Business Confidential Information Redacted

UNITED STATES – MEASURES CONCERNING THE IMPORTATION, MARKETING AND SALE OF TUNA AND TUNA PRODUCTS

Recourse to Article 22.6 of the DSU by the United States

(WT/DS381/ARB)

Written Submission of the United Mexican States

31 August 2016

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Brazil – Aircraft (Article 22.6 – Brazil)	Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB, 28 August 2000, DSR 2002:I, p. 19
Brazil – Aircraft (Article 21.5 – Canada)	Appellate Body Report*, Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/AB/RW, adopted 4 August 2000, DSR 2000:VIII, 4067
EC – Bananas III (US) (Article 22.6 – EC)	Decision by the Arbitrators, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the DSU*, WT/DS27/ARB, 9 April 1999, DSR 1999:II, p. 725
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US – COOL (Article 22.6 – US)	Decisions by the Arbitrator, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 22.6 of the DSU the United States*, WT/DS384/ARB and Add.1 / WT/DS386/ARB and Add.1, circulated to WTO Members 7 December 2015
US – Gambling (Article 22.6 – US)	Decision by the Arbitrator, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS285/ARB, 21 December 2007, DSR 2007:X, p. 4163
US – Tuna II (Mexico)	Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
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US – Tuna II (Mexico) (Article 21.5 – Mexico)	Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/RW, Add.1 and Corr.1, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW
US – Upland Cotton (Article 22.6 – US I)	Decision by the Arbitrator, *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*, WT/DS267/ARB/1, 31 August 2009, DSR 2009:IX, p. 3871
US – 1916 Act (EC) (Article 22.6 – US)	Decision by the Arbitrators, *United States – Anti-Dumping Act of 1916, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU*, WT/DS136/ARB, 24 February 2004, DSR 2004:IX, p. 4269

TABLE OF ACRONYMS USED IN THIS SUBMISSION

Acronym	Full Name
2013 Final Rule	Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products; Final Rule 78 Fed. Reg. 40997 (July 9, 2013)
2016 Interim Final Rule (2016 IFR)	Enhanced Document Requirements and Captain Training Requirements to Support Use of the Dolphin Safe Label on Tuna Products; Interim Final Rule 81 Fed. Reg. 15444 (March 23, 2016)
AIDCP	Agreement on the International Dolphin Conservation Program
BCI	Business confidential information
DMLs	Dolphin Mortality Limits
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
EII	Earth Island Institute
ETP	Eastern Tropical Pacific Ocean
FAD	Fish Aggregating Device
FAO	United Nations Food and Agriculture Organization
FTC	U.S. Federal Trade Commission
IATTC	Inter-American Tropical Tuna Commission
ICCAT	International Commission for the Conservation of Atlantic Tunas
IDCP	International Dolphin Conservation Program
IOTC	Indian Ocean Tuna Commission
IRP	International Review Panel

IUU	Illegal, unreported and unregulated
ISSF	International Seafood Sustainability Foundation
MMPA	Marine Mammal Protection Act
MSC	Marine Stewardship Council
NAFTA	North American Free Trade Agreement
NMFS	National Marine Fisheries Service
NOAA	National Oceanic and Atmospheric Administration
PAST	Pacific Alliance for Sustainable Tuna
RPT	Reasonable Period of Time
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

LIST OF EXHIBITS

Number	Title
MEX-1	*Curriculum vitae* of Sébastien Pouliot (1 July 2016)
MEX-2	Sébastien Pouliot, "Methodology and Measurement of Losses to the Mexican Tuna Industry from the U.S. Dolphin-Safe Labeling Measure" (06 July 2016)
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MEX-4	U.S. ITC, "Tuna: Customs Value by HTS Number and Customs Value for All Countries – U.S. Imports for Consumption", Monthly data for 2002 – 2015, available online at: https://dataweb.usitc.gov/.
MEX-5	U.S. ITC, *Harmonized Tariff Schedule of the United States* (2014), Chapter 16, pp. 16-7 – 16-8 (excerpt), available online at: https:// www.usitc.gov/publications/docs/tata/hts/bychapter/1400c16_0.pdf.
MEX-6	Atuna, "Tuna Species Guide" (2016), available online at: http:// www.atuna.com/index.php/en/tuna-info/tuna-species-guide.
MEX-7	NOAA Fisheries (NMFS), "Fishery Market News Report T-21 – United States Tuna Cannery Receipts" (24 February 1989); NOAA Fisheries (NMFS), "Southwest Region Fisheries Report No. T-21 – United States Tuna Cannery Receipts" (9 February 1990); NOAA Fisheries (NMFS), "Southwest Region Fisheries Report No. T-8 – United States Tuna Cannery Receipts" (1 February 1991); NOAA Fisheries (NMFS), "Canned Tuna Industry Update – United States Tuna Cannery Receipts" (January – December 1991 and comparisons); NOAA Fisheries (NMFS), "Canned Tuna Industry Update – United States Tuna Cannery Receipts" (January – December 1992 and comparisons); and NOAA Fisheries (NMFS), "Canned Tuna Industry Update – United States Tuna Cannery Receipts" (January – December 1993 and comparisons).
MEX-8	Mario F. Tiesl, Brian Roe & Robert L. Hicks, "Can Eco-Labels Tune a Market? Evidence from Dolphin-Safe Labeling", *Journal of Environmental Economics and Management*, Vol. 43, No. 2 (2002), pp. 339-359.
MEX-9	Atuna, "Soupy vs Steaky: The Idea Behind BB's New Marketing Plan" (4 March 2016)
MEX-10	Jean Tirole, *The Theory of Industrial Organization* (Cambridge: MIT Press, 1988), Chapter 2, pp. 96-97 (excerpt).
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MEX-12	Shabbar Jaffry & James Brown, "A Demand Analysis of the UK Canned Tuna Market", *Marine Resource Economics*, Vol. 23, No. 2 (2008), pp. 215-227.
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MEX-15	Nielsen, "Item Rank Report – Seafood – Tuna – Shelf stable" (12-week and 52-week reports ending 24 October 2015).
MEX-16	Conapesca (SAGARPA), "Consulta Especifica Por Especie" (2014), available online at: http://www.conapesca.gob.mx/wb/cona/consulta_ especifica_por_produccion.
MEX-17	SIAVI (Secretaría de Economía), "Partida – Estadísticas – Comercio Annual" (2003-2015), available online at: http://www.economia-snci.gob.mx/siavi4/partida.php.
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MEX-20	Secretaría de Economía, "Mercados Nacionales Pesqueros: Productos Enlatados" (2014), available online at: http://www.economia-sniim.gob.mx/SNIIM-PESCA/e_enlata.asp.
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MEX-23	FAO, FIGIS, "Statistical Query Results – Global Tuna Catches by Stock: Quantity (t)" (2000-2010), available online at: http://www.fao.org/figis/ servlet/SQServlet?file=/work/FIGIS/prod/webapps/figis/temp/hqp_ 5311818243619243776.xml&outtype=html.
MEX-24	Ley de los Impuestos Generales de Importación y de Exportación (*Tarifa*), Capítulo 16 (excerpt), Mexican Official Gazette (18 June 2007).
MEX-25	Quandl, "MEXICO – Spot Exchange Rate, Pesos/US$, Business day", available online at: https://www.quandl.com/data/FED/RXI_N_B_MX-MEXICO-SPOT-EXCHANGE-RATE-PESOS-US-Business-day.

MEX-26 **BCI**	Confidential Statement on behalf of Mexican producers.
MEX-27	U.S. Census Bureau, "Facts for Features: Hispanic Heritage Month 2015" (14 September 2015), Release No.: CB15-FF.18, available online at: http://www.census.gov/newsroom/facts-for-features/2015/cb15-ff18.html.
MEX-28	James R. Hagerty, "Tuna Firms Jostle for Uncle Sam's Recognition", *The Wall Street Journal* (17 February 2014), available online at: http://www.wsj.com/articles/SB10001424052702303743604579352793666178318.
MEX-29	Pinsa Comercial, "Atún Dolores – Atún Dolores en Agua y Aceite", available online at: http://www.pinsacomercial.com.mx/index.php/productos/atun-dolores; Pinsa Comercial, "Atún Mazatún – Atún Mazatún en Agua y Aceite", available online at: http://www.pinsacomercial.com.mx/index.php/productos/atun-mazatun; Tuny, "Familias", available online at: http://tuny.mx/familias/.
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MEX-31	IDCP, "Updated Estimates of N_{Min} and Stock Mortality Limits," Document SAB-07-05 (30 Oct. 2009).
MEX-32	AIDCP, 22nd Meeting of the Parties, Minutes (30 Oct. 2009).
MEX-33	Declaration of John F. Turner, Earth Island Institute v. Donald Evans, et al, Case No. C-99-3892-TEH (March 10, 2003).
MEX-34	EII, "An urgent message for members of Congress".
MEX-35	Press Release, "ISSF and Pacific Alliance for Sustainable Tuna Establish Framework for Collaboration to Promote Mutual Sustainability Goals" (Aug. 25, 2016).
MEX-36 **BCI**	Confidential Exhibit.
MEX-37	Amended Complaint, In re: Packaged Seafood Products Antitrust Litigation, Case No. 16-cv-0051 (May 23, 2016).
MEX-38	United States' Notice of Motion and Motion to Intervene, In re: Packaged Seafood Products Antitrust Litigation (Jan. 13, 2016); Join Stipulation re: Limited Stay of Discovery, In re: Packaged Seafood Litigation (April 21, 2016); Order Approving Joint Stipulation (May 4, 2016).
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MEX-44	Wegmans, "Bumble Bee Tuna, Solid White Albacore, In Water", available online at http://www.wegmans.com/webapp/wcs/stores/servlet/ProductDisplay?langId=-1&storeId=10052&catalogId=10002&productId=659324&openTab=details ; Safeway, "Tuna", available online at http://shop.safeway.com/ecom/shop-by-aisle/Canned-Goods-Soups/Canned-Meat-Seafood/Tuna#state-ui-richInfo_960019221.
MEX-45 **BCI**	Confidential Exhibit.
MEX-46	Newsweek, "Earth Island Rules" (May 5, 2002).
MEX-47	Atuna, "EII on-board observers, ghosts?" (Oct. 8, 2013), available online at http://www.atuna.com.
MEX-48	CBS News, "Does dolphin-safe tuna live up to its labeling?" (Dec. 3, 2015), available online at http://www.cbsnews.com/news/does-dolphin-free-tuna-live-up-to-its-labeling/.
MEX-49	Starkist, "FAQ", available online at http://starkist.com/faq; Chicken of the Sea, "FAQ", available online at http://chickenofthesea.com/company/faqs.
MEX-50	AIDCP, "Resolution to Establish Procedures for *AIDCP Dolphin Safe* Tuna Certification" (20 June 2001).
MEX-51	IATTC, Quarterly Report (April-June 2013).
MEX-52	AIDCP, "Resolution To Adopt The Modified System For Tracking And Verification Of Tuna" (20 June 2001).
MEX-53	The Pew Charitable Trusts, "Estimating the Use of FADs Around the World" (Nov. 2015).
MEX-54	16 U.S.C. § 1385(d).
MEX-55	AIDCP, Press Release (21 June 2001).
MEX-56	AIDCP, Informational Pamphlet and Educational Module on the AIDCP.
MEX-57	European Commission, "Commission Decision of 21 April 2015 on notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing", *Official Journal of the European Union* (2015/C 142/06).
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MEX-59	IOTC, "IOTC Compliance Report for: Philippines", IOTC-2015-CoC12-CR22 [E] (23 March 2015).
MEX-60	European Commission, "Commission Decision of 1 October 2015 on notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing", *Official Journal of the European Union* (2015/C 324/10).
MEX-61	Final Rule, Fish and Fish Product Import Provisions of the Marine Mammal Protection Act, 81 Fed. Reg. 54390 (Aug. 15, 2016).
MEX-62	NOAA Fisheries, "Seafood Import Provisions under the Marine Mammal Protection Act".
MEX-63	Public Opinion Strategies, National Survey Methodology (Oct. 16, 2010).
MEX-64	U.S. Food and Drug Administration, "Mercury Levels in Commercial Fish and Shellfish (1990-2010)", available online at http://www.fda.gov/Food/FoodborneIllnessContaminants/Metals/ucm115644.htm.
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MEX-67	L.A. Times, "U.S. Reportedly Will Lift Embargo on Tuna from Mexico" (August 6, 1986); New York Times, "U.S. and Mexico Seek End to Tuna War" (May 12, 1986)
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MEX-69	IDCP, "Matters Related to the Tuna Tracking and Dolphin Safe Certification Programs," Document TT-36-05 (19 Oct. 2015).
MEX-70	Norma Oficial Mexicana NOM-084-SCFI-1994

I. INTRODUCTION

1. The United States' responses to Mexico's methodology paper can be summarized into four main arguments:

a) The 2016 tuna measure rather than the 2013 tuna measure should be used to calculate the level of nullification or impairment;

b) The counterfactuals used in the methodology are inappropriate and should be substituted with a counterfactual wherein the tuna measure is completely withdrawn;

c) The methodology should assume that many U.S. retailers will not carry Mexican tuna products because the tuna in the products is caught by encircling dolphins; and

d) There are flaws and incorrect assumptions in the methodology.

2. The United States then recalculates the level of nullification or impairment based on levels of Mexican exports of tuna products to the United States prior to the adoption of the original tuna measure and adjusted downward to take into account what it characterizes to be U.S. consumer preferences, reducing the annual amount from the USD $472.3 million estimated in Mexico's methodology paper to between USD $8.5 million to USD $21.9 million.

3. In this submission Mexico responds to the points raised in the United States' written submission.

A. The 2013 Tuna Measure is the Appropriate Subject of this Arbitration

4. Mexico's previous letters to the Arbitrator explained in detail why the 2013 tuna measure should be used to calculate the level of nullification or impairment and why it is not legally permissible or systemically desirable to use the 2016 tuna measure.[1] This submission reiterates and elaborates upon the legal and systemic reasons for this. It also explains why it is necessary and legitimate for this arbitration to proceed separately from the Article 21.5 compliance proceedings concerning the 2016 tuna measure.

5. Mexico, a developing country Member, requires authorization to suspend concessions or other obligations in order to provide the necessary leverage to prompt the United States, a developed country Member, to end this long-running dispute by bringing the tuna measure into compliance with the covered agreements. In simple terms, this requires the revision of the tuna measure so that dolphin-safe labelling is accurate within the constraints imposed by Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement) and the chapeau of Article XX of the General Agreement on Tariffs and Trade (GATT 1994). Upon this occurring, it will not be necessary for Mexico to act upon this authorization.

6. Aside from the legal errors and systemic problems in the United States' position that the 2016 tuna measure should be used to calculate the level of nullification or impairment, that position is flawed because it assumes that the current Article 21.5 Panel proceedings will alter the recommendations and rulings of the Dispute Settlement Body (DSB) in this dispute during the course of the arbitration prior to the issuance of the Arbitrator's decision. This assumption is incorrect. The recommendations and rulings of the DSB will not be known until

[1] Letter from Mexico to the Chairman of the Arbitrator (19 May 2016); Letter from Mexico to the Chairman of the Arbitrator (3 June 2016).

the Article 21.5 Panels' reports are adopted by the DSB. This will occur after the circulation of the Panels' reports to the WTO Members (i.e., after the circulation of the reports to the parties) and may involve additional delays caused by an appeal proceeding. There is no basis under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) or the Sequencing Agreement to suspend this Article 22.6 arbitration during the timeframe of the Article 21.5 proceedings. Thus, the DSB recommendations and rulings related to the 2016 tuna measure are not and will not be before the Arbitrator in this arbitration.

7. There is no reason for the United States to be concerned about the impact of the outcome of the separate compliance proceedings on the level of nullification or impairment and on any related suspension of concessions or other obligations by Mexico. Mexico acknowledges its ongoing obligation to ensure that any suspension of concessions or other obligations must not exceed the level of the nullification or impairment sustained by Mexico. Any changes in that level resulting from the outcome of the current Article 21.5 compliance proceedings will be taken into account by Mexico. Mexico recognizes that the suspension of concessions is temporary and that pursuant to DSU Article 22.8 "shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed".

B. Appropriate Counterfactual

8. The counterfactual used in the methodology paper and its two potential scenarios are reasonable and appropriate. Both assume that the United States has adopted measures in compliance with the DSB recommendations and rulings and with the covered agreements, an approach that the United States has previously acknowledged as appropriate in *US – Gambling (Article 22.6 – US)*.[2] With respect to the first scenario, compliance is achieved by eliminating the detrimental impact (under the first part of the legal test in Article 2.1 of the TBT Agreement) and discrimination (under Articles I:1 and III:4 of the GATT 1994) by allowing Mexican tuna products to use the dolphin-safe label certified under the system created through the Agreement on the International Dolphin Conservation Program (AIDCP) – of which the United States itself is a co-creator. If this change were made, the tuna measure would permit Mexican tuna products to be labelled "AIDCP certified dolphin-safe", thus opening sales opportunities for Mexican tuna products in the U.S. market. With respect to the second scenario, the detrimental impact and discrimination remain, but the eligibility criteria, the certification requirements, and the tracking and verification requirements are imposed on all tuna products in an even-handed manner (under the second part of the legal test in Article 2.1 of the TBT Agreement) and in a manner that does not constitute arbitrary or unjustifiable discrimination (under the chapeau of Article XX of the GATT 1994). If this change were made to the tuna measure, only a small portion of tuna products from the United States and other countries would qualify for the label, thus opening sales opportunities for Mexican tuna products to supply the U.S. market.

9. There is no legal or factual basis for the Arbitrator to dismiss Mexico's counterfactual and consider the alternative counterfactual proposed by the United States. The latter involves withdrawing the tuna measure and relying on the consumer protection labelling regime under

[2] As the arbitrator summarized in that case, "[t]he United States does not disagree with the basic approach adopted by Antigua in determining its level of nullification or impairment of benefits. Specifically, the United States agrees that the level of nullification and impairment may be calculated based on a counterfactual, under which the Member concerned is assumed to have adopted measures in compliance with the DSB recommendations and rulings." *US – Gambling (Article 22.6 – US),* para. 3.13.

the U.S. Federal Trade Commission Act.[3] Mexico's counterfactual does not necessarily have to reflect the "most likely" scenario of compliance by the Member concerned.[4] By nature, a counterfactual represents a hypothetical scenario and thus there may be, in any given case, a degree of uncertainty as to what exact form compliance might have taken, had it occurred.[5] It is not for an arbitrator to speculate on what might have been the "most likely" such scenario; rather, a counterfactual should reflect at least a plausible or "reasonable" compliance scenario.[6] The two counterfactuals in the methodology paper are "reasonable" in this sense because they simply assume that the tuna measure is brought into compliance with the recommendations and rulings of the DSB and with the covered agreements.

10. Even if the alternative counterfactual proposed by the United States is used, the level of nullification or impairment will not change, provided that reasonable assumptions are made under that counterfactual. That counterfactual assumes a scenario that Mexico has been seeking from the outset of this dispute – Mexican tuna products can use the AIDCP-certified dolphin-safe label, and all other tuna products can use a dolphin-safe label provided that it is accurate and does not deceive U.S. consumers. Mexico disagrees with the United States' assumption that, under its counterfactual, retailers accounting for 46.4 percent of the U.S. market will not buy Mexican tuna products because they contain tuna caught by encircling dolphins. Although this assumption might be reasonable if the Mexican fleet encircled dolphins in an "unregulated" manner (a fishing practice that is not acceptable to Mexico and is not used by the Mexican fleet), the assumption is completely unreasonable given that the Mexican fleet fishes in an AIDCP-certified manner. Under the United States' counterfactual, the market will be provided with information to distinguish between tuna products containing tuna caught in an AIDCP-certified manner and tuna caught in an unregulated manner. The availability of this information will immediately reshape the U.S. tuna product market because retailers and consumers will be made aware of the fundamental difference between the two types of fishing practices. Mexico also disagrees with the United States' assumption that "all tuna product currently meeting the dolphin safe labeling requirements … could be sold with some label suggesting it is 'dolphin safe.'"[7] Thus, the United States assumes that 100 percent of the current supply of tuna products from the United States and other countries will be labelled accurately so as not to deceive U.S. consumers. This is not a reasonable assumption. As explained, most of these tuna products would not qualify for the label, which is an outcome that will further reshape the U.S. tuna product market.

11. When reasonable assumptions are used, the United States' counterfactual essentially combines the two scenarios in the counterfactual in Mexico's methodology paper. The level of

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3 U.S. written submission, para. 70.

4 *US - Gambling (Article 22.6 - US)*, paras. 3.26 ("We do not consider that the proposed counterfactual must necessarily reflect the 'most likely' scenario of compliance by the Member concerned. … It is not for us to speculate on what might have been the 'most likely' such scenario") and 3.56 ("whether the scenario at issue is the 'most likely' … is not pertinent as such in our determination").

5 *US - Gambling (Article 22.6 - US)*, paras. 3.26 and 3.56.

6 *US - Gambling (Article 22.6 - US)*, paras. 3.26-3.27 and 3.56.

7 U.S. written submission, para. 123.

the nullification or impairment estimated by Mexico will be no lower, and possibly higher, under the U.S. counterfactual.[8]

C. The United States Incorrectly Describes Preferences in the U.S. Market

12. The United States argues that Mexico's methodology paper is undermined by the alleged preference in the U.S. market for tuna products containing tuna that was not caught by setting on dolphins, that this preference would exist "irrespective of the content (or existence) of the U.S. dolphin safe labeling requirements", and that there is very little consumer demand for tuna products produced from encircling dolphins.[9] On this basis, the United States argues that 46.4 percent of the retailers would not purchase Mexican tuna products.[10] This is incorrect.

13. Part of the error in the United States' position on market preferences is caused by the fact that it does not distinguish in the evidence it cites between "encircling" dolphins with purse seine nets (the term "setting on dolphins" is not technically accurate) (i) in a manner compliant with the AIDCP and (ii) unregulated dolphin encirclement. Mexico's fleet fishes in the Eastern Tropical Pacific Ocean (ETP) using dolphin encirclement only in accordance with the strict requirements of the AIDCP, which relate specifically to the preservation and safety of dolphins. This is very different from unregulated dolphin encirclement. It is the latter fishing method that, in the past, caused the substantial dolphin mortalities in the ETP referred to in the United States' written submission. Those historic mortalities are only relevant in explaining why the U.S. market originally developed a concern over dolphin mortalities in the ETP which led to the introduction of the tuna measure, a fact that is pertinent to the United States' assertions regarding dolphin-safe preferences in the U.S. market. That situation was remedied in the early 1990s, which is a testament to the effectiveness of the AIDCP. Mexico and the United States both agree that the unregulated encirclement of dolphins is unacceptable and Mexico acknowledges that there is limited demand for tuna products containing tuna caught by *unregulated* dolphin encirclement.

14. With respect to AIDCP-compliant dolphin encirclement, the United States mischaracterizes the preferences of U.S. final consumers and overstates the influence of the Earth Island Institute (EII). EII's influence has substantially diminished and is further diminishing as the market increasingly recognizes the illegitimacy of its labelling regime. Moreover, the alleged preference is inextricably linked to the tuna measure itself because it is the measure that perpetuates the misconception about encircling dolphins and not U.S.

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[8] In its description of the history in paragraph 11 of its written submission, the United States omits to mention that the United States maintained a *complete embargo* on imports of Mexican yellowfin tuna products from 1999 until 2000, although the embargo had been found inconsistent with the United States' GATT obligations in 1991. *US – Tuna (Mexico) (GATT)*. The United States also omits that, in connection with the creation of the AIDCP, in the 1995 Panama Declaration the United States committed to revise the definition of "dolphin-safe" in the tuna measure to match that of the AIDCP. See Panel Report, *US – Tuna II (Mexico)*, paras. 2.35–2.39. Moreover, the United States sought to implement that commitment until the Hogarth court ruling in 2007. See Panel Report, *US – Tuna II (Mexico)*, paras. 4.23–4.24 and 7.332. Mexico reaffirms that its tuna industry has been improperly blocked from the U.S. market for over 25 years. Mexico also notes that the United States incorrectly states that Mexico initiated the WTO proceedings in 2009; Mexico initiated the proceedings in 2008, shortly after the United States indicated it was giving up on implementing its commitment. WT/DS381/1 (28 Oct. 2008).

[9] U.S. written submission, para. 17 and section III.B.d.

[10] U.S. written submission, para. 136.

consumers' preferences viewed in isolation from the measure. The measure perpetuates the misconception in two ways.

15. First, the measure incorporates a "no dolphin sets" standard and prohibits the use of the AIDCP-certified label or any other statements that explain the dolphin protection aspects of AIDCP-compliant fishing. Thus, the Mexican industry is prohibited from informing the U.S. market about the two different methods of dolphin encirclement — i.e., AIDCP-certified and unregulated. The restrictive U.S. standard is also reflected in the administration of the measure, as evidenced in the manufactured statements that the United States has secured from market participants for use as evidence in this proceeding.[11] It is important to recall that the United States' current "strict" view of the "dolphin sets" standard when interpreting and administering the tuna measure is not what the measure itself incorporated prior to the 2007 decision of the Ninth Circuit Court of Appeals in *Hogarth*. At that time, AIDCP-certified tuna products containing tuna caught by setting on dolphins could be labelled dolphin-safe provided that it could be shown that that no dolphins were killed or seriously injured during the set in which the tuna was caught and the method of fishing was not having a significant adverse impact on dolphin stocks. Although the Secretary of Commerce made the findings of no significant adverse impact under this "sustainable fisheries stocks" approach to the dolphin-safe label, these findings were overturned by the Court and the United States' reverted to its current strict interpretation without seeking any further appeal.[12] It was that action that prompted this dispute.

16. Second, in addition to these regulatory aspects, the perpetuation of the strict "no dolphin sets" standard in the current market is only made commercially feasible because of the large supply of *purportedly* dolphin-safe tuna products available for sale in the U.S. market containing tuna caught in fisheries other than the ETP under significantly less regulated or unregulated circumstances. Under Mexico's counterfactual, this supply would drop substantially because the tuna measure would be brought into compliance with the covered agreements, eliminating mislabeled dolphin-safe tuna products (i.e., products that are no longer eligible for the label because they cannot satisfy the WTO-consistent labelling conditions and requirements) and consumer deception, thereby opening a substantial opportunity for sales of AIDCP-certified Mexican tuna products. The United States ignores this supply reduction in its criticism of Mexico's methodology.

17. Finally, under the United States' counterfactual, the United States' regulatory intervention in the market would no longer exist and, therefore, the "no dolphin sets" standard and the already diminishing influence of EII would dissipate and would not be factors in the market, further opening opportunities for sales of Mexican AIDCP-certified tuna products.

D. The United States' Allegations of Flaws and Assumptions in the Methodology Paper Are Incorrect

18. The United States' written submission asserts that the methodology paper is flawed because: the U.S. has a low value tuna market that has a price premium only for albacore tuna and not the yellowfin tuna produced by Mexico; most yellowfin tuna is canned with skipjack as lower priced "light tuna"; yellowfin tuna has a high mercury content compared to albacore and other tuna sold in the U.S. market; the U.S. market prefers milder tasting albacore tuna; there are supply limitations for yellowfin tuna; and U.S. canneries are operating at below capacity. As explained below in detail, these criticisms are without merit.

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[11] Exhibit US-40, pp. 8, 10, 13, 14 and 15.

[12] Panel Report, *US – Tuna II (Mexico)*, paras. 4.23-4.24.

II. THE ARTICLE 22.6 PROCEEDING MUST GO FORWARD BASED ON THE RECOMMENDATIONS AND RULINGS OF THE DSB IN THE ORIGINAL ARTICLE 21.5 PROCEEDING

19. In its submission, the United States 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."[13] The United States goes on to suggest that the Arbitrator should delay its ruling in these Article 22.6 proceedings until the new Article 21.5 proceedings initiated by the United States are completely resolved.[14] The United States' position and its supporting arguments are legally incorrect, and the approach that it proposes would result in procedural unfairness and manifest prejudice to Mexico, while rendering Article 22 of the DSU ineffective and calling into question the utility of sequencing agreements in WTO disputes. For the reasons set out below, the United States' request for a preliminary ruling must be denied, and its ongoing efforts to improperly conflate the Arbitrator's mandate in this Article 22.6 arbitration with the claims at issue in the second round of Article 21.5 proceedings must be rejected.

A. The Tuna Measure Itself is not "At Issue" in this Arbitration

20. Contrary to the claims of the United States, the consistency with the covered agreements of the U.S. dolphin-safe labelling regime for tuna products is not "at issue" in this arbitration under DSU Article 22.6. The original proceedings and, in particular, the first compliance proceedings have already addressed and resolved that issue. Specifically, the DSB's recommendations and rulings pursuant to DSU Article 21.5 reflect that the United States failed to bring its WTO-inconsistent dolphin-safe tuna labelling regime into conformity with the recommendations and rulings of the DSB before the expiry of the reasonable period of time (RPT) on 13 July 2013.[15] As discussed in detail below, this arbitration forms part of a continuum of events, flowing directly from the DSB's recommendations and rulings pursuant to DSU Article 21.5, and this has important procedural and systemic implications.[16] The DSB's recommendations and rulings, and the adopted findings of the Appellate Body, the original Panel, and the first compliance Panel are all relevant to the current arbitration. Determining whether or not a "measure at issue" is consistent with the covered agreements is not part of the Arbitrator's mandate because, put simply, that determination has already been made for the purposes of this arbitration.

21. Rather, the Arbitrator's sole mandate "is to examine whether there is equivalence between the proposed level of suspension and the level of nullification or impairment", where the level of the "nullification or impairment in question is … that 'sustained by the complaining

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[13] U.S. written submission, para. 50.

[14] U.S. written submission, paras. 51 and 65.

[15] Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU, Action by the Dispute Settlement Body, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, WT/DS381/28 (4 Dec. 2015); Dispute Settlement Body, Minutes of Meeting (15 Feb. 2016), WT/DSB/M/371, at paras. 2.1-2.12.

[16] In the original compliance proceedings, the Appellate Body referred to the underlying proceedings and procedures in the dispute as a "continuum of events", of which the original proceedings and the original Article 21.5 proceedings "form a part". In this regard, the Appellate Body explained that a "panel's examination of a measure taken to comply must take due account of the findings by the original panel and the Appellate Body adopted by the DSB", and "due cognizance must be accorded to the recommendations and rulings made by the DSB in the original proceedings, based on the adopted findings of the Appellate Body and original panel". Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 5.9, 7.64 and 7.112. In Mexico's view, this principle also applies to the mandate of an arbitrator under Article 22.6 of the DSU.

party as a result of the failure of the responding party to bring its WTO-inconsistent measures into compliance'".[17] In the event that the Arbitrator cannot accept Mexico's determination of the level of the nullification or impairment that it has suffered, then the Arbitrator's mandate requires it to make its own determination.[18]

22. The United States' request that the Arbitrator render a preliminary ruling that identifies a "measure at issue in this proceeding" — let alone a measure for which no DSB recommendations, rulings, or adopted findings exist — is therefore legally incorrect and inappropriate in relation to the Arbitrator's mandate.

B. The Subject "At Issue" in this Arbitration is the Level of the Nullification and Impairment sustained as a result of the United States' Failure to bring the Measure into Compliance before the End of the RPT

23. As noted above, the Arbitrator's sole mandate in this arbitration is to either confirm or determine the appropriate level of suspension for the purposes of Article 22 of the DSU. Consistent with the provisions of the DSU and the *Understanding between the United States and Mexico regarding Procedures under Articles 21 and 22 of the DSU* (the "Sequencing Agreement"),[19] this arbitration is based on the DSB's recommendations and rulings pursuant to Article 21.5 in the first compliance proceeding, specifically with respect to the nullification and impairment sustained by Mexico as a result of the United States' failure to bring the tuna measure as amended by the 2013 Final Rule into compliance before the expiry of the RPT on 13 July 2013.[20] This strict limit on the Arbitrator's mandate is not only required by the governing procedural rules, but is also important for systemic reasons.

24. The Sequencing Agreement specifically provides that Mexico may request authorization to suspend the application of concessions or other obligations pursuant to DSU Article 22 in the event that the DSB, following a proceeding under DSU Article 21.5, rules that the measure taken to comply is inconsistent with a covered agreement.[21] The Sequencing Agreement further provides that "the United States may object under DSU Article 22.6 to the level of suspension of concessions or other obligations ..., thereby referring the matter to arbitration pursuant to DSU Article 22.6".[22] This is precisely the procedure that has been followed further to the DSB's recommendations and rulings pursuant to Article 21.5 following the original compliance proceedings. The Sequencing Agreement also provides that: "The

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[17] Decision of the Arbitrator, *US – COOL (Article 22.6 – US)*, para. 4.2, citing Decision of the Arbitrator, *US – 1916 Act (EC) (Article 22.6 – US)*, para. 4.5.

[18] Decision of the Arbitrator, *US – COOL (Article 22.6 – US)*, para. 4.4.

[19] Understanding between the United States and Mexico regarding Procedures under Articles 21 and 22 of the DSU, *US – Tuna II (Mexico)*, WT/DS381/19 (7 Aug. 2013).

[20] Recourse to Article 22.2 of the DSU by Mexico, *Tuna II (Article 22.2 – Mexico)*, p. 2 ("As required by Article 22.4 of the DSU, the level of suspension of concessions proposed by Mexico is equivalent on an annual basis to the level of the nullification or impairment of benefits accruing to Mexico under the covered agreements due to the United States' failure to bring its Tuna measure into compliance by 13 July 2013 or to otherwise comply with the recommendations and rulings of the DSB in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*"); Dispute Settlement Body, Minutes of Meeting (13 May 2016), WT/DSB/M/376, para. 7.6 ("Mexico's request for the suspension of concessions complied with all of the requirements under Article 22.2 of the DSU, in particular the failure by the United States to comply with the DSB's recommendations and rulings within the reasonable period of time").

[21] Sequencing Agreement, para. 6.

[22] Sequencing Agreement, para. 7.

Parties will cooperate to enable the arbitrator under DSU Article 22.6 to circulate its decision within 60 days of the referral to arbitration".[23] Thus, the United States' ongoing efforts to improperly conflate the Arbitrator's mandate in this Article 22.6 arbitration with the claims at issue in the second round of Article 21.5 proceedings,[24] including its suggestion that "this arbitration should take into account the compliance finding that will be given in those proceedings",[25] directly contradicts its commitments under the Sequencing Agreement.

25. There is no basis for this arbitration to be suspended or otherwise delayed in the manner suggested by the United States. Moreover, there is no basis for a recent amendment to the U.S. measure that is the subject of a second round of compliance proceedings to be considered relevant in determining the level of the nullification or impairment at issue in this arbitration. Under the circumstances, DSU Article 22 and the Sequencing Agreement do not allow for a delay or suspension of the Arbitrator's decision in order to take into account the DSB's future recommendations and rulings with respect to the second round of compliance proceedings. This is dramatically illustrated by the fact that, if the second round of Article 21.5 compliance proceedings includes challenges before the Appellate Body (a reasonable possibility considering the procedural history of this dispute), then the DSB's recommendations and rulings possibly will not be circulated before 2018.

26. From a procedural perspective, it should also be noted that when Mexico's proposed level of suspension of concessions was referred to this arbitration pursuant to Article 22.6, the 2016 interim final rule had not been published. In fact, Mexico was informed by the United States about the publication of the 2016 tuna measure on the same day that the United States filed its objection to the suspension proposed by Mexico, i.e., only one day before the publication of the new regulations. There are no recommendations, rulings or adopted findings by the DSB with respect to the 2016 tuna measure.

27. There is also an overriding systemic reason to reject the United States' proposed approach and deny its request for a preliminary ruling. If the claims and issues before a new Article 21.5 compliance panel are allowed to influence or delay an established Article 22.6 arbitration that is based on the recommendations, rulings, and adopted findings of the DSB in respect of a preceding round of Article 21.5 proceedings, then the result is an *endless loop* that could indefinitely preclude the right to suspend concessions or other obligations pursuant to Article 22. A Member maintaining a WTO-inconsistent measure would be allowed to delay the resolution of a meritorious complaint by introducing amendments each time the complaining Member seeks to enforce its rights under Article 22 following a round of Article 21.5 proceedings. Not only would this result in manifest procedural unfairness and prejudice to the complaining Member, but it would also render the Article 22 enforcement mechanism meaningless.

28. In this regard, Mexico notes that the United States has itself acknowledged and advanced arguments with respect to this systemic concern. In its appellee submission to the

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[23] Sequencing Agreement, para. 8.

[24] See, e.g., Recourse to Article 21.5 of the DSU by the United States, Request for the Establishment of a Panel, WT/DS381/32 (12 April 2016), p. 3; Dispute Settlement Body, Minutes of Meeting (13 May 2016), WT/DSB/M/376, paras. 7.3-7.4; Letter from the United States to the Chairman of the Arbitrator re: Mexico's Request for an Organizational Meeting of the Arbitrator (18 May 2016); Letter from the United States to the Chairman of the Arbitrator re: Mexico's Request for an Organizational Meeting of the Arbitrator (3 June 2016); Dispute Settlement Body, Minutes of Meeting (14 June 2016), WT/DSB/M/377, para. 7.2; Dispute Settlement Body, Minutes of Meeting (20 June 2016), WT/DSB/M/378, para. 1.2.

[25] U.S. written submission, paras. 51 and 65.

Appellate Body in *US – Continued Suspension*, the United States stated as follows, identifying the same systemic issue that Mexico has described above:

> In addition, the United States observes that following the EC's logic that an original complaining party should terminate its suspension of concessions and initiate an Article 21.5 compliance panel proceeding when an original responding party claims compliance, would lead to a strange and absurd result. Assuming an original complaining party were to follow the EC's view, and assuming, at the close of the Article 21.5 compliance panel proceeding, the compliance panel concluded that compliance had not in fact been achieved, the original complaining party would be left with nothing in the face of continued breach by the original responding party. The end of the compliance panel proceeding under Article 21.5 does not provide for a renewed reasonable period of time for compliance, nor does it provide for another opportunity to request authorization for the suspension of concessions. The inequity of such an outcome is enough to demonstrate the fallacy of the EC's argument.[26]

29. Finally, other WTO Members support Mexico's interpretation and have similar systemic concerns about the United States' position. At the DSB meetings held on 22 April 2016 and on 9 May 2016, Members made the following comments:

- Guatemala: "[t]he United States was right that the DSB could not grant authorization to suspend concessions where the Member concerned had come into compliance. However, the problem was that the DSB had not yet determined whether the United States had brought its measures into compliance. That determination was to be made through recourse to the proceedings under Article 21.5 of the DSU. Until such a determination was made, Guatemala considered that there was no obligation for Mexico to suspend the arbitration under Article 22.6 of the DSU nor would there be a basis for the DSB to be prevented from granting authorization to Mexico to suspend concessions or other obligations";[27]
- Canada: "[i]t was also established practice, and supported by the Sequencing Agreement between the United States and Mexico in this specific dispute, that if the DSB ruled that a measure taken to comply remained inconsistent with the WTO Agreement, the complaining party had the right to request authorization to suspend concessions and other obligations. Once a dispute arrived at this point, however, the adoption by the responding party of new compliance measures prior to that request did not, in Canada's view, give rise to an obligation on the complaining party to seek, or even to await the completion of, any additional compliance review before it could pursue its rights under Article 22 of the DSU", and "[a] delay in the Article 22.6 proceedings by any means other than with the agreement of the complaining party would create harmful incentives for responding parties to amend repeatedly or replace a WTO-inconsistent compliance measure and assert compliance simply to forestall the suspension of concessions … all Members should support interpretations of the DSU that did not result in undue prejudice to either party,

[26] U.S. appellee submission (June 26, 2008), *US – Continued Suspension*, para. 117.

[27] Dispute Settlement Body, Minutes of Meeting (14 June 2016), WT/DSB/M/377, para. 7.6.

but especially to a complaining party that had prevailed on multiple occasions";[28]

- Japan: "[t]he US action could possibly delay and defer the DSB's consideration of the request for authorization properly made by Mexico at this very critical stage in the dispute. This may potentially set a precedent which could leave room for abuse in the future";[29]
- Korea: "Korea agreed with Mexico that there was no DSU provision that could impede the arbitration process. The United States argued that the DSB could not grant authorization to suspend concessions in any amount where the Member concerned had come into compliance. At the present moment, it was not known whether the United States, having revised the amended tuna measure, was in compliance with the DSB's recommendations and rulings. There was only a claim of compliance. The Article 21.5 panel would, upon establishment, make that determination in due course. Until that determination was made and the relevant report was adopted by the DSB, the arbitration proceedings should progress in parallel with any compliance panel proceedings";[30]
- Australia: "Australia considered that the arbitration proceedings commenced under Article 22.6 of the DSU should continue in parallel to any Article 21.5 panel process unless otherwise agreed by the parties. To require suspension of an Article 22.6 arbitration contingent on an Article 21.5 panel finding would prevent a complaining Member from exercising its rights under the DSU. Moreover, there was no legal basis in the DSU for such a suspension. Australia was also concerned about the systemic implications of requiring suspension of the Article 22.6 arbitration. In Australia's view, it would unfairly delay the rights of a Member to seek suspension of concessions for measures which the DSB had agreed were not consistent with WTO obligations. Further, it would undermine Members' confidence in the ability of the dispute settlement system to ensure that parties sustained efforts towards the resolution of disputes in accordance with the DSU provisions";[31]
- Norway: "the discussion at the present meeting raised several matters of systemic interest, including the question of sequenced or parallel proceedings when a measure had been amended after the first Article 21.5 proceedings, but prior to authorization of suspension. Without prejudice to its position on this issue, Norway noted that a Member's right to retaliate was a key part of a well-functioning dispute settlement system";[32]
- Brazil: "if a party to a dispute wished to avoid retaliation, it should comply with the decision of the first compliance panel under Article21.5 of the DSU";[33]
- Chinese Taipei: "Chinese Taipei agreed with Mexico, Guatemala, Australia and some other delegations that, in the absence of an agreement between the

[28] Ibid., paras. 7.7-7.8.

[29] Ibid., para. 7.9.

[30] Ibid., para. 7.10.

[31] Ibid., para. 7.11.

[32] Ibid., para. 7.13.

[33] Ibid., para. 7.14.

parties, the pending Article 22.6 arbitration could not be suspended simply because of a declaration of compliance by the Member concerned or due to the establishment of another compliance panel under Article 21.5 of the DSU. Chinese Taipei found no legal basis for such a suspension". [34]

C. The Prior Cases Cited by the United States are Inapposite

30. In its written submission, the United States cites *EC – Bananas III (US) (Article 22.6 – EC)*[35] and *Brazil – Aircraft (Article 22.6 – Brazil)*[36] to support its position. But those cases involved circumstances very different from those in the current dispute.

31. In *EC – Bananas III (US) (Article 22.6 – EC)*, the initial compliance panel proceedings were initiated (but could not be fully resolved) prior to the United States' Article 22.2 request for authorization to suspend concessions, and therefore ran in parallel with the Article 22.6 arbitration.[37] The dilemma before the arbitrator in that arbitration was that "authorization by the DSB of the suspension of concessions or other obligations presupposes the existence of a failure to comply with the recommendations or rulings contained in panel and/or Appellate Body reports as adopted by the DSB",[38] and there were not yet any underlying recommendations, rulings, or adopted findings of the DSB pursuant to DSU Article 21.5 with respect to the existence of such a failure to comply. There is no such dilemma in the current arbitration, as the DSB has already made recommendations, rulings, and adopted the reports of the Panel and Appellate Body pursuant to Article 21.5,[39] and it is clearly the U.S. failure to comply that is the basis of the current arbitration.[40] Further, unlike the circumstances in *EC – Bananas III (US) (Article 22.6 – EC)*, this arbitration was initiated before the constitution of a panel for a (second round of) Article 21.5 compliance proceedings was requested, and before

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[34] Dispute Settlement Body, Minutes of Meeting (20 June 2016), WT/DSB/M/378, para. 1.5.

[35] U.S. written submission, paras. 46 and 53, citing Decision of the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, paras. 4.3 and 4.7.

[36] U.S. written submission, para. 46, citing Decision of the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, para. 3.50.

[37] See Request for the Establishment of a Panel by the European Communities, *EC – Bananas III (Article 21.5 – EC)*, WT/DS27/40 (15 December 1998); Recourse by the United States to Article 22.2 of the DSU, *EC – Bananas III (US) (Article 22.2 – US)*, WT/DS27/43 (14 January 1999) ("The following communication, dated 14 January 1999, from the Permanent Mission of the United States to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 22.2 of the DSU"); Recourse to Article 21.5 of the DSU by the European Communities, Constitution of the Panel, *EC – Bananas III (Article 21.5 – EC)*, WT/DS27/45 (18 January 1999) ("At its meeting on 12 January 1999, the Dispute Settlement Body (DSB) decided, in accordance with Article 21.5 of the DSU, to refer to the original panel the matter raised by the European Communities in document WT/DS27/40"); Request by the European Communities for Arbitration under Article 22.6 of the DSU, *EC – Bananas III (Article 22.6 – EC)*, WT/DS27/46 (3 February 1999).

[38] Decision of the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 4.4.

[39] Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU, Action by the Dispute Settlement Body, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, WT/DS381/28 (4 December 2015); Dispute Settlement Body, Minutes of Meeting (3 December 2015), WT/DSB/M/371 (15 February 2016), paras. 2.1-2.12; Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 8.2-8.3.

[40] Recourse to Article 22.2 of the DSU, *US – Tuna II (Mexico) (Article 22.2 – Mexico)*, WT/DS381/29 (11 March 2016) ("the level of suspension of concessions proposed by Mexico is equivalent on an annual basis to the level of the nullification or impairment of benefits accruing to Mexico under the covered agreements due to the United States' failure to bring its Tuna measure into compliance by 13 July 2013").

the further amended measure that is at issue in those compliance proceedings was published.[41]

32. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the initial compliance panel proceedings were not fully resolved when Canada requested authorization to suspend concessions and other obligations pursuant to Article 22.2 because the DSB had not yet adopted the panel's report and issued recommendations and rulings pursuant to Article 21.5.[42] Brazil initiated an appeal of certain findings in the panel report to the Appellate Body before requesting arbitration under Article 22.6.[43] This led to the same situation that had arisen in *EC – Bananas III (US) (Article 22.6 – EC)*, such that the initial Article 21.5 proceedings had to be resolved through the issuance of DSB recommendations and rulings and the adoption of the panel and Appellate Body reports, with respect to the existence of a failure to comply before the arbitration under Article 22.6 could be decided. Ultimately, the Appellate Body's report in the initial compliance proceedings was adopted by the DSB while the Article 22.6 proceedings were pending.[44]

33. Again, the dilemma at issue in those arbitrations — i.e., the absence of any DSB recommendations and rulings and adopted panel and Appellate Body reports pursuant to Article 21.5 — does not arise in the current arbitration. The circumstances in this arbitration are, in fact, the opposite: the DSB has adopted the reports of the Appellate Body and the Panel and has made recommendations and rulings, and pursuant to the provisions of the Sequencing Agreement, Mexico requested authorization under Article 22.2 after those recommendations, rulings, and adopted reports were in place.[45]

34. Moreover, in *EC – Bananas III (US) (Article 22.6 – EC)*, there was no sequencing agreement. While there was a bilateral agreement similar in nature to a sequencing

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[41] See Recourse to Article 22.6 of the DSU, *US – Tuna II (Mexico) (Article 22.6 – US)*, WT/DS381/30 (22 March 2016); 81 Fed. Reg. 15444 (23 March 2016); Request for the Establishment of a Panel, *US – Tuna II (Mexico) (Article 21.5 – US)*, WT/DS381/32 (12 April 2016); and Recourse to Article 21.5 of the DSU by the United States, Constitution of the Panel, *US – Tuna II (Mexico) (Article 21.5 – US)*, WT/DS381/37 (2 June 2016) ("At its meeting on 9 May 2016, the Dispute Settlement Body (DSB) decided, in accordance with Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), to refer to the original panel, if possible, the matter raised by the United States in document WT/DS381/32").

[42] The Panel Report in the initial compliance proceeding was circulated on 9 May 2000, and Canada requested authorization to suspend concessions and other obligations under Article 22.2 the next day, on 10 May 2000. See Panel Report, *Brazil – Aircraft (Article 21.5 – Canada)*, WT/DS46/RW (9 May 2000); Recourse by Canada to Article 4.10 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement) and Article 22.2 of the DSU, *Brazil – Aircraft (Article 22.2 – Canada)*, WT/DS46/16 (11 May 2000).

[43] See Notification of an Appeal by Brazil under paragraph 8 of Article 4 of the SCM Agreement and paragraph 4 of Article 16 of the DSU, *Brazil – Aircraft (Article 21.5 – Canada)*, WT/DS46/17 (22 May 2000); Request by Brazil for Arbitration under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement, *Brazil – Aircraft (Article 22.6 – Brazil)*, WT/DS46/18 (9 June 2000).

[44] The Appellate Body Report was circulated on 21 July 2000, adopted by the DSB on 4 August 2000, and the Decision of the Arbitrator was circulated on 28 August 2000. See Appellate Body Report and Panel Report pursuant to Article 21.5 of the DSU, Action by the Dispute Settlement Body, *Brazil – Aircraft (Article 21.5 – Canada)*, WT/DS46/24, (14 Aug. 2000); See also Decision of the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 2.1-2.3.

[45] Recourse to Article 22.2 of the DSU by Mexico, *Tuna II (Mexico) (Article 22.2 – Mexico)* (WT/DS381/29) (11 March 2016).

agreement in *Brazil – Aircraft (Article 22.6 – Brazil)*,[46] it did not contemplate the possibility that the report of the initial compliance panel might be appealed to the Appellate Body in order to fully resolve the Article 21.5 proceedings, and thus its provisions could not be reconciled with the circumstances created by Brazil's appeal.[47] In the present dispute, the provisions of the Sequencing Agreement are unambiguous, providing, *inter alia*, that: "[i]n the event that the DSB, following a proceeding under DSU Article 21.5, rules that measure taken to comply does not exist or is inconsistent with a covered agreement, Mexico may request authorization to suspend the application of concessions or other obligations under the covered agreements to the United States pursuant to DSU Article 22", and "[t]he Parties will cooperate to enable the arbitrator under DSU Article 22.6 to circulate its decision within 60 days of the referral to arbitration."[48] The United States' effort to breach the Sequencing Agreement also has systemic implications, because if successful it would undermine the future use of sequencing agreements.

35. Under the circumstances, it is not sufficient for the United States to further revise the WTO-inconsistent tuna measure and then unilaterally declare that there is no longer any inconsistency or non-compliance under which Mexico is authorized to suspend concessions. As the Appellate Body in *US – Continued Suspension* stated:

> The Member required to implement the DSB's recommendations and rulings may be presumed to have acted in good faith when adopting the implementing measure. However, the presumption of good faith attaches to the actor, but not to the action itself. Thus, whilst the presumption of good faith concerns the reasons for which a Member acts, such a presumption does not answer the question whether the measure taken by the implementing Member has indeed brought about substantive compliance.[49]

In its written submission, the United States chose not to comment at all on the Appellate Body's finding in *Continued Suspension*, but that does not eliminate its importance to this dispute.

36. It is only when an Article 21.5 panel and, if necessary, the Appellate Body have ruled that the measure at issue has been brought into compliance, their reports have been adopted by the DSB, and the DSB has issued its recommendations and rulings pursuant to Article 21.5 that the current status of the inconsistency may *potentially* be changed.[50]

37. Previously, the United States has attempted to distinguish *US – Continued Suspension* on the basis that the DSB has not yet taken the formal step of authorizing the suspension of benefits in the present dispute.[51] However, every step necessary for that authorization has been taken, except for the determination of the value of the benefits to be suspended. There

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[46] See the Annex in Recourse by Canada to Article 21.5 of the DSU, *Brazil – Aircraft (Article 21.5 – Canada)*, WT/DS46/13 (26 Nov. 1999) ("Canada and Brazil have reached an agreement concerning the procedures to be applicable for proceedings in this case pursuant to Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement, as follows …").

[47] Decision of the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 2.1.

[48] Sequencing Agreement, paras. 6 and 8.

[49] Appellate Body Report, *US – Continued Suspension*, para. 315.

[50] In the context of DSU Article 22.8, the suspension of concessions continues to apply pending the outcome of the DSU Article 21.5 proceeding. See Appellate Body Report, *US – Continued Suspension*, paras. 305, 315, 338-345, 355.

[51] Letter from the United States to the Chairman of the Arbitrator re: Mexico's Request for an Organizational Meeting of the Arbitrator (3 June 2016), paras. 12-13.

is no additional procedural step involving a further evaluation of the compliance of the U.S. measure with the covered agreements for the purposes of the current arbitration. The Appellate Body's findings in *US – Continued Suspension* are directly on point. The DSB's recommendations and rulings and the adopted panel and Appellate Body reports pursuant to Article 21.5 provide that the U.S. measure remains in non-compliance after the expiry of the RPT, and Mexico is fully entitled to an expeditious Article 22.6 proceeding, as Mexico requested in its letter dated 13 May 2016.

D. The United States' Unilateral Declaration of Compliance is Legally and Factually Unsupported, Irrelevant in this Arbitration, and Not Within the Arbitrator's Jurisdiction

38. The United States' claim that it has now brought its measure into compliance is (i) not within the jurisdiction of this arbitration, (ii) unsupported by any findings, recommendations, or rulings adopted by the DSB, and (iii) irrelevant to the issue before the Arbitrator, which is not the *right* to impose countermeasures, but rather the *quantum* of the countermeasures that Mexico is entitled to implement based on the level of the nullification and impairment caused by the WTO-inconsistent tuna measure since the end of the RPT.

39. Because it is apparent that the United States is seeking to influence the Arbitrator based on a one-sided characterization of the Article 21.5 dispute, Mexico must point out that the Appellate Body did not settle whether the distinctions of the tuna measure relating to fishing method eligibility, dolphin-safe certification, and tracking and verification are consistent with the covered agreements. Rather, it determined that it was unable to complete the analysis for those aspects of the measure because the panel had not made the relevant factual findings:

> In conclusion, in the absence of a proper assessment by the Panel of the respective risks posed to dolphins inside and outside the ETP large purse-seine fishery, we are unable to complete the legal analysis and assess fully whether all of the regulatory distinctions drawn under the amended tuna measure can be explained and justified in the light of differences in the relative risks associated with different methods of fishing for tuna in different areas of the oceans.[52]

Thus, the issue of whether the United States has brought the tuna measure's eligibility criteria, certification requirements, and tracking and verification requirements into compliance with the DSB's recommendations and rulings remains unresolved, and neither the amendments to the "determination provisions" nor the unilateral declarations of WTO-consistency by the United States are capable of remedying the United States' failure to comply for the purposes of the current arbitration. In Mexico's view, the tuna measure remains in violation of TBT Article 2.1 and Articles I:1 and III:4 of the GATT 1994. Mexico will address the arguments of the United States with respect to the second round of Article 21.5 proceedings in Mexico's submissions in those proceedings.

40. In relation to the United States' argument that "this arbitration should take into account the compliance finding that will be given in those [Article 21.5] proceedings,"[53] it should be noted that the determination in this arbitration will be issued prior to the issuance of the panels' reports to the parties and to the WTO Members in the second round of Article 21.5 proceedings. Moreover, the panel reports in both the original proceedings and the initial Article 21.5 proceedings were appealed to the Appellate Body, and it is reasonable to expect

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[52] Appellate Body Report, *US – Tuna II (Mexico)*, para. 7.266.

[53] U.S. written submission, paras. 51 and 65.

that the future Article 21.5 report may be subject to appeal as well. Finally, as noted above, it is not merely the reports themselves that are relevant to an arbitration but the recommendations and rulings of the DSB that flow from the adoption of the reports, an action that will not take place until after the end of the Article 21.5 proceedings. In effect, therefore, the United States has asked that the Arbitrator's decision be delayed until 2018. That is obviously unacceptable and reinforces that the United States' effort to manipulate the Article 22.6 arbitration is inappropriate.

41. Mexico observes that the United States cites repeatedly to its Article 21.5 first written submission.[54] That submission is not part of the record of this arbitration and cannot be relied upon or used in any manner to determine the level of nullification and impairment sustained by Mexico as a result of the United States' failure to bring the tuna measure into compliance before the end of the RPT. To do so would result in an extreme denial of due process.

42. Finally, the United States argues that the Arbitrator is compelled to base its decision solely on the 2016 tuna measure because Articles 22.4 and 22.7 require that, for the purposes of the Arbitrator's decision under Article 22.6, the level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment, and to "do what Mexico suggests, would result in Mexico being authorized to impose retaliatory tariffs in response to a WTO-consistent measure".[55] This is not correct. First, as noted above, Mexico acknowledges that the suspension of concessions is temporary, and that Mexico has a continuing obligation to ensure that its suspension of concessions does not exceed the level of the nullification or impairment as a result of the United States' failure to bring the WTO-inconsistent measure into compliance. Whether or not an amendment brings the measure into compliance can only be settled by the recommendations and rulings of the DSB further to the adoption of the compliance panel and, if necessary, Appellate Body reports. Second, for the purposes of this arbitration, there is no inconsistency with Articles 22.4 or 22.7 where the level of suspension is equivalent to the level of the nullification and impairment sustained by Mexico as a result of the United States' failure to bring its tuna measure into compliance before the end of the RPT. Such a result is entirely consistent with the requirements of the DSU.

E. Conclusions on the United States' Preliminary Ruling Request

43. For the foregoing reasons, the United States' request for the Arbitrator to make a preliminary ruling to the effect that "the measure at issue in this arbitration is the tuna measure as amended by the 2016 IFR" must be rejected. Accordingly, Mexico requests that the Arbitrator dismiss the United States' preliminary request and its submissions regarding the purported compliance of the 2016 tuna measure in their entirety.

44. Article 22 of the DSU is an essential instrument in the WTO's dispute resolution machinery. It provides a means of enforcing the DSB's recommendations and rulings in a pragmatic and reasonable manner, without impinging upon a responding Members' sovereignty. It is also the only recourse available to a complaining Member when the responding Member fails or refuses to bring its measure into compliance with the recommendations and rulings of the DSB within the reasonable period of time designated for the implementation of a measure taken to comply. The effectiveness of the mechanism is crucially important to developing country Members when facing ongoing WTO-inconsistencies related to measures of developed country Members, which is the situation in this dispute. The United States' proposed approach would seriously undermine the countermeasures

[54] U.S. written submission, paras. 2, 13, 47, 51, 55, 57, 65, 75, 78, footnote 131 to para. 75, footnote 137 to para. 78, and footnote 139 to para. 78.

[55] U.S. written submission, para. 64.

mechanism under Article 22 in particular, and the WTO dispute resolution system in general, and as it would permit a Member to avoid indefinitely both compliance with the DSB's recommendations, rulings, and adopted findings and the suspension of concessions or other obligations by repeatedly amending the measure at issue and claiming vigorously that it has finally brought the measure into compliance.

45. Taking into account these important systemic concerns, Mexico also notes that if the Arbitrator were to accept the U.S. request to suspend the Article 22.6 proceedings, the Arbitrator's decision would not be subject to an appeal proceeding and would not have third-party participation. Such a decision would create a damaging precedent for the WTO dispute settlement system.

III. THE APPROPRIATE COUNTERFACTUAL

A. Mexico's Counterfactual

46. Mexico's methodology paper presents a counterfactual with two potential scenarios, both of which present measures that are consistent with the recommendations and rulings of the DSB and with the covered agreements.

1. First Scenario

47. In the first scenario, the United States would eliminate the blanket disqualification of tuna caught by dolphin sets from eligibility for the dolphin-safe label and allow tuna harvested by dolphin sets using techniques that minimize impacts on dolphins to use the label, such as those under the AIDCP, the multilateral treaty governing purse-seine fishing in the ETP to which both Mexico and the United States are parties. Under this scenario, Mexican tuna products would be treated no differently than tuna products of any other country.

48. The reasonableness of this scenario is confirmed by the counterfactual proposed by the United States that similarly will allow Mexican tuna products to be labelled with the AIDCP dolphin-safe label.

49. Mexico acknowledges the United States' assertion that Mexico's first scenario (and the United States' proposed counterfactual) allows producers of tuna products containing tuna caught using methods other than dolphin encirclement to promote that fact to distinguish their products from Mexican tuna products. However, that would not materially alter the level of nullification or impairment estimated in Mexico's methodology paper. Currently, the U.S. market is prevented by the tuna measure from being properly informed about the difference between unregulated dolphin encirclement and AIDCP-certified dolphin encirclement, the AIDCP's comprehensive certification, tracking and verification system and the success the AIDCP has had in reducing dolphin mortalities to statistically insignificant levels. Under Mexico's first counterfactual, this would no longer be the case, permitting the market to immediately distinguish between the two different types of dolphin encirclement fishing. Thus, the U.S. market will be fully informed of the certified fishing method used by the Mexican fleet and authorized by the AIDCP.

2. Second Scenario

50. In the second scenario, the same eligibility criteria, certification requirements, and tracking and verification requirements would be applied to all tuna, regardless of where it is harvested, in accordance with the requirements of Article 2.1 of the TBT Agreement and the chapeau of Article XX of the GATT 1994 (i.e., there would no longer be different regulatory treatment based on different fishing methods or different fisheries that was not calibrated to the differences in methods and fisheries). Tuna products from any country (including the United States) containing tuna that was harvested using a fishing method that causes harm to dolphins to a comparable extent as AIDCP-certified dolphin encirclement, and/or that does

not protect dolphins in an equivalent manner, and/or for which the dolphin-safe status of the tuna is not properly certified and traceable or verifiable would be disqualified from receiving the "dolphin-safe" label. As a consequence, the majority of tuna products from all countries, including the United States, would not be eligible for the dolphin-safe label within the relevant timeframe for the assessment of the level of nullification or impairment if at all. The evidence supporting this conclusion is discussed below in the context of the assumptions in the United States' proposed counterfactual.

51. In this second scenario, Mexican tuna products would not be allowed to receive the "dolphin-safe" label and would be treated no differently than tuna products from other countries and/or suppliers that also do not receive the label. Under this scenario, the great majority of the U.S. market would be supplied from a variety of countries with tuna products without the dolphin-safe label, and there would be substantial room for Mexican products to compete on equal terms. 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.

52. Mexico acknowledges the United States' assertion that the eligibility criteria, certification requirements, and tracking and verification requirements would be calibrated to the different risks to dolphins in different fisheries. Such calibration is assumed in this second counterfactual (discussed below in the context of the assumptions in the United States' proposed counterfactual). It will not change the fact that the majority of tuna products from all countries, including the United States, would not be eligible for the dolphin-safe label.

3. Mexico's Counterfactual is Consistent with Applicable Legal Requirements

53. The United States' claim that the Arbitrator is *required* to apply a counterfactual under which the measure would be withdrawn is not correct. For example, in *US – Gambling (Article 22.6 – US)* the arbitrator stated:

> We also note that while Article 3.7 of the DSU does provide that the objective of dispute settlement proceedings is usually the withdrawal of the inconsistent measures, we do not read this provision to mean that this is in all cases the only possible outcome in disputes where a violation of one of the covered agreements has been found. The recommendations of the DSB to the United States in this dispute require it to bring its measures into compliance with the GATS. This did not necessarily require it to "withdraw" the measures by removing entirely the restrictions it maintained on remote gambling and betting services. We note in this respect that the "concept of compliance or implementation prescribed in the DSU" has been described by arbitrators mandated under Article 21.3(c) of the DSU to determine the reasonable period of time for implementation as "the withdrawal or *modification* of a measure, the establishment or application of which by a Member of the WTO constituted the violation of a provision of a covered agreement" (emphasis added).[56]

[56] *US – Gambling (Article 22.6 – US)*, para. 3.46.

54. The United States acknowledged in *US – Gambling (Article 22.6 – US)* that it is appropriate to assume in a counterfactual that measures are adopted in compliance with the DSB's recommendations and rulings and with the covered agreements.[57]

55. The arbitrator in *US – Gambling (Article 22.6 – US)* also stated:

> "… it would not be sufficient, in our view, for the United States to simply identify the existence of alternative possible means of compliance, other than that envisaged by Antigua in its counterfactual. Rather, for the United States to succeed in its challenge, it must persuade us that the particular scenario identified by Antigua as the basis for its counterfactual is not such as to accurately reflect the level of nullification or impairment of benefits accruing to Antigua under the GATS as a result of the continued application by the United States of inconsistent measures."[58]

> "We do not disagree with the United States that a WTO Member generally has the discretion to determine the means through which it will comply with adverse DSB rulings, provided that such means are consistent with the WTO covered agreements. However, this does not, in our view, imply that the Member concerned has the freedom to decide, for the purposes of a determination under Article 22.7 of the DSU, among a range of potential measures that it might have taken in order to comply with such rulings, which one should form the basis of the arbitrator's assessment."[59]

> "We do not consider that the proposed counterfactual must necessarily reflect the 'most likely' scenario of compliance by the Member concerned. By nature, a counterfactual represents a hypothetical scenario and thus there may be, in any given case, a degree of uncertainty as to what exact form compliance might have taken, had it occurred. The Member concerned may have had a range of WTO-consistent options at its disposal to choose from to ensure compliance. It is not for us to speculate on what might have been the 'most likely' such scenario."[60]

56. The counterfactual in Mexico's methodology paper is "plausible", "reasonable", and appropriate because it simply assumes that the tuna measure is brought into compliance with the recommendations and rulings of the DSB and with the covered agreements.

B. The United States' Counterfactual

57. As an alternative to Mexico's counterfactual, the United States proposes a counterfactual under which the tuna measure would be withdrawn entirely, and all producers and retailers could use the dolphin-safe label, subject to general rules, applicable to all types of products (not just tuna products), that marketing claims not be unfair or deceptive.

58. Mexico agrees with the United States' assertion that the complete withdrawal of the tuna measure would constitute an appropriate means of bringing the measure into compliance

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[57] *US – Gambling (Article 22.6 – US),* para. 3.13 ("The United States does not disagree with the basic approach adopted by Antigua in determining its level of nullification or impairment of benefits. Specifically, the United States agrees that the level of nullification and impairment may be calculated based on a 'counterfactual', under which the Member concerned is assumed to have adopted measures in compliance with the DSB recommendations and rulings").

[58] Ibid., para. 3.23.

[59] Ibid., para. 3.24.

[60] Ibid., para. 3.26.

because it would allow Mexico, for the first time, to promote its AIDCP-certified fishing method. This outcome, which would allow U.S. consumers to be provided with full and accurate information on the dolphin-safe status of the tuna products they are purchasing, is what Mexico has been seeking from the outset of this dispute. It would allow the U.S. market to be properly educated about dolphin-safe fishing practices and certification, tracking and verification programs.

59. The United States' counterfactual confirms the reasonableness of Mexico's first scenario under its counterfactual whereby Mexican tuna products can use the AIDCP-certified dolphin-safe label.

60. Although as discussed above the Arbitrator is not required to apply the United States' proposed counterfactual, doing so would not materially reduce the level of nullification and impairment shown in Mexico's methodology paper, provided that the projected market conditions are appropriately assessed.

1. Combination of the Two Scenarios in Mexico's Counterfactual

61. Under the United States' proposed counterfactual, wherein the tuna measure is completely withdrawn and the Federal Trade Commission (FTC) consumer labelling rules apply generally, all tuna products would be able to use a dolphin-safe label provided that such label is accurate so that consumers are not deceived. Thus, Mexican tuna products would be permitted to use the AIDCP dolphin-safe label, provided that the tuna in those products complied with the strict AIDCP rules and procedures, including that such tuna is traceable back to the fishing set or gear deployment in question. Likewise, tuna products from the United States and other countries would be able to use a dolphin-safe label provided that such a label is accurate so that U.S. consumers are not deceived about whether the tuna they are purchasing was harvested using a method harmful to dolphins, or whether any dolphin was killed or seriously injured in the gear deployment or set in which the tuna was caught. It would not be reasonable to assume that consumers and retailers, let alone the FTC, would accept that a "dolphin-safe" label could be used on tuna products containing tuna that was caught in a fishing set or gear deployment in which dolphins were killed or seriously injured, and/or in circumstances where it is impossible to verify that the product contains only tuna that was caught in a dolphin-safe manner. Accordingly, Mexico strongly disagrees with the United States' assertion that under its 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."[61] Mexico explains this point in further detail below.

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

2. Correcting Two Key Assumptions in the United States' Counterfactual

63. The United States' estimate of the level of nullification or impairment is grounded in two key assumptions. First, it assumes that retailers accounting for 46.4 percent of the U.S. market for tuna products will not purchase and offer for sale Mexican tuna products because

[61] U.S. written submission, para. 71.

the tuna was caught using the AIDCP-certified dolphin encirclement fishing method.[62] Second, the United States assumes that 100 percent of tuna products from all other sources will be able to use the dolphin-safe label.[63] Both of these assumptions are incorrect.

a. Demand for and Consumption of Mexican Tuna Products

64. As elaborated upon below, the methodology paper correctly accounts for the demand for (as opposed to the consumption of) tuna products in the U.S. market, including Mexican tuna products. In this section Mexico addresses the United States' assumption that retailers accounting for 46.4 percent of the U.S. market for tuna products will not purchase Mexican tuna products.

65. Inherent in the United States' arguments is the premise that the dolphin-safe label itself has no value because the market is only concerned with the narrow question of whether or not dolphins were encircled in the process of harvesting the tuna. This is contradicted by the findings of the Panels and Appellate Body in the prior proceedings.

(1) It is not the Fishing Method that Matters but Whether There are Adverse Effects on Dolphins

66. The United States argues, in effect, that the dolphin-safe label has no value and that the only relevant factor is whether the dolphin encirclement method has been used. This argument contradicts the determinations of the Appellate Body. In completing the analysis under Article 2.1 of the TBT Agreement in the first compliance proceedings, the Appellate Body found as follows:

> Since the amended tuna measure maintains the overall architecture and structure of the original tuna measure – in particular, in terms of the regulatory distinction between tuna products derived from tuna caught by setting on dolphins and tuna products derived from tuna caught by other fishing methods – and given the participants' agreement that the relevant factual situation has not changed from the original proceedings, we find that, by excluding most Mexican tuna products from access to the dolphin-safe label, while granting conditional access to such label to like products from the United States and other countries, the amended tuna measure, similar to the original measure, modifies the conditions of competition to the detriment of Mexican tuna products in the US market.[64] (emphasis original)

67. The Appellate Body also stated:

> As the original panel found and as both participants have acknowledged in these compliance proceedings, access to the dolphin-safe label constitutes an

62 U.S. written submission, paras. 135-136.

63 U.S. written submission, paras. 71, 76 and 123.

64 Appellate Body Report, *US – Tuna II (Mexico) (Mexico – Article 21.5)*, para. 7.238.

"advantage" on the US market for tuna products by virtue of that label's "significant commercial value".[65]

68. In Mexico's view, it would be inappropriate for the Arbitrator to apply a scenario that has the effect of repudiating the Appellate Body's determination that access to the dolphin-safe label confers an advantage on the U.S. market.

69. To the extent that the United States has provided evidence of market participants accepting the narrow EII definition of dolphin-safe (i.e., no setting on dolphins is the only relevant consideration), that evidence is flawed for the reasons set out below, in particular the fact that the narrow definition is only being sustained by the prohibition against using the AIDCP dolphin-safe label and against advertising the many virtues of the AIDCP-certified fishing method.

70. The design, structure and architecture of the tuna measure confirms that it is adverse effects on dolphins in the form of mortalities and serious injuries that are relevant, not simply the method of fishing used. Tuna products containing tuna caught using other fishing methods cannot use the dolphin-safe label if any dolphins were killed or seriously injured during the gear set in which the tuna were caught. Moreover, the ongoing existence of the U.S. tuna measure itself is *conclusive evidence* that the "dolphin-safe" label has substantial consumer value independently of the fishing method used to capture the tuna. If the United States' assertion is correct that the U.S. market will not purchase tuna products containing tuna simply because the tuna is caught using a certain fishing method (i.e., encircling dolphins) then there is no need for the regulation of the term "dolphin safe" and, therefore, no need for the tuna measure in the first place. Tuna products would simply have to be labelled so as to declare the fishing method used to capture the tuna. Mexico seeks to be able to label its tuna products with the AIDCP-certified "dolphin safe" label, acknowledging that the tuna is caught by encircling dolphins in an AIDCP-certified manner. The fact that the dolphin-safe label has value when used in conjunction with the regulated fishing method clearly demonstrates that the label has value independently of dolphin encirclement.

(2) The Evidence Cited by the United States does not Support the Proposition that the U.S. Market will not Purchase Mexican Tuna Products

71. The Arbitrator must carefully scrutinize the "evidence" cited by the United States to support its proposition that the U.S. market will not purchase Mexican tuna products because such products contain tuna caught by encircling dolphins *in an AIDCP-compliant manner*, the fishing method used by the Mexican fleet. Most of the evidence does not support that proposition, and the evidence that provides some support for the proposition is unreliable or weak.

[65] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.236, citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 234 (referring to Panel Report, *US – Tuna II (Mexico)*, paras. 7.310, 7.314, and 7.316-7.317). In the original proceedings, the Appellate Body reviewed the same relevant facts, circumstances, and features of the market and concluded that "such findings 'clearly establish' that the lack of access to the dolphin-safe label of tuna products containing tuna caught by setting on dolphins had a detrimental impact on the competitive opportunities of Mexican tuna products in the US market". Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.45, citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 235.

(a) Evidence Concerning "Unregulated" Encirclement of Dolphins is Not Relevant to Mexican Tuna Products

72. In assessing the United States' evidence, it is important to distinguish between encircling dolphins in a manner that is consistent with the AIDCP dolphin-safe requirements and "unregulated" encirclement. The former fishing method is used by the Mexican tuna fleet and the latter is not. Unregulated dolphin encirclement caused significant dolphin mortalities in the 1970s and 1980s and led to the successful multilateral actions to protect dolphins in the ETP through the La Jolla Agreement (1992), the Panama Declaration (1995) and the AIDCP (1999).[66] The number of actual dolphin mortalities per year has been de minimis in relation to the dolphin population since 1993. As stated in court testimony in 1999 (when dolphin mortalities in the ETP were somewhat higher than currently)[67] by the then Assistant Secretary for Oceans and International Environment of the U.S. Department of State:

> To put these numbers in perspective, the estimate of the total dolphin population in the Eastern Pacific Ocean is approximately 9.5 million. In other words, at the current levels, dolphin mortality in the purse seine tuna fishery amounts to less than .02 percent (two one-hundredths of one percent) of the total number of dolphins in the region.[68]

73. As found by the panel in the original proceedings:

> It is undisputed that the application of the AIDCP controls has played a decisive role in the considerable reduction of dolphin mortalities in the ETP in the last decades. Annual estimate of dolphin mortality in the ETP in 1986 was 132,169 marine mammals, whereas the estimate in 2008 was 1,169 individuals. As noted above, the United States recognizes that the observed dolphin mortalities as a result of setting on dolphins in the ETP are approximately 1,200 dolphins per year. Furthermore, the Panel observes that the majority of sets on dolphins in the ETP these days produce *zero* observed dolphin mortalities. In 2008, for instance, in 92 per cent of the sets on dolphins in the ETP no incidental mortalities of dolphins were observed to have occurred.
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> Moreover, the AIDCP establishes overall dolphin mortality limits (DMLs) for the fleets fishing for tuna in the ETP (5,000 individuals). In recent years, these limits have not been met. The Panel also notes that the AIDCP has established

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66 Panel Report, *US – Tuna II (Mexico)*, paras. 2.35-2.41.

67 The incidental mortality of dolphins (of all species) in the ETP large purse seine tuna fishery in 2015 was 765 animals. See IATTC, "Fishery Status Report No. 14" (2016), available at https://www.iattc.org/FisheryStatusReportsENG.htm (Exhibit MEX-30). Exhibit MEX-31 contains a 2009 report of the AIDCP's Scientific Advisory Board on updated estimates of stock mortality limits from the 2008 U.S. abundance estimate for the two dolphin stocks at issue – the northeastern spotted dolphin and eastern spinner dolphin. Based on the fact that the populations of these stocks are significantly larger than previously believed, the report recommended increases in the per-stock, per-year dolphin mortality limits (DMLs) for those stocks. AIDCP, "Updated Estimates of NMin and Stock Mortality Limits," Document SAB-07-05 (30 Oct. 2009) (Exhibit MEX-31). The United States agreed to those increases – from 648 to 793 for the northeastern spotted dolphin, and from 518 to 655 for the eastern spinner dolphin. International Dolphin Conservation Program (IDCP), 22nd Meeting of the Parties, Minutes (30 Oct. 2009), item 8 on p. 4, Appendix 8 on p. 10 (Exhibit MEX-32).

68 Declaration of John F. Turner, Earth Island Institute v. Donald Evans, et al, Case No. C-99-3892-TEH (March 10, 2003), para. 16 (Exhibit MEX-33).

> certain mechanisms to enforce these limits. Under the AIDCP observer program 100 per cent of the trips are monitored by an independent observer. The AIDCP has also established an International Review Panel (IRP) that monitors the compliance by the vessels operating in the ETP with requirements and controls established by the AIDCP. Finally, under the System for Tracking and Verifying Tuna of the AIDCP, each party establishes its own tracking and verification programme, implemented and operated by a designated national authority, which includes periodic audits and spot checks for caught, landed, and processed tuna products. Should the mortalities of the fleet of any party to the AIDCP meet or exceed the total amount of DML distributed, fishing for tuna in association with dolphins must cease for all vessels operating under the jurisdiction of that party.
>
> On the basis of the above, we conclude that, when conducted under "controlled" circumstances, e.g. in accordance with the requirements of the AIDCP, the adverse effects of setting on dolphins in the form of observed dolphin mortality or serious injury may be considerably reduced. In addition, compliance with the AIDCP dolphin-safe labelling requirements includes a requirement that no dolphin has been killed or seriously injured in sets in which the tuna was caught. Therefore, allowing compliance with the AIDCP labelling requirements to be advertised on the US market would discourage observed dolphin mortality resulting from setting on dolphins to the same extent as the existing US dolphin-safe provisions do and would involve no reduction in the level of protection in this respect.[69]

74. The United States' submissions depend almost exclusively on information related to EII. It is clear from the evidence that EII's *raison d'être* is the historic "unregulated" dolphin mortalities that are no longer relevant in the ETP large purse seine fishery. This is made clear in the recent claims by EII that "[a]s a result of the 'Dolphin Safe' commitment by tuna companies, dolphin mortality has dropped by more than 97% in the past ten years",[70] and this commitment is "saving 80,000+ dolphins each year".[71] These claims relate to the reduction in dolphin mortalities in the ETP in the early 1990s from the levels prevailing in the 1970s and 1980s. However, EII's "dolphin-safe" regime was not responsible for these results. It is an important reflection on the EII's credibility that these reductions were the direct result of the La Jolla Agreement (1992), the Panama Declaration (1995), and the AIDCP (1999), but EII refuses to acknowledge the existence of those measures, and, in fact, actively campaigned against the adoption of U.S. legislation to implement the international commitments of the United States under the AIDCP.[72]

75. To the extent the United States seeks to rely on EII's activities, it is referring to historic "unregulated" dolphin encirclement and ignoring the AIDCP and the success of the Mexican fleet in protecting dolphins for over twenty years. Mexico agrees that products resulting from fishing operations – whether dolphin encirclement or other fishing methods, including gillnet, longline, trawl, and fish-aggregating device (FAD) fishing – that are conducted in a manner that does not protect dolphins should not be entitled to use a dolphin-safe label. That was the underlying basis for the Appellate Body's determinations in the original and compliance proceedings. Marketing campaigns by EII that are based predominantly on the fishing

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69 Panel Report, *US – Tuna II (Mexico)*, paras. 7.609-7.612.

70 Exhibit US-34, p. 2.

71 Exhibit US-37, p. 2.

72 EII, "An urgent message for members of Congress" (Exhibit MEX-34).

practices of the *U.S. fleet* in the ETP in the 1970s and 1980s – and do not reflect or educate consumers on the true status of dolphin protection in the ETP and lack of such protections outside the ETP – are neither credible nor pertinent to Mexican tuna products.

76. Under Mexico's first counterfactual scenario and the United States' alternative counterfactual, the market misconceptions regarding unregulated fishing methods and AIDCP-compliant fishing methods would be immediately corrected.

(b) The "Evidence" Manufactured by the United States Should Be Rejected

77. Several of the letters included in Exhibit US-40 show that, specifically in preparation for this arbitration, the United States pressured U.S. retailers into stating that they would not carry Mexican tuna products. The identical nature of certain of the statements indicate that they were not formulated by the retailers themselves or made in the retailers' own words. As "evidence", these statements are clearly unreliable. To the extent that such evidence is given any weight in this arbitration, it is simply proof that the United States is "shaping" consumer expectations in the market to comport with its outdated perspective on dolphin mortalities in the ETP large purse seine fishery. This reshaping is only made possible by the legislated definition of dolphin-safe in the U.S. tuna measure and by the deficiencies in the measure that enable non-ETP tuna products to be labelled dolphin-safe when such status cannot be assured.

78. As can be seen at the bottom of page 11 of the exhibit, an email sent by the United States to one of the retailers states as follows:

> I'm reaching out on behalf of the U.S. Department of Commerce with regards to whether Southeastern Grocers has or does not have a dolphin-safe tuna policy, and whether your company would or would not sell tuna caught in association with dolphins throughout your stores. The U.S. is involved in an international trade dispute at the World Trade Organization and we are obtaining statements from top retailers to bolster the U.S. position in the case. We hope to obtain a statement from Southeastern Grocers and would appreciate if you could forward this request to the appropriate staff member so that we may discuss the above. I can be reached at the submitted email, and by phone at 562-980-4073. The lead attorney on the case from the Office of the United States Trade Representative is also available to answer any questions you may have. His name is Sloane Strickler and he can be reached at 202-395-6164.
>
> Thank you,
>
> Daniel Studt

(Emphasis added.) Interestingly, Southeastern Grocers did not give the Commerce Department the statement it sought. Rather, it simply stated: "We have been and will continue to work closely with our supplier partners to ensure that all of our own brand tuna is responsibly sourced and dolphin-safe."[73]

79. Similarly, Walmart provided no commitments to never sell tuna products containing tuna harvested using the dolphin encirclement method, as the United States asserts in its submission. Rather, Walmart stated that it wants canned light and white tuna suppliers who comply with the International Seafood Sustainability Foundation (ISSF) conservation measures, certified as sustainable by the Marine Stewardship Council (MSC), or use certain

[73] Exhibit US-40, p. 11.

fishing practices "as validated through chain of custody."[74] It is relevant in this regard that the ISSF is coordinating on joint projects with the Pacific Alliance for Sustainable Tuna (PAST), which is a group of Mexico's major tuna producing companies representing more than 95% of Mexican domestic production.[75] The United States does not explain why it included Walmart as a retailer that would not carry Mexican tuna products if those products could bear a dolphin-safe label.[76]

80. There are letters from five other retailers that say what the Commerce Department wished – namely, that the companies would not in the future sell canned tuna that they knew was produced from dolphin sets. Two of these letters are identical, and the other three contain a portion of the identical language – implying that the Commerce Department sent drafts of a model letter to the companies and pressured them to sign a letter containing that language.[77] Citing to those letters as evidence of existing market conditions is extraordinarily disingenuous. In fact, the action of the Commerce Department in actively pressuring U.S. retailers not to carry Mexican tuna products is a new and additional measure in violation of the covered agreements, an issue that is not within the scope of this arbitration but will be addressed in Mexico's submissions in the Article 21.5 proceedings.

81. Because the United States has withheld full information on how the statements were obtained, neither Mexico nor the Arbitrator is able to tell whether the Commerce Department confirmed that the companies are aware that under the tuna measure the dolphin-safe label is supposed to mean that no dolphins were killed or seriously injured during the sets and gear deployments in which the tuna was caught, and that there is currently no way to verify that the tuna products they are carrying actually meet that standard.

82. Further context is provided by a pending antitrust lawsuit against Starkist, Bumble Bee Seafoods, Chicken of the Sea, and Tri-Marine by a large number of U.S. retail companies, including Kroger, Albertsons (which owns Safeway), and Hy-Vee, Inc., alleging price-fixing and other anti-competitive behavior.[78] One of the allegations is that the "Big Three" agreed among themselves as follows:

> On a teleconference during the week of 16 February 10, 2012, the StarKist Defendants, Bumble Bee and the Chicken of the Sea, Defendants agreed that none of them would launch a FAD-free canned tuna product in the United States. This agreement was later confirmed in writing during the week of February 17, 2012. Defendants agreed not to sell FAD-free canned tuna

[74] Exhibit US-40, p. 16.

[75] Press Release, "ISSF and Pacific Alliance for Sustainable Tuna Establish Framework for Collaboration to Promote Mutual Sustainability Goals" (Aug. 25, 2016) (Exhibit MEX-35).

[76] U.S. written submission, para. 35 and Exhibit US-41 BCI.

[77] In contrast, the communications from some of these same companies submitted in Mexico's Exhibit MEX-58 BCI in the original proceedings were generated in the normal course of business and not in relation to any WTO proceeding. Those communications, in which the companies stated they would carry Mexican products if they could have a dolphin-safe label, are much more persuasive. Exhibit MEX-36 BCI.

[78] Amended Complaint, In re: Packaged Seafood Products Antitrust Litigation, Case No. 16-cv-0051 (May 23, 2016) (Exhibit MEX-37).

products in the United States under their own brand names to avoid competition in the sale of canned tuna in the United States.[79]

83. Pre-trial discovery in this lawsuit was tolled until the end of 2016, at the request of the U.S. Department of Justice, which informed the court that it is conducting an investigation to determine whether to bring criminal charges against the defendants.[80]

84. Accordingly, there are serious questions regarding the degree to which current retailer behaviors relating to fishing methods within the United States should be treated as reflecting free market behavior.

(c) Other Purported Evidence

85. Other, older letters included in Exhibit US-40 are certifications that some retailers provided to EII. It is unclear why the United States believes these documents are relevant. The Great Atlantic & Pacific Tea Company certification to EII from 1999 makes no commitment to never carry tuna products caught by killing or seriously injuring dolphins, and, in any event, that company went into bankruptcy and closed all of its grocery stores in 2015.[81] The Albertson's certification to EII is also from 1999, and it does not reflect the current dolphin-safe standard. The letters from Food Lion and Publix both decline to make the commitment requested by EII.

86. It should be noted that awareness of EII's lack of credibility is growing. For example, in 2012 Pacifical, a venture jointly owned by the Partner Nations to the Nauru Agreement (PNA) to market tuna, obtained certification from the MSC and declined to participate in EII's program. (The PNA is comprised of eight Pacific Island countries that control approximately 50 percent of the world's supply of skipjack tuna.) EII reacted by attacking Pacifical and the PNA and purporting to prohibit purchases of tuna from Pacifical.[82]

87. Subsequently, Bumble Bee entered into an agreement to purchase and promote tuna from Pacifical.[83] Nonetheless, EII has maintained Bumble Bee's status on its "white list" of EII-certified "dolphin-safe" tuna producers.[84] FCF Fishery Company, one of the world's three largest brokers of tuna, also buys tuna from Pacifical and maintains its EII status.[85]

88. The certifications from Safeway and Wegman's, although more recent, are similarly suspect. First, they do not address the "no dolphins killed or seriously injured" standard. Second, although these certifications purport to prohibit the retailers from carrying products

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79 Ibid., p. 32. As discussed below, setting on fish aggregating devices (FADs) is a fishing method that is widely criticized because it is highly destructive to the marine environment. The Mexican industry avoids using FADs, but the fleets of other countries, including the United States, favor this method.

80 United States' Notice of Motion and Motion to Intervene, In re: Packaged Seafood Products Antitrust Litigation (Jan. 13, 2016); Join Stipulation re: Limited Stay of Discovery, In re: Packaged Seafood Litigation (April 21, 2016); Order Approving Joint Stipulation (May 4, 2016) (Exhibit MEX-38).

81 New York Post, "Bankrupt A&P unable to get buyers for 1/3 of stores" (Nov. 3, 2015) (Exhibit MEX-39).

82 See PNA, "PNA Alerts Consumers About Misleading Earth Island Institute [EII] Notices" (12 April 2012) (Exhibit MEX-40).

83 "Bumble Bee Announces Partnership with Pacifical" (April 13, 2016) (Exhibit MEX-41).

84 EII Approved Dolphin-Safe Tuna Processing Companies and Fishing Companies (July 28, 2016), p. 23 (Exhibit MEX-42).

85 "FCF, Largest Tuna Supplier in Western Pacific, Signs Agreement to Provide Marine Stewardship Council-certified Tuna" (Jan. 16, 2015) (Exhibit MEX-43); EII Approved Dolphin-Safe Tuna Processing Companies and Fishing Companies (July 28, 2016), p. 21 (Exhibit MEX-42).

from a non-EII-certified supplier, both retailers carry products from Bumble Bee, which is openly sourcing tuna from Pacifical, an entity that has been black-listed by EII.[86] Accordingly, these certifications reaffirm that EII certification lacks substance and is unenforceable.

89. For the above reasons, the documents provided in Exhibit US-40 only validate that the U.S. government seeks to continue to manipulate the U.S. market for tuna products by confusing retailers and consumers regarding the meaning of the "dolphin-safe" designation. The contents of Exhibit US-40 in fact show that the United States has never fully implemented even the 2013 tuna measure, as the retailers apparently are completely unaware of the changes to the measure made in 2013 requiring, for the first time, that the production of non-ETP tuna products use tuna captured without killing or seriously injuring dolphins.

90. Finally, the United States submitted a "draft" "dolphin-safe company policy" from EII, but does not provide any evidence that this particular document was actually adopted by any U.S. market participants.[87]

(3) Earth Island Institute's Purported Certification Program Has Been Widely Discredited and Cannot Be Preserved Without Indirect Support from the Tuna Measure

91. As part of its counterfactual, the United States endorses EII's purported dolphin-safe program, arguing in effect that if the United States were to withdraw the tuna measure, EII should be viewed as controlling use of the dolphin-safe label. This is not a credible argument or a responsible position from a fisheries conservation perspective.

92. As noted above, under Mexico's first counterfactual scenario and the United States' counterfactual, Mexico will be permitted to use the AIDCP dolphin-safe label on its tuna products in the U.S. market. This will enable the Mexican industry to counter the influence of the EII label in the market, something that to date it has been prohibited from doing. Indeed, evidence submitted in the original proceedings demonstrated that during the short period in 2003 when the United States changed the definition of "dolphin-safe" to comply with its commitment under the AIDCP, a major retailer agreed to purchase and carry Mexican tuna products.[88]

93. The EII dolphin-safe program simply requires payment to EII of an annual fee in order to be maintained its list of "approved" companies.[89] EII does not have any team to monitor actual fishing methods or dolphin mortalities; in fact, in July 2012, EII confirmed that its

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[86] Wegmans, "Bumble Bee Tuna, Solid White Albacore, In Water", available online at http://www.wegmans.com/webapp/wcs/stores/servlet/ProductDisplay?langId=-1&storeId=10052&catalogId=10002&productId=659324&openTab=details; Safeway, "Tuna", available online at http://shop.safeway.com/ecom/shop-by-aisle/Canned-Goods-Soups/Canned-Meat-Seafood/Tuna#state-ui-richInfo_960019221 (Exhibit MEX-44).

[87] Exhibit US-33.

[88] Exhibit MEX-45 BCI.

[89] Newsweek, "Earth Island Rules" (May 5, 2002) ("The industry even pays an informal tax to sustain Earth Island as its self-appointed regulator. The monitoring program costs about $400,000 a year, and at least a quarter is raised from companies. Tuna executives say they have little choice but to pay, if only to stay in the good graces of Earth Island. The importers' association in Germany gives $50,000 a year. Until recently, the British industry group gave five cents for each case of tuna sold. Earth Island is considering designing its own label, copyrighting it in Europe and charging companies for the right to use it.") (Exhibit MEX-46).

monitors do not board tuna vessels while at sea, and that the organization does not have resources to put observers on tuna vessels.[90] EII was cited in December 2015 as saying, with respect to fishing methods in the Western Pacific:

> "It's not 100 percent zero-dolphin kill in all those techniques, but it's very low," Phillips [of EII] said of the fishing practices sanctioned by the label. ''They may catch a dolphin, but if they do that tuna has to be segregated, and not be labeled dolphin-safe."[91]

But EII lacks any mechanism to verify that such segregation actually takes place. Further, there are no public compliance records of EII's dolphin-safe programs.

94. Further, Starkist and Chicken of the Sea (two of the so-called "Big Three" brands in the U.S. market) continue to define their dolphin-safe claims as meaning only that their tuna was not caught in association with dolphins; they have never updated their policies to match the new standard adopted in the tuna measure in 2013, which requires that no dolphins were killed or seriously injured in the fishing set or gear deployment in which the tuna was caught.[92] As EII purportedly now includes the no mortality and no serious injury requirements in its updated standard, it appears that Starkist and Chicken of the Sea do not comply with the EII dolphin-safe standard.

95. Accordingly, it is not possible to tell what the EII standard actually means. In fact, it is the continuing discriminatory nature of the U.S. tuna measure that enables EII's activities. If the United States were to eliminate the discrimination by allowing Mexican tuna products to use an AIDCP-certified dolphin-safe label or appropriately prohibit other suppliers from using a dolphin-safe label, EII would cease to have any influence over U.S. retailers. Moreover, if the United States were to withdraw the measure entirely, the AIDCP dolphin-safe label would become the only official dolphin-safe label in the U.S. market, and, in particular, the only label endorsed by the U.S. government through its role in the AIDCP.

96. In any event, the Arbitrator should not base the counterfactual on the United States' speculation about whether a new label might be created by a non-governmental entity and whether it could convince retailers that such a label would be more meaningful than the AIDCP dolphin-safe label.

(4) The Value of the AIDCP Label

97. The AIDCP is an environmental agreement that, in combination with its precursors, the La Jolla Agreement and the Panama Declaration, resolved the dolphin mortality problem that existed in the ETP in the 1970s and 1980s.

98. In the original proceeding, Mexico demonstrated that the AIDCP and its predecessor agreements have been a tremendous success, reducing dolphin mortality in the ETP to a statistically insignificant level while allowing the use of a fishing method that promotes the

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[90] Atuna, "EII on-board observers, ghosts?" (Oct. 8, 2013), available online at http://www.atuna.com (Exhibit MEX-47).

[91] CBS News, "Does dolphin-safe tuna live up to its labeling?", available online at http://www.cbsnews.com/news/does-dolphin-free-tuna-live-up-to-its-labeling/ (Exhibit MEX-48).

[92] Starkist, "FAQ", available online at http://starkist.com/faq, p. 4 ("StarKist will not purchase any tuna caught in association with dolphins"); Chicken of the Sea, "FAQ", available online at http://chickenofthesea.com/company/faqs, p. 1 ("Chicken of the Sea remains fully committed to the 100% dolphin-safe policy implemented in April 1990. This policy guarantees that Chicken of the Sea will not purchase tuna from vessels that net fish associated with dolphins, and we require certification of dolphin-safe fishing practices from all tuna suppliers.") (Exhibit MEX-49).

sustainability of tuna stocks and limits harm to other species of sea life. The original Panel found that:

> It is undisputed that the application of the AIDCP controls has played a decisive role in the considerable reduction of dolphin mortalities in the ETP in the last decades. [The] [a]nnual estimate of dolphin mortality in the ETP in 1986 was 132,169 marine mammals, whereas the estimate in 2008 was 1,169 individuals. As noted above, the United States recognizes that the observed dolphin mortalities as a result of setting on dolphins in the ETP are approximately 1,200 dolphins per year. Furthermore, the Panel observes that the majority of sets on dolphins in the ETP these days produce *zero* observed dolphin mortalities. In 2008, for instance, in 92 per cent of the sets on dolphins in the ETP no incidental mortalities of dolphins were observed to have occurred.[93] (emphasis original; footnotes omitted)

99. The ADICP authorizes the use of dolphin-safe labelling on tuna products where the tuna contained therein has been harvested in compliance with the AIDCP's extensive requirements for fishing procedures, certification and tracking and verification. The AIDCP has its own dolphin-safe label for this purpose.[94] Use of the AIDCP dolphin-safe certification is subject to the supervision of the AIDCP.[95]

100. Under the AIDCP, every large purse seine vessel fishing for tuna in the ETP must have an independent observer onboard. The observer program is concisely described in a report of the Inter-American Tropical Tuna Commission (IATTC):

> The Agreement on the International Dolphin Conservation Program (AIDCP) requires 100-percent coverage by observers on trips by Class-6 purse seiners (vessels with fish-carrying capacities greater than 363 metric tons) that fish for tunas in the eastern Pacific Ocean (EPO). This mandate is carried out by the IDCP On-Board Observer Program, made up of the IATTC's international observer program and the observer programs of Colombia, Ecuador, the European Union, Mexico, Nicaragua, Panama, Venezuela and the Regional Observer Program (ROP) under the umbrella of the WCPFC, based on a Memorandum of Cooperation (MOC) signed by representatives of the IATTC and the WCPFC.
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> * * *
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> The observers are biologists trained to collect a variety of data on the mortalities of dolphins associated with the fishery, sightings of dolphin herds, catches of tunas and bycatches of fish and other animals, oceanographic and meteorological data, and other information used by the IATTC staff to assess the conditions of the various stocks of dolphins, study the causes of dolphin mortality, and assess the effect of the fishery on tunas and other components of the ecosystem. The observers also collect data relevant to compliance with the provisions of the AIDCP and data required for the tuna-tracking system established under the AIDCP, which tracks the "dolphin-safe" status of tuna

[93] Panel Report, *US – Tuna II (Mexico)*, para. 7.609. See also Appellate Body Report, *US – Tuna II (Mexico)*, paras. 244 and 260.

[94] AIDCP, Resolution to Establish Procedures for *AIDCP Dolphin-Safe* Tuna Certification (20 June 2001) (Exhibit MEX-50).

[95] See IDCP, "Matters Related To The Tuna Tracking And Dolphin Safe Certification Programs" (Document TT-36-05) (19 Oct. 2015), p. 2 (Exhibit MEX-69).

> caught in each set from the time it is captured until it is unloaded (and, after that, until it is canned and labeled).[96]

101. The AIDCP rules for tracking dolphin-safe tuna are very detailed and comprehensive, and apply from the moment of capture of the tuna all the way through unloading of the tuna, and then to the processing and marketing of the tuna products containing that tuna.[97]

102. The success of the AIDCP has been recognized by the Food and Agriculture Organization of the United Nations (FAO), which awarded the Margarita Lizárraga Medal to the AIDCP in 2005. The medal is awarded biennially to a person or organization that serves with distinction in the application of the Code of Conduct for Responsible Fisheries.[98] Other methods promoted by the tuna measure, in particular FAD fishing, have a disastrous impact on fisheries stocks.[99] Thus, due to the reputation of the AIDCP and its certified fishing method's preservation of the oceanic ecosystem, the AIDCP dolphin-safe label clearly has considerable consumer information value.

103. The tuna measure prohibits tuna product labels from using the term "dolphin-safe" or describing how the tuna was harvested in a manner that protects or conserves dolphins unless the specific requirements of the U.S. measure's labelling provisions — and, thus, its particular

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96 IATTC, Quarterly Report (April-June 2013), p. 14 (Exhibit MEX-51).

97 AIDCP, "Resolution To Adopt The Modified System For Tracking And Verification Of Tuna" (20 June 2001) (Exhibit MEX-52).

98 Panel Report, *US – Tuna II (Mexico)*, footnote 620.

99 See, e.g., The Pew Charitable Trusts, "Estimating the Use of FADs Around the World" (Nov. 2015), p. 2 (Exhibit MEX-53):

> "The use of drifting FADs has a significant environmental impact and is closely linked to issues of long-term tuna sustainability. These objects contribute to marine litter, jeopardize the survival of vulnerable species, and have already contributed to bigeye tuna in the Pacific and Atlantic becoming overfished. FADs that are not recovered drift freely, entangling and killing marine life. For instance, an estimated 480,000 to 960,000 silky sharks are killed each year in the Indian Ocean when caught in drifting FADs.
>
> Fishing on FADs was the primary factor driving purse seine catches of bigeye tuna to a record high in the western and central Pacific in 2013. While purse seine vessels generally target schools of skipjack tuna, juvenile bigeye tuna often gather under FADs and are caught before they have a chance to reproduce. In 2013, for example, more than 85 percent of bigeye tuna landed in the western and central Pacific were small, mostly immature fish caught on these devices. The overall tonnage of small bigeye caught on FADs that year actually exceeded the tonnage caught by longline vessels that target bigeye tuna. Scientists also believe that FADs play a role in the significant changes in the migratory patterns of skipjack tuna during El Nino events. An overabundance of FADs, meanwhile, may be linked to changes in observed behavior and size of skipjack tuna caught in several oceans" (footnotes omitted).

definition of "dolphin-safe" — are satisfied.[100] The measure also prohibits Mexican tuna products from using any other term or symbol that suggests that the tuna contained in the product were harvested using a method of fishing that is not harmful to dolphins.[101] As a consequence, an official, international "dolphin-safe" designation recognized outside the United States cannot be used in the U.S. market if it differs from the U.S. definition of "dolphin-safe", and this is the case for the AIDCP "dolphin-safe" certification. In the context of this dispute, this means that Mexican tuna products cannot be labelled as dolphin-safe in the U.S. market.

104. In this regard, it is crucial to appreciate that when the United States originally introduced the tuna measure, it intervened in the U.S. tuna product market by defining, controlling, and regulating the meaning of the "dolphin-safe" designation on labels affixed to tuna products. The measure extensively swayed the perceptions of U.S. distributors as to U.S. consumers' understanding of what the term "dolphin-safe" means. Importantly, from Mexico's perspective, the U.S. dolphin-safe labelling provisions have dictated that tuna caught by encircling dolphins is not "dolphin–safe", irrespective of the manner in which the fishing operations are conducted. As a consequence, even though the Mexican industry heavily invested in the dolphin-safe fishing mechanisms required by the AIDCP and fished in a manner compliant with the AIDCP dolphin-safe standards, Mexican tuna products were prohibited from using the international dolphin-safe label authorized by the AIDCP in the U.S. market. In turn, this has prevented the Mexican tuna industry from advertising the environmental merits of its fishing methodology, including the protection and conservation of dolphins and the overall sustainability of the ETP fishery. These prohibitions further indoctrinated and shaped the U.S. market with the tuna measure's exclusive definition of "dolphin-safe".

105. Under the tuna measure that was the subject of the original dispute settlement proceedings, tuna products made with tuna from the ETP were eligible for the dolphin-safe label only if there were no dolphin encirclement sets during the voyage on which the tuna was caught and there were no dolphins killed or seriously injured during the fishing set or gear deployment in which the tuna was caught. Meanwhile, for non-ETP tuna products, "dolphin-safe" simply meant that there were no dolphin encirclement sets during the voyage on which the tuna was caught. In other words, for non-ETP tuna products, it was permissible to use

[100] Appellate Body Report, *US – Tuna II (Mexico)*, para. 199 ("…the measure at issue sets out a single and legally mandated definition of a 'dolphin-safe' tuna product and disallows the use of other labels on tuna products that do not satisfy this definition. In doing so, the US measure prescribes in a broad and exhaustive manner the conditions that apply for making any assertion on a tuna product as to its 'dolphin-safety', regardless of the manner in which that statement is made. As a consequence, the US measure covers the entire field of what 'dolphin-safe' means in relation to tuna products"). See also Panel Report, *US – Tuna II (Mexico)*, paras. 7.128 ("Together, the provisions at issue therefore regulate the use of the term 'dolphin-safe' and of other related terms on labels for tuna products offered for sale on the US market. They do so in a binding and exclusive manner. The provisions at issue imply in particular that there is no possibility for competing or alternative definitions of what is 'dolphin-safe' on the US market, or for any claims to be made relating to 'dolphins, porpoises or marine animals', except in compliance with the criteria set out in the measures") and 7.131 ("…to the extent that they prescribe, in a binding and legally enforceable instrument, the manner in which a dolphin-safe label can be obtained in the United States, and disallow any other use of a dolphin-safe designation, the US tuna labelling measures 'regulate' dolphin-safe labelling requirements 'in a binding or compulsory fashion'. ... In particular, the measures prescribe 'in a negative form', to use the Appellate Body's terms, that no tuna product may be labelled dolphin-safe or otherwise refer to dolphins, porpoises or marine mammals if it does not meet the conditions set out in the measures, and thus *impose* a prohibition on the offering for sale in the United States of tuna products bearing a label referring to dolphins and not meeting the requirements that they set out" (emphasis original)).

[101] 16 U.S.C. § 1385(d) (Exhibit MEX-54).

the label even when dolphins had been killed or seriously injured during the fishing set or gear deployment in which the tuna was harvested.[102] In this regard, the panel in the original proceedings found that:

> … we are not persuaded, based on the evidence presented to us, that at least some of the dolphin populations affected by fishing techniques other than setting on dolphins are not facing risks at least equivalent to those currently faced by dolphin populations in the ETP under AIDCP monitoring.[103]

The Appellate Body affirmed this finding,[104] and determined that the different, more liberal standard applied to non-ETP tuna products was inconsistent with TBT Article 2.1.[105]

106. During the original proceedings, Mexico showed that, on its website explaining the dolphin-safe program, the Commerce Department described only the program for the ETP, and made no mention of the different, more liberal standard for non-ETP tuna that allowed products to be labelled dolphin-safe regardless of how many dolphins were killed during their capture.[106]

107. Also in the original proceedings, Mexico showed that the AIDCP, as part of its program to protect dolphins, had developed its own dolphin-safe labelling system, which is backed by the stringent verification and tracking requirements of the AIDCP and enforced by the member governments.[107] The United States, as a full member of the AIDCP, actively participated and approved the AIDCP dolphin-safe label, including the issuance of the below press release in 2001:[108]

> The countries and regional economic integration organizations participating in the Agreement on the International Dolphin Conservation Program (AIDCP), meeting here for the 5th Meeting of the Parties to the AIDCP, today announced the creation of a unique and far-reaching program to certify and label tuna caught in the eastern Pacific Ocean consistent with the AIDCP and without mortality or serious injury to dolphins.
>
> The new *AIDCP Dolphin Safe* Tuna Certification is the only one in the world supported by a comprehensive and transparent multilateral tracking and verification system administered by member governments and the treaty organization that will ensure full consumer confidence in the *AIDCP Dolphin Safe* label and the certification behind it.

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[102] Appellate Body Report, *US - Tuna II (Mexico)*, para. 289 ("As the Panel noted, where 'tuna is caught outside the ETP, it would be eligible for the US official label, even if dolphins have in fact been caught or seriously injured during the trip, since there is, under the US measures as currently applied, no requirement for a certificate to the effect that no dolphins have been killed or seriously injured outside the ETP"), citing Panel Report, *US – Tuna II (Mexico)*, para. 7.532.

[103] Panel Report, *US – Tuna II (Mexico)*, para. 7.617.

[104] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 259-260.

[105] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 298-299.

[106] See Appellate Body Report, *US – Tuna II (Mexico)*, para. 58, citing Mexico's appellee submission, para. 166.

[107] See Panel Report, *US – Tuna II (Mexico)*, paras. 2.40-2.41, 4.61, 7.630, 7.633, 7.673, 7.675-7.676. See also Appellate Body Report, *US – Tuna II (Mexico)*, para. 101.

[108] AIDCP, Press Release (21 June 2001) (Exhibit MEX-55).

> In a joint statement released by the Parties to the AIDCP, they said, "For the first time, consumers will be able to purchase 'Dolphin Safe' tuna with absolute confidence in what the label means and that it means what it says. Consumers will know that the *AIDCP Dolphin Safe* tuna they are buying has been tracked and verified from the moment it comes out of the sea to the moment the label goes on the can."
>
> The *AIDCP Dolphin Safe* Tuna Certification program was originally proposed last year by Colombia as a means by which to inform consumers about the full scope of the International Dolphin Conservation Program (IDCP) in the eastern Pacific Ocean tuna fishery. In their joint statement, the Parties to the AIDCP recognized the need to institute a comprehensive national and international education effort to improve public understanding of the objectives and successes of the IDCP, and to correct misinformation about the program that has been or may be propagated by others.
>
> In addition to approving the new government administered tracking, verification, certification and labelling regimes, the Parties took additional substantive actions to further support consumer confidence in the *AIDCP Dolphin Safe* Tuna Certification, including continuous enhancements to the tracking and verification system and the adoption of clear measures to promote compliance with all aspects of the IDCP program generally.
>
> In the joint statement, the Parties said, "We are all understandably proud of the recognized success of the International Dolphin Conservation Program, a program unparalleled in the world. We have taken the initiative to create this certification program as a means by which to herald our program to the world and to support our industries and the responsible NGOs that have helped to build this program into what it is today. After all, none of the successes of the program would have been possible without the tremendous dedication and commitment of the tuna industries operating in the eastern Pacific Ocean, and the cooperative support of such prominent conservation organizations as The Ocean Conservancy, World Wildlife Fund, National Wildlife Federation, Greenpeace and the Environmental Defense Fund, among others."

108. The United States, through the AIDCP, has also participated in the creation of materials to promote the use and public understanding of the AIDCP dolphin-safe label.[109]

109. The tuna measure has prevented the Mexican industry from using the AIDCP dolphin-safe label in the U.S. market, thereby depriving it of the ability to explain the meaning of the AIDCP label to U.S. retailers and consumers and to explain the success of this award-winning environmental agreement in protecting dolphins.[110] This would change under Mexico's first counterfactual scenario and the United States' counterfactual.

[109] See AIDCP, Informational Pamphlet and Educational Module on the AIDCP (Exhibit MEX-56). See also informational video at https://www.iattc.org/AIDCPvideo/.

[110] Evidence has previously been submitted that being able to use a dolphin-safe label to counter the misconceptions created by EII would be valuable. See Exhibit MEX-36 BCI, para. 7.

b. Most Tuna Products from Other Sources Would Not Be Able to Use the Label

110. The United States' second assumption is that 100 percent of tuna products from all other sources will be able to use the dolphin-safe label.[111] Under the United States' proposed counterfactual, the FTC consumer labelling rules apply generally and all tuna products would be able to use a dolphin-safe label provided that such label is accurate so that consumers are not deceived. Thus, tuna products from the United States and other countries would be able to use a dolphin-safe label provided that such a label is accurate so that U.S. consumers are not deceived. As discussed above, it would not be reasonable to assume that consumers and retailers, let alone the FTC, would accept that a "dolphin-safe" label could be used on tuna products containing tuna that was caught in a fishing set or gear deployment in which dolphins were killed or seriously injured, and/or in circumstances where it is impossible to verify that the product contains only tuna that was caught in a dolphin-safe manner. Thus, some form of mechanism will have to be put in place by tuna product suppliers so that dolphin-safe claims can be verified. In this sense, such a mechanism is similar in effect to the mechanism in the second scenario of Mexico's counterfactual — i.e., WTO-consistent eligibility, certification and tracking and verification requirements.

111. The deficiency in the assumption that 100 percent of tuna products from other sources would be able to use the dolphin-safe label lies in the failure of the United States to distinguish between the imposition of the regulatory regime (e.g., FTC regime, WTO-consistent tuna measure) and industry adoption and implementation of such a regime. As explained above, to date, tuna product suppliers from the United States and other countries have not had to adopt and implement the procedures necessary to assure the accuracy of the dolphin-safe label. The implementation of such procedures will take time and will involve costs. Some suppliers will invest the time and money to adopt and implement, others will not. From the perspective of the Arbitrator's assessment of the level of nullification or impairment, the relevant timeframe is the "short-run", as reflected in the structure of the model employed by Mexico (discussed below and in the methodology paper). For any suppliers who chose to invest the necessary time and money, it is reasonable to assume that it will take considerably longer than the "short-run" for those suppliers to put in place the necessary procedures to assure label accuracy so that U.S. consumers are not deceived (see below for similar U.S. regulation that provides five years for implementation). Accordingly, it is unreasonable for the United States to assume that 100 percent of the tuna products containing tuna caught outside the ETP will immediately be eligible to use a dolphin-safe label.

112. The necessary procedures to assure labelling accuracy are not currently in place outside the ETP. In the original compliance proceedings, the Panel determined that outside the ETP, "captains may not necessarily and always have the technical skills required to certify that no dolphins were killed or seriously injured in a set or other gear deployment, and this may result in inaccurate information being passed to consumers".[112]

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111 U.S. written submission, paras. 71, 76 ("all tuna product that currently qualifies as dolphin safe would continue to qualify for the label") and 123.

112 Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.233. The Panel also stated that "the United States has acknowledged that observer certification may heighten the veracity, reliability and, importantly, the accuracy of the relevant certification. Thus, even the United States' own argument appears to recognize that it may be *easier* or *more likely* for dolphin-safe certifications made only by captains to be inaccurate than it is for dolphin certifications made by captains and observers. And of course, the consequence of this is that it may be more likely that tuna caught by vessels other than large purse seine vessels in the ETP will be inaccurately labelled as dolphin-safe than it is that tuna caught by large purse seine vessels in the ETP will be" (emphasis original). See ibid., para. 7.168.

113. The original compliance Panel also found that the United States has no legal requirements or other means to track tuna prior to the time it reaches a U.S. cannery, determining that: "… the United States must rely on the canneries for information about the movement of tuna prior to arrival at the cannery, and is not able to go 'behind the documents', as it were, to verify that a particular dolphin-safe certification describes the batch of tuna with which it is associated."[113] With respect to imports of tuna products made in non-U.S. canneries, the Panel found: "[a]s in the case of US canneries, it appears that the United States is not able to directly track the movement and dolphin-safe status of tuna from the time of catch up to the point of delivery to a non-US cannery and subsequent shipment to the United States, but must rely on documentation provided by the importer."[114]

114. Mexico continues to believe strongly that fishing methods used without measures to protect dolphins – including fishing on FADs, longlines, gillnets, trawl fishing, etc. — cannot accurately be represented as dolphin-safe methods. Nonetheless, in light of the findings by the panels in the original proceedings that dolphins outside the ETP face risks similar to those within the ETP, the absence of reliable certification, tracking and verification systems for non-ETP tuna products means that such products cannot be accurately presented as dolphin-safe. The adoption of enforcement requirements equivalent to those of the AIDCP would prevent the great majority of non-ETP tuna products from being labelled dolphin-safe. The withdrawal of the tuna measure would remove its insulating effect and allow the validity of non-AIDCP labels to be challenged as inaccurate.

115. In light of the substantial amount of transshipping involved in non-ETP sourcing, and the lack of investment in oversight, verification and monitoring systems by non-ETP producers and governments, it would be unreasonable to assume that a substantial portion of non-ETP tuna products would have qualified to use the label in 2014.[115] In this regard, it is relevant to examine the information available on the regulation of fishing by three of the largest exporters of tuna products to the United States: Thailand, the Philippines and Taiwan. The European Commission recently has issued reports on these three countries under Council Regulation (EC) No 1005/2008 of 29 September 2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing. Relevant highlights of those reports are presented below:

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113 Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.365.

114 Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.366.

115 Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.372 ("We also see some merit in Mexico's argument that the different tracking and verification requirements may make it more likely that tuna caught other than by large purse seine vessels in the ETP could be incorrectly labelled"), 7.381 ("we accept Mexico's argument that the practice of trans-shipping may increase the likelihood that tuna caught outside the ETP large purse seine fishery could be incorrectly labelled"), 7.382, 7.391 ("We concluded that the different tracking and verification requirements have a detrimental impact on Mexican tuna and tuna products, including because they may make it more likely that tuna caught other than by large purse seine vessel will be incorrectly labelled as dolphin-safe"), 7.602 ("the Panel concluded that the different certification requirements do not stem exclusively from a legitimate regulatory distinction within the meaning of Article 2.1 of the TBT Agreement, because, to the extent that captains' could not be assumed to have the skills necessary to make an accurate dolphin-safe certification, this distinction makes it easier for non-dolphin-safe tuna caught other than by large purse seine vessel in the ETP to be incorrectly labelled as dolphin-safe, which inaccurate labelling would undermine the overall objectives of the amended tuna measure") and 7.610.

Thailand: Commission Decision of 21 April 2015 on notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing (2015/C 142/06)[116]

- "Thailand is the world's largest tuna importer, importing between 800 000 to 850 000 metric tonnes of tuna per year (2008 data) to supply over 50 processing plants all specialising in tuna processing. 90 % of these imports originate from the Western and Central Pacific Ocean and the remainder from the West Indian Ocean".[117]
- "The fleet has expanded by more than 15,000 vessels since 2011, now reaching circa 40,000 vessels of which 7 000 are classified as commercial vessels (each having a gross tonnage of more than 20 tonnes). Of the total, less than a fifth use logbooks, which suggests that the majority of catches go unreported."[118]
- "The Commission established that the traceability systems developed by the Thai public authorities are not incorporated into the accounting systems of companies and therefore do not ensure that data is exhaustive and reliable since there is no link between what is recorded in the authorities' systems with what is recorded in the companies' accounting and production systems. This situation undermines the reliability of the traceability chain at company level."[119]
- "National documentation schemes developed by the authorities for the purpose of traceability are used incorrectly by operators, who were found to inaccurately record incoming quantities of fish. This exposes the system to potential abuse by allowing operators to over declare incoming quantities from erroneous catch certificates and to launder fish through these overestimations."[120]

Philippines: Commission Decision of 10 June 2014 on notifying a Third Country that the Commission considers as possible of being identified as non-cooperating Third Countries pursuant to Council Regulation (EC) No 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing (2014/C 185/03)[121]

- "The Philippines has a large long distance fleet which includes, as of March 2014, 68 vessels targeting tuna ('tuna vessels') registered on the IOTC list of authorised fishing vessels and 18 tuna vessels registered on the ICCAT list of authorised fishing vessels. According to the information submitted by the Philippines in their Annual Fishery Reports of 2012 and 2013 to the WCPFC, the Philippines had 622 fishing vessels (including transport and carrier vessels) registered as of 1 July 2012 and 722 fishing vessels registered as of 11 June 2013 with that RFMO…. The Philippines vessels target mainly tuna. The yearly catch data of tuna submitted by the Philippines include all the tuna catch unloaded in Philippine ports, regardless of where they were caught and does not distinguish those catches in accordance with their provenance or in

116 Exhibit MEX-57.

117 Ibid., para. 63.

118 Ibid., para. 30.

119 Ibid., para. 45.

120 Ibid., para. 46.

121 Exhibit MEX-58.

accordance with the flag of the catching vessel. This creates doubts about the capacity to effectively trace those catches."[122]

- "The composition of the Philippine fleet, in combination with the variety of sources of fishery products entering in the supply chain, and with an insufficient traceability system, entails a clear risk of access of IUU products to the Philippines market."[123]
- "In line with the basic principles of Article 11(1)(11) of the FAO Code of Conduct for responsible Fisheries the Philippines should be able to monitor origin of fish and fisheries products and consequently guarantee that EU non-compliant fish is not exported to the EU. However, the Philippines does not implement the traceability scheme which would be needed to avoid that it imports and re-exports raw material and fish products from non-notified countries and countries identified as non-cooperating countries to the EU. A working traceability system would indeed be necessary from the stage of landing to that of export, or from the stage of import to subsequent export. However, such a system is not in place in the Philippines and the lack of control and monitoring of fishing activities in particular of landing, the dearth of inspections at sea and in port, the lack of checks on the logbooks entail that IUU fishing products may have easy access to the Philippines, and the EU market. In addition, it is common business practice that fish stemming from Philippines flagged vessels is captured in the waters of Third Countries and subsequently either landed to Third Countries for further processing, or transhipped in the waters of Third Countries and subsequently sent for further processing in another country. Therefore, many transactions at risk take place outside the waters of Philippines. … However, the Philippines does not implement any measure needed to ensure that authorities are controlling the veracity of information and traceability of transactions pertaining to their vessels activities".[124]
- "The BFAR relies on information provided by the operators or processing plants, instead of verifying and validating the data in catch certificates based on its own assessment. The Philippines have failed to develop a coherent control scheme to review the companies' traceability procedures. For example, despite the large number of documents requested prior to validating the catch certificate (regular and simplified), the BFAR cannot verify whether the weight indicated in the catch certificate is correct as it does not carry out any control inside factories. Therefore, the validation of the catch certificate can be qualified as being 'blind' and the risk that IUU catches are channelled into export streams is real."[125]
- "In this respect it must be recalled that the lack of control on transhipment undermines the ability of the authorities to control the catches made by purse seiners and, therefore, creates a risk of under-reporting of catches. The limited presence of patrol vessels, the limited coverage by on-board observers (except during the fish aggregating devices (FAD) closure period, e.g. summer time) and the current weak operational status of the VMS may also favour IUU fishing

122 Ibid., para. 37.

123 Ibid., para. 39.

124 Ibid., para. 45.

125 Ibid., para. 51.

activities. There are also weaknesses in the control of artisanal fisheries, such as limited control at landing, and limited surveillance at sea. Furthermore, the licence system is still not implemented in all municipalities."[126]

- "As regards observers, the Philippines was not compliant with the [IOTC] Resolution 11/04: it has not provided information on the level of coverage as well as the observer reports."[127]
- "According to Article 3 of the WCPFC Convention, the WCPFC area of competence comprises in principle all waters of the Pacific Ocean (bounded to the south and to the east by defined lines), including waters under jurisdiction of the Philippines. As the Philippines considers that WCPFC rules do not fully apply to waters under its jurisdiction, it is not entirely clear what data is collected and reported to WCPFC; this does not cover assessments of all the Philippines fisheries waters. The Philippines, by considering its archipelagic waters to be beyond the scope of application of the WCPFC measures is in breach of these measures."[128]

Taiwan: Commission Decision of 1 October 2015 on notifying a third country of the possibility of being identified as a non-cooperating third country in fighting illegal, unreported and unregulated fishing (2015/C 324/10)[129]

- "Twenty Taiwanese flagged vessels are reported by the Indian Ocean Tuna Commission to have committed infringements contrary to the conservation and management measures of coastal States in the Indian Ocean in 2013 and 2014. These vessels have conducted operations: with fishing gears non-marked, with no original documents on board of the vessel or with missing fishing related documentations, with outdated fishing licences, with no clearance from the last fishing port called, with no fishing licence from the flag State, with no Vessel Monitoring System (VMS) on-board working or with VMS on-board disrupted, conducted shark finning operations, conducted illegal at-sea transhipments and without reporting transhipments."[130]
- "The 2012 and 2015 visits revealed that Taiwan lacks a traceability system that is able to ensure full transparency in all stages of fishing transactions i.e. catch, transhipment, landing, transport, factory processing, export and trading."[131]
- "The Commission established that the trading companies are not incorporating in their accounting systems information concerning traceability of fishing transactions and there is no certainty that what is recorded in the authorities' systems corresponds with what is recorded in the companies' accounting and production systems. This situation undermines the reliability of the traceability chain at company level. It also exposes the system to potential abuse by

126 Ibid., para. 55.

127 Ibid., para. 93. The most recent available Indian Ocean Tuna Commission (IOTC) Compliance Report for the Philippines states that, among other things, it has not transposed the bank on large scale driftnets into its domestic legislation and has not implemented an observer program. IOTC, "IOTC Compliance Report for: Philippines", IOTC-2015-CoC12-CR22 [E] (23 March 2015) (Exhibit MEX-59).

128 Exhibit MEX-58, para. 101.

129 Exhibit MEX-60.

130 Ibid., para. 44.

131 Ibid., para. 49.

allowing trading operators to over declare incoming quantities from erroneous catch certificates and to launder fish through these overestimations. Furthermore, the Taiwanese electronic databases supporting the authorities' systems are incomplete and crucial documents in the supply chain such as landing declarations, e-logbooks and information from designated ports are still either not fully recorded or missing. This highlights the failures of the traceability system as a whole."[132]

- "The analysis of products caught by Taiwanese flagged vessels revealed the following inconsistencies: catch certificates with data amended or without all required data, inconsistent information concerning catch, master declarations, logbook, ICCAT statistic documents, dolphin safety declarations, transhipment, landing and processing data and dates, lack of access to Vessel Day Scheme actual fishing effort data for vessels operating in the Pacific, no records of licences from coastal States, inconsistencies on fishing and carrier vessels with vessels changing names and vessels not listed in the Union sanitary approved establishments lists, incomprehensible trade patterns (i.e. fish caught in Atlantic/Indian ocean, transported in Asia, processed and export to the Union) and incomplete information on processing statements and relevant production yields."[133] (emphasis added)
- "Information available for 2014 from ICCAT revealed that Taiwanese vessels have failed to present to the ICCAT observers valid authorisations to tranship and up to date versions of the Transhipment Declaration (previous versions were used, which did not include the last changes such as the inclusion of a reference to the stock and the area). In addition, Taiwanese vessels have failed to present valid authorisations to fish for the ICCAT area and numerous cases of non-compliance in connection with the logbooks were identified such as logbooks which were not bound in contravention of Recommendation 03-13 and the logbook sheets which were not numbered as required in ICCAT Recommendation 11-01, Annex 1. Furthermore, non-compliance with marking and VMS requirements and inconsistencies in the reporting of information to the ICCAT observers were detected as well."[134]

It is clear from the above that the major suppliers of tuna to the United States do not have the necessary procedures in place to assure accurate labelling.

116. Therefore, the United States' assumption that the necessary procedures would have been put in place by the suppliers in the short-run is unreasonable. It is useful to note in this regard that a recently adopted Commerce Department regulation, adopted in a completely different legal context, threatens to block entirely imports of tuna and other seafood products from non-ETP sources on the basis that the supplying countries have not proven that they are sufficiently protecting dolphins and other marine mammals. That regulation incorporates a five-year "exemption period," which the Commerce Department explained as follows:

> A five-year exemption period has been provided to allow foreign harvesting nations time to develop, as appropriate, regulatory programs comparable in effectiveness to U.S. programs. During this time, NOAA will identify fisheries that have interactions with marine mammals and export fish and fish products

132 Ibid., para. 50.

133 Ibid., para. 56.

134 Ibid., para. 91.

> to the U.S. and NOAA will consult with harvesting nations with such fisheries to gather information about their marine mammal bycatch.[135]

This new regulation is evidence that the United States itself is skeptical of the ability of producers currently to assure the accuracy of dolphin-safe claims and believes that it will take years to remedy the situation.

117. With regard to the United States' counterfactual, under which there would be no specific rules for when a product could be labelled dolphin-safe — other than general rules prohibiting marketing claims from being deceptive and unfair — the absence of the discriminatory, non-WTO compliant tuna measure would make it difficult to justify use of the dolphin-safe label for the great majority of non-ETP products. This is because the majority of consumers believe that the term "dolphin-safe" means that *no* dolphins were killed or seriously injured during the harvesting of the tuna *in the can they are purchasing*, and very little of the supply of non-ETP products is supported by adequate certification, tracking and verification processes to back up such a claim.[136]

118. In conclusion, it is not reasonable for the United States to assume in its counterfactual that 100 percent of tuna products from all other sources would be able to use the dolphin-safe label.

IV. THE UNITED STATES WRONGLY INTERPRETS ECONOMIC CONCEPTS AND CAUSAL EFFECTS

119. The United States discusses in its written submission the state of the U.S. tuna market. In that discussion, the United States confuses the concepts of demand and consumption. In addition to the inappropriate use of economic concepts, the United States wrongly attributes the causes of several events in the U.S. tuna market.

A. Definition of Economic Concepts and Attribution of Causality

120. In several places in its written submission, the United States confuses a basic economic concept. For example, the United States writes:

> U.S. cannery receipts tell a consistent story with regard to weak demand for yellowfin tuna product.[60] 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

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135 Final Rule, Fish and Fish Product Import Provisions of the Marine Mammal Protection Act, 81 Fed. Reg. 54390 (Aug. 15, 2016) (Exhibit MEX-61). The new regulations establish a program for evaluating a harvesting nation's regulatory program for reducing marine mammal incidental mortality and serious injury in its export fisheries and to determine whether such a program is comparable in effectiveness to the U.S. regulatory program. The regulations will place the burden on each harvesting nation to establish that it meets the conditions of "comparability" for export of its fish and fish products to the United States. In effect, the regulations will begin enforcement of the U.S. Marine Mammal Protection Act to fisheries other than the purse seine tuna fishery in the ETP. Thus, in connection with the planned implementation of potential *complete bans on imports*, the United States is preparing to require other countries to assess marine mammal stocks in their fisheries, take measures to protect marine mammals, and implement monitoring and tracking systems that presumably will be similar to those now in place in the ETP. See NOAA Fisheries, "Seafood Import Provisions under the Marine Mammal Protection Act" (Exhibit MEX-62).

136 Public Opinion Strategies, National Survey Methodology (Oct. 16, 2010) (Exhibit MEX-63).

> 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 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.[137]

[60] *See* "U.S. Tuna Cannery Receipts" (data collected from NMFS TTVP database) (Exh. US-22).

121. In the quote above, the United States incorrectly uses the word "demand" when it intends to refer to "consumption". The word "demand" in economics refers to the quantity of a product that consumers are willing to purchase in function of their preferences, income, the price of the product and prices for other goods. The demand is often described by a mathematical function that includes all the variables that affect demand. Graphically, the demand is typically illustrated with the price on the vertical axis and the quantity on the horizontal axis. The quantity demanded decreases as the price of the product increases. The demand shifts outward or inward in response to changes in variables other than the own-price of the good.

122. The word "supply" in economics describes the cost of producing one unit of a product at the margin. It is the marginal cost of production for a good and it typically increases with respect to the quantity produced. The supply shifts inward if the price of an input increases and outward if the price of an input decreases.

123. The intersection of the demand and the supply yields the equilibrium price and quantity. The equilibrium quantity can be referred to as the "consumption". It also equals production in an autarkic world. When there is trade, the equilibrium quantity equals production plus the net quantity traded, which can be positive or negative.

124. The United States attempts to explain weak consumption of yellowfin tuna in the United States by a weak demand but ignores that consumption is determined by the intersection of the demand and the supply. In fact, the causes of weak consumption that the United States mentions are caused by the supply rather than the demand. Such errors appear in several places of the United States written submission.[138]

125. Exhibit US-10 BCI explains that consumption of yellowfin tuna is limited by the higher cost of yellowfin tuna. More specifically, [[…]] stated that:

> [[...]][139]

[[…]] also stated that [[…]].[140]

126. These two quotes from [[…]] clearly show that the price of yellowfin is high because raw yellowfin materials are expensive. The high price then causes low consumption. The market reality described by [[…]] is illustrated by Figure 1, which shows the supply of yellowfin tuna to the U.S. market (the line S_0) and the U.S. demand for yellowfin tuna (the line D). The current situation corresponds to where the supply is given by S_0. The supply of canned yellowfin tuna is limited because of the high cost of raw yellowfin tuna. The equilibrium

[137] U.S. written submission, para. 25.

[138] See, e.g., U.S. written submission, paras. 25, 36 and 97.

[139] Exhibit US-10 BCI, p. 9.

[140] Exhibit US-10 BCI, p. 10.

quantity, i.e. consumption, is small because of the high cost of producing yellowfin tuna, rather than because of a lack of demand.

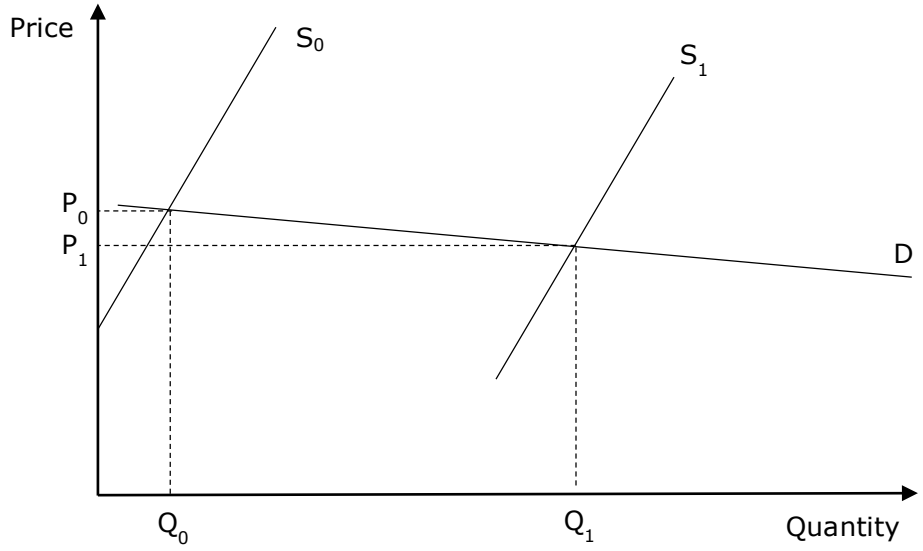

Figure 1: U.S. market for yellowfin tuna

B. There is a Demand for Yellowfin Tuna

127. The United States claims that there is no overriding demand for Mexican yellowfin tuna. One reason that the United States puts forward is that yellowfin is a premium product and that demand for premium tuna is occupied by albacore canned products, accounting for 29 percent of canned tuna sales in 2014.[141] Indeed, albacore tuna is a premium product comparable in quality to yellowfin tuna.

128. With albacore tuna occupying nearly a third of the U.S. canned tuna market by volume, it indicates that there *is* a demand for premium canned tuna in the United States. The United States argues that U.S. consumers have distinct preferences for albacore tuna, suggesting that U.S. consumers would not consume yellowfin tuna instead of albacore tuna. The basis for that argument is the relative consumption quantities for the different species of tuna.[142] But this argument forgets that the consumption quantities observed are at equilibrium and thus the quantities depend on production cost. Because it costs more to produce canned yellowfin tuna than canned albacore tuna, consumption of canned yellowfin tuna in the United States has been lower in recent years.

129. In support of its argument, the United States offers U.S. tuna cannery receipts from 1987 to 2015.[143] The United States describes that while the U.S. fleet was still operating in the ETP, the U.S. receipts for yellowfin tuna exceeded those of albacore and even those of skipjack in 1987.[144] After the U.S. exited the ETP, albacore quickly took over as the second

141 Exhibit US-17.

142 U.S. written submission, para. 21.

143 Exhibit US-22.

144 U.S. written submission, para. 25.

most important species in the U.S. cannery receipts. However, this change does not reflect a shift in U.S. consumers' preferences for yellowfin tuna versus albacore or skipjack. Rather, the changes in the relative quantities echo increasing costs for canned yellowfin tuna. With the move of the U.S. fleet out of the ETP and the U.S. tuna measure, U.S. canneries lost access to inexpensive yellowfin tuna, hence causing a decline in the receipts for yellowfin and a decline in U.S. consumption of yellowfin tuna. Thus, the decline in U.S. cannery receipts for yellowfin tuna is a consequence of the U.S. tuna measure and was not caused by U.S. consumers valuing yellowfin tuna less.[145]

130. Albacore tuna currently competes with skipjack tuna in the U.S. market. Although it commands a higher price, albacore tuna captures a significant share of the market because U.S. consumers are willing to pay a premium for its higher quality. There is no doubt that albacore would occupy an even larger share of the U.S. market if its price was lower. The same is true for yellowfin tuna and this is what the model in Mexico's methodology paper shows.[146]

131. Another argument that the United States brings as evidence that there is little demand for yellowfin tuna is that some yellowfin tuna is mixed with skipjack in light tuna. The evidence reported by the United States is from 2005.[147] That yellowfin tuna is mixed with skipjack is actually not surprising. Indeed, by its definition light meat tuna can contain tuna species other than skipjack. [[…]] explains this: [[…]][148] Adding higher quality tuna species into cans of light meat tuna improves taste and texture.

132. The mixing of high quality tuna in light meat will greatly depend on the relative prices of skipjack, yellowfin and albacore tuna. If the price of yellowfin tuna is high but the price of albacore tuna is low, the U.S. canneries will not mix yellowfin with skipjack and will rather use albacore tuna in light meat tuna. Similarly, if the price of yellowfin tuna is low but the price of albacore tuna is high, U.S. canneries will use some yellowfin tuna in light meat tuna and will not use albacore tuna.

133. For the model in Mexico's methodology paper, the mixing of yellowfin tuna or albacore tuna in light meat tuna is not problematic. Canned yellowfin tuna is the product that Mexico would export to the United States. The model is calibrated for canned yellowfin tuna that is marketed as such, versus all other (generic) canned tuna. Whether the generic canned tuna contains some yellowfin or not is captured in the value of the mean premium.

134. The U.S. raises the issue that yellowfin contains more mercury than skipjack tuna, hence depressing the demand for yellowfin tuna. However, according to the U.S. government itself, the mercury content in albacore tuna is essentially the same as in yellowfin tuna.[149] With albacore tuna occupying nearly a third of the U.S. canned tuna market by volume, it does indicate that mercury is not a primary concern of a large segment of U.S. consumers.

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145 The shift of the U.S. fleet out of the ETP/away from yellowfin and to the Western and Central Pacific/to skipjack in the late 1980's and early 1990's closely mirrors the decline in consumer consumption of canned tuna in the U.S. market. It is reflective of the declining quality of generic tuna with the removal of yellowfin from the supply chain.

146 Exhibit MEX-2.

147 See Exhibit US-18.

148 Exhibit US-10 BCI, p. 3.

149 See U.S. Food and Drug Administration, "Mercury Levels in Commercial Fish and Shellfish (1990-2010)", available online at http://www.fda.gov/Food/FoodborneIllnessContaminants/Metals/ucm115644.htm (Exhibit MEX-64).

V. MEXICO'S METHODOLOGY IS APPROPRIATE TO ESTABLISH THE LEVEL OF NULLIFICATION OR IMPAIRMENT

135. The model in Mexico's methodology paper captures the necessary market realities of the Mexican and American canned tuna market to properly calculate the level of nullification or impairment. These market realities include differentiation in the canned tuna market, access to inexpensive yellowfin tuna in Mexico and small transaction costs for canned tuna between Mexico and the United States.[150]

A. Mexico's Methodology Builds Around the Correct Counterfactual and Uses the Appropriate Methodology

136. The implementation period ended on 13 July 2013. Accordingly, the calculations use the 2014 calendar year because it is the first calendar year after the expiration of the RPT. The counterfactual applies to two alternative scenarios where modifications to the tuna measure are implemented on January 1, 2014. The market then adjusts given the existing infrastructures and levels of investment. That is, the model considers the short run as established in previous arbitrations.[151]

137. The implication of considering the short run is that Mexican canneries, and canneries elsewhere, cannot make investments in response to the modifications of the tuna measure. The time it would take to expand production would exceed the length of run applicable for the calculation of nullification or impairment. As such, the model is based on the catch of yellowfin tuna in the ETP observed in 2014. The quantity of yellowfin tuna canned in Mexico in 2014 remains equal to its observed value. However, Mexican canneries can import some yellowfin tuna caught in the ETP by other countries. Only yellowfin tuna caught and transformed domestically can be exported to the United States in the model.

138. The model is specifically calibrated for 2014 and thus reflects the state of the market at that time. The United States describes several trends in consumption and production.[152] While those trends explain how the canned tuna market ended up where it was in 2014, it has no immediate relevance for the calculations of nullification or impartment. The calibration of the model based on 2014 data reflects the state of the market in 2014 and hence summarizes all the history of the market up to that point. Trends are not relevant to the counterfactual itself, especially when it uses a short run perspective.

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150 On page 26 of Exhibit 2 of Mexico's methodology paper, it was incorrectly stated that a product can be sold as yellowfin tuna in the Mexican market if it has 40 percent yellowfin content. In fact, the applicable regulation states that the product must be labelled with the species that is the highest percentage of the content. See Norma Oficial Mexicana NOM-084-SCFI-1994, section 4.1.1 (Exhibit MEX-70).

151 The short-run assumption is consistent with the Arbitrator decision in *United States – Certain Country of Origin Labelling (COOL) Requirements* (WT/DS384/ARB and WT/DS386/ARB), paras. 6.30-6.32. In that arbitration, the Arbitrator distinguished between long-run supply elasticities — which would apply to a counterfactual wherein the measure in question "had never existed" — and short-run supply elasticities — which would apply if the measure in question had not been withdrawn at the end of the reasonable period of time for implementation (RPT). The Arbitrator noted that this approach was consistent with the practice in other arbitrations, citing *US – Upland Cotton (Article 22.6 – US II)*, paras. 4.144 and 4.147 and *EC – Hormones (US) (Article 22.6 – EC)*, para. 38.

152 See, e.g., U.S. written submission, paras. 19, 25 and 97.

B. The United States Mischaracterizes Mexico's Model

139. In several places in its submission the United States mischaracterizes the model in Mexico's methodology paper. Incorrect understanding of the model has important consequences.

140. The United States writes, "Mexico has a completely elastic supply curve (i.e., Mexican industry could supply an unlimited quantity of canned yellowfin at no increasing marginal cost)."[153] This is an incorrect description of Mexico's model. Figure 2 of Mexico's methodology paper shows the assumptions for the supply of canned yellowfin tuna by Mexican canneries. The supply curve is initially perfectly elastic, but for a quantity equal to the Mexican production of yellowfin tuna in 2014 it becomes perfectly inelastic. The model assumes that Mexican canneries could increase that production by importing yellowfin tuna from other countries. The Mexican supply of yellowfin increases but still remains perfectly elastic at its production capacity given by the sum of the domestic production and the imported tuna.

141. A related comment by the United States is that the model assumes that Mexico can increase its production without affecting the marginal cost of its canneries.[154] This is incorrect. The model assumes a constant marginal cost (perfectly elastic supply) for the Mexican production of canned yellowfin tuna up to the assumed production capacity where it increases to infinity (perfectly inelastic supply). The United States then states that the United States consumption of yellowfin tuna products under Mexico's model would be large enough to have an influence on the world price of yellowfin tuna.[155] This is not the case in the model because the production is fixed at quantities that were actually caught in 2014. If there is any response in the price of yellowfin tuna, it should be very small.

142. In a second associated point, the United States asserts that the cost of importing yellowfin from others fishing in the ETP should increase.[156] If that is actually the case, the increase in cost should be small. In addition, the transformation of greater volumes of yellowfin tuna should cause a decrease in transformation costs of Mexican canneries. Canning technology is very similar throughout the world and has not changed for many years.[157] [[…]] states that increasing production through adding an additional shift would not increase the marginal cost of production and would actually lower the unit production cost.[158] Recall that Mexico's model assumes that production in Mexico is increased through an additional shift.[159] Because the production technology is essentially the same for Mexican and American canneries, the unit cost of Mexican canneries also should then decline, offsetting any increase in the cost of yellowfin tuna.

143. The United States comments on the assumption for the elasticity of demand for canned tuna in the United States, stating that "the demand elasticity for tuna is the same for generic and yellowfin (set at -1)".[160] The model does assume an elasticity of demand of -1 for all tuna. However, it is not true that the model assumes the same elasticity of demand for all canned

153 U.S. written submission, para. 88.

154 U.S. written submission, para. 113.

155 U.S. written submission, paras. 113 and 117.

156 U.S. written submission, paras. 113 and 116-119.

157 See Exhibit MEX-19.

158 Exhibit US-10 BCI, p. 1.

159 Exhibit MEX-26.

160 U.S. written submission, para. 90.

tuna species. Indeed, the model considers substitution between generic and yellowfin tuna, with the implication that the demand for a specific tuna species is more elastic than the total demand for tuna. The own-price elasticity of the U.S. demand for generic tuna in the United States at the solution of the model is -2.51. The demand for yellowfin tuna is more elastic, and when evaluated at the solution of the model it equals -6.47. This is consistent with the contention of the United States that the demand for yellowfin tuna is particularly elastic.[161] It is also supported by the statement from [[…]].[162]

144. An elastic demand for yellowfin tuna products explains why the consumption of yellowfin increases substantially with the decline of the price of yellowfin tuna in the United States. An elastic demand means that consumption is sensitive to changes in the price of a good. This is true both for an increase or a decrease in the price. The modification of the tuna measure under the counterfactual yields a decline in the price of yellowfin tuna products in the United States. This is a shift to the right of the supply of yellowfin tuna products in the United States as illustrated by the shift in the supply from S_0 to S_1 in Figure 1. Because the demand for yellowfin tuna products is elastic, even a small decline in the price of canned yellowfin tuna yields a large increase in the consumption of canned yellowfin tuna. The modifications of the tuna measure would bring about a significant decline in the price of canned yellowfin tuna in the United States and hence a very large increase in consumption because the demand is elastic.

145. As the price of yellowfin canned tuna declines, many consumers naturally switch from the consumption of canned generic tuna to the consumption of canned yellowfin tuna. Some consumers would switch from consuming skipjack to consuming yellowfin tuna while some other consumers would switch from consuming canned albacore tuna to consuming yellowfin canned tuna. The demand for premium tuna products is linked to the demand for other tuna products. The definition of a premium product is a product that commands a higher price because of its attributes. If the price of the premium product declines, consumers will switch to that better product. There is nothing that prevents consumers from switching to a premium product if its price goes down.

146. The United States also comments about the intensity of demand parameters.[163] The relative sizes of these parameters reflect the difference in size of the Mexican and American markets and the greater per capita consumption of U.S. consumers. The intensity parameters, and the value assigned to them, is the normal way of calibrating demand.

147. The United States confuses what drives the increase in consumption of canned yellowfin tuna in the model.[164] Mexico's methodology model does not assume any shift in demand. As described previously and illustrated in Figure 1, the increased consumption for canned yellowfin tuna in the United States comes from a decline in the price that comes from an increase in supply from the introduction of supplies of canned yellowfin tuna from Mexico. However, there is no reason to believe that U.S. production would increase in response to modifications to the tuna measure. Rather, it is more likely that U.S. production would go down in response to the tuna measure because it would bring down the price of canned tuna. Mexico's model assumes that U.S. production remains constant, but this is not necessary, and

161 U.S. written submission, para. 105.

162 Exhibit US-10 BCI, p. 1.

163 U.S. written submission, paras. 90, 99 and 107.

164 See U.S. written submission, para. 110.

relaxing that assumption would have no impact on the results. What matters at the margin, and is illustrated in Figure 1 of Mexico's methodology paper, is the world price of canned tuna.

148. The Mexican yellowfin tuna industry is set up differently from most of the yellowfin tuna industry in the rest of the world. In the early 1990s, as a result of both the primary and secondary embargoes imposed by the United States, fresh and frozen yellowfin tuna markets in the United States and third countries Japan and Europe were closed to Mexican tuna. In response to the embargo, the Mexican industry re-organized itself, becoming more internally focused and vertically integrated. In its re-organization, the Mexican tuna industry essentially abandoned the fresh tuna market.[165] Tuna is caught and frozen aboard in brine in vessels that can stay at sea for several weeks. Because the Mexican tuna industry is isolated from the world fresh yellowfin market, the raw tuna material for producing canned yellowfin is inexpensive to Mexican canneries.

149. Elsewhere in the world, the canned yellowfin tuna market is impacted by the demand for fresh yellowfin tuna. The strong demand for fresh yellowfin tuna has caused its price to exceed the price of skipjack and albacore on markets outside of Mexico.[166] The high price for yellowfin tuna on the world market explains its limited supply to the United States.

150. Modifications of the tuna measure would bring new inexpensive supplies of canned yellowfin tuna from Mexico onto the U.S. market. This is appropriately modeled as a shift to the right of the supply of canned yellowfin tuna on the United States market.

151. Figures 2 and 3 below illustrate the basic structure of the model in Mexico's methodology paper. Figure 2 shows tuna markets in the United States and Figure 3 shows tuna markets in Mexico. In each figure, panel A illustrates the generic tuna market and panel B illustrates the yellowfin tuna market. Arrows in the figures show shifts in demand and supply curves in response to modifications to the U.S. tuna measure. Any line that shifts is in black with the tuna measure in place and in blue after modifications to the tuna measure. As in Mexico's methodology model, the world supply of generic tuna is assumed perfectly elastic. Relaxing this assumption would have no qualitative effect on the Figures.

152. As Figure 2 shows, with the tuna measure, the United States consumes a large quantity of generic tuna and a small quantity of yellowfin tuna because yellowfin tuna is very expensive relative to generic tuna. In Figure 3, Mexico consumes some generic tuna and consumes all of the yellowfin it produces. The supply of yellowfin tuna to Mexico is perfectly inelastic at a quantity that equals its production in 2014.

[165] J. Joseph, "The Tuna-Dolphin Controversy in the Eastern Pacific Ocean: Biological, Economic, and Political Impacts," *Ocean Development and International Law*, Vol. 25 (1994), p. 15 (Exhibit MEX-65).

[166] See Exhibit US-10 BCI, p. 10; Exhibit MEX-14, Figure 42.

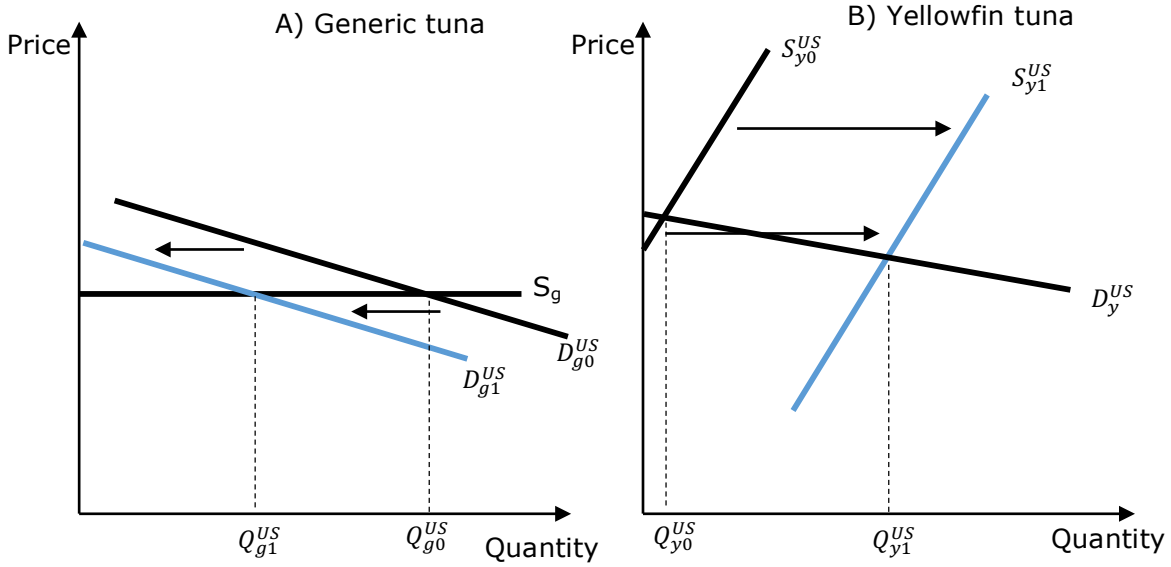

Figure 2: U.S. tuna market – modifications to U.S. tuna measure

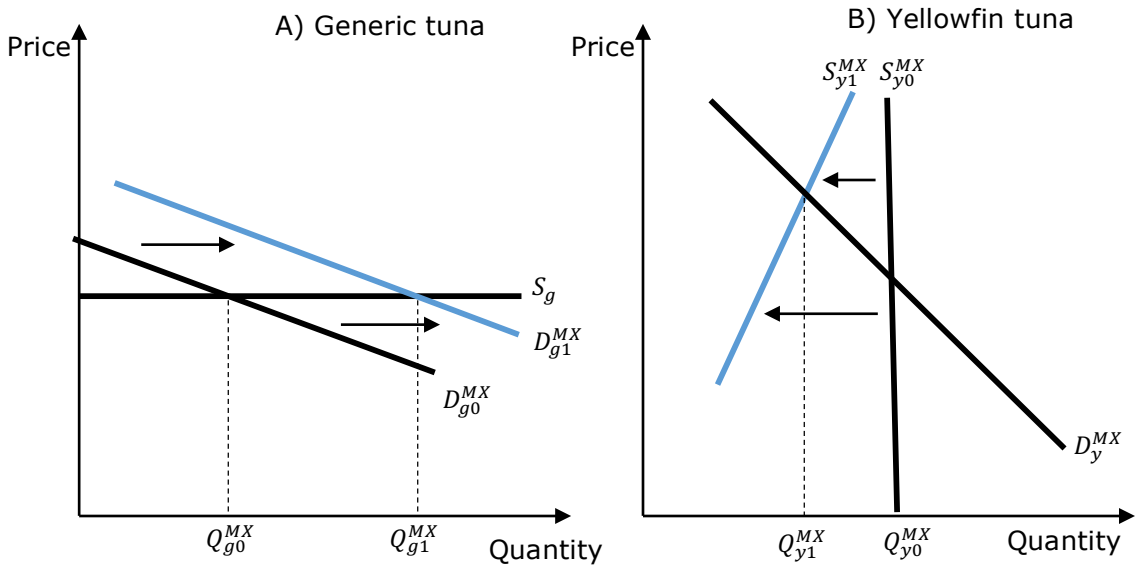

Figure 3: Mexican tuna market – modifications to U.S. tuna measure

153. Modifications to the tuna measure open the U.S. market to Mexican tuna. This shifts the supply of yellowfin tuna to the United States from S_{y0}^{US} to S_{y1}^{US} because Mexico can produce canned yellowfin tuna at a lower cost. The introduction of Mexican canned yellowfin tuna lowers the price of canned yellowfin tuna in the United States causing a large increase in consumption because the demand for canned yellowfin tuna is elastic. As the price of canned yellowfin tuna declines in the United States, the demand for generic tuna in the United States

shifts down because consumers substitute some of their consumption of generic canned tuna to canned yellowfin tuna.

154. In Mexico, the opening of the U.S. market to Mexican canned tuna shifts to the left and rotates the supply of yellowfin tuna to the Mexican market.[167] The rotation in the supply of canned yellowfin tuna to Mexico is from the downward slope of the U.S. demand for yellowfin tuna. The price of canned yellowfin tuna in Mexico increases which causes a shift to the right in the Mexican demand for canned generic tuna hence increasing Mexican consumption of canned generic tuna.

C. Difference in Preferences of Mexican and American Consumers

155. The United States argues that consumers are not willing to pay a premium for canned yellowfin tuna and that American and Mexican consumers do not have the same preferences.[168]

156. Regarding willingness to pay, Mexico's methodology paper provides plenty of evidence that U.S. consumers are willing to pay a premium for canned yellowfin tuna. This premium is reflected in the data. If consumers were not willing to pay a premium for canned yellowfin tuna, as it is currently selling for a high price, there would be no consumption of yellowfin tuna in the United States. While the United States argues that Mexico does not provide evidence that consumers are willing to pay a premium for yellowfin tuna, it also clearly identifies yellowfin tuna as a premium product. [[…]] provides support for this: [[…]][169]

157. In Mexico's model, albacore tuna is bundled together with all other canned tuna. The regression model provides evidence that U.S. consumers are willing to pay a premium for canned yellowfin tuna versus the average canned tuna (generic) consumed in the United States. This is the appropriate way to provide evidence of willingness to pay for canned yellowfin tuna because it is consistent with the construction of the model. Even if U.S. consumers are willing to pay a premium for albacore tuna, when it is averaged with skipjack tuna (lightmeat tuna) to create a generic tuna category, U.S. consumers are willing to pay more for canned yellowfin tuna than the generic canned tuna category. The regression model provides the necessary information to support that there is a premium for yellowfin tuna.[170]

158. The bundling of products of different qualities is common in economics modeling. For example, virtually all models of grain markets do not distinguish between the different varieties of wheat (e.g. winter vs spring wheat, soft vs hard wheat, durum wheat). Similarly, economists do not model cattle markets differentiating between all types of cattle (e.g. red and black Angus, longhorn and even crosses with zebu). It was indeed the case that cattle were not differentiated by their species in the models used to calculate nullification and impairment in *US – COOL*, as all the cattle were found to be "like products". Without considering all possible types of tuna, the model gets to the point that the average consumer is willing to pay a premium for yellowfin and hence derives the relevant demand for yellowfin tuna. Adding complexities to the model by considering all tuna species would make the model less transparent and would most likely not yield a more accurate calculation of the amount of nullification or impairment.

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167 At equilibrium, the supply of Mexican canned yellowfin tuna equals the sum of the supply of canned yellowfin tuna to the United States and of the supply of canned yellowfin tuna to Mexico.

168 U.S. written submission, paras. 99-107.

169 Exhibit US-10 BCI, p. 2.

170 See Tables 5, 6 and 7 of Mexico's methodology paper (Exhibit MEX-2).

159. Assuming that Mexican and American consumers have similar preferences for canned tuna is a reasonable assumption. In both countries, canned tuna is not a staple food and canned tuna represents a small share of food consumption. The United States provides evidence that consumers in the United States and Mexico consume some products with different intensity.[171] For some of these products like fruits and vegetables, the difference in consumption patterns can be in large part explained by difference in costs of producing these products and hence their prices at retail. For other products, such as certain types of cheese or chilli peppers or lettuce, there are indeed some engrained consumption patterns as these are staple food products. But this is not the case for canned tuna.

160. Even though there is no reason to believe that preferences for canned tuna should differ across the two countries, Table 1 offers results for the model assuming that the mean willingness to pay for yellowfin tuna in the United States is $1/kg and the mean willingness to pay in Mexico is $2/kg. This is a rather extreme assumption on the relative preferences. Other assumptions of the model are the same as in Mexico's methodology paper. In comparison to the results in Mexico's methodology paper, prices for yellowfin canned tuna are lower and Mexican export volumes of canned yellowfin tuna to the United States are smaller. Given the results in Table 1, the export loss is USD $351 million.

Table 1: Model solutions with Mexican imports yellowfin tuna (mean willingness to pay for yellowfin tuna in the United States is $1/kg and mean willingness to pay in Mexico is $2/kg)

	United States	Mexico
Consumption of yellowfin tuna (metric tonnes)	52,208	33,292
Consumption of generic tuna (metric tonnes)	255,042	38,456
Price of yellowfin tuna ($/kg)	7.22	7.17
Price of generic tuna including tariff and charge ($/kg)	5.00	5.32
Exports of yellowfin tuna (metric tonnes)	0	52,208
Imports of yellowfin tuna (metric tonnes)	52,208	20,000
Exports of generic tuna to the U.S. (metric tonnes)	0	0
Imports of generic tuna from other countries (metric tonnes)	77,692	15,456

161. If preferences are different across the two countries, it may very well be the case that preferences for yellowfin tuna are stronger in the United States than in Mexico. This is a very possible scenario because income is higher in the United States and thus the demand for a premium product like canned yellowfin tuna would be stronger in the United States. Table 2 offers results for the model assuming that the mean willingness to pay for yellowfin tuna in the United States is $2/kg and the mean willingness to pay in Mexico is $1/kg. All other assumptions of the model are the same as in Mexico's methodology paper. With the assumptions on willingness to pay, the model yields a corner solution where Mexico exports all of the yellowfin tuna that it has caught domestically. Because of the limit in the quantity of yellowfin it can export to the United States, the difference in the prices for yellowfin tuna between Mexico and the United States does not equal transportation costs. With the results in Table 2, the export loss from the tuna measure is USD $485 million.

Table 2: Model solutions with Mexican imports yellowfin tuna *(*mean willingness to pay for yellowfin tuna in the United States is $2/kg and mean willingness to pay in Mexico is $0/kg*)*

[171] U.S. written submission, para. 100.

	United States	Mexico
Consumption of yellowfin tuna (metric tonnes)	65,500	20,000
Consumption of generic tuna (metric tonnes)	228,193	59,792
Price of yellowfin tuna ($/kg)	7.80	6.25
Price of generic tuna including tariff and charge ($/kg)	5.00	5.32
Exports of yellowfin tuna (metric tonnes)	0	65,500
Imports of yellowfin tuna (metric tonnes)	65,500	20,000
Exports of generic tuna to the U.S. (metric tonnes)	0	0
Imports of generic tuna from other countries (metric tonnes)	50,843	36,792

D. Elastic Supply

162. The United States mentions that it is a large consumer in the world market for canned tuna, representing about 19 percent of world consumption.[172] However, the United States is a much smaller player in the total world market for tuna as U.S. consumption of canned tuna is about 8 percent of the world catch of tuna.[173]

163. Although the United States might not be all that important as a player in the world tuna market, it is worth exploring the sensitivity of the amount of nullification or impairment to the assumption that the United States is a price taker on the world market for tuna. Relaxing the price taking assumption means that the world supply that the United States faces is not perfectly elastic. This requires adding a new equation to the model. Assuming a world supply of generic tuna with a constant elasticity, the export quantity of canned generic tuna to the United States is given by

$$Q_{gw\exp} = Bp^{\varepsilon},$$

where ε is the elasticity of supply to the United States. At equilibrium, the consumption of generic tuna in the United States is

$$Q_{gus} = Q_{gdom} + Q_{gw\exp},$$

where Q_{gus} is the consumption of canned generic tuna in the United States, Q_{gdom} is U.S. production of generic tuna and $Q_{gw\exp}$ is the world export of generic tuna to the United States.

164. Table 3 shows the results assuming that world export supply elasticity equals 10. All other assumptions of the model are the same as in Mexico's methodology paper. U.S. consumption of canned yellowfin from Mexico is very similar to the results in Mexico's methodology paper when world supply of generic tuna is perfectly elastic. U.S. and Mexican consumption of generic tuna rise because the price of generic tuna is lower. The price of yellowfin tuna is also lower in both countries. The export loss to Mexico in this scenario is USD $455 million.

Table 3: Model solutions with Mexican imports yellowfin tuna (world export supply elasticity equals 10)

	United States	Mexico

[172] U.S. written submission, para. 15.

[173] See Mexico's methodology paper (Exhibit MEX-2).

Consumption of yellowfin tuna (metric tonnes)	63,728	21,772
Consumption of generic tuna (metric tonnes)	251,244	56,459
Price of yellowfin tuna ($/kg)	7.55	7.50
Price of generic tuna including tariff and charge ($/kg)	4.66	4.96
Exports of yellowfin tuna (metric tonnes)	0	63,728
Imports of yellowfin tuna (metric tonnes)	63,728	20,000
Exports of generic tuna to the U.S. (metric tonnes)	0	0
Imports of generic tuna from other countries (metric tonnes)	73,894	33,459

165. The reason that Mexican exports of canned yellowfin tuna are marginally affected by the change in the world supply elasticity is that trade volumes for yellowfin tuna are determined by price arbitrage between the two countries. The world price of generic tuna is the same for the U.S. and Mexico. This is a fact that is not affected by whether or not the model allows for U.S. import volumes to affect the world price. The decline in the world price of generic tuna causes a decline in the price of yellowfin tuna. But it does not change the fact that Mexico will export yellowfin tuna until at the margin it makes as much money on the U.S. or in the Mexican market.

166. Table 4 offers alternative results where the world supply of generic tuna to the United States equals 1. The export quantity of Mexican yellowfin tuna to the United States is similar to the other scenarios for the export supply elasticity but the export price of yellowfin tuna is lower. In the scenario with an export supply elasticity of 1, the U.S. price of generic tuna declines to about $4.00/kg. The consumers who purchase generic tuna buy more of it because its price is lower. The implication is that total consumption of canned tuna in the United States increases compared to the situation where the tuna measure is still in place (332,542 metric tonnes vs 363,362 metric tonnes = 64,055 + 299,307 metric tonnes). The export loss to Mexico in this scenario is USD $423 million.

Table 4: Model solutions with Mexican imports yellowfin tuna (world export supply elasticity equals 1)

	United States	Mexico
Consumption of yellowfin tuna (metric tonnes)	64,055	21,445
Consumption of generic tuna (metric tonnes)	299,307	68,772
Price of yellowfin tuna ($/kg)	7.00	6.95
Price of generic tuna including tariff and charge ($/kg)	4.02	4.28
Exports of yellowfin tuna (metric tonnes)	0	64,055
Imports of yellowfin tuna (metric tonnes)	64,055	20,000
Exports of generic tuna to the U.S. (metric tonnes)	0	0
Imports of generic tuna from other countries (metric tonnes)	121,957	45,772

167. The export losses are lower when the export supply is inelastic. With a more inelastic world supply of generic tuna, the removal of the tuna measure causes the world price of generic tuna to decline. The export volume of Mexican yellowfin tuna to the United States is very similar across scenarios for the world supply elasticity. The more inelastic the world supply of generic tuna, the lower the price of canned yellowfin tuna after the removal of the tuna measure. It is the lower price of canned yellowfin tuna that drives the lower value for the export loss to Mexico in the calculations.

168. The increase in U.S. imports of Mexican yellowfin tuna causes a decrease in the imports of generic tuna, which causes a decline in the world price of generic tuna. In Mexico, the increase in exports of canned yellowfin tuna to the United States causes an increase in Mexican imports of generic tuna. It is assumed above that this increase in Mexican imports of generic canned tuna does not affect the world price. But the increase in Mexican imports of canned generic tuna partially offsets the decline in U.S. imports of canned generic tuna. This means that the scenarios above, in which only U.S. imports affect the world price of canned generic tuna, overestimate the decline in the world price of generic canned tuna in response to modifications to the tuna measure. Despite that, the model still shows that the export losses to Mexico are not very sensitive to the choice of elasticity of supply. The export losses to Mexico would be even less sensitive to the choice of supply elasticity if Mexican imports were also allowed to affect the world price of generic canned tuna.

E. Mexico's Partial Equilibrium Model is Appropriate to Calculate Export Losses

169. The United States criticizes Mexico for using a partial equilibrium model to calculate the export losses to Mexico.[174] Partial equilibrium models have been used in previous disputes at the WTO (cotton, COOL at some point as well). The partial equilibrium model of Mexico focuses very precisely on the issue at hand, which is the modification of the tuna measure in a manner that is consistent with WTO obligations. As such, the partial equilibrium model is fully consistent with the proposed counterfactual for the calculation of the export losses to Mexico.

170. Mexico's partial equilibrium model captures the essential features of the canned tuna market in the United States and Mexico. The production of canned tuna in Mexico is mostly specialized in the production of canned yellowfin tuna, which is of higher quality than the average tuna quality consumed in the United States. Ignoring this fundamental fact would significantly bias down the calculations of the export losses to Mexico.

171. The partial equilibrium model is calibrated to data observed for 2014. As such it captures the state of the market in 2014 and incorporates in the demand curves tastes, substitution between generic tuna and yellowfin tuna and income, and it incorporates in the supply curves input prices, production technology and expectations. Equilibrium prices and quantities are found at the intersection of demand and supply curves.

172. As the United States describes, partial equilibrium models are often used to model an exogenous change in either a supply curve or in a demand curve.[175] Here, the policy change is the modification of the tuna measure which shifts to the right the supply of Mexican canned yellowfin tuna to the United States (see Figures 2 and 3 above). The price wedge method proposed by the United States is not appropriate in this case. Using this technique requires being able to quantify in terms of a tariff equivalent a barrier that limits the flow of products between two countries. The United States mentions that this method cannot be employed in this case because of the lack of data. The data problem is indeed there and is a direct effect of the tuna measure. Estimating a tariff equivalent to the trade barrier from the tuna measure would require that some volumes of canned yellowfin tuna without the dolphin-safe label be exported to the United States on a constant basis. However, the tuna measure is so severe that it nearly drives export volumes to zero, making it impossible to estimate a tariff equivalent for the measure. All that it is possible to say is that the tariff would be so large that it is prohibitive of exports of canned yellowfin tuna from Mexico to the United States.

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174 See U.S. written submission, paras. 81-87.

175 U.S. written submission, para. 83.

173. The U.S. demand for canned yellowfin tuna in Mexico's methodology paper is based on the demand for canned generic tuna in 2014 and evidence of consumers' preference for canned yellowfin tuna. As explained before, the consumption of canned yellowfin tuna in the United States is too small to properly derive a demand curve.[176] The approach in Mexico's methodology model is a sensible way of deriving a demand curve.

174. There are no potential important suppliers of canned yellowfin tuna to the United States other than Mexico. South East Asian countries have supplied very small quantities of canned yellowfin tuna to the United States. Modifications to the U.S. tuna measure would not alter this fact. The market forces that prevent exports of greater quantities of canned yellowfin tuna from these countries would remain after modifications to the U.S. tuna measure. Likewise, the same market forces operate on U.S. canneries and would still operate with modifications to the tuna measure preventing greater U.S. production of canned yellowfin tuna. Only exports to the United States of canned tuna from Mexico would potentially increase as a result of modifications to the U.S. tuna measure.

175. Modifications of the tuna measure would not substantially impact U.S. imports of yellowfin tuna from Central and South America. Mexico has an important cost advantage in exporting canned yellowfin tuna to the United States compared to any other countries. The cost advantage comes from the installed processing capacity in Mexico, the vertical integration of the Mexican canned tuna industry, its strategic location near the fishing zones and as a neighbor to the United States, and inexpensive labor and access to the United States market free of tariff as a party of the North American Free Trade Agreement (NAFTA). The assumption that there would be no imports of canned yellowfin tuna from countries other than Mexico is strongly supported by market realities.

176. One potential source of canned yellowfin tuna would be that the U.S. fleet moves back into the ETP to fish yellowfin tuna in association with dolphins in response to the removal of the tuna measure. However, that is something that is not feasible in the relevant short run for the calculations of the amount of impairment or nullification. U.S. vessels are not set up to fish in that manner in the ETP, as they need special equipment to use the dolphin encirclement method. Moreover, even if it would be feasible for these boats to move into the ETP, fishing in the ETP would not be profitable. There are no major tuna canneries on the U.S. West Coast that are set up to process whole fish,[177] so the tuna would have to be sent to

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[176] Canned yellowfin tuna was about 1.2 percent by weight of the total consumption of canned tuna in the United States (Exhibit US-17).

[177] See U.S. Department of Labor, Wage and Hour Division, The Tuna Processing Industry, available online at https://www.dol.gov/whd/as/sec3.htm (Exhibit MEX-66):

> "The use of pre-cooked tuna loins as a raw material in canning operations is a relatively new development that could have a significant impact on the structure and location of the industry. Because the conversion of raw fish to loins is labor intensive, it may also have an influence on the cost and the amount of labor needed in the production process for U.S. canneries.
>
> * * *
>
> Some use of tuna loins by U.S. processors began as early as the 1960s, but their utilization on a large commercial scale has only occurred in recent years. The canneries in Puerto Rico increasingly used loins in their processing operations as part of a raw material mix with raw whole tuna. This was necessitated in part because of a reduction in raw tuna supplies from the eastern Pacific Ocean because of the dolphin-safe policy. In 1990, Bumble Bee opened a cannery in California that exclusively processes loins.
>
> Today, all U.S. tuna canneries utilize precooked loins in their processing operation. Both Chicken of the Sea and StarKist rely on tuna loins (generally less than 30 percent of the product mix) when whole fish supplies are in short supply. However, virtually all the tuna utilized by Bumble Bee canneries in California and Puerto are in the form of precooked loins. These loins are

Samoa where the largest U.S. canneries are located, transshipped to Asian processors, or sent to another country in the ETP. But the long distance would not make this a profitable option. The most likely place to process the yellowfin tuna caught by U.S. vessels in the ETP would be Mexico, where it would be canned as a Mexican product.

F. The U.S. Calculations are Without Merit

177. The United States offers alternative calculations of the level of nullification or impairment.[178] Aside from employing a counterfactual that is not correctly defined, the market-based approach proposed by the United States is flawed and underestimates losses from the tuna measure to Mexico.

178. The calculation of the United States is based on the historical import volumes of canned tuna from Mexico before the adoption of the tuna measure. However, these historical figures are not instructive of the levels of imports if the tuna measure was modified. The reason is that these import volumes were observed more than 25 years ago at a time when market conditions were very different than in 2014. A proper counterfactual keeps everything but the measure of interest constant. It is obviously not the case that market conditions when the tuna measure was enacted in 1990 are the same as in 2014.

179. For example, the United States maintained a trade embargo on imports of Mexican tuna from 1980 to 1986, which arose from a dispute over the scope of territorial waters and fishing rights.[179] When the United States lifted the embargo, it pressured Mexico to agree to "voluntarily" restrain exports to the United States.[180] Therefore, the period immediately following the termination of the embargo is not representative of open market conditions.

180. The United States writes that in the 1987-89 period Mexico's share of U.S. imports of tuna products was 3.9 percent on a weight basis.[181] There are several reasons why this share does not correspond to what would be observed with the removal of the tuna measure in 2014. Mexican firms now have a much better access to the U.S. market than in the period between 1987 and 1989 because Mexico is a signatory of NAFTA. Accordingly, Mexico can export canned tuna to the United States free of duties, while the applicable duty between 1987 and 1989 was 35 percent for products in oil and (tariff item 1604.14.10) 12.5 percent for products not in oil (tariff item 1604.14.30).[182]

181. Prior to the enactment of the tuna measure in 1990, U.S. canneries processed large quantities of yellowfin tuna from domestic and imported sources.[183] This canned U.S. yellowfin tuna competed with Mexican canned tuna on the U.S. market, thus limiting penetration of Mexican canned tuna on the U.S. market. Since 2014, the market conditions are very different. The U.S. fleet has moved out of the ETP and the U.S. canning industry has significantly changed so that it is no longer capable of processing large quantities of yellowfin

imported and the tuna converted into cans or pouches in the U.S. In addition to the labor saving realized through their importation, tuna loins enter the U.S. at tariff rates substantially below those imposed on tuna in airtight containers."

178 U.S. written submission, paras. 122-133.

179 L.A. Times, "U.S. Reportedly Will Lift Embargo on Tuna from Mexico" (Aug. 6, 1986); New York Times, "U.S. and Mexico Seek End to Tuna War" (May 12, 1986) (Exhibit MEX-67).

180 Ibid.

181 U.S. written submission, para. 130.

182 Harmonized Tariff Schedule of the United States, Supplement 1, Ch. 16 (July 1989), available online at https://www.usitc.gov/tata/hts/archive/8910/1989_supplement_index.htm (Exhibit MEX-68).

183 U.S. written submission, para. 25.

tuna from the ETP. Aside from the tuna measure, the U.S. market was essentially emptied of canned yellowfin tuna in 2014 while between 1987 and 1989 competition for yellowfin tuna was stiff. As explained before, a quick response to the removal of the tuna measure is not possible by any country other than Mexico. After modification of the tuna measure, the U.S. yellowfin market would then be occupied by Mexican canned tuna products, unlike how it was prior to 1990.

182. There are many other reasons, in addition to the two detailed above, why the tuna market between 1987 and 1989 was completely different than the market in 2014. This causes the counterfactual year used by the United States (the average of the period 1987 and 1989) to be entirely detached from 2014, the appropriate counterfactual year for the calculation of nullification or impairment.

183. It is possible to use the data presented by the United States in Exhibit US-22 to make a market-based check on Mexico's calculations of its export volumes with modifications to the tuna measure. These calculations only consider U.S. cannery receipts such that import volumes of canned yellowfin tuna are ignored. Between 1987 and 1989, annual U.S. cannery receipts of yellowfin tuna averaged 203,461 short tons, or 184,577 metric tonnes. Assuming a canning yield of 52.5 percent,[184] this means an average annual production of 96,903 metric tonnes of canned yellowfin tuna, most of which was consumed domestically. This is much larger than the 63,568 metric tonnes found in Mexico's methodology paper. That is, based on historical market data, the U.S. consumption of canned yellowfin tuna in Mexico's model is still well below observed historical consumption levels before the enactment of the tuna measure.

[184] See Exhibit MEX-19.

VI. CONCLUSION

184. For the reasons explained in Mexico's methodology paper and in this submission, Mexico reaffirms its requested authorization to suspend concessions equal to USD $472.3 million annually, which is the level of the nullification or impairment resulting from the failure of the United States to comply with the recommendations and rulings of the DSB and bring its Tuna Measure into consistency with the covered agreements after the expiry of the RPT.