

*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)**

Written Submission  
of the United States of America

August 3, 2016

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**TABLE OF ACRONYMS**

<b>Acronym</b>	<b>Full Name</b>
2013 Final Rule	Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, 78 Fed. Reg. 40,997 (July 9, 2013)
2016 IFR	Enhanced Document Requirements and Captain Training Requirements To Support Use of the Dolphin Safe Label on Tuna Products, 81 Fed. Reg. 15,444 (Mar. 23, 2016)
AIDCP	Agreement on the International Dolphin Conservation Program
C.F.R.	Code of Federal Regulations
DOC	Department of Commerce
DPCIA	Dolphin Protection Consumer Information Act
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
EII	Earth Island Institute
ETP	Eastern Tropical Pacific Ocean
FAO	United Nations Food and Agriculture Organization
FDA	U.S. Food and Drug Administration
FFA	Forum Fisheries Agency
FTC	U.S. Federal Trade Commission
FTCA	Federal Trade Commission Act
IATTC	Inter-American Tropical Tuna Commission

ICCAT	International Commission for the Conservation of Atlantic Tunas
IOTC	Indian Ocean Tuna Commission
NGO	Non-governmental organization
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
NTB	Non-tariff barrier
MSY	Maximum-sustainable yield
RFMOs	Regional Fishery Management Organizations
RPT	Reasonable period of time
SBR	Spawning biomass ratio
TBT Agreement	Agreement on Technical Barriers to Trade
TTVP	Tuna Tracking and Verification Program
U.S.C.	United States Code
WCPFC	Western and Central Pacific Fisheries Commission
WTO	World Trade Organization

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<i>EC – Hormones (Canada) (Article 22.6 – EC)</i>	Decision by the Arbitrators, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by Canada – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS48/ARB, 12 July 1999
<i>EC – Hormones (US) (Article 22.6 – EC)</i>	Decision by the Arbitrators, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones), Original Complaint by the United States – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU</i> , WT/DS26/ARB, 12 July 1999
<i>Korea – Alcoholic Beverages (Article 21.3(c))</i>	Award of the Arbitrator, <i>Korea – Taxes on Alcoholic Beverages – Arbitration under Article 21.3(c) of the DSU</i> , WT/DS75/16, WT/DS84/14, 4 June 1999, DSR 1999:II, 937
<i>US – Certain EC Products (Panel)</i>	Panel Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/R and Add.1, adopted 10 January 2001, as modified by Appellate Body Report WT/DS165/AB/R

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<i>US – Offset Act (Byrd Amendment) (Canada) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by Canada – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS234/ARB/CAN, 31 August 2004
<i>US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)</i>	Decision by the Arbitrator, <i>United States – Continued Dumping and Subsidy Offset Act of 2000, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS217/ARB/EEC, 31 August 2004
<i>US – Tuna II (Article 21.5 – Mexico) (AB)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/AB/RW, adopted 3 December 2015
<i>US – Tuna II (Article 21.5 – Mexico) (Panel)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/RW, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW
<i>US – Tuna II (Mexico) (AB)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012

<i>US – Tuna II (Mexico) (Panel)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R
<i>US – Tuna (Mexico) (GATT)</i>	GATT Panel Report, <i>United States – Restrictions on Imports of Tuna</i> , DS21/R, 3 September 1991, unadopted, BISD 39S/155
<i>US – Upland Cotton (Article 22.6 – US I)</i>	Decision by the Arbitrator, <i>United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS267/ARB/1, 31 August 2009
<i>US – Upland Cotton (Article 22.6 – US II)</i>	Decision by the Arbitrator, <i>United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement</i> , WT/DS267/ARB/2 and Corr.1, 31 August 2009



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<b>Exh. No.</b>	<b>Description</b>
1	Dolphin Protection Consumer Information Act (DPCIA), 16 U.S.C. § 1385 (2011)
2	Dolphin Safe Tuna Labeling Regulations, 50 C.F.R. § 216, Subpart H (2016)
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17	“52-Week Canned Tuna Sales, Summed by Type” (based on Exhibit MEX-15)

18	Sam Roe & Michael Hawthorne, “How Safe is Tuna?” <i>Chicago Tribune</i> , Dec. 13, 2005
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20	Rosalee S. Rasmussen & Michael T. Morrissey, “Effects of Canning on Total Mercury, Protein, Lipid, and Moisture Content in Troll-Caught Albacore Tuna ( <i>Thunnus alalunga</i> ),” <i>Food Chemistry</i> , vol. 101 (2007)
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58	Samuel Laird, “Quantifying Commercial Policies,” in <i>Applied Methods for Trade Policy Analysis: A Handbook</i> (1997)
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79	“Historical U.S. Imports of All Tuna” (data drawn from NOAA U.S. Foreign Trade, <a href="http://www.st.nmfs.noaa.gov/commercial-fisheries/foreign-trade/">http://www.st.nmfs.noaa.gov/commercial-fisheries/foreign-trade/</a> )
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## I. INTRODUCTION

1. Mexico's July 6, 2016 Methodology Paper ("Mexico's Methodology Paper") dramatically overestimates the level of nullification or impairment attributable to the U.S. dolphin safe labeling measure, as amended.

2. First, Mexico's Methodology Paper fails to take into account the fact that the United States has brought the dolphin safe labeling measure into compliance with the Dispute Settlement Body (DSB) recommendations and rulings in the first compliance proceeding in this dispute. As the United States explained in its July 22 first written Article 21.5 submission, the interim final rule issued on March 22, 2016 ("2016 IFR") by the U.S. National Oceanic and Atmospheric Administration (NOAA) directly responds to the concerns of the Appellate Body and the first compliance panel. As such, the dolphin safe labeling measure is not inconsistent with U.S. obligations under the covered agreements, and there is consequently no nullification or impairment of benefits accruing to Mexico under the relevant agreements.

3. Second, even aside from the fact that the measure is now in compliance, Mexico's Methodology Paper reflects a flawed economic methodology that drastically overestimates any level of nullification or impairment that could be attributed to the U.S. measure, were it not in compliance. At the most fundamental level, Mexico's model asks the wrong question. Instead of seeking to quantify the value of the U.S. dolphin safe labeling measure and model the effect of its removal on Mexican exports of tuna product to the United States, Mexico constructs a question with no basis in reality. Mexico asks what would happen if Mexico were the exclusive supplier of a product for which there was massive latent demand in the United States and models the answer. This question has no relationship to the correct counterfactual or to the realities of the canned tuna market in the United States.

4. Mexico's Methodology Paper compounds this fundamental error by specifying its model based on assumptions that the available evidence demonstrates are incorrect. In particular, Mexico's model assumes that, under the particular counterfactuals it proposes, U.S. consumers will demand canned yellowfin tuna produced from setting on dolphins to the same degree as Mexican consumers currently do. But this is an unreasonable assumption because the counterfactual relates to the U.S. market. It is well established, both by the original panel and by the available evidence concerning consumer preferences, that U.S. consumers are "sensitive to the dolphin safe issue" and "have certain preferences with respect to tuna products" on this basis and that not consuming tuna caught by setting on dolphins is at the heart of these preferences.<sup>1</sup> Mexican consumers, by contrast, clearly have different preferences. Indeed, if U.S. and Mexican consumers had the same preferences, this dispute would not exist: either the Mexican fleet would use another fishing method (if Mexican consumers objected to their tuna product being produced from setting on dolphins) or the U.S. label would not constitute an advantage in the U.S. market (if U.S. consumers did not object).

5. Pursuant to this flawed design and numerous wrong assumptions, Mexico's model generates a wholly unreasonable solution, predicting that U.S. imports of canned tuna from

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<sup>1</sup> *US – Tuna II (Mexico) (Panel)*, paras. 7.288-289.

Mexico will increase by 1,264 percent over 2015 levels and will account for 44.7 percent of all U.S. imports of canned tuna – over 12 times Mexico’s share of U.S. canned tuna imports in 2015. These predictions are completely disproportionate to Mexico’s position in the global canned tuna industry. They are also refuted by available data on Mexican historical and current share of U.S. tuna product imports.

6. In lieu of Mexico’s fatally flawed model, the United States puts forward an approach based on levels of U.S. imports from Mexico prior to the adoption in 1990 of the original Dolphin Protection Consumer Information Act (DPCIA). Specifically, the United States looks to Mexico’s share of U.S. tuna imports in the years prior to the enactment of the DPCIA, and on this basis calculates Mexico’s likely share of U.S. tuna product imports given the counterfactual of withdrawal of the U.S. dolphin safe labeling measure. The U.S. model accounts for demonstrated U.S. consumer preferences not to purchase tuna caught by setting on dolphins. Such a historical, market-based approach is the most appropriate in the light of the available data and is consistent with the approach taken by past Article 22.6 arbitrators.

7. After discussing the procedural background and underlying facts, the United States requests in section IV of this submission that the Arbitrator make a preliminary ruling that the measure at issue in this proceeding is the U.S. measure as amended by the 2016 IFR. In section V, the United States explains why the level of suspension of concession or other obligations proposed by Mexico is not equivalent to the level of nullification or impairment. First, the United States explains that there is no nullification or impairment because the United States has brought the U.S. measure into compliance. Second, the United States explains that, even aside from compliance, the figure that Mexico has proposed far exceeds any level of nullification or impairment that could be attributed to the U.S. measure (were it not in compliance). Finally, in section VI, the United States provides the appropriate calculation of nullification or impairment, leaving aside the issue of compliance.

## **II. PROCEDURAL BACKGROUND**

8. On December 3, 2015, the DSB adopted its recommendations and rulings resulting from the compliance proceedings under Article 21.5 of the DSU in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*.<sup>2</sup> The DSB found that the U.S. dolphin safe labeling measure, as amended, was inconsistent with Article 2.1 of the TBT Agreement and was inconsistent with Articles I:1 and III:4 of the GATT 1994 and not justified under Article XX of the GATT 1994.<sup>3</sup>

9. On March 10, 2016, Mexico requested authorization from the DSB to suspend the application of concessions or other obligations under the covered agreements pursuant to Article

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<sup>2</sup> Minutes of December 3, 2015 DSB Meeting, WT/DSB/M/371, para. 2.12 (Feb. 15, 2016).

<sup>3</sup> *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 8.1(a)(viii), (d).

22.2 of the DSU in these disputes.<sup>4</sup> On March 22, the United States further amended the U.S. dolphin safe labeling measure in response to the DSB recommendations and rulings and subsequently objected to the level of suspension requested by Mexico.<sup>5</sup> Pursuant to Article 22.6 of the DSU, the U.S. objection referred the matter to arbitration.<sup>6</sup> At the March 23, 2016 DSB meeting, the United States explained that the matter had already been referred to arbitration and that the United States had brought the measure into compliance.<sup>7</sup>

### III. STATEMENT OF FACTS

#### A. Overview of the U.S. Dolphin Safe Labeling Measure and History of Previous Proceedings

10. The measure at issue in this dispute is the U.S. dolphin safe labeling measure for tuna products.<sup>8</sup> As defined in the previous two panel proceedings, this measure comprises three legal instruments: (1) the Dolphin Protection Consumer Information Act (DPCIA), (2) the DPCIA implementing regulations issued by NOAA, and (3) the 9<sup>th</sup> Circuit Court of Appeals decision in *Earth Island Institute v. Hogarth (Hogarth)*.<sup>9</sup> The measure sets out the minimum conditions under which tuna product may be marketed to U.S. consumers as “dolphin safe.”<sup>10</sup>

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<sup>4</sup> Recourse to Article 22.2 of the DSU by Mexico, WT/DS381/29 (Mar. 11, 2016).

<sup>5</sup> Recourse to Article 22.6 of the DSU by the United States, WT/DS381/30 (Mar. 22, 2016).

<sup>6</sup> See *US – COOL (Article 22.6)*, para. 2.18.

<sup>7</sup> Minutes of March 23, 2016 DSB Meeting, WT/DSB/M/376, paras. 7.3-7.4.

<sup>8</sup> Under the U.S. measure, “tuna product” refers to a “food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days.” *US – Tuna II (Article 21.5 – Mexico) (AB)*, n.101 (citing 16 U.S.C. § 1385(c)(5)). In other words, “tuna product” is tuna that has undergone some processing and is not sold as “fresh” tuna. This market consists primarily of canned tuna, although products processed in other ways, e.g., freezing, drying, etc., are also sold in the U.S. market to some extent.

<sup>9</sup> *US – Tuna II (Mexico) (Panel)*, para. 2.1; *US – Tuna II (Mexico) (AB)*, para. 172; *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 3.2; *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 6.7.

<sup>10</sup> Specifically, subsection (d) of the DPCIA, as well as the NOAA implementing regulations, provides that it is a violation of the Federal Trade Commission Act (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). Thus, the measure sets a minimum standard for tuna product that can bear any label suggesting it is “dolphin safe.” Producers and retailers can make use of the “official” Department of Commerce dolphin safe label set out in the NOAA regulations, but private labels established by non-governmental organizations (NGOs) or particular companies are used much more widely in the U.S. marketplace. See *infra*, sec. III.B.1.d.



11. As discussed below, the DPCIA was initially enacted in 1990 and prohibited tuna product produced from vessels setting on dolphins to carry a label suggesting that it was dolphin safe.<sup>11</sup> In 1991, Mexico challenged that statute as discriminating against Mexican tuna product in a manner inconsistent with Article I:1 of the GATT 1947. The GATT 1947 panel rejected that claim, however, finding that the measure did not discriminate against Mexican tuna product because setting on dolphins by eastern tropical Pacific (ETP) purse seine vessels was, in fact, very harmful to dolphins.<sup>12</sup> In 1997, Congress amended the DPCIA, with the most significant change being to provide an opportunity for tuna product produced from vessels setting on dolphins to be eligible to carry a dolphin safe label if a certain condition was met. In 2007, the 9<sup>th</sup> Circuit Court of Appeals in *Hogarth* ruled that this condition had not been met.<sup>13</sup>

12. In 2009, Mexico challenged the U.S. dolphin safe labeling requirements (comprising the statute, regulations, and *Hogarth*). The WTO panel (referred to in this submission as the “original panel”) rejected Mexico’s claim of discrimination in 2011.<sup>14</sup> In 2012, the Appellate Body reversed the original panel’s finding, determining that the U.S. dolphin safe labeling requirements did discriminate against Mexican tuna product.<sup>15</sup>

13. On July 9, 2013, NOAA’s National Marine Fisheries Service (NMFS) issued a final rule (“2013 Final Rule”), which amended the existing DPCIA implementing regulations, in order to come into compliance with the DSB recommendations and rulings in the original proceeding. In 2015, the first compliance panel found that the United States had not brought its measure into compliance.<sup>16</sup> The Appellate Body upheld that ultimate finding (but for largely different reasons).<sup>17</sup> As discussed in the U.S. First Written Submission to the Second Article 21.5 Panel,<sup>18</sup> on March 22, 2016, NMFS issued an interim final rule (“2016 IFR”) that amended the DPCIA regulations again, in order to come into compliance with the DSB recommendations and rulings in the first compliance proceeding.<sup>19</sup>

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<sup>11</sup> DPCIA, Pub. L. 101-627, 104 Stat. 4436, Title IX (Nov. 28, 1990) (Exh. US-3).

<sup>12</sup> *US – Tuna (Mexico) (GATT)*, paras. 5.43-44. In this regard, Mexico’s statement in its Methodological Paper that the “[m]easure” has discriminated against Mexican tuna product “for over twenty-five years” is incorrect. See Mexico’s Methodology Paper, para. 1. In fact, the prior dispute settlement proceedings gave the United States the basis to consider that its measure did not discriminate.

<sup>13</sup> See *US – Tuna II (Mexico) (Panel)*, paras. 2.1-33 (summarizing the measure as originally challenged).

<sup>14</sup> See *US – Tuna II (Mexico) (Panel)*, paras. 8.1-8.2.

<sup>15</sup> *US – Tuna II (Mexico) (AB)*, para. 407(b).

<sup>16</sup> *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 8.2-8.5.

<sup>17</sup> *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 8.1.

<sup>18</sup> Unless otherwise noted, all references to the U.S. submissions in an Article 21.5 proceeding refer to submissions in the currently ongoing U.S.-initiated proceeding.

<sup>19</sup> *Enhanced Document Requirements and Captain Training Requirements To Support Use of the Dolphin Safe Label on Tuna Products*, 81 Fed. Reg. 15,444 (Mar. 23, 2016) (“2016 IFR”) (Exh. US-4).

## **B. The U.S. Tuna Product Market**

14. Under the U.S. measure, “tuna product” refers to a “food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days.”<sup>20</sup> In other words, “tuna product” is tuna that has undergone some processing and is not sold as “fresh” tuna. In light of the fact that much of the other processed products (*i.e.*, frozen tuna and tuna loins) are ultimately processed into canned tuna, much of the data in the literature regarding “tuna product” focuses on canned tuna rather than the other smaller-volume tuna products.<sup>21</sup>

15. Despite an overall decline in U.S. per capita consumption of canned tuna over the past fifteen years, since peak levels in the 1980s through the early 2000s,<sup>22</sup> the United States remains by far the single biggest consumer of canned tuna, representing 19 percent of world consumption.<sup>23</sup> As a result of this market share, the U.S. market is the single greatest influence on the global market for canned tuna,<sup>24</sup> strongly affecting both global prices of canned tuna and prices of tuna being processed at canneries throughout the world.<sup>25</sup>

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<sup>20</sup> *US – Tuna II (Article 21.5 – Mexico) (AB)*, n.101 (citing 16 U.S.C. § 1385(c)(5)).

<sup>21</sup> See generally Makoto Peter Miyake *et al.*, *Recent Developments in the Tuna Industry: Stocks, Fisheries, Management, Processing, Trade and Markets*, FAO Fisheries and Aquaculture Technical Paper 543, at 61-99 (2010) (Exh. MEX-14) (“FAO, Recent Developments in the Tuna Industry”) (discussing fresh tuna (which is outside the scope of the measure), certain Japanese processed products (which are not sold in the United States), and canned tuna).

<sup>22</sup> See Roberto A. Ferdman, “How Americans Fell out of Love with Canned Tuna,” *Washington Post*, (Aug. 18, 2014) (Exh. US-5); “Historical Supply of Canned Tuna” (data drawn from NMFS and *Fisheries of the United States*) (Exh. US-6).

<sup>23</sup> Amanda Hamilton *et al.*, Forum Fisheries Agency (FFA), *Market Industry Dynamics in the Global Tuna Supply Chain*, at 241 (2011) (Exh. US-7) (“FFA, Market and Industry Dynamics”) (showing that, in 2008, the United States consumed 48 million cases of canned tuna (600,000 mt.), of the 251 cases (3,137,500 mt.) consumed globally, or 19.1 percent of the total); 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 5, Elsevier Editorial System™ for Ecological Economics (publication pending 2016) (Exh. US-8) (“The US is the world’s largest consumer of canned tuna (as a country, the European Union is higher as a block).”).

<sup>24</sup> FAO, *Recent Developments in the Tuna Industry*, at 106 (Exh. MEX-14) (“[T]he United States market has the greatest influence on the canned tuna industry.”).

<sup>25</sup> FAO, *Recent Developments in the Tuna Industry*, at 104-115 (Exh. MEX-14) (“[T]he purse seine-caught frozen fish markets are themselves strongly influenced by the level of the United States demand for canned tuna. Comparisons of United States import prices of canned tuna from Asia (Thailand and the Philippines) to import prices paid by European Union member states (United Kingdom and Germany) show the substantial United States market leadership upon the European Union markets.”) (emphasis added); *id.* (stating that Bangkok is “the key marketplace where prices are formed and from there are imposed on peripheral markets” and that “the price (both for fish to be packed and canned products) flexibility, which means the extent to which price changes when catches fluctuate, in Bangkok seems to respond more to demand conditions in the market for canned products (*particularly in the United States*) than to supply conditions.”) (emphasis added). The evidence indicates that U.S. production has

16. The U.S. canned tuna product market is an approximately \$1.5 billion market.<sup>26</sup> Eighty percent of this market is served by three companies: Bumblebee, Chicken of the Sea, and StarKist, which produce tuna product from U.S. and foreign canneries.<sup>27</sup> These three companies (often referred to as “the big three”) have long dominated the U.S. market and have significant brand awareness among U.S. consumers. Approximately half of the U.S. market is supplied by canneries located in the United States and its territories.<sup>28</sup>

### 1. U.S. Consumer Preferences for Tuna Product

17. As discussed below, the U.S. tuna product market is differentiated based on a number of product characteristics. Most importantly, U.S. consumers of canned tuna have definite preferences with respect to price, taste, texture, and whether the tuna product was produced in a dolphin safe manner, in particular that it was not produced from the intentional encirclement of dolphins.<sup>29</sup> The evidence establishes that there is no overriding demand by U.S. consumers for tuna product produced from yellowfin tuna as Mexico claims. The evidence also shows that U.S. consumers are significantly disinclined to purchase any tuna product produced by setting on dolphins. As a consequence, demand for Mexican tuna product (“virtually all” of which is produced from vessels setting on dolphins<sup>30</sup>) is exceedingly low in the U.S. market, irrespective of the content (or existence) of the U.S. dolphin safe labeling requirements.

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a material impact on world supply as well. *Id.* at 93 (noting that in 2007, U.S. production accounted for 12 percent of the global canned tuna production).

<sup>26</sup> “U.S. Supply of Canned Tuna” (data collected from NMFS Fishery Statistics Division) (Exh. US-9). Unless otherwise specified, all references to dollars refer to US dollars.

<sup>27</sup> FFA, Market and Industry Dynamics, at 35 (Exh. US-7) (“Despite gains made by private labels, the ‘big three’ brands (i.e. StarKist, Bumble Bee and Chicken of the Sea) still commanded upwards of 80% of the value in US retail markets.”).

<sup>28</sup> See “U.S. Supply of Canned Tuna” (Exh. US-9) (data collected from NMFS TTVP database) (showing that domestic processed canned tuna accounted for 47 percent of the total canned tuna supplied to the U.S. market in 2010, compared to 55.5 percent in 2015).

<sup>29</sup> Other factors may influence U.S. consumers, including whether the tuna product is certified as “sustainable.” See Chiang et al. 2016, at 5 (Exh. US-8) (“Another important trend, and one this study seeks to better understand, is that US consumers, retailers, and restaurants increasingly demand that purchased seafood be sustainably produced.”).

<sup>30</sup> *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.73 (noting “Mexico’s statement that ‘most’ Mexican tuna products are still excluded from access to the dolphin-safe label as ‘virtually all of Mexico’s purse seine tuna fleet continues to fish in the ETP by setting on dolphins’”) (citing *US – Tuna II (Article 21.5 – Mexico) (Panel)*, paras. 7.105, 7.444 (quoting Mexican submissions)).

**a. U.S. Consumers Prefer Less Expensive Tuna Product to More Expensive Tuna Product**

18. Overall, the U.S. canned tuna market is “characterized by high volume and low margins.”<sup>31</sup> The U.S. market is thus similar to the Middle Eastern, German, and UK markets, which are also dominated by low value, and different from markets such as Australia, France, Italy, Japan, and Spain, which emphasize higher value canned tuna products.<sup>32</sup> Since the advent of canned tuna in the 1900s in the United States, canned tuna has been considered a low cost and practical source of protein for the U.S. consumer. In this regard, the literature indicates that there is a “psychological limit” in the mind of U.S. consumers against paying more than one U.S. dollar for a can of tuna.<sup>33</sup> Consistent with that proposition is the fact that as the per can cost approaches \$1, U.S. demand for canned tuna begins to weaken.<sup>34</sup> Higher prices have been an important factor driving declining demand for tuna product in recent years.<sup>35</sup>

19. Despite the overall trend towards lower canned tuna consumption in the United States,<sup>36</sup> canned tuna remains a key category for retailers as a product that attracts customers who then spend more on other products.<sup>37</sup> As a result, there is intense competition among retailers over

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<sup>31</sup> FFA, Market and Industry Dynamics, at 253 (Exh. US-7); *see also id.* at 241 (“The contemporary global canned tuna market developed in the 1950s, when canned salmon prices increased markedly due to production constraints and consumers looked for a cheaper canned seafood alternative. Since this time, canned tuna has risen to become an extremely popular relatively low-cost source of protein and is now traded as a global ‘commodity’ product (i.e. high-volume, low value, low margins).”).

<sup>32</sup> FFA, Market and Industry Dynamics, at 241-242 (Exh. US-7) (“The US and Middle Eastern markets, as well as Germany and UK in the EU, are typically low value, low quality markets. Conversely, Spain, Italy and France in the EU, along with Japan and Australia are higher value markets, demanding high quality canned tuna products.”).

<sup>33</sup> FAO, Recent Developments in the Tuna Industry, at 96-97 (Exh. MEX-14) (stating that, since the 1950s, “canned tuna has always represented a low-cost and handy food for most consumers: in the United States, *the psychological limit of 1 United States dollar per can* has been an established price barrier.”) (emphasis added); *see also id.* n.11 (“This is the reason behind the recent addition of protein substitutes to canned materials to reduce the cost and the appearance on the market of smaller-sized cans.”).

<sup>34</sup> FFA, Market and Industry Dynamics, at 242 (Exh. US-7) (stating that, in contrast to other markets such as the UK and Australia where prices are generally stable and retailers rely on promotion and marketing to influence sales volume, “in the US market, retail prices change a lot, but when the cost exceeds 70-80 cents/can (or higher than 2 cans for US \$1), then US market demand starts to compress.”); *see also* “Yellowfin Market Review,” at 2 (2016) (Exh. US-10) (BCI) [ ]].

<sup>35</sup> Ferdman, “How Americans Fell out of Love with Canned Tuna,” at 5 (Exh. US-5).

<sup>36</sup> FFA, Market and Industry Dynamics, at 253 (Exh. US-7) (“Despite heavy promotions, per capita consumption of tuna has declined from a peak of 3.9 lbs per capita in 1989 to 2.9 lbs per capita in 2008. In 2009, consumption rebounded to 3.3 lbs per capita.”); NMFS, *Fisheries of the United States – 2014*, 107 (Exh. MEX-3) (showing a decline of in per capita consumption from 3.9 lbs in 1989 to 2.3 lbs. in 2014).

<sup>37</sup> FFA, Market and Industry Dynamics, at 253 (Exh. US-7) (stating that tuna’s high household penetration and high sales velocity (speed of sale), “combined with the fact that the average shopping dollars per trip are more than twice as high for a checkout that does include tuna, compared with one that does not, makes canned and

price, with almost half of all tuna product being sold at a discount.<sup>38</sup> Changes in the U.S. retail market have further exacerbated the downward pressure on prices as a higher and higher percentage of canned tuna is sold to superstores and other larger retailers, which then engage in fierce price competition.<sup>39</sup> Often it is the suppliers, not the retailers, that absorb the cost of the price discounts, although it is not unusual for a retailer to sell canned tuna at a loss due to its ability to bring consumers into the store.<sup>40</sup> Price pressure is further exacerbated by consumer willingness to buy canned tuna marketed under “private label” brands (usually tied to the name of the particular retailer), rather than under the national brand names.<sup>41</sup>

**b. Where U.S. Consumers Are Willing to Pay a Price Premium for Tuna Product, It Is Generally for Albacore**

20. Despite the fact that the U.S. market is characterized by high volume, low value products, some tuna products are sold at a premium. In the canned market, that differentiation occurs largely between premium canned albacore, which is sold as “white” tuna, and discount canned tuna, which is sold as “light” tuna and generally contains skipjack tuna, alone or in combination with other species such as tongol, big-eye, and yellowfin.<sup>42</sup> Under U.S. Food and Drug Administration (FDA) regulations, canned tuna can be labeled “white meat” if it is 100 percent albacore, while tuna product produced from other species generally qualifies for the “light meat”

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pouched tuna a destination category and tuna shoppers ‘preferred’ customers for retailers. As a result, tuna is heavily promoted to drive volume.”).

<sup>38</sup> FFA, Market and Industry Dynamics, at 253 (Exh. US-7) (“In 2007, 46% of all tuna was sold on promotion.”).

<sup>39</sup> FFA, Market and Industry Dynamics, at 254 (Exh. US-7) (“Several market outlets compete for tuna purchases, and in recent years, traditional retail markets have lost sale shares to superstores such as WalMart and Warehouse Clubs. Retail markets remain dominant in terms of volume. In 2009, 61% of tuna was bought in retail markets and 36% in superstores. These data reflect a trend shift: from 2001 to 2005 shelf stable tuna sales were down 4.6% in traditional grocery stores while super-center tuna sales were up 68.6% and Warehouse Clubs were up 15.6%.”); *id.* (“The increasing market share by the market power of the largest retailers reflects the market power that a consolidating retail market generates. Big retailers fight for market share by drawing customers in with lower prices, squeezing suppliers and forcing them to sell at low prices.”).

<sup>40</sup> FFA, Market and Industry Dynamics, at 253 (Exh. US-7).

<sup>41</sup> FFA, Market and Industry Dynamics, at 253 (Exh. US-7).

<sup>42</sup> FFA, Market and Industry Dynamics, at 254 (Exh. US-7) (“The canned market is largely differentiated into the light meat and white meat (albacore) segments. By volume, sales are 66% light meat, and though albacore is only 34% of the market by volume, it is 52% of the market value.”); *see also id.* at 176 (“White meat is a higher value item than light meat.”); Jolene Thym, “Taste-Off: The Best Canned Tuna,” *Mercury News* (Mar. 8, 2016) (Exh. US-11) (a consumer survey in which all but one of the premium products surveyed were albacore).

label.<sup>43</sup> Canned tuna can also be labeled by species – albacore, skipjack, yellowfin, etc. – although it must be 100 percent composed of that species to be so labeled.<sup>44</sup>

21. U.S. consumers have a preference for canned albacore over tuna product containing other tuna species due to albacore’s mild flavor, firm texture, and light color.<sup>45</sup> U.S. consumers, by and large, do not like “fishy” tasting fish, which is why tilapia, Alaska pollock, pangasius, catfish, and cod are so popular in the United States.<sup>46</sup> Many U.S. consumers are willing to pay a price premium for albacore, as demonstrated by the fact that the average retail price for canned albacore is \$5.32 per pound, while the average retail price for skipjack is \$3.17 per pound.<sup>47</sup> This distinct preference is also evident in Exhibit MEX-15, which shows that sales of canned albacore accounted for 29 percent of canned tuna sales during the covered period by weight but 40 percent by value.<sup>48</sup> U.S. consumers’ preference for albacore appears to be distinct from consumer preferences in other countries, as the U.S. market consumes 19 percent of global production of canned tuna overall but 55-60 percent of the world’s consumption of albacore.<sup>49</sup>

22. While albacore is the dominant premium product in the U.S. canned tuna market,<sup>50</sup> other niche tuna products are also widely sold. For example, pouched tuna is a gourmet product,

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<sup>43</sup> See 21 C.F.R. § 161.190(a)(4)(i) (2012) (Exh. US-12). Tuna product produced from other species can be labeled “light,” “dark,” or “blended.” *Id.* § 161.190(a)(4)(ii)-(iv) (Exh. US-12).

<sup>44</sup> See 21 C.F.R. § 161.190(a)(8)(viii) (Exh. US-12). In contrast, according to Mexico, the label “yellowfin” can be used on tuna products sold in Mexico with as little as 40 percent yellowfin in them (by volume). Pouliot 2016, at 26 (Exh. MEX-2).

<sup>45</sup> See Bumble Bee, “Q&A: What’s the Difference Between the Various Types of Canned Tuna,” *bumblebee.com*, Aug. 14, 2013, (Exh. US-13) (stating that people prefer albacore due to its “firmer texture” and “milder flavor”); “Supermarket Standoff,” *Bon Appetit*, July 25, 2011, (Exh. US-14) (describing the results of a consumer taste-test in which consumers’ preferred products, in both the oil-packed and water-packed categories, were solid white albacore products and where consumers complained about other products being “too fishy”); *see also* Bumble Bee, “Products-Related FAQ,” *bumblebee.com* (accessed July 30, 2016) (Exh. US-15) (“There is a noticeable difference in color and flavor between white and light tuna.”); “Yellowfin Market Review,” at 7 (Exh. US-10) (BCI) [[

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<sup>46</sup> See “Seafood Consumption Top 10 List,” *preparedfoods.com*, Nov. 6, 2015 (Exh. US-16).

<sup>47</sup> See Chiang et al. 2016, at 5 (Exh. US-8) (“For canned tuna, the data in the study presented here (09/13/2008 through 09/03/2011) demonstrate that the average retail price for canned albacore tuna was \$5.32 per pound, significantly more expensive than canned skipjack that averaged \$3.17 per pound.”).

<sup>48</sup> See “52-Week Canned Tuna Sales, Summed by Type” (based on Exhibit MEX-15) (Exh. US-17) (aggregating the data from Exhibit MEX-15); *see also* “Yellowfin Market Review,” at 7-8 (Exh. US-10) (BCI) [[

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<sup>49</sup> FFA, Market and Industry Dynamics, at 170, table 4.6 (Exh. US-7).

<sup>50</sup> See, e.g., FFA, Market and Industry Dynamics, at 254 (Exh. US-7) (“The canned market is largely differentiated into the light meat and white meat (albacore) segments. By volume, sales are 66% light meat, and

accounting for 20 percent of the production of StarKist, the market leader in this sector, but making up 50 percent of its profits.<sup>51</sup> However, this segment of the market is reportedly not growing.<sup>52</sup> Also, U.S. consumers are becoming more aware of sustainability issues in the industry and looking for eco-labelled products at retail and in restaurants.<sup>53</sup> Tuna product produced from yellowfin tuna – and marketed as “yellowfin” – is also sold in the gourmet market, although in much smaller volumes than gourmet albacore, as discussed below.

**c. U.S. Consumers Do Not Prefer Yellowfin Tuna Product Even Where the Yellowfin Product Is Dolphin Safe**

23. Dolphin safe tuna product sold in the United States can be, and is, produced from yellowfin tuna. Such tuna product is either sold as “yellowfin,” which caters to the gourmet market, or as “light tuna.” Although canned yellowfin can command a higher price within the gourmet market, demand for the product, which differs noticeably in taste, texture, and color from albacore, is limited.<sup>54</sup> Consequently, much of the yellowfin produced for the tuna product market is labeled as “light tuna” – often canned with skipjack – rather than sold as “yellowfin.” A 2005 investigation by the Chicago Tribune newspaper found that only about half the cans of yellowfin are labeled as such, and that industry officials admitted that vessels producing for the U.S. tuna product market produce more yellowfin than can be sold labeled as “yellowfin.”<sup>55</sup> That same investigation also found that, overall, yellowfin is contained in 15 percent of canned

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though albacore is only 34% of the market by volume, it is 52% of the market value.”); *see also* Thym, “Taste-Off: The Best Canned Tuna,” (Exh. US-11).

<sup>51</sup> FFA, Market and Industry Dynamics, at 176 (Exh. US-7).

<sup>52</sup> FFA, Market and Industry Dynamics, at 254 (Exh. US-7).

<sup>53</sup> *See, e.g.*, Chiang et al. 2016, at 5 (Exh. US-8) (“Another important trend, and one this study seeks to better understand, is that US consumers, retailers, and restaurants increasingly demand that purchased seafood be sustainably produced.”); FFA, Market and Industry Dynamics, at 56 (Exh. US-7) (“Increasingly, NGOs are focusing on sustainability issues and consumers are becoming more aware, prompting brands and retailers to seek sustainably caught tuna. This has seen an increase in demand for certified sustainable eco-labelled tuna products (e.g. Marine Stewardship Council (MSC), Friend of the Sea (FOS)) and also pole and line caught tuna, in preference to purse seine caught tuna, since the former is considered to be a more environmentally friendly form of tuna fishing.”).

<sup>54</sup> *See* “Yellowfin Market Review,” at 4, 9 (Exh. US-10) (BCI) [ [ ]]; “52 Week Canned Tuna Sales, Summed by Type” (Exh. US-17) (showing that yellowfin made up 1.2 percent of all reported sales during the relevant period by weight and 1.5 percent by value).

<sup>55</sup> *See* Sam Roe & Michael Hawthorne, “How Safe is Tuna?” *Chicago Tribune*, Dec. 13, 2005 (Exh. US-18) (“About 15 percent of canned light tuna is made with yellowfin, the industry acknowledged. Each year, roughly 180 million cans of yellowfin are sold in the U.S. All of these cans are sold as “light tuna,” *and only about half are labeled as ‘yellowfin,’ ‘gourmet’ or other wording* that might signal to shoppers that the fish inside is likely high in mercury. The other half, or about 90 million cans sold each year, have labels identical to those on other cans of light tuna. . . . *Industry officials acknowledged their boats catch more yellowfin tuna that they can sell as a gourmet product. So instead of discarding the fish, they sell it as regular light tuna.*”) (emphasis added).

tuna labeled “light meat.” Canned yellowfin has long been marketed to U.S. consumers as “light meat,” and that practice continues today.<sup>56</sup>

24. In this context, another factor dampening demand for yellowfin tuna product is U.S. consumers’ concerns regarding the mercury content of canned tuna. Mercury, which is neurotoxic, is present in marine creatures, particularly in the larger predators, such as albacore and yellowfin and to a lesser extent in smaller fish, such as skipjack.<sup>57</sup> As such, one of the reasons that producers process yellowfin and skipjack together and sell it as “light tuna,” rather than selling cans of 100 percent yellowfin, is to lower the per can mercury level of canned yellowfin and produce a safer product that is consistent with U.S. FDA food safety regulations.<sup>58</sup> Public campaigns by NGOs and others regarding the threat of mercury levels in canned tuna have affected U.S. sales of tuna product for the last forty years.<sup>59</sup>

25. U.S. cannery receipts tell a consistent story with regard to weak demand for yellowfin tuna product.<sup>60</sup> In 1987, when the U.S. fleet was still operating in the ETP large purse seine fishery (and producing a significant amount of yellowfin by setting on dolphins), almost half of U.S. cannery production (46.1 percent) was of yellowfin (compared to 19.6 percent for albacore and 34.2 percent for skipjack). In the next year, however, the percentage of yellowfin had dropped nearly a third to 31.6 percent. Between 1991 and 1999, the percentage hovered between 17.3-24.3 percent (with albacore steadily increasing to 33.8 percent by 1999 and skipjack constituting about half of the total (49.0 percent)). In the 2000s, the share of yellowfin continued to drop, dipping below 10 percent in 2006 for the first time. Since 2009, the share of yellowfin

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<sup>56</sup> See Roe & Hawthorne, “How safe is tuna?” (Exh. US-18); StarKist, “Products,” <http://starkist.com/products> (accessed July 27, 2016) (Exh. US-19) (“Tuna labeled as ‘Light Meat’ may contain one or more varieties of light meat species, usually Skipjack or Yellowfin tuna. Tuna labeled as ‘White Meat’ contains Albacore tuna.”); Bumble Bee, “Products-Related FAQ” (accessed July 30, 2016) (Exh. US-15) (“White tuna and light tuna are different species of tuna that are packed in cans. Only albacore (*Thunnus alalunga*) is considered ‘white tuna.’ Other species, commonly skipjack, yellowfin, tongol, or big-eye are called ‘light tuna.’”).

<sup>57</sup> Actual mercury content will vary widely even within the same species, depending on how old the fish are. Fishing methods that tend to catch younger fish will harvest fish with lower levels of mercury, while fishing methods that catch older fish will have the contrary result. For example, troll-caught albacore, which tend to be younger and smaller, contain comparatively lower levels of mercury. See Rosalee S. Rasmussen & Michael T. Morrissey, “Effects of Canning on Total Mercury, Protein, Lipid, and Moisture Content in Troll-Caught Albacore Tuna (*Thunnus alalunga*),” *Food Chemistry*, vol. 101, at 1130, 1134 (2007) (Exh. US-20). Mercury levels in Pacific yellowfin are estimated to be rising at 3.8% per year. See Paul E. Drevnick, Carl H. Lamborg & Martin J. Horgan, “Increase in mercury in Pacific yellowfin tuna,” *Environmental Toxicology and Chemistry*, vol. 34(4), at 932 (2015) (Exh. US-21).

<sup>58</sup> FAO, Recent Developments in the Tuna Industry, at 89 (Exh. MEX-14).

<sup>59</sup> 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).

<sup>60</sup> See “U.S. Tuna Cannery Receipts” (data collected from NMFS TTVP database) (Exh. US-22).



has not reached 7 percent, while the share of albacore has not fallen below 35 percent and the share of skipjack has not fallen below 46 percent.

26. These low percentages of yellowfin being processed by U.S. canneries do not indicate lack of availability of dolphin safe yellowfin. To the contrary, market data shows that about 40 percent of the “yellowfin” labeled canned tuna was produced by the three leading U.S. brands, all of which, as discussed in the next section, sell only dolphin safe tuna product.<sup>61</sup> This strongly suggests that if there were greater demand for canned yellowfin, the market would have responded by processing more yellowfin to meet that demand. The fact that the tuna industry has not done so, but, instead, is producing less and less canned yellowfin as a percentage of the total over the last few decades indicates how weak U.S. consumer demand for yellowfin tuna product is, even where that tuna product is marketed as “dolphin safe.”

**d. There Is Very Little U.S. Consumer Demand for Tuna Product Produced from Setting on Dolphins**

27. There is very little demand from U.S. consumers for tuna product produced from setting on dolphins. It is well established that U.S. consumers prefer dolphin safe tuna product, and that this “sensitiv[ity]” to the issue is driven by a desire not to purchase tuna product produced from setting on dolphins, given the uniquely harmful nature of this fishing method.<sup>62</sup>

28. As the original panel discussed, in the 1980s, in reaction to purse seine vessels killing tens to hundreds of thousands of dolphins in the ETP every year, one NGO, Earth Island Institute (EII), led a mass media campaign to raise consumer awareness of the issue. This campaign produced significant results in the U.S. market, as the “big three” and other companies changed their purchasing policies in April 1990 to not purchase tuna from vessels that set on dolphins.<sup>63</sup> These purchasing policies remain in place today because canned tuna produced from the intentional harassment and capture of dolphins remains an important issue for U.S. consumers.<sup>64</sup>

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<sup>61</sup> See “Yellowfin Market Review,” at 9 (Exh. US-10) (BCI) [

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<sup>62</sup> See *US – Tuna II (Mexico) (Panel)*, para. 7.288 (“We further note that it is *undisputed* that US consumers are sensitive to the dolphin-safe issue. ... [The purchasing policies of major tuna processors, first enacted in April 1990] are still in place: such companies will not purchase tuna *from vessels that fish in association with dolphins.*”) (emphasis added); see also *id.* para. 7.249 (“The information presented to the Panel does suggest that US consumers have certain preferences with respect to tuna products, based on their dolphin-safe status, and we do not exclude that such preferences may be relevant to an assessment of likeness.”).

<sup>63</sup> See also *US – Tuna II (Mexico) (Panel)*, para. 7.368 (“Finally Mexico argued that the major three US distributors do not advertise that they comply with the EII standard but rather that they define ‘dolphin safe’ to mean not setting nets on dolphins.”).

<sup>64</sup> *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. The evidence presented to the Panel also shows that major tuna processors reacted to these dolphin-safe concerns, and

Indeed, as the original panel correctly noted, this change in purchasing policy “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.”<sup>65</sup>

29. Subsequent to this change in the market in April 1990, the EII-led consumer campaign produced legal results, with the U.S. Congress passing the DPCIA in November 1990.<sup>66</sup> A desire on the part of Congress to respond to consumer demand and deny access to the dolphin safe label to tuna product produced from setting on dolphins in the ETP was a key component of that law. In particular, Congress prohibited access to the label for tuna product produced from vessels setting on dolphins based on its finding that “dolphins and other marine mammals are frequently killed in the course of tuna fishing operations *in the eastern tropical Pacific Ocean*” and 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*.”<sup>67</sup>

30. As discussed in previous proceedings, the DPCIA, as enacted in 1990 and amended in 1997, sets the minimum standards for dolphin safe labels. Private actors (NGOs, companies, etc.) can develop and use their own “dolphin safe” labels that set any standard that they consider appropriate, as long as the standards for the private label meet or exceed the minimum standards

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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.”) (citing, among other things, Susan Reed, “A Filmmaker Crusades to Make the Seas Safe for Gentle Dolphins,” *People* (Aug. 6, 1990) and Anthony Ramirez, “Epic Debate Led to Heinz Tuna Plan,” *NY Times* (Apr. 16, 1990) (Exh. US-23) (quoting the spokesman for StarKist tuna explaining that “the film crystallized the issue for consumers. *They told us they don’t want us to kill dolphins*,” and reporting how Stark-Kist’s officials had changed the company’s policy in response to consumer tracking surveys that show that a growing majority of consumers were aware of the dolphin issue and that the “level of concern” was high and rising) (emphasis added)).

<sup>65</sup> *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.”).

<sup>66</sup> DPCIA, Pub. L. 101-627, Titla XI (Exh. US-3).

<sup>67</sup> DPCIA, Pub. L. 101-627, sec. 901(b), (d) (Exh. US-3) (emphasis added); *see also* U.S. Response to Orig. Panel Question 40, paras. 97-100 (citing Statement of Rep. Barbara Boxer before the H. Rep., 136 Cong. Rec. H11878-02, 101st Cong. (Oct. 23, 1990) (Exh. US-24) and quoting then-Representative Boxer, the sponsor of the DPCIA, stating: “Without the letters and phone calls of countless consumers and schoolchildren from across the United States, we would not have gained 183 co-sponsors of the [DPCIA].”); *see also* Kellert, Stephen R., *American Perceptions of Marine Mammals and their Management*, at 14, Yale Univ. School of Forestry & Env. Studies (May 1999) (Exh. US-25) (finding that four-fifths of U.S. consumers “indicated a willingness to pay ‘a little more for fish’ if fishing practices resulted in fewer numbers of marine mammals being harmed or killed” and nearly 90% of respondents “indicated certain fishing practices should be outlawed if they resulted in marine mammals being killed, even if this resulted in ‘slight increases in the price of fish.’”).

set by the DPCIA and its implementing regulations.<sup>68</sup> And, in fact, these private labels (referred to as “alternative” labels in the original proceeding) are used much more often than the “official” Department of Commerce (DOC) dolphin safe label.<sup>69</sup> As the original panel correctly found, it is from the information provided on these different dolphin safe labels (private and DOC) that consumers are able to express their preference for tuna product that was not produced from setting on (or otherwise harming) dolphins.<sup>70</sup>

**i. Companies Comprising the Vast Majority of the U.S. Market Have Committed Not to Produce, Purchase, or Sell Tuna Product Produced from Setting on Dolphins**

31. The most engaged of the private actors on the dolphin safe labeling issue is EII. EII has set its own standard for “dolphin safe,” which includes a prohibition on setting on dolphins, as well as a number of other requirements.<sup>71</sup> Companies that agree to adhere to the EII dolphin safe standard pay a licensing fee, and otherwise promise to comply with EII requirements, can use the EII dolphin safe label.<sup>72</sup> As indicated in the original proceeding, EII reports to have commitments from 90 percent of the world’s tuna companies to, among other things, not produce, hold, or sell tuna product produced from setting on dolphins.<sup>73</sup>

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<sup>68</sup> See, e.g., Harris Teeter Chunk Light Tuna (2016) (Exh. US-26); Harris Teeter Solid White Tuna (2016) (Exh. US-27); Safeway Solid White Albacore Tuna (2016) (Exh. US-28); Trader Joe’s Albacore Tuna (2016) (Exh. US-29); Wal Mart Great Value Chunk Light (2016) (Exh. US-30); Whole Foods Chunk White (2016) (Exh. US-31); Wild Selections White Albacore (2016) (Exh. US-32).

<sup>69</sup> Precise figures are not available. However, NOAA’s TTVP reports that from May 2001 through September 2015, TTVP staff reviewed 97 distinct brands of canned or pouched tuna sold in 114 stores in 87 different cities in the United States and Puerto Rico. In none of those stores did TTVP staff find tuna products for sale labeled with the DOC official mark.

<sup>70</sup> *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 . . . .”); see also *id.* para. 7.287 (“We agree with the United States that US consumers’ decisions whether to purchase dolphin-safe tuna products are the result of their own choices rather than of the measures. However, as observed above, it is the measures themselves that control access to the label and allow consumers to express their preferences for dolphin-safe tuna.”).

<sup>71</sup> See, e.g., EII, Draft Dolphin Safe Company Policy (Jan. 1, 2015) (Exh. US-33).

<sup>72</sup> See EII International “Dolphin Safe” Standards for Tuna (Dec. 8, 2015) (Exh. US-34); see also EII Dolphin Safe Company Policy (Exh. US-33).

<sup>73</sup> *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.”) (citing Exh. Amicus-28); EII, Draft Dolphin Safe Company Policy (Exh. US-33).

32. In general, EII has certified compliance of upstream companies, such as producers and distributors, rather than downstream retailers. As to processing companies and fishing companies, EII has agreements with 159 companies in 51 countries and territories.<sup>74</sup> All major exporting countries are represented, including Ecuador (18 companies), Indonesia (45 companies), Philippines (54 companies), Thailand (43 companies), and Vietnam (16 companies).<sup>75</sup> As for importers, distributors, brokers, retailers, and agents, EII has agreements with 417 companies in 48 countries.<sup>76</sup> All major exporting and importing countries are represented. For the United States, 53 companies have agreements with EII, including many of the largest players in the U.S. market.<sup>77</sup> The vast majority of tuna product sold at retail in the United States passes through at least one of these companies, the one significant exception being Mexican tuna product, which comprises tuna caught by setting on dolphins.

**ii. Retailers Confirm that They Do Not Sell Tuna Product Produced from Setting on Dolphins**

33. In light of the fact that EII's focus is primarily on upstream companies and not retailers, the United States contracted a leading market research firm to provide specific data as to the tuna product retail market,<sup>78</sup> which accounts for approximately 70 percent of all sales of tuna product.<sup>79</sup> Based on that list, the United States reviewed the evidence as to dolphin safe policies

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<sup>74</sup> See EII, Approved Dolphin-Safe Tuna Processing Companies & Fishing Companies (Dec. 2015) (Exh. US-35).

<sup>75</sup> Exports from these countries account for 93%, by value and by weight, of U.S. imports of tuna product in air tight containers (ATC) from 2010-2015. See "Imports of Canned Tuna from All Countries Individually – 2010-2015" (Exh. US-36) (data drawn from NOAA U.S. Foreign Trade, <http://www.st.nmfs.noaa.gov/commercial-fisheries/foreign-trade/>) (showing that, of the \$4.146 billion of tuna in ATCs imported over the past 5 years, 3.855 million, 93.0%, came from these five countries).

<sup>76</sup> See EII, Approved Dolphin-Safe Importers, Distributors, Brokers, Retailers, Agents (Dec. 2015) (Exh. US-37).

<sup>77</sup> For example, the companies that have agreements with EII include: (1) American Roland, a leader in imported specialty foods in the United States and around the world; (2) Bumble Bee Seafoods, North America's largest branded shelf-stable seafood company; (3) Compass Group, the world's largest contract food services provider; (4) Kraft Foods Inc. (now the Kraft Heinz Company), North America's third-largest food and beverage company, and the fifth-largest such company in the world; (5) StarKist, a subsidiary company of Dongwon Industries and one of the world's largest tuna catching companies; and (6) Tri Marine, one of the world's largest raw material suppliers for the tuna industry.

<sup>78</sup> [[

]] This information is contained in "Shelf Stable Market Data" (2016) (Exh. US-38) (BCI).

<sup>79</sup> See, e.g. Chiang et al. 2016, at 5 (Exh. US-8) ("Approximately 70% of canned tuna in the US is sold in grocery retailers, leading to grocery scanner data as the basis for this study."). In addition, a number of large restaurants have committed to adhere to EII standards in their purchasing of tuna product or have made more general acknowledgements of a commitment to sustainably sourced seafood. See "Dolphin Safe Statements from Restaurants" (2016) (Exh. US-39).

of the companies that have the largest market share in the United States.<sup>80</sup> This separate retailer-by-retailer evidence confirms the thrust of the EII data overall, *i.e.*, that major U.S. retailers are sensitive to the demands of their consumers, and, as such are committed to selling only “dolphin safe” tuna product and will not carry tuna product produced from setting on dolphins.<sup>81</sup> Specifically, the United States is aware of statements to that effect from retailers accounting for [[ ]] of the retail market and ([[ ]]) of all canned tuna consumption.<sup>82</sup>

34. In addition, the United States is aware of a statement by Walmart (and its subsidiary Sam’s Club), the leading seller of tuna product by volume in the United States.<sup>83</sup> In its statement, Walmart states that all major brands it sells are not produced from setting on dolphins and that purchasing decisions are governed by Walmart’s new sustainability policy, rather than whether the tuna product qualifies for the dolphin safe label or not under the U.S. measure.<sup>84</sup>

35. As demonstrated and reinforced by these policies, there is no demand for Mexican tuna product in this segment of the market. Further, the relevant demand factors relate entirely to the substance of Mexico’s fishing practices and not to the measure at issue. Including Walmart, the total retailers covered by statements account for 66 percent of retail market share, 46.4 percent of total consumption.<sup>85</sup>

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<sup>80</sup> As shown in Exhibit US-38, the U.S. retail market for tuna product is exceedingly complex. Exhibit US-38 indicates that there are 121 individual retailers of tuna product reporting to Nielsen, the leading market research firm, 103 of which have nationwide retail market shares of less than 1% individually, although collectively they make up over 24 of the retail market. See “Shelf Stable Market Data” (2016) (Exh. US-38) (BCI).

<sup>81</sup> See “Dolphin Safe Statements from Retailers” (2016) (Exh. US-40).

<sup>82</sup> See “Sales of Canned Tuna by Some Companies with Dolphin Safe Policies” (Exh. US-41) (BCI); “Shelf Stable Market Data” (2016) (BCI) (Exh. US-38).

<sup>83</sup> See “Dolphin Safe Statements from Retailers” (Exh. US-40).

<sup>84</sup> According to Walmart’s sustainability policy, canned tuna must be sourced from fisheries that are: 1) complying with the International Sustainable Seafood Foundation (ISSF) measures; 2) managing a program in accordance with the principles of the Sustainability Consortium or certified as sustainable by the Marine Stewardship Council (MSC); 3) using better management fishing practices such as fishing with pole and line or free-school purse seine sets; or 4) “[a]ctively working toward certification or involved in a Fisheries Improvement Project (FIP) that has definitive and ambitious goals, measureable metrics and time bound milestones.” See “Dolphin Safe Statements from Retailers,” at 16 (Exh. US-40).

<sup>85</sup> See “Sales of Canned Tuna by Some Companies with Dolphin Safe Policies” (Exh. US-41) (BCI); “Shelf Stable Market Data” (Exh. US-38) (BCI). These figures also include tuna product purchased by the U.S. military with funds appropriated by the U.S. Congress. By statute, the U.S. military may only procure food with appropriated funds that is “grown, reprocessed, reused, or produced in the United States,” meaning, that, *de facto*, the U.S. military only uses such funds to purchase dolphin safe tuna product. See 10 U.S.C. § 2533a (Exh. US-42).

**e. There Is No Overriding U.S. Consumer Demand for Mexican Tuna Product**

36. Thus, the available evidence proves that U.S. consumers do not have an overriding demand for yellowfin canned tuna. Overall, the canned tuna market is very price sensitive and there is no evidence that U.S. consumers will tolerate higher prices outside of the premium, gourmet markets. In this regard, dolphin safe yellowfin canned tuna cannot compete with dolphin safe skipjack canned tuna, which is less expensive (and, in any event, may be considered the safer product of the two by many consumers in light of lower mercury levels). In terms of taste, texture, and color, dolphin safe yellowfin canned tuna cannot compete with dolphin safe albacore canned tuna, which is considered the higher quality product and is the dominant premium canned tuna on the U.S. market. U.S. cannery receipts confirm these points, showing a consistent weakening of demand for dolphin safe yellowfin canned tuna compared to other dolphin safe canned tuna over the last few decades. Indeed, if U.S. consumers demanded yellowfin canned tuna, presumably all dolphin safe yellowfin canned tuna would be sold as “yellowfin,” but that is not the case; a substantial amount of dolphin safe yellowfin is processed with skipjack and sold under the generic (and less expensive) “light meat” label.

37. Finally, the evidence shows that consumer preference regarding whether the canned tuna is the product of the intentional targeting and capture of dolphins remains an important driver of demand in the U.S. market, and exists independently of the content of the U.S. dolphin safe labeling requirements. Bumble Bee, Chicken of the Sea, StarKist, and other producers stopped new purchases of tuna harvested from setting on dolphins *before* the statute was enacted in November 1990.<sup>86</sup> Thus, prior to the DPCIA coming into effect, consumer preference drove this change, and the purchasing policies that reflect this preference remain in place today, as reflected by the commitments to EII and the other relevant retailer statements.

38. In light of the above, it is clear that there is no overriding demand in the U.S. market for Mexican-produced canned yellowfin tuna.

**2. The Supply of Tuna to the U.S. Tuna Product Market**

39. As mentioned above, the United States is the largest consumer of canned tuna, with an estimated 19 percent share of the global market.<sup>87</sup> The U.S. market is supplied by both U.S.-packed canned tuna and by canned tuna imports, with the market shares of these groups remaining fairly consistent over the past decade. Approximately 50-55 percent of the canned tuna supplying the U.S. market is produced by U.S. processors, using U.S.-caught tuna and imported tuna for canning.<sup>88</sup> The other 45-50 percent of the market is supplied by canned tuna

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<sup>86</sup> *US – Tuna II (Mexico) (Panel)*, para. 7.288 (finding that the purchasing policy changes were issued in April of 1990).

<sup>87</sup> FFA, Market and Industry Dynamics, at 241 (Exh. US-7).

<sup>88</sup> “U.S. Supply of Canned Tuna” (Exh. US-9); “U.S. Tuna Cannery Receipts” (Exh. US-22).

imports.<sup>89</sup> The top exporters of canned tuna product to the United States are Thailand, Ecuador, Vietnam, the Philippines, and Indonesia, which together account for 93 percent of canned tuna imports (by value and by volume) into the United States.<sup>90</sup>

40. Weaker U.S. demand in recent years for canned tuna means that the tuna processing industries that serve the U.S. market are operating significantly below capacity. For example, U.S. cannery production has declined somewhat compared to a decade ago.<sup>91</sup> However, the supply of tuna to U.S. canneries has remained constant or has been increasing over the past five to ten years, suggesting an excess of tuna relative to the quantity processed.<sup>92</sup> Further, production increased in 2015 following the opening of a new plant in American Samoa, and shipments as of May 2016 were 4 percent over the corresponding year-to-date figure for 2015.<sup>93</sup> Other processing industries that export to the United States also have excess capacity. Thailand, for example, is estimated to be operating at approximately 85 percent of capacity.<sup>94</sup> Ecuador is likewise operating at approximately 75-80 percent.<sup>95</sup>

41. The U.S. tuna product market is predominantly supplied with three types of tuna: skipjack, yellowfin, and albacore. Skipjack is the least expensive and most abundant.<sup>96</sup> It is harvested in the western central Pacific Ocean, the ETP, the Indian Ocean, and the Atlantic Ocean and is estimated not to be overfished or subject to overfishing in any of these areas.<sup>97</sup> Yellowfin is likewise fished in all four oceans, but is overfished and subject to overfishing in the Indian Ocean and is overfished in the Eastern Tropical Pacific and the Atlantic Oceans.<sup>98</sup> In

<sup>89</sup> “U.S. Supply of Canned Tuna” (Exh. US-9).

<sup>90</sup> “Imports of Canned Tuna from All Countries Individually – 2010-2015” (Exh. US-36).

<sup>91</sup> “U.S. Supply of Canned Tuna” (Exh. US-9).

<sup>92</sup> “U.S. Tuna Cannery Receipts” (Exh. US-22).

<sup>93</sup> “U.S. Supply of Canned Tuna” (Exh. US-9) (showing that U.S. pack tuna increased by 8,758,099 (3,973 mt) from 2014 to 2015).

<sup>94</sup> FFA, Market and Industry Dynamics, at 159 (Exh. US-7).

<sup>95</sup> Henry Vega & Mariano J. Beillard, U.S. Dep’t of Ag. *Ecuador’s Tuna Fish Industry: Update*, Aug. 17, 2015 (Exh. MEX-21).

<sup>96</sup> “Yellowfin Market Review,” at 2 (Exh. US-10) (BCI) [ [

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<sup>97</sup> “Yellowfin Market Review,” at 11 (July 28, 2016) (Exh. US-10) (BCI) (summarizing RFMO data); Doc. IATTC-90-04a: Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015, at 60 (June 2016) (Exh. US-43); IOTC, Executive Summary: Skipjack Tuna (2015) (Exh. US-44).

<sup>98</sup> “Yellowfin Market Review,” at 11 (July 28, 2016) (Exh. US-10) (BCI); *see* IATTC, Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015, at 52, 57-58 (Exh. US-43); ICCAT Report 2014-2015(II), Summary of Yellowfin Stock Assessment, at 17 (2011/2016) (Exh. US-45); IOTC, Executive Summary: Yellowfin Tuna (2015) (Exh. US-46). In this regard, we note that Mexico does not represent the entire canned yellowfin supply. While data on canned yellowfin production is not available, Mexico accounted for only 7-9 percent of the yellowfin catch between 2010 and 2014. *See* “Yellowfin Tuna Capture Fisheries Production” (data drawn from FAO, <http://www.fao.org/figis/servlet/TabSelector>) (Exh. US-47). Further, only about 17-21 percent of

particular, the latest IATTC report found that the spawning biomass ratio (SBR) (the ratio of the amount of spawn produced relative to the amount that would have been produced if there were no fishing in the fishery) of yellowfin in the EPO was at or below the SBR at the fishery's maximum sustainable yield (MSY), suggesting that yellowfin is in an overfished state.<sup>99</sup> Albacore is also harvested in all four of these oceans. It is not in an overfished state or subject to overfishing in the western central Pacific, the Eastern Tropical Pacific, or the Indian Oceans,<sup>100</sup> but is likely overfished or subject to overfishing in parts of the Atlantic.<sup>101</sup>

#### **IV. THE MEASURE AT ISSUE IN THIS PROCEEDING IS THE TUNA MEASURE AS AMENDED BY THE 2016 IFR: REQUEST FOR A PRELIMINARY RULING**

42. In its Methodology Paper, Mexico makes the startling and erroneous argument that the Arbitrator should disregard the fact that the tuna measure has been amended and instead should proceed to make findings based on a measure that is no longer in existence.<sup>102</sup> In other words, Mexico asks the Arbitrator to determine some past level of nullification or impairment. Mexico would then seek authorization to suspend concessions regardless of whether there is any longer any nullification or impairment. There is no basis for Mexico's approach, and indeed it is contrary to the DSU.

43. Article 22.4 of the DSU is explicit that the DSB cannot authorize a level of suspension of concessions in excess of "the level of nullification or impairment." Article 22.4 does not say "in excess of some *past* level of nullification or impairment."

44. Similarly, Article 22.7 of the DSU is explicit that the key task of an arbitrator is to "determine whether the level of such suspension is *equivalent* to the level of nullification or impairment." Again, the text of Article 22.7 does not state that an arbitrator is to determine whether the level of suspension requested is equivalent to "the *past* level of nullification or impairment."

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the global catch of yellowfin is harvested in the eastern Pacific Ocean. See "Total Catches of Yellowfin in the Pacific Ocean and Globally" (data drawn from RFMO reports) (Exh. US-48).

<sup>99</sup> IATTC, Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015," at 52, 57-58 (June 2016) (Exh. US-43).

<sup>100</sup> IATTC, Tunas, Billfishes and Other Pelagic Species, at 74-76 (Exh. US-43); WCPFC, Stock Assessment for South Pacific Albacore Tuna, at 32 (Aug. 4, 2015) (Exh. US-49); IOTC, Executive Summary: Albacore Tuna (2015) (Exh. US-50),

<sup>101</sup> ICCAT Report 2014-2015(II), Summary of Albacore Stock Assessment, at 74 (2015) (Exh. US-51).

<sup>102</sup> Mexico's Methodology Paper, para. 12 ("It is only after an Article 21.5 panel and, if necessary, the Appellate Body have ruled that the measure taken to comply has brought the measure at issue into compliance, and the corresponding reports have been adopted by the DSB, that the WTO-inconsistent status of the measure will be changed to one of WTO consistency, such that the suspension of concessions may no longer be necessary." And: "Rather, the level of the nullification or impairment must be assessed in relation to the amended Tuna Measure that was in place when the RPT expired on 13 July 2013, for which the DSB has adopted Article 21.5 compliance Panel and Appellate Body reports and made recommendations and rulings.").



45. The context of Articles 22.4 and 22.7 also confirms that the measure at issue is the one in existence, not some past measure. For instance, Article 22.8 of the DSU states that:

The suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommendations or rulings provides a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached.

Again, the issue under Article 22.8 is the measure as it currently exists, or whether it has been withdrawn, and not some past measure no longer in existence.

46. Past arbitrators have confronted the exact same question raised by Mexico in this proceeding. Those past arbitrators have confirmed that the task in an Article 22.6 proceeding is to look at the measure as it currently exists and not the measure in an earlier form. In *EC – Bananas III*, the arbitrator explained:

[W]e could resort to the option of measuring the level of nullification or impairment on the basis of our findings in the original dispute, as modified by the Appellate Body and adopted by the DSB. To do that would mean to ignore altogether the undisputed fact that the European Communities has taken measures to revise its banana import regime. That is certainly not the mandate that the DSB has entrusted to us.<sup>103</sup>

Similarly, in *US – Upland Cotton*, the arbitrator rejected a request by the complaining party for authorization to take countermeasures in relation to a measure that had been withdrawn, reasoning that such an authorization necessarily would exceed the current level of nullification or impairment.<sup>104</sup> Mexico's approach is in direct contravention of the approach determined by arbitrators in past Article 22.6 proceedings, in light of the relevant provisions of the DSU.

47. Furthermore, Mexico's approach is directly contrary to the principle that no suspension of concessions is possible once the Member concerned has brought the measure found to be inconsistent with a covered agreement into compliance. A key issue then is whether there is any longer any nullification or impairment. That issue, which is the subject of separate proceedings, can only be assessed by taking into account the 2016 IFR. And, indeed, as discussed in the July 22 U.S. First Written 21.5 Submission, the 2016 IFR does, in fact, bring the United States into compliance with the DSB recommendations and rulings, and the U.S. dolphin safe labeling requirements are consistent with the covered agreements. Mexico is thus simply incorrect to

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<sup>103</sup> *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.7.

<sup>104</sup> *US – Upland Cotton (Article 22.6 – US I)*, para. 3.50.

argue that the 2016 IFR is “not relevant” to the present proceedings under Article 22.6 of the DSU.<sup>105</sup>

48. Indeed, Mexico does not explain how the previous measure, which was no longer in existence when the matter was referred to arbitration, is within the terms of reference of the Arbitrator. The 2016 IFR was adopted on March 22, 2016, before the United States objected to Mexico’s request for authorization to suspend concessions.<sup>106</sup> Therefore, the tuna measure had been adopted before the matter was referred to arbitration.

49. The fact that the measure at issue for purposes of this proceeding is the tuna measure as amended by the 2016 IFR, and not the measure no longer in existence, is a fundamental issue for this proceeding. It is therefore in the interests of the Arbitrator and the parties that this issue be clarified at this early stage of the proceeding as it will affect the proceeding as it goes forward.

50. Accordingly, the United States respectfully requests the Arbitrator to render a preliminary ruling that the measure at issue for purposes of this proceeding is the tuna measure as amended by the 2016 IFR.

*The determination regarding compliance is to be made by the Article 21.5 panels*

51. In this instance, the DSB has tasked the Article 21.5 compliance panels, established at the request of the United States and at the request of Mexico, with resolving the disagreement over compliance. And those proceedings are underway. Accordingly, this arbitration should take into account the compliance finding that will be given in those proceedings.

52. When a past arbitrator was confronted with a similar situation where there were concurrent Article 22.6 and Article 21.5 proceedings, the arbitrator explained that:

The decision of the Appellate Body could influence the extent to which [the Member concerned] may be considered to have brought its [measure] into conformity with its WTO obligations. Due process required that parties be in a position to meaningfully comment on the content of the Appellate Body report.<sup>107</sup>

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<sup>105</sup> Mexico’s Methodology Paper, para. 12 (“Accordingly, the recent changes to the Tuna Measure are not relevant to the present Article 22.6 proceedings. Rather, the level of the nullification or impairment must be assessed in relation to the amended Tuna Measure that was in place when the RPT expired on 13 July 2013, for which the DSB has adopted Article 21.5 compliance Panel and Appellate Body reports and made recommendations and rulings.”).

<sup>106</sup> See *Enhanced Document Requirements and Captain Training Requirements To Support Use of the Dolphin Safe Label on Tuna Products*, 81 Fed. Reg. 15,444, 15,445 (Mar. 23, 2016) (“2016 IFR”) (Exh. US-4) (noting that the 2016 IFR was a final measure as of March 22, 2016); “Statement by the United States at the Meeting of the WTO Dispute Settlement Body,” at 7-9 (Mar. 23, 2016) (Exh. US-53).

<sup>107</sup> *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 2.1.

The arbitrator then went on to establish a timetable in that proceeding “providing for two alternative dates of issuance of their report.” The arbitrator explained:

Should the Appellate Body either decline jurisdiction in proceedings under Article 21.5 of the DSU or fully uphold the conclusions of the panel under Article 21.5, the report would be issued on 26 July 2000. Should any party consider that the conclusions of the Appellate Body would require additional submissions by the parties, a second round of submissions and possibly a second hearing would be organised. The award of the Arbitrators would then be issued on 23 August 2000.<sup>108</sup>

The arbitrator in that dispute thus found that it needed to take into account the result of the separate, ongoing compliance proceedings under Article 21.5 of the DSU before it could reach a conclusion under Article 22.6 of the DSU.

53. The same considerations should apply in these proceedings. And this is also consistent with the decision of the arbitrator in *EC – Bananas III*, which found that “any assessment of the level of nullification or impairment presupposes an evaluation of consistency or inconsistency with WTO rules of the implementation measures taken.”<sup>109</sup>

## **V. THE LEVEL OF SUSPENSION OF CONCESSIONS OR OTHER OBLIGATIONS PROPOSED BY MEXICO IS NOT EQUIVALENT TO THE LEVEL OF NULLIFICATION OR IMPAIRMENT**

54. Pursuant to Article 22.6 of the DSU, the United States objected to Mexico’s proposed level of suspension of concessions or other obligations because that proposed level is not equivalent to the level of nullification or impairment attributable to the measure at issue.

55. Article 22.4 of the DSU is explicit and requires that the “level of suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment.” As an initial matter, Mexico’s request is not consistent with Article 22.4 of the DSU because there is no longer any nullification or impairment. The United States has complied with the DSB recommendations and rulings in this dispute, as the United States has explained to the Article 21.5 panel established by the DSB on May 9, 2016 and explains in section V.A below. As a result, there is no nullification or impairment and thus no basis for Mexico to suspend any concessions or other obligations.

56. Even aside from the fact that the United States has complied, Mexico’s calculations suffer from conceptual flaws and methodological errors that result in estimates of the level of nullification or impairment that are not accurate, not supportable, and inconsistent with Article 22.4 of the DSU, as the United States explains in section V.B. Finally, in section VI, leaving

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<sup>108</sup> *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 2.2.

<sup>109</sup> *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.3.

aside the issue of compliance, the United States explains what would have been the appropriate calculation of the level of nullification or impairment.

**A. The United States Has Fully Implemented the Recommendations and Rulings of the DSB and, Therefore, There Is No Nullification or Impairment of Benefits**

57. As the United States fully explained in its First Written Submission to the second Article 21.5 Panel, the 2016 IFR brings the U.S. dolphin safe labeling measure into compliance with the DSB recommendations and rulings and the measure is now consistent with the covered agreements. As such, the level of nullification or impairment is zero.

58. In November 2015, the Appellate Body circulated its second report in this dispute. In that report, the Appellate Body found that:

- a) the measure's denial of access to the dolphin safe label for Mexican tuna product, which is produced from vessels setting on dolphins, and conditional access to the dolphin safe label for tuna products produced from other Members, which they produce from other fishing methods, results in a detrimental impact on Mexican tuna products in the U.S. market; and
- b) this detrimental impact did not stem from an exclusive legitimate regulatory distinction for the sole reason that the design of the so-called "determination provisions" was not even-handed because those provisions did not take into account certain hypothetical situations. (The Appellate Body was unable to complete the analysis as to the other three elements of the measure in dispute).

59. On these two bases, the Appellate Body found the measure to be inconsistent with Article 2.1 of the TBT Agreement. And for very similar reasons the Appellate Body also found the measure inconsistent with Articles I:1 and III:4 of the GATT 1994.

60. As discussed in its July 22 U.S. first written submission, the 2016 IFR amends the design of the determination provisions to directly address the concerns of the Appellate Body that the design of the determination provisions was not even-handed because certain "gaps" existed in coverage and the provisions did not call for heightened tracking and verification requirements.

61. Moreover, and as further explained in the July 22 submission, the 2016 IFR makes other changes to the certification requirements because, while the Appellate Body had not found that these aspects of the measure supported a finding of less favorable treatment, the first compliance panel had raised concerns, and the United States sought to address those concerns in light of the Appellate Body's legal framework. Those changes further ensure that the other elements of the measure – the eligibility criteria, certification requirements, and tracking and verification

requirements – are calibrated to the differences in risk to dolphins associated with different fishing methods and different areas of the oceans, and are thus even-handed.<sup>110</sup>

62. As such, the measure, in its individual aspects and as a whole, even-handed and cannot support a finding of less favorable treatment under Article 2.1 of the TBT Agreement or a finding that any inconsistency with Articles I:1 and III:4 of the GATT 1994 is not justified under Article XX of the GATT 1994.

63. As discussed above, compliance is a threshold issue to be resolved before determining what the level of nullification or impairment is. That is, if the United States has brought its dolphin-safe labeling measure into compliance with WTO rules, the level of suspension “equivalent to the nullification or impairment” would necessarily be zero.

64. To make the contrary finding, and do what Mexico suggests, would result in Mexico being authorized to impose retaliatory tariffs in response to a WTO-consistent measure.<sup>111</sup> Such authorization would be squarely inconsistent with the DSU. Article 22.4 requires that “[t]he level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment.” Article 22.7 of the DSU applies this requirement in the context of an arbitration under Article 22.6.<sup>112</sup> Past arbitrators have recognized that the task under Article 22.6 involves two sides of an equation – the level of nullification or impairment and the level of suspension of concessions.<sup>113</sup> It is not possible for an arbitrator to complete its task without examining both sides of the equation. And where there is no nullification or impairment, the level of suspension of concessions would be zero, which is the case here.

65. In this instance, the DSB has tasked the Article 21.5 compliance panels, established at the request of the United States and at the request of Mexico with resolving the disagreement over

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<sup>110</sup> See *US – Tuna II (Article 21.5 – Mexico) (AB)*, para. 7.253.

<sup>111</sup> See Mexico’s Methodology Paper, para. 13 (“Mexico acknowledges that the suspension of concessions is temporary and that it has a continuing obligation to ensure that its suspension of concessions does not exceed the level of nullification or impairment. Mexico does not believe that the 23 March 2016 amendments to the Tuna Measure eliminate the WTO-inconsistency. However, to the extent that the compliance Panels and the Appellate Body find otherwise in the second round of Article 21.5 proceedings, any suspension of benefits or other obligations would cease upon the adoption of the corresponding reports by the DSB.”).

<sup>112</sup> Article 22.7 states that “[t]he arbitrator acting pursuant to paragraph 6 ... shall determine whether the level of such suspension is equivalent to the level of nullification or impairment.”

<sup>113</sup> See *US – Certain EC Products (Panel)*, para. 6.122 (“Since the Article 22.6 arbitration process was given the authority to determine ‘a level of suspension equivalent to the level of nullification,’ it has the authority to assess both variables of the equation, including whether the implementing measure nullifies any benefit and the level of such nullified benefits.”); *EC – Hormones (US) (Article 22.6 – EC)*, para. 20 (“As noted by the arbitrators in the Bananas case, ‘[i]t is impossible to ensure correspondence or identity between two levels if one of the two is not clearly defined.’ Therefore, as a prerequisite for ensuring equivalence between the two levels, we have to be able to determine, not only the ‘level of the nullification and impairment,’ but also the ‘level of the suspension of concessions or other obligations.’” (citing *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.2).

compliance. And those proceedings are underway. Accordingly, this arbitration should take into account the compliance finding that will be given in those proceedings.

**B. Even Aside from the Fact that the United States Has Complied, the Figure Mexico Has Proposed Far Exceeds the Actual Level of Nullification or Impairment**

66. Even aside from the fact that the United States has come into compliance, Mexico's proposed figure far exceeds what would have been the actual level of nullification or impairment. The following sections put aside the issue of compliance, although as explained above that is a key threshold issue. In this section, the United States first explains why the appropriate counterfactual is withdrawal of the measure and why the counterfactuals that Mexico has proposed are incorrect. Second, the United States explains why Mexico's proposed model is fundamentally flawed and overstates the appropriate level of nullification or impairment.

**1. Mexico Has Proposed Incorrect Counterfactuals**

67. In its Methodology Paper, Mexico describes the proposed counterfactual as one where "the WTO-inconsistent discriminatory aspects of the original and amended Tuna Measure were eliminated."<sup>114</sup> Mexico then claims that this one counterfactual could be achieved under either one of two scenarios: 1) the United States modifies the measure such that the Mexican tuna product qualifies for the dolphin safe label (Mexico's Counterfactual #1); or 2) the United States modifies the standards of the measure such that only Ecuadorian tuna product would qualify for the label and the tuna product of all other Members (including Mexico and the United States) would not qualify (Mexico's Counterfactual #2).<sup>115</sup> Mexico claims both scenarios produce "essentially identical" results.<sup>116</sup>

68. As explained below, even aside from the fact that the United States has come into compliance, Mexico has proposed incorrect counterfactuals, which have no support in the DSU, past practice, or in the DSB recommendations and rulings. Rather, the appropriate counterfactual in such a situation is withdrawal of the measure.

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<sup>114</sup> Mexico's Methodology Paper, para. 17; *see also id.* 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.").

<sup>115</sup> *See* Mexico's Methodology Paper, paras. 21-22, 30; Pouliot 2016, at 34 (Exh. MEX-2).

<sup>116</sup> Mexico's Methodology Paper, para. 22 ("Because the volume of tuna that qualifies for the "dolphin-safe" label in the second scenario is very small, scenarios 1 and 2 are essentially identical.").

**a. The Appropriate Counterfactual for a Measure that Has Not Been Brought into Compliance Is Withdrawal of the Measure**

69. As has long been recognized, a Member has discretion as to how to implement DSB recommendations and rulings.<sup>117</sup> And any measure taken to comply will, of course, depend on those DSB recommendations and rulings.<sup>118</sup> In this regard, past WTO arbitrators have indicated that the normal counterfactual for calculating nullification or impairment is withdrawal of the measure.<sup>119</sup> The issue was debated most recently in *US – COOL* where Mexico had also argued for a novel counterfactual – that the measure had never been adopted in the first place.<sup>120</sup> The *COOL* arbitrator rejected Mexico’s approach, finding that the appropriate counterfactual was that the measure had been “withdrawn at the end of the RPT.”<sup>121</sup> And there is no precedent for an arbitrator to choose a counterfactual that is based on the complainant’s novel (and unproven) theory of compliance that does not relate to the DSB recommendations and rulings.

70. The legal effect of the withdrawal of the measure would be to eliminate the “specific set of conditions that must be fulfilled by each of these categories of tuna in order to use the term

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<sup>117</sup> *US – Gambling (Article 22.6 – US)*, n.58 (“This issue has been addressed in arbitrations under Article 21.3(c) for the determination of the RPT.”) (citing *Australia – Salmon (Article 21.3(c))*, para. 30; *Korea – Alcoholic Beverages (Article 21.3(c))*, para. 45 (“Choosing the means of implementation is, and should be, the prerogative of the implementing Member, as long as the means chosen are consistent with the recommendations and rulings of the DSB and the provisions of the covered agreements.”)).

<sup>118</sup> *US – Gambling (Article 21.5 – Antigua and Barbuda)*, para. 6.21 (“The possible form of measures taken to comply with a recommendation under Article 19.1 of the DSU will depend on the rulings of the DSB in the particular dispute.”).

<sup>119</sup> 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)); see also *US – Upland Cotton (Article 22.6 – US II)*, para. 4.118 (“In the circumstances of this case, we find that the choice of MY 2005, which represents the first moment at which the United States should have come into compliance with the recommendations and rulings at issue by removing the adverse effects of the subsidies or withdrawing them, is in principle legitimate. We note that the end of the implementation period has been chosen as period of reference in arbitrations under Article 22.6 of the DSU previously.”) (citing *US – FSC (Article 22.6 – US)*, para. 2.15 (“We therefore decided to assess the proposed suspension of concessions at the time the United States should have withdrawn the prohibited subsidy at issue, in 2000.”)); *US – Offset Act (Byrd Amendment) (EC) (Article 22.6 – US)*, para. 3.147 (“Our core rationale is that the trade effect of the CDSOA measure can be estimated to be the nullification or impairment that the Requesting Parties have suffered as a result of the measure having not been withdrawn.”).

<sup>120</sup> *US – COOL (Article 22.6 – US)*, n.465 (“Mexico describes the counterfactual in the following terms: ‘if the COOL measure had not been adopted’ and ‘if the COOL measure was never in place.’”) (quoting Mexico’s *COOL* methodology paper and Mr. Pouliot’s *COOL* Study).

<sup>121</sup> See *US – COOL (Article 22.6 – US)*, paras. 6.31-32 (noting that the United States had made “repeated assertions that the counterfactual concerned ‘the measure withdrawn,’” and finding that “[f]or purposes of our own determination, we follow the counterfactual of the COOL measure having been withdrawn at the end of the RPT”).

‘dolphin-safe’ or to make similar claims.”<sup>122</sup> Under this counterfactual, producers and retailers could still claim that tuna product sold in the United States is “dolphin safe,” but would do so subject to the default rules for labeling governed by the Federal Trade Commission Act and enforced by the U.S. Federal Trade Commission (FTC).<sup>123</sup> Under these default rules, claims as to the dolphin safe nature of the product could be made as long as they are not “unfair or deceptive.”<sup>124</sup>

71. Under this legal standard, therefore, for purposes of a counterfactual one could conclude that all tuna product currently meeting the dolphin safe labeling requirements, as well as tuna product produced from setting on dolphins consistent with the AIDCP, would be marketed with some label suggesting it is dolphin safe. In such a scenario, it is also reasonable to conclude that the private NGO, producer, or retailer labels that exist in the market would continue to be used.

72. Further, in light of the fact that tuna product produced from setting on dolphins and from other fishing methods could both be labeled dolphin safe, it is reasonable to conclude that producers and retailers would continue to seek to be responsive to their customers’ strong preference to avoid purchasing tuna product produced by setting on dolphins.<sup>125</sup> In this regard, producers and retailers of tuna product not produced by this method could market their tuna product as “not produced from the intentional encirclement of dolphins.”<sup>126</sup> In other words, even with the measure withdrawn, producers and retailers could continue to provide information regarding the tuna product that they produce or sell so as to “enable the US consumer to avoid buying tuna caught in a manner involving the types of observed and unobserved adverse impact on dolphins associated with this method.”<sup>127</sup>

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<sup>122</sup> *US – Tuna II (Article 21.5 – Mexico) (Panel)*, para. 3.21; *id.* para. 3.2 (“Taken together, the DPCIA, the implementing regulations, and the Hogarth ruling set out the requirements for when tuna products sold in the United States may be labelled as ‘dolphin-safe’ ... The DPCIA and the implementing regulations also prohibit any reference to dolphins, porpoises, or marine mammals on the label of a tuna product if the tuna contained in the product does not comply with the labelling conditions spelled out in the DPCIA.”).

<sup>123</sup> *See* 15 U.S.C. §§ 45, 52, 55 (Exh. US-54).

<sup>124</sup> 15 U.S.C. § 45 (Exh. US-54). This legal standard currently governs other labels used on tuna product sold at retail in the United States, including the gear type used to produce the tuna product and whether the product is “sustainable” or not. *E.g.*, Harris Teeter Chunk Light Tuna (2016) (Exh. US-26); Harris Teeter Solid White Tuna (2016) (Exh. US-27); Safeway Solid White Albacore Tuna (2016) (Exh. US-28); Trader Joe’s Albacore Tuna (2016) (Exh. US-29); Wal Mart Great Value Chunk Light (2016) (Exh. US-30); Whole Foods Chunk White (2016) (Exh. US-31); Wild Selections White Albacore (2016) (Exh. US-32).

<sup>125</sup> *See, e.g., US – Tuna II (Mexico) (Panel)*, para. 7.288 (“We further note that it is *undisputed* that US consumers are sensitive to the dolphin safe issue. ... [The purchasing policies of major tuna processors, first enacted in April 1990] are still in place: such companies will not purchase tuna *from vessels that fish in association with dolphins.*”) (emphasis added).

<sup>126</sup> Under U.S. law, Mexican producers could not make an untruthful claim such as this one about their tuna product. *See* 15 U.S.C. § 45 (Exh. US-54).

<sup>127</sup> *US – Tuna II (Mexico) (Panel)*, para. 7.505.



73. Finally, it is reasonable to conclude that the commitments made to EII or directly to customers by the vast majority of producers, distributors, exporters, importers, and retailers that serve the U.S. tuna product market to not produce, hold, or sell tuna or tuna product that was harvested by setting on dolphins would remain in place.

#### **b. Mexico’s Two Counterfactuals Are Without Support**

74. As noted above, Mexico appears to put forward two different counterfactuals, which Mexico claims produce “essentially identical” results.<sup>128</sup> Mexico claims that both counterfactuals are WTO-consistent, in that they both eliminate the “‘artificial’ market that falsely distinguishes between dolphin-safe and non-dolphin-safe tuna products.”<sup>129</sup> Both counterfactuals rely on what would appear to be different (and contradictory) theories of compliance, neither of which are reflected in the DSB recommendations and rulings. In this regard, Mexico’s own argument in this proceeding supports an approach where the Arbitrator takes into account the findings of the ongoing Article 21.5 proceedings in this Article 22.6 proceeding.

75. In Mexico’s Counterfactual #1, the United States would modify the standards of the measure for tuna product produced inside the ETP large purse seine fishery by changing the eligibility criteria so that all tuna product produced from setting on dolphins in a manner consistent with the AIDCP would be potentially eligible for the official label, as would be tuna product produced from other fishing methods used in other fisheries.<sup>130</sup> The counterfactual appears to assume that the future finding of the ongoing Article 21.5 proceedings will be that the eligibility criteria are not calibrated to the differences in risk between fishing methods, and, as such, are not even-handed. Mexico provides no support for such a compliance theory, and Mexico errs, as the United States explained in its July 22 First Written 21.5 Submission.<sup>131</sup>

76. We would further note that, although Mexico’s Counterfactual #1 incorrectly assumes that the United States would modify the label instead of withdrawing it, because it lowers the

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<sup>128</sup> Mexico’s Methodology Paper, para. 22.

<sup>129</sup> Mexico’s Methodology Paper, paras. 17, 19-20; *see also* Pouliot 2016, at 3 (Exh. MEX-2) (“The counterfactual applies to the 2014 calendar year and is constructed under the assumption that 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.”).

<sup>130</sup> *See* Mexico’s Methodology Paper, para. 21 (“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 (like those under the AIDCP, the multilateral treaty governing purse-seine fishing in the ETP) to use the label.”); *see also* Pouliot 2016, at 3-4 (Exh. MEX-2) (“In the first scenario, the United States allows tuna products containing tuna fished by setting in association with dolphins using techniques that minimize impacts on dolphins, like those adopted by the Mexican fleet under the AIDCP, to receive the “dolphin-safe” label, such that Mexican tuna products are imported into the United States and are treated no differently than tuna products of any other country.”).

<sup>131</sup> *See* U.S. First Written 21.5 Submission, paras. 89-110.

standards of the measure, it has the same practical consequences as withdrawal of the measure, namely: 1) all tuna product that currently qualifies as dolphin safe would continue to qualify for the label; 2) all private dolphin safe labels could continue to be used in the market; 3) tuna product from the United States and other Members could be marketed as “not produced from the intentional encirclement of dolphins” while Mexican tuna product could not be so marketed; and 4) the commitments to EII or consumers made by the vast majority of producers, distributors, exporters, importers, and retailers that serve the U.S. market to not produce, hold, or sell tuna or tuna product produced by setting on dolphins would continue.

77. In Mexico’s Counterfactual #2, the United States would modify the standards of the measure for tuna product produced outside the ETP large purse seine fishery to deny access to the label to most tuna product sold in the U.S. market.<sup>132</sup> Under this particular counterfactual, Mexico requests the Arbitrator to assume that tuna product from almost every Member would be ineligible for the label.<sup>133</sup> Moreover, the United States would impose AIDCP-equivalent certification requirements and tracking and verification requirements for that tuna product produced outside the ETP large purse seine fishery (irrespective of calibration to risk).<sup>134</sup> In Mexico’s view, *only* Ecuadorian tuna product would qualify for the label because, in Mexico’s view, Ecuador is the only Member whose fleet operates in accordance with the AIDCP without setting on dolphins.<sup>135</sup> The tuna product of all other Members would not qualify for the label either because it is produced from setting on dolphins (Mexico) or because it is not subject to AIDCP equivalent certification requirements and tracking and verification requirements (all Members not operating in the ETP large purse seine fishery).<sup>136</sup>

78. The counterfactual makes a number of assumptions that differ both from Mexico’s own previously stated compliance theory and the DSB findings. Most striking is the fact that this counterfactual, in contrast to the first one, assumes that drawing a distinction between purse seine fishing by setting on dolphins and purse seine fishing without setting on dolphins (*i.e.*, the fishing method of not only Ecuador, but all purse seine fleets outside the ETP large purse seine

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<sup>132</sup> See Mexico’s Methodology Paper, para. 22 (“In the second scenario . . . the majority of tuna products from all countries, including the United States, would not be eligible for the dolphin-safe label.”).

<sup>133</sup> Mexico’s Methodology Paper, para. 22.

<sup>134</sup> See Mexico’s Methodology Paper, para. 22.

<sup>135</sup> See 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.”); see also Mexico’s Methodology Paper, para. 30 (“Ecuador is the only source other than Mexico in which dolphin-safe tuna can be assured because of the AIDCP requirements applied to its fishing operations in the ETP.”).

<sup>136</sup> See Mexico’s Methodology Paper, para. 22 (stating that “the majority of tuna products from all countries, including the United States, would not be eligible for the dolphin-safe label”).

fishery) is calibrated to the differences in risk.<sup>137</sup> And while Mexico's counterfactual remains incorrect (as the United States has explained, the currently drawn eligibility distinctions are calibrated), Mexico's concession is, to say the least, a very different position than any Mexico has taken before. Moreover, Mexico's counterfactual, as it applies to the certification requirements and tracking and verification requirements, appears to rely on the argument, squarely rejected by the Appellate Body, that the calibration analysis is irrelevant to whether these requirements are even-handed.<sup>138</sup> As explained in the July 22 U.S. first written 21.5 submission, these requirements are, in fact, calibrated, and, as such, are even-handed.<sup>139</sup>

79. Finally, the practical consequences of this counterfactual would differ somewhat from Mexico's Counterfactual #1. Although it is not clear from Mexico's submission, it would appear that Mexico is arguing for a counterfactual where, because the majority of tuna product that currently qualifies for the dolphin safe label would no longer qualify, the private dolphin safe labels would not be able to be used in the market (unless used on Ecuadorian tuna product). However, even under this counterfactual, tuna product produced by the United States and other Members could still distinguish their products from Mexico's tuna product by marketing their tuna product as "not produced from the intentional encirclement of dolphins" as long as such statement did not state that the product was "dolphin safe." And, of course, the commitments to EII or to customers made by the vast majority of producers, distributors, exporters, importers, and retailers that serve the U.S. tuna product market to not produce, hold, or sell tuna or tuna product that was harvested by setting on dolphins would continue.

## **2. Mexico's Proposed Model Is Fundamentally Flawed and Results in Overstatement of the Level of Nullification or Impairment**

80. As discussed below, Mexico's proposed level of \$472.3 million dramatically overstates the level of nullification or impairment because it is calculated using a deeply flawed economic model. Indeed, as the United States will explain, Mexico's election to use a partial equilibrium model in this case is inappropriate because sufficient data do not exist to construct a correctly specified model. Moreover, Mexico's model is based on certain incorrect assumptions concerning U.S. consumer demand and the potential supply of canned yellowfin tuna from Mexico, the United States, and other Members.

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<sup>137</sup> Tuna product harvested by purse seine fishing without setting on dolphins produces at least 50-90 percent of the tuna product for the U.S. market. See U.S. First Written Submission to 1<sup>st</sup> Article 21.5 Panel, paras. 125-128 (showing that purse seine vessels accounted for 90.7 percent, by volume, of the tuna caught by U.S. vessels sold on the U.S. tuna product market and for nearly 50 percent of vessel records from non-U.S. vessels catching tuna sold on the U.S. tuna product market, which understates the share by volume due to the greater carrying capacity of purse seine vessels than other types of vessels).

<sup>138</sup> See *US – Tuna II (Article 21.5 – Mexico) (AB)*, paras. 7.153-155.

<sup>139</sup> See U.S. First Written 21.5 Submission, paras. 122-142.

**a. Mexico’s Partial Equilibrium Model Is Not Appropriate in Light of the Available Data**

81. Mexico has used a partial equilibrium model of the U.S. and Mexican canned tuna markets to calculate its proposed level of nullification or impairment caused by the U.S. dolphin safe labeling requirements. Partial equilibrium models are often used to calculate the impact of a policy change by generating a picture of a defined market through a series of simplifying assumptions.<sup>140</sup> However, to produce a meaningful result, the model must be set up to solve for the issue at hand, using relevant variables that are based on actual data or reasonable assumptions. Mexico’s model does not meet this standard.

82. In general terms, partial equilibrium analysis is used to calculate the equilibrium price and quantity within a defined market, based on constructed market demand and supply curves. The market demand curve is determined by market price, consumer tastes, prices of complementary and substitute products, and income.<sup>141</sup> Similarly, the market supply curve is determined by resource prices, production technology, expectations and the number of sellers. Then, the equilibrium price and quantity of the goods at issue in the defined market is found by equating supply and demand.<sup>142</sup>

83. In international trade analysis, partial equilibrium models are often used to show the impact of a policy change, which is modeled as an exogenous change in supply or demand, as appropriate.<sup>143</sup> The policy change it is often used to evaluate is the removal (or addition) of a tariff or other border duty.<sup>144</sup> Where partial equilibrium analysis is used to model the removal of a particular non-tariff barrier (NTB), the generally accepted method is to calculate a tariff equivalent (“price wedge”) of the NTB and then model its removal. This approach has been employed or suggested in previous WTO disputes,<sup>145</sup> as well as in relevant scholarship.<sup>146</sup>

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<sup>140</sup> See, e.g., Simon Board, University of California, Los Angeles, “Partial Equilibrium: Positive Analysis,” at 2-3 (2009) (Exh. US-55); *US – Upland Cotton (Article 22.6 – US II)*, para. 4.2 (noting that “[t]o quantify these effects, Brazil relies on a partial equilibrium model already referred to in the compliance proceedings, the ‘Sumner model’”); see also *US – Offset Act (Byrd Amendment) (Canada) (Article 22.6 – US)*, Annex B, paras. 2-21 (noting a preference for the partial equilibrium model, but rejecting the parties’ models and adopting their own).

<sup>141</sup> Board, “Partial Equilibrium: Positive Analysis,” at 3, 8 (Exh. US-55).

<sup>142</sup> Board, “Partial Equilibrium: Positive Analysis,” at 4, 8 (Exh. US-55).

<sup>143</sup> See Roberta Piermartini & Robert Teh, *WTO Discussion Papers No. 10: Demystifying Modelling Methods for Trade Policy*, at 4-5 (2005) (Exh. US-56).

<sup>144</sup> See WTO, *A Practical Guide to Trade Policy Analysis*, at 141-158 (2012) (Exh. US-57); Piermartini & Teh 2005, at 4-5 (2005) (Exh. US-56).

<sup>145</sup> 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.

<sup>146</sup> See, e.g., Samuel Laird, “Quantifying Commercial Policies,” at 53-57, in *Applied Methods for Trade Policy Analysis: A Handbook* (1997) (Exh. US-58) (explaining that the “price wedge technique is used frequently by World Bank economists” and scholars, as well as in the WTO context, in order to quantify the effect of NTMs);

84. In this context, therefore, 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. To determine the value of the dolphin safe label, however, 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 and other lunch meat, respectively, would also be important.

85. It appears to be *undisputed* that this level of data concerning the U.S. tuna product market is not available.<sup>147</sup> In particular, Mexico’s dataset does not include retailer-level data that would allow the comparison between particular types of labeled and unlabeled tuna product that would be necessary to estimate the value of the dolphin safe label. Specifically, Mexico’s dataset does not have data on sales and purchases of the same type of tuna products (by species, form, and pack, at least) sold with and without the dolphin safe label or on whether tuna was sold at a promotional value.<sup>148</sup> Indeed, Mexico’s dataset does not allow for any comparison of labeled and unlabeled tuna product, or even store-by-store analysis of the price difference between comparable yellowfin and non-yellowfin products. Accordingly, Mexico has been unable to calculate the price wedge necessary for an accurate partial equilibrium model. The U.S. datasets also do not include such information.<sup>149</sup>

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Marco Fugazza, UN Conference on Trade and Development (UNCTAD), “The Economics Behind Non-Tariff measures: Theoretical Insights and Empirical Evidence,” at 1-2, 9-14 *Policy Issues in Int’l Trade & Commodities Study Series No. 57* (2013) (Exh. US-59) (describing the “standard approach to appreciate price and quantity effects of NTMs” as making such measures “equivalent to an ad valorem tariff” and the “methodologies expected to be more reliable in quantifying NTMs,” including “inventory, price comparison and quantity impact”); WTO, *World Trade Report 2012*, at 136-137 (2012) (Exh. US-60) (“In the trade literature, the [ad valorem equivalent] of different NTMs is computed using one of two approaches – the ‘price gap’ or the ‘econometrics-based methods.’”); Linda A. Links & High M. Arce, U.S. Int’l Trade Comm., *Estimating Tariff Equivalents of Nontariff Barriers*, at 5 (2002) (Exh. US-61) (“The 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.”); see WTO, *A Practical Guide to Trade Policy Analysis*, at 71-72 (Exh. US-57) (stating that “[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,” and that “[a] relatively common approach is to calculate *ad valorem* equivalents of NTMs” and 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”).

<sup>147</sup> 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).

<sup>148</sup> See Nielsen, “Item Rank Report – Seafood-Tuna-Shelf Stable” (Oct. 24, 2015) (Exh. MEX-15).

<sup>149</sup> See “Shelf Stable Market Data” (2016) (Exh. US-38) (BCI).

86. Mexico's partial equilibrium model thus does not ask the question it should ask – what is the value of the U.S. dolphin safe label and what would be the effect of its removal. As such, Mexico's model does not calculate the level of nullification or impairment based on the correct counterfactual. Rather, Mexico's model asks a wholly different question – what is the demand for canned yellowfin tuna in the U.S. market if one assumes: 1) canned yellowfin's access to the U.S. market is so severely restricted that current U.S. consumption is not at all indicative of actual demand; 2) U.S. consumers have a strong preference for canned yellowfin tuna (produced by setting on dolphins or otherwise) over all other canned tuna; and 3) Mexico is the only possible supplier of canned yellowfin tuna to the U.S. market.<sup>150</sup>

87. Thus, leaving aside the fact that Mexico's assumptions have no basis in the real world, which is discussed below, Mexico's model is simply not an appropriate model to use for this case given the available data. As discussed below in section VI, the U.S. proposed model does employ the correct counterfactual and does calculate an accurate level of nullification or impairment in this case.

**b. Mexico's Model Is Based on Incorrect Assumptions and Is Fundamentally Flawed as a Result**

88. Mexico's model is defined by a series of demand equations and accounting relationships that are specified almost entirely based on assumptions. Specifically, Mexico's model is based on the assumptions that: (1) yellowfin tuna product has been so restricted in its entry into the U.S. market that current consumption levels have no relationship to actual demand; (2) the Mexican and U.S. tuna product markets constitute a single market with an identical consumer preference for yellowfin tuna product; (3) Mexico is the only possible supplier of yellowfin tuna product to the U.S. market; and (4) Mexico has a completely elastic supply curve (*i.e.*, Mexican industry could supply an unlimited quantity of canned yellowfin at no increasing marginal cost).

89. First, the model sets demand parameters based on the first two of these assumptions. The model assumes a vertically differentiated canned tuna market with only two products – yellowfin and everything else (which Mexico refers to as “generic”).<sup>151</sup> Then, discounting data on actual U.S. consumption of yellowfin, as compared to other tuna products, the model assumes that the average U.S. and Mexican consumer prefers canned yellowfin tuna and are willing to pay a price premium for it of \$2 a kilogram over “generic” tuna.<sup>152</sup> The model also assumes the willingness to pay is distributed throughout the market based on the logistic distribution function, which is

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<sup>150</sup> See Pouliot 2016, at 9, 14 (for assumption that yellowfin 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).

<sup>151</sup> Pouliot 2016, at 9, 11-12 (Exh. MEX-2).

<sup>152</sup> Pouliot 2016, at 10-12, 20 (Exh. MEX-2).

similar to a normal distribution function, except it allows for larger preferences at the high and low end when the scale parameter is sufficiently large.<sup>153</sup>

90. The model then specifies other aspects of the demand equation, again assuming that they are equal between U.S. and Mexican consumers. In particular, it assumes: (a) the distribution has a scale parameter equal to one, which concentrates the majority of the consumers close to the center of the preference;<sup>154</sup> and (b) the demand elasticity for tuna is the same for generic and yellowfin (set at -1).<sup>155</sup> Mexico then creates a variable for each country, termed “intensity of demand,”<sup>156</sup> which is based on the quantity of canned tuna consumed in each, divided by the average price in that country raised to the price elasticity (-1).<sup>157</sup> The demand intensity parameter is the only variable that is different between the U.S. and the Mexican demand equations. Since the average price of tuna between the two markets differs by only \$0.04 in the model, this parameter is driven almost entirely by the 2014 tuna consumption in the two markets.

91. Second, the rest of the parameters in the model, which are market constraints used to explain the supply of canned tuna, are set based on assumptions (3) and (4) above. The model first sets total U.S. consumption of yellowfin equal to the yellowfin exported by Mexico. It then sets a series of equations to ensure that quantities of tuna consumed and produced in the market are equal to: (a) for yellowfin tuna product, the total quantity of tuna product produced in Mexico, thus assuming that Mexico produces 100 percent of the yellowfin tuna product consumed in the United States;<sup>158</sup> and, (b) for “generic” canned tuna in Mexico, the difference between production and consumption is set to equal exports or imports.<sup>159</sup> Other equations ensure that prices of canned yellowfin differ between the United States and Mexico only by transportation cost and set prices for generic tuna equal to world prices and tariffs.<sup>160</sup>

92. Driven by these four key assumptions, Mexico’s model produces an outcome under which Mexico exports 97.3 percent of its actual 2014 production of canned yellowfin to the United States, while reducing its own consumption of canned yellowfin by 62.4 percent (to allow

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<sup>153</sup> Pouliot 2016, at 12-13 (Exh. MEX-2).

<sup>154</sup> Pouliot 2016, at 14, 20 (Exh. MEX-2).

<sup>155</sup> Pouliot 2016, at 15 (Exh. MEX-2).

<sup>156</sup> Pouliot 2016, at 13, 32 (Exh. MEX-2).

<sup>157</sup> Pouliot 2016, at 13, 15 (Exh. MEX-2) (Equations 5 and 12).

<sup>158</sup> Pouliot 2016, at 30 (Exh. MEX-2) (“Equation (20) says that yellowfin tuna consumed in the United States comes from Mexico. Equation (21) says that without the tuna measure that Mexican canned yellowfin tuna is consumed in the United States and in Mexico. Note that equation (21) includes Mexican imports of yellowfin tuna.”).

<sup>159</sup> Pouliot 2016, at 30 (Exh. MEX-2) (Equations 22 and 23)

<sup>160</sup> Pouliot 2016, at 30 (Exh. MEX-2) (describing Equations 24, 25 and 26, respectively).

that product to be exported).<sup>161</sup> In short, Mexico projects that its tuna product exports to the United States will increase by 1,264 percent over 2015 levels.<sup>162</sup> Further, Mexico projects that its market share of U.S. imports of canned tuna will be 44.7 percent, based on 2015 total import figures – 1,277 percent of Mexico’s actual market share of U.S. canned tuna imports in 2015.<sup>163</sup>

93. As explained in the remainder of this section, Mexico’s calculations result in an inflated level of nullification or impairment because each of the four key assumptions on which the model is based is incorrect.

**i. Canned Yellowfin Tuna Is Currently Sold in the U.S. Market and There Is No Pent-Up Demand**

94. Mexico’s model is premised on the assumption that canned yellowfin tuna has been almost entirely barred from the U.S. market such that the current U.S. consumption of canned yellowfin does not reflect demand.<sup>164</sup> The model then disregards all evidence of U.S. consumer preferences, as reflected in actual consumption of various canned tuna products, and derives a demand curve based on assumptions.<sup>165</sup> However, Mexico’s underlying assumption is incorrect. Dolphin safe yellowfin canned tuna, which is unaffected by the U.S. measure, *is* sold in the U.S. market, but it is sold in relatively small quantities because demand is weak. Thus there is no pent-up demand for canned yellowfin tuna, particularly for canned yellowfin tuna that is produced from setting on dolphins, as discussed above.<sup>166</sup> Thus, the premise of Mexico’s model and all the ensuing assumptions about U.S. consumer demand are wrong.<sup>167</sup>

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<sup>161</sup> See Pouliot, at tables 8, 12 (Exh. MEX-2) (showing that, under the model solution, exports to the United States account for 63,568 mt of the 65,342 mt of Mexican domestic production of canned yellowfin and that Mexican consumption of canned yellowfin falls to 21,932 mt from 58,344 mt).

<sup>162</sup> See “U.S. Imports of Tuna Product from the World and from Mexico” (data collected from NMFS Fishery Statistics Division) (Exh. US-62) (data collected from U.S. Census Bureau, Economic Indicators Division, <https://dataweb.usitc.gov/>) (showing that, in 2015, the United States imported 5,028 mt of tuna in airtight containers (ATC) from Mexico).

<sup>163</sup> See “U.S. Imports of Tuna Product from the World and from Mexico” (Exh. US-62) (showing that, in 2015, 3.5 percent of U.S. imports of canned tuna were from Mexico).

<sup>164</sup> 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”).

<sup>165</sup> Pouliot 2016, at 10-11, 14 (Exh. MEX-2). Specifically, since canned yellowfin tuna is not a new product in the U.S. model, Mexico’s use of the choice model to model consumer demand for the product was incorrect. See *id.* at 11. Rather, 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. See, e.g., Chiang et al., 2016, at 7.

<sup>166</sup> See *supra*, sec. III.B.1.d.

<sup>167</sup> 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).



95. Contrary to Mexico's assumptions, there are numerous other sources of canned yellowfin in the U.S. market that are not adversely affected by the U.S. dolphin safe labeling measure *at all* and thus are available on an unrestricted basis. For example, each of the "big three" companies (Bumble Bee, Chicken of the Sea, and StarKist) sell all-yellowfin dolphin safe tuna products in the United States.<sup>168</sup> Other tuna processors also sell canned yellowfin tuna on the U.S. market, including yellowfin-only chunk, solid yellowfin, and yellowfin fillets packed in water and in olive oil.<sup>169</sup> Indeed, from 2010-2015, dolphin safe yellowfin accounted for between 4.3 and 6.7 percent of the tuna processed by U.S. canneries.<sup>170</sup> U.S. canneries sourced this dolphin safe yellowfin from both U.S. vessels and foreign vessels.<sup>171</sup>

96. If demand for canned yellowfin tuna were strong, dolphin safe canned yellowfin would sell in higher quantities given the available supply of yellowfin caught in a dolphin safe manner, but that is not the case. Sales of tuna products containing 100 percent yellowfin are dwarfed by sales of albacore (white meat) and skipjack or skipjack and other species (light meat).<sup>172</sup> Further, much of the dolphin safe yellowfin produced for the U.S. tuna product market is not marketed as "yellowfin" at all, but sold as "light meat" (often in combination with skipjack).<sup>173</sup> There is simply not sufficient demand for even the amount of dolphin safe yellowfin currently available. In this regard, we would note that Mexico's evidence suggests the same is true for *non-dolphin safe* tuna product as well, as Exhibit MEX-15 indicates that both leading Mexican brands, Tunny and Dolores, market a "chunk light" product in the United States.<sup>174</sup>

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<sup>168</sup> 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 – Olive Oil Solid Fillet Light Yellowfin, and Starkist – EVOO Fillet Light Yellowfin being sold by U.S. retailers). Such products all use or are eligible for the dolphin safe label. See StarKist, Products (Exh. US-19); Bumble Bee, Canned Tuna, <http://www.bumblebee.com/products/tuna/> (accessed July 27, 2016) (Exh. US-63); Genova, Our Products, <http://www.genovaseafood.com/products> (accessed July 27, 2016) (Exh. US-64); BenZ's, Our Products, <http://benzsfish.com/our-products/> (accessed July 27, 2016) (Exh. US-65).

<sup>169</sup> See, e.g., Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Exh. MEX-15) (referring to, among other brands, a Genova – EVOO Solid Light Yellowfin, a Tonnino – Olive Oil Fillet Light Yellowfin, a Sclafani – Olive Oil Solid Light Yellowfin, and a Benz's – Water Chunk Light Yellowfin).

<sup>170</sup> See "U.S. Tuna Cannery Receipts" (Exh. US-22).

<sup>171</sup> In 2015, for example, U.S. vessels caught 5,600 short tons of yellowfin for canning and canneries imported another 4,622 short tons. See "U.S. Tuna Cannery Receipts" (Exh. US-22).

<sup>172</sup> See *supra*, sec. III.B.1.

<sup>173</sup> See *supra*, sec. III.B.1 (citing Roe & Hawthorne, "How Safe is Tuna?" (Exh. US-18)).

<sup>174</sup> See Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Exh. MEX-15). Of course, Mexico also continues to supply non-dolphin safe tuna product to the United States. As shown in Exhibit MEX-4, with \$22.7 million in exports, Mexico was the sixth largest exporter of canned and pouched tuna to the United States in 2014. Pouliot 2016, at 9 (Exh. MEX-2); see also U.S. ITC, "Tuna: Customs-Value by HTS Number and Customs Value for All Countries," (Exh. MEX-4); NMFS, "Imports of Canned Tuna from All Countries Individually – 2010-2015" (Exh. US-36). Indeed, Mexican tuna product has had a relatively steady share of the U.S. market for imports of tuna

97. The absence of demand for yellowfin tuna product is further confirmed by the fact that the decline in the quantity and share of the yellowfin processed by U.S. canneries continued decades after the measure went into effect. The share of tuna processed by U.S. canneries made up by yellowfin was already falling before the DPCIA was enacted – from 46.1 percent in 1987 to 33.2 percent in 1990.<sup>175</sup> In 1991, following the DPCIA’s enactment, the percentage fell again to 23.0 percent. Instead of stabilizing at that lower level, however, (or rising back to the earlier level to meet demand), the percentage of yellowfin processed by U.S. canneries has steadily fallen – to 12.7 percent in 2000 and to 5.5 percent in 2010, around which it has fluctuated since.<sup>176</sup> Mexico’s model, and the false assumptions upon which it relies, does not explain this continued decline in yellowfin tuna product’s share of the U.S. cannery receipts. Such evidence directly contradicts Mexico’s assumption that there is latent, untapped demand for canned yellowfin, much less canned yellowfin produced from setting on dolphins.

98. Thus, Mexico’s model is based on the assumption of an unsatisfied demand for canned yellowfin that is contradicted by the evidence. In fact, U.S. consumers do have access to canned yellowfin, both dolphin safe and non-dolphin safe, but the data prove that they do not demand the product enough for canneries to increase supply or, indeed, even to market all of the yellowfin they have as a “yellowfin” product. There is, therefore, no reason to think that U.S. consumption of yellowfin would increase if the U.S. measure were removed and Mexican producers could market their canned yellowfin as “dolphin safe.” Thus, the assumption upon which Mexico’s model is premised is false.

**ii. The U.S. and Mexican Tuna Product Markets Are Not One Market with a Strong Preference for Yellowfin Tuna Product**

99. Another critical factor driving the outcome of Mexico’s model is its assumption that the United States and Mexico constitute a single market with a strong preference for yellowfin tuna product.<sup>177</sup> Specifically, the model sets the willingness to pay for yellowfin, distribution of willingness to pay, and the elasticity of demand for tuna equal across the two countries.<sup>178</sup> This leads to a result that is almost entirely driven by the percentage of consumption between the two countries, because the “intensity of demand” parameter, which Mexico constructed based on the countries’ consumption of tuna in 2014, is the only variable that is different between the U.S.

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in airtight containers of approximately 1.2-2.3 percent over the past decade, which rose to 3.6 and 3.5 percent in 2014 and 2015 respectively. See “U.S. Imports of Tuna Product from the World and from Mexico” (Exh. US-62).

<sup>175</sup> See “U.S. Tuna Cannery Receipts” (Exh. US-22).

<sup>176</sup> See “U.S. Tuna Cannery Receipts” (Exh. US-22). As noted above, there are any number of reasons why dolphin safe yellowfin is relatively uncompetitive with dolphin safe albacore and dolphin safe skipjack in the U.S. market, including price, quality, and food safety. See *supra*, sec. III.B.1.

<sup>177</sup> Pouliot 2016, at 10-16 (Exh. MEX-2).

<sup>178</sup> Pouliot 2016, at 13-15 (Exh. MEX-2).

and Mexican demand equations.<sup>179</sup> However, Mexico’s basic assumption is incorrect for at least two reasons: (1) there is no reason to believe that Mexican and U.S. consumers have the same preferences with regard to tuna product; and (2) the available evidence refutes the idea that U.S. consumers have a preference for yellowfin tuna product. Consequently, the parameters of Mexico’s model relating to U.S. demand are all likewise inaccurate.

100. First, there is no reason to believe that Mexican and U.S. consumers have the same preferences concerning tuna product. Mexican and U.S. consumer preferences differ both in general terms and in specific preferences for food products. For example, a 2012 McKinsey study found that Mexican consumers are more brand-loyal than American consumers and less likely to “trade down” from their favorite brands in response to economic downturn, particularly in food-related categories.<sup>180</sup> With respect to particular foods, Mexican and U.S. consumers have markedly different preferences concerning chicken meat, with U.S. consumers strongly preferring white meat and Mexican consumers preferring dark meat.<sup>181</sup> Preferences are also different with respect to cheese, with soft cheeses such as Oaxaca, Panela, and Fresco being the most popular in Mexico, and mozzarella, cheddar, and “other American” cheeses dominating the U.S. market.<sup>182</sup> Fruit and vegetable preferences are also different, with Mexican consumers preferring mandarins, mangoes, coconuts, lemons and limes, and pineapples more strongly than U.S. consumers, and U.S. consumers preferring juiced rather than fresh fruits more strongly than Mexican consumers.<sup>183</sup> Mexican consumers also had a much stronger preference for chili peppers than their U.S. counterparts, who prefer lettuce.<sup>184</sup>

101. Further, Mexico submits no evidence substantiating its assertion that “[t]here is no reason for U.S. consumers to have a different appreciation for canned yellowfin tuna than Mexican consumers.”<sup>185</sup> The fact that, as Mexico states, 17 percent of Americans are Hispanic suggests that some part of that 17 percent of the U.S. population may have preferences somewhat similar

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<sup>179</sup> Specifically, the intensity of demand parameter is based on the quantity of canned tuna consumed in an individual country, divided by the average price. It is the only variable that is different between the U.S. and the Mexican demand equations and, since the average price of tuna between the two market differs by only \$0.04, it is driven almost entirely by the 2014 consumption of tuna in the two markets, specifically by the fact that the United States consumed 79 percent of tuna of the combined U.S. and Mexico markets presented by Mexico.

<sup>180</sup> Oscar Garcia, Jorge Lacayo & Anne Martinez, McKinsey & Company, “Understanding Mexico’s Evolving Consumers,” at 2-3 (August 2012) (Exh. US-66).

<sup>181</sup> Christopher G. Davis et al., U.S. Dep’t Ag., *Assessing the Growth of U.S. Broiler and Poultry Meat Exports*, at 9, 23 (2013) (Exh. US-67).

<sup>182</sup> Gabriel Hernandez, U.S. Dep’t Ag. Foreign Ag. Service, *GAIN Report No. MX4072: Dairy Products Annual Report*, at 4-5 (Oct. 16, 2014) (Exh. US-68); Jean C. Buzby, U.S. Dep’t Ag., “Cheese Consumption Continues to Rise” (Feb. 2005) (Exh. US-69).

<sup>183</sup> See Jim Stout et al., U.S. Dep’t Ag., Econ. Res. Serv., *Global Trade Patterns in Fruits and Vegetables*, at 45 (2004) (Exh. US-70).

<sup>184</sup> Stout et al. 2004, at 45 (Exh. US-70).

<sup>185</sup> Pouliot 2016, at 16 (Exh. MEX-2).

to Mexican consumers (although likely shaped also by other American consumer preferences), but it provides no support for the idea that U.S. consumers *generally* have the same preferences as Mexican consumers. Indeed, the fact that Hispanic Americans are recognized as a subgroup of American consumers with distinct preferences in terms of food items suggests that the opposite is true.<sup>186</sup> Further, the evidence indicates that U.S. and Mexican consumers differ in their willingness to purchase tuna product produced from setting on dolphins.<sup>187</sup> Thus, Mexico’s assumption of a single market for tuna product is unsupported and deeply flawed.

102. Second, and relatedly, the assumption that U.S. consumers have a strong preference for canned yellowfin vis-à-vis canned “generic” tuna is also refuted by the available evidence. The U.S. tuna product market is made up of a variety of products – not “yellowfin” and “generic,” as Mexico assumes. As described above in section III.B.1, the low-end portion of the market is composed of “light tuna” – a mixture of skipjack, yellowfin, tongol, and/or big-eye tuna<sup>188</sup> – and is heavily influenced by cost.<sup>189</sup> The high-end portion of the market is dominated by “white tuna” (*i.e.*, albacore).<sup>190</sup> Some products labeled “yellowfin” also fall into the high-end portion of the market, although consumption (and demand) for such products are low, compared to albacore.<sup>191</sup> As discussed in the previous section, however, this is not because premium yellowfin tuna product is not available on the U.S. market but rather because U.S. consumers

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<sup>186</sup> See Nielsen, “A Fresh View of Hispanic Consumers” (Apr. 15, 2014) (Exh. US-71); Keith Nunes, “Hispanic Shoppers Moving to the Mainstream,” *meatpoultry.com* (Aug. 26, 2014) (Exh. US-72) (noting that Hispanic consumers are becoming more similar to other American consumers in their purchasing habits but noting that “a gap between the purchasing patterns of Hispanic and all food shoppers on average also continues to persist”).

<sup>187</sup> See, e.g., *US – Tuna II (Mexico) (Panel)*, para. 7.288 (“We further note that it is *undisputed* that US consumers are sensitive to the dolphin safe issue. . . . [The purchasing policies of major tuna processors, first enacted in April 1990] are still in place: such companies will not purchase tuna *from vessels that fish in association with dolphins.*”) (emphasis added). In this regard, it is striking that EII reports that zero Mexican companies have committed to adhere to EII standards compared to the commitments made by the significant number of companies (both U.S. and foreign) serving the U.S. market. 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). 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.”).

<sup>188</sup> Bumble Bee, “What’s the Difference Between the Various Types of Canned Tuna?” (Exh. US-13).

<sup>189</sup> See *supra* sec. III.B.1.a (citing FAO, *Recent Developments in the Tuna Industry*, at 96-97 (Exh. MEX-14) (stating that “canned tuna has always represented a low-cost and handy food for most consumers: in the United States, the psychological limit of 1 United States dollar per can has been an established price barrier”); FFA, *Market and Industry Dynamics* at 253 (Exh. US-7) (stating that in 2007, 46% of all tuna was sold on promotion”).

<sup>190</sup> See *supra*, sec. III.B.1.b (citing 21 C.F.R. § 161.190(a)(4)(i) (Exh. US-12)).

<sup>191</sup> See *supra*, secs. III.B.2.b-c.

prefer other types of tuna.<sup>192</sup> In particular, U.S. consumers have a demonstrated preference for albacore over other types of tuna product.<sup>193</sup>

103. Mexico, in contrast to this data on actual U.S. consumer preferences, has provided no evidence in support of its assumption that U.S. consumers have a preference for yellowfin tuna over all other types of tuna, besides its incorrect assertion that U.S. preferences should be the same as Mexican preferences.<sup>194</sup> Indeed, Mexico's model does not even acknowledge the existence of albacore as a premium tuna product and its popularity with U.S. consumers, despite the fact that Exhibit MEX-9 states that albacore is an important premium tuna product on the U.S. market.<sup>195</sup> Further, Exhibit MEX-29 relates to Mexican consumer preferences rather than to U.S. consumer preferences.<sup>196</sup> Pinsa and Marindustrias, the two leading Mexican tuna product companies mentioned in the exhibit, may market only yellowfin as a premium product, but many companies focused on the U.S. tuna product market, including the "big three" companies, have one or more premium albacore products, as well as sometimes premium yellowfin products.<sup>197</sup>

104. Further, the \$2 per kg value assigned to the mean willingness to pay for yellowfin tuna product over generic seems to be entirely assumed and divorced from the reality of the U.S. market. Indeed, Mexico is explicit that this figure is not calculated but is "assumed in the model."<sup>198</sup> However, Mexico suggests that it is conservative in light of a regression analysis that suggested an estimated premium on yellowfin tuna of \$1.13-\$4.67 per kg. Yet Mexico acknowledges that the data is not available "to calibrate the distribution of preference for canned yellowfin tuna versus canned generic tuna" and that it is "not possible to isolate the stores that sell canned yellowfin tuna from the data."<sup>199</sup> Mexico also asserts, in contradiction to its price premium assumption, that "where it is offered, canned yellowfin tuna is priced to compete with

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<sup>192</sup> See *supra*, sec. V.B.2.b.i.

<sup>193</sup> See *supra*, sec. III.B.1.b (noting that: (1) while the United States consumes 19% of total consumption of canned tuna overall, it consumes 55-60% of the world's consumption of albacore); and, (2) Exhibit MEX-15 shows that canned albacore sales account for 29% of sales by weight but 40% by value, demonstrating that albacore is a high value product; and, (3) the average retail price for canned albacore tuna is \$5.32 per pound, compared to \$3.17 per pound for light tuna). Further, a recent study found that cross-price elasticity between albacore and skipjack canned tuna was inelastic (0.325), showing that the U.S. consumer differentiates between albacore and light tuna and is reluctant to substitute away from one to the other. See Chiang et al. 2016, at 21 (Exh. US-8).

<sup>194</sup> See Pouliot 2016, at 10-11 (Exh. MEX-2).

<sup>195</sup> Atuna, "Soupy vs. Steaky: The Idea Behing BB's New Marketing Plan" (Mar. 4, 2016) (Exh. MEX-9).

<sup>196</sup> See Pinsa and Tuny Webpages (Exh. MEX-29).

<sup>197</sup> See StarKist, Products (Exh. US-19); Bumble Bee, Canned Tuna (Exh. US-63); Genova, Our Products (Exh. US-64); BenZ's, Our Products (Exh. US-65); Chicken of the Sea, Products: Tuna, <http://chickenofthesea.com/products/tuna> (accessed July 27, 2016) (Exh. US-73); Wild Planet, Products: Tuna, <http://www.wildplanetfoods.com/our-products/tuna/> (accessed July 27, 2016) (Exh. US-74).

<sup>198</sup> Pouliot 2016, at 15-16 (Exh. MEX-2).

<sup>199</sup> Pouloit 2016, at 17 (Exh. MEX-2).

other canned tuna products.”<sup>200</sup> Thus, Mexico both admits that the regression is not a true estimate of willingness to pay and makes statements suggesting there should be no price premium. Further, the regression does not properly represent the price premium for yellowfin, as the data is not detailed enough to do a proper analysis, the regression does not account for albacore, and the dataset is not representative of the entire market, as demonstrated by the need to remove over 60 percent of observations due to lack of sales.<sup>201</sup>

105. Similarly, the assumption of a logistic distribution of willingness to pay, for which Mexico provides no justification, is inconsistent with the reality of the U.S. tuna product market.<sup>202</sup> A logistic distribution of willingness to pay means that half of consumers are willing to pay more than the mean (\$2 kg for yellowfin) and half are willing to pay less. This does not describe the U.S. distribution of willingness to pay for tuna, where many consumers show a high sensitivity to price, as shown by the fact that nearly half of all sales of canned tuna are at discounted (sale) prices, suggesting that consumers are unwilling to pay full price, let alone a premium.<sup>203</sup> Indeed, a recent study found that yellowfin and skipjack have particularly elastic demand such that consumers will decrease consumption of these types of canned tuna by more than a proportional amount as prices rise.<sup>204</sup>

106. Thus, the key assumptions underlying the demand side of Mexico’s model – that U.S. consumers have the same preferences as Mexican consumers and that they favor yellowfin tuna product – are not supported by the evidence, *even without taking into account* that U.S. and Mexican consumers differ as to willingness to purchase tuna product produced from setting on dolphins. Consequently, the demand parameters set based on those assumptions, which are the heart of Mexico’s model, are also incorrect.

107. Specifically: (i) Equations 1 and 2 are wrong in assuming a market in which all premium product is yellowfin; (ii) Equation 3 is wrong in establishing a mean willingness to pay of \$2 extra per kg for yellowfin than for all other tuna products; (iii) the intensity of demand parameter introduced in Equation 5 wrongly assumes that the only difference between the U.S. and Mexican markets is the quantity of tuna consumed; and (iv) the logistic distribution assumed in

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<sup>200</sup> Pouloit 2016, at 17 (Exh. MEX-2).

<sup>201</sup> See Pouloit 2016, at 18-19 (Exh. MEX-2). Finally, we note that, even aside from these issues, we were unable to reproduce Mexico’s calculations based on the data Mexico provided.

<sup>202</sup> See Pouloit 2016, at 14 (Exh. MEX-2).

<sup>203</sup> FFA, Market and Industry Dynamics, at 253 (Exh. US-7) (stating that in 2007, “46% of all tuna was sold on promotion”).

<sup>204</sup> Specifically, the study found that in conventional supermarkets, the own-price elasticity of albacore is near unity (so that as the price increases, change in sales is nearly proportional), while the own-price elasticity of conventional skipjack is -1.188 (significantly higher than one, so that “a price increase leads to a proportionately greater decline in sales and revenue). Chiang et al. 2016, at 8 (Exh. US-8). In natural supermarkets, the study found that the own-price elasticities of both skipjack and yellowfin tuna cans were higher still: -1.910 and -1.646, respectively. Chiang et al. 2016, at 8 (Exh. US-8).

Equation 8 is inappropriate because it ignores the fact that tuna sales are highly sensitive to price and, therefore, willingness to pay is not distributed in this manner (with half of consumers willing to pay the mean willingness to pay or more for a premium product). These equations are central to Mexico's model and, consequently, the errors in the underlying assumptions render Mexico's model critically flawed.<sup>205</sup>

### **iii. Mexico Is Not the Only Supplier of Yellowfin Tuna Product to the U.S. Market**

108. Another key assumption underlying Mexico's model is that Mexico is the only potential supplier of yellowfin tuna product to the U.S. market.<sup>206</sup> Specifically, Mexico assumes that, once the alleged latent demand for yellowfin has been awakened by a change to the measure, only Mexican producers will be able to respond to it. In this regard, Mexico asserts that U.S. canneries could not increase production and that Mexico is the only supplier of yellowfin tuna product to the U.S. market.<sup>207</sup> These assumptions are similarly incorrect and, consequently, the equations relying on them are flawed.

109. First, yellowfin tuna is caught and processed throughout the world; Mexico is not the sole supplier. The data presented in Exhibit MEX-15 shows that at least 30 different brands from North America, Europe, Asia, and South America marketed all-yellowfin tuna products in the U.S. market.<sup>208</sup> In particular, Chicken of the Sea, StarKist, and Bumble Bee, as well as numerous smaller labels, all sell all-yellowfin products, including chunk, solid, and fillets in both water and oil and also combine yellowfin with skipjack to produce "light meat" tuna. Similarly, U.S. cannery receipts show that U.S. canneries purchase from U.S. vessels and import yellowfin each year for processing.<sup>209</sup> Data from regional fisheries management organizations (RFMOs)

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<sup>205</sup> In addition to these flawed key assumptions, we also note the following errors: (1) The value input into Equation 12 in order to determine the U.S. demand intensity does not match the value cited in Table 1 or in the text of Exhibit MEX-2, *see* Pouliot 2016, at 5, 34 (Exh. US-2); (2) Tables 1-3 contain discrepancies from the most recently revised U.S. trade data, *compare id.* at 5-6 (not including 2015 data and presenting different numbers than the most recently updated data) *with* "U.S. Imports for Consumption of Tuna Product from the World and from Mexico" (Exh. US-62); "U.S. Supply of Canned Tuna" (Exh. US-9); and (3) Table 8 represents a larger group of products than tuna product, and, specifically, 1604.19 should be excluded.

<sup>206</sup> *See* Pouliot 2016, at 5-6, 8, 30 (Exh. MEX-2).

<sup>207</sup> Pouliot 2016, at 5-6, 8 (Exh. MEX-2) (assuming that U.S. canneries could not increase production); *id.* at 30 ("Equation (20) says that yellowfin tuna consumed in the United States comes from Mexico.").

<sup>208</sup> *See* Nielsen, "Item Rank Report – Seafood-Tuna-Shelf Stable" (Oct. 24, 2015) (Exh. MEX-15) (These brands include: Chicken of the Sea, Star Kist, Bumble Bee, Tonnino, Natural Value, Tuny, Sclafani, BenZ's, Crown Prince, Genova, Cora, Callipo, Roland, Polar, California Delight, Oro di Sicilia, Progresso, Flott, Neptuna, Nostromo, Dave's Gourmet Albacore, Ortiz, Rio Mare, Sustainable Seas, Pole & Line, Dolores, and Van Camp's.).

<sup>209</sup> *See* "U.S. Tuna Cannery Receipts" (Exh. US-22).

similarly show that many countries' vessels harvest yellowfin.<sup>210</sup> Thus, Mexico is far from the only producer of yellowfin tuna or tuna product.

110. Second, even if there were a sudden increase in U.S. demand for yellowfin tuna product under Mexico's counterfactual (a consequence that is not supported by the evidence), Mexico would not be the sole supplier of canned yellowfin tuna. Most importantly, and contrary to Mexico's assertions, U.S. canneries are not operating at full capacity. Mexico chooses to look no further back than 2010 when asserting that there are "small variations in the U.S. production quantity."<sup>211</sup> Looking even a few years earlier, however, shows that production was 21.2 percent greater in 2008 than in 2014 and 32.1 percent greater, on average, from 2001-2003 than 2014, showing that U.S. production has the ability to shift, based on demand.<sup>212</sup> Further, supply of tuna to U.S. canneries has increased by 50.6 percent from 2010 to 2015, suggesting that production could be increased quickly without needing to scramble to purchase additional tuna.<sup>213</sup> Finally, a new plant opened in American Samoa in 2014/2015, which has slowly increased production through 2015 and into 2016, such that U.S. shipments from American Samoa have increased by 4 percent by volume over the previous year as of May 2016.<sup>214</sup>

111. There is also no reason to think that other tuna industries in other countries could not similarly increase production. In particular, as mentioned above, canneries in Thailand and Ecuador – first and second largest exporters of canned tuna to the United States<sup>215</sup> – are operating at about 80 and 70 percent capacity, respectively.<sup>216</sup> Consequently, there is every reason to believe that the tuna processing industries in these countries would increase production to meet any increasing U.S. demand for canned yellowfin.

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<sup>210</sup> See IATTC Data (2015) (Exh. Mex-22) (showing that Ecuador, Venezuela, Panama, Colombia, Nicaragua, Japan, Korea, Taiwan, and Vanuatu all harvested yellowfin); WCPFC, Yearbook – 2012, at 5-62, 77-101 (2013) (Exh. US-82) (showing that Australia, Belize, China, Indonesia, Korea, Japan, the Philippines Taiwan, and the United States, *inter alia*, all catch yellowfin).

<sup>211</sup> Pouliot 2016, at 5 (Exh. MEX-2).

<sup>212</sup> See "Historical Supply of Canned Tuna" (Exh. US-6).

<sup>213</sup> See "U.S. Tuna Cannery Receipts" (Exh. US-22).

<sup>214</sup> See "Trimarine Officially Opens State-of-the-Art Tuna Processing Facility in American Samoa," *trimarinegroup.com* (January 30, 2014) (Exh. US-75); "U.S. Imports from American Samoa of Canned Tuna and Loins" (Exh. US-76) (also showing growth in supply of 4.2 percent from 2013 to 2015).

<sup>215</sup> "U.S. Imports of Canned Tuna from All Countries Individually – 2010-2015" (Exh. US-36).

<sup>216</sup> FFA, Market and Industry Dynamics, at 159 (Exh. US-7) (estimating that Thailand is operating at approximately 85 percent of capacity, and Ecuador is likewise operating at approximately 75-80 percent); 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, but that production capacity in Manabi Province, which accounts for 70 percent of Ecuador's processing operations, has a processing capacity of 450,000 per year, thus suggesting that the country's overall processing capacity is approximately 642,857 per year).



112. Thus, Mexico’s assumption that only the Mexican tuna industry could respond to any change in U.S. demand for yellowfin is incorrect. In reality, both U.S. canneries and the foreign canneries that currently supply the U.S. market with yellowfin and other tuna product would compete to satisfy any new U.S. demand. Consequently, Equation 20, the parameter imposing that assumption on the U.S. market, and Mexico’s model as a whole are fundamentally flawed.

**iv. Mexican Canneries Do Not Have the Ability to Increase Production Without Any Impact on Marginal Cost**

113. Finally, Mexico’s model assumes that Mexico has the ability to increase production of yellowfin tuna product (seemingly without limit) without increasing marginal cost.<sup>217</sup> This assumption is incorrect for at least two reasons: (1) the United States is a sufficiently important consumer of canned tuna that a shift in demand of the magnitude Mexico envisions would have an effect on world prices of yellowfin suitable for canning; and (2) Mexico is wrong to assume that it could import yellowfin from other ETP fishing nations at no increasing cost. Consequently, Mexico’s model – specifically Equation 21, which includes Mexican imports of yellowfin tuna in Mexican supply – and Mexico’s assumption throughout its model of static tuna product prices are flawed.<sup>218</sup>

114. First, Mexico is wrong that the United States is a price taker in the global tuna product market.<sup>219</sup> As noted above, the United States consumes nearly 20 percent of the global supply of canned tuna.<sup>220</sup> This share of global consumption is such that the U.S. market has a significant effect on prices of tuna suitable for canning. As a 2010 study by the FAO found, “purse seine-caught frozen fish markets” in Thailand, Japan, and Europe (major processing centers) “are themselves strongly influenced by the level of the United States demand for canned tuna.”<sup>221</sup> In particular, with respect to yellowfin and skipjack, Bangkok is “the key marketplace where prices are formed and from there are imposed on peripheral markets.”<sup>222</sup> And, the report found, the “price flexibility” in Bangkok (*i.e.*, the extent to which price changes when catches fluctuate) “seems to respond more to demand conditions in the market for canned products (*particularly the United States*) than to supply conditions.”<sup>223</sup> Thus, Mexico’s assumption that the price of

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<sup>217</sup> Pouliot 2016, at 22 (Exh. MEX-2).

<sup>218</sup> Pouliot 2016, at 22 (Exh. MEX-2).

<sup>219</sup> Specifically, Mexico states that U.S. “production and consumption of tuna are small shares of the global tuna market” and, on this basis, assumes that “the world supply of *canned tuna* is perfectly elastic.” Pouliot 2016, at 22 (Exh. MEX-2) (emphasis added). Mexico thus ignores the fact that the United States is such a significant consumer of canned tuna that the U.S. market has effect on global prices of tuna for canning.

<sup>220</sup> FFA, Market and Industry Dynamics, at 241 (Exh. US-7).

<sup>221</sup> FAO, Recent Developments in the Tuna Industry at 104 (Exh. MEX-14).

<sup>222</sup> FAO, Recent Developments in the Tuna Industry at 104 (Exh. MEX-14).

<sup>223</sup> FAO, Recent Developments in the Tuna Industry at 104 (Exh. MEX-14); *see id.* at 106 (stating that “the United States market has the greatest influence on the canned tuna industry”) (emphasis added).

yellowfin suitable for canning would be unaffected by a significant shift in U.S. demand such as the one assumed in Mexico's model is incorrect.<sup>224</sup>

115. Further, the price of what Mexico's model calls "generic" tuna product would also be affected. Mexico's model results in a dramatic decline in the quantity of tuna product other than canned yellowfin tuna consumed in the U.S. market.<sup>225</sup> In light of the effect of U.S. demand on the price of tuna product, this sharp decrease in demand would lead to a decrease in the price of other types of tuna product, just as it would lead to an increase in the price of canned yellowfin tuna. Due to the high elasticity of tuna product discussed above, any decline in the price of tuna products containing species other than yellowfin, which Mexico recognizes are substitute goods for canned yellowfin tuna,<sup>226</sup> would cause demand to shift back towards other tuna products and away from canned yellowfin tuna.<sup>227</sup> Mexico's model simply ignores this obvious dynamic.

116. Second, and relatedly, Mexico's assumption of a perfectly elastic supply curve (*i.e.* a horizontal supply curve, meaning that Mexico could produce an infinite amount of yellowfin tuna product without incurring any additional marginal costs) is likewise unsupported and incorrect. In terms of evidence, Mexico supports its assertion of perfectly elastic supply by stating that, because Mexican canneries currently operate on a single day shift, "production could easily be expanded to can imported yellowfin tuna."<sup>228</sup> However, this assertion, and the supporting affidavit of Mexican canneries, relates not to marginal costs (which dictate the slope of the supply curve) but to fixed costs, namely infrastructure.<sup>229</sup> Mexico's assertion is, therefore, without basis in the evidence.

117. The assumption is also incorrect. As described above, the price of yellowfin suitable for canning would rise in response to increased U.S. demand, thwarting Mexico's assumption of no increasing marginal cost. In addition, the supply of yellowfin in the ETP is not unlimited and an increase of the kind Mexico assumes would likely encounter hard supply constraints. Catches of tuna species in the ETP are regulated by the IATTC, which monitors catches and takes corrective action if they rise above sustainable levels. The latest IATTC report found that recent fishing

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<sup>224</sup> See WTO, *A Practical Guide to Trade Policy Analysis*, at 150-151 (Exh. US-57) (stating that where a country is large enough to have an effect on prices, and in other contexts, "assuming a finite elasticity of supply – and hence a variable 'world', or more exactly, foreign price – is more realistic" and explaining how this should be modelled).

<sup>225</sup> See Pouliot 2016, at 5, 33 (Exh. MEX-2) (showing that U.S. consumption of canned tuna in 2014 was 330,264 mt, with very little of it being yellowfin, compared to 230,746 mt of "generic" tuna consumed in the United States under Mexico's model).

<sup>226</sup> Pouliot 2016, at 10 n.5 (Exh. MEX-2).

<sup>227</sup> See Pouliot 2016, at 10 n.5 (Exh. MEX-2).

<sup>228</sup> Pouliot 2016, at 22 (Exh. MEX-2).

<sup>229</sup> Pouliot 2016, at 22 (Exh. MEX-2); Exh. MEX-26 (BCI) [[

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mortality rates are slightly below the MSY level and that the SBR was at or below the SBR at MSY, suggesting that yellowfin tuna was in an overfished state.<sup>230</sup> These findings suggest that the IATTC would take action if catches of yellowfin in the ETP increased substantially.<sup>231</sup> Indeed, at the 2016 meeting of the IATTC, the Commission adopted interim harvest control rules for yellowfin tuna that would trigger measures to reduce catch.<sup>232</sup>

118. Finally, Mexico's assumption that it could import additional yellowfin for canning without any increased cost is particularly flawed due to the structure of the tuna industry in the major tuna producer in the area, Ecuador. Mexico claims that it would import from other ETP fishing countries the 20,000 additional mt of yellowfin that its processors would need to serve the Mexican market, given the increased exports to the United States.<sup>233</sup> Ecuador is the only country in the area that could supply that volume.<sup>234</sup> Ecuador, however, has its own tuna processing industry. It was the second largest producer of canned tuna as of 2008<sup>235</sup> and is the second largest exporter (by value) of canned tuna to the United States.<sup>236</sup> Yet Mexico's model assumes that if the U.S. measure were changed so as to unleash a latent demand for canned yellowfin, the Ecuadorian industry would not try meet this demand itself, but instead would sell the less valuable raw/frozen input to Mexico so that the Mexican industry could reap the profits of producing a processed product.<sup>237</sup> This assertion is *particularly far-fetched and flawed* given

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<sup>230</sup> IATTC, Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015," at 52, 57-58 (June 2016) (Exh. US-43).

<sup>231</sup> 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) (data drawn from NOAA U.S. Foreign Trade, <http://www.st.nmfs.noaa.gov/commercial-fisheries/foreign-trade/>) (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). In this regard, we note that the quantity of tuna that Mexico estimates it would import from Ecuador, 20,000 kg canned weight, amounts to over a third (36 percent) of the combined catch of the five countries from which Mexico predicts it could import. See Pouliot 2016, at 31 (Exh. MEX-2).

<sup>232</sup> See IATTC, Resolution C-16-02: Harvest Control Rules for Tropical Tunas (July 2016) (Exh. US-52).

<sup>233</sup> See Pouliot 2016, at 29 (Exh. MEX-2).

<sup>234</sup> Ecuador's ETP yellowfin harvest is second only to Mexico with close to the capacity of 20,000 mt. IATTC, "Tunas, Billfishes and Other Pelagic Species in the Eastern Pacific Ocean in 2015," at 39 (Exh. US-43). The country on Mexico's list with the next largest yellowfin harvest, Venezuela, harvested only 12,023 mt (canned weight) in 2014. See Pouliot 2016, at 29 (Exh. MEX-2).

<sup>235</sup> See FFA, Market and Industry Dynamics, at 193-194 (Exh. US-7).

<sup>236</sup> "U.S. Imports of Canned Tuna from All Countries Individually – 2010-2015" (Exh. US-36).

<sup>237</sup> In this regard, we note that Ecuador is already a significant exporter of canned tuna to both the United States and Mexico. In 2015, for example, Ecuador exported \$2.0 million in prepared tuna products to Mexico, compared to \$168,258 in frozen tuna and nothing in fresh tuna. "Ecuador Exports of Prepared Tuna by Value" data collected from the Global Trade Atlas, <https://www.gtis.com/gta> (Exh. US-78). In the same year, Ecuador exported \$105.3 million in prepared tuna to the United States. *Id.*

that, under Mexico's Counterfactual #2, *only* Ecuadorian tuna product could carry the dolphin safe label in the U.S. market.<sup>238</sup>

119. Thus, Mexico's assumption of a perfectly elastic supply curve based on its ability to import yellowfin for canning without limit and without any effect on its price, reflected in Equations 20 and 22,<sup>239</sup> is not reasonable. Relatedly, Mexico's assumption of a constant price of yellowfin supply and other tuna product, reflected throughout its model, is also incorrect. These assumptions are both central to Mexico's model and, therefore, the model itself is deeply flawed.

### **3. Conclusion**

120. Even aside from the fact that the U.S. measure now complies with the DSB recommendations and rulings, Mexico's partial equilibrium model is not an appropriate tool for determining the level of nullification and impairment in this case. Sufficient evidence does not exist to construct an accurate partial equilibrium model. Instead, Mexico has constructed a model that asks the wrong questions and relies on unreasonable assumptions. The evidence clearly establishes that there is no pent-up U.S. demand for canned yellowfin and that there is very little demand at all for canned tuna produced from setting on dolphins. Further, U.S. and Mexican consumer preferences differ in material ways, and it is not the case that the United States and Mexico constitute a single tuna product market. Mexico's other assumptions, including that Mexico is the only supplier of canned yellowfin tuna to the U.S. market and that Mexican industry can increase production without increasing marginal cost, are also disproved by the evidence.

121. In light of the above, Mexico's model calculation of \$472.3 million in nullification or impairment is dramatically inflated, and is inconsistent with the DSU. The United States respectfully requests that the Arbitrator reject this figure, as well as reject the use of Mexico's model in this case as it is not an appropriate tool for determining the level of nullification or impairment given the available evidence. The United States provides an appropriate model, given the evidence available, in the following section.

## **VI. THE APPROPRIATE CALCULATION OF THE LEVEL OF NULLIFICATION OR IMPAIRMENT**

### **A. The Appropriate Counterfactual Is Withdrawal of the Measure**

122. As discussed in section V.B.1.a above, a Member has discretion as to how to implement DSB recommendations, and past WTO arbitrators have indicated that the normal counterfactual for calculating nullification or impairment is withdrawal of the measure. The United States uses

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<sup>238</sup> See Pouliot 2016, at 34 (Exh. MEX-2); *see also* Mexico's Methodology Paper, para. 30 ("Ecuador is the only source other than Mexico in which dolphin-safe tuna can be assured because of the AIDCP requirements applied to its fishing operations in the ETP.").

<sup>239</sup> Pouliot 2016, at 29-30 (Exh. MEX-2).

this counterfactual to calculate the level of nullification or impairment, putting aside the issue of compliance.

123. Under such a counterfactual, it is reasonable to conclude that all tuna product currently meeting the dolphin safe labeling requirements, as well as tuna product produced from setting on dolphins consistent with the AIDCP, could be sold with some label suggesting it is “dolphin safe.” However, it is also reasonable to conclude that producers and retailers of tuna product not produced from setting on dolphins will continue to seek to differentiate their product from tuna product produced from setting on dolphins, such as by marketing their product in ways that Mexican producers cannot – *e.g.*, claiming their tuna product was “not produced from the intentional encirclement of dolphins.” Finally, it is reasonable to conclude that the commitments made either to EII or directly to customers by the vast majority of producers, distributors, exporters, importers, and retailers that serve the U.S. tuna product market to not produce, hold, or sell tuna or tuna product that was harvested by setting on dolphins would remain in place.

**B. A Market-Based Approach Is the Appropriate Method of Calculating the Level of Nullification or Impairment**

124. As explained in section V.B.2.a above, the data essential to constructing and correctly specifying a partial equilibrium model are not available. Consequently, Mexico has not employed the appropriate methodology to answer the question at hand, which has resulted in Mexico asking the wrong questions, relying on unreasonable assumptions, and calculating an inflated level of nullification or impairment.

125. In light of the evidence available, the most appropriate methodology to calculate the amount of nullification or impairment caused by the U.S. dolphin safe labeling measure would be to compare, on a prospective basis, the U.S. imports from Mexico of tuna product with the measure in place to the level of imports that would occur if the measure were withdrawn. This approach, which examines Mexico’s historical market share of the U.S. tuna product market prior to the adoption of the DPCIA, is both consistent with the approach taken by past Article 22.6 arbitrators as well as the evidence on this record.

126. Where relevant data was available, previous Article 22.6 arbitrators have used historical export or import levels to determine the level of nullification or impairment caused by a measure. In *EC – Hormones*, the arbitrator calculated the level of nullification or impairment in respect of edible beef offal by: (1) considering average U.S. exports of the covered products in the three years preceding the import ban at issue; (2) making a downward adjustment based on changing preferences; (3) multiplying the estimated figure by the estimated price of the products; and (4) deducting the value of current imports.<sup>240</sup> In *EC – Bananas*, the arbitrator calculated the effect of the EU measure based on the level of Ecuador’s “best-ever exports,” which occurred the year

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<sup>240</sup> *EC – Hormones (US) (Article 22.6 – EC)*, paras. 66-78; *EC – Hormones (Canada) (Article 22.6 – EC)*, paras. 57-67.

before the measure was enacted.<sup>241</sup> In *US – Gambling*, the arbitrator used the difference between the complaining Member’s revenues from supplying the services affected by the challenged measure the year before the measure came into effect and the average actual annual revenue in the years following to calculate the level of nullification or impairment.<sup>242</sup>

127. A similar approach is appropriate in this dispute because historical levels of U.S. imports of Mexican tuna and tuna product are indicative of the level of nullification and impairment caused by the U.S. measure. As described in sections III.A and III.B.2.d above, the DPCIA was originally enacted in 1990.<sup>243</sup> Prior to 1990, there was no dolphin safe labeling measure or other instrument addressing dolphin safety concerns with respect to tuna and tuna product. As such, levels of Mexican exports to the United States prior to 1990 during years when there was no measure and market access was not limited are generally instructive as to the levels of imports from Mexico that might exist if the dolphin safe labeling measure were withdrawn. The U.S. model, therefore, uses Mexican exports during the three years preceding 1990 (1987-1989).

128. The U.S. approach uses Mexico’s share of U.S. imports of the covered products during the relevant historical period rather than absolute quantities of imports for two reasons. First, U.S. consumption of tuna product has declined markedly since the period before the DPCIA was adopted. In particular, U.S. imports of tuna product decreased by 28.4 percent between 1989 and 2015.<sup>244</sup> Consequently, a volume-based approach would not be appropriate because it would not account for the overall decline in tuna product consumption. Second, data on imports of “tuna product,” as such, is only available beginning in 1989.<sup>245</sup> Therefore, because it is preferable not to base a historical analysis on data from a single year, as that year may not be representative of import levels during the period overall, the U.S. model uses Mexico’s share of imports of all tuna (*i.e.*, tuna products and fresh tuna) during the three years prior to 1990.

129. Using Mexico’s historical share of all tuna imports, rather than just tuna product, may somewhat overestimate the level of nullification and impairment, but is likely very close to Mexico’s historical share of tuna product imports for several reasons. First, tuna product is a substantial subset of the “all tuna” category, accounting for between 90.3 and 98.0 percent of

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<sup>241</sup> *EC – Bananas III (Ecuador) (Article 22.6 – EC)*, para. 169.

<sup>242</sup> *US – Gambling (Article 22.6 – US)*, paras. 3.177, 3.182, 3.184, 3.187-188.

<sup>243</sup> *See supra* secs. III.A and III.B.2.d.

<sup>244</sup> *See* “U.S. Imports of Tuna Product from the World and from Mexico” (Exh. US-62) (showing that total imports of tuna product were 334,048 metric tons in 1989 and 239,103 metric tons in 2015).

<sup>245</sup> *Compare* “U.S. Imports of Tuna Product from the World and from Mexico” (Exh. US-62) *with* “Historical U.S. Imports of All Tuna” (Exh. US-79). In this regard, we note that it is well established that the U.S. measure applies to “tuna product,” which covers canned and pouched tuna, as well as tuna loins and frozen tuna, but excludes fresh tuna. *US – Tuna II (Article 21.5 – Mexico) (AB)*, n.101 (citing 16 U.S.C. § 1385(c)(5) and explaining that “tuna product” refers to a “food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days”).

U.S. imports of all tuna, by volume, since 1989.<sup>246</sup> Further, Mexico's share of U.S. imports of tuna product in 1989, 3.8 percent by weight, was very close to Mexico's share of U.S. imports of all tuna, 3.4 percent by weight, in the same year<sup>247</sup> and is below the numbers that the United States uses in its analysis.

130. On this basis, the United States identified U.S. imports of tuna product from Mexico in the three years prior to 1990 and calculated Mexico's market share, by volume.<sup>248</sup> Using an average is preferred in such cases as it smooths year-to-year anomalies and gives a more accurate picture of Mexico's market share during the relevant period. Mexico's average annual share of U.S. imports of all tuna from 1987-1989 was 3.9 percent, by volume. The United States also notes that in 1987 Mexico's import share reached its historical high of 5.8 percent.<sup>249</sup> Accordingly, the United States considers that 3.9 percent is a reasonable estimate of what Mexico's annual share of U.S. imports of tuna product would be in the absence of the U.S. measure, and 5.8 percent represents the highest possible level of potential imports that could be affected by the U.S. measure (without taking into account U.S. consumer preference for tuna product not produced from setting on dolphins).

131. Next, to establish a range of U.S. imports of Mexican tuna product that could be expected under the counterfactual, the United States applied both percentages to current U.S. imports of tuna product based on average annual imports of tuna product for 2013-2015.<sup>250</sup> Over this three year period, the United States imported, on average 251,011 mt of tuna product.<sup>251</sup> Assigning Mexican tuna product a 3.9 percent share of imports at this level suggests that U.S. imports of Mexican tuna product would be approximately 9,789 mt per year.<sup>252</sup> At Mexico's historical high import share of 5.8 percent, U.S. imports of Mexican tuna product would be 14,559 mt a year.<sup>253</sup>

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<sup>246</sup> See "Tuna Product Share of All Tuna Imports" (Exh. US-80).

<sup>247</sup> See "U.S. Imports of Tuna Product from the World and from Mexico" (Exh. US-62); "Historical U.S. Imports of All Tuna" (Exh. US-79).

<sup>248</sup> U.S. Model (Exh. US-81); see "Historical U.S. Imports of All Tuna" (Exh. US-79). In this regard, we note that three years is a period that previous Article 22.6 arbitrators have chosen for considering historical import values. See *EC – Hormones (US) (Article 22.6 – EC)*, paras. 66-78; *EC – Hormones (Canada) (Article 22.6 – EC)*, paras. 57-67. We also note, however, that Mexican tuna and tuna product was embargoed from 1980 to mid-1986 due to issues unrelated to the dolphin safe issue. However, Mexico's share of tuna imports during the other period of market access for which data is available, namely 1975-1979 was in the same range as Mexico's import share during 1986-1989, namely 2.7-5.4 percent, by volume. "Historical U.S. Imports of All Tuna" (Exh. US-79).

<sup>249</sup> See U.S. Model (Exh. US-81); "Historical U.S. Imports of All Tuna" (Exh. US-79).

<sup>250</sup> See U.S. Model (Exh. US-81); "U.S. Imports of Tuna Product from the World and from Mexico" (Exh. US-62).

<sup>251</sup> See U.S. Model (Exh. US-81); "U.S. Imports of Tuna Product from the World and from Mexico" (Exh. US-62).

<sup>252</sup> See U.S. Model (Exh. US-81).

<sup>253</sup> See U.S. Model (Exh. US-81).

132. To establish the value of U.S. imports of Mexican tuna product under the counterfactual, the United States multiplied the projected quantity of Mexican tuna product imports by the average import price of tuna products from the world, excluding Mexico, for 2013-2015.<sup>254</sup> Excluding imports from Mexico from the calculation of the average price of tuna product accounts for any price difference between Mexican tuna product and other tuna product due to the ineligibility of Mexican product for the label. This approach generates a liberal estimate because, over the relevant time period, the average price of tuna product from the world excluding Mexico is between 27 and 34 percent higher than the average import price from Mexico.<sup>255</sup> Based on this calculation, the annual value of U.S. imports of Mexican tuna product under the counterfactual would be \$51.8 million, based on a 3.9 percent share of tuna product imports, and \$77.1 million, based on a 5.8 percent share.<sup>256</sup>

133. From this projected value of U.S. imports of Mexican tuna product under the counterfactual, it is necessary to subtract the value of current U.S. imports of Mexican tuna product to identify how much higher such imports would be if the U.S. measure were withdrawn (without regard to U.S. consumer preference for tuna product not produced from setting on dolphins). Using the average actual value of U.S. imports of Mexican tuna product for 2013-2015 produces a result of \$32.9 million, based on a 3.9 percent import share, and an upward bound of \$58.1 million, based on Mexico's historical high import share.<sup>257</sup>

### **C. Results of the Market-Based Approach Must Be Discounted to Account for U.S. Preferences to Arrive an Accurate Level of Nullification or Impairment**

134. As noted above, however, this market-based approach does not take into account the current U.S. consumer preference for tuna product produced from fishing methods other than setting on dolphins over tuna product produced from setting on dolphins.<sup>258</sup> In light of this fact, and the fact that under this counterfactual (as well as Mexico's inappropriate counterfactuals)

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<sup>254</sup> See U.S. Model (Exh. US-81).

<sup>255</sup> "U.S. Imports of Tuna Product from the World and from Mexico" (Exh. US-62) (showing, for example, that for 2013-2015, tuna product imports from the world excluding Mexico were \$1.19, \$1.14, and \$1.64 more valuable, per kg, than tuna product imports from Mexico).

<sup>256</sup> See U.S. Model (Exh. US-81).

<sup>257</sup> See U.S. Model (Exh. US-81); "U.S. Imports of Tuna Product from the World and from Mexico" (Exh. US-81).

<sup>258</sup> See, e.g., *US – Tuna II (Mexico) (Panel)*, para. 7.288 ("We further note that it is undisputed that US consumers are sensitive to the dolphin safe issue. ... [The purchasing policies of major tuna processors, first enacted in April 1990] are still in place: such companies will not purchase tuna *from vessels that fish in association with dolphins.*") (emphasis added); *id.* 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.") (emphasis added).



producers and retailers would continue to be able differentiate tuna product produced from fishing methods other than setting on dolphins from that tuna product produced from setting on dolphins,<sup>259</sup> the figures listed in the preceding section should be discounted to arrive at an accurate level of nullification or impairment.

135. The market impact of this particular U.S. consumer preference can be found in the commitments that the many companies serving the U.S. market, both domestic and foreign, have made to EII not to produce, hold, or sell tuna product produced from setting on dolphins.<sup>260</sup> These commitments do not depend on the content of U.S. law and would not likely change if the U.S. measure is withdrawn. Given the different supply chains of the many companies (both foreign and domestic) that serve the U.S. market, it is difficult to put an exact figure on how much of the U.S. tuna product market is covered by commitments to EII, although since the EII commitments reflect approximately 90 percent of tuna companies world-wide, it would be reasonable to conclude that such commitments cover about 90 percent of the U.S. market.<sup>261</sup> (Indeed, the “big three” companies, Bumble Bee, Chicken of the Sea, and StarKist, all of whom have made commitments to EII, control approximately 80 percent of the U.S. market alone.<sup>262</sup>)

136. At a minimum, however, the discount for U.S. consumer preferences must reflect the policies of individual retailers regarding tuna product produced by setting on dolphins or that are otherwise not affected by the U.S. dolphin safe labeling measure. As discussed above, the United States is currently aware such policies by retailers that account for 46.4 percent of total consumption of tuna product in the U.S. market.<sup>263</sup> It is necessary, therefore, to reduce by that amount the projections of Mexican exports of tuna product to the United States under the counterfactual.<sup>264</sup> To implement this adjustment, the U.S. model, after calculating the estimated value of imports of Mexican tuna product,<sup>265</sup> multiplied that figure by 0.53, to reflect the market

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<sup>259</sup> See *supra*, sec. V.B.1.

<sup>260</sup> See *supra*, sec. V.B.1.d.i (citing 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)).

<sup>261</sup> See *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.”) (citing Exh. Amicus-28).

<sup>262</sup> FFA, Market and Industry Dynamics, at 35 (Exh. US-7).

<sup>263</sup> See “Sales of Canned Tuna by Some Companies with Dolphin Safe Policies” (Exh. US-41) (BCI); “Shelf Stable Market Data” (Exh. US-38) (BCI).

<sup>264</sup> As set out in paragraph 131 above, assigning Mexican tuna product a 3.9 percent share of imports, based on 2014 levels, suggests that U.S. imports of Mexican tuna product would be approximately 9,789 mt per year. At 5.8 percent share of tuna product imports, Mexico’s historical high import share, U.S. imports of Mexican tuna product would be approximately 14,559 mt per year. See *supra* para. 131; U.S. Model (Exh. US-81).

<sup>265</sup> As described above, the U.S. model obtained the projected value of U.S. imports of Mexican tuna product by multiplying the projected quantities identified in n.264 by the average price of tuna product imports from

share available to tuna product produced from setting on dolphins, before subtracting the value of Mexico's actual imports.<sup>266</sup>

137. Accordingly, the level of nullification or impairment in this case, properly adjusted for U.S. consumer preferences as reflected in actual market access, would amount to **\$8.5 million**, using the average actual value of U.S. imports of Mexican tuna product for 2013-2015, and **\$21.9 million**, using Mexico's historical high import share.<sup>267</sup>

## VII. CONCLUSION

138. For the reasons set forth above, the United States requests that the Arbitrator find that the level of suspension of concessions requested by Mexico is in excess of the appropriate level of nullification or impairment. As described above, the United States has brought its measure into compliance and so there is no longer any nullification or impairment. And even aside from the fact that the measure is now in compliance, the more appropriate level of nullification or impairment would have been approximately **\$8.5 to \$21.9 million** per year had the measure not been brought into compliance already.

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the world, excluding Mexico. *See supra* para. 132. On this basis, the annual value of U.S. imports of Mexican tuna product under the counterfactual, not accounting for consumer preferences, would be \$51.8 million, based on a 3.9 percent share of tuna product imports, and \$77.1 million, based on a 5.8 percent share. U.S. Model (Exh. US-81).

<sup>266</sup> *See* U.S. Model (Exh. US-81). As set out in Exhibit US-81, multiplying the projected value of U.S. imports of Mexican tuna product produced estimates of total import values of \$27.5 million, based on a 3.9 percent share, and \$40.8 million, based on a 5.8 percent market share. Subtracting the value of Mexico's actual imports (an average of \$18.9 per year for 2013-2015) produces \$8.5 million and \$21.9 million, respectively. *See* U.S. Model (Exh. US-81).

<sup>267</sup> *See* U.S. Model (Exh. US-81).