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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 to the Arbitrator's Questions

September 30, 2016

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132	Byung-Do Kim et al., "Modeling the Distribution of Price Sensitivity and Implications for Optimal Retail Pricing," 13 *J. of Bus. & Econ. Stats.* 291 (1995)
133	Charles Blackorby et al., "Separability," *The New Palgrave Dictionary of Economics* (2d ed. 2008)
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143	Alan Lowther & Michael Liddel, ed., *Fisheries of the United States 2014* (2015)

QUESTIONS FROM THE ARBITRATOR TO THE PARTIES

For the United States:

2.1 Factual and general questions

51. With reference to paragraph 94 of the United States' first written submission, please elaborate on what is meant by the phrase "there is no pent-up demand for canned yellowfin tuna".

1. The evidence shows that few U.S. consumers of canned tuna – approximately 1-2 percent – choose to purchase canned yellowfin tuna marketed as such.[1] Mexico's model is premised on the assumption that this level of consumption reflects a supply shortage rather than limited demand.[2] In fact, however, the available evidence refutes this assumption. Specifically, (1) there is a significant global supply of canned yellowfin tuna (hereinafter "yellowfin") and the U.S. market is fully integrated into this global market; (2) the manner of the decline in U.S. demand is not consistent with a sudden supply restriction; and (3) evidence from the U.S. market today confirms a lack of demand for canned yellowfin. Thus, in concluding that "there is no pent-up demand for canned yellowfin tuna," the United States was stating that the current low levels of consumption of yellowfin in the United States reflect limited demand for the product by U.S. consumers, rather than limited supply, and that, therefore, a central assumption underpinning Mexico's model is incorrect.

2. Mexico's model is based on the assumption that U.S. consumption of yellowfin does not reflect demand. First, Mexico relies on this assumption to justify modeling, not its own counterfactual, but the introduction of an entirely new product into the U.S. market, using a choice model in which the quantity demanded is a function of price and unobserved preferences.[3] It is also reflected in Mexico's decision to use the total tuna consumption in the U.S. market as a

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[1] *See* "52 Week Canned Tuna Sales, Summed by Type" (Exh. US-17) (showing that, in the data presented in Exh. MEX-15, 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) [[

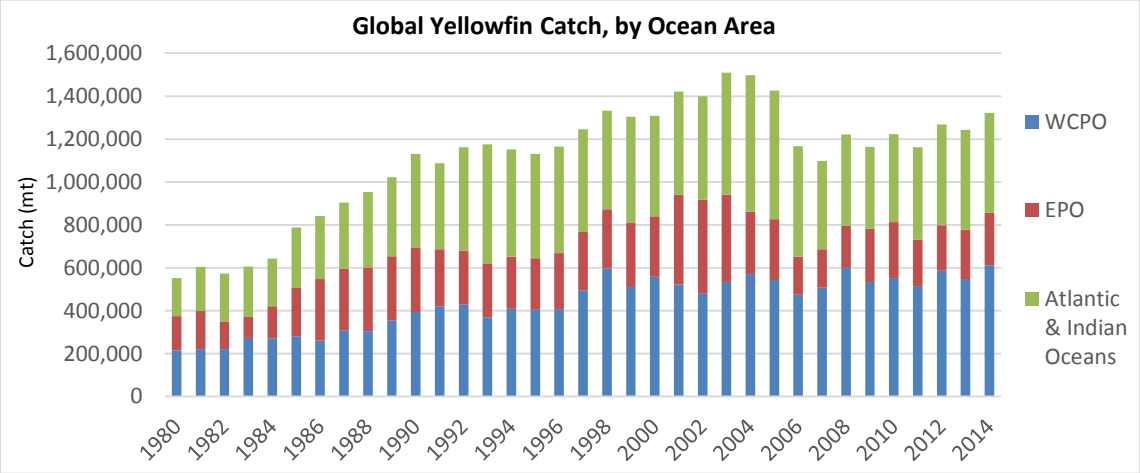
]]. An additional quantity of canned yellowfin (roughly equal to the quantity sold as "yellowfin") is sold as "light tuna," usually with skipjack. *See* Sam Roe & Michael Hawthorne, "How Safe is Tuna?" at 2, *Chicago Tribune*, Dec. 13, 2005 (Exh. US-18); "Yellowfin Market Review," at 4 (Exh. US-10) (BCI).

[2] *See* Pouliot 2016, at 9 (Exh. MEX-2) (assuming that the "decline in the quantities of canned yellowfin tuna in the United States was a direct result of the tuna measure" and asserting that the "very small" quantity of canned yellowfin consumed in the United States "does not mean that there is no demand for it"); *id.* at 12-13 (deriving a demand curve based on assumptions about preferences rather than any actual consumption data); Mexico's Written 22.6 Submission, para. 124.

[3] *See* Pouliot 2016, at 9-11 (Exh. MEX-2) (asserting that actual U.S. consumption 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 actual consumption into account); U.S. Written 22.6 Submission, n.165 (explaining that, to model consumer demand for a product that is already on the market the almost ideal demand system (AIDS) model is standard in the literature) (citing, for example, Chiang et al., 2016, at 7 (Exh. US-8)).

proxy for the demand intensity for yellowfin[4] and in the choice to assume that the average consumer is willing to pay an additional $2 per kg for yellowfin canned over "generic" tuna that follows a logistic distribution (meaning that half of all U.S. consumers are willing to pay more than a $2 premium for yellowfin and half are willing to pay less).[5] These elements are the main drivers of Mexico's model and are wholly inconsistent with the observed preferences of U.S. consumers and thus depend on the assumption that the supply of canned yellowfin to the U.S. market is severely limited.

3. The reality is that there is no supply shortage of canned yellowfin to the U.S. market. It is a product that exists in the global and U.S. canned tuna markets wholly independent of Mexican production. Yellowfin is the second most produced species (by volume) in the global tuna industry (after skipjack), accounting for 12.3 million metric tons of tuna caught from 2005-2014 (28 percent of total global tuna catch).[6] As depicted in the figure below, yellowfin catches have more than doubled since 1980 and have increased by 190,909 mt since 1990.



See "Yellowfin Catch by Ocean Area" (data drawn from WCPFC, *Yearbook – 2014*) (Exh. US-84).

4. Yellowfin is a widely distributed species and is caught in the Atlantic, eastern tropical Pacific (ETP/EPO), Indian, and western central Pacific (WCPO) oceans.[7] By far the most important source of yellowfin is the WCPO, which produced nearly half (46.3 percent) of all

[4] *See* Pouliot 2016, at 13, 32 (Exh. MEX-2).

[5] *See* Pouliot 2016, at 10-12, 20 (Exh. MEX-2) (discounting data on U.S. consumption of yellowfin, as compared to other products, and assuming that the average U.S. consumer prefers canned yellowfin over other tuna products and is willing to pay a price premium for it of $2 a kilogram over "generic" tuna and that willingness to pay is distributed throughout the market based on the logistic distribution function).

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

[7] *See* James Joseph, FAO, *Managing Fishing Capacity of the World Tuna Fleet*, at 9 (2003) (Exh. US-87); "Yellowfin Market Review," at 11 (Exh. US-10) (BCI).

yellowfin landed in 2014.[8] In contrast, the EPO produced only about 18.5 percent of that total (with Mexico's individual share of the total being less than 9 percent).[9] As shown in the graph above, the importance of the WCPO as the primary source of the world's yellowfin has increased over the past decades as catches in the WCPO have grown dramatically, almost tripling between 1980 and 2014, while catches in the ETP have remained fairly consistent.

5. Most of this global catch of yellowfin is used for canning or processing.[10] In the WCPO, for example, most of the yellowfin catch (73 percent for 2010-2014) is taken in purse seine fisheries, which produce tuna for the processing industries.[11] Other WCPO fisheries, including pole and line and handline fisheries, also produce yellowfin for canning.[12] Purse seine fisheries in the Atlantic, ETP, and Indian oceans,[13] and pole and line and handline fisheries in the Indian Ocean,[14] also produce yellowfin for canning.

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[8] *See* "Total Catches of Yellowfin in the Pacific Ocean and Globally" (Exh. US-48).

[9] "Total Catches (tonnes) of Yellowfin in the Pacific Ocean and Globally" (Exh. US-48).

[10] *See* Joseph 2003, at 9 (Exh. US-87).

[11] *See* WCPFC, *Yearbook – 2014*, at 131 (Exh. US-85); 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); FFA, Market and Industry Dynamics, at 67-68, 77, 89, 94-96 (Exh. US-89) (explaining how the Taiwanese, Korean, Philippine, and Chinese purse seine vessels, *inter alia*, in the WCPO catch yellowfin and skipjack for canning); *see also* Crown Prince, Yellowfin Tuna, http://www.crownprince.com/cpn-yellowfin-tuna.htm (Sept. 18, 2016) (Exh. US-90) (explaining that its yellowfin tuna was caught by purse seine vessels and processed in Thailand); "Tri Marine Announces Draft Report for MSC Certification of Its American Samoa Fleet," *trimarinegroup.com* (Dec. 14, 2015) (Exh. US-91) (announcing that Tri Marine's free school purse seine skipjack and yellowfin fleet operating around American Samoa would shortly receive MSC certification); "Solomon Islands Skipjack and Yellowfin Achieves MSC Certification," *trimarinegroup.com* (July 12, 2016) (Exh. US-92) (announcing that Tri Marine's Solomon Islands skipjack and yellowfin tuna purse seine and pole and line fishery had achieved MSC certification).

[12] Glenn Hurry, WCPFC, "The Western and Central Pacific Tuna Fishery," at 12 (Exh. US-88) (noting that skipjack and yellowfin are caught by pole-and-line gear and that "most catch is for canning"); *see also* Crown Prince, Yellowfin Tuna (Exh. US-90) (explaining that its yellowfin tuna was caught by pole and line and processed in Thailand); Sustainable Seas, "Products and Online Shopping," http://online-store.sustainableseas.com/online-products.html (Sept. 18, 2016) (Exh. US-93) (explaining that its canned yellowfin was produced using hand line and pole and troll methods and processed in Vietnam).

[13] *See* FFA, Market and Industry Dynamics, at 108-112 (Exh. US-89) (explaining that the EU purse seine fleet – "the largest in the world and . . . comprised of some of the most powerful purse seiner business in the world" – fish primarily in the Western Indian and the Eastern Atlantic Oceans for tuna (mainly yellowfin) for processing); *id.* at 119-120 (explaining that purse seine fleets of Ecuador and other Latin American countries, including Mexico, fish for yellowfin and skipjack in the ETP for processing).

[14] *See* M. Shiham Adam et al., IOTC, "Review of Yellowfin Tuna Fisheries in the Maldives," at 5-6 (2015) (Exh. US-94) (2nd 21.5 Exh. MEX-40) (explaining that the pole and line fishery in the Maldives, which caught 18,481 mt of yellowfin tuna in 2014, produces for tuna processors, as does the handline fishery, which produced nearly 50,000 mt of yellowfin in 2014, in part); *see also* Ocean Brands, Products and FAQs, http://www.oceanbrands.com/ (Sept. 18, 2016) (Exh. US-95) (explaining that its canned yellowfin is produced from a pole and line fishery in the Maldives in the Indian Ocean).

6. The United States is fully integrated into the global tuna industry. Over the past 10 years, imports have made up 68 percent of all tuna canned by U.S. processors.[15] The WCPO produces almost all of that tuna – both from U.S. vessels and from imports – processed at U.S. canneries.[16] In addition, imports of canned tuna have accounted for 45-53 percent of the U.S. supply of canned tuna since 2005.[17] The United States imports canned tuna from many different countries (28 in 2015), many of which, such as Thailand, Vietnam, the Philippines, and Indonesia (the first, third, fourth, and fifth largest exporters of tuna product to the United States) fish in the WCPO or process tuna caught there.[18]

7. The United States is also fully integrated into the global canned yellowfin tuna industry. The majority of the world's yellowfin tuna is caught in the WCPO, and as noted above, the WCPO produces almost all of the tuna processed at U.S. canneries. Furthermore, a survey of the vessel records associated with U.S. imports of tuna and tuna product between 2005 and 2013 shows that much of the tuna was caught by vessels of countries whose fleets are the top harvesters of yellowfin, including Taiwan, Indonesia, the Philippines, Japan, and Ecuador.[19] Other sources of U.S. imports, namely Spain and Italy, are known to produce mainly yellowfin products.[20]

8. Indeed, canned tuna containing yellowfin is available in the U.S. tuna product market, both marketed as "light tuna" or "lightmeat tuna" (usually combined with skipjack and packed in water), or as a gourmet product marketed as "yellowfin" (often packed in olive oil and often with flavoring).[21] Each of the three canned tuna producers with the largest share of the U.S. market (Bumble Bee, Chicken of the Sea (Genova), and StarKist) sell all-yellowfin tuna products in the United States,[22] as do numerous other companies with processing facilities inside and outside the

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

[16] "US Tuna Cannery Receipts, by Source" (data drawn from NMFS database) (Exh. US-97).

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

[18] *See* "U.S. Imports of Canned Tuna from All Countries Individually – 2010-2015" (Exh. US-36).

[19] *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 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).

[20] *See* "U.S. Imports of Canned Tuna from All Countries Individually – 2010-2015" (Exh. US-36) (showing that Spain and Italy were the 11th and 12th most significant source of U.S. imports of tuna product in 2015, by value); "Yellowfin Tuna Capture Fisheries Production" (Exh. US-47) (showing that Spain was the third largest country in terms of yellowfin capture in 2014).

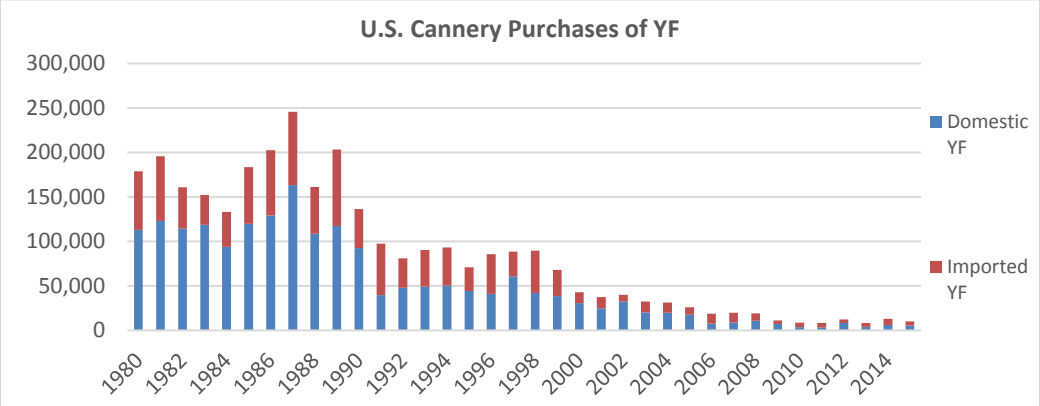
[21] Sam Roe & Michael Hawthorne, "How Safe is Tuna?" at 2 (Exh. US-18) (finding that about half of the canned yellowfin sold in the United States is sold as "yellowfin," and the rest is sold as generic "light tuna").

[22] *See* Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Exh. MEX-15) (referring to, *inter alia*, Chicken of the Sea: Solid Light Yellowfin in Olive Oil; Bumble Bee – Gourmet Yellowfin Tuna, Prime Fillet Tonno

United States, including BenZ's,[23] Crown Prince (Thailand),[24] Sustainable Seas (Vietnam),[25] Ocean Brands,[26] and Natural Value.[27] Further, the United States imports canned yellowfin products from other countries, including Thailand, Italy, and Mexico.[28]

9. Thus, canned yellowfin is a product that is widely available in the global tuna market, in which the United States is enmeshed. Canned yellowfin is, in fact, sold in the U.S. market. The fact that it is sold in small quantities is, therefore, indicative of consumer demand, not a supply constraint.

10. Additionally, the manner of the decline of canned yellowfin consumption in the U.S. market supports the conclusion that current levels reflect limited demand, not limited supply. As shown in the graphs below, the quantity of yellowfin purchased by U.S. canneries has declined dramatically since the late 1980s. Over the past decade, yellowfin accounted for only 6.4 percent of all tuna received by U.S. canneries (10.3 percent of the tuna caught by U.S. vessels and 4.6 percent of the tuna caught by foreign vessels).[29] However, this decline did not occur suddenly, as would be the case if there were a severe supply restriction, but over a period of decades.



in Olive Oil; and StarKist – Solid Light Yellowfin in Extra Virgin Olive Oil, Yellowfin Marinated, Roasted Garlic in Extra Virgin Olive Oil being sold by U.S. retailers); StarKist, Products (Exh. US-19) (showing a flavored and unflavored yellowfin products); Bumble Bee, Canned Tuna, at 10 (Exh. US-63) (showing a solid light tuna product that is 100% yellowfin); Genova, Our Products (Exh. US-64) (showing two all-yellowfin products).

[23] BenZ's, Our Products, at 6, 8 (Exh. US-65) (showing 2 canned yellowfin in water products).

[24] Crown Prince, Yellowfin Tuna (Exh. US-90).

[25] Sustainable Seas, Products and Online Shopping (Exh. US-93) (showing two canned yellowfin in water products).

[26] Ocean Brands, Products and FAQs (Exh. US-95) (showing a canned yellowfin in water product).

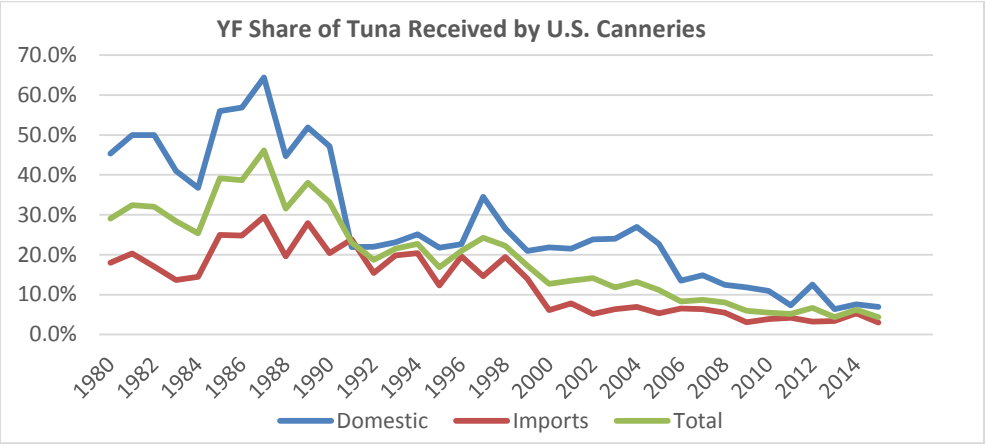
[27] Natural Value, Retail Catalogue, http://naturalvalue.com/products/ (Sept. 18, 2016) (Exh. US-99).

[28] *See* Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Exh. MEX-15) (showing sales of: several different Solid Light Yellowfin products of Callipo, an Italian brand; Dolores and Tuny brands (Mexican); and Crown Prince solid light yellowfin and chunk yellowfin, which are products of Thailand).

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

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

11. Further, as shown in the graph below, yellowfin as a share of imported tuna received by U.S. canneries declined steeply only beginning in 2000. This is also not consistent with an absolute supply restriction beginning in 1990, as Mexico alleges.



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

12. Thus, the decline in U.S. cannery purchases of yellowfin over the past thirty years suggests that U.S. canneries (and U.S. consumers) simply are not demanding the canned yellowfin available in the global tuna market, reflecting a shift in U.S. consumer preferences from yellowfin to albacore and skipjack, as well as non-tuna products.

13. Finally, evidence from actors in the U.S. tuna industry confirm that U.S. consumer demand for yellowfin does not outstrip supply. A 2005 investigation estimated that about 15 percent of canned light tuna in the United States is made with some yellowfin and that approximately 180 million cans of yellowfin are sold each year.[30] However, only about half of this product is marketed as a "yellowfin"; the rest is sold simply as "light tuna."[31] 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."[32] This suggests that, far from being constrained, yellowfin supply outstrips demand for yellowfin tuna product in the U.S. market. Another tuna company serving the U.S. market has explained that, [[

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[30] *See* Roe & Hawthorne, "How Safe is Tuna?" (Exh. US-18).

[31] Roe & Hawthorne, "How Safe is Tuna?" at 2 (Exh. US-18).

[32] Roe & Hawthorne, "How Safe is Tuna?" at 2 (Exh. US-18).

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

14. Thus, there is no shortage of yellowfin that could supply the U.S. tuna product market if demand for it were greater than represented by current levels of consumption. The U.S. tuna market is integrated into the global tuna canning industry and, indeed, the United States regularly imports tuna and tuna product caught or processed by countries with the capacity to supply far more canned yellowfin tuna than Mexico produces. There is, therefore, no support for Mexico's assertion that U.S. consumers have limited access to canned yellowfin.[34] It follows that current levels of yellowfin consumption in the U.S. market reflect the portion of consumers that are willing to pay a premium for canned yellowfin. There is thus no "pent up demand" for Mexico's canned yellowfin (even if one were to assume – incorrectly – that U.S. consumers do not distinguish between tuna product produced from setting on dolphins and tuna product produced without setting on dolphins). The estimate generated by Mexico's model – that canned yellowfin tuna would increase its market share 10 to 20 fold and make up 54 percent of U.S. canned tuna imports and 22 percent of total consumption of canned tuna (by volume) at a *higher price* for yellowfin than currently exists in the U.S. market – has no basis in reality.[35]

52. With reference to paragraphs 14, 74, 75 and 86 of Mexico's written submission, please comment on Mexico's assertion that the United States "overstates the influence of the EII", and that "EII's lack of credibility is growing".

15. As the question notes, Mexico argues that the United States "overstates the influence" of Earth Island Institute (EII).[36] In Mexico's view, "EII's influence has substantially diminished and is further diminishing as the market increasingly recognizes the illegitimacy of its labelling regime."[37] Later in its submission, Mexico makes the similarly unsubstantiated claim that "EII's lack of credibility is growing."[38] None of these statements are correct.

16. As explained previously, in the late 1980s, EII, along with other NGOs, campaigned to raise consumer awareness of the dangers of dolphin sets in the ETP. The campaign led to consumer actions, including boycotts of tuna companies that processed tuna caught by setting on dolphins.[39] These campaigns produced significant results in April 1990 as StarKist, and then,

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[34] *See* Mexico's Written 22.6 Submission, para. 129.

[35] *See* Pouliot 2016, at 32-33 (Exh. MEX-2) (showing that, in Mexico's model, total U.S. imports of yellowfin (all from Mexico) total 63,568 mt at $7.79/kg, or $495,194,720 total, whereas U.S. imports of "generic" tuna total 53,340 mt, and U.S. production totals 177,350).

[36] Mexico's Written 22.6 Submission, para. 14.

[37] Mexico's Written 22.6 Submission, para. 14.

[38] Mexico's Written 22.6 Submission, para. 86.

[39] Two early targets of EII-led consumer boycotts were the U.S. StarKist and Chicken of the Sea. Louis Sahagun, "Protests Urge Tuna Boycott over Killing of Dolphins," *LA Times*, Apr. 12, 1988 (Exh. US-100) ("On Monday, environmental groups, including the Earth Island Institute, Marine Mammal Fund and the Sea Shepherd Society of Redondo Beach, launched a boycott of canned tuna with demonstrations held at the Long Beach office of J. H. Heinz Co., which produces StarKist brand tuna, and at the St. Louis headquarters of Ralston Purina Co., which produces Chicken of the Sea tuna. At Long Beach, about 20 demonstrators carried placards that said 'Sorry Charlie StarKist Kills Dolphins' and shouted, 'Save the dolphins, boycott Heinz.'"). *See also*, Anita Manning, "Concerned

within hours, Chicken of the Sea and Bumble Bee, pledged to stop purchasing tuna caught by setting on dolphins.[40] Subsequently, companies throughout the tuna supply chain began to make commitments to adhere to EII's own "dolphin safe" standard, which includes not producing or otherwise dealing in tuna that is caught by setting on dolphins. As indicated in Exhibits US-35 and 37, EII currently has such commitments from over 500 companies that operate in dozens of countries,[41] reportedly covering 90 percent of the world's tuna companies.[42] These companies include the largest companies in the tuna industry,[43] operating in the United States, Europe, and Asia, with all major exporting countries represented.[44] These commitments are not made contingent on the content or existence of the Dolphin Protection Consumer Information Act (DPCIA) or its implementing regulations. These facts are *undisputed* by Mexico. And, as such, Mexico has no basis to argue that the United States has "overstate[d] the influence" of EII in the U.S. market.

17. Moreover, as the United States discussed, the vast majority of these commitments are made not by retailers, but by "tuna companies" – *i.e.*, the companies that are upstream in the supply chain from retailers – fishing companies, processors, and distributors, *inter alia*.

Students Are Tuning Out Tuna," *USA Today*, Jan. 11, 1990 (Exh. US-101); Robert Howe, "Tuna Gets Hook in Alexandria Schools After Students Object," *Wash. Post*, Mar. 3, 1990 (Exh. US-102); Statement of Rep. Barbara Boxer before the H. Rep., 136 Cong. Rec. H11878-02, 101st Cong. (Oct. 23, 1990) (Exh. US-24) (quoting then-Representative Boxer, the sponsor of the DPCIA: "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].").

[40] *See, e.g.*, Michael Parrish, "Film Turns Tide for Dolphins at StarKist Tuna: Environment: A Rock 'n' Roll Executive Carried the Public's Message: 'People Just Want to Let the Dolphin Alone," *LA Times*, April 14, 1990 (Exh. US-103) (describing the NGO position as being that "people just want to let the dolphin alone, period, and they're willing to pay the extra cost to do that"); *see also US – Tuna II (Mexico) (Panel)*, para. 7.288 ("This evidence suggests that, following public campaigning by the environmental organization 'Earth Island Institute' in the late 1980s . . . tuna processors were under pressure to stop purchasing tuna caught in conditions that were harmful to dolphins. The evidence presented to the Panel also shows that major tuna processors reacted to these dolphin-safe concerns, and that this led to changes in their purchasing policies as of April 1990. These policies are still in place: such companies will not purchase tuna from vessels that fish in association with dolphins.").

[41] *See* EII, Approved Dolphin-Safe Tuna Processing Companies & Fishing Companies (Dec. 2015) (Exh. US-35); EII, Approved Dolphin-Safe Importers, Distributors, Brokers, Retailers, Agents (Dec. 2015) (Exh. US-37). As noted in the U.S. Written 22.6 Submission, these exhibits indicate that EII has commitments with 159 processing companies and fishing companies operating in 159 companies in 51 countries and territories, and 417 importers, distributors, brokers, retailers, and agents, operating in 48 countries. *See* U.S. Written 22.6 Submission, para. 32.

[42] *US – Tuna II (Mexico) (Panel)*, para. 7.368 ("We further note in this respect that some of the evidence presented to the Panel suggests that 90 per cent of the world's tuna companies have adopted a strict 'no setting on dolphins' standard. If this is the case, the proportion of tuna imported in the United States that is caught by other methods than setting on dolphins may simply reflect the general distribution of the products on the world market, rather than any specific features of the US market.").

[43] *E.g.*, StarKist, Bumble Bee, Chicken of the Sea, Tri Marine, Grupo Calvo Group, Dongwon, RD, Frabelle, Waren Verein, FCF International, Tuna Canners Association of the Philippines, and the Thailand Tuna Association. *See* EII, Approved Dolphin-Safe Tuna Processing Companies & Fishing Companies (Exh. US-35).

[44] *See* U.S. Written 22.6 Submission, para. 32.

Consequently, in looking at the purchasing policies only of retailers, the United States is, in fact, *understating* the influence of EII in the U.S. market, *not overstating* it. In other words, the fact that a particular retailer does not have a specific purchasing policy against buying tuna product produced from setting on dolphins does not mean that the retailer purchases such tuna product (or would do so in the future) because the companies in that retailer's supply chain may each be individually committed not to sell such tuna product.

18. As to the retailer commitments provided in Exhibit US-40, Mexico's assertion that this exhibit proves that the U.S. Government is "pressuring U.S. retailers not to carry Mexican tuna products" is contradicted by the evidence.[45] It is clear from the exhibit that the U.S. Department of Commerce simply asked companies whether they had an official dolphin safe tuna policy.[46] Neither the language of the letter nor any other fact suggests that pressure was (or could be) applied. Further, the United States is surprised at this particular accusation, since, at every stage of this dispute, both parties have invited companies in their relevant industries to submit statements for litigation purposes.[47] It is relevant to this dispute that the major retail channels in the United States have a policy of not purchasing non-dolphin safe tuna product and, as such the United States does not act improperly by asking particular retailers whether they have such a policy and what the content of that policy is. Further, the United States did not even attempt to confirm the dolphin safe policy of all retailers pledged not to purchase non-dolphin safe tuna, which confirms that the figures provided in paragraph 35 of the U.S. written 22.6 submission (66 percent of retail market share, 46.4 percent of total consumption) are conservative.[48]

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[45] Mexico's Written 22.6 Submission, para. 80.

[46] *See* "Dolphin Safe Statements from Retailers" (Exh. US-40) ("I'm reaching out on behalf of the U.S. Department of Commerce with regards to whether Southeastern Grocers *has or does not have* a dolphin-safe tuna policy, and whether your company *would or would not* sell tuna caught in association with dolphins throughout your stores.") (emphasis added).

[47] *See, e.g.*, Mexico's First Written Submission to the 1st 21.5 Panel, paras. 159, 227 (citing and describing Exhibits MEX-73, MEX-89A, MEX-89B, and MEX-89C, consisting of statements from persons in the Mexican tuna industry).

[48] In this regard, the United States notes that Mexico appears confused by the relevance of Walmart's purchasing policy, which is focused on the sustainability of the source fishery, rather than whether tuna product is produced from setting on dolphins or whether a dolphin was killed or seriously injured in the relevant set. *See* Mexico's Written 22.6 Submission, para. 79. In actuality, however, the fact that Walmart's purchasing policy does not depend upon whether the tuna product is "dolphin safe" or not is extremely relevant to the Arbitrator's analysis of what is the level of nullification or impairment caused *by the measure*. As has been discussed previously, the United States understands that Walmart's U.S. stores do not sell tuna product produced from setting on dolphins (although its Mexican stores apparently do sell Mexican canned tuna brands). And what Walmart's policy states is that its policy is not dependent on whether Mexican tuna product carries or does not carry the dolphin safe label, or even if the law continues to exist. Rather, Walmart's decision to carry (or not carry) Mexico's tuna product produced by setting on dolphins depends on whether such tuna product can meet Walmart's sustainability standards. As such, Mexico cannot claim that its market access will increase through sales at Walmart in the event the U.S. measure is withdrawn or modified. Mexican tuna product, which apparently does not currently meet Walmart's

19. Mexico's claim that "EII's lack of credibility is growing" is similarly unsupported and incorrect. First, the number of companies that have made commitments to EII has steadily grown over the years. EII reports that in 2003, 353 tuna companies had commitments with EII, and that this number grew to 468 in 2009, 481 in 2012, and is now over 500. If EII's "credibility" were diminishing to the point that actors in the U.S. market considered it to be "illegitimate,"[49] one would expect the trend to be in the opposite direction. Moreover, EII's monitoring program has been certified by the International Standards Organization (ISO) for meeting ISO's standards for both business (ISO 9001) and environmental standards (ISO 14001). EII's practices are audited annually by QMS Global in this regard.[50] Thus, the facts tell a very different story than Mexico suggests, *i.e.*, that demand for Mexico's tuna product, which is not produced in a manner that meets EII standards, continues to be limited.[51]

20. To the extent that Mexico is saying that EII is not "credible" in the *Mexican market*, however, Mexico's assertion may be correct. The total absence of Mexican companies in EII's approved lists is notable.[52] But that point does not speak to EII's credibility in the *U.S. market*. Rather, the fact that Mexican companies, which produce primarily for Mexican consumers, have refused to make the same commitment that the "big three" U.S. brands, which produce for U.S. consumers, have made speaks to an entirely different point – how distinct the U.S. and Mexican markets are from one another in terms of consumer preferences for tuna product produced from setting on dolphins. If consumer preferences in Mexico and the United States were in fact the same – as Mexico repeatedly alleges – one would expect U.S. and Mexican companies to be making similar production decisions. But, in fact, just the opposite has happened. Mexican companies, which have focused on meeting the demand of consumers in Mexico, continue to produce tuna product from setting on dolphins, while those companies that have focused on meeting the demand of consumers in the United States, including, among others, "the big three" and the Ecuadorian producers that supply the U.S. market, changed their policies decades ago.[53]

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sustainability standards, will either be purchased (or not purchased) by Walmart in the future based on a different metric and a metric which is not a factor in the calculation of nullification or impairment in this dispute.

[49] Mexico's Written 22.6 Submission, para. 14.

[50] QMS Global Certificate of Registration for EII (2016) (Exh. US-104).

[51] Mexico's single piece of "evidence" here is that EII has continued to certify companies to meeting its standard that purchase from a company that Mexico alleges is not also certified by EII. In this regard, Mexico is incorrect. This particular company does, in fact, have an EII-consistent dolphin safe policy, which includes a prohibition on the intentional chasing and capturing of dolphins. *See* Marine Mammal – Dolphin Safe Policy (Exh. US-105) (2014) (BCI).

[52] *See* EII, Approved Dolphin-Safe Tuna Processing Companies & Fishing Companies (Exh. US-35); EII, Approved Dolphin-Safe Importers, Distributors, Brokers, Retailers, Agents (Exh. US-37).

[53] *See also US – Tuna II (Mexico) (Panel)*, para. 7.289 ("Indeed, the evidence that canners refuse to buy tuna caught in association with dolphins suggest that the pressure is sufficient to induce processors of tuna products to avoid altogether tuna that would make their final products ineligible for the label. While this is only indirect evidence as to the final consumers' behaviours, it suggests that the producers themselves assume that they would not

53. With reference to paragraph 123 of the United States' written submission, what is the basis for the United States' position that consumers in the United States distinguish between tuna products produced by setting on dolphins and tuna products from tuna caught by other non-dolphin-safe fishing methods? Could it not equally be argued that consumers simply distinguish between tuna products designated as dolphin-safe and tuna products designated as non-dolphin-safe? Please explain and provide evidence to support your answer.

21. In paragraph 123 of its written submission, the United States was explaining that, under the counterfactual of withdrawal of the measure, 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 certified dolphin-safe" label, as Mexico suggests).[54] In such a hypothetical, the U.S. consumer, for the first time, would be faced with the situation that tuna product produced from setting on dolphins and not setting on dolphins could be marketed in similar terms. Yet U.S. consumers remain "sensitive" to the manner in which tuna product is produced, and continue not to want to purchase tuna product produced from the intentional chase and capture of dolphins.[55] It was in this context that the United States noted that, under U.S. law,[56] producers of tuna product produced by not setting on dolphins will still be able to distinguish their product by making some claim to that effect on the label. The United States observes that Mexico agrees with the United States on this point.[57]

22. The reason that marketers of tuna product produced without setting on dolphins would incur the expense and trouble to change their labels would be due to the belief that U.S. consumers think such information important, and would choose tuna product not produced from setting on dolphins over tuna product that was.[58] Of course, no such marketing claim is needed now as the dolphin safe label already makes that distinction under current law. As is well understood, the definition of what it means to be "dolphin safe" for purposes of the U.S. market

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be able to sell tuna products that do not meet dolphin-safe requirements, or at least not at a price sufficient to warrant their purchase.").

[54] *See also* Mexico's Written 22.6 Submission, para. 8.

[55] *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.").

[56] That is, under the Federal Trade Commission Act (FTCA) "unfair or deceptive" legal standard provided for in 15 U.S.C. § 45 (Exh. US-54).

[57] *See* 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.").

[58] That choice could take place in choosing between different brands of yellowfin, but could also be between yellowfin produced from setting on dolphins on the one hand, and albacore or "light meat" (*i.e.*, skipjack or a combination of skipjack and yellowfin) on the other hand.

is, and has always been, intricately tied to the concept that the product was *not* produced by setting on dolphins. The question in this proceeding is, however, how the U.S. market will react – and, in particular, whether U.S. consumers will choose to purchase tuna product produced from setting on dolphins over tuna product not produced by setting on dolphins – if U.S. law is substantially changed such that a claim of "dolphin safe" can no longer be relied on to mean what it has always meant.

23. From the inception of the U.S. dolphin safe label, the concept of what it means to be "dolphin safe" has been intimately linked to the concept that the tuna product has *not* been produced by setting on dolphins. As has been discussed, the April 1990 decision by the "big three" companies to stop selling tuna product produced from setting on dolphins came after a sustained consumer campaign against the practice of setting on dolphins by purse seine vessels in the ETP.[59] The U.S. Congress's initial enactment of the DPCIA followed that industry decision, and, as originally conceived, the dolphin safe label *only* meant that tuna product produced from purse seine vessels in the ETP was not produced from setting on dolphins.[60] The 1997 amendments to the DPCIA did not change that close connection between these two concepts. Indeed, it was not until 2013 that "dolphin safe" tuna product produced from outside the ETP large purse seine fishery meant anything *other* than it was not produced by setting on dolphins.[61]

24. This suggests that U.S. consumers do "distinguish between tuna products designated as dolphin-safe and tuna products designated as non-dolphin-safe" as the question indicates. But in doing so, U.S. consumers are distinguishing between tuna product produced from setting on dolphins and tuna product produced without setting on dolphins, a point that the original panel recognized.[62]

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[59] *See, e.g.*, John Javna, "One of the Most Impressive Environmental Victories of 1990…" *Baltimore Sun*, Jan. 5, 1991 (Exh. US-106) (stating 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"); *see also US – Tuna II (Mexico) (Panel)*, para. 7.289 ("Indeed, the evidence that canners refuse to buy tuna caught in association with dolphins suggest that the pressure is sufficient to induce processors of tuna products to avoid altogether tuna that would make their final products ineligible for the label. While this is only indirect evidence as to the final consumers' behaviours, it suggests that the producers themselves assume that they would not be able to sell tuna products that do not meet dolphin-safe requirements, or at least not at a price sufficient to warrant their purchase.").

[60] DPCIA, Pub. L. 101-627, sec. 901(d) (Exh. US-3); *see also id.* sec. 901(b) (noting that Congress had found that consumers would like to know if the tuna they purchase is falsely labeled as to the effect of *the harvesting of the tuna on dolphins*") (emphasis added); *see also* U.S. Response to Orig. Panel Question 40, paras. 97-100.

[61] *See Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products*, 78 Fed. Reg. 40,997 (July 9, 2013) (Exh. US-107). The prohibition on producing tuna product with illegal large-scale driftnets has also applied since the inception of the DPCIA.

[62] *See US – Tuna II (Mexico) (Panel)*, para. 7.505 (finding that, by "deny[ing] access to the label to products containing tuna caught by setting on dolphins, [the measure] enable[s] 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 . . . .").

25. This question thus exposes a central disconnect in Mexico's argument. What Mexico argues with regard to its Counterfactual #1 is that the dolphin safe label has value in the U.S. market, and if the United States modified the long-standing definition of what "dolphin safe" means to include tuna product produced from setting on dolphins, Mexican producers would be able to profit from a (very large) share of that existing value. But Mexico ignores the fact that any value that the label has in the U.S. marketplace is *because* of that definition. If the United States eliminated a central pillar of what it means to be "dolphin safe," the label would no longer mean to the U.S. consumer what it does now, and the value of the label to the consumer would decline accordingly. In this regard, it is relevant (and undisputed) that, in such a hypothetical, producers could continue to provide U.S. consumers sufficient information to distinguish their product from Mexican tuna product with respect to whether it was produced by dolphin sets.[63]

26. Mexico responds by arguing that the fact that its competitors will continue to distinguish their product from Mexico's product would not prevent Mexico's exports from growing 28-fold (by value). In Mexico's view, this is so because while the U.S. consumer *is* concerned about "unregulated" setting on dolphins – for which Mexico argues there is little demand[64] – the U.S. consumer *is not* concerned about tuna product produced from setting on dolphins consistent with the AIDCP.[65] But, of course, that is not the choice the U.S. consumer would be faced with. Rather, the choice the U.S. consumer would face would be between tuna product that is produced without setting on dolphins and tuna product that is produced from setting on dolphins harvested in the ETP large purse seine fishery, where over 6 million dolphins are intentionally chased, and over three and half million dolphins are captured *each and every year*.[66]

27. Further, Mexico's apparent belief that U.S. consumers are not concerned with the intentional chase and capture of dolphins under the AIDCP is without basis. In particular, Mexico's argument is undermined by the entire history of the DPCIA, the continuing impact that

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[63] 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.").

[64] Mexico's Written 22.6 Submission, para. 13. The United States would, again, note that such "unregulated" setting on dolphins is banned in the western central Pacific Ocean, the Indian Ocean, and all U.S. fisheries. *See* U.S. First Written 21.5 Submission, para. 47.

[65] Mexico' Written 22.6 Submission, para. 49 ("Currently, the U.S. market is prevented by the tuna measure from being properly informed about the difference between unregulated dolphin encirclement and AIDCP-certified dolphin encirclement, the AIDCP's comprehensive certification, tracking and verification system and the success the AIDCP has had in reducing dolphin mortalities to statistically insignificant levels. Under Mexico's first counterfactual, this would no longer be the case, *permitting the market to immediately distinguish between the two different types of dolphin encirclement fishing*. Thus, the U.S. market will be fully informed of the certified fishing method used by the Mexican fleet and authorized by the AIDCP.") (emphasis added).

[66] *See* U.S. First Written 21.5 Submission, para. 37 ("From 2009 to 2013, for example, approximately 6.2 million dolphins were chased, and approximately 3.6 million were captured each year in ETP dolphin sets.") (citing Tables Summarizing Fishery-by-Fishery Evidence on the Record, tables 1-2 (Exh. US-108) (21.5 Exh. US-13)).

EII has in the U.S. market, and the broader context of U.S. law. As has been noted previously, U.S. law does not merely ban the intentional killing of marine mammals. Rather, what is banned – since 1972 – is all *harassment* of marine mammals,[67] and the changes to U.S. law in 1997 to allow U.S. vessels to intentionally chase and capture dolphins in the ETP consistent with the AIDCP is a significant exception to that general rule. Given U.S. consumer views regarding marine mammal protection, however, it is, therefore, not surprising that U.S. vessels, and their purchasers, which depend so heavily on the U.S. market, do not take advantage of the allowance under U.S. law to fish for tuna by setting on dolphins in the ETP large purse seine fishery.

28. The fact is that there is simply no basis to believe that were the measure withdrawn or substantially modified U.S. consumers would begin to purchase tuna product produced by setting on dolphins in lieu of tuna product produced without setting on dolphins.

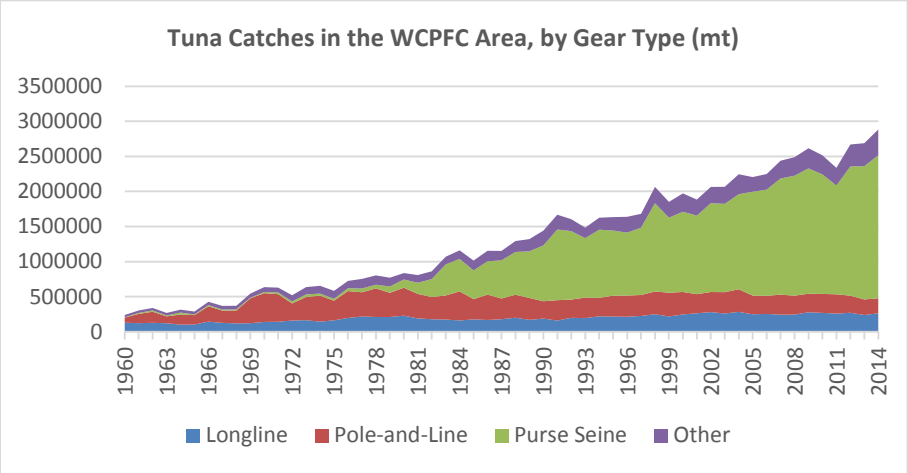
54. With reference to paragraph 1 of Mexico's MP, does the United States agree that "[t]he Tuna Measure has re-shaped the United States tuna product market for over twenty-five years"? Or are changes in the United States tuna product market attributable to other factors?

29. Mexico provided no evidence to support its assertion that the U.S. measure has "re-shaped" the U.S. tuna product market over the past 25 years. In fact, the available evidence shows that the most important factors shaping the U.S. market during this period have been, not the dolphin safe label, but the increasing importance of the WCPO in the global tuna industry (along with the related rise of tuna producers in the WCPO region) and U.S. consumer preferences.

30. The WCPO purse seine tuna fishery began in the 1960s, but produced relatively small quantities of tuna until the early 1980s, when changes in resource availability and technology caused catches to begin increasing exponentially. As shown in the graph below, the WCPO purse seine fleet's total production of 38,479 mt of tuna in 1960 grew to 122,079 mt by 1985 and to 214,919 by 1990 (more than a five-fold increase in ten years).[68] In 2014, it had increased to 374,209 mt.

[67] As noted in the compliance proceedings, 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. 16 U.S.C. § 1372 (Exh. US-109); 16 U.S.C. § 1362(13) (Exh. US-110) (defining "take" as to "*harass*, *hunt*, *capture*, or kill, or *attempt to harass*, *hunt*, *capture*, or kill") (emphasis added).

[68] WCPFC, *Yearbook – 2014*, at 131 (Exh. US-85).



Source: WCPFC, *Tuna Fisheries Yearbook 2014*, at 131 (Exh. US-85).

31. Several factors account for the remarkable growth of the WCPO purse seine fishery, including the discovery of additional tuna resources,[69] new technological developments in the fishery (namely the use of floating object or FAD sets),[70] and environmental conditions leading to low harvests in the ETP in the early 1980s, causing vessels to shift to the WCPO.[71] Another factor affecting U.S. vessels was the relocation of the bulk of U.S. processing activities from the U.S. mainland to Puerto Rico and American Samoa, which made fishing in the WCPO more convenient and efficient than the EPO.[72]

32. The ETP purse seine catch, by contrast, declined in the early 1980s and remained fairly constant between 1990 and 2014 (263,253 mt in 1990 and 238,889 mt in 2014).[73] Consequently, the ETP purse seine fishery's relative importance has diminished as the WCPO purse seine fishery's importance has grown. In 1980, the WCPO accounted for 21 percent of the Pacific

[69] Roger L. Corey et al., Int'l Trade Comm. (ITC), *Competitive Conditions in the U.S. Tuna Industry*, at xvii (1986) (Exh. US-111).

[70] Corey et al. 1986, at 4 (Exh. US-111).

[71] Robert Gillet & Antony Lewis, *A Survey of Purse Seine Fishing Capacity in the Western and Central Pacific Ocean, 1988 to 2003*, at 12 (2003) (Exh. US-112); Corey et al. 1986, at 9-10 (Exh. US-111) (noting that "[t]he effects of the most recent El Nino, which occurred from late 1982 through early 1984 . . . forced an increase in water temperature in the eastern Pacific and a decrease in temperature in western Pacific waters," which caused tuna fishing to be more difficult in the ETP (as tuna swam in deeper waters) and easier and less costly in the WCPO, leading to "a large shift in the total harvesting effort by tuna vessels . . . from the eastern to the western Pacific").

[72] Corey et al. 1986, at 10-11 (Exh. US-111) ("[T]he closure of a Hawaii cannery and all but one California cannery significantly reduced the market for frozen tuna for vessels fishing in the eastern Pacific. These vessels were then forced to sell much more of their catch to canneries in Puerto Rico and American Samoa, where most of the reduced California/Hawaii capacity was relocated. The resulting increased transportation costs, during a time of rising harvesting costs and declining prices, contributed to the decision of many U.S. vessel operators to either move their operations to the western Pacific or cease active participation in the U.S. tuna fishery.").

[73] WCPFC, *Yearbook – 2014*, at 131 (Exh. US-85).

purse seine catch and the ETP accounted for 80 percent; in 1990, the WCPO accounted for 45 percent and the ETP for 55 percent; and in 2014, the WCPO accounted for 62 percent and the EPO for 38 percent.[74] The vast majority of the purse seine catch in both areas is used for canning. Thus, beginning in the 1980s, the WCPO grew from a minor contributor to the global catch of tuna for processing to the majority supplier in the Pacific, the most important region for tuna production, eclipsing the ETP's formerly dominant position.

33. During this period, tuna industries in countries that fish in and process tuna caught in the WCPO have grown exponentially and have become the dominant factors in the global tuna canning industry. As a 1990 International Trade Commission (ITC) report explained:

> The Asian region has emerged as the primary world exporter of canned tuna. Asian canned tuna producers have developed into the world's leading exporters during the 1980s. Thailand is the leading world canned tuna exporter; followed by the Philippines. Indonesia is an emerging producer and exporter and may challenge the position of Thailand and the Philippines in the future.[75]

34. Thailand, in particular, went from producing almost no canned tuna in 1980, to over 700,000 mt, a quarter of all canned tuna produced in the world, in 2008.[76] A number of factors were instrumental in fueling the expansion of Thailand's canned tuna industry, including, most importantly, proximity to tuna resources in the WCPO and the Indian Ocean.[77] Other factors included: "a low cost and highly productive labor force"[78]; "an already well-established food processing industry"[79]; "excellent shipping logistics"[80]; and "the Thai government's 'pro-

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[74] WCPFC, *Yearbook – 2014*, at 131 (Exh. US-85).

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

[76] See Liam Campling et al., *Pacific Island Countries, The Global Tuna Industry and the International Trade Regime – A Guidebook*, at 339 (2007) (Exh. US-114); FFA, Market and Industry Dynamics, 155 (Exh. US-7).

[77] Campling et al. 2007, at 329 (Exh. US-114) ("Thailand was well located to draw upon the expanded low cost supplies of tuna from both the Pacific and Indian Oceans"); *see* FFA, Market and Industry Dynamics, at 159 (Exh. US-7) (referring to Thailand's "strategic location to source raw materials from both the Pacific and Indian oceans").

[78] FFA, Market and Industry Dynamics, at 159 (Exh. US-7); Campling et al. 2007, at 340 (Exh. US-114) (explaining that "[a] major factor behind the historical inflow of foreign direct investment (FDI) as well as the development of domestic manufacturing firms in Thailand is the abundant supply of low cost labour").

[79] FFA, Market and Industry Dynamics, at 159 (Exh. US-7); Campling et al. 2007, at 340 (Exh. US-114).

[80] FFA, Market and Industry Dynamics, at 159 (Exh. US-7); *see also* Campling et al. 2007, at 342 (Exh. US-114) ("Since the 1970s Thai government policy placed a consistent emphasis on infrastructure development, which provided a key foundation for economic development. This was consistently highlighted as a priority in national development plans and has resulted in Thailand boasting one of Southeast Asia's most advanced industrial and commercial infrastructures.").

business' policy."[81] In particular, due to its history as a base for fruit and vegetable canning operations, Thai tuna processors "can offer much cheaper cans as part of total operating costs," which, considering that cans are second only to fish in terms of the costs of producing canned tuna, "provides Thailand with an important competitive advantage."[82] Additionally, "[t]he concentration of processing in and around Bangkok acts as an industrial cluster," which provides a range of benefits to the Thai industry.[83] A 2007 report concluded that Thailand's global dominance in the tuna industry "cannot be overestimated."[84]

35. Other Asian tuna industries supplied from the WCPO tuna fisheries have many of the same advantages as Thailand, although not to the same extent. The tuna industries of Indonesia and the Philippines benefit from the same location advantage as Thailand and, like Thailand, expanded rapidly in the 1980s and 1990s as the WCPO purse seine fisheries became increasingly productive.[85] Vietnam's industry developed more recently, in parallel with other seafood processing industries for export and relying on the "major strength" of Vietnam's "cheap and highly productive labor force."[86]

36. Unsurprisingly, as the processing industries in the WCPO region developed, they became increasingly important suppliers to the U.S. market. As shown in the chart below, U.S. imports of canned tuna and loins from the main Asian producers rose from very low levels in 1980 ($29 million) to over $300 million in 1990 to a peak of over $700 million in 2012 to just over $500 million in 2015.[87] Thailand led the way, supplying 9.1 percent of U.S. imports of canned tuna and tuna loins (for canning) in 1980 and accounting for 40 to 55 percent of such imports over the past decade.[88]

[81] FFA, Market and Industry Dynamics, at 159 (Exh. US-7).

[82] Campling et al. 2007, at 340 (Exh. US-114).

[83] Campling et al. 2007, at 340 (Exh. US-114).

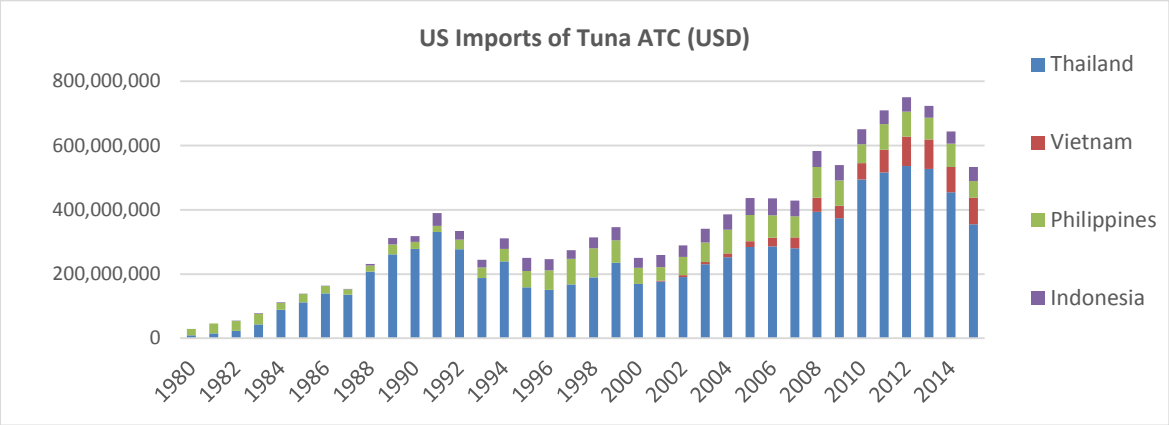
[84] Campling et al. 2007, at 344 (Exh. US-114).

[85] *See* FFA, Market and Industry Dynamics, at 202, 207, 218 (Exh. US-89).

[86] FFA, Market and Industry Dynamics, at 225 (Exh. US-7); *see also id.* at 156 (showing that the labor cost per metric ton of production in Vietnam is less than half of similar costs in Thailand and Ecuador).

[87] "US Imports of Tuna ATC from Top WCPO Producers" (Exh. US-115).

[88] "US Imports of Tuna ATC from Top WCPO Producers" (Exh. US-115).



37. A 1990 report by the U.S. International Trade Commission (ITC) noted that the remarkable rise of Thailand as a supplier to the U.S. tuna product market in the 1980s "resulted mainly from expanding production in Thailand coupled with contractual arrangements to provide canned tuna to U.S. processors" and predicted that Thailand's rise "will likely continue."[89] And indeed, the value of canned tuna imports from Thailand and other WCPO producers continued to grow in the 1990s and 2000s, as shown above. As a 2010 report by the FAO explained, "[s]ince Thailand is the world's major canned tuna producer, it is not surprising that more than half of all United States imports originate there."[90] Thailand, the Philippines, and Indonesia are also major suppliers of prepared tuna to the EU market, accounting together for 20 percent of all such imports in 2011-2015.[91]

38. In addition, several different changes in U.S. consumer preferences have also played an important role in influencing the U.S. tuna product market.

39. First, as the United States explained in its written 22.6 Submission, beginning in the late 1980s, U.S. consumers developed a strong preference for tuna that was not caught by setting on dolphins. In 1988, environmental activists led a media campaign to raise awareness of the "capture and killing of dolphins" in dolphin sets in the ETP.[92] This campaign stirred public outrage and resulted in public pressure on tuna companies serving the U.S. market to stop purchasing tuna caught by setting on dolphins.[93] In response, the three largest tuna companies

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[89] Corey et al. 1990, at xiv (Exh. US-113).

[90] Makoto Peter Miyake *et al*., *Recent Developments in the Tuna Industry: Stocks, Fisheries, Management, Processing, Trade and Markets*, FAO Fisheries & Aquaculture Technical Paper 543, at 108 (2010) (Exh. MEX-14).

[91] "EU Imports of Prepared Tuna Products – 2011-2015" (Exh. US-116).

[92] *US – Tuna II (Mexico) (Panel)*, para. 7.288 ("This evidence suggests that, following public campaigning by the environmental organization 'Earth Island Institute' in the late 1980s (including through film footage shot in 1987-88 showing the capture and killing of dolphins during a fishing trip where setting on dolphins was used), tuna processors were under pressure to stop purchasing tuna caught in conditions that were harmful to dolphins.").

[93] *US – Tuna II (Mexico) (Panel)*, para. 7.288; *see* Sahagun, "Protests Urge Tuna Boycott over Killing of Dolphins" (Exh. US-100); Manning, "Concerned Students Are Tuning out Tuna" (Exh. US-101) (describing how

serving the U.S. market announced that they had adopted such a policy, and other companies followed suit.[94] This decision accelerated the trend, discussed above, of the U.S. purse seine fleet moving to the WCPO, where it was possible to catch more tuna with less expenditure of resources through floating object and free schools sets.[95] Thus, U.S. consumer preferences for tuna not caught by setting on dolphins affected the sourcing decisions of major processors serving the U.S. market and the operation of the U.S. purse seine fleet.

40. Second, U.S. consumers have demonstrated a strong preference for albacore over all other types of canned tuna. This preference is due to albacore's mild flavor, firm texture, and light color.[96] U.S. consumers are willing to pay a premium for albacore, and, indeed, it dominates the premium canned tuna market in the United States. In 2008, albacore represented 34 percent of the U.S. canned tuna market by volume but 52 percent by value.[97] The data in Exhibit MEX-15 also reflects this preference, showing that sales of canned albacore accounted for 29 percent of canned tuna by weight during the covered period but 40 percent by value.[98] (Yellowfin, by contrast, accounted for 1.2 percent by weight and 1.5 percent by value.) The U.S. preference for albacore is distinct from consumer preferences in other markets as shown by the fact that the United States consumes 19 percent of the global canned tuna production but 55-60 percent of the world's consumption of albacore.[99]

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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) (stating 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").

[94] *See US – Tuna II (Mexico) (Panel)*, para. 7.288 ("The evidence presented to the Panel also shows that major tuna processors reacted to these dolphin-safe concerns, and that this led to changes in their purchasing policies as of April 1990. These policies are still in place: such companies will not purchase tuna from vessels that fish in association with dolphins."); Manning 1990 (Exh. US-101) (quoting David Burney of the Tuna Foundation as saying that the tuna industry was seeking solutions: "This isn't an industry that's ignored the issue. There's been a tremendous effort that's gone forward through years."); Javna, "One of the Most Impressive Environmental Victories of 1990 . . ." (Exh. US-106) ("For a while it seemed to many of us like one more hopeless cause. Then suddenly last April, H.J. Heinz, owner of Starkist Tuna (the largest tuna canning company in the world), gave in and pledged to buy only 'dolphin-safe' tuna. Within hours, two other companies agreed to stop their harmful fishing practices as well.").

[95] *See* Corey et al. 1990, at 2-4 (Exh. US-113).

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

[97] FFA, Market and Industry Dynamics, at 254 (Exh. US-7).

[98] *See* "52-Week Canned Tuna Sales, Summed by Type" (Exh. US-17) (aggregating the data from Exhibit MEX-15); *see also* "Yellowfin Market Review," at 7-8 (Exh. US-10) (BCI) [[
]].

[99] FFA, Market and Industry Dynamics, at 170, table 4.6 (Exh. US-7); *see* Corey et al. 1990, at 2-11 (Exh. US-113) ("In the U.S. market, all but albacore are processed into "lightmeat" canned tuna; only albacore maybe labelled 'whitemeat' canned tuna. Whitemeat tuna is usually considered superior to lightmeat tuna in terms of taste and appearance."). European consumers, by contrast, prefer yellowfin as a premium product. *See* Corey et al. 1990,

41. The preference of U.S. consumers for albacore has grown more pronounced over the past thirty years, as reflected in the purchasing decisions of U.S. canneries producing for the U.S. market. In 1987, albacore accounted for less than 20 percent of the tuna processed by U.S. canneries. This figure increased to over 30 percent by 1997 and to over 40 percent in 2014 and 2015.[100] The vast majority of this albacore is imported by the U.S. canneries (*i.e.* bought from foreign vessels, not the U.S. fleet) and thus reflects a deliberate choice by canneries in response to consumer demand, rather than simply the effects of some level of vertical integration.[101] Thus, the U.S. consumer preference for albacore has been an important factor shaping the products sold in the U.S. canned tuna market over the past 25 years.

42. Third, health concerns among consumers have been important factors shaping the U.S. tuna product market. In contrast to European consumers, U.S. consumers prefer tuna packed in water due to the perception that it is healthier than tuna packed in oil.[102] This trend began in the early 1980s and persists today.[103] More recently, U.S. consumer demand has been affected by differences in mercury levels among types of tuna. 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 tuna alone.[104] Furthermore, U.S. consumers have become concerned about mercury levels in light tuna composed of large tuna, namely yellowfin, compared to the mercury levels of light tuna composed of skipjack.[105] Public campaigns by NGOs and others regarding the threat of mercury

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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.").

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

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

[102] 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.").

[103] Corey et al. 1990, at 2-11 (Exh. US-113) ("United States canners are continuing to shift their production from tuna canned in oil to tuna canned-in water or brine. According to industry sources, the increase in the production of canned tuna in water started to occur in the early 1980s as a result of a shift in consumer preference to water-packed tuna rather than oil-packed tuna. The trend toward water-packed tuna has continued with U.S. production of water packed accounting for 75 percent of U.S. canned tuna production in 1989."); *see* Campling et al. 2007, at 319 (Exh. US-114).

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

[105] *See* Roe & Hawthorne, "How Safe Is Tuna?" (Exh. US-18).

in canned tuna have affected U.S. sales of tuna product in recent decades.[106] Finally, overall consumption of canned tuna is declining, as consumers are switching to fresher products.[107]

43. Thus, over the past 25 years, the dominant factor shaping the U.S. (and global) tuna product market, from the supply side, has been the rise of the WCPO purse seine fishery and the countries processing tuna caught in that fishery. From the demand side, three trends have been noted for their effect on the U.S. market – a preference for dolphin safe tuna caught other than by dolphin sets, a preference for canned albacore over light tuna, and health concerns over certain pack styles and over mercury content in large fish such as yellowfin. The U.S. measure has been relevant primarily as it relates to the first consumer preference identified here. Finally, we note that, to the extent Mexico considers that the market has been shaped by the U.S. tuna measure, the most logical way to ascertain the level of nullification and impairment it is causing Mexico is to look at Mexico's share of the market before the measure came into effect, as the U.S. methodology proposes.

55. With reference to paragraph 37 of Mexico's MP, please comment on Mexico's assertion that "[i]f it had not been for the Tuna Measure, it is very likely that Mexican tuna canneries would have developed, in the long run, much greater fishing and production capacities than those observed today".

44. It is unclear what Mexico hopes to establish with such a statement. However, to the extent Mexico is suggesting that whatever level the Arbitrator concludes is equivalent to the current level of nullification and impairment should be augmented by some unspecified amount due to some capacity that was never developed, such a suggestion should be rejected as being inconsistent with the text of Articles 22.4 and 22.7 of the DSU. These articles are explicit that the relevant consideration in an Article 22.6 proceeding is the current level of nullification and impairment of benefits caused by the challenged measure.[108]

45. The arbitrator in *EC – Hormones* rejected an analogous argument concerning lost additional exports that would have been realized from "marketing and promotional efforts that would have taken place but for the hormone ban."[109] The arbitrator explained:

> We decided not to take these allegedly lost exports into account. . . . [T]he estimate we have to make is based on what would have happened had the hormone ban been withdrawn on 13 May 1999. We cannot assume, under the "counterfactual," that the ban was never imposed and, therefore, that US marketing efforts would have continued after 1989 until now. . . . Taking such lost exports into account would, in our view, be too speculative.

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[106] *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).

[107] Alan Lowther & Michael Liddel, ed., *Fisheries of the United States 2014*, at 105 (2015) (Exh. US-143).

[108] *See* U.S. Written Submission, paras. 43-44.

[109] *See EC – Hormones (Article 22.6 – US)*, para. 76.

This reasoning applies equally to the facts of this case.

46. Additionally, there are certain absolute constraints on the fishing capacity of Mexico's fleet that undermine the credibility of Mexico's assertion. As the United States noted in its written 22.6 submission, the supply of yellowfin in the ETP is not unlimited and a substantial increase in catch by the Mexican fleet would likely encounter supply constraints. The IATTC is responsible for managing tuna stocks in the EPO and it monitors catches and takes corrective action if they rise above sustainable levels.[110] The latest IATTC report indicates that yellowfin is in an "overfished" state in the EPO (although "overfishing" is not currently occurring),[111] suggesting that significantly higher catches by Mexican vessels over the past 25 years (as Mexico is suggesting) would likely have prompted action to limit overall catch levels.[112]

47. Mexico could, of course, have increased its production of tuna by fishing in the WCPO or increasing the capacity of the Mexican processing sector by purchasing tuna caught in the WCPO from non-Mexican vessels. Indeed, this is what the tuna industry in Ecuador, the largest tuna processor in the region, did when it became clear that tuna in the ETP was insufficient to supply its growing industry.[113] However, because the tuna-dolphin association that Mexico's vessels depend on does not exist in the WCPO,[114] the Mexican fleet would have needed to develop different ways to fish for tuna (as the Ecuadorian fleet has), which the Mexican fleet has thus far steadfastly refused to do.[115] Consequently, the decision of the Mexican tuna industry not to evolve in this direction cannot be attributed to the U.S. measure.[116]

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[110] U.S. Written Submission, para. 117.

[111] IATTC, Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015," at 52, 57-58 (June 2016) (Exh. US-43).

[112] *See, e.g.*, IATTC, Resolution C-13-01: Multiannual Program for the Conservation of Tuna in the Eastern Pacific Ocean During 2014-2016 (June 2013) (Exh. US-77) (stating that, in light of "the best scientific information available" and "the importance of conservation measures" for tuna stocks in the region, it was instituting a yearly 62-day closure period for the large purse seine fishery in the ETP for 2014-2016).

[113] FFA, Market and Industry Dynamics, at 196 (Exh. US-7) (explaining that, in response to supply shortages in the ETP, Ecuadorian tuna processors have begun importing tuna from the WCPO: "Between January and early August, 2010, over 80,000 mt of tuna were imported into Eastern Pacific production sites. Of this, around 72,000 mt were delivered to Ecuador. Over 89% of raw material imports to the Eastern Pacific region originated in the WCPO. According to one industry representative, 'Even if the [ETP] fleet has a banner year, the fleet can't supply the industry. It's 100,000 mt short per year. Primarily, the gap is going to be filled by the WCPO.'").

[114] *See US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.241-242; *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.220-227; *US – Tuna II (Mexico) (Panel)*, para. 7.520.

[115] *See infra*, Response to Question 69 (discussing Mexico's unique reliance on this fishing method).

[116] The United States also notes that Mexico's claim that its industry "essentially abandoned" the fresh tuna market as a result of a U.S. embargo in the 1990s does not logically follow, given that the embargo *did not cover exports of fresh tuna*. Mexico's Written 22.6 Submission, para. 148. Rather, the embargo to which Mexico refers to only covered tuna product produced from Mexico's large purse seine fleet, *i.e.*, canned and other processed tuna

48. Indeed, Ecuador's example demonstrates that the U.S. measure did not prevent a fishing nation in the ETP region from developing into an important player in the global tuna industry. In the 1980s, Ecuadorian production of prepared tuna was fairly constant and low level (approximately 10,000 mt per year).[117] Production expanded in the 1990s, reaching 45,600 mt in 1999, and then grew rapidly to a peak of 202,500 mt in 2004.[118] Currently, Ecuador's industry processes each year approximately 500,000 mt of tuna, including yellowfin, skipjack, and bigeye tuna,[119] and Ecuador was the second largest processing nation (behind Thailand) in 2008.[120] In 2013-2015, Ecuador exported prepared tuna products to nearly 50 countries, mainly in Europe, South America, and the United States.[121] In particular, Ecuador is the largest source of prepared tuna imports to the European Union (supplying $456.4 million in imports, 23 percent of the total, from 2011-2015).[122] In contrast, Mexico exports very little canned tuna to the European and South American markets, suggesting deficiencies in Mexico's competitiveness in these canned tuna markets that cannot be attributed to the U.S. measure.[123] The failure to compete in Europe is particularly notable given the European consumer preference for yellowfin.[124]

49. In short, there is no evidence supporting Mexico's suggestion that its processing industry would have developed "much greater fishing and production capacities" but for the U.S.

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products. In any event, Mexico's claim is incorrect, as Mexico exports a notable amount of fresh tuna to the United States and other countries. *See* "Mexico's Exports of Tuna and Tuna Product" (Exh. US-117) (showing that, between 2011 and 2015, Mexico exported $271,405,736 of fresh tuna – more than triple the value of its prepared tuna exports); "Fresh Tuna Imports from the World and from Mexico" (Exh. US-118) (showing that, in the same period, Mexico exported 6,680,854 kg of fresh tuna to the United States, including 5,362,513 kg of fresh yellowfin).

[117] FFA, Market and Industry Dynamics, at 195 (Exh. US-7).

[118] FFA, Market and Industry Dynamics, at 196 (Exh. US-7).

[119] Vega & Mariano J. Beillard, U.S. Dep't of Ag. *Ecuador's Tuna Fish Industry: Update*, Aug. 17, 2015 (Exh. MEX-21).

[120] FFA, Market and Industry Dynamics, at 26 (Exh. US-7).

[121] *See* "Ecuador Exports of Prepared Tuna by Value" (Exh. US-78) (showing that in 2015 Ecuador exported over $15 million of prepared tuna products to Spain, the United States, the Netherlands, Colombia, Argentina, Germany, France, the United Kingdom, Chile, Italy, Venezuela, Brazil, and Peru, as well as lower values to approximately 35 other countries).

[122] "EU Imports of Prepared Tuna Products – 2011-2015" (Exh. US-116).

[123] *See* "Mexico's Exports of Tuna and Tuna Product" (Exh. US-117) (showing that, for 2011-2015, Mexico exported $10.7 million of prepared tuna to Costa Rica and nothing over $600,000 to any other country besides the United States and Puerto Rico); "EU Imports of Prepared Tuna Products – 2011-2015" (Exh. US-116) (showing that the EU imported $494,348 of prepared tuna from Mexico for 2011-2015). Mexico is, however, a significant supplier of frozen tuna for the EU processing industry, suggesting that it is Mexican processors that are not competitive in the EU market. *See* "EU Imports of Frozen Tuna Products – 2011-2015" (Exh. US-119) (showing that Mexico was the second largest source for frozen tuna product imports into the EU for 2011-2015, accounting for $260.1 million in imports over that period, or 9.8% of the total, by value).

[124] Corey et al. 1990, at xv, 4-5 (Exh. US-113).

measure. Indeed, there is evidence showing this is not the case. And in any event, Mexico has not shown that this assertion was relevant to the level of current nullification and impairment.

2.2 Questions related to the proposed counterfactuals

56. With reference to paragraphs 178-181 of Mexico's written submission, please address the issues raised by Mexico, whereby the years 1987-1989 used by the United States for its counterfactual are not appropriate for the calculations of the level of nullification or impairment for two main reasons: (i) there were voluntary export restrictions in place at that time, and (ii) they precede the signing of NAFTA.

50. The voluntary export restrictions that were in place between 1987 and 1989 do not render the U.S. counterfactual inappropriate for calculating the level of nullification and impairment because there is no evidence that they had a restricting effect on Mexican tuna exports to the United States during this period. When the United States and Mexico reached agreement on the lifting of the embargo arising out of a disagreement over the scope of territorial waters, the parties agreed to certain voluntary restraints on total Mexican exports of tuna and tuna products to the United States.[125] As shown in the table below, however, actual U.S. imports of Mexican tuna and tuna product were below the agreed level in each of the three years during which the restraints were technically in place. Indeed, 1987 was the only year in which Mexican exports came close to the levels at which the restraint would have had a restrictive effect.[126]

Year	Agreed Import Level	Actual U.S. Imports from Mexico
1987	17,500 mt / 19,200 st	17,198 mt
1988	22,500 mt / 24,800 st	6,681 mt
1989	27,500 mt / 30,300 st	13,060 mt

51. Thus, the evidence indicates that the voluntary export restraints did not have a significant effect on Mexican exports of tuna and tuna product during the 1987-1989 period. Consequently, Mexican tuna imports' market share during this period – 3.9 percent – is a reasonable estimate of Mexico's annual market share in the absence of the U.S. measure, and 5.8 percent, Mexico's all-time high market share, is a liberal estimate.[127]

[125] Corey et al. 1986, at 125 (Exh. US-111); Wesley W. Parks et al., "U.S. Trade in Tuna for Canning, 1987," 52 *Marine Science* 14, 20 (1990) (Exh. US-142) (stating that, during the first agreement year, Mexican exports to the United States totaled 16,600 short tons, "less than the agreed total of 19,200 tons," and naming the agreed values for 1988 and 1989).

[126] *See* "Historical U.S. Imports of All Tuna" (Exh. US-79).

[127] *See* U.S. Written 22.6 Submission, para. 130.

52. Further, as shown below, the evidence from the period prior to the 1980 embargo confirms these estimates of Mexico's market share in the absence of any measure affecting Mexican exports to the United States.[128]

	Total Tuna Imports from Mexico (mt)	**% Total Imports**
1975	5,663	2.7
1976	8,094	3.0
1977	11,611	4.4
1978	17,853	5.4
1979	10,038	3.2

53. The fact that 1987-1989 pre-dates the signing of NAFTA similarly does not make it inappropriate for calculating the level of nullification and impairment. To the contrary, data on Mexican exports to the United States of other seafood products pre- and post-NAFTA, as well as data on other countries' exports of canned tuna to the United States, demonstrates that Mexico's market share of the U.S. tuna product market would not be significantly different from the 1987-1989 period due to NAFTA being in effect.

54. Mexico is a significant exporter of many seafood products to the United States. Of the top 15 types of seafood products imported into the United States over the past five years, Mexico has a market share of over two percent of imports of shrimp, tuna, crab, and sardines.[129] The U.S. markets for these products are similar in that the United States imports these products in significant quantities from many countries in different regions of the world, including, specifically, the Americas and Asia.[130] Prior to NAFTA coming into effect, imports into the United States of at least subsets of all of these products (generally the processed form, as is the case with tuna) were subject to tariffs. Specifically, some shrimp products were subject to a 10 percent tariff; crab products were subject to tariffs ranging from 5 to 11 percent; and sardine products were subject to tariffs ranging from 2.5 to 20 percent, depending on the form of the

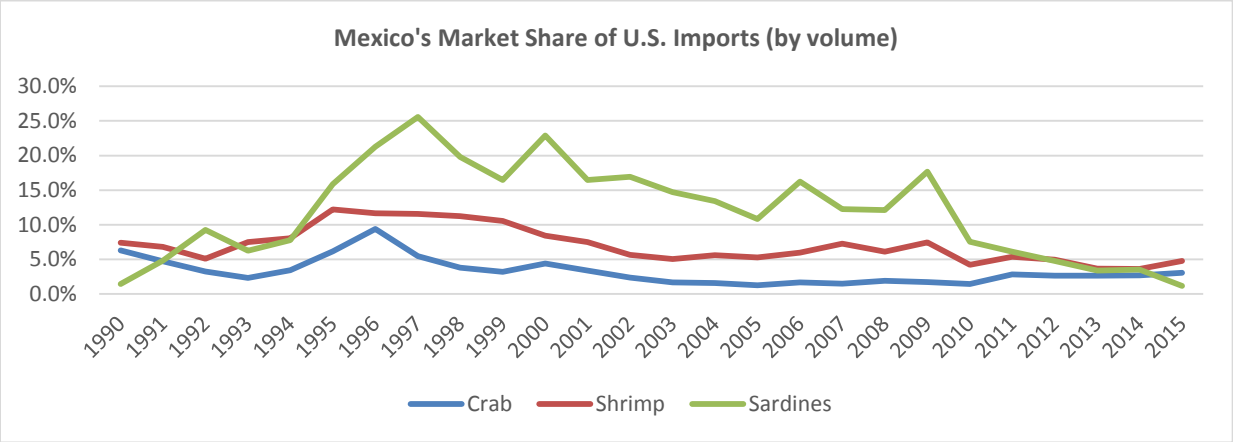
[128] *See* "Historical U.S. Imports of All Tuna" (Exh. US-79).

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

[130] *See* "U.S. Imports of Canned Tuna from All Countries Individually" (Exh. US-36); "U.S. Imports of All Shrimp Products" (Exh. US-121) (showing imports from the 11 countries with at least 1 percent share of U.S. imports); "U.S. Imports of All Crab Products" (Exh. US-122) (showing imports from the 13 countries with at least 1 percent of U.S. imports); "U.S. Imports of All Sardines Products" (Exh. US-123) (showing imports from the 13 countries with at least 1 percent share of U.S. imports).

product.[131] Thus, Mexico's import share of these products is suggestive of how Mexico's market share of U.S. imports of canned tuna would have been affected by NAFTA.

55. As shown in the graph below, Mexico's import share of all of these products did increase (to varying degrees) during the phase-in of NAFTA beginning in 1994.[132] In every instance, however, Mexico's import share subsequently declined and, by 2010 at the latest, was lower than it had been in 1993. Indeed, for shrimp products, Mexico's market share returned to pre-NAFTA levels around 2000, and for crab products the increase in market share following NAFTA was relatively small and lasted only about 3 years. Additionally, for none of these products did Mexico's market share ever approach the 55 percent projected by Mexico's model.



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

56. Thus, the effect of NAFTA on Mexico's import share of the products most analogous to tuna product suggest that Mexico's current share of U.S. imports would not be materially affected. Further, Mexico's exports of shrimp, arguably the most analogous product because it is most similar to tuna in terms of the volume of product imported and the countries supplying the bulk of U.S. imports, were only briefly affected by NAFTA, with Mexico's market share exceeding its pre-NAFTA high for only seven years beginning in 1995, and Mexico's current import share being significantly below pre-NAFTA levels.[133] With shrimp, as with tuna, Asian producers and Ecuador dominate the U.S. market, with Ecuador, China, India, Indonesia, Thailand, and Vietnam accounting for 83 percent of all imports for 2011-2015.[134]

57. The data on Mexico's share of U.S. imports of other seafood products are also relevant because they further illustrate the unreasonableness of Mexico's model's prediction that Mexico

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[131] *See* Harmonized Tariff Schedule of the United States, Supplement 1, Ch. 16 (July 1989), available online at https://www.usitc.gov/tata/hts/archive/8910/1989_supplement_index.htm (Exh. US-124) / (Exh. MEX-68).

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

[133] *See* "U.S. Imports of All Shrimp Products" (Exh. US-121).

[134] *See* "U.S. Imports of All Shrimp Products" (Exh. US-121).

would supply *over half* of all U.S. imports of tuna product. For *none* of the top seafood products imported into the United States does Mexico's import share for the past five years reach anywhere close to 50 percent. Indeed, for *none* of the top 15 products does Mexico's import share *even exceed 5 percent*.[135] The level of imports predicted by Mexico's model is grossly disproportionate to Mexico's position in the global tuna industry and to the position in the U.S. market of other Mexican seafood products that are produced and exported to the United States from diverse countries around the world.

58. Further, data on U.S. imports of canned tuna from countries that have experienced a substantial change in tariff treatment also suggests that using pre-NAFTA data is not unreasonable. U.S. imports of canned tuna and loins from Canada averaged 95,889 kg per year in the 10 years preceding NAFTA's entry into force in 1994 and only 32,806 kg per year in the decade following.[136] Imports of tuna product from Canada have still not reached their 1983 peak of 955,147 kg, despite increasing U.S. preference for albacore (which is the product Canada exports to the United States) over the past 25 years.[137] Also, Korea's share of U.S. imports of tuna product has been lower, by volume, in the four years since tariff reductions under the U.S.-Korea Free Trade Agreement began than in the 4 years preceding it.[138] The import share, by value, was higher during the first two years of the tariff phase-out than in the years before entry into force of the agreement, but it declined again in 2014-2015.[139]

59. Conversely, Ecuador's share of U.S. imports of canned tuna has *increased* over the past two years as Ecuador has lost tariff preferences. Until 2014, the majority of tuna products imported by the United States from Ecuador were duty free under the Andean Trade Promotion and Drug Eradication Act (ATPA). These preferences were removed beginning in 2013, so that the average tariff rate on canned tuna imports from Ecuador increased from 4% in 2012, to 7% in 2013 to 14% in 2014 and 2015.[140] However, U.S. imports of canned tuna from Ecuador were higher in 2013-2015 than average imports for 2009-2012, and Ecuador's share of all U.S. imports of canned tuna increased from 11 percent, by value, in 2012, to 14.1 percent in 2013, 15.3 percent in 2014, and 17.6 percent in 2015.[141]

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

[136] *See* "U.S. Imports of Tuna in Airtight Containers from Canada" (Exh. US-126). Tariffs on Canadian tuna products were already being reduced under the Canada-US Free Trade Agreement prior to NAFTA but fell further under NAFTA. Additionally, imports of tuna product had been zero in the three years preceding NAFTA, showing that the tariff reductions under the FTA, which entered into force in 1988, also had not had a significant positive effect on Canadian exports of tuna product to the United States. *See id.*

[137] *See* "U.S. Imports of Tuna in Airtight Containers from Canada" (Exh. US-126).

[138] *See* "U.S. Imports of Tuna Product from Korea" (Exh. US-127).

[139] *See* "U.S. Imports of Tuna Product from Korea" (Exh. US-127).

[140] *See* "U.S. Imports of Tuna Product from Ecuador" (Exh. US-128).

[141] *See* "U.S. Imports of Tuna Product from Ecuador" (Exh. US-128); "Imports of Canned Tuna from All Countries Individually – 2010-2015" (Exh. US-36) (showing that, for 2010-2013, U.S. imports of canned tuna from

60. Thus, neither of the points discussed at paragraphs 178-181 of Mexico's written 22.6 submission suggest that the years 1987-1989 used by the United States for its counterfactual are not appropriate for the calculations of the level of nullification or impairment. Rather, evidence suggests that the voluntary export limits in place in those years did not actually have any restrictive effect, and the data on U.S. imports from Mexico of other comparable seafood products, and on imports of tuna product from other countries, suggests that the fact that 1987-1989 pre-dates NAFTA does not render the U.S. counterfactual inappropriate.

57. With reference to paragraph 67 of the United States' written submission, please explain what, in the view of the United States, are the differences between Mexico's proposed counterfactual ("the measure that has impaired exports of Mexican tuna products to the United States has been removed or modified such that the WTO-inconsistent unfair competitive advantage given to tuna products from other countries is completely eliminated": MEX-2, p. 3) and the United States' proposed counterfactual ("withdrawal of the measure").

61. Mexico's proposed "counterfactual" – removal or modification of the measure – appears to be more of a concept, than an actual, specific counterfactual. For that reason, Mexico discusses its claim in terms of two "scenarios," which appear to describe different counterfactuals in and of themselves. In this regard, the U.S. counterfactual is just one more "scenario" – as Mexico puts it – of this overall concept of removal or modification of the measure. The U.S. scenario describes where "the measure has been removed" and the two scenarios put forth by Mexico describe different ways where "the measure has been modified." The United States has not sought to compare its counterfactual with Mexico's concept as the two are not actually comparable. Rather, the United States has sought to compare and contrast the three "scenarios," which the United States refers to as the "U.S. counterfactual," "Mexico's Counterfactual #1," and "Mexico's Counterfactual #2." In this context, there does appear to be some significant differences between the approaches of Mexico and the United States.

62. As to whether the three proposed scenarios can be proven to be WTO-consistent based on the DSB recommendations and rulings, there appears to be a significant difference between the U.S. counterfactual on the one hand, and the two Mexican counterfactuals on the other. It is *undisputed* that the U.S. counterfactual – withdrawal of the measure – is WTO-consistent. As such, the U.S. counterfactual is "plausible, reasonable, and appropriate" under Mexico's proposed legal framework.[142] The same, however, cannot be said of Mexico's two counterfactuals, both of which describe modifications of the measure that cannot be proven to be WTO-consistent by reference to the DSB recommendations and rulings this dispute. And of course there is a more fundamental problem with both of Mexico's counterfactuals. There is no

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Ecuador averaged $91,452,953 (16,904,382 kg) per year, compared to $101,754,359 (17,158,672 kg) per year for 2014-2015).

[142] Mexico's Written 22.6 Submission, para. 56 (arguing that a counterfactual that is in "compliance with the recommendations and rulings of the DSB and with the covered agreements" is "plausible, reasonable, and appropriate") (internal quotes omitted) (citing *US – Gambling (Article 22.6 – US)*).

basis for choosing a counterfactual that would impose on the Member concerned a particular means of complying. A Member concerned retains the discretion to choose the means for coming into compliance with WTO obligations. The complaining party does not have the right to choose which of the means of compliance the Member concerned is to adopt.

63. The United States understands that Mexico's Counterfactual #1 refers to a hypothetical measure under which the eligibility criteria are changed such that tuna product produced from setting on dolphins consistent with the AIDCP would be potentially eligible for the label, but the differences in the certification requirements and tracking and verification requirements remain unchanged.[143] Under this scenario, Mexican tuna product would be permitted to be marketed as "AIDCP certified dolphin-safe," and all tuna product that currently can be marketed as dolphin safe could continue to be so marketed.[144] Mexico claims that, in such a scenario, the detrimental impact would be eliminated,[145] but cites to no DSB recommendations and rulings that support such a conclusion. In the first compliance proceeding, the panel found that the differences in certification requirements and tracking and verification requirements resulted in separate detrimental impacts. The United States appealed those findings, but the Appellate Body did not address the merits of the U.S. appeals.[146] As such, there are no DSB recommendations and rulings that prove Mexico's Counterfactual #1 is WTO-consistent.

64. The same point is true for Mexico's Counterfactual #2. As discussed in response to Question 58, Mexico's description of Counterfactual #2 is quite vague. However, it would appear that in this scenario Mexican tuna product produced from setting on dolphins would still be ineligible for the label, but that AIDCP-equivalent certification and tracking and verification requirements would be applied to tuna product produced from all fishing methods and all fisheries, *irrespective of risk*.[147] And because AIDCP requirements are unique, no tuna product produced from outside the ETP large purse seine fishery would be eligible for the label. Again, Mexico does not cite any DSB recommendations and rulings to support the conclusion that

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[143] Mexico's Written 22.6 Submission, para. 47 ("In the first scenario, the United States would eliminate the blanket disqualification of tuna caught by dolphin sets from eligibility for the dolphin-safe label and allow tuna harvested by dolphin sets using techniques that minimize impacts on dolphins to use the label, such as those under the AIDCP, the multilateral treaty governing purse-seine fishing in the ETP to which both Mexico and the United States are parties.").

[144] *See* Mexico's Written 22.6 Submission, para. 8.

[145] Mexico's Written 22.6 Submission, para. 8 ("With respect to the first scenario, compliance is achieved by eliminating the detrimental impact (under the first part of the legal test in Article 2.1 of the TBT Agreement) and discrimination (under Articles I:1 and III:4 of the GATT 1994) …").

[146] Mexico, for its part, did not dispute the merits of the first compliance panel's findings in this regard, and opposed the U.S. appeals. *See* Mexico's Appellee 21.5 Submission, paras. 117, 156-157.

[147] Mexico's Written 22.6 Submission, para. 8 ("With respect to the second scenario, the detrimental impact and discrimination remain, but the eligibility criteria, the certification requirements, and the tracking and verification requirements are imposed on all tuna products in an even-handed manner (under the second part of the legal test in Article 2.1 of the TBT Agreement) and in a manner that does not constitute arbitrary or unjustifiable discrimination (under the chapeau of Article XX of the GATT 1994).").

requiring AIDCP-equivalent certification and tracking and verification requirements on all tuna products produced from outside the ETP large purse seine fishery would be calibrated to the risk to dolphins, and thus be even-handed. Rather, this position simply restates Mexico's (unproven) theory of compliance.[148]

65. With regard to the consequences in the marketplace, the United States agrees that there are similarities between the U.S. counterfactual and Mexico's Counterfactual #1 (there seem to be very few similarities with Mexico's Counterfactual #2). Under either the U.S. counterfactual or Mexico's Counterfactual #1, Mexican tuna product produced consistent with the AIDCP would likely be able to be marketed as "AIDCP certified dolphin-safe"[149] (or something similar). The United States and Mexico also appear to agree that, under either scenario, producers of tuna product produced by not setting on dolphins could market their product as such, thereby continuing to distinguish their product from Mexican products.[150] The United States also considers that tuna product produced to other standards, such as the EII standard, could continue to be marketed as meeting such standards under either counterfactual. Further, the commitments of producers, distributors, retailers, and others to adhere to the EII standards (and thus not purchase tuna product produced by setting on dolphins) would continue under either scenario. Finally, the United States considers that tuna product that currently can be marketed as dolphin safe would continue to be permitted to be so marketed if the measure were withdrawn.

66. Mexico, however, disagrees with the last statement, contending that in the event the measure were withdrawn, tuna product produced from outside the ETP that currently can be marketed as "dolphin safe" under the DPCIA and its implementing regulations would no longer be allowed to under the Federal Trade Commission Act (FTCA) default standard because such tuna product is not subject to AIDCP-equivalent certification and tracking and verification requirements.[151] Mexico does not provide any legal support for its position, and it is indeed incorrect.

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[148] Further, even this assessment of Mexico's approach may be overly conservative. As discussed below in response to Question 58, Mexico's legal theory of compliance discussed in this proceeding appears to differ significantly from its legal theory of compliance discussed in the parallel compliance proceedings.

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

[150] *See* U.S. Written 22.6 Submission, para. 79; Mexico's 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.").

[151] Mexico's Written 22.6 Submission, para. 62 ("In Mexico's view, the United States' counterfactual can be viewed as a combination of the first scenario in Mexico's counterfactual, whereby Mexican tuna products can use the AIDCP dolphin-safe label, and the second scenario in Mexico's counterfactual, whereby the necessary accuracy requirements must be applied to all tuna products, including those produced with non-ETP tuna, in order to ensure that U.S. consumers are not deceived.").

67. Under the FTCA, claims as to the dolphin safe nature of the product, could be made as long as they are not "unfair or deceptive."[152] With regard to the "deceptive" prong, the Federal Trade Commission (FTC) has long interpreted the law as requiring that a company must have a "reasonable basis" for its claims, and that it be able to "substantiate" its claims.[153] Reasonable basis means that there must be "competent and reliable evidence" to support the claim.[154] There is no support in the case law for Mexico's assertion that, under the hypothetical withdrawal of the measure, a cannery would need a higher-level certification or tracking program than is currently required to prove the "dolphin safe" status of tuna product in the event of audit by NMFS.[155] And this, of course, makes sense. As the Arbitrator will recall, the DPCIA is not designed as a "safe harbor" for claims that would otherwise be inconsistent with the FTCA but for the DPCIA – it simply describes a category of products that are not eligible for such labels. Thus, the DPCIA is designed to provide a specific application of the FTCA for this particular type of claim on this particular product; it does not bless any FTCA-inconsistent labels.[156]

68. The United States would note, however, that any similarity between the U.S. counterfactual and Mexico's Counterfactual #1 would not be relevant to an assessment of Mexico's model as Mexico, has not, in fact, modeled such a scenario. As the United States has previously discussed, Mexico has not attempted to model the effect of the removal of the dolphin safe label on demand for Mexican tuna product (or even for canned yellowfin). Indeed, such an approach, while it might be appropriate in theory, would require detailed data on U.S. purchases of canned tuna that is not available in this dispute.[157] Instead, Mexico's model asks the entirely different question of what the demand for canned yellowfin tuna in the U.S. market *would be*, if: 1) canned yellowfin's access to the U.S. market were so restricted that current U.S. consumption is not at all indicative of actual demand; 2) U.S. consumers had a strong preference for canned yellowfin tuna (produced by setting on dolphins or otherwise) over all other canned tuna; and 3)

[152] 15 U.S.C. § 45 (Exh. US-54).

[153] FTC Policy Statement Regarding Advertising Substantiation (March 11, 1983) (Exh US-129).

[154] 16 C.F.R. § 260.2 (Exh. US-130).

[155] Certainly, we are not aware that any U.S. court has required 100 percent certification and AIDCP-equivalent tracking and verification for any of the claims currently made on canned tuna, which are subject to the FTCA standard. *See, e.g.*, Exhibits US-26 through 32 providing photographs of some of these marketing claims currently being used in the U.S. canned tuna market.

[156] Specifically, subsection (d) of the DPCIA, as well as the NOAA implementing regulations, provides that it is a violation of the FTCA for "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" does not meet the conditions established by the DPCIA and the NOAA implementing regulations. DPCIA, 16 U.S.C. §§ 1385(d)(1), (d)(3)(A)(C) (Exh. US-1); *see* 50 C.F.R. § 216.91(a) (Exh. US-2).

[157] U.S. Written 22.6 Submission, paras. 84-85.

Mexico were the only possible supplier of canned yellowfin tuna to the U.S. market.[158] As discussed above, none of these assumptions is accurate.

58. With reference to paragraph 78 of the United States' written submission, please explain why, in the view of the United States, Mexico's second scenario "remains incorrect", insofar as it relates to the risks posed by purse seine fishing by setting on dolphins, on the one hand, and purse seine fishing without setting on dolphins, on the other hand.

69. Mexico does not specify how the hypothetical measure contemplated by its Counterfactual #2 would be designed. Rather, Mexico simply states that under this hypothetical measure "the same eligibility criteria, certification requirements, and tracking and verification requirements would be applied to all tuna, regardless of where it is harvested,"[159] and that, as a result, the tuna product of Mexico and other nations would not qualify for the dolphin safe label,[160] while the tuna product of Ecuador would qualify.[161]

70. It is not clear from this (or any earlier) description whether, under this hypothetical measure, tuna product produced by these other nations would not qualify for the label because (1) the eligibility criteria have changed and the tuna product does not meet them; or, (2) the tuna product is not subject to AIDCP-equivalent certification and tracking and verification requirements (but the eligibility criteria have not changed).[162] By stating that Ecuadorian tuna product would continue to meet the standards for this hypothetical measure, Mexico appears to indicate that the eligibility criteria *as to purse seine fishing* would not change – tuna product

[158] U.S. Written 22.6 Submission, para. 86.

[159] Mexico's Written 22.6 Submission, para. 50.

[160] Mexico's Written 22.6 Submission, para. 50 ("Tuna products from any country (including the United States) containing tuna that was harvested using a fishing method that causes harm to dolphins to a comparable extent as AIDCP-certified dolphin encirclement, and/or that does not protect dolphins in an equivalent manner, and/or for which the dolphin-safe status of the tuna is not properly certified and traceable or verifiable, would be disqualified from receiving the 'dolphin-safe' label."); *see also id.* para. 51 ("In this second scenario, Mexican tuna products would not be allowed to receive the "dolphin-safe" label and would be treated no differently than tuna products from other countries and/or suppliers that also do not receive the label.").

[161] *See, e.g.*, Pouliot 2016, at 34 (Exh. MEX-2) ("The counterfactual reasonably assumes that the only imports of dolphin-safe tuna that will occur if the United States brings itself into compliance are from Ecuador, which fishes in the ETP using methods other than setting on dolphins and has similar tracking and verification systems as Mexico as required by the AIDCP.").

[162] *See, e.g.*, Pouliot 2016, at 27 (Exh. MEX-2) (stating that under Counterfactual #2, "non-discriminatory eligibility, certification and tracking and verification requirements apply to all imports and a substantial portion of tuna products from the United States and other countries no longer qualifies to use the label and thus have no competitive advantage over Mexican products in the major distribution channels" without specifying what eligibility criteria, in Mexico's view, qualifies as "non-discriminatory").

produced from purse seine fishing by setting on dolphins would remain ineligible and tuna product produced from other forms of purse seine fishing would remain potentially eligible.[163]

71. In this context, the United States wishes to clarify its earlier statement that the Arbitrator quotes in this Question. To the extent that the hypothetical measure uses different eligibility criteria from the current measure (for example, by determining that tuna product produced from longline fishing is ineligible for the label), the United States maintains that Mexico's counterfactual is incorrect. As noted in both this proceeding and in the compliance proceedings, the eligibility criteria, as currently exist, are calibrated to the risks to dolphins, and do not render the measure WTO-inconsistent. That said, the United States does not argue that such a hypothetical measure is incorrect "as it relates to the risks posed *by purse seine fishing* by setting on dolphins, on the one hand, and *purse seine fishing* without setting on dolphins, on the other hand," as Mexico's approach appears to be consistent with the conclusion that the current eligibility criteria for purse seine fishing are calibrated to the risk to dolphins, and therefore cannot support a finding of WTO-inconsistency.[164]

72. We note, however, that Mexico's argument in this regard appears to be internally inconsistent. Mexico here claims that its proposed counterfactual is one where the United States has modified the measure to be WTO-consistent, and that both "scenarios" describe hypothetical measures that are in compliance with the DSB recommendations and rulings and WTO-consistent.[165] But, while Mexico argues in this proceeding that not altering the eligibility criteria as to purse seine fishing is WTO-consistent because such a regulatory distinction would be calibrated,[166] Mexico argues just the opposite in the parallel compliance proceedings. There, Mexico argues that, "[i]f the eligibility criteria were properly calibrated," tuna product produced from purse seine vessels not setting on dolphins (*e.g.*., Ecuador's currently dolphin safe tuna

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[163] In this regard, we would note that Ecuador is not the only party to the AIDCP whose large purse seine vessels do not set on dolphins in the ETP. We understand that both Peru and Spain have large purse seine vessels that are approved to operate in the ETP but that have not been assigned Dolphin Mortality Limits ("DMLs"). Without an assigned DML, a vessel may not set on dolphins under the AIDCP.

[164] *See, e.g., US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.155 ("By engaging with the United States' arguments as it did, the Appellate Body accepted the premise that such regime will not violate Article 2.1 if it is properly 'calibrated' to the risks to dolphins arising from different fishing methods in different areas of the oceans."); *id.* para. 7.334 (discussing the calibration test in the context of Article XX).

[165] *See, e.g.*, Mexico's Written 22.6 Submission, para. 46 ("Mexico's methodology paper presents a counterfactual with two potential scenarios, both of which present measures that are consistent with the recommendations and rulings of the DSB and with the covered agreements."); Mexico's Methodology Paper, para. 19 ("Under the circumstances, the counterfactual, in which the Tuna Measure was brought into compliance, must incorporate the assumption that the WTO-inconsistent discrimination has been eliminated.").

[166] *See* Mexico's Written 22.6 Submission, para. 50 ("In the second scenario, the same eligibility criteria, certification requirements, and tracking and verification requirements would be applied to all tuna, regardless of where it is harvested, in accordance with the requirements of Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994 (i.e., there would no longer be different regulatory treatment based on different fishing methods or different fisheries *that was not calibrated to the differences in methods and fisheries*).") (emphasis added).

product) *must be deemed ineligible*, and tuna product produced from purse seine vessels setting on dolphins in the ETP large purse seine fishery *must be deemed eligible*[167] (although Mexico allows, as an alternative, that *all* tuna product produced by purse seine fishing could be deemed ineligible).[168] Simply stated, Mexico does not present a coherent case by claiming that the existing eligibility criteria as to purse seine fishing is appropriately calibrated to the risk to dolphins in this proceeding while arguing in the parallel proceeding that is, in fact, not the case.

73. Finally, we note that Mexico's statement that Counterfactual #2 – which relies on particular (but unspecified) regulatory distinctions regarding eligibility criteria, certification requirements, and tracking and verification requirements – is "consistent with the recommendations and rulings of the DSB" is inaccurate.[169] There are, in fact, no DSB recommendations and rulings regarding whether any of those three regulatory distinctions can support findings of consistency or inconsistency with either Article 2.1 of the TBT Agreement or the GATT 1994, since the Appellate Body reversed the first compliance panel's findings on these three regulatory distinctions in the context of the second step of Article 2.1 and in the chapeau of Article XX and did not complete any of these analyses.

74. Thus, Mexico's counterfactuals depend not on the DSB recommendations and rulings, but Mexico's own (unproven) theory of compliance. Such is not the case for the U.S. counterfactual as withdrawal of the measure by its nature constitutes compliance with the DSB recommendations and rulings.

59. With reference to paragraph 16 of Mexico's MP, does the United States agree that "the appropriate period for assessing the counterfactual is the first full calendar year following the expiration of the RPT"?

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[167] Mexico's First Written 21.5 Submission, para. 256 ("Applying overall absolute level of adverse effects method of comparison to the calibration test, it is clear that the difference in the treatment of AIDCP-compliant dolphin encirclement as ineligible when it has a lower risk profile than all four of the other fishing methods described above is the exact opposite of what is expected given the objectives of the measure to provide accurate information to U.S. consumers regarding adverse effects on dolphins. If the eligibility criteria were properly calibrated, they would result in the lowest risk profile of the five fishing methods being designated as eligible (i.e., AIDCP-compliant dolphin encirclement) and the others being designated as ineligible.") (internal quotes omitted); *id.* para. 254 (arguing the basis for determining purse seine fishing without setting on dolphins as being one of the four "ineligible" fishing methods).

[168] Mexico's First Written 21.5 Submission, para. 256 ("Alternatively, all five [fishing methods] should be designated as ineligible."); *see also id.* ("*The existing treatment* is clearly not properly calibrated and is manifestly disproportionate with, is not commensurate with and is not appropriately tailored to the different overall levels of risks associated with these different fishing methods.") (emphasis added and internal quotes omitted).

[169] *See* Mexico's Written 22.6 Submission, para. 46 ("Mexico's methodology paper presents a counterfactual with two potential scenarios, both of which present measures that *are consistent with the recommendations and rulings of the DSB* and with the covered agreements.") (emphasis added); *id.* para. 56 ("The counterfactual in Mexico's methodology paper is plausible, reasonable, and appropriate because it simply assumes that the tuna measure is brought *into compliance with the recommendations and rulings of the DSB* and with the covered agreements.") (emphasis added and internal quotes omitted).

75. There is no single "one size fits all" approach with respect to the appropriate period for assessing a counterfactual. The appropriate period will depend on a number of factors that may vary from case to case.

76. In this case, it would be more appropriate to use the most recent data available, which is for calendar year 2015. There has been a consistent trend of declining tuna consumption over the past fifteen years. Consequently, any calculations based on 2014 data would overstate the level of nullification and impairment.

2.3 Questions relating to the economic methodologies presented by the parties

60. At paragraph 111 of Mexico's written submission, Mexico states that "the relevant time-frame is the 'short-run'", as reflected in the structure of the model employed by Mexico. Please comment on Mexico's claim that the relevant time-frame for the assessment of the level of nullification and impairment is the "short-run". Also, please comment on the assertion that the structure of the model employed by Mexico assesses "short-run" effects.

77. In light of the fact that the appropriate counterfactual in this proceeding is withdrawal of the measure, the United States considers that a short-run assessment of the level of nullification and impairment is appropriate. However, Mexico's model reflects neither a short- nor a long-run assessment but, rather, reflects a hybrid timeframe in which the Mexican tuna industry is given time to attempt to change U.S. consumer preferences but no other tuna industry is allowed to adjust to these changed preferences.

78. With respect to the first part of the Arbitrator's question, past arbitrators have explained that a short-run assessment refers to a "situation . . . where the process of adjustment by producers, consumers and owners of factors of production has not been fully completed," whereas a long-run assessment "refers to a situation where all adjustments by producers, consumers, and owners of factors of production to the given change have been completed" and the market has reached a long run equilibrium.[170] The period of time associated with a long-run assessment is generally regarded as ten years.[171] Arbitrators have taken a fact-specific approach to determining whether a short- or long-run analysis is appropriate to determining the level of nullification and impairment.[172] In particular, the arbitrator in *US – COOL* considered that since

[170] *US – Upland Cotton III (Article 22.6/Article 7.10) (US)*, para. 4.144; *see US – COOL (Article 22.6 – US)*, n.464.

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

[172] The arbitrator in *US – Upland Cotton*, for example, explained the choice of a short-run approach by stating that, while "a long-run analysis may be more appropriate in cases where there are no adjustment costs," in the case at hand, there were "adjustment factors" that were due, in part, to the existence of the subsidies at issue in the dispute. *See US – Upland Cotton III (Article 22.6/Article 7.10) (US)*, para. 4.147.

the counterfactual was "the COOL measuring having been withdrawn at the end of the RPT," a short-run approach was appropriate.[173]

79. In this proceeding, the United States considers that the correct counterfactual, to the extent that one is appropriate, is removal of the measure.[174] Consequently, as in *US – COOL*, the United States considers that a short-run assessment is appropriate. We note, however, that it is not clear that there would be a significant difference between the results of a short- and a long-run analysis, as there would be no adjustment costs associated with the removal of the measure. In this regard, Mexico's claim at paragraph 111 that, under the U.S. proposed counterfactual, all tuna product produced from outside the ETP large purse seine fishery would not be able to use a dolphin safe label unless the tuna processors established additional certification and tracking programs reflects an incorrect interpretation of the FTCA that is unsupported by U.S. law.[175]

80. With respect to the second part of the question, Mexico's assertion that the structure of its model assesses "short run" effects is incorrect. As the United States explained previously, Mexico did not model the effects of either of the two counterfactuals Mexico proposed or of the removal of the measure.[176] Rather, Mexico modeled the introduction of a new product into the U.S. market for which U.S. and Mexican consumers have an identical, strong preference and of which Mexico is the only supplier.[177] The evidence on the record shows, however, that canned yellowfin is not a new product, that U.S. consumers do not prefer it to other tuna, that U.S. and Mexican consumers have very different preferences regarding canned yellowfin (and canned yellowfin produced by setting on dolphins, in particular), and that Mexico is far from the only supplier of canned yellowfin. Thus, the problem with Mexico's model is not that it takes a short- or long-run approach, but that it is modeling a change in the market that has no basis in reality, and, therefore, cannot produce an accurate estimate of the level of nullification or impairment.

81. Additionally, several other aspects of Mexico's model are not consistent with a short-run assessment.

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[173] *See US – COOL (Article 22.6 – US)*, para. 6.32.

[174] *See* U.S. Written 22.6 Submission, para. 66 (explaining that, aside from the fact that the United States has come into compliance, the correct counterfactual is withdrawal of the measure).

[175] *See supra* U.S. Response to Question No. 57. As discussed above, the DPCIA does not provide a safe harbor for any labels that would otherwise be inconsistent with the FTCA – it simply describes a category of products that are *not* eligible for such labels. Consequently, there is no reason to think that the records currently maintained by industry to substantiate their "dolphin safe" claims under the DPCIA would not be sufficient to show that such a claim has a "reasonable basis" under the default FTCA standard.

[176] *See* U.S. Written 22.6 Submission, para. 86.

[177] *See* U.S. Written 22.6 Submission, para. 86; *see also* Pouliot 2016, at 9, 14 (for the assumption that there is currently no relevant demand curve for yellowfin tuna product in the United States), 10-12 (for the preference for yellowfin tuna product), and 30 (for the assumption that all yellowfin consumed in the United States comes from Mexico) (Exh. MEX-2).

82. First, the shift in U.S. and Mexican consumption of yellowfin tuna modeled by Mexico is not consistent with a short run assessment. The evidence on the record shows that canned yellowfin, marketed as such, accounts for 1-2 percent of all U.S. consumption of canned tuna.[178] For this figure to increase to 27.5 percent is not a realistic adjustment in the short run, particularly in light of the fact that evidence on the record suggests that only a small subset of consumers – 6 percent according to Exhibit MEX-63 (and other sources suggest that the actual figure is lower) – prefer yellowfin tuna, or even know what it is.[179] Assuming that 6 percent is correct, however, this is the extent of the consumption increase that could be expected in the short run if there were a shift in supply. Predicting that yellowfin will comprise nearly five times the share of U.S. consumption of canned tuna as the share consumers who possibly look for the product is unreasonable in the short run. The prediction that yellowfin will drop from 66.3 to 30 percent of all Mexican consumption of canned tuna is also not reasonable in the short run.

83. Mexico suggests that the shift in U.S. consumption will occur through consumer education regarding the benefits of producing tuna product by intentionally targeting dolphins, consistent with the requirements of the AIDCP.[180] As discussed above, there is no evidence to support that U.S. consumers will change their preference for tuna product produced from fishing methods that do not depend on the intentional chase and capture of dolphins, *even in the long term*. However, given that these consumer preferences have been in place for decades, it is certainly unreasonable to expect Mexico's approach to have an impact with the U.S. consumer *in the short term*.[181]

84. Further, Mexico's argument exposes the inconsistencies in Mexico's model's treatment of Mexico and other countries. Mexico assumes that U.S. consumers will have the opportunity to become educated as to the superiority of canned yellowfin, such that they substantially change their canned tuna purchasing habits to purchase less albacore and lightmeat tuna containing skipjack and substantially more canned yellowfin. However, none of the many other countries

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[178] *See* "Yellowfin Market Review" (BCI) (Exh. US-10) [[

]]; "52 Week Canned Tuna Sales, Summed by Type" (Exh. US-17) (showing that 1.2 percent, by volume, and 1.5 percent, by value, of all sales of canned tuna during the covered period were of canned yellowfin sold as such).

[179] Public Opinion Strategies, National Survey Methodology, at 2 (Oct. 16, 2010) (Exh. MEX-63). It should be noted, however, that the questions in the survey appeared biased, in that consumers were limited in their responses by choices set out in the question and "lightmeat" or "light" tuna, which makes up the majority of canned tuna sold on the U.S. market, was not given as an option. *See also* "Yellowfin Market Review" (BCI) (Exh. US-10) [[

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[180] *See* Pouliot, at 16 (stating that, "With access to canned yellowfin tuna, U.S. consumers would rapidly learn about its superior quality just like Mexican consumers who currently have access to canned yellowfin tuna").

[181] *See EC – Hormones (Article 22.6 – US)*, paras. 76-77 (finding that the idea that additional market access "would have been realized from US marketing and promotional efforts" was "too speculative").

that catch and process yellowfin are acknowledged as a potential supplier of the product.[182] If, as Mexico's model predicts, millions more U.S. consumers started purchasing canned yellowfin at a higher price than it currently sells for in the U.S. market,[183] it is unreasonable to assume that the tuna industries in these other yellowfin-producing countries (including the United States) would not respond by increasing supply. Further, these companies could respond in the short term, as the supply of canned yellowfin already exists and as canneries are operating below capacity.[184]

85. Second, the elasticities that Mexico's model solves for are not consistent with the short-run elasticities of skipjack, albacore, and yellowfin tuna currently available in the relevant economic literature. At the solution of Mexico's model, U.S. demand for "generic tuna" is -2.51, while U.S. demand for yellowfin tuna is more elastic, at -6.47.[185] The available literature, however, estimates the short-run elasticity of canned skipjack at around -1.18 and, in natural supermarkets, the elasticities of canned skipjack and canned yellowfin at -1.910 and -1.646, respectively.[186] Further, these estimates are based on actual consumer data, not on unsubstantiated assumptions about U.S. consumer preferences.[187]

86. Thus, Mexico's model does not actually reflect short-run assumptions, but, rather, a collection of sometimes inconsistent assumptions seemingly designed to justify the particular outcome generated by Mexico's model, namely Mexico exporting its entire current production of yellowfin to the United States.

61. With reference to paragraph 172 of Mexico's written submission, please comment on Mexico's statement that "[t]he price wedge method proposed by the United States is not appropriate in this case. Using this technique requires being able to quantify in terms of a tariff equivalent a barrier that limits the flow of products between two countries. […] However, the tuna measure is so severe that it nearly drives export volumes to zero, making it impossible to estimate a tariff equivalent for the measure".

87. Mexico is correct that the price wedge method "requires being able to quantify in terms of a tariff equivalent" the non-tariff barrier at issue. Mexico is incorrect, however, that the U.S. tuna measure "nearly drives export volumes to zero" or makes it "impossible to estimate a tariff equivalent." In fact, export volumes are not "nearly . . . zero," and the necessary data, while not on the record in this dispute, is theoretically available. Further, the fact that the data to perform

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

[183] *See* Pouliot, at 32 (Exh. MEX-2).

[184] *See* U.S. Written 22.6 Submission, para. 40.

[185] *See* Mexico's Written 22.6 Submission, para. 144.

[186] *See* Fu-Sung Chiang et al., "Will American Consumers Pay More for Eco-Friendly Canned Tuna? Estimating US Consumer Demand for Canned Tuna Varieties using Scanner Data," at 8, Elsevier Editorial System™ for Ecological Economics (publication pending 2016) (Exh. US-8).

[187] Chiang et al., at 8 (Exh. US-8).

an appropriate partial equilibrium analysis are not on the record does not justify use of a different model based on inadequate data and specified through incorrect assumptions that does not determine the actual level of nullification or impairment.

88. As the United States explained previously, properly determining the value of the dolphin safe label would require detailed data on U.S. purchases of tuna product with and without the dolphin safe label, including store-by-store sales of tuna by type (albacore, yellowfin, and light tuna), accounting for product characteristics (pouched vs. canned, water vs. oil, and flavored), and including information on the timing of sales and whether sales were made at promotional values. Information on complementary and substitute products, such as bread, other canned fish, chicken, and other lunch meats, respectively, would also be important. Similarly detailed data would be needed to properly estimate the distribution of willingness to pay for yellowfin tuna over light-tuna and albacore.

89. This level of data concerning the U.S. tuna product market is not on the record in this dispute. The dataset presented in Exhibit MEX-15 does 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 comparable yellowfin and non-yellowfin products or dolphin safe and non-dolphin safe (Mexican) products.[188] Specifically, the dataset does not allow for proper comparison of tuna product, or 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.

90. It is not accurate, however, that U.S. imports of canned tuna from Mexico are close to zero and, therefore, it is impossible to collect such data or conduct such an analysis. In 2014 and 2015, Mexico was the sixth largest supplier of canned tuna to the United States, accounting for $22.7 million of U.S. imports in 2014 and $17.5 million in 2015.[189] This represented 3.4 and 3.0 percent of all U.S. imports of canned tuna during those years.[190] Indeed, the United States has imported canned tuna from Mexico every year going back to 1996. The volume of U.S. imports of canned tuna from Mexico over the past several years are not so small that it is impossible to generate sufficient data to estimate a tariff equivalent.[191] However, the data are not publicly available, and Mexico did not produce any from non-public sources.

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[188] *See* 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).

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

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

[191] Tariff equivalents have been estimated on less trade. *See* Linda Calvin & Barry Krissoff "Technical Barriers to Trade: A Case Study of Phytosanitary Barrier and U.S.-Japanese Apple Trade" 23 *J. of Ag. & Res. Econ*. 351, 354 (1998) (calculating a tariff equivalent based on a lower volume and market share of trade) (Exh. US-131).

91. If the data required to properly specify a partial equilibrium model were on the record, the Arbitrator could have the option of using a partial equilibrium analysis to accurately model the effect of the removal of the U.S. measure. The absence of such data in the record, however, does not justify modeling a scenario with no basis in reality or using a model that is specified based on numerous incorrect assumptions, as is the case with Mexico's model.

62. With reference to paragraph 84 of the United States' first written submission, please elaborate on the basis for the United States' assertion that "the generally accepted way to use partial equilibrium analysis would be to determine the value of the U.S. dolphin safe label and model the effect of its removal on the equilibrium price and quantity of Mexican tuna product sold in the United States"?

92. Reports published by the UN, the WTO, and other organizations have suggested that, when seeking to measure the trade effects of non-tariff measures (NTBs), such as TBT measures, the "common approach is to calculate *ad valorem* equivalents of [such measures]." [192] As one ITC report explained, "[t]he use of partial or general equilibrium models to estimate the economic effects of NTBs requires some measure of the price wedge generated by the import restraint. This measure is generally expressed as the tariff equivalent of the import restraint."[193] As a WTO/UN report from 2005 stated that, for purposes of quantifying the effect of a NTB, "[m]ost measurement methods use a simple partial equilibrium framework to develop a tariff equivalent to the NTM that reflects by how much supply, demand or trade are affected by the measure."[194] A 2013 UN report similarly described "[t]he standard approach to appreciate[ing] price and quantity effects of NTMs" as calculating a tariff equivalent of such measures.[195] It also explained that the most commonly used and relatively "more reliable" methodologies used in this regard include "price comparison" by means of a price wedge.[196]

93. The United States considers that the correct counterfactual in this dispute (so far as one is required) is the removal of the U.S. dolphin safe labeling measure. Consequently, the relevant

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[192] *See* WTO, *A Practical Guide to Trade Policy Analysis*, at 71-72 (2012) (Exh. US-57).

[193] Linda A. Linkins & High M. Arce, U.S. Int'l Trade Comm., *Estimating Tariff Equivalents of Nontariff Barriers*, at 5 (2002) (Exh. US-61).

[194] WTO, *A Practical Guide to Trade Policy Analysis*, at 73 (Exh. US-57).

[195] Marco Fugazza, UN Conference on Trade and Development (UNCTAD), "The Economics Behind Non-Tariff measures: Theoretical Insights and Empirical Evidence," at 2 *Policy Issues in Int'l Trade & Commodities Study Series No. 57* (2013) (Exh. US-59); *see* WTO, *World Trade Report 2012*, at 136-137 (2012) (Exh. US-60) (stating that, to ascertain the "trade effects of . . . NTMs, studies analyse the impact of NTMs on international trade by estimating an 'ad-valorem tariff equivalent (AVE), *i.d.*, the level of an ad-valorem tariff that would have an equally trade-restrictive effect as the NTM in question").

[196] Fugazza 2013, at 9 (Exh. US-59); *see also* WTO, *World Trade Report 2012*, at 136 ("In the trade literature, the AVE of different NTMs is computed using one of two approaches – the 'price gap' or the 'econometrics-based method'"); WTO, *A Practical Guide to Trade Policy Analysis*, at 71-72 (Exh. US-57) (summarizing the "two most common approaches to the measurement of NTMs" as "the price-gap approach, which aims at deriving a tariff/tax equivalent to the NTM as discussed, and inventory-based frequency measures").

inquiry in determining the level of nullification and impairment accruing to Mexico is what would be the effect on the price and quantity of Mexican tuna product exports to the United States if the label were removed, or, to put it another way, what are the trade-distortive effects of the U.S. dolphin safe label. In this light, the United States considers that the approach suggested by relevant trade scholarship, and previous WTO disputes,[197] would be to develop a tariff equivalent ("price wedge") that reflects by how much U.S. imports of Mexican tuna product are affected by the measure. We note that this approach would also be consistent with the findings of the Appellate Body that the dolphin safe label constitutes an "advantage" that is not accorded to Mexican tuna product due to the fishing method employed by Mexican vessels.[198]

94. This is not, of course, what Mexico's model does. Rather, Mexico's model assesses the effect of the removal of an entirely different (and purely hypothetical) measure, namely a ban on all canned yellowfin. This is reflected in the decision to use a choice model in which the quantity demanded is a function of price and unobserved preferences, as well as in the decisions to use total U.S. canned tuna consumption as a proxy for the demand intensity for yellowfin[199] and to assume that half of all consumers are willing to pay a $2 per kg premium for yellowfin canned tuna over all other types of canned tuna,[200] despite the fact that very few U.S. consumers currently choose to consume canned yellowfin. As the United States has explained, however, the U.S. measure is neither a *de facto* nor a *de jure* ban on yellowfin. Canned yellowfin (both U.S.-produced and imported) has been sold in the U.S. canned tuna market since the DPCIA first went into effect.[201] Further, the vast majority of yellowfin caught for canning around the world is *eligible* for the dolphin safe label and thus is not affected by the measure.[202]

95. In short, the fact that Mexico did not model the value of the dolphin safe label has profound consequences for whether Mexico's model accurately measures the level of nullification and impairment attributable to the measure. Because Mexico chose to model the effect of the removal of an entirely different (and non-existent measure), Mexico's model's estimate has no relation to the actual level of nullification and impairment in this dispute.

63. With reference to paragraph 173 of Mexico's written submission, please comment on Mexico's statement that "the consumption of canned yellowfin tuna in the United

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[197] *See US – Offset Act (Byrd Amendment) (Canada) (Article 22.6 – US)*, para. 3.82; *US – Upland Cotton (Article 22.6 – US II)*, para. 4.124; U.S. *US – COOL (Article 22.6)*, para. 6.7.

[198] *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.237.

[199] *See* Pouliot 2016, at 13, 32 (Exh. MEX-2).

[200] *See* Pouliot 2016, at 10-12, 20 (Exh. MEX-2) (discounting data on U.S. consumption of yellowfin, as compared to other products, and assuming that the average U.S. consumer prefers canned yellowfin over other tuna products and is willing to pay a price premium for it of $2 a kilogram over "generic" tuna and that willingness to pay is distributed throughout the market based on the logistic distribution function).

[201] *See* Response to Question No. 51.

[202] *See* U.S. Written 22.6 Submission, para. 95.

States is too small to properly derive a demand curve" and that "the approach in Mexico's methodology model is a sensible way of deriving a demand curve".

96. Both of the statements quoted in the question are incorrect. First, the consumption of canned yellowfin tuna in the United States could support a properly derived demand curve if the data concerning that consumption were sufficiently detailed. Second, even if this were not the case, Mexico's model's approach is not a sensible way of deriving a demand curve.

97. On the first point, Exhibits MEX-15 and US-1 both show that canned yellowfin (marketed as such) is sold in substantial quantities in the U.S. market. In the 52-week period data set out in by Exhibit MEX-15, consumers purchased 1.8 mt of canned yellowfin, valued at over $23 million.[203] [[

[204]

.]][205] Analogous datasets have been used by economists to derive elasticities of demand for canned albacore, skipjack, and yellowfin in various markets.[206] Such data has also been used to estimate demand curves for the canned tuna industry as a whole.[207]

98. Moreover, Exhibit MEX-2 demonstrates that it was possible to derive a premium for canned yellowfin in the United States relative to other types of canned tuna based on the 12- and 52- week data set out in Exhibit MEX-15.[208] The fact that this was possible confirms that it is the level of detail of the dataset, not the number of observations, that precluded proper derivation of a demand curve. If the dataset in Exhibit MEX-15 had included information at the level of detail necessary to derive a demand curve – ideally including (1) store-by-store sales of tuna by type (albacore, yellowfin, and light tuna) and accounting for product characteristics (pouched vs. canned, water vs. oil, and flavored); and, (2) information on the timing of sales and whether sales were made at promotional values – the dataset should have been adequate to derive a demand curve using econometric analysis, as Mexico did to calculate the yellowfin premium. (Although information on complementary and substitute products, such as bread, chicken, canned fish, and other lunch meats, respectively, would also have been important.) Additionally, other years could have been added to the dataset if more observations were needed.

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

[204] "Yellowfin Market Review," at 3 (Exh. US-10) (BCI).

[205] *See* "Yellowfin Market Review," at 3 (Exh. US-10) (BCI).

[206] *See* Chiang et al. 2016, at 8-9 (Exh. US-8).

[207] Byung-Do Kim et al., "Modeling the Distribution of Price Sensitivity and Implications for Optimal Retail Pricing," 13 *J. of Bus. & Econ. Stats.* 291, at 297 (1995) (Exh. US-132).

[208] *See* Pouliot, at 20, 38-41 (Exh. MEX-2).

99. With respect to the second part of the question, Mexico's approach would not have been reasonable even if the data required to derive a demand curve did not, theoretically, exist. Mexico's assertion that its use of a discrete choice model is "standard in economics" is misleading because Mexico does not parametrize its model in the standard way.[209] Discrete choice models are based on using individual consumer decisions regarding the consumption of various substitute goods to derive a complete set of demand equations. A standard empirically estimated discrete choice model would use consumer-level data, or other detailed analysis of consumer purchasing decisions, to estimate the effect that certain product attributes have on consumer purchasing decisions. With the appropriate data, a discrete choice model would (in theory) be capable of estimating the value of things like the dolphin safe label or the extent to which consumers view yellowfin as a premium product compared to skipjack or albacore.

100. One feature of discrete choice models, however, is that because they are based on individual consumption choices, they require highly disaggregated data that observes the decisions of a set of consumers over time. The modeler needs to be able to observe how consumers react to price changes among related goods as well as the availability of various attributes that a household may or may not desire. Consequently, data of the sort necessary to properly derive a demand curve (*i.e.*, store-by-store sales based on product characteristics, information on whether sales of tuna product were made at promotional values, and information on complementary and substitute products) would be necessary. A discrete choice model would use the information gathered from this type of empirical analysis to construct a demand function that explicitly accounts for these types of preferences rather than attributing demand entirely to unobserved preferences.

101. In this dispute, that level of data is not available.[210] Consequently, Mexico's model was unable to define a demand function that accurately described the nuances in demand for yellowfin and "generic" canned tuna (although, as the United States has explained, albacore is a separate product and should not be grouped together with lightmeat tuna).[211] Instead, Mexico represented demand for both kinds of tuna depicted in the model with a single variable "a," referred to as the "intensity of demand" parameter, which Mexico parametrized as the total consumption of canned tuna in the United States in 2014.[212] But since, as Mexico argues, "generic" and "yellowfin" tuna are different products, the assumption that they have the same demand parameters is not reasonable. Indeed, the fact that canned tuna labeled as yellowfin represents only 1-2 percent of all canned tuna sales in the U.S. market demonstrates that using a single, identical variable to capture all the nuances of consumer demand for these two different products is extremely dubious.

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[209] *See* Pouliot, at 11 (Exh. MEX-2).

[210] *See* Pouliot 2016, at p. 17 (Exh. MEX-2) (noting that only retail data are available); *id.* p. 18 (noting that the available data "are aggregated by regions and not all canned tuna products are offered in all stores").

[211] *See* U.S. Written 22.6 Submission, para. 102.

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

102. Mexico's assumption (without any justification) of a logistic distribution of willingness to pay a mean $2 per kg premium for yellowfin over "generic" canned tuna is also unreasonable. The distribution parameters should be set based on detailed data on the purchasing decisions of consumers. Instead, Mexico assumes a distribution without any evidence that distribution of willingness to pay actually follows a logistic distribution in the U.S. market.

103. Thus, both of Mexico's assertions concerning the U.S. demand for canned yellowfin are incorrect. The number of purchases of canned yellowfin tuna in the U.S. market does not preclude properly deriving a demand curve, if sufficiently detailed data were available in this dispute. Moreover, in the absence of such data, Mexico's approach is not a reasonable way to derive demand curves for the three categories of canned tuna in the U.S. market (lightmeat tuna, premium yellowfin, and albacore) to accurately calculate the level of nullification and impairment in this dispute.

2.4 Questions regarding the assumptions of the economic methodologies

64. With reference to paragraph 143 of Mexico's written submission, please comment on the following statement made by Mexico:

> **However, it is not true that the model assumes the same elasticity of demand for all canned tuna species. Indeed, the model considers substitution between generic and yellowfin tuna, with the implication that the demand for a specific tuna species is more elastic than the total demand for tuna. The own-price elasticity of the U.S. demand for generic tuna in the United States at the solution of the model is -2.51. The demand for yellowfin tuna is more elastic, and when evaluated at the solution of the model it equals -6.47. This is consistent with the contention of the United States that the demand for yellowfin tuna is particularly elastic (internal citations omitted).**

104. It is accurate that, inside the final model Mexico uses, the elasticity of -1 represents the elasticity of demand for all tuna, which would be less elastic than individual tuna products.[213] However, while deriving the demand equations at equation (5), Exhibit MEX-2 explains that "The demand parameters a and η are assumed to be the same whether a consumer chooses to consume canned yellowfin or "generic" tuna. The quantity of canned tuna demanded by a consumer does not depend on the type of canned tuna selected but only on the price of canned tuna selected."[214] In this reference, η is the elasticity of demand for "generic" and yellowfin tuna. Equation (5) then feeds into the demand equations used to estimate the intensity of demand parameter and eventually into equations (16) and (17) of the model. Thus, the elasticities inputted into the model are the same for yellowfin and "generic" canned tuna, although the outputs are different.

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[213] *See* Pouliot 2016, at 29 (equations 16 and 17) (Exh. MEX-2).

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

105. Further, there are several reasons that the way Mexico's model solves for the elasticities of yellowfin and "generic" tuna is unlikely to yield accurate results.

106. First, Mexico erred in aggregating demand for albacore and "lightmeat" tuna. When modeling the demand for different products, it is not accurate that any two variables can be aggregated into a composite commodity vis-à-vis a third variable and the model will produce accurate results. To the contrary, the separability condition provides that "two variables are separable from a third if the marginal rate of substitution between the first two variables is independent of the third."[215] Only if this condition is met "is it possible to construct an aggregator function over the first two variables that is independent of the third."[216] In the U.S. canned tuna market, as Mexico acknowledges, albacore is a premium product that makes up a significant, distinct share of the market.[217] If anything, albacore is more similar to canned premium yellowfin than to generic lightmeat tuna (although U.S. consumers strongly prefer albacore). Consequently, albacore and generic lightmeat tuna do not fall into the category of products that can properly be aggregated into a composite commodity, vis-à-vis yellowfin. This error alone suggests that Mexico's model is unlikely to reflect accurate results.

107. Second, the elasticities that Mexico's model solves for are not reasonable. As Mexico explained, the U.S. demand for "generic" and yellowfin tuna at the solution of the model are -2.51 and -6.47, respectively.[218] However, current economic literature that has derived the elasticities of canned tuna based on detailed consumer data estimate the elasticities of skipjack and albacore at -1.18 and -1.142, respectively.[219] It also estimates the elasticities of skipjack and yellowfin in natural supermarkets at -1.910 and -1.646. The fact that, unlike those in Mexico's model, the study's elasticities for premium products (albacore and yellowfin) are less elastic than non-premium products (skipjack) is consistent with economic theory.[220] The elasticities determined by Mexico's model (not based on consumer data) are both substantially higher than those found in the literature.

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[215] Charles Blackorby et al., "Separability," *The New Palgrave Dictionary of Economics* (2d ed. 2008) (Exh. US-133).

[216] Blackorby et al. 2008 (Exh. US-133).

[217] *See* Mexico's 22.6 Written 22.6 Submission, para. 128 ("Indeed, albacore tuna is a premium product comparable in quality to yellowfin tuna.").

[218] *See* Mexico's Written 22.6 Submission, para. 143.

[219] *See* Chiang et al. 2016, at 8-9 (Exh. US-8).

[220] Consumers are willing to pay more for premium products, such as yellowfin and albacore, because they value the features of the product. As consumers focus on specific features of a product, rather than price, there will be fewer substitutes for the product and demand will be more inelastic. It should also be noted that premium products tend to focus on a subsection of the market that values these features enough to pay a price premium for them. *See* "Econ 150 Economic Principles and Problems," BYU Idaho, *available at* https://courses.byui.edu/econ_150/econ_150_old_site/lesson_09.htm (Sept. 29, 2016) (Exh. US-134).

108. Finally, the fact that the results of Mexico's model do not align with Mexico's regression analysis of current U.S. consumption further suggests that Mexico has not correctly modeled U.S. yellowfin preferences. According to Mexico's model, "6.6 percent of consumers are willing to pay a premium of $4.65/kg" for yellowfin tuna.[221] Using the weighted OLS results of the regression in Exhibit MEX-2 shows that the current premium for canned yellowfin in the U.S. market is $4.63/kg and $4.67/kg, while OLS estimates have a price premium $1.93/kg.[222] However, these regression results are based on data showing that current U.S. consumption of yellowfin makes up 1.2% of the market.[223] Consequently, assuming Mexico's regression analysis has properly represented the U.S. tuna market then if Mexico's model correctly estimated U.S. preferences for canned yellowfin it should solve for 1.2% of consumers being willing to pay a price premium somewhere in the range of $1.93/kg to $4.67/kg. The fact that Mexico's model does not produce results within this range provides further confirmation that its demand equations are misspecified.

65. With reference to paragraph 153 of Mexico's written submission, please comment on the appropriateness of modelling the modification of the tuna measure as a shift to the right of the supply curve of yellowfin tuna to the United States, in the context of the partial equilibrium model used by Mexico for its simulations.

109. Modeling a shift in the supply curve of all canned yellowfin tuna to the U.S. market is not consistent with modeling the removal of the U.S. dolphin safe labeling measure. The measure does not prevent Mexican canned tuna from entering the U.S. market and, consequently, its removal would not alter the supply of canned yellowfin currently available to the U.S. market, which includes Mexican canned yellowfin caught by setting on dolphins and canned yellowfin produced by other countries that is eligible for the dolphin safe label.[224] The removal of the measure could be modeled as a shift in the supply curve of yellowfin tuna able to bear some sort of label suggesting it is dolphin safe (assuming Mexican tuna product would be able to use the AIDCP label). However, this shift would not be consistent with the graphs Mexico presented at paragraph 153 of its written submission nor is it what Mexico modeled.

110. First, the graphs presented in Mexico's written 22.6 submission suggest that the supply of yellowfin tuna in the U.S. market would shift dramatically under the proposed counterfactual. Specifically, Mexico has drawn supply as currently being very limited and increasing by a substantial amount.[225] This is inconsistent with Mexico's actual position in the global tuna industry, including with respect to the supply of canned yellowfin.

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

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

[223] *See* "52 Week Canned Tuna Sales, Summed by Type (from Exhibit MEX-15)" (Exh. US-17).

[224] *See* Response to Question No. 51.

[225] *See* Mexico's Written 22.6 Submission, para. 153.

111. As discussed above in response to question 51, the WCPO, not the ETP, is by far the most important source of yellowfin tuna for canning.[226] In 2014, the ETP accounted for only 18.5 percent of the global catch of yellowfin, and Mexico accounted for only 8.6 percent.[227] Over two thirds of the global yellowfin catch is caught by purse seine vessels, which produce almost exclusively for canning.[228] The U.S. canned tuna market is open to and integrated into this global market, both in the fish processed by U.S. canneries, which in 2015 was 66 percent imported, and in imports of canned tuna from many other countries, including the largest processors of yellowfin.[229] Thus, if there were a shift in the supply curve, it would be small relative to the quantity of yellowfin already available to the U.S. market.

112. Second, a shift in the supply curve, either large or small, is not consistent with what Mexico actually modeled. The graphs presented in paragraph 153 of Mexico's written submission present very different supply and demand curves than those modeled and presented in Exhibit MEX-2. Mexico's model addressed the supply of a supposedly new tuna product (canned yellowfin) into a market in which there was no current supply. Supply of the product was perfectly elastic up to a pre-selected level, due to a supply constraint.[230] Consequently, the graphs in Exhibit MEX-2 show a current supply of yellowfin that is restricted and elastic, which is shifted out substantially.

113. Moreover, both of the demand shifts Mexico has represented (in Exhibit MEX-2 and at paragraph 153) would lead to an increase in the equilibrium quantity of canned yellowfin consumed in the U.S. market and a decrease in the equilibrium price.[231] Mexico's model, however, shows both a quantity and a *price increase* in consumption of yellowfin tuna in the U.S. market. Specifically, in 2014, the price of imports of canned tuna from Mexico averaged $4.00 a kilogram, but Mexico's model shows this price increasing to $7.79 a kilogram (a price increase of 94.8%).[232] Meanwhile, the equilibrium quantity of U.S. consumption of Mexican canned tuna also increases dramatically to 62,568 mt (with Mexico's share of the import market increasing from 3 to 50 percent).[233] This sort of increase in both equilibrium price and quantity would typically be explained by a demand shock, not an increase in supply.

114. Thus, the United States disagrees that modeling a shift in the supply curve is the most appropriate way to model the level of nullification and impairment accruing to Mexico. Even

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[226] *See* U.S. Response to Question No. 51.

[227] *See* "Total Catches of Yellowfin in the Pacific Ocean and Globally" (Exh. US-48); "Yellowfin Tuna Capture Fisheries Production" (Exh. US-47).

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

[229] *See* U.S. Response to Question No. 51; "U.S. Tuna Cannery Receipts Rev" (Exh. US-22 rev); "U.S. Imports of Canned Tuna from All Countries Individually – 2010-2015" (Exh. US-36).

[230] *See* Pouliot 2016, at 9 (Exh. MEX-2).

[231] *See* Mexico's Written 22.6 Submission, para. 153; Pouliot 2016, at 9 (Exh. MEX-2).

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

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

aside from this, however, Exhibit MEX-2 suggests that Mexico did not model the scenario set out in paragraph 153 of its written 22.6 submission, or, indeed, any supply shift at all.

66. With reference to paragraphs 175 and 176 of Mexico's written submission, please comment on Mexico's statements that "the assumption that there would be no imports of canned yellowfin tuna from countries other than Mexico is strongly supported by market realities", and on Mexico's claim that United States vessels would not be able (or would not find it profitable) to revert to fishing yellowfin tuna in the ETP in the short run.

115. Mexico's assumption that there would be no imports of canned yellowfin from any country other than Mexico is, in fact, strongly contradicted by "market realities."

116. First, Mexico's assertion that countries that fish and process tuna in the WCPO area could not be suppliers of yellowfin to the U.S. market is incorrect. In fact, as discussed above, the WCPO is the most important source of yellowfin, including yellowfin produced for canning, in the world. In 2014, vessels in the WCPO landed 46.3 percent of the global yellowfin catch and 57 percent of the global yellowfin catch by purse seine vessels (the vast majority of which is used for canning).[234] The ETP purse seine fishery produced less than half as much yellowfin as the WCPO purse seine fishery in that year. And Mexico's production accounted for less than 9% of the total yellowfin catch.[235] Further, the WCPO region tuna processors are by far the most significant sources of canned tuna in the world, accounting for 48 percent of total global production in 2008, compared to 25 percent for the ETP producers (mainly Ecuador).[236]

117. The United States imports substantial amounts of canned tuna from all of the WCPO producers. Thailand, Vietnam, the Philippines, and Indonesia together accounted for 79 percent of all canned tuna imported into the United States between 2010 and 2015.[237] Ecuador, the other major supplier to the U.S. canned tuna market, also produces canned yellowfin. The United States already imports canned yellowfin from these and other tuna producers, as shown by Exhibits MEX-15 and US-10.[238] The fact that the United States does not import more canned

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

[235] "Total Catches (tonnes) of Yellowfin in the Pacific Ocean and Globally" (Exh. US-48).

[236] FFA, Market and Industry Dynamics, at 154 (Exh. US-7).

[237] *See* "Imports of Canned Tuna from All Countries Individually – 2010-2015" (Exh. US-36) (showing that, for this period, Thailand, Vietnam, the Philippines, and Indonesia accounted for 52.6, 11.2, 9.8, and 5.6 percent of all imports of canned tuna).

[238] *See* Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Exh. MEX-15) (showing sales of: several different yellowfin products of Callipo (Italy), Crown Prince (Thailand), StarKist (Ecuador and American Samoa), Cora (Italy), Bumble Bee (Thailand et al.), Oro di Sicilia (Italy), Nostromo (Italy), Ortiz (Spain), Van Camp's (Ecuador), Rio Mare (Italy), Sustainable Seas (Vietnam), and others); "Yellowfin Market Regiew" (Exh. US-10) (BCI) [[

]]; *see also*, Crown Prince, Yellowfin Tuna (Exh. US-90) (showing a

yellowfin is, therefore, not a function of lack of supply, but of lack of demand. If U.S. demand for yellowfin *were* what Mexico's assumes it to be – that is, if vastly more U.S. consumers were willing to purchase yellowfin at a higher price than the 1-2 percent of consumers who purchase it are currently paying[239] – the existing suppliers to the U.S. market would be in a position to supply greater quantities of yellowfin and would have responded to the U.S. demand.

118. Second, Mexico's unsupported assertion[240] that it is the lowest cost producer of yellowfin is contradicted by the available evidence. Mexico claims that it has a "cost advantage" over all other producers due to installed processing capacity, vertical integration, strategic location near fishing zones, inexpensive labor, and tariff treatment. In reality, however, other countries have much greater advantages in terms of low-cost tuna processing.

119. Ecuador, for example, has almost all of the advantages that Mexico asserts give it a cost advantage, but has greater capacity to take advantage of economies of scale than Mexico. Ecuador has installed processing capacity, a semi-vertically integrated canning industry, is located near the fishing zones, and has a relatively inexpensive, productive labor force.[241] Until 2014, Ecuador also had duty free access to the U.S. market, under the ATPA, for the majority of their tuna exports to the United States.[242] Although this preference was phased out beginning in 2013, Ecuador's market share actually increased in 2015 relative to previous years.[243] Additionally, Ecuador has demonstrated that a diversified, rather than fully integrated, canning industry can be useful in bringing costs *down*, as sourcing from the WCPO has lowered the cost of fish for the Ecuadorian industry, particularly in years where ETP harvests were low.[244]

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canned yellowfin produce produced in Thailand); Sustainable Seas, Products and Online Shopping, (Exh. US-93) (showing canned yellowfin products produced in Vietnam).

[239] Mexico's model shows the average price of U.S. imports of canned (yellowfin) tuna from Mexico increasing from $4.00 per kg to $7.79 per kg (an increase of 94.8 percent). *See* Pouliot, at 33 (Exh. MEX-2). At the same time, yellowfin goes from being 1-2 percent of all consumption of canned tuna to 63,568 mt per year, 54 percent of all canned tuna imports. *See id.* As shown in exhibit US-10, Delores, a top Mexican product, is currently sold for between $0.292 and $0.318 an ounce. Yellowfin Market Review," at 8 (Exh. US-10) (BCI). If retail prices increased comparably to the rise in import prices, these products would sell for between $0.569 and $0.619 per ounce – 58.1%- 71.9% above the current average price per ounce of yellowfin ($0.360) on the U.S. market. *See id.*

[240] *See* Mexico's Written 22.6 Submission, paras. 129, 148.

[241] *See* Henry Vega & Mariano J. Beillard, U.S. Dep't of Ag. *Ecuador's Tuna Fish Industry: Update*, Aug. 17, 2015 (Exh. MEX-21) (stating that Ecuadorian canneries process about 500,000 mt of tuna annually); FFA, Market and Industry Dynamics, at 196-197 (Exh. US-7) (stating that "several of the plants in Ecuador . . . are vertically integrated into industrial purse seining" and that Ecuador has the advantage of an "efficient, productive and stable labour force").

[242] *See* "U.S. Imports of All Tuna Product from Ecuador" (Exh. US-128).

[243] *See* "U.S. Imports of All Tuna Product from Ecuador" (Exh. US-128).

[244] *See* FFA, Market and Industry Dynamics, at 198 (Exh. US-7) (noting that, due to supply limitations in the ETP, "Ecuador and WCPO processing links are increasing" and "raw material caught in the WCPO and transshipped to Ecuador is a well-established and increasingly important source of supply for Ecuador's processing industry").

Finally, Ecuador has much greater economies of scale and scope than Mexico does, as it is a much large player in the global tuna industry.[245]

120. Further, many of the supposed advantages Mexico listed also apply with even more force to Thailand. In particular, Thailand benefits from close proximity to the WCPO – the largest source of yellowfin for canning – and the Indian Ocean.[246] Fish is the most significant component in the cost of canned tuna and Thailand's dominance in the canning industry makes it a global leader in canning grade frozen skipjack and yellowfin.[247] Thailand is also better placed than any industry in the world to take advantage of economies of scale in processing and canning (the second most significant component in the cost of canned tuna) due to the high concentration of processing facilities around Bangkok.[248] Thus, as one recent report concluded, the Thai producers command unparalleled "economies of scale in production and procurement."[249] Third, Thailand has a low-cost, highly productive labor force, about 7 percent more productive, per metric ton of production – than Ecuador's.[250]

121. Other WCPO countries also benefit from many of these advantages, including installed processing capacity, strategic location near fishing zones, and a low-cost, high productivity workforce. The Philippines, for example had greater installed production capacity than Mexico as of 2008, and Vietnam benefitted from a labor force that, per metric ton of production, is less than half as expensive as Thailand and Ecuador's.[251] China, a small but rapidly growing supplier of canned tuna to the U.S. market, has a similarly productive labor force.[252]

122. Mexico has also provided no evidence suggesting that duty free access under NAFTA counterbalances the significant competitive advantages of the existing major suppliers to the U.S. market in terms of access to low-cost tuna, economies of scale in processing and canning, and low-cost, and high-productivity labor forces. As discussed above in response to Question 56, the available evidence concerning Mexico's market share of other, similar seafood products since NAFTA came into effect suggests that the opposite is the case. Although the share of U.S. imports of shrimp, crab, and sardines coming from Mexico increased to varying degrees after

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[245] *See* FFA, Market and Industry Dynamics, at 155 (Exh. US-7) (stating that, in 2008, Ecuador's annual production capacity was 362,400 mt, compared to Mexico's 186,000).

[246] *See supra* U.S. Response to Question 54; Campling et al. 2007, at 339 (Exh. US-114); FFA, Market and Industry Dynamics, at 159 (Exh. US-7).

[247] *See* FFA, Market and Industry Dynamics, at 158, 201 (Exh. US-7). In this regard, we note that Mexico has acknowledged that "harvest costs and landed tuna prices . . . in Central and South American countries [are] similar to those of the Mexican fleet." *See* Pouliot 2016, at 28 (Exh. MEX-2).

[248] Campling et al. 2007, at 340 (Exh. US-114).

[249] Campling et al. 2007, at 344 (Exh. US-114).

[250] FFA, Market and Industry Dynamics, at 156 (Exh. US-7).

[251] FFA, Market and Industry Dynamics, at 156 (Exh. US-7).

[252] FFA, Market and Industry Dynamics, at 156 (Exh. US-7).

NAFTA came into effect, the rise of other producers in the past 5-15 years eroded all such gains, so that Mexico's market share for each of these products is now lower than it was in 1993.[253]

123. Finally, Mexican products are not currently the least expensive canned yellowfin products in the U.S. market.[254] [[

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124. Mexico's own evidence proves this point as well. The data set out in Exhibit MEX-15 shows that Mexican tuna products are generally not the least expensive yellowfin products in the U.S. market. In the East North Central region, for example, certain Bumble Bee, StarKist, and Chicken of the Sea yellowfin products were all less expensive than all but one of the Dolores products sold.[258] In the Mid-Atlantic, a dozen private labels, Bumble Bee, Chicken of the Sea, and Star-Kist yellowfin products were less expensive than most of the Dolores products.[259] In New England, the South Atlantic, and the Northwest, private labels, Bumble Bee, and StarKist all had less expensive yellowfin products.[260]

125. With respect to Mexico's second assertion concerning the U.S. fleet,[261] it is, of course, reasonable to consider that U.S. vessels would not return to the ETP in order to set on dolphins under any of the counterfactuals proposed. The reason, however, is not that the canneries "are not set up" to process ETP yellowfin, but rather that the canneries producing for the U.S. market would not purchase tuna produced from setting on dolphins because U.S. consumers do not want

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[253] *See supra* U.S. Response to Question 56; "Mexico's Historical Market Share of Top Seafood Products" (Exh. US-125). Indeed, for shrimp and sardines, the dominant exporters to the U.S. market are many of the same producers that dominate the U.S. canned tuna market, including Ecuador, Indonesia, Thailand, and Vietnam (for shrimp) and Ecuador, the Philippines, and Thailand (for sardines). *See* "U.S. Imports of All Shrimp Products" (Exh. US-121); "U.S. Imports of All Sardines Products" (Exh. US-123).

[254] *See US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.237.

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

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

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

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

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

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

[261] Mexico's Written 22.6 Submission, para. 176 ("One potential source of canned yellowfin tuna would be that the U.S. fleet moves back into the ETP to fish yellowfin tuna in association with dolphins in response to the removal of the tuna measure.").

to purchase such a product. The April 1990 pledges to U.S. consumers by the "big three" tuna companies not to purchase tuna caught by setting on dolphins exist entirely independently from the U.S. measure and would remain in place regardless of whether the measure is withdrawn or modified.[262] For this reason alone, U.S. vessels would not likely return *en masse* to the ETP in order to set on dolphins, in the short term or the long term.

126. That does not mean, however, that U.S. canneries "are not set up" to meet increased demand for yellowfin from U.S. consumers in the short term, if ever such an increase occurred. U.S. canneries are not vertically integrated and already produce the majority of their tuna product from tuna caught by non-U.S. vessels.[263] U.S. canneries located in the WCPO could, therefore, purchase yellowfin (in addition to or in lieu of albacore and skipjack) from other fleets fishing in the WCPO and elsewhere that catch substantial quantities of yellowfin, including the fleets of Indonesia, the Philippines, Korea, and Taiwan.[264] And, of course, canneries located in Thailand and Ecuador, among other places, could also simply sell more canned yellowfin to the U.S. market than they do now.

127. Thus, Mexico's assertion that it would be the only supplier of canned yellowfin in the U.S. market where the measure is withdrawn or modified, given the dramatically different demand curve assumed by Mexico's model, is, in fact, strongly contradicted – not "supported" – by "market realities."

2.5 Questions related to data

67. Please comment on the data and methodology of Table 3 of MEX-2.

128. The United States has two comments on the data and methodology set out in Table 3: (1) the data do not reflect the most current information available; and, (2) the calculation of average unit value does not account for the differences among types of tuna product and, therefore, yields an inaccurate picture of the total cost per kilogram of canned tuna imports from different countries.

129. With respect to the first point, the data in Table 3 covers a single year rather than the average of several years. As reflected in the U.S. approach, the United States considers that, where possible, estimating the level of nullification and impairment based on an average is the sounder economic approach. Moreover, we note that Mexico has chosen to rely on 2014 data,

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[262] *See US – COOL (Article 22.6 – US)*, para. 6.32 ("For purposes of our own determination, we follow the counterfactual of the COOL measure having been withdrawn at the end of the RPT. We note that this is consistent with the approach adopted by previous arbitrators.") (citing *EC – Hormones (US) (Article 22.6 – EC)*, para. 38 ("Upon careful consideration of the claims and arguments set forth by the parties, we consider that our starting-point is as follows: what would annual prospective US exports of hormone-treated beef and beef products to the EC be if the EC had withdrawn the ban on 13 May 1999?") (emphasis original)).

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

[264] *See* "Yellowfin Tuna Capture Fisheries Production" (Exh. US-47).

rather than on the most current year available, 2015. The United States has updated the table with the 2015 data below.

U.S. Imports of Canned Tuna in 2015

	Value ($1000)	Quantity (MT)	Duties ($1000)	Charges ($1000)	Unit Value ($/KG)	Avg. Duty Rate	Charge($/KG)	Total cost ($/KG)
Thailand	267,535	70,110	34,108	11,219	3.82	13%	0.16	4.46
Ecuador	101,513	18,275	14,928	3,952	5.55	15%	0.22	6.59
Vietnam	80,148	18,931	10,075	2,631	4.23	13%	0.14	4.90
Philippines	51,929	15,694	6,572	2,482	3.31	13%	0.16	3.89
Indonesia	33,173	8,634	4,159	1,318	3.84	13%	0.15	4.48
Mexico	17,477	5,028	0	312	3.48	0%	0.06	3.54
China	9,918	2,927	1,240	488	3.39	13%	0.17	3.98
Costa Rica	4,731	554	0	266	8.54	0%	0.48	9.01
Korea	2,784	491	615	128	5.67	22%	0.26	7.18
Portugal	1,573	259	520	68	6.07	33%	0.26	8.33
Other	6,188	1,243	1,131	217	4.98	18%	0.17	6.06
Total	**576,971**	**142,145**	**73,346**	**23,080**	**4.06**	**13%**	**0.16**	**4.74**

(Source: U.S. Census Bureau, accessed through USITC Dataweb, HS codes 1604.14.10, 1614.14.22, 1604.14.30)

130. We note that in 2015 the total quantity and the average price of canned tuna imports into the U.S. market declined, from 155,192 mt to 142,145 mt and from $5.00 per kg to $4.74 per kg.[265] As the United States has explained, this is consistent with the trend of declining tuna consumption over the past fifteen years.[266] Consequently, any calculations based on 2014 data would overstate the level of nullification and impairment.

131. With respect to the second point, an average value figure for each country does not give an accurate picture of the cost-competitiveness of tuna products from different countries because such a figure reflects primarily the makeup of imports from each country, not the pricing of comparable products. Premium products will naturally be more expensive than non-premium

[265] *See* Pouliot, at 6 (Exh. MEX-2).

[266] *See* Ferdman, "How Americans Fell out of Love with Canned Tuna," at 1 (Exh. US-5). For example, the quantity of supply in the U.S. market has fallen by 27 percent over the past decade, from 406,040 mt in 2005 to 319,237 in 2015. "U.S. Supply of Canned Tuna" (Exh. US-9).

products. Thus, whether U.S. imports from a particular country consist of albacore, premium quality yellowfin, or light tuna will be an important factor in determining the total cost per kg of that country's products, as will whether the products are packed in olive oil or water/vegetable oil, whether they are solid or chunk pack, whether they are pouched or canned, and whether they contain flavoring. Consequently, the appropriate way to compare the cost structure of different countries would be to compare similar products, not averages. The Mexican tuna products sold in the United States are mainly chunk light yellowfin in water or vegetable oil.[267] That these products are less expensive than premium albacore or gourmet yellowfin products (*e.g.*, solid pack in olive oil) does not demonstrate that Mexico is a lower cost producer than other countries. Further, as Exhibit MEX-15 and US-10 establish, when comparing two similar products, Mexico's products are generally not the least expensive on the U.S. market.[268]

68. At paragraph 129 of Mexico's written submission, Mexico provides an interpretation of the trends described in paragraph 25 of the United States' written submission. Please comment on Mexico's interpretation of the factor causing these trends.

132. In paragraph 129, Mexico asserts that the relatively consistent decline in the quantities of yellowfin purchased by U.S. canneries for the U.S. canned tuna market reflects, not lack of demand, but "increasing costs for canned yellowfin" and the fact that "U.S. canneries lost access to inexpensive yellowfin."[269] Mexico also suggests that the U.S. fleet moving to the WCPO caused albacore to take over as the second most important species in U.S. cannery receipts.[270] This story – of constricting supply of yellowfin and rising prices in conjunction with increased availability of albacore to the U.S. fleet – is contradicted by the evidence concerning U.S. cannery purchases and yellowfin supply and prices since 1990. Rather, the evidence tells a story of decreasing U.S. demand for yellowfin and increasing demand for albacore.

133. First, as explained above in response to Question 66 and elsewhere, U.S. canneries' access to yellowfin for canning is not limited to the catch of U.S. vessels. In 1990, when the DPCIA was enacted, tuna caught by foreign vessels accounted for just over half of all tuna purchased by U.S. processors, and this figure has risen steadily over the ensuing 25 years to

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

[268] *See* "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-136) (showing, for example, (1) in the East North Region, Dolores 5 oz chunk light yellowfin in water sold for an average of $1.86 per unit, more than Chicken of the Sea' 5 oz solid light yellowfin in water and Bumble Bee's solid light yellowfin in water; (2) in the mid-Atlantic, the same Dolores product sold for an average of $2.04 per unit, which was more than the private label, Bumble Bee, and Chicken of the Sea 5 oz yellowfin products in water; (3) in New England, the same Dolores product sold for $2.03 per unit, which was more than Bumble Bee and Chicken of the Sea yellowfin products in water and more than a Genova 5 oz yellowfin product in in olive oil; and (4) in the South Atlantic, the same product sold for $1.79 and was more expensive than the Bumble Bee and Chicken of the Sea 5 oz yellowfin products in water and the Chicken of the Sea product in olive oil).

[269] Mexico's Written 22.6 Submission, para. 129.

[270] Mexico's Written 22.6 Submission, para. 129.

about 66 percent today.[271] Further, the vast majority of tuna purchased by U.S. canneries is caught in the WCPO, which, in the 1990s, was producing an increasing supply of yellowfin tuna.[272] There is no evidence on the record suggesting that the yellowfin tuna caught in the WCPO is, generally speaking, more expensive than the yellowfin tuna caught in the ETP. To the contrary, the evidence indicates that the prices of cannery grade yellowfin in Thailand and Latin America are related.[273] It is thus incorrect that declining catches of yellowfin by U.S. vessels in the 1990s would necessarily affect U.S. canneries' access to "inexpensive yellowfin."

134. Second, the timing and manner of the U.S. canneries' declining purchases of yellowfin is not consistent with an abrupt supply restriction beginning in 1990. U.S. cannery purchases of yellowfin totaled 33.9 percent of all U.S. cannery purchases of tuna in the 1980s and still accounted for 22 percent of all such purchases in the 1990s.[274] It was only in the 2000s that yellowfin fell to 11 percent of all tuna purchases by U.S. canneries, and from 2010 to 2015, the number fell further to 5.3 percent.[275] This steady decline is inconsistent with a sudden supply restriction and, further, is not explained by any constriction in the global supply of yellowfin, which remained remarkably constant from 1990 to 2014.[276]

135. Third, the available evidence concerning the global prices of yellowfin contradicts Mexico's interpretation of declining U.S. consumption of yellowfin. As shown in the graph below, the world price for whole frozen yellowfin for canning actually *dropped* in the early 1990s, precisely when, as depicted in the second graph, U.S. cannery purchases of yellowfin started to decline. U.S. cannery purchases fell again in 1999-2000, when yellowfin prices were also falling. These results are exactly *the opposite* of what one would expect if price, rather than U.S. consumer demand, drove the U.S. canneries' purchasing decisions.

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

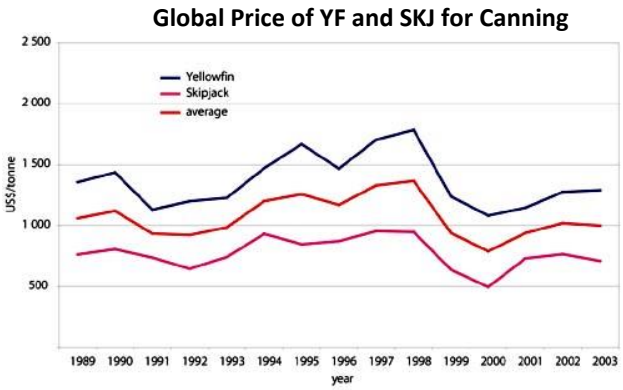
[272] *See* "Yellowfin Catch by Ocean Area" (Exh. US-84) (showing that yellowfin catches in the WCPO rose from 353,660 mt in 1989 to 509,888 mt in 1999).

[273] *See* FFA, Market and Industry Dynamics, at 158 (Exh. US-7) (stating that Thailand is a "global price leader for canning grade frozen tuna"); *id.* 201 (stating that, during FAD closures in the ETP, the processors in Bangkok work together to drive up the price of cannery grade frozen tuna). Further, as discussed in response to Question 66, some of this canned yellowfin is actually sold in the United States at price levels below what Mexican canned yellowfin sells for, as Mexico's own evidence establishes. *See supra* U.S. Response to Question 66 (citing "Price Comparison of the Yellowfin Products in MEX-15" (Exh. US-136); "Yellowfin Market Review," at 8 (Exh. US-10) (BCI)).

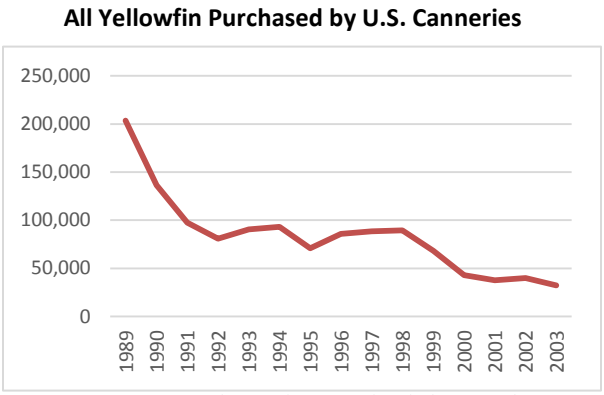
[274] *See* "U.S. Cannery Purchases of YF, Total and Share" (Exh. US-96).

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

[276] *See* "Yellowfin Percent of Global Catch" (Exh. US-86).



See FAO, *Management of Tuna Fishing Capacity* (2004) (Exh. US-137)



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

136. Fourth, Mexico's assertion that the rise in U.S. consumption of canned albacore was related to the departure of the U.S. fleet from the ETP and the alleged restricted supply of yellowfin is inconsistent with the evidence. The U.S. purse seine fleet in the WCPO does not, and never has, caught significant quantities of albacore. Since 1987, the largest share of the albacore purchased by canneries that was caught by U.S. vessels was 16.2 percent in 1996.[277] Rather, the vast majority of albacore purchased by U.S. canneries *is caught by foreign vessels* (97 percent in 2015).[278] Thus, albacore's increasing share of the tuna purchased by U.S. canneries reflects not the movement of U.S. vessels from the ETP to the WCPO, but the deliberate choice by U.S. canneries to produce those products for which there is the highest level of U.S. consumer demand.[279]

69. What is the share of yellowfin tuna that is imported into the United States under the dolphin-safe label, as opposed to the share of yellowfin tuna that is imported into the United States without such label? With reference to Table 3 of MEX-2, please provide data indicating the share of imports that occur under a "dolphin-safe" label for each supplier to the United States market.

137. Nearly all of the tuna product imported into the United States is eligible to be marketed as dolphin safe. The notable exception is Mexican tuna product. In the past 5 years, we are aware of only 15 entries of non-dolphin safe tuna from countries other than Mexico (caught in the ETP purse seine fishery) while over 90 percent of entries from Mexico are non-dolphin safe.[280]

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

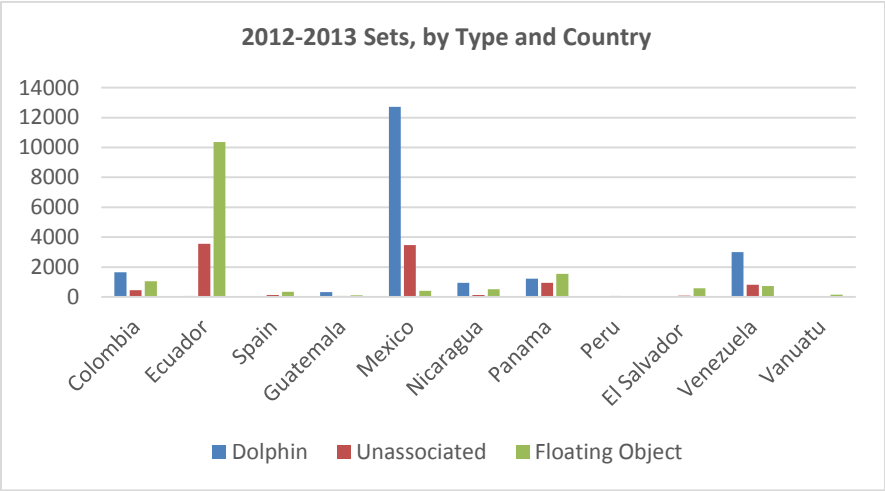
[278] *See* "U.S. Tuna Cannery Receipts Rev" (Exh. US-22 rev).

[279] *See* U.S. Written 22.6 Submission, paras. 20-21 (citing, among other things, FFA, Market and Industry Dynamics, at 254 (Exh. US-7) (stating that while albacore accounts for only 34% of the U.S. market by volume, it accounts for 52% of the market value); Chiang et al. 2016, at 5 (Exh. US-8) (noting that the average retail price for canned albacore tuna was $5.32 per pound compared to $3.17 per pound for skipjack)).

[280] *See* "Entries of Non-Dolphin Safe Tuna Product – 2011-2016" (BCI) (Exh. US-138).

138. Of course, this is not surprising. U.S. consumer preferences for tuna product that is produced in a manner that meets the dolphin safe eligibility criteria is well known. Accordingly, where a tuna producer has tuna product that does not meet the eligibility criteria, such as when the tuna was harvested by a vessel that sets on dolphins, that tuna producer will sell such tuna product internally or in another export market where there may be a higher level of demand due to differences in consumer preferences.

139. Mexico is a known exception to this point as it takes the position that, in fact, none of its tuna product meets the dolphin safe standard as "virtually all of Mexico's purse seine tuna fleet continues to fish in the ETP by setting on dolphins."[281] And recent IATTC data regarding dolphin sets in the ETP are consistent with Mexico's position, as shown in the chart below.[282] Indeed, no country depends so heavily on dolphin sets, either in absolute terms or as a percentage of their fleet's fishing effort. Mexico's commitment to this fishing method is unique.



140. Thus, while a number of the AIDCP parties whose fleets do set on dolphins – such as, Colombia, Ecuador, and El Salvador – also export tuna product to the United States, they choose to export their tuna product that was not produced from setting on dolphins and that otherwise meets the labeling conditions of the U.S. measure, and to sell their tuna product produced from setting on dolphins either domestically or in exports markets other than the United States where consumers have substantially different preferences.

3 FOR THE PARTIES

[281] *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 7.444 ("According to Mexico, 'virtually all of Mexico's purse seine tuna fleet continues to fish in the ETP by setting on dolphins and is therefore fishing for tuna that would not be eligible to be contained in a dolphin-safe tuna product under the Amended Tuna Measure.'" (quoting Mexico's First Written Submission, para. 227).

[282] *See* "EPO Dataset – 2009-2013" (Exh. US-139).

70. As a general matter, what considerations should guide an Arbitrator in choosing between competing WTO-consistent counterfactuals where both appear to be reasonable and plausible?

141. For the reasons discussed above, the United States does not consider this to be the case in this proceeding. It is undisputed that the U.S. counterfactual is WTO-consistent. In contrast, Mexico cannot prove with reference to the DSB recommendations and rulings that either of their two counterfactuals are WTO-consistent – and, indeed, Mexico appears to undermine its own position in its arguments to the compliance panels.

142. Furthermore, the choice of a counterfactual needs to take into account the fact that it is up to the Member concerned to choose the means of bringing the measure at issue into compliance. It is not up to the complaining party to decide on the means of bringing the measure into compliance, or to infringe on the discretion of the Member concerned.

71. With reference to page 14 of MEX-2, please comment on Mexico's assertion that "[o]ther distribution functions [other than the logistic distribution function] like the normal distribution or the uniform distribution function can also be used". Please elaborate on (i) how results would be affected by the use of a different probability function, and (ii) whether there is any other more appropriate distribution function than the logistic distribution function.

143. The choice and parametrization of the distribution function are essential features of discrete choice models. Discrete choice models are estimates of what determines consumer behavior and how that behavior changes with fluctuations in price and product attributes.[283] In order for the model to correctly estimate consumer decisions in response to price fluctuations, the distribution in the model needs to be reflective of actual consumer behavior and its parametrization must be correct. In the context of Mexico's model, correctly defining the willingness of the average consumer to pay for yellowfin and how that is distributed across the spectrum of consumers in the market is an essential precondition of the model's producing an accurate result.

144. The correct way to define and parametrize (*i.e.*, define the shape and scale of) the distribution in Mexico's model would be based on observations of consumer purchasing decisions with regards to canned tuna in the U.S. and Mexican markets, separately. This could be done based on literature and prior economic analysis of consumer purchasing decisions within Mexico and the United States. This is also commonly done based on survey results, experiments (such as control groups), or on detailed analysis of consumer purchases (*e.g.*, a disaggregated dataset from a market research company such as Nielsen or IRI).[284] The level of detail required

[283] *See, e.g.*, Steven Berry et al., "Automobile Prices in Market Equilibrium," 63 *Econometrica* 841, 841-842 (1995) (US-140).

[284] *See* Berry et al. 1995, at 842 (explaining that choice models "represents consumer preferences over products as a function of individual characteristics and of the attributes of those products); *id.* at 844-845 ("Most of

in the consumer purchase data would be similar to that required to properly derive a demand curve or properly calculate the "intensity of demand" parameter, including store-by-store sales of tuna by type and accounting for product characteristics, the timing of sales, and whether sales were made at promotional values, as well as information on complementary and substitute products.[285]

145. Instead of conducting the analysis necessary to correctly define and parametrize the distribution function, Mexico simply assumed that both the U.S. and the Mexican market have a logistic distribution, with a mean willingness to pay for yellowfin of $2 per kilogram.[286] There is no evidence to support either assumption. In fact, evidence of U.S. consumer purchasing decisions shows that consumers are highly sensitive to changes in the price of tuna, suggesting that the distribution would be asymmetrical, with the majority of consumers unwilling to pay a premium price for tuna product.[287] We do not have the same level of knowledge of the purchasing decisions of Mexican consumers, but the data that Mexico has provided shows that 64 percent of Mexican consumers are paying a price premium of $1.10 per kg for canned yellowfin.[288] This suggests that more than half of consumers in the Mexican market are willing to pay a premium for tuna in the Mexican market and that the distributions in the U.S. and Mexican market are not the same.

146. Thus, Mexico's use of logistic distributions for both Mexican and U.S. willingness to pay, as well as Mexico's use of an identical $2 per kg willingness to pay is unsupported and dubious. As the United States has explained, detailed data on consumer purchases is not available; nor is there preexisting economic literature available that would allow either party to properly parametrize the distribution of willingness to pay. In short, it is simply not possible accurately to define and parametrize Mexico's model. The available evidence does suggest, at least, that the distributions in the U.S. and Mexican market should not be the same. In the U.S. market, the fact that consumers of canned tuna are highly sensitive to price (and unusually so,

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this paper assumes that we do not have data that matches individual characteristics to the products those individuals purchased. Consequently, we proceed (as does much of the prior literature on the empirical analysis of equilibrium in markets for differentiated products) by considering the problem of estimating all the parameters of the demand system from product level data (i.e. from information on prices, quantities, and the measurable characteristics of the products). We then extend the discussion to allow for the possibility of incorporating exogenous (and frequently available) information on the distribution of individual characteristics (e.g., the distribution of income and/or family size). Only in the extensions section do we come back to the advantages of having data that matches consumer characteristics to the products those consumers purchased.")

[285] *See supra* U.S. Responses to Questions 61, 63.

[286] *See* Pouliot 2016, at 14, 20 (Exh. MEX-2).

[287] *See* U.S. First Written Submission, paras. 19, 105; FFA, Market and Industry Dynamics, at 253 (Exh. US-7) (stating that in 2007, "46% of all tuna was sold on promotion").

[288] *See* Pouliot 2016, at 28, Table 8 (Exh. Mex-2) (showing that the consumption share of yellowfin in the Mexican canned tuna market is 64 percent); *id.* at 27 (solving equations 13, 14, and 15 to determine the price of yellowfin is $5.41 per kg and the price of generic $4.31 per kg).

compared to other markets) suggests that an exponential distribution is likely closer to accurate than a logistic distribution.

147. Thus, it is possible that some changes could make Mexico's model potentially closer to accurate, but the model would still be fatally flawed. For example, it is possible to use Mexico's cumulative distribution function (formula 8) and the (insufficiently detailed) data provided in MEX-15 to solve for a mean willingness to pay in the United States and Mexico, producing results of -$2.48 in the United States and $1.78 in Mexico.[289] It would also likely improve the accuracy of the model to adopt an exponential distribution for U.S. willingness to pay, parametrized based on the (insufficiently detailed) data in Exhibit MEX-15 so that 1.2 percent of consumers are willing to pay a premium for yellowfin of $1.93 per kg. A logistic distribution seems more appropriate for Mexican willingness to pay, so the mean willingness to pay could be set at $1.78. Updating the model on this basis reduces the estimated level of nullification and impairment by hundreds of millions of dollars. Even with these changes, however, the model is inherently flawed because it is a choice model that is not specified based on consumer behavior and the demand characteristics of the products at issue.

148. Most importantly, the fact that the intensity of demand parameter remains the primary driver of the results in Mexico's model must preclude the model's being taken as an accurate depiction of the level of nullification and impairment. In a discrete choice model, demand is generally represented based on the characteristics of the products purchased by consumers.[290] That is, there are multiple demand parameters based on the different features of the products at issue.[291] When choice models are used to model the introduction of a new product, data on previous purchases is used to estimate demand based on a series of attributes of those products.[292] For tuna, these might represent texture, flavor, healthfulness, color, etc. Once demand is calibrated based on sales of current products, the new product can be defined based on the same attributes allowing the demand specification to estimate the sales of the new product. In Mexico's model, by contrast, a single variable is the *sole* driver of demand intensity, and it is based *solely* on the total amount of tuna consumed in each country, which is not indicative of any of the characteristics of either yellowfin or so called "generic" tuna.

[289] This calculation for the United States reflects the OLS figures. Using OLS is standard unless there is reason to think the data observations are measured with varying degree of precision and/or data are heteroskedastic, and Mexico advanced no such reason.

[290] *See, e.g.*, Berry et al. 1995, at 868 (specifying demand parameters for automobiles based on the "number of cylinders, number of doors, weight, engine displacement, horsepower, length, width, wheelbase, EPA miles per gallon rating (MPG), and dummy variables for whether the car has front wheel drive, automatic transmission, power steering, and air conditioning as standard equipment").

[291] *See, e.g.*, Berry et al. 1995, at 868.

[292] *See* S. Beggs & S. Cardell, "Assessing the Potential Demand for Electric Cars," 16 *J. of Econometrics* 1, 1 (1981) (Exh. US-141).

149. Thus, regardless of all other features of Mexico's model, the intensity of demand parametrization renders it a fatally flawed representation of the level of U.S. demand for Mexican tuna product and, therefore, of the level of nullification and impairment in this dispute.

72. The parties appear to agree that the consumption of yellowfin tuna has fallen significantly since 1987 (United States' written submission, paragraph 25). The parties differ, however, in the explanations they provide. The United States asserts that the reduction is due to a fall in demand, while Mexico states that it is due to the fall in production. Could the parties provide any information on the pattern of prices of yellowfin tuna and how in their views these patterns can be explained by changes in its demand and/or supply?

150. Please refer to the United States' response to question 68 above.