites of both Dolores and Tuny, neither Mexican brand appears to make a product packed in olive oil at all, and Dolores seems to make only a few solid pack canned products and Tuny to make none.[208]

129. Finally, the United States would again note that when comparing Mexican canned tuna packed in vegetable oil to other similar products, the Mexican branded products are not consistently the lower priced product.[209] This also suggests that, to the extent Mexico has a competitive advantage over other non-U.S. competitors in this small segment of the market due to a disparity in tariffs, that competitive advantage does compensate for the other cost disadvantages that Mexico has vis-à-vis its competitors from Asia and Ecuador.

3 TO BOTH PARTIES

143. Could the parties please indicate exactly how they define the category of "high-end" yellowfin tuna products, and in particular, whether this category comprises:

a. only solid-pack tuna or also tuna in chunk;

b. only fillets or other pieces;

c. only tuna products in olive oil or also other ambient tuna;

d. all such tuna products, or only tuna products within a certain price-range below the top price range (if the latter, please provide details); and

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[205] Bumble Bee operates a cannery in California, and StarKist operates a cannery in American Samoa. *See also* "Average Prices of Top Selling Canned Tuna Products, by Type, from Exhibit MEX-15" (Exh. US-146) (showing that, of the top selling yellowfin products, three were StarKist products packed in olive oil).

[206] *See* Genova, "Our Products" (Exh. US-64).

[207] *See* "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-135) (showing that all of the Dolores yellowfin products sold in the United States during the covered period were chunk style packs in water or vegetable oil); "Imports of Tuny Brand Canned Tuna from Exhibit MEX-15" (Exh. US-145) (showing that all the Tuny products imported into the United States were chunk style packs).

[208] *See* Pinsa and Tuny Webpages (Exh. MEX-29).

[209] *See* U.S. Response to Arbitrator's Question 66, paras. 123-124; "Average Prices of Top Selling Canned Tuna Products, by Type, from Exhibit MEX-15" (Exh. US-146) (showing that, in terms of price per ounce and unit price, several of the top canned yellowing products, including some with more high-value attributes, such as being packed in olive oil, are priced below or competitively with the top selling Dolores products, on average).

e. tuna caught by purse seine fishing and stored in brine in the vessel.

Please explain whether the parties use the terms "high-end" and "gourmet" interchangeably.

130. The U.S. canned tuna market is not rigidly divided into "high-end" or "gourmet" and "low-end" or "generic" markets. There are a wide variety of canned tuna products available on the U.S. market, and the assumption of both parties to this dispute has always been that all of these products are sufficiently substitutable that they are "like products" under Article 2.1 of the TBT Agreement and under the GATT 1994.[210] In fact, the DSB recommendations and rulings confirm that this is the case.[211]

131. That said, the canned tuna products sold on the U.S. market vary in terms of price and other attributes that add value to the product. There are, for example, products that have more "high-end" or "gourmet" attributes, and products that have fewer (or none) of these attributes. In this regard, the United States has generally used the terms "high-end" and "gourmet" interchangeably. The "high-end" or "gourmet" attributes include the following: fish type, pack form, pack content, container, and flavoring.[212] With regard to each of these attributes, the table below sets out characteristics that would be associated with the product being "high-end" or "gourmet" versus low-end or generic.

	Fish Type	**Pack Form**	**Pack Content**	**Container**	**Flavoring**
High-end	Albacore / Yellowfin	Solid / Fillet	Olive Oil / Spring Water	Jar / Pouch	Yes
Low-end	Skipjack	Chunk	Water / Vegetable Oil	Can	No

132. Generally speaking, the possession of all or some of these attributes would make a product more gourmet or high-end, while the possession of a few or none of these attributes would do the opposite. This is also true within the yellowfin segment of the U.S. market. As

[210] *See US – Tuna II (Mexico) (Panel)*, para. 7.213.

[211] *See US – Tuna II (Mexico) (AB)*, para. 230; *US – Tuna II (Mexico) (Panel)*, paras. 7.233-252 (noting, *inter alia*, that: "Mexico first submits that the physical properties of Mexican tuna products are identical to those of US tuna products insofar as the products from both WTO Members comprise tuna meat in a retail-ready package. Mexico further observes that canned and pouched tuna meat from the various tuna species compete against each other in the US tuna market, confirmation of this is that the largest seller of tuna products in the United States packages various species of tuna meat. Mexico also observes that, to the extent that there are physical differences in the species of the tuna meat, such differences do not materially affect the competitive relationship between Mexican and US tuna products because Mexican and certain US tuna products contain tuna meat from identical tuna species such as yellowfin tuna and canned and pouched tuna meat from the various tuna species compete against each other in the US market.").

[212] *See, e.g.*, Pouliot 2016, at 17-19 (Exh. MEX-2); U.S. Response to Arbitrator's Question 51, para. 8; U.S. Response to Arbitrator's Question 67, para. 131.

shown by Exhibits US-10 and MEX-15, the most expensive canned yellowfin products tend to be those with more of the attributes set out above.

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134. Similarly, Exhibit MEX-15 shows that, within yellowfin products the most expensive, per ounce, of the top-selling products during the covered period in 2015 were (1) Tonnino yellowfin fillet in olive oil in a jar with jalapeno flavoring, (2) Tonnino yellowfin fillet in olive oil in a jar with garlic flavoring, (3) Starkist chunk light yellowfin in extra virgin olive oil in a pouch, (4) private label solid yellowfin in olive oil, and (5) Bumble Bee premium yellowfin fillet in olive oil.[215] Of the ten most expensive of the top-selling products, five were yellowfin fillets, four were solid yellowfin, and only one (in a pouch) was chunk; nine were in olive oil and one was in spring water.[216] Conversely, the five least expensive yellowfin products were all chunk light products in water or vegetable oil.[217]

135. Thus, there are no hard-and-fast rules concerning gourmet or high-end products, but gourmet yellowfin products tend to be solid or fillet and in olive oil, and the most gourmet products tend to be in jars. It is also important to note that consumption of gourmet yellowfin products, particularly the highest end of the market, is only a subset of the 1-2 percent of all canned tuna consumption that is made up of canned yellowfin. For example, the four most expensive of the top-selling yellowfin products shown in Exhibit MEX-15 (and there was a significant price gap between these most expensive products and other canned yellowfin

[213] "Yellowfin Market Review," at 13 (2016) (Exh. US-10) (BCI).

[214] "Yellowfin Market Review," at 8 (2016) (Exh. US-10) (BCI) [[

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[215] "Average Prices of Top Selling Canned Tuna Products, by Type, from Exhibit MEX-15" (Exh. US-145).

[216] "Average Prices of Top Selling Canned Tuna Products, by Type, from Exhibit MEX-15" (Exh. US-145).

[217] "Average Prices of Top Selling Canned Tuna Products, by Type, from Exhibit MEX-15" (Exh. US-145) (showing that the least expensive yellowfin products, in ascending price order, were: (1) a private label chunk light in water, (2) a different private label chunk light in water, (3) a third private label chunk light product in water, (4) Dolores chunk light in water (10 oz), and (5) Dolores chunk light in vegetable oil (10 oz)).

products) accounted for 7 percent of the sales of the top 20 yellowfin products, by weight, and 14 percent by value.[218]

136. With respect to the last part of the Arbitrator's question, there is nothing about the brining process that occurs on board purse seine vessels producing for the canned market (as the vast majority of purse seine vessels do) that makes the product unsuitable for consumption as a high-end canned product. Brined tuna is only unsuitable for consumption as a fresh product and, generally, as a frozen product consumed like a fresh product (such as a tuna fillet).[219] The vast majority of canned tuna products globally and on the U.S. market – both high-end and bargain products – are caught by purse seine vessels and are brined.[220]

144. The price used in the United States' methodology to calculate the level of nullification or impairment is USD 5.29. Alternatively, could one of the prices in Exhibit US-144 or Exhibit MEX-15 be used? If so, which price should be chosen? If not, please explain why.

137. Since the U.S. model is based on Mexico's share of tuna product by weight, it would be appropriate to alter the price to adjust for expectations in the quality of canned tuna that Mexico would export. As such, prices from either exhibit could be used in the U.S. model, if it is expected that the quality of Mexican product would be better represented by these estimates. However, as explained in response to Question 141(b) above, if prices from Exhibit MEX-15 are used, they would need to be adjusted to remove the mark-up from the retail value to reflect the price paid to the exporter. For this reason, the prices in Exhibit US-144 will more accurately reflect the world import prices of canned yellowfin, as they directly represent the prices paid by importers for canned yellowfin tuna product and require no additional estimation.

138. As shown by Exhibit US-144, the average price paid to exporters for canned yellowfin imports into the EU in 2015 was $5.31 per kg. (*i.e.*, $5.24 per kg. for yellowfin not in vegetable oil and $5.51 per kg. for yellowfin in vegetable oil).[221] Using the average price in the U.S. model results in a level of nullification and impairment of between $30.6 and $61.0 million per

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[218] "Average Prices of Top Selling Canned Tuna Products, by Type, from Exhibit MEX-15" (Exh. US-145).

[219] *See, e.g.*, J. John Kaneko, Pacific Management Resources, "Rationalization of HACCP for the Fresh Tuna Industry," at 3-4 (1997) (Exh. US-170) (explaining that longline, handline, and troll fishing may produce for the fresh market but that "purse seine caught fish are handled in large lots and brine frozen. The resulting quality of fish is generally only suitable for canning raw material and not for fresh market applications."); Mexico's Written Submission, para. 148 (stating that the "Mexican tuna industry is isolated from the world fresh yellowfin market" because "[t]una is caught and frozen aboard in brine in vessels that can stay at sea for several weeks").

[220] *See, e.g.*, Boston Sword & Tuna, "Buyer's Guide: Yellowfin Tuna" (accessed Oct. 30, 2016) (Exh. US-171) ("Yellowfin is fished by purse seine, longline and handline and annual landings usually exceed 1 million metric tons. The purse seine fishery is by far the largest. Almost all the seine catch is brine frozen and used for canning. . . . Longliners are . . . the primary source of fish for the fresh market."); *See* Joseph 2003, at 9 (Exh. US-87); Glenn Hurry, WCPFC, "The Western and Central Pacific Tuna Fishery," at 10 (2014) (Exh. US-88) (noting that mainly skipjack and yellowfin are caught by purse seine gear and that most of this catch is for canning).

[221] *See* "Prices of EU Imports of Tuna Product in 2015" (Exh. US-145).

year. Taking account of the 46.6 percent of the market (at minimum) that will not purchase Mexican tuna product as a result of the withdrawal of the measure results in an estimate of between $5.5 and $24.6 million.[222]

139. Since Exhibit MEX-15 shows retail prices, not import prices, then in order to use the data within it to calculate the level of nullification and impairment, it is necessary to remove the mark-up from import (or domestic production) to retail.[223] This is done below, but since Exhibit MEX-15 includes imported and domestic product, and because mark-ups can vary by product, these estimates will be a less accurate depiction of the import price of yellowfin than those shown in Exhibit US-144.[224]

140. That said, it is possible to estimate the U.S. mark-up of canned tuna from import to retail using comparable U.S. import and retail prices. Exhibit MEX-15 covered the 52 weeks ending on October 24, 2015, and, therefore, the most comparable import price data would be for 2015. The U.S. average import price of canned tuna in 2015 was $4.74 per kg., and the average retail price of canned tuna from Exhibit MEX-15 was $8.26 per kg.[225] This shows that the average retail price represents an increase of 74 percent over the import price. To put it another way, the import price is only 57 percent of the final retail price and the other 43 percent is the mark-up that occurs once the product is inside the United States (primarily occurring at the retail level).

141. When this mark-up is taken into account, the yellowfin price premiums estimated from Mexico's OLS regression analyses and a correctly weighted WLS regression translate into an import price premium of between $0.65 and $1.94 per kilogram (from the retail premium of $1.13 and $3.39), as shown in the chart below.

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[222] *See* "U.S. Model with Alternative Pricing of Mexican Imports" (Exh. US-171).

[223] *See supra* U.S. Response to Arbitrator's Question 141(b).

[224] In economic theory, the mark-up of a product is typically determined by market share and the elasticity of demand, which is related to the number of competing products in the market space that are close substitutes and by the price of the product. Products with more close substitutes have less market power so the mark-up will be lower. While high-end products that are more expensive tend to have higher mark-ups, since they tend to be differentiated and they are purchased by consumers who buy more expensive goods and have diminishing marginal utility of income.

[225] *See* "Prices of U.S. Imports, by Type, 2014-2015" (Exh. US-165) (showing import prices); "Average Prices of Top Selling Canned Tuna Products, by Type, from Exhibit MEX-15" (Exh. US-146) (showing that a total of 184,131,094 kg. of canned tuna, valued at $1,521,216,551, was sold during the covered period, giving an average price of $8.26 per kg). A similar estimate is calculated when looking at albacore alone, which has an average retail price of $10.82 in Mex-15 and an average import price of $6.24, which translates into a price increase of 73% from import. *See id* (showing that a total of 56,663,093 kg. of canned albacore, worth $612,617,970, was sold).

	Retail Price ($/KG)	Import Price ($/KG)	Retail/Import	Import Price Share	Mark-Up Share
All	$ 8.26	$ 4.74	174.3%	57.4%	42.6%
Albacore	$ 10.82	$ 6.24	173.4%	57.7%	42.3%

	Retail Price Premium	Import Price Premium (57.4% of Retail)
US (OLS 12 week)	$1.93	$1.11
US (OLS 52 Week)	$1.13	$0.65
US (WLS 12 Week)	$3.39	$1.94
US (WLS 52 Week)	$3.06	$1.76

142. Taking Mexico's approach of adding these to the average import price of all tuna, this suggests that the 2015 average import price for canned yellowfin is between $5.65 and $6.94 per kg. Using these prices in the U.S. model results in a level of nullification and impairment of between $34.0 and $85.0 million. Adjusting these figures for the 46 percent of the market (at minimum) that would be unaffected by the removal of the measure results in an estimate of between $7.3 and $37.4 million.[226]

143. These estimates based on Exhibits US-144 and MEX-15 approximate the $8.5 to $21.9 million estimate that the United States provided in the U.S. written submission and confirm the reasonableness of that original estimate.

145. The most recent and complete information before the Arbitrator on prices for different types of tuna in the US tuna market is contained in Exhibit MEX-15. Is this the best available information on price data? If not, could each party provide to the Arbitrator better or additional information about the retail, wholesale and import prices of (i) high-end canned tuna, including yellowfin tuna, and (ii) canned generic tuna in the United States for the period 1980-2015?

144. Data in Exhibit MEX-15 represent the most recent and complete information on the retail prices for different types of canned tuna in the U.S. market, on the record in this proceeding. However, data in Exhibit US-144 represent the best available information on the global price paid to the exporter (*e.g.* the customs value) of canned yellowfin tuna product. The prices set out in Exhibit US-144 are an appropriate proxy for the customs value of U.S. imports of canned yellowfin. There is additional information available on prices of albacore (generally a high-end canned tuna product) and other canned tuna on the U.S. market.

145. As mentioned previously, U.S. customs data does not break out yellowfin from all canned tuna imports. However, data is available on the import price of (i) canned albacore, (ii) other canned tuna, and (iii) all canned tuna beginning in 1989. That dataset is provided in Exhibit US-173.[227] Albacore is a premium tuna species, and it is usually packed in solid form, *i.e.* as a higher end product. The price of canned albacore imports is therefore a reasonable proxy for U.S. import prices of high-end canned tuna, broadly speaking. The price of "all other tuna" is a reasonable proxy for imports of lower-end canned tuna, as the vast majority of U.S. canned tuna imports that are not albacore are chunk-style skipjack. We also note that the prices set out in

[226] *See* "U.S. Model with Alternative Pricing of Mexican Imports" (Exh. US-172).

[227] *See* "Prices of U.S. Canned Tuna Imports for 1989-2015" (Exh. US-173).

Exhibit US-172 are similar to those shown in Exhibit US-144, further confirming that the EU data on the import price of canned yellowfin is a good proxy for the U.S. import price.[228]

146. The United States is not aware of a dataset on wholesale prices of canned tuna. However, as explained in the U.S. response to Question 144 above, the average mark-up from import to retail for canned tuna can be estimated, based on Exhibit MEX-15, to be 43 percent of the retail price (*i.e.*, of the final retail price, 57 percent is the import price and 43 percent is the mark-up). Additionally, the U.S. Department of Agriculture (USDA) provides detailed estimates for the mark-up in the broader fish and seafood sector. These estimates show that the mark-up is, on average, 40 percent of the retail price. USDA also provides detail on the mark-up for transportation, wholesale and retail, which make up 6.4 percent, 4.9 percent and 29.0 percent, respectively, of the retail price.[229]

146. The Arbitrator notes the United States' argument, presented, inter alia, in paragraphs 33-38 of its written submission, that US retailers accounting for 46.4% of total US consumption of tuna products are not willing to sell products produced from tuna caught by setting on dolphins. In this regard, the United States refers to the statements obtained from such retailers, presented in Exhibit US-40.

a. Please specify the type of tuna products to which these statements pertain? Do they pertain to canned tuna products? To canned yellowfin? To high-end canned yellowfin?

147. As an initial matter, the United States wishes to clarify that, in these paragraphs (and elsewhere), the United States argued that the vast majority of companies that sell tuna product directly or indirectly to U.S. retailers have committed to EII to not produce or sell tuna product that is produced from setting on dolphins. However, it is difficult to calculate precisely the market share that those EII commitments actually reflect, because the vast majority of the companies that have made commitments are upstream from the retail segment. Therefore, the United States reviewed written purchasing policies of particular retailers in order to account for U.S. consumer preferences in the U.S. model. As discussed, the evidence indicates that such retailer purchasing policies regarding tuna product produced from setting on dolphins account for at least [[ ]] of the retail market (and [[ ]] of all canned tuna consumption).[230]

148. In addition, the United States separately observed that the purchasing policy of Walmart did not depend on whether the tuna product is dolphin safe or not, but whether it meets Walmart's sustainability standard. As such, the withdrawal of the measure would not affect

[228] *See* "Prices of U.S. Canned Tuna Imports for 1989-2015" (Exh. US-173) (showing that, in 2015, the average customs price of imports of canned skipjack was $3.77 per kg, compared to $3.97 per kg. in the EU, and that the average customs price of canned albacore imports was $5.43 a kilogram in 2015, compared to $5.31 per kg. for canned yellowfin imports in the EU).

[229] *See* USDA, ERS, "Measuring Transportation and Trade Markups on Imported Commodities with the Food Dollar Model" (Exh. US-174).

[230] U.S. Written Submission, para. 33 (citing "Sales of Canned Tuna by Some Companies with Dolphin Safe Policies" (Exh. US-41) (BCI); "Shelf Stable Market Data" (2016) (Exh. US-38) (BCI)).

Walmart's decision to carry Mexican tuna product produced from setting on dolphins.[231] Therefore, it is reasonable to include Walmart's market share into the market share of those retailers that have written purchasing policies against purchasing tuna product produced from setting on dolphins as withdrawal of the measure will affect both Walmart and these other companies similarly. Including Walmart, the total retailers covered by statements account for 66 percent of retail market share, which is 46.6 percent of total consumption.[232]

149. Again, the United States considers such figures to be *very conservative*. It is *undisputed* that the vast majority of U.S. retailers have voluntarily chosen not to carry Mexican tuna product. There is very little demand for canned yellowfin products in the United States overall,[233] and there are numerous canned yellowfin products that are produced without setting on dolphins on the market.[234] Yet the U.S. model takes into account only the specific retailer statements that are on the record in this dispute. In other words, the U.S. model assumes that retailers accounting for over 53 percent of total consumption in the United States would react to the withdrawal of the measure by beginning to carry Mexico's tuna product, which such retailers have largely voluntarily chosen not to carry for the last 20 years. Further, the U.S. model makes this assumption despite the evidence on the record that only 8 percent of U.S. consumers surveyed stated that they would prefer canned tuna caught by setting on dolphins (assuming no dolphin was killed), while 74 percent stated that they would prefer tuna caught *without* setting on dolphins (again, assuming no dolphin was killed).[235]

150. As to the Arbitrator's specific question, the United States notes that some of the statements refer to canned tuna (*e.g.*, Food Lion) while other statements refer more generally to "tuna" (*e.g.*, ALDI). The United States is not aware of any company that has purchasing policies regarding tuna product that differ based on the type of product. That is, the United States is not aware of a purchasing policy that prevents the purchase of canned tuna produced by setting on dolphins but would allow the purchase of pouched tuna product produced in such a manner, or distinguishes among canned tuna products based on differences in species, or between so-called "high end" or "low end" canned products. Certainly, there is no evidence on the record that there is any company that operates in this manner. Rather, the United States understands that companies have either decided to carry Mexican tuna product produced from setting on dolphins or have decided not to carry it. Accordingly, the United States considers the statements provided in Exhibit US-40 to apply to all tuna products covered by this dispute.

b. *To the United States*: The Arbitrator notes the United States' statement, in paragraphs 33 and 35 of its written submission, that the 46.4% figure was

[231] U.S. Written Submission, para. 34.

[232] U.S. Written Submission, para. 35.

[233] *See* U.S. Written Submission, sec. III.B.1; U.S. Responses to the Arbitrator's Questions 52-54.

[234] *See* U.S. Opening Statement, para. 34.

[235] *See* National Public Opinion Survey, Question 4 (2016) (Exh. US-148). As discussed above, neither of Mexico's surveys contradicts these findings, which are entirely consistent with the evidence on the record that U.S. consumers have remained "sensitive" to this issue since in the late 1980s. *See US – Tuna II (Mexico) (Panel)*, paras. 7.288-289.

calculated on the basis of data in the table presented in Exhibit US-38. Please explain step-by-step how this figure was calculated on the basis of that data.

151. Exhibit US-41 shows that volume of sales of canned tuna in 2014 and 2015 made by each of the retailers whose statements are included in Exhibit US-40 and calculates each retailer's share of the total canned tuna sales in those years.[236] In making these calculations, the supply of canned tuna in 2014 and 2015, as reported by the NMFS Fishery Statistics Division and presented in US-6, was used to represent total U.S. consumption.[237] The volumes of sales made by the individual retailers were estimated based on several sources, as described below.

152. First, the majority of the retailers and their subsidiaries with policies included in Exhibit US-41 are covered by [[ ]].[238] These retailers, and their total sales of canned tuna, are listed in Exhibit US-38.[239] [[

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153. Second, for the [[ ]] retailers [[ ]] that were covered by Exhibit US-40, but not by Exhibit US-38, estimates were calculated based on data provided by USDA, public sources, and [[ ]] at issue.

154. The share of all canned tuna sales represented by [[ ]]. First, the Economic Research Service of USDA supplied data showing these retailers' share of total grocery sales in 2014.[240] Second, based on economic studies of the canned tuna market, the share of grocery sales of canned tuna was estimated to be 70 percent of all tuna product sales.[241] Based on the total canned tuna supply in 2014 and 2015, as set out in Exhibit US-5, this suggested that grocery store sales of canned tuna were 509.7 and 492.7 million pounds in 2014 and 2015 respectively.[242] Third, the companies' shares of all grocery sales were used to estimate their canned tuna sales for 2014 and 2015. [[

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[236] *See* "Sales of Canned Tuna by Some Companies with Dolphin Safe Policies" (Exh. US-41) (BCI).

[237] *See* "Historical Supply of Canned Tuna" (Exh. US-6).

[238] [[ ]] *See* "Sales of Canned Tuna by Some Companies with Dolphin Safe Policies" (Exh. US-41) (BCI); "Shelf Stable Market Data" (Exh. US-38) (BCI).

[239] *See* "Shelf Stable Market Data" (Exh. US-38) (BCI).

[240] *See* "Share of Grocery Sales by the Top 20 Retailers" (Exh. US-175).

[241] *See* U.S. Written Submission, para. 33; Chiang et al. 2016, at 5 (Exh. US-8) ("Approximately 70% of canned tuna in the US is sold in grocery retailers, leading to grocery scanner data as the basis for this study.").

[242] *See* "Historical Supply of Canned Tuna" (Exh. US-6) (showing that total supply in 2014 and 2015 was 728.1 million pounds and 703.8 million pounds, which, multiplied by .7, equal 509.7 and 492.7 million pounds).

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155. For the [[ ]] retailer, [[,]] sales of canned tuna were estimated [[

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c. The Arbitrator notes that the statements in Exhibit US-40 carry dates that precede the expiry of the RPT in this dispute, such as 1999 and 2007. Please explain why the Arbitrator should treat these statements as indicating the views of these retailers as of the end of the RPT. Could the United States provide more recent statements?

157. Of the retailer statements included in Exhibit US-40, five of them are dated prior to the expiry of the reasonable period of time (RPT) on July 13, 2013: A&P (1999); Albertsons (1999); Publix (1999), Food Lion (2007), and Safeway (2011). The United States has not considered it necessary to obtain more recent statements from these five retailers because these are the five retailers that are on the current EII list of approved dolphin-safe importers, distributors, brokers, retailers, and agents, which was last updated in December 2015.[249] Accordingly, the commitments made by these companies in previous years not to carry tuna product produced from setting on dolphins remain the current commitments for these companies.

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[243] *See* "Sales of Canned Tuna by Some Companies with Dolphin Safe Policies" (Exh. US-41) (BCI).

[244] *See* "Shelf Stable Market Data" (Exh. US-38) (BCI).

[245] [[
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[246] [[ ]]

[247] Skariachan 2013 (Exh. US-176).

[248] *See* "Sales of Canned Tuna by Some Companies with Dolphin Safe Policies" (Exh. US-41) (BCI).

[249] EII, Approved Dolphin-Safe Importers, Distributors, Brokers, Retailers, Agents, at 12-13 (Dec. 2015) (Exh. US-37) (listing each of these five retailers under the heading "United States").

158. In this regard, Mexico's criticism of the inclusion of these older letters, including that the Albertson's certification "does not reflect the current dolphin-safe standard," and that both Food Lion and Publix "decline[d] to make the commitment requested by EII,"[250] is incorrect. These companies remain committed to only selling tuna product produced in a manner consistent with the EII standard for "dolphin safe," which includes not selling tuna product produced from setting on dolphins in the ETP consistent with the AIDCP restrictions.[251] This is a current commitment – in existence both at the time the RPT expired and now – and is entirely consistent with the commitments of many other companies, and overall U.S. consumer preferences regarding tuna product produced without setting on dolphins and tuna product produced from setting on dolphins, regardless of whether that is done in the ETP large purse seine fishery or not and regardless of whether the U.S. measure has been withdrawn or not.[252]

159. Of course, as a general matter, the fact that a company committed to a certain policy many years ago does not mean that its commitment to that policy is necessarily weaker today. One only has to look to the continuous and consistent commitment first made by the "big three" companies over 26 years ago not to source tuna product produced from setting on dolphins for proof of that.

d. The Arbitrator notes that Walmart, one of the mentioned US retailers, does not refer to the intentional encirclement of dolphins in its statement. Given that this is one of the most recent statements, and given Walmart's high share in the US retail market, how, in your view, Walmart's statement should affect the Arbitrator's assessment of the overall willingness of the US retailers to sell tuna products obtained from tuna caught by setting on dolphins?

160. As an initial matter, the United States observes that there are certain points that are undisputed between the parties. First, it is undisputed that the measure does not prohibit U.S. retailers from selling Mexican tuna product produced from setting on dolphins that is not eligible for the dolphin safe label,[253] and that retailers themselves are well aware that it is their choice to carry such tuna product or not.[254] Second, it is undisputed that the major U.S. supply chains –

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[250] Mexico's Written Submission, para. 85.

[251] *See infra*, U.S. Response to the Arbitrator's Question 134(b). Further, the United States acknowledges Mexico's argument that parent company of the A&P stores underwent a bankruptcy and that A&P "closed all of its grocery stores in 2015." Mexico's Written Submission, para. 85. However, the evidence provided in Exhibit US-41 (BCI) is accurate as to that company's market share in 2014 and 2015. Moreover, the United States observes that whether A&P's market share is included or not included in the calculation will not have a material impact on the overall result as A&P had only a [[ ]] retail market share in both 2014 and 2015 and a [[ ]] share of total consumption in both 2014 and 2015.

[252] *See, e.g.*, National Public Opinion Survey, Question 4 (2016) (Exh. US-148).

[253] *See, e.g., US – Tuna II (Mexico) (Panel)*, paras. 7.88, 7.132, 7.137 (referring to the "fact that it is legally permissible to place the product on the market without using the designation that is regulated by the measure at issue").

[254] *See, e.g.*, "Dolphin Safe Statements from Retailers" (Exh. US-40) (Costco, Kroger, and Trader Joe's acknowledging that they are permitted to sell tuna product produced from setting on dolphins).

processors, distributors, and retailers – do not, in fact, purchase or sell Mexican tuna product that is not eligible to carry the dolphin safe label under the current measure.

161. From this starting point, the parties make very different arguments. Mexico claims that in the case where the measure is withdrawn, the importer, distributors, and retailers that do not currently sell Mexican tuna product will "immediately" change their long-standing purchasing policies and beginning selling this tuna product (which the U.S. consumer, in Mexico's view, has a strong, unmet demand for).[255] Mexico puts forward *zero* evidence to support its argument. In contrast, the United States has put forward significant evidence regarding U.S. consumer preferences and the purchasing policies of individual companies, including retailers, that indicate that the withdrawal of the measure will not cause a dramatic shift in the purchasing decisions among the companies that participate in the major supply chains for tuna product sold in the United States. Specifically, the United States has made the *very conservative* estimate that retailers accounting for 66 percent of retail market share and 46.6 percent of total consumption will not begin selling Mexican tuna product *as a result of* the measure being withdrawn.[256]

162. It is in this context that the United States included the Walmart letter in Exhibit US-40. According to the letter, Walmart does not appear to have a "dolphin safe" policy, but has a sustainability standard that tuna product must meet in order to be eligible to be sold by Walmart. Whether Walmart actually decides to sell a particular brand of tuna product in its U.S. stores will depend, among other things, on the demand for that particular product perceived by Walmart.[257] The lesson of this letter is that either: 1) Walmart would be willing to sell Mexican tuna product if such tuna product, sometime in the future, is authorized to carry the MSC label and Walmart identifies sufficient customer demand for Mexican tuna product; or 2) Walmart would not be willing to sell Mexican tuna product, either because such tuna product is not, ultimately, granted authority to carry the MSC label or because Walmart considers that there is not sufficient consumer demand for canned yellowfin produced from setting on dolphins (given the availability

[255] Mexico's Written Submission, para. 76 ("Under Mexico's first counterfactual scenario and the United States' alternative counterfactual, the market misconceptions regarding unregulated fishing methods and AIDCP-compliant fishing methods would be *immediately* corrected.") (emphasis added); *id.* para. 10 ("Under the United States' counterfactual, the market will be provided with information to distinguish between tuna products containing tuna caught in an AIDCP-certified manner and tuna caught in an unregulated manner. The availability of this information will *immediately* reshape the U.S. tuna product market because retailers and consumers will be made aware of the fundamental difference between the two types of fishing practices.") (emphasis added); Mexico's Opening Statement, para. 32 ("More specifically, in the case of canned yellowfin tuna, Mexican products would become available in major retail chains while currently it is mostly available in Hispanic stores."); *see also* Mexico's Response to the Arbitrator's Question 22, para. 24 ("For the purpose of assessing the level of the nullification or impairment caused by the tuna measure, what matters is the sensitivity of the principal distribution channels in the U.S. market (i.e., retailers and distributors) to dolphin-safe tuna in the light of the regulated definition of 'dolphin safe' …").

[256] U.S. Written Submission, para. 35.

[257] "Dolphin Safe Statements from Retailers" (Exh. US-40) (Walmart stating that it "will evaluate any changes in the tuna retail industry's fishing practices *as well as our customer's demand* and adjust our assortment accordingly) (emphasis added).

of canned albacore, skipjack, and yellowfin products that are produced without setting on dolphins (with and without the MSC label)).[258]

163. In either case, two things are clear. First, it is *wholly Walmart's decision* as to whether to begin selling Mexican tuna product sometime in the future (the United States understands that Walmart does not currently sell such product in the United States), and second that Walmart will make that decision *without regard* to whether the measure is in existence or not.

164. As to the Arbitrator's specific question regarding its "assessment of the overall willingness of the U.S. retailers to sell tuna products obtained from tuna caught by setting on dolphins," we would note that Walmart is just one company, and appears to have taken a position that is markedly different from other companies, both large and small.[259] To be sure, many companies that sell seafood products have sustainability standards, but they also maintain "dolphin safe" standards, which prohibit the production, selling, or purchase of tuna caught by setting on dolphins as well.[260] In this regard, there is no evidence that Walmart's corporate decision is indicative of a trend of U.S. retailer's willingness to purchase tuna product produced from setting on dolphins if, in fact, Mexican tuna product qualifies for the MSC label (at some uncertain date in the future).

165. Of course, if the Arbitrator wants to assess "the overall willingness" of U.S. retailers in this regard, the United States would suggest that the many retailers listed in Exhibit US-40, and the many companies that produce and distribute tuna product to U.S. retailers that have committed to EII not to produce, hold, or sell tuna product produced from setting on dolphins, are more representative of U.S. retailers overall than the corporate policy of a single company. In this regard, the United States observes that Exhibit US-35 lists 13 U.S. processing and fishing companies that have made this commitment.[261] And Exhibit US-37 lists 53 U.S. importers, distributors, brokers, retailers, and agents that have made this same commitment.[262] This, of

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[258] As noted at the Arbitrator's meeting, there are over 90 brands of canned tuna authorized to carry the MSC label that are currently sold in the United States. None of the tuna product sold by these MSC brands are produced from setting on dolphins. *See* "MSC Certified Canned Tuna Brands Sold in the United States" (Exh. US-177).

[259] To name but one example, Exhibit US-40 includes a statement from Target, a chief competitor of Walmart. As of May 2014, Target had 1,789 retail stores in the United States. *See* https://www.reference.com/business-finance/many-target-stores-united-states-bf1c3430513c4954#.

[260] *See, e.g.*, Bumble Bee, which maintains policies with regard to both points. *See* http://www.bumblebee.com/sustainability/; http://www.bumblebee.com/faqs/ (discussing dolphin safe policy).

[261] *See* EII, Approved Dolphin-Safe Tuna Processing Companies & Fishing Companies (Dec. 2015) (Exh. US-35) (listing the following U.S. or American Samoa companies: Tri Marine Samoa, Inc., Samoa Tuna Processors, Inc., Samoa Fishing Management, Inc., Starkist Seafoods (Dong Won), American Tuna Boat Association, Oregon Seafoods Processing and Packaging, Best Fish Company, American Albacore Fishing Association, Western Fishboat Owners Association, Wild Planet Foods, Inc., StarKist Seafood Company (Dong Won), Chicken of the Sea (ThaiUnion Int.), Bumble Bee Seafoods Inc.).

[262] *See* EII, Approved Dolphin-Safe Importers, Distributors, Brokers, Retailers, Agents (Dec. 2015) (Exh. US-37) (listing the following U.S. companies: Da Yang Seafood, Monaco Foods, Inc., SafeCatch, Inc., Anova Foods, LLC, American Roland Food Corp., Sea Delight, LLC, Blue Ocean Seafood Company, LLC, Culinary Brands, Inc., Super Fish, Inc., Oregon Seafoods Processing and Packaging, Pacific Seafood Group, Inc., Contessa

course, is in addition to the dozens, if not hundreds, of foreign companies that produce or distribute tuna product for the U.S. market that have made the same commitment to EII.[263]

166. Moreover, in making any such generalized assessment, one should examine U.S. consumer demand for tuna product produced without setting on dolphins compared to tuna product produced from setting on dolphins. As the Walmart letter (and others) make clear, a key factor driving a retailer's decision as to whether to offer a particular product for sale is whether the retailer thinks that its customers want to purchase such a product.[264] In this regard, the recently completed nation-wide survey provided in Exhibit US-148, where 74 percent of U.S. consumers of canned tuna stated that they would prefer tuna product not caught by setting on dolphins compared to only 8 percent that want to purchase tuna caught by setting on dolphins, merely confirms the abundance of evidence already on the record that there is very limited demand for Mexico's canned yellowfin products.[265]

e. *To Mexico*: If the Arbitrator were to agree with the United States' assertion in this regard, please explain how Mexico's model could be modified to reflect any such adjustment? Please provide the programme file.

147. Is there a reason to think that US retailers would not sell tuna products produced from tuna caught by setting on dolphins even if consumers were willing to purchase

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Premium Foods, Inc., Food Import Inc., West Island Seafood, Inc., Rema Foods, Inc., International Seafood Brokers, Inc., Best Fish Company, Orca Bay Seafoods, Inc., Resers Fine Foods, Inc., American Albacore Fishing Association, Western Fishboat Owners Association, MW Polar Foods, Inc., Otis McAllister, Inc. (La Sirena Brand), Ottogi American, Inc., A&P Stores, Inc., Albertson's, Inc., Alliant Foodservice, Inc., Atalanta Corp., Berns & Koppstein, Bumble Bee Seafoods, Camerican, Chicken of the Sea (Thai-Union), Compass Group-Mitsui, Crown Prince Natural Tuna, Dave's Gourmet Albacore, Food Lion Stores, Inc., Kraft General Foods, Inc., Marquez Bros.: El Mexicano, Mitsubishi International Corporation, Mitsui Foods, Inc., Natural Value Tuna, Safcol USA, Inc., JFE Shoji Trade America Inc. (formerly Kawasho International, Owner, of Geisha Brand), Publix Supermarkets, Inc., Purcell International, Safeway Stores, Inc., Santini Foods, (formerly Humble Whole Foods), Star Kist (Dong Won), Tri Marine International, Integra Trading & Consulting, Inc., Schreiber Foods International, Inc., United Natural Brands (Natural Sea Tuna), Wild Planet/Carvalho Fishing). Given that some companies operate in more than one segment of the supply chain, there is some overlap between the two lists.

[263] As discussed at paragraph 32 of the U.S. written submission, 159 processing and fishing companies in 51 countries and territories have committed to EII only to produce, hold or sell tuna product that meets EII's definition of "dolphin safe." *See* EII, Approved Dolphin-Safe Tuna Processing Companies & Fishing Companies (Dec. 2015) (Exh. US-35). All major exporting countries are represented, including Ecuador (18 companies), Indonesia (45 companies), Philippines (54 companies), Thailand (43 companies), and Vietnam (16 companies). Similarly, 417 importers, distributors, brokers, retailers, and agents in 48 countries have made the same commitment. *See* EII, Approved Dolphin-Safe Importers, Distributors, Brokers, Retailers, Agents (Dec. 2015) (Exh. US-37). Again, all major exporting countries are represented.

[264] *See* "Dolphin Safe Statements from Retailers" (Exh. US-40) (Walmart stating that it "will evaluate any changes in the tuna retail industry's fishing practices *as well as our customer's demand* and adjust our assortment accordingly) (emphasis added); *id.* (letters from Costco, Kroger, Target, and Whole Foods, all of which reference the preference of their respective customers as being an important factor in their individual decision not to sell tuna product produced from setting on dolphins).

[265] *See* U.S. Written Submission, paras. 17-38.

such products, for instance because of potential reaction from NGOs in case the Tuna Measure were withdrawn?

167. The United States would observe that scenario described in this question does not accurately depict the U.S. market. The evidence establishes that U.S. consumers do not prefer canned yellowfin products produced from setting on dolphins over other products, and, as such, that there is very limited demand for Mexican tuna product in the United States. This is true today and would also be true in a scenario where the measure was withdrawn.

168. It is clear that NGOs have been opinion leaders on the dolphin safe issue and have reinforced U.S. consumer preferences in this regard. However, the influence of these NGOs derives from their success in mirroring or shaping public opinion. Any NGO campaign can only be successful in affecting the behavior of private companies – as EII's decades long campaign has undoubtedly been – where the campaign is accurately representing the concern of the customers of those companies.[266] In other words, the "big three" companies did not dramatically alter their respective supply chains in April 1990 simply because one NGO asked them to. Rather, those companies felt compelled to do so because they perceived that the consumers of canned tuna no longer wanted to purchase their product now that they understood how that tuna product was produced.[267] The same is true for the over 500 companies that have, to date, made the same commitment to EII in the years since the big three made their commitments.[268]

169. In this regard, we would note, again, the unreasonableness of Mexico's position that its products are being blocked from the U.S. market by the obstinacy of the importers, distributors, and retailers, but that these companies will "immediately" change their long-standing purchasing policies once the measure is withdrawn.[269] First, these companies understand their customers, and if they thought that their customers wanted to purchase a particular brand of tuna product they would very likely offer that tuna product for sale. The fact that they do not, and in many

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[266] *See* U.S. Response to Arbitrator's Question 52, para. 16.

[267] *See* U.S. Response to Arbitrator's Question 54, para. 39; *see also* Sahagun, "Protests Urge Tuna Boycott over Killing of Dolphins" (Exh. US-100); Manning, "Concerned Students Are Tuning out Tuna" (Exh. US-101) (describing how students in Colorado and Connecticut school districts convinced the board of education to remove tuna from the school lunch menu due to concerns over dolphin deaths); Javna, "One of the Most Impressive Environmental Victories of 1990…" (Exh. US-106) (describing the boycott, led by Earth Island Institute, in which "millions of consumers boycotted canned tuna that had been caught in boats using purse seine nets" that "trap dolphins along with fish").

[268] The same point can, of course, also be true in the legislative sphere. *See* U.S. Response to Orig. Panel Question 40, paras. 97-100 (citing Statement of Rep. Barbara Boxer before the H. Rep., 136 Cong. Rec. H11878-02, 101st Cong. (Oct. 23, 1990) (Exh. US-24) and quoting then-Representative Boxer, the sponsor of the DPCIA, stating: "Without the letters and phone calls of countless consumers and schoolchildren from across the United States, we would not have gained 183 co-sponsors of the [DPCIA].").

[269] Mexico's Written Submission, para. 10 ("Under the United States' counterfactual, the market will be provided with information to distinguish between tuna products containing tuna caught in an AIDCP-certified manner and tuna caught in an unregulated manner. The availability of this information will *immediately* reshape the U.S. tuna product market because retailers and consumers will be made aware of the fundamental difference between the two types of fishing practices.") (emphasis added); *see also id.* para. 76; Mexico's Response to the Arbitrator's Question 22, para. 24; Mexico's Opening Statement, para. 32.

cases have committed to EII (or generally) that they will not, is strong evidence that the consumer preferences reflected in the recently completed national opinion poll presented in Exhibit US-148 are correct. Second, these companies are, by and large, sophisticated commercial entities that sell a wide range of seafood products and are deeply immersed in all the environmental challenges of producing seafood for sale, including bycatch issues, and how different fishing methods intersect with that issue. Mexico's claim that these sophisticated companies will suddenly become enlightened as to the "truth" about setting on dolphins – as Mexico sees it – once the measure is withdrawn is simply wrong.[270]

148. The Arbitrator notes the United States' argument, in paragraph 58 of its opening oral statement, that its approach uses Mexico's share of US imports of all tuna in the period lasting from 1986 to 1989. This is a three-year period following a seven-year embargo, lasting between 1980 and 1986. The United States applies this share to its average imports in 2013-2015. Could the parties explain whether it is likely that Mexico's share of US imports of all tuna after the removal of the Tuna Measure is the same as its share after an embargo would be the same?

170. The United States considers that all the evidence on the record suggests that it is likely that Mexico's share of U.S. imports of all tuna product after the removal of the U.S. measure would be similar to its share of all tuna imports between 1987 to 1989, adjusting for the minimum portion of the market that would be unaffected by the removal of the measure. The reason for this is that all the available evidence suggests that Mexico's share of U.S. tuna imports in 1987-1989 is representative of Mexico's share of U.S. tuna imports during a period of unrestricted market access, notwithstanding the previous embargo.

171. First, there is no reason to believe that any after-effects of the embargo limited Mexico's market penetration during the 1987-1989 period. Mexico's share of U.S. tuna imports peaked in 1987, declined in 1988, and rose again in 1989.[271] This is not suggestive of any period of recovery from a restriction or of ramping up connections in the U.S. market. Further, at that time, Mexico was exporting primarily frozen tuna and tuna loins to U.S. canneries for canning.[272] Consequently, developing relationships within the United States would not have been an issue, as Mexico's tuna industry already had business relationships with U.S. canneries, as shown by U.S. cannery purchases from Mexico prior to 1980.

172. Second, Mexico's share of U.S. tuna imports during this period was essentially the same as its share during the other period when Mexico's exports of tuna to the United States were unrestricted.[273] This suggests that Mexico's share of U.S. imports in 1987-1989 simply

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[270] *See* Mexico's Written Submission, paras. 10, 76.

[271] *See* U.S. Response to Arbitrator's Question 56, para. 50; "Historical U.S. Imports of All Tuna" (Exh. US-79).

[272] *See supra* U.S. Response to Arbitrator's Question 132; "U.S. Imports of Tuna Product from the World and from Mexico" (Exh. US-62).

[273] *See* U.S. Response to Arbitrator's Question 56, para. 52; "Historical U.S. Imports of All Tuna" (Exh. US-79).

represents the Mexican tuna industry's level of competitiveness in an unrestricted U.S. market. As the United States has explained previously, there have been no changes in the size or competitiveness of the Mexican tuna industry that would suggest it would be dramatically more competitive in the U.S. market than it was in 1987-1989.[274]

173. Third, as discussed previously, Mexico's share of all U.S. tuna imports during 1987-1989 is consistent with Mexico's share of U.S. imports of other major seafood products then and today.[275] This further suggests that the overall level of competitiveness of Mexico's seafood industries has not changed substantially since 1987-1989 and that 4-6 percent of imports is a reasonable estimate of Mexico's likely share under unrestricted conditions. The comparison between sardines and tuna product is particularly relevant because: (1) the same companies (in Mexico, Asia, and elsewhere) tend to process both products; and, (2) certain processed sardines are subject to a 20 percent MFN tariff, while Mexican products have no tariff.[276] Thus, the fact that Mexico's share of U.S. sardine imports today is not significantly different than it was in 1987-1989 and that it is roughly 3-5 percent, by volume, strongly suggests that using Mexico's share of tuna imports in 1987-1989 as a guideline for its share today is reasonable.[277]

174. Fourth, the U.S. tuna product market has changed relatively little over the past 25 years, remaining remarkably stable in terms of volume and the major exporters to the United States.[278] Of the top sources of U.S. imports of tuna in airtight containers (a reasonably good proxy for tuna product because it covers canned tuna and tuna in pouches and in jars) for 1987-1989, five of the top ten and three of the top five are the same today.[279] The most significant change was the emergence of Vietnam and China, which account for 9 and 8 percent of imports for 2013-2015. Certainly, no changes close to the scenario envisioned by Mexico have occurred. Further, Asian producers and Ecuador have only become more dominant over the past 25 years, so it is not unlikely that using the 1987-1989 figure actually over-estimates the competitiveness of Mexico's tuna industry today.[280]

175. Thus, as a general matter, Mexico's share of U.S. tuna imports during 1987-1989 is a reasonable estimate of what its share of U.S. tuna product imports would be today, in the absence

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[274] *See supra* U.S. Response to Arbitrator's Question 132; "Mexican Purse Seine Catches of Tuna" (Exh. US-152) (showing that the Mexican purse seine fleet's catch of all tuna and of yellowfin has been essentially consistent since 1987-1989); U.S. Opening Statements, paras. 61-66; U.S. Response to Arbitrator's Question 56, paras. 50-60.

[275] *See* U.S. Response to Arbitrator's Question 56, paras. 54-57; "Mexico's Historical Market Share of Top Seafood Products" (Exh. US-125).

[276] *See* Harmonized Tariff Schedule of the United States, Supplement 1, Ch. 16, at 8 (2016) (Exh. US-179); "Examples of Companies Producing Canned Tuna and Canned Sardines" (Exh. US-179).

[277] *See* "U.S. Sardine Imports Since 1987" (Exh. US-180).

[278] *See* U.S. Opening Statement, para. 66.

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

[280] *See* U.S. Response to Arbitrator's Question 54, paras. 33-37; U.S. Response to Arbitrator's Question 55, para. 48.

of any measure or other factor limiting Mexico's market access. This is not because the dolphin safe labeling measure is at all similar to an embargo but, rather because the absence of any restrictive measure would be similar between the two periods. The one additional factor that must be accounted for, however, is U.S. consumer preferences concerning setting on dolphins, which is why the United States adjusted the estimate based on Mexico's share of U.S. imports during 1987-1989 to account for the retailers that have announced they would not carry tuna caught by setting on dolphins regardless of the measure or would make purchasing decisions entirely independently from the U.S. measure.

149. Is there any market other than Mexico and the United States where Mexico is a competitive supplier of high-end canned yellowfin tuna?

176. As explained above in response to Question 142 and more fully in response to Question 151 below, Mexico does not sell high-end tuna products in the U.S. market.[281] The Mexican tuna products sold in the United States are mainly chunk light yellowfin in water or vegetable oil.[282] While there is no rigid line between high-end yellowfin products and other products, generally high-end canned yellowfin products are solid or fillet pack products, are packed in olive oil, and, at the highest end, tend to be in jars not in cans.[283] Thus, Mexico is *not* a competitive supplier of high-end canned yellowfin in the United States.

177. As also explained further in response to Question 151, it is unclear whether, and to what extent, Mexican companies produce and sell higher-end canned yellowfin products in Mexico.[284] It appears from Exhibit MEX-29 that one of the two major Mexican companies, Tuny, does not produce any yellowfin products that would be considered high-end.[285] It is not clear whether, and to what extent, Dolores produces high-end products or how widely these products are consumed in Mexico.[286]

178. The second largest market for Mexican canned tuna products is Costa Rica, as shown by Exhibit US-117.[287] Mexican exports of prepared tuna product to the United States and Costa Rica accounted for over 98 percent of all Mexican exports of canned and loin tuna in 2014 and over 97 percent in 2015. The average price of Mexican canned tuna imported into Costa Rica

[281] *See supra* U.S. Response to Arbitrator's Question 142; *infra* U.S. Response to Arbitrator's Question 151.

[282] *See* "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-136) (showing that all the Dolores products sold during the covered period were chunk style products).

[283] *See supra* U.S. Response to Arbitrator's Question No. 143

[284] *See infra* U.S. Response to Arbitrator's Question No. 151.

[285] *See* Pinsa and Tuny Webpages (Exh. MEX-29) (seeming to show that all the Tuny products displayed are chunk style packs).

[286] *See* Pinsa and Tuny Webpages (Exh. MEX-29) (showing that all the Dolores products that may be solid packs ("lomo" products) are either in water or in "oil" (*i.e.*, vegetable oil) and that there are no products in jars).

[287] *See* "Mexico's Exports of Tuna and Tuna Product" (Exh. US-117) (showing that 96 percent of all Mexico's exports of prepared tuna were to the United States and Costa Rica).

was $3.63 per kg. in 2014 and $3.46 per kg. in 2015.[288] This is the customs value (or the price paid to the exporter) and, as such, is comparable to the customs price of Mexican canned tuna imports into the United States of $4.00 per kg. in 2014 and $3.48 per kg. in 2015.[289] This suggests that the canned tuna exported from Mexico to Costa Rica is comparable to that exported to the United States, *i.e.*, lower-end chunk yellowfin in water or vegetable oil, suggesting that Mexico is *not* a competitive supplier of high-end canned yellowfin in Costa Rica.[290]

179. Finally, it is unclear what other markets Mexico is competitive in for any tuna product, whether high end or low end. As noted previously, Mexico appears to export very little canned tuna to the EU, for example, even though it enjoys the same access as many of the EU's top exporters (*e.g.*, Thailand). This failure to compete in the EU is particularly notable given 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.[291]

150. The Arbitrator notes Mexico's statement in its reply to the Arbitrator Question No. 42, that "yellowfin tuna accounts for only about 1.2 percent of total U.S. canned tuna consumption (Exhibit US-17)". The Arbitrator also notes that in Exhibit US-10 [BCI], it is stated that [[

]]. Could the parties please explain how these two figures can be reconciled?

180. Exhibit US-10 and Exhibit MEX-15 provide slightly different figures because each describes the canned tuna purchases that occurred during the period covered by the particular dataset based on the information of the retailers that participated in that market research firm's studies.

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[288] *See* "Costa Rica Imports of Canned Tuna" (Exh. US-181).

[289] *See* Pouliot 2016, at 6 (Exh. MEX-2) (for 2014 value); U.S. Response to Arbitrator's Question 67, para. 129 (for 2015 values).

[290] In this regard, we note that, as explained further in response to Question 157 below, Costa Rica *is* a competitive producer of high-end canned yellowfin products. In particular, the Tonnino and Neptuna brands are sold widely in the United States. *See infra* U.S. Response to Arbitrator's Question No. 157.

[291] *See* U.S. Response to the Arbitrator's Question 55, para. 48 (citing Exhibits US-113, 116, 117, and 119); *see also* U.S. Opening Statement, para. 34 (making the same point).

[292] "Yellowfin Market Review," at 2 (Exh. US-10) (BCI).

[293] "Yellowfin Market Review," at 2 (Exh. US-10) (BCI).

182. Exhibit MEX-15 presents data for the 52-week period ending October 24, 2015 (*i.e.*, for the last two months of 2014 and the first ten months of 2015) and was compiled by Nielsen, another leading U.S. market research firm, based on the data from retailers that participate with Nielsen.[294] Consequently, the figures Exhibit MEX-15 presents, including the fact that canned yellowfin accounted for 1.2 percent of all canned tuna sales, by volume, refer to sales during the covered period by firms that participate in Nielsen's market research studies.

183. Because [[ ]] and Nielsen may have somewhat different client companies and because the periods covered by the two exhibits is not identical, it is not surprising that the share of all canned tuna purchases represented by canned yellowfin differs [[ ]]. [[

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151. From the discussion that took place during the Arbitrator's meeting with the parties, the Arbitrator understands that only "large yellowfin", as opposed to "juvenile (small) yellowfin", can be used to produce the high-end canned yellowfin tuna that Mexico exports to the United States and consumes domestically in its counterfactual. Could the parties confirm on this understanding?

184. As the United States explained in response to the Arbitrator's Question 143 above, there is no rigid dividing line between "high-end" canned yellowfin products and other canned yellowfin products, but high-end yellowfin products tend to have some or all of the following attributes: (1) solid or fillet pack, (2) in olive oil, extra virgin olive oil, or spring water, and (3) in a jar or other non-can container.[298] Based on the available evidence from the U.S. market,

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[294] Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Oct. 24, 2015) (Exh. MEX-15).

[295] *See, e.g.*, U.S. Response to Arbitrator's Question 51, para. 1; U.S. Response to Arbitrator's Question 60, para. 82; U.S. Response to Arbitrator's Question 63, para. 101.

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]] Exhibit MEX-15 shows these percentages as 1.2, 29.4, and 69.4 percent. "52-Week Canned Tuna Sales, Summed by Type" (based on Exhibit MEX-15) (Exh. US-17).

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[298] *See supra* U.S. Response to Arbitrator's Question 143.

Mexico does not export any such high end canned yellowfin products to the United States.[299] Rather, Mexican tuna product sold on the U.S. market as either "yellowfin" or "lightmeat" appears to be chunk style products packed in water or vegetable oil.

185. With respect to consumption in Mexico, there is no evidence on the record as to what percent of the Mexico-produced tuna products consumed in Mexico are high-end canned yellowfin products. From the evidence on the record thus far, it appears that one of the two major Mexican tuna companies, Tuny, does not produce any products that would be considered high end on the U.S. market – *i.e.*, solid pack products or products in olive oil.[300] It is not clear whether, and, if so, to what extent, the Dolores products listed in Exhibit MEX-29 include solid products, but it does not appear that Dolores produces any products packed in olive oil or in jars.[301] The balance of consumption in Mexico between any high-end products produced and lower end chunk light-style products is also not clear.

186. With regard to what size of yellowfin can be used in high-end products, Mexico has not introduced any evidence substantiating its claim that only "large yellowfin" can be used in such packs or even explained what it meant by high-end in this context. It is therefore not possible to fully confirm or deny the accuracy of the claim. The available evidence establishes two general guidelines, however: (1) yellowfin weighing 10 kg. or more are considered in international frozen yellowfin markets to be prime quality and, therefore, would presumably be appropriate for any high-end pack; and, (2) how tuna companies pack fish varies across companies, and at least some companies may also use smaller yellowfin in gourmet, high end products.

187. With respect to the first guideline, the evidence on the record establishes that yellowfin over 10 kgs are considered premium for canning. Exhibit US-87, a FAO report, explained that "[m]ost of the commercial [yellowfin] catch is used for canning and fish over 10 kg. are considered prime raw material for this purpose."[302] Exhibit US-7, a FFA report, similarly found that EU canneries, large-scale producers of high-end yellowfin products, prefer to source "large-sized whole round fish (*i.e.*, yellowfin over 10 kg)."[303] In fact, as shown by Exhibit MEX-14, price hubs in the global canning industry tend to track the prices of yellowfin under 10 kg. and yellowfin over 10 kg. separately.[304] As shown by that exhibit, prices for smaller yellowfin are

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[299] *See* "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-135) (showing that all of the Mexican brand yellowing products sold in the United States during the covered period were chunk style packs in water or vegetable oil).

[300] *See* Pinsa and Tuny Webpages (Exh. MEX-29) (seeming to show that all the Tuny products displayed are chunk style packs).

[301] *See* Pinsa and Tuny Webpages (Exh. MEX-29) (showing that all the Dolores products that may be solid packs ("lomo" products) are either in water or in "oil" (*i.e.*, vegetable oil) and that there are no products in jars).

[302] James Joseph, FAO, Managing Fishing Capacity of the World Tuna Fleet, at 9 (2003) (Exh. US-87); *see alto* Atuna, "Tuna Species Guide," at 6 (Exh. MEX-6) (stating that when yellowfin "get[] larger than 10-15 kg. the meat tends to become slightly darker and fairly dryer" and that the "large size of the yellowfin makes it well fit for solid packaging in cans").

[303] FFA, Market and Industry Dynamics, at 29, 183, 193 (Exh. US-7).

[304] FAO, Recent Developments in the Tuna Industry, at 104 (Exh. MEX-14).

generally about halfway between the price of skipjack and of large yellowfin. Thus, this "prime" yellowfin over 10 kg. would presumably (barring defects in particular fish) be suitable for canning as a high-end yellowfin product.

188. However, Mexico was incorrect in stating at the Arbitrator's meeting that Mexican vessels produce "large" yellowfin because they set on dolphins while vessels that do not set on dolphins only produce small yellowfin. In fact, the main fishing method that produces this type of large yellowfin for the global tuna canning industry is purse seine fishing by unassociated sets (also called school sets). In an unassociated or school set, vessels look for and set directly on a school of tuna, including large yellowfin. Unassociated sets are used in all ocean areas in which tuna is fished.

189. Data from the relevant RFMOs all confirm that the average weight of yellowfin caught by unassociated sets in all ocean regions is above 10 kg. per fish in recent years. In 2015, for example, the average weight of the yellowfin tuna caught in the WCPO, the ETP, and the Indian Ocean was 18.9 kg., 13.9 kg., and 45.8 kg. per fish.[305] Dolphin sets in the ETP also tend to produce large yellowfin (the average weight per fish was 21.4 kg. in 2015).[306] Thus, there would appear to be no reason that yellowfin caught by unassociated sets would not be generally suitable for packing in premium products, such as solid pack products. Additionally, while FAD-caught yellowfin is, on average, smaller than yellowfin caught by unassociated sets,[307] as discussed below, such fish is also used in solid pack products.

190. With respect to the second guideline, the available evidence indicates that different tuna companies have different policies with respect to the size of fish that they will pack in a premium product (for example, in a solid pack can) and that at least some companies (and perhaps a majority) pack smaller fish in solid form as well, depending on their economic interest. It is not uncommon, for example, for canneries to pack fish larger than about [[ ]] in solid form.[308]

191. One company that packs fish smaller than 10 kg. in solid form is Wild Planet. Wild Planet purchases exclusively tuna between 4 and 11 kg. (9 to 25 pounds) to minimize the mercury content of their canned tuna products, but produces solid albacore products.[309] Wild Planet also produces solid skipjack products, and skipjack tend to be significantly smaller than

[305] *See* "Average Size of Yellowfin Caught in Different Ocean Areas" (Exh. US-182); *see also* Graham Pilling et al., WCPFC, "A Compendium of Fisheries Indicators for Tuna Stocks Not Assessed in 2016," at 27 (Aug. 2016) (Exh. US-183); IOTC, *Report of the 17th Session of the IOTC Working Party on Tropical Tunas*, at 80 (Oct. 2015) (Exh. US-184); ICCAT, Executive Summary of Report 2014-2015 (II), at 27 (Exh. US-185).

[306] *See* "Average Size of Yellowfin Caught in Different Ocean Areas" (Exh. US-182).

[307] *See* "Average Size of Yellowfin Caught in Different Ocean Areas" (Exh. US-182) (showing that average size for yellowfin caught by FAD sets in 2015 ranged from 2.4 kg. in the ETP to 6.7 kg. in the WCPO); Pilling et al. 2016, at 27 (Exh. US-183); IOTC, *Report of the 17th Session of the IOTC Working Party on Tropical Tunas*, at 80 (Oct. 2015) (Exh. US-184); ICCAT, Executive Summary of Report 2014-2015 (II), at 27 (Exh. US-185).

[308] *See* William Jacobson, Witness Statement (Nov. 8, 2016) (Exh. US-186) (BCI).

[309] *See* Wild Planet, FAQs (accessed Nov. 4, 2016) (Exh. US-187).

10 kg.[310] Thus, the company clearly finds it possible and profitable to produce solid pack products from tuna smaller than 10 kg. Other brands, including Wild Selections, Ocean Naturals, and StarKist, also produce solid skipjack products, suggesting, given the small size of skipjack, that they too use fish significantly smaller than 10 kg. to produce higher-end products.[311]

192. The available evidence suggests that major producers of high-end yellowfin products also pack fish smaller than 10 kg. in solid (*i.e.*, higher-end) products. Rio Mare, an Italian company and a major producer of high-end yellowfin products, produces only solid products, but sources yellowfin caught by FAD sets.[312] Rio Mare must, therefore, be canning some smaller yellowfin in solid pack products. Similarly, Spain is one of the largest country producers of high end canned yellowfin in the world,[313] but its fleet sets on FADs as much as on unassociated schools.[314] Thus, it is highly likely that Spanish companies also pack yellowfin caught by FADs in premium canned products.

152. Could parties provide information as to what is the share of consumption of canned yellowfin (overall and high-end) in markets other than the United States and Mexico, e.g. in the European Union? In particular, what is the share of yellowfin versus albacore in the high-end canned tuna market? What is the share of yellowfin catch in total catch of all tuna species?

193. With respect to the first part of the Arbitrator's question, a complete picture of overall EU consumption is not available for two main reasons. First, data are not available on the percentage of EU domestic production of canned tuna represented by yellowfin and albacore. Second, while it is possible to draw certain conclusions based on the import data of canned tuna and tuna loins (which are almost certainly processed into canned tuna in the EU, and thus

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[310] *See* Atuna, "Tuna Species Guide," at 2 (Exh. MEX-6).

[311] *See* Sustainable Seas, "Products and Online Shopping," (Exh. US-93) (showing a solid skipjack product); Wild Selections, "Products: Tuna," http://www.wildselections.ca/product/solid-light-skipjack-tuna-in-water/ (accessed Nov. 5, 2016) (Exh. US-188); Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Oct. 24, 2015) (Exh. MEX-15) (showing that StarKist sells a solid light tuna product in addition to its solid yellowfin tuna product); StarKist, "Products" (Exh. US-19) (same).

[312] *See* Greenpeace Canada, 2013 Tuna Sustainability Ranking (Exh. US-189).

[313] *See* "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-136) (showing numerous Spanish all-yellowfin brands being sold on the U.S. market, including products by Ortiz, Isabel, and Calvo); FFA, Market and Industry Dynamics, at 183-184 (Exh. US-7) (explaining that Spain is the major canned tuna producer in the EU and that, due to high labor costs, the preference of EU canneries is to process large yellowfin); "Yellowfin Tuna Capture Fisheries Production" (Exh. US-47) (showing that the Spanish fleet is the third largest global harvester of yellowfin, behind the fleets of Indonesia and the Philippines).

[314] *See* Monim J. Amande et al., "Precision in Bycatch Estimates: The Case of Tuna Purse Seine Fisheries in the Indian Ocean," ICES J. Mar. Sci., at 2-3 (2012) (Exh. US-190) (showing that half of the sets by Spanish and some French vessels on 115 trip in the Indian between 2003 and 2009 were FAD sets and half were unassociated sets); Monim J. Amande et al., "Bycatch and Discards of the European Purse Sine Tuna Fishery in the Atlantic Ocean: Estimation and Characteristics for 2008 and 2009," 66 ICCAT Collect. Vol. Sci. Papers 2113, 2114-218 (2011) (Exh. US-191) (showing similar set composition for the Spanish purse seine fleet in the Atlantic).

relevant for purposes of EU consumption),[315] this data is broken down by tuna species but not further not broken out into high-end and low-end yellowfin or albacore products.

194. In 2015, the European Union imported 363,522 mt. of canned tuna. Canned yellowfin accounted for 21 percent of these imports (76,604 mt).[316] Canned skipjack accounted for 249,853 mt., 69 percent of the total.[317] The EU does not break out albacore from all prepared tuna in its import statistics, but it is likely that much or all of the "other" canned tuna imports – 37,065 mt., 10 percent of the total – were canned albacore, as that is the only other tuna species that goes into a substantial amount of canned products.[318] Thus canned yellowfin and canned albacore imports were likely about 31 percent of all EU canned tuna imports, with 68 percent of that amount being yellowfin and about 32 percent being albacore.

195. With regard to loins, in 2015, the EU imported 54,719 mt. of yellowfin loins, 55,551 mt. of skipjack loins, and 11,846 mt. of other tuna loins (likely albacore).[319] Combining the loin imports with the canned tuna imports, EU imports of all yellowfin tuna products were 131,323 mt., 27 percent of all such imports.[320] Imports of canned albacore and albacore loins likely were about 48,911 mt., 10 percent of the total.[321] Accordingly, based on the available import data, albacore and yellowfin together likely represented approximately 37 percent of EU canned tuna and tuna loin imports, with yellowfin accounting for 73 percent of that total and albacore accounting for 27 percent of that total.

196. This balance between yellowfin and albacore is not surprising, as it is well established that consumers in some EU countries (notably Spain and Italy) have a distinct preference for high-end yellowfin products.[322] This is in contrast to preferences in other EU countries, including the United Kingdom and Germany, where lower-end, inexpensive products are more popular.[323] These markets are more similar to the United States, which is generally a low-end

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[315] *See* FFA, Market and Industry, at 29, 183, 193 (Exh. US-7).

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

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

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

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

[320] *See* "Prices of EU Imports of Tuna Products in 2015" (Exh. US-144). Imports of skipjack loins and canned skipjack amounted to 305,404 mt., 63 percent of all prepared tuna imports. *Id.*

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

[322] *See* Corey et al. 1990, at xv (Exh. US-113) ("During 1986-89, European imported canned tuna prices generally ranged from 2 percent to 9 percent higher than such prices in the U.S. market. The price differences can be attributed mainly to higher-value pack styles that the European market demands. Higher shares of solid-style and yellowfin packs go to the European market when compared with the U.S. market."); *id.* at 4-5 and 4-6 (stating that "Italian consumers overwhelmingly prefer yellowfin packed in olive oil"); FFA, Market and Industry Dynamics, at 249 (Exh. US-7) (noting that "in Italy and Spain demand is for 80gm cans of yellowfin in oil").

[323] *See* FAO, Recent Developments in the Tuna Industry, at 98 (Exh. MEX-14) (stating that "Northern European Countries (the United Kingdom and Germany) consumer low-priced skipjack products (in oil or brine) imported from Southeast Asia. Southern European countries (Italy and Spain) are both domestically processing and importing yellowfin-based products at higher prices."); FFA, Market and Industry Dynamics, at 249 (Exh. US-7)

market, except for the U.S. strong preference for albacore.[324] It should be noted, however, that, not all canned yellowfin or canned albacore products are high-end products,[325] and "high end" products (*e.g.*, solid pack products in olive oil) and "low-end" products (*e.g.*, chunk pack products in water or vegetable oil) are not broken out in the available import data.

197. With respect to the second part of the Arbitrator's question, as shown by Exhibits US-85 and US-86, yellowfin accounts for approximately 28 percent of the global tuna catch, accounting for 28 percent of the global catch in 2014 and over the ten year period ending in 2014.[326]

153. With reference to Figure 1 in Exhibit MEX-79, could the parties elaborate on what prices that Figure shows, and whether the increase in yellowfin prices shown in the Figure is compatible with a hypothetical restrictive effect of the Tuna Measure or with an independent increase in the price of fresh tuna (yellowfin or other species)?

198. Figure 1 in Exhibit MEX-79 shows the price of fresh and frozen tuna, by species, imported into the United States.[327] As discussed further below, for yellowfin, in the years since 2000 in particular, this price corresponds to the price of fresh yellowfin for retail consumption and has no relationship to the price of cannery grade yellowfin or, more generally, of canned yellowfin. Further, the figure does not show a marked increase in the price of yellowfin in the early or mid-1990s, as would be expected if the tuna measure had a restrictive effect on the supply of cannery-grade or canned yellowfin to the U.S. market, and thus refutes Mexico's interpretation of the U.S. measure.

199. With respect to the first part of the Arbitrator's question, Figure 1 shows the price of fresh and frozen tuna imported into the United States. It does not cover imports of tuna loins or tuna received by canneries in American Samoa. The last major cannery in the United States that processed fresh and frozen tuna closed in 2001.[328] The two major canneries remaining process exclusively tuna loins.[329] Consequently, beginning in 2001, there is essentially no relationship between the tuna covered by the exhibit and the cannery-grade tuna imported into the United

(noting that "the French market is for canned skipjack); Corey et al. 1990, at. 4-6 (Exh. US-113) (noting that the UK market is "for solid, oil-packed lightmeat tuna (mainly skipjack)" but that "in recent years, demand has shifted to chunk-style lightmeat packed in brine" due to health and price considerations); *id.* at 4-8 (noting that the German market "is the most price-conscious in the EC").

[324] *See, e.g.*, Corey et al. 1990, at xv (Exh. US-113).

[325] *See supra* U.S. Response to Arbitrator's Question 143.

[326] *See* WCPFC, *Yearbook – 2014*, at 134 (2015) (Exh. US-85); "Yellowfin Percent of Global Catch" (Exh. US-86).

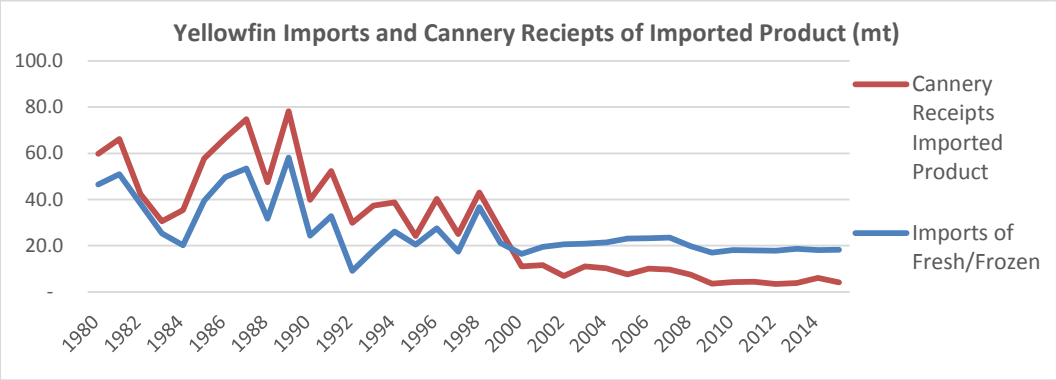
[327] *See* Exhibit MEX-79.

[328] *See* Melinda Fulmer, "It's the End of the Line for L.A. Harbor's Chicken of the Sea Canning Operation, *L.A. Times*, Aug. 2, 2001 (Exh. US-192).

[329] FFA, Market and Industry Dynamics, at 28 (Exh. US-7).

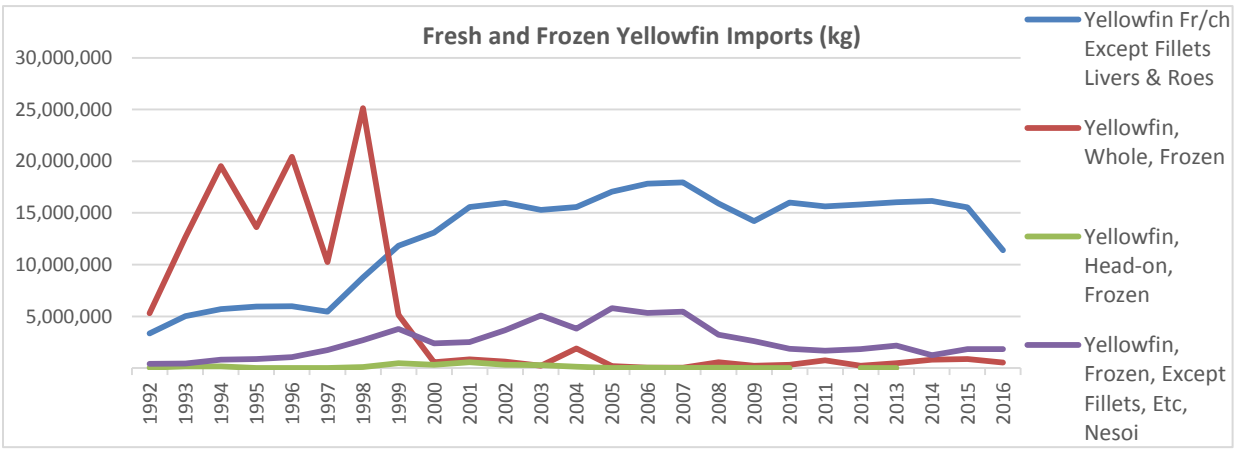
States. The only possible relationship would be tuna received by "micro-canneries," which operate primarily on the West Coast and process mainly albacore.[330]

200. For yellowfin in particular, after 2000, what Figure 1 is depicting is primarily the price of yellowfin for consumption as a fresh or frozen product, rather than consumption as a canned or pouched product. In the United States, yellowfin is distinctly more popular as a fresh or frozen product for consumption than as a canned or pouched product. Yellowfin accounts for nearly three quarters of U.S. fresh tuna imports over the past five years,[331] compared to only about 6 percent of cannery receipts and 1-2 percent of canned tuna consumption.[332] Since 2000, U.S. imports of fresh and frozen yellowfin greatly exceeded cannery receipts, as shown below.



Source: "U.S. Cannery Receipts and Imports of Fresh/Frozen Tuna, by Species" (Exh. US-196).

In fact, imports of fresh yellowfin greatly have exceeded imports of all types of frozen yellowfin (*i.e.*, both for consumption and cannery grade, if any) since 1999.



[330] *See, e.g.*, Beth Quinn, "Oregon's Premium Albacore Hooks a Growing Number of Enthusiasts Around the Country," *Associated Press*, Sept. 9, 2003 (Exh. US-193); "Dave's Gourmet Albacore" (Exh. US-194); Tom Banse, "First Microbreweries, Now Micro-Canneries Flourish," July 17, 2012 (Exh. US-195).

[331] *See* "Fresh Tuna Imports from the World and from Mexico" (Exh. US-118).

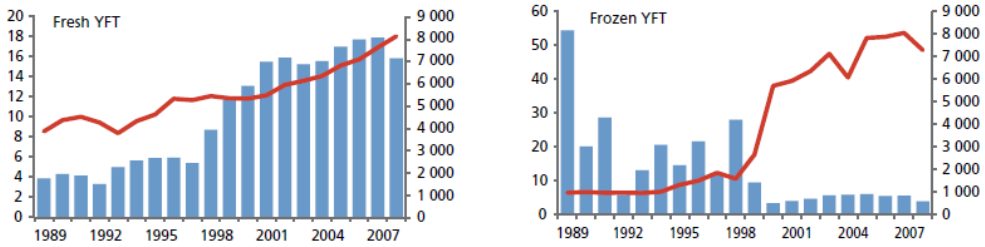
[332] *See* "U.S. Cannery Purchases of YF, Total and Share" (Exh. US-96); "52 Week Canned Tuna Sales, Summed by Type" (Exh. US-17); "Yellowfin Market Review," at 4 (2016) (Exh. US-10) (BCI).

Source: "U.S. Fresh and Frozen Yellowfin Tuna Imports" (Exh. US-197).

201. Thus, for yellowfin, the prices reported in Figure 1 of Exhibit MEX-79 reflect the changing composition of U.S. yellowfin imports, not an increase in the price of cannery grade yellowfin. Exhibit MEX-79 shows the price of yellowfin jumping from about $3 per kg. in the late 1990s to just under $6 per kg. in 2000 and continuing to climb thereafter. This nearly 100 percent increase occurred just as the last U.S. cannery that would have imported frozen cannery-grade yellowfin closed, *i.e.*, just as the prices depicted in Figure 1 lost any direct relationship to imports of tuna for canning. For the years 2000 onwards, what Figure 1 is showing is the price of fresh yellowfin for consumption, as well as a small amount of frozen yellowfin for retail consumption. It is not depicting yellowfin for canning or canned yellowfin imports.

202. This is important because, as the evidence on the record shows, the price of fresh and frozen yellowfin for consumption is separate from, and not an accurate proxy for, the price of cannery grade yellowfin. Exhibit MEX-14 describes the separate industries of fresh and frozen tuna for consumption, on the one hand, and the canning industry, on the other.[333] The report depicts the separate, and markedly different, tuna prices in these two markets. It shows, for example, that the price of fresh yellowfin and non-cannery grade frozen yellowfin in the United States rose from about $6,000 per mt. ($6 per kg) in 2000 to $7,000-$8,000 per mt. ($7-8 per kg) in 2007.[334] This is consistent with the prices in Figure 1 of Exhibit MEX-79 and with the price for sashimi-grade yellowfin paid in Japan.[335]

FIGURE 49
Fresh and frozen non-cannery grade tuna imports by the United States in quantity (columns, left axis) and declared value (lines, right axis)



203. As depicted below, however, Exhibit MEX-14 shows that global prices for cannery-grade frozen yellowfin are significantly lower than the price of fresh yellowfin and frozen yellowfin for consumption, ranging from $1-2 per kg. between 1995 and 2007.[336]

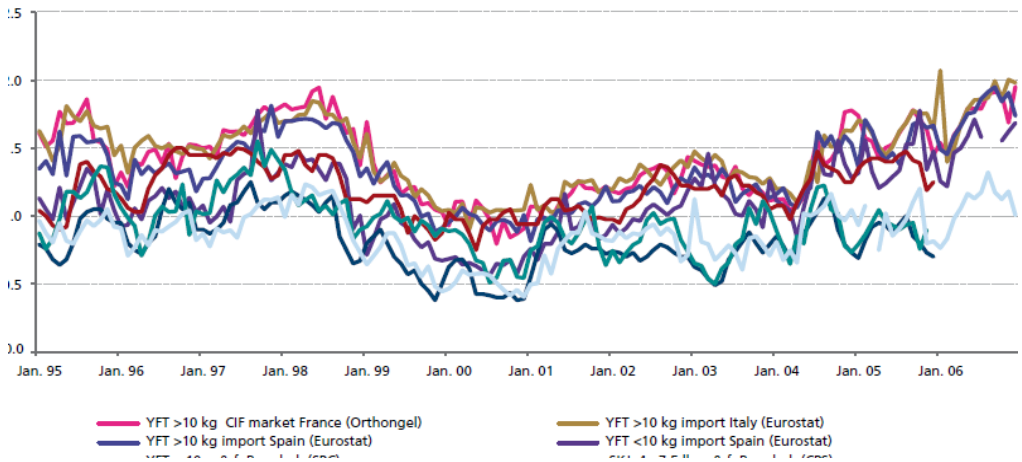
[333] FAO, Recent Developments in the Tuna Industry, at 75-83 (Exh. MEX-14) (describing the "fresh tuna industry" in Japan, Europe, and North America); *id.* at 85-111 (describing the global tuna canning industry).

[334] FAO, Recent Developments in the Tuna Industry, at 82 (Exh. MEX-14).

[335] *See* FAO, Recent Developments in the Tuna Industry, at 82 (Exh. MEX-14) (stating that the price of "fresh and frozen non-cannery trade" yellowfin "in 2008 rose to US$8,149 per tonne, similar to the average price for fresh yellowfin imports in Japan (US$8,368 per tonne)").

[336] FAO, Recent Developments in the Tuna Industry, at 104 (Exh. MEX-14).

FIGURE 65
Monthly prices (declared United States dollar value per kilogram) of frozen SKJ and YFT in Europe, Thailand and Japan, 1995–2006



204. Other evidence on the record confirms the separate nature of the fresh and frozen-for-consumption yellowfin markets and the cannery-grade market and the price difference between the two. For example, the FFA study excerpted in Exhibits US-7, US-89, and US-198 discusses the separate tuna canning and tuna sashimi industries, explaining, in particular, that different fleets produce for these two different markets. Industrial purse seiners and certain longline vessels targeting albacore produce for the canned market (along with some pole and line vessels).[337] Distant-water and offshore longline vessels targeting bigeye and yellowfin produce for the fresh/frozen market (along with handline vessels and some pole and line vessels).[338] Further, like Exhibit MEX-14, the FFA study finds that prices of cannery-grade frozen yellowfin ranged from about $1,000 to $2,000 per mt. (*i.e.*, $1 to $2 per kg) between 2000 and 2011,[339] while the fresh yellowfin price ranged from $5.50 to $8.00 per kg. in the United States during the same period and were similar in Japan.[340]

205. The FAO study excerpted as Exhibit US-137 presents the same picture. It shows prices of sashimi-grade yellowfin in Japan ranging from about 900 to 1,600 yen per kg. between 1990 and 2003 (about $9 to $16 per kg., assuming roughly 100 yen to the US dollar),[341] compared to

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[337] *See* FFA, Market and Industry Dynamics, at 53-136 (Exh. US-89) (describing the fleets that produce for the global canned tuna market); *id.* at 154-262 (describing the global canned tuna processors and the principal canned tuna markets).

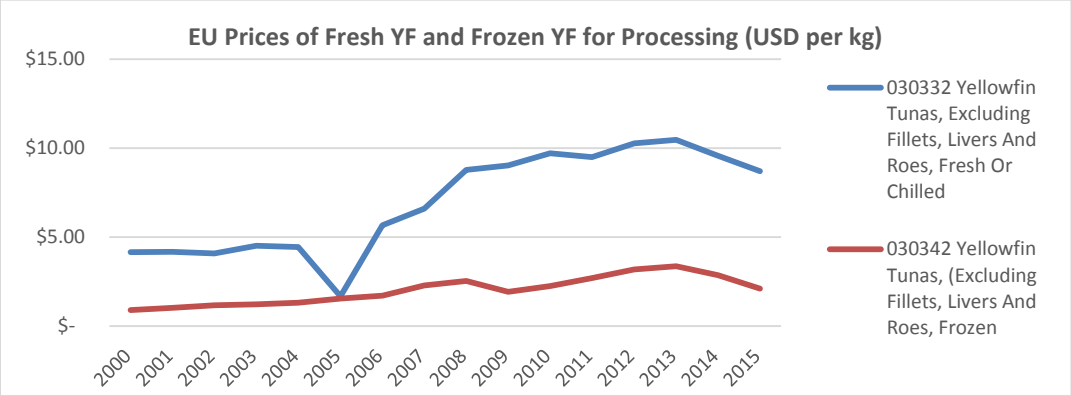
[338] *See* FFA, Market and Industry Dynamics, Part 2, at 263-301 (Exh. US-198) (describing the fleets that produce for the fresh/frozen market, namely "longline vessels," specifically "large-scale distant water vessels (supplying frozen tuna) and small-medium scale offshore vessels (supplying fresh tuna)").

[339] FFA, Market and Industry Dynamics, at 59 (Exh. US-7).

[340] FFA, Market and Industry Dynamics, at 314 (Exh. US-198) (for the United States) and 307 (for Japan, showing prices of 700-800 yen per kg. for sashimi grade fresh tuna, and assuming about 100 yen to the dollar, which has been approximately the conversion rate since the mid-1990s).

[341] *See* FAO, *Management of Tuna Fishing Capacity*, at 264 (Figure 22) (Exh. US-137).

prices for cannery grade yellowfin in Italy, Spain, and globally ranging from about $1 to about $2 per kg. during the same period.[342] And current data from the EU market also confirms the difference between the fresh and cannery grade yellowfin markets. As shown in the graph below, the EU price of fresh yellowfin is very similar to the U.S. price. However, the EU price of frozen yellowfin for further processing is much lower and is consistent with the global cannery-grade yellowfin price described in the other reports on the record. The price of EU imports of yellowfin loins (a higher value canning product than whole frozen yellowfin for canning) is also significantly below the fresh yellowfin price, at $5.55 per kg. in 2015.[343]



Source: "European Union Prices of Yellowfin Imports, by Type" (Exh. US-199) (data drawn from EuroStat).

206. The prices for albacore and skipjack shown in Figure 1 of Exhibit MEX-79 are also not necessarily representative of the price of albacore and skipjack for canning, although they are likely a much more accurate proxy than the yellowfin figures because skipjack and albacore are generally not consumed as fresh products.[344] The closure in 2001 of the last canner on the U.S. mainland that processed whole frozen tuna, and the exclusion of American Samoa from the data depicted in Figure 1, means that the albacore and skipjack imports being depicted are likely not actually for canning in major facilities. However, since they are mainly consumed as canned products, they may be destined for canning in micro-canneries or other further processing. The fact that the price of skipjack depicted in Figure 1 is similar to the EU price of skipjack loins suggests that this may be the case.[345]

207. Thus, for years prior to about 2000, Figure 1 overstates the prices of cannery-grade product by including fresh yellowfin. Beginning in 2000-2001, however, there is no relationship whatsoever between what Figure 1 shows and the price of cannery-grade yellowfin in the United States, as *nearly all* the imports covered by Figure 1 are of fresh yellowfin for consumption. All of the evidence on the record confirms that this is the case and refutes Mexico's assertion that the

[342] *See* FAO, *Management of Tuna Fishing Capacity*, at 264 (Figure 24A), 265 (Figures 24B and 24C), 266 (Figure 25) (Exh. US-137).

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

[344] *See* "Fresh Tuna Imports from the World and from Mexico" (Exh. US-118) (showing that fresh albacore accounted for 4 percent of U.S. imports of fresh tuna for 2011-2015 and fresh skipjack accounted for .1 percent).

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

prices are the same due to some hypothetical, undefined "arbitrage" between the fresh and cannery-grade yellowfin markets that would make the price of the two products similar in the United States. The two markets are distinct in terms of how the fish are caught, how they are stored, and how much they cost. There is no evidence that any "arbitrage" between the markets causes the prices to converge and, indeed, all the available evidence shows this is not the case.[346]

208. With respect to the second part of the Arbitrator's question, the behavior of yellowfin prices in the 1990s refutes Mexico's interpretation of the U.S. measure as a supply restriction. As Mexico admits, if the U.S. measure acted as a supply restriction on imports of yellowfin for canning, there would have been an increase in the price of yellowfin for canning, and of canned yellowfin, in the U.S. market in the early- and mid-1990s.[347] But this is not what happened. Rather, as the United States has explained previously, the price of yellowfin for canning fell because, although supply declined, "demand declined even more."[348] Figure 1 confirms this, showing that there was relatively little movement in the price of yellowfin imports in the early- and mid-1990s and that, during this period, the price of yellowfin was consistent with the prices of albacore and skipjack.[349]

209. In conclusion, Figure 1 in Exhibit MEX-79 shows the prices of U.S. fresh and frozen tuna imports. Prior to 2000, such prices overstated the prices for cannery-grade tuna, particularly yellowfin, since they included the price of fresh tuna and frozen tuna for consumption. Since 2000, these prices provide no information at all regarding the price of cannery grade imports, particularly yellowfin, as they reflect almost entirely the price of sashimi-grade yellowfin for consumption. Further, the behavior of yellowfin prices during the 1990s refutes Mexico's assertion that the U.S. measure operated as a supply restriction on cannery-grade yellowfin.

154. With reference to paragraphs 14 and 15 of Mexico's responses to the Arbitrator's questions, could the parties further elaborate on Mexico's assertion that producers of canned yellowfin tuna located in South East Asia and American Samoa are not impacted by the Tuna Measure?

210. In paragraphs 14-15 of its response to Question 18, and again at the Arbitrator's meeting,[350] Mexico claimed that the measure does not "impact" Asian and U.S. producers, and that the only producers so affected are the ones that source tuna from the ETP large purse seine

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[346] In fact, the only evidence of any overlap between the industries is that "longline vessels targeting albacore for canning . . . or other species such as sharks and swordfish, may also supply incidental bigeye and yellowfin catch to the fresh sashimi market." *See* FFA, Market and Industry Dynamics, at 264 (Exh. US-198). All reports on the record confirm, however, that vessels producing for the canned market (notably the major purse seine fleets) could not suddenly produce for the fresh market and that vessels producing for the fresh yellowfin market (notably the major longline fleets) do not sell to canneries, as it would be financially ruinous to do so.

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

[348] *See* U.S. Opening Statement, para. 17.

[349] *See* Exhibit MEX-79.

[350] *See* Mexico's Opening Statement, para. 48.

fishery. From this premise, Mexico claims that none of the Asian or U.S. producers of canned yellowfin would supply additional canned yellowfin to the United States,[351] meaning Mexico would be the "sole supplier" of canned yellowfin under the scenario Mexico envisions occurring where the measure is withdrawn – *i.e.*, that the market finally addresses decades of unmet U.S. consumer demand for canned yellowfin, with canned yellowfin suddenly increasing from 1-2 percent of consumption to 22 percent of consumption[352] while prices for canned yellowfin increase substantially (nearly doubling for Mexican canned yellowfin imports).[353]

211. The United States observes that the eligibility criteria of the measure apply to all fisheries equally – tuna product produced from setting on dolphins and where a dolphin has been killed or seriously injured – does not qualify for the label, no matter the type of fishing vessel involved, nor the location of the vessel.[354] What Mexico appears to be arguing, therefore, is that its Asian and U.S. competitors produce tuna product that is more likely to qualify for the dolphin safe label than Mexican tuna product. That is, of course, undoubtedly true. U.S. and Asian producers of canned tuna – of yellowfin or otherwise – produce tuna product from fishing methods that can be done without harming dolphins.[355] In contrast, Mexican vessels have chosen to rely to a unique degree on a fishing method that never produces tuna product that is dolphin safe.[356]

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[351] As noted in the U.S. response to Question 142, *supra*, U.S. producers of canned yellowfin operate canneries in both American Samoa and the continental United States.

[352] *See* Pouliot 2016, at 33 (Exh. MEX-2) (showing that, under the outcome generated by Mexico's model, canned yellowfin accounted for 63,568 mt. of the total 294,314 mt); "52 Week Canned Tuna Sales, Summed by Type" (Exh. US-17) (showing that purchases of canned yellowfin accounted for 1.2 percent by volume and 1.5 percent by value of all purchases of canned tuna).

[353] U.S. Opening Statement, para. 30 (observing that 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) (citing 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)).

[354] *See, e.g.*, *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 3.2 (stating that "tuna caught by 'setting on' dolphins is currently not eligible for a 'dolphin-safe' label in the United States, regardless of whether this fishing method is used inside or outside the [ETP]"); *US – Tuna II (Mexico) (AB)*, para. 172 (observing same).

[355] As discussed in the first compliance proceeding, over 99% of U.S. and imported tuna product marketed in the United States is produced from purse seine, longline, and pole and line. *See* U.S. First Written Submission to the 1st 21.5 Panel, paras. 123-128.

[356] *See* U.S. Response to the Arbitrator's Question 69, para. 139; U.S. First Written Submission to the 2d Article 21.5 Panel, paras. 33-47 (discussing the evidence as to why setting on dolphins is a fishing method that is inherently dangerous to dolphins); *see also US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.240-242 (agreeing with the United States that setting on dolphins differs from other fishing methods in both "quantitative and qualitative terms"); *id.* paras. 7.244-245 (agreeing with the United States that there is a "difference between fishing methods that cause harm to dolphins only incidentally and those, like setting on, that interact with dolphins 'in 100 per cent of dolphin sets,'" and that "[t]his distinction is especially important where, as the United States argues is the case with setting on – the particular nature of the interaction is itself 'inherently dangerous' to dolphins, even where no dolphin is seen to be killed or seriously injured, because it has unobservable deleterious effects on dolphins' physical and emotional well-being").

212. However, the fact that other countries do not produce anywhere close to as much non-dolphin safe canned tuna as Mexico does (even assuming that all fleets capture tuna in sets where a dolphin has been killed or seriously injured) is not a basis for concluding, as Mexico does, that these countries would supply no canned yellowfin to the U.S. market under the conditions assumed by Mexico's model. Mexico's assertion is that they would be unaffected by removal of the measure, but Mexico did not actually model removal of the measure. 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.[357] It is these changes in demand to which the tuna industries in other Members would respond.

213. For example, the import price generated by Mexico's model, $7.84 per kg., is significantly more than the price that the EU is currently paying for canned yellowfin. In 2015, the EU imported nearly 77,000 mt. of canned yellowfin at an average price of $5.31 per kg. ($6.15 per kg., adjusting for U.S. tariffs and charges).[358] If U.S. consumers were willing to pay $1.69 more per kg. for this entire volume of canned yellowfin than the current average price at which it is being exported to the EU, some or all of it would currently be being exported to the United States. And if U.S. consumers suddenly became willing to purchase the volume of canned yellowfin estimated by Mexico's model at the price generated by it, tuna industries in other Members would respond to this change in demand.

155. The parties have discussed four factors that may confound the comparison between 1987-1989 average market shares and 2013-2015 average market shares used in the United States' methodology: (i) voluntary export restraints; (ii) NAFTA; (iii) changes in market structure; and (iv) changes in the Mexican tuna industry. Could there be any other relevant factor to be considered in this regard?

214. There are no factors that confound the comparison between Mexico's market share of U.S. tuna imports from 1987-1989 and Mexico's market share of U.S. tuna product imports today.[359]

215. In particular, as the United States has explained: (1) the voluntary export restraints did not have any actual limiting effect on Mexico's exports to the United States;[360] (2) all available evidence concerning the effect of the NAFTA on other major seafood products and of FTAs on canned tuna imports suggest that the effect of the NAFTA would not be significant or long-lasting, in terms of Mexico's share of tuna product imports;[361] (3) the structure of the U.S. market has been remarkably consistent over the past 25 years;[362] and, (4) changes in the Mexican

[357] *See* U.S. Opening Statement, paras. 28-34.

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

[359] *See* U.S. Response to Arbitrator's Question 56, paras. 50-60; U.S. Opening Statements, paras. 60-67.

[360] U.S. Response to Arbitrator's Question 56, paras. 50-52; U.S. Opening Statements, para. 61.

[361] U.S. Response to Arbitrator's Question 56, paras. 53-59; U.S. Opening Statements, paras. 62-63.

[362] U.S. Opening Statements, paras. 64, 66.

tuna industry (from exporting loins to exporting canned products) do not suggest that Mexico's overall share of U.S. tuna product imports would be affected, rather they would simply export a higher-value product, since the overall capacity of Mexico's tuna industry is essentially unchanged from the late 1980s.[363]

156. Do the parties consider that any ETP country other than Mexico is impacted by the Tuna Measure? Please elaborate.

216. It appears that Mexico is claiming that those Members producing tuna product from the ETP large purse seine fishery are "impacted" by the measure only to the extent that they produce tuna product that does not qualify for the dolphin safe label. Where that occurs, the producer can choose to sell the tuna product in the United States without the advantage that the label provides or choose to sell the tuna product in a market where consumer preferences differ from those in the United States. In this regard, we would note that ETP large purse seine vessels kill virtually all of the dolphins when setting on dolphins, and kill almost no dolphins when setting on FADs or unassociated schools.[364] Consequently, under Mexico's argument, countries that set on dolphins are more "impacted" by the dolphin safe labeling measure than countries that do not.

217. While it is true that Mexico relies heavily on this "particularly harmful" fishing method,[365] Mexico is not the only nation operating in the ETP large purse seine fishery to do so. In 2014 to 2016, the vessels of seven different countries were granted dolphin mortality limits (DMLs).[366] For 2017, those same countries have been granted DMLs, plus one U.S. vessel.[367] In particular, Ecuador, a major producer of canned yellowfin, has 10 vessels that are authorized to set on dolphins in 2017.[368]

218. Mexico claims that not all of these countries are permitted to export tuna product produced from ETP large purse seine fishery under the "affirmative finding" process.[369] It is true that, given the unique danger of harvesting yellowfin by setting on dolphins in the ETP, the United States requires proof sufficient that NOAA can make an affirmative finding that the

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[363] U.S. Opening Statements, para. 65; *see supra* U.S. Response to Arbitrator's Question 132.

[364] *See* U.S. First Written Submission to the 2d Article 21.5 Panel, Table 1 at para. 41 (explaining that in the years 2005-2014, non-dolphin sets resulted in 18 observed mortalities compared the 10,067 observed mortalities resulting from dolphin sets, or 0.2% of the total).

[365] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.207 ("We see no merit in this allegation of error under Article 11 of the DSU by Mexico. Mexico has neither established that the Panel made a finding 'that the dolphin set method is more harmful to dolphins than other fishing methods when the dolphin set method is regulated under the AIDCP,' nor identified any problem with the statements made by the Panel regarding the Appellate Body's use of the phrase '*particularly harmful*' in connection with the fishing method of setting on dolphins.") (emphasis added).

[366] *See* IDCP, "Dolphin Mortality Limits 2012-2014" (Exh. US-200); IDCP, "Dolphin Mortality Limits Requested for 2015-2017" (Exh. US-160).

[367] *See* IDCP "IDCP Dolphin Mortality Limits Requested for 2015-2017" (Exh. US-160).

[368] *See* IDCP "IDCP Dolphin Mortality Limits Requested for 2015-2017" (Exh. US-160).

[369] *See* Mexico's Response to the Arbitrator's Question 18, para. 15.

particular country (and its large purse seine vessels) are acting consistently with the requirements of the AIDCP in order to export yellowfin tuna product to the United States (other types of tuna, including skipjack, are not impacted by this measure).[370] The affirmative finding measure does not relate to the labeling conditions at issue in this dispute.

219. Currently, five nations have affirmative findings to ship yellowfin tuna product produced from the ETP purse seine fishery: Ecuador, El Salvador, Guatemala, Mexico, and Spain.[371] Leaving Mexico aside, the ETP large purse seine fleets of Spain, Ecuador, and the United States have produced over 40,000 mt. of yellowfin per year from the ETP large purse seine fishery.[372] And, of course, both Ecuador and Spain produce canned yellowfin from fisheries other than the ETP large purse seine fishery. As such, it is incorrect for Mexico to argue that it is the only country that is "impacted" by the U.S. measure.

157. Which countries (besides Italy and Spain) exported high-end canned yellowfin tuna to the United States in 2014? Which countries would export such products to the United States if the Tuna Measure were withdrawn?

220. As the United States has explained, neither U.S. Customs nor NOAA break out canned yellowfin from import data on canned tuna. The U.S. Government also does not break out tuna by type of pack – indeed, we are aware of no government that does so. It is also important to note that, as the United States explained in response to the Arbitrator's Question 143, there is no rigid divide between "high-end canned yellowfin" and other types of canned yellowfin (or other types of canned tuna).[373] Rather, there are certain attributes that characterize high-end canned tuna products and the possession of these attributes makes a product tend toward being high-end or "gourmet."

221. Consequently, the best way to gain an understanding of which countries export high-end canned yellowfin to the U.S. market is to look at the high-end canned yellowfin products that are currently sold in the United States and work backward to attempt to determine where they were produced. Based on such an analysis, it seems that, at a minimum, the following countries produce high-end canned yellowfin products for the U.S. market:

- **Costa Rica**. Tonnino, a Costa Rican company, produces some of the leading gourmet yellowfin products sold in the United States. These include Tonnino yellowfin fillet in olive oil in a jar, Tonnino yellowfin fillet in olive oil with garlic in a jar, and Tonnino

[370] *See* 50 C.F.R. § 216.24(f)(8) (Exh. US-201). As part of this process, NOAA examines a number of factors, including that the nation is meeting the obligations of, and complying with, the provisions under the International Dolphin Conservation Program (IDCP), ensuring that its vessels are participating in the IDCP, and that it's the fleet is not exceeding its DMLs and per-stock, per-year dolphin mortality caps.

[371] *See* NOAA Fisheries, "Tuna/Dolphin Embargo Status Update" (accessed Nov. 2, 2016) (Exh. US-202).

[372] *See* "ETP Purse Seine Catches of Yellowfin, by Country" (Exh. US-151).

[373] *See supra* U.S. Response to Question 143.

yellowfin fillet in olive oil with jalapeno in a jar.[374] Neptuna, also a Costa Rican brand, produces yellowfin fillets in water and in olive oil in jars and tubs and yellowfin fillet in olive oil with flavoring products.[375]

- **Ecuador**. The Van Camp's products sold in the U.S. market are designated as products of Ecuador. These products include solid yellowfin in oil (3 oz., 3-pack), solid yellowfin 5 oz cans in water and in oil, and a yellowfin fillet in olive oil.[376] Additionally, StarKist has two canneries in Ecuador, so some or all of the StarKist solid yellowfin products may also be products of Ecuador.[377]

- **Thailand**. A number of high-end yellowfin products sold on the U.S. market are specifically designated as a product of Thailand. These include Crown Prince Solid Yellowfin in Extra Virgin Olive Oil,[378] Chicken of the Sea solid yellowfin in olive oil,[379] and Natural Value solid yellowfin in water.[380] This is almost certainly an incomplete picture, however, as some of the Bumble Bee products and many of the private label products may be canned in Thailand as well.[381]

- **United States**. One of the most popular all-yellowfin brands, Genova (owned by Chicken of the Sea), produces a solid yellowfin in olive oil product and solid yellowfin in

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[374] *See* Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Exh. MEX-15); "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-136); "What's Fabulous: Tonnino Tuna," www.thecitycook.com (Mar. 25, 2015) (Exh. US-203).

[375] *See* Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Exh. MEX-15); "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-136).

[376] *See* Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Exh. MEX-15); "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-136); *see also* http://www.vanecuador.com/#products.

[377] *See* Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Exh. MEX-15) (referring to StarKist – Solid Light Yellowfin in Extra Virgin Olive Oil); StarKist, Products (Exh. US-19) (showing a flavored and unflavored yellowfin products); FFA, Market and Industry Dynamics, at 174 (Exh. US-7) (showing that two of StarKist's major canning facilities are in Ecuador); *id.* at 198 (explaining that "US-based StarKist has two plants in Ecuador" and that "[t]he primary objective of the StarKist plants in Ecuador is to supply StarKist and private labels for the U.S. market").

[378] Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Exh. MEX-15); "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-136); Crown Prince, Yellowfin Tuna (Exh. US-90).

[379] Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Exh. MEX-15); "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-136); Yellowfin Market Review," at 13 (Exh. US-10) (BCI); FFA, Market and Industry Dynamics, at 174 (Exh. US-7) (showing that Thailand produces COSI cans and pouches for the U.S. market of all species).

[380] *See* "Yellowfin Market Review," at 13 (Exh. US-10) (BCI).

[381] *See* FFA, Market and Industry Dynamics, at 174 (Exh. US-7) (showing that Bumble Bee has management and supply contracts with several canneries in Thailand); *id.* at 160 (showing that Thai Union processes tuna for private labels in Thailand, that Sea Value does 100 percent private label production, and that Kingfisher Holdings, ltd. does 90 percent private label production including premium products for the U.S. and EU markets); "Yellowfin Market Review," at 8 (Exh. US-10) (BCI) [[
]].

olive oil with sea salt product at a cannery located in the continental United States, in Lyons Georgia.[382]

- **Vietnam**. Sustainable Seas brand, a product of Vietnam, produces premium canned yellowfin products in water with and without sea salt.[383] Some of the private label products and products of the big three companies may also be sourced from Vietnam.[384]

- **Spain and Italy**. As the question notes, Spain and Italy are major producers of high-end yellowfin products. The Spanish all-yellowfin products covered by Exhibit MEX-15 include products by Ortiz, Isabel, and Calvo, while the Italian products include all-yellowfin products by Callipo, Nostromo, Ora di Sicilia, Rio Mare, Flott, Maremi, and Calvi.[385] It is important to note, however, that these are Spanish and Italian brands, but the products may not be canned in Spain and Italy. Spain and Italy do have indigenous canning industries (Spain's is particularly substantial) but, like the big three companies in the United States, major Spanish and Italian companies also have contracts with canneries in Asia, Ecuador, and elsewhere.[386]

222. These are the countries that, as shown by the evidence on the record, definitely produce premium yellowfin products currently sold on the U.S. market. The list is likely incomplete, however, as it does not reflect where all the private label all-yellowfin products are produced, where certain brands brought in by importers (*e.g.*, American Roland and California Delight[387]) are produced, or where the Spanish and Italian brands are produced. The important point, however, is that tuna industries in numerous Members currently produce high-end yellowfin products and currently export them to the United States.

223. With respect to the second part of the Arbitrator's question, we would assume that all of the countries that currently export high-end yellowfin products to the United States would continue to do so if the U.S. dolphin safe labeling measure were withdrawn. Further, if U.S. demand for canned yellowfin were actually what Mexico assumes it to be in its model, such

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[382] *See* "Yellowfin Market Review," at 13 (Exh. US-10) (BCI); Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Exh. MEX-15); "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-136); Genova, Our Products (Exh. US-64) (showing two solid all-yellowfin products advertised as a product of the USA).

[383] *See* Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Exh. MEX-15); "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-136); Sustainable Seas, Products and Online Shopping (Exh. US-93) (showing two "premium" canned yellowfin products).

[384] *See, e.g.*, "Yellowfin Market Review," at 8 (Exh. US-10) (BCI) [[
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[385] *See* Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Exh. MEX-15); "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-136).

[386] *See* FFA, Market and Industry Dynamics, at 187 (Exh. US-7) (showing that the top 5 Spanish tuna companies have canneries in Spain, El Salvador, Brazil, and Ecuador); *id.* at 190 (showing that 3 of the top 4 non-Spanish processing firms in Europe are owned by foreign companies, including Thai Union and Mitsubishi).

[387] *See* "Yellowfin Market Review," at 13 (Exh. US-10) (BCI); Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Exh. MEX-15); "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-136).

countries – and the United States – would produce significantly more canned yellowfin for the U.S. market than they do now. This is demonstrated by the fact that the EU is currently importing over 76,000 mt. of canned yellowfin per year at prices that, adjusting for U.S. tariffs and charges, are significantly below the price generated by Mexico's model.[388]

224. There likely would be no substantial changes in the profile of countries exporting high-end yellowfin to the United States if the measure were withdrawn because, as the United States has explained elsewhere, consumer preferences concerning setting on dolphins would not change as a result of the legal change.[389] Consequently, we do not anticipate that countries will materially change either the fishing methods that they employ to produce tuna or their decisions about what product to export to what market under such a scenario. For the same reason, we would not expect – and Mexico puts forward no evidence that suggests – that Mexico would begin exporting high-end canned yellowfin to the United States where it does not do so today.[390]

158. The chart at the top of the second page in Exhibit US-96 shows that purchases of yellowfin tuna by United States' canneries declined after the introduction of the Tuna Measure. Was this due to the fact that the United States switched from canning yellowfin to selling fresh yellowfin? Could other factors explain this decline?

225. The decline in U.S. cannery receipts of yellowfin during the early 1990s – from 34 percent in the 1980s to 22 percent in the 1990s – was unrelated to U.S. consumption of fresh yellowfin. Rather, it was due to low and declining demand for canned yellowfin in the United States, combined with changes in the catch composition of the U.S. fleet following the decision by the "big three" tuna companies not to process tuna caught by setting on dolphins.

226. First, as explained above, there is no nexus between the supply of tuna to U.S. canneries and U.S. fresh tuna consumption because the supply chains for the global canning industry and for the fresh tuna market are essentially separate.[391] Major canneries, including U.S. canneries, generally receive tropical tunas (skipjack and yellowfin) caught by industrial purse seine vessels and longline-caught albacore.[392] Some pole and line and troll fisheries produce for canning, but

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[388] *See* "Prices of EU Imports of Tuna Product in 2015" (Exh. US-144) (showing that, in 2015, the EU imported 76,604 metric tons of canned yellowfin in vegetable oil and in other packs at average prices of $6.37 per kg. and $6.07, adjusting for U.S. tariffs and charges, which is significantly below the $7.84 per kg. estimated by Mexico model).

[389] *See* U.S. Written Submission, sec. III.B.1; U.S. Responses to the Arbitrator's Questions 52-54; National Public Opinion Survey (2016) (Exh. US-148).

[390] *See* "Yellowfin Market Review," at 13 (Exh. US-10) (BCI); Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Exh. MEX-15); "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-136) (all showing that the only canned yellowfin products from Mexico sold during the covered periods were chunk yellowfin in water or vegetable oil); Pinsa and Tuny Webpages (Exh. MEX-29).

[391] *See supra* U.S. Response to Arbitrator's Question 153.

[392] *See* FFA, Market and Industry Dynamics, at 53-136 (Exh. US-89) (stating that the fleets that produce for the canned tuna market are "purse seiners primarily targeting skipjack, as well as yellowfin" and "longliners

the vast majority of all fish received by U.S. and other canneries is caught by these two fleets.[393] Some canneries receive frozen tuna directly from vessels and others receive tuna loins from loining plants, but the source of the tuna is the same. The vast majority of the tuna produced for canning is completely isolated from the fresh market because industrial purse seiners generally store tuna in brine, after which it is not suitable for consumption as a fresh product.[394]

227. Fresh tuna for retail consumption, on the other hand, is generally produced by offshore and distant-water longline fleets targeting yellowfin and bluefin tuna.[395] Some handline and pole and line fisheries produce for the fresh market, but the vast majority of the global supply comes from the longline fleets.[396] Longline-caught tuna is not unsuitable for use in canning the way purse seine caught tuna is for consumption as a fresh product, but tropical tuna longliners that are eligible to supply the fresh or frozen market do not supply the canning market because they can get a much higher value for their product on the fresh market (about four times as high for fresh yellowfin than for cannery grade yellowfin).[397] Thus, the change in purchasing patterns described in the Arbitrator's question had no relationship to U.S. fresh yellowfin consumption.

228. Second, what actually caused the decline in cannery purchases in the 1990s and subsequently was changing U.S. demand patterns and resulting changes in the operation of the U.S. fleet. Specifically, the following factors explain the change: (1) growing consumer preferences in the late 1980s and early 1990s (continuing today) for tuna not caught by setting on

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specifically targeting albacore for canning, as well as some by-catch from longliners otherwise targeting sashimi-grade tuna").

[393] *See* FFA, Market and Industry Dynamics, at 53 (Exh. US-89) (stating that about 2.7-2.8 million of the 3 million metric tons of tuna "destined for canning" is caught by purse seine vessels); William Jacobson Witness Statement, App. 2 (May 26, 2014) (Exh. US-204) (showing that records from purse seine vessels accounted for about 50 percent of the vessels records associated with imported tuna products between 2005 and 2013, longline vessels made up 36 percent, and pole and line vessels make up 15 percent); *id.* at App. 3 (showing that purse seine vessels account for 41 percent of the vessels records associated with U.S. cannery purchases of tuna from domestic vessels and *over 90 percent* of the tuna received by U.S. canneries from U.S. vessels, with longline accounting for 7.8 percent and pole and line for 1.4 percent).

[394] *See* Kaneko 1997, at 3-4 (Exh. US-170); Mexico's Written Submission, para. 148. The one exception appears to be certain Japanese purse seine vessels, which are specially equipped with "ultra-low temperature . . . freezers on board" that allow the vessel to store "a portion of the catch" in a manner that allows it to be sold "in the lower-quality segment of the Japanese sashimi market." FFA, Market and Industry Dynamics, at 60 (Exh. US-89). Other purse seiners could be fitted with similar equipment, but the vast majority of them are not.

[395] FFA, Market and Industry Dynamics, at 263-301 (Exh. US-198) (describing the fleets that produce for the fresh/frozen market, namely "longline vessels," specifically "large-scale distant water vessels (supplying frozen tuna) and small-medium scale offshore vessels (supplying fresh tuna)").

[396] *See* FFA, Market and Industry Dynamics, at 269, 293-294, 296, 298 (Exh. US-198).

[397] *See supra* U.S. Response to Arbitrator's Question 153 (showing that all the evidence on the record suggests that, over the past decade, global prices of cannery grade yellowfin have ranged between about $2 per kg, compared to fresh yellowfin prices of about $8 to $10 per kg, or even higher for sashimi grade products); *see* "Yellowfin Market Review," at 10 (Exh. US-10) (BCI) [[
]].

dolphins; (2) growing consumer preferences for albacore as a premium product; (3) consumer preferences for the cheapest canned tuna; and, (4) health considerations.

229. On the first factor, as explained previously, in the late 1980s, NGOs in the United States led a mass media campaign to raise consumer awareness of the harms associated with dolphin sets. This campaign ultimately led the "big three" tuna companies (Bumble Bee, Chicken of the Sea, and Star Kist) and other tuna companies producing for the U.S. market to announce policies that they would not purchase tuna from vessels that set on dolphins.[398] One of the consequences of this was that U.S. vessels, and other vessels producing for the U.S. market, stopped setting on dolphins and, for the U.S. fleet, started setting more on FADs and unassociated schools in the WCPO.[399] As a result, U.S. cannery receipts of yellowfin from U.S. vessels declined, and U.S. cannery receipts of skipjack from U.S. vessels rose.[400]

230. It is important to note, however, that the U.S. tuna industry generally is not vertically integrated, so canneries' access to yellowfin is not limited to the catch of U.S. vessels.[401] Also, the vast majority of the global harvest of yellowfin is not caught by dolphin sets.[402] U.S. canneries, therefore, could have offset the decline in yellowfin receipts from U.S. vessels by buying more yellowfin from foreign vessels. (The EU, for example, imports tens of thousands of metric tons of yellowfin tuna loins for canning.[403]) U.S. canneries did not do so, however, presumably because consumers were not demanding canned yellowfin as a distinct product. Indeed, even when U.S. cannery receipts of yellowfin were higher, yellowfin was canned with skipjack as lightmeat tuna.[404] Because canneries did not offset the decline in yellowfin receipts from U.S. vessels, overall U.S. cannery receipts of yellowfin declined.[405] Thus, the preference for tuna not caught by dolphin sets, coupled with lack of demand for all-yellowfin canned tuna, was one factor driving the decline in U.S. cannery receipts of yellowfin in the early 1990s.

231. With regard to the second factor, U.S. consumers became aware of and developed a strong preference for albacore during the mid-1990s to early 2000s, particularly in the premium

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[398] *See* U.S. Written Submission, para. 28.

[399] *See* U.S. Written Submission, para. 25.

[400] "U.S. Cannery Purchases of YF, Total and Share" (Exh. US-96).

[401] *See* "U.S. Cannery Purchases of YF, Total and Share" (Exh. US-96) (showing that since at least the early 1980s, the majority of tuna received by U.S. canneries has been caught by foreign vessels).

[402] *See* U.S. Written 22.6 Submission, para. 95; U.S. Response to Arbitrator's Question 66, para. 116 (recalling that, in 2014, WCPO vessels landed 46.3 percent of the global yellowfin catch and 57 percent of the global yellowfin catch by purse seine vessels and that, in that year, Mexico's production accounted for less than 9% of the total yellowfin catch).

[403] Corey et al. 1990, at 1-2 (Exh. US-113). We note, however, that there were other reasons for the U.S. fleet moving to the WCPO, including the greater availability of cheap tuna resources. *See* Corey et al. 1986, at 9-10 (Exh. US-111).

[404] *See* Corey et al. 1992, at 1-1 (stating that U.S. canneries "process tropical tuna, principally skipjack and yellowfin, which is marketed as lightmeat canned tuna"), 3-1 (stating that yellowfin tuna is "marketed in canned form as lightmeat tuna") (Exh. MEX-73); FFA, Market and Industry Dynamics, at 254 (Exh. US-7).

[405] *See* "U.S. Cannery Purchases of YF, Total and Share" (Exh. US-96).

segment of the U.S. market. U.S. canneries have always processed albacore caught by U.S. vessels, but in the mid-1990s, albacore jumped from accounting for about 20 percent of U.S. cannery receipts over the previous 15 years to about 30 percent, and then to over 40 percent beginning around 2004, where it has remained since.[406] The U.S. consumer preference for albacore – which is due to albacore's mild flavor, firm texture, and light color – it is distinct from consumer preferences in other markets.[407] For example, the United States consumes 19 percent of world canned tuna production but accounts for 55-60 percent of world consumption of albacore.[408] Further, companies producing for the U.S. market have clearly identified and actively responded to this preference, as over 95 percent of U.S. cannery receipts of albacore are from foreign vessels.[409] Mexico's claim that U.S. demand for albacore only arose because the price of yellowfin was high is entirely unsupported[410] and is refuted by the circumstance that, in fact, albacore prices were above yellowfin prices in the early and mid-1990s.[411]

232. The strong and growing preference for albacore likely further drove down U.S. consumer demand for yellowfin in the 1990s and subsequently. Canned albacore is a premium product on the U.S. market. It tends to be packed in high-end forms (mostly as solid) and sells at a premium over lighmeat tuna.[412] Exhibit MEX-15 shows that sales of canned albacore accounted for 29 percent of canned tuna by weight during the covered period but 40 percent by value.[413] The strong demand for albacore is particularly notable because the United States is generally a low-end canned tuna market.[414] Consequently, having a higher-end product that is so popular would tend to further reduce U.S. demand for canned yellowfin products. In this regard, it is important to note that U.S. cannery receipts of yellowfin dropped by just as large a share in the early 2000s (from about 22 percent to about 11 percent) as in the early 1990s and that it was in the early 2000s that albacore grew from about 30 to about 40 percent of U.S. cannery receipts.[415]

233. Concerning the third factor, the United States is well known to be a bargain canned tuna market, which likely further decreased consumption of canned yellowfin. As an FFA report on

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

[407] *See* U.S. Written 22.6 Submission, para. 21.

[408] FFA, Market and Industry Dynamics, at 170, table 4.6 (Exh. US-7).

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

[410] *See* Mexico's Written Submission, para. 129.

[411] *See* "Prices of Frozen Tuna Imports, by Species" (Exh. US-205). In this regard, we note that, as discussed above, the price of frozen tuna imports during the 1990s was a reasonable, although not a perfect, proxy for the price of cannery grade tuna, by species. Once the last U.S. cannery to process whole frozen tuna shut down in 2000-2001, however, frozen tuna import prices lost any connection to the U.S. canned tuna market.

[412] "Average Prices of Top Selling Canned Tuna Products, by Type, from Exhibit MEX-15" (Exh. US-145) (showing that the average price per ounce of the top 20 albacore products in Exhibit MEX-15 was $.31 per ounce, compared to $.20 per ounce for light tuna); "Yellowfin Market Review," at 7-8 (Exh. US-10) (BCI) [[
]].

[413] *See* "52-Week Canned Tuna Sales, Summed by Type" (Exh. US-17).

[414] *See* U.S. First Written Submission, paras. 18-19.

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

global tuna markets found, the U.S. canned tuna market is "characterized by high volume and low margins."[416] In fact, U.S. demand for canned tuna begins to weaken as the per can cost approaches $.70-80 cents a can or $1 for two cans.[417] An FAO report similarly noted that the available literature indicates that there is a "psychological limit" in the mind of U.S. consumers against paying more than one U.S. dollar for a can of tuna.[418] This trend has grown more pronounced as a higher and higher percentage of canned tuna is sold to superstores and other larger retailers, which then engage in fierce price competition.[419] As of 2007, nearly half of all canned tuna sold in the United States was purchased on sale.[420]

234. This characteristic of U.S. consumers is relevant because skipjack is the most abundant and least expensive type of tuna in the United States and globally. Skipjack accounted for nearly 60 percent of the global tuna catch in 2014 and, unlike other species, is not overexploited.[421] The global price of cannery-grade skipjack is generally about 60-80 percent of that of yellowfin.[422] As a consequence, canned skipjack products under-sell canned yellowfin products, including Mexican canned yellowfin products, by a considerable margin.[423] For example, Exhibit MEX-15 shows that the top-selling Dolores products sold at an average price per ounce of $0.31,[424] but the top 10 light tuna products sold at an average price of $.16 per ounce – about half the price per ounce of the Dolores products.[425] In short, skipjack is clearly the desirable canned tuna product for consumers whose most important concern is cost. This feature of skipjack would have become more appealing to consumers as all tuna prices rose over the past twenty-five years.[426]

235. Finally, concerning the fourth factor, growing consumer preferences for low mercury tuna products have likely driven down demand for yellowfin products at the lower end of the

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[416] FFA, Market and Industry Dynamics, at 253 (Exh. US-7).

[417] FFA, Market and Industry Dynamics, at 242 (Exh. US-7) (stating that "in the US market, retail prices change a lot, but when the cost exceeds 70-80 cents/can (or higher than 2 cans for US $1), then US market demand starts to compress."); *see also* "Yellowfin Market Review," at 2 (2016) (Exh. US-10) (BCI) [[
]].

[418] FAO, Recent Developments in the Tuna Industry, at 96-97 (Exh. MEX-14).

[419] *See* U.S. First Written Submission, para. 19; FFA, Market and Industry Dynamics, at 254 (Exh. US-7).

[420] FFA, Market and Industry Dynamics, at 253 (Exh. US-7).

[421] *See* "Yellowfin Percent of Global Catch" (Exh. US-86); U.S. First Written Submission, para. 41.

[422] *See* FAO, Recent Developments in the Tuna Industry, at 104 (Exh. MEX-14); FFA, Market and Industry Dynamics, at 59 (Exh. US-7); "Yellowfin Market Review," at 10 (Exh. US-10) (BCI).

[423] *See* "Average Prices of Top Selling Canned Tuna Products, by Type" (Exh. US-146); "Yellowfin Market Review," at 7-8 (Exh. US-10) (BCI).

[424] "Average Prices of Top Selling Canned Tuna Products, by Type" (Exh. US-146).

[425] "Average Prices of Top Selling Canned Tuna Products, by Type" (Exh. US-146).

[426] *See* FAO, Recent Developments in the Tuna Industry, at 104 (Exh. MEX-14); FFA, Market and Industry Dynamics, at 59 (Exh. US-7).

yellowfin market. As the United States has explained, mercury is a concern with all large predators.[427] Skipjack, as the smallest tuna species, generally has the lowest level of mercury.[428]

236. Consequently, consumers who are most concerned about mercury will likely choose skipjack over lightmeat tuna containing (or composed entirely of) yellowfin. Concerns about mercury have only grown more public and widespread since the early 1990s.[429] In fact, a recent FAO report found that, in order to keep the average mercury content of light tuna below the mercury standard set by the FDA, canneries producing for the U.S. market tend to "pack[] large yellowfin (which has relatively higher mercury content) mixed with skipjack (which has very little mercury content)" rather than packing yellowfin alone.[430] Thus, U.S. consumer awareness of and preference to avoid high mercury products has likely affected demand for yellowfin vis-à-vis skipjack over the past 25 years.

237. In conclusion, the decline in U.S. cannery purchases of yellowfin in the early 1990s was not due to increasing U.S. consumption of fresh yellowfin but to developments in U.S. consumer preferences. This is confirmed by the behavior of U.S. prices for cannery grade yellowfin during the early 1990s, which, as shown by Exhibits MEX-73 and US-133, declined at import, wholesale, and retail levels.[431] If there had been a relationship between cannery-grade and fresh yellowfin consumption, or the supply restriction Mexico claims, such prices would have risen.

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[427] *See* U.S. Response to Arbitrator's Question No. 54, paras. 39-43.

[428] *See* FDA, "Mercury Levels in Commercial Fish and Shellfish (1990-2010), at 3-4 (Exh. MEX-64) (stating that skipjack has average mercury content that is less than half of the mercury content in albacore and yellowfin).

[429] *See* Ferdman, "How America Fell Out of Love with Canned Tuna," at 1-2 (Exh. US-5)

[430] FAO, Recent Developments in the Tuna Industry, at 89 (Exh. MEX-14).

[431] *See* Roger Corey et al. 1992, at 2-10 (Exh. MEX-73) (stating, with regard to cannery grade yellowfin, that "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"); *id.* at 2-13 ("Wholesale prices of retail-size containers of chunk-light tuna packed in water . . . generally trended downward slightly during 1990-91."); Corey et al. 1990, at 307 (Exh. US-113) (confirming that there was "a downward trend in retail prices in 1990" even as U.S. imports of canned tuna also declined).