

**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)



**Responses of the United Mexican States to the Arbitrator's Questions  
Concerning Substance**

**30 September 2016**

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<i>US – Tuna II (Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/AB/R, adopted 13 June 2012, DSR 2012:IV, p. 1837
<i>US – Tuna II (Mexico)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products</i> , WT/DS381/R, adopted 13 June 2012, as modified by Appellate Body Report WT/DS381/AB/R, DSR 2012:IV, p. 2013
<i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/AB/RW and Add.1, adopted 3 December 2015
<i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i>	Panel Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/RW, Add.1 and Corr.1, adopted 3 December 2015, as modified by Appellate Body Report WT/DS381/AB/RW
<i>US – Upland Cotton (Article 22.6 – US I)</i>	Decision by the Arbitrator, <i>United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement</i> , WT/DS267/ARB/1, 31 August 2009, DSR 2009:IX, p. 3871
<i>US – Upland Cotton (Article 22.6 – US II)</i>	Decision by the Arbitrator, <i>United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement</i> , WT/DS267/ARB/2 and Corr.1, 31 August 2009, DSR 2009:IX, 4083

### LIST OF EXHIBITS

Number	Title
MEX-71	Public Opinion Strategies, Dolphin Safe National Survey
MEX-72	NOAA Fisheries, Tuna/Dolphin Embargo Status Update, available at <a href="http://www.nmfs.noaa.gov/pr/dolphinsafe/embargo2.htm">http://www.nmfs.noaa.gov/pr/dolphinsafe/embargo2.htm</a>
MEX-73	U.S. International Trade Commission, "Tuna: Current Issues Affecting the U.S. Industry," USITC Publication 2547 (Aug. 1992)
MEX-74	New York Times, "Judge Orders Tuna Import Ban Over Dolphin Kill" (Aug. 29, 1999), available at <a href="http://www.nytimes.com/1990/08/30/us/judge-orders-tuna-import-ban-over-dolphin-kill.html">http://www.nytimes.com/1990/08/30/us/judge-orders-tuna-import-ban-over-dolphin-kill.html</a>
MEX-75	William Jacobson Second Witness Statement (July 21, 2014)
MEX-76	International Trade Commission, HTS 160414 (2014-2015), generated at <a href="https://dataweb.usitc.gov/">https://dataweb.usitc.gov/</a>

## 1 FOR MEXICO

### 1.1 Factual and general questions

**16. With reference to paragraph 37 of the United States' written submission, please comment on the statement that "Bumble Bee, Chicken of the Sea, StarKist, and other producers stopped new purchases of tuna harvested from setting on dolphins before the statute was enacted in November 1990. Thus, prior to the DPCIA coming into effect, consumer preference drove this change" (original footnotes omitted).**

1. This statement must be understood in the context of the assertion that it supports, which is set out in the first sentence of paragraph 37. That assertion reads: "consumer preference regarding whether the canned tuna is the product of the intentional targeting and capture of dolphins remains an important driver of demand in the U.S. market" (emphasis added). For the following reasons, this assertion and the supporting statement referred to in the question have no bearing on the determination of the level of nullification or impairment at the time of expiry of the reasonable period of time (RPT).

2. First, the assertion in the first sentence of paragraph 37 relates to "consumer preferences" while the alleged "evidence" in the statement referenced in the Arbitrator's question relates to the actions of "canneries".<sup>1</sup> Although the actions of canneries and other market participants such as retailers and distributors may reflect *perceived* consumer preferences, they are not direct evidence of those preferences and therefore do not necessarily reflect those preferences. As discussed below, these perceptions from the 1980s do not accurately reflect U.S. consumer preferences in the context of the Mexican fleet's fishing method (i.e., fishing in an AIDCP-compliant dolphin-safe manner), nor do they reflect consumer preferences on the date of the expiry of the RPT, the relevant reference date for the counterfactual at issue in this arbitration.

3. Second, the actions by tuna canneries to which the statement refers relate to "unregulated" dolphin encirclement and to the significant dolphin mortalities caused by this fishing method in the 1980s and early 1990s that led to the adoption and implementation of the La Jolla Agreement (1993), the Panama Declaration (1995), and the AIDCP (1999). Consumer preferences in the 1980s were based on the substantial dolphin mortalities that resulted from unregulated dolphin encirclement, and the actions of canneries at that time reflected those preferences. To this extent, the statement in paragraph 37 that "prior to the DPCIA coming into effect, consumer preference drove this change" is accurate. However, as explained in Mexico's written submission, it was not the introduction of the DPCIA in 1990 that prompted this dispute, but rather the 2007 decision of the Ninth Circuit Court of Appeals in the *Hogarth* case.<sup>2</sup> That ruling overturned the U.S. government's decision to administer the tuna measure in a manner that would allow AIDCP-certified tuna products containing tuna caught by dolphin encirclement to be labelled dolphin-safe, provided that it

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<sup>1</sup> Bumble Bee, Chicken of the Sea, Starkist and the other producers are canners who purchase tuna. Mexico's claims are based on the treatment of Mexican tuna products (e.g., canned tuna) by the U.S. measure. The Mexican industry is not seeking to sell tuna to Bumble Bee, Chicken of the Sea, or Starkist.

<sup>2</sup> Mexico's written submission, para. 15.

could be shown that no dolphins were killed or seriously injured during the set in which the tuna was caught.<sup>3</sup> This would have allowed U.S. consumers to be informed of the differences between AIDCP-compliant and unregulated dolphin encirclement.

4. Third, given that unregulated dolphin encirclement caused substantial dolphin mortalities in the 1980s, it was sufficient at the time to refer simply to an aversion to “setting on dolphins” when defining consumer preferences and the consequent actions of canneries. To this extent, the statement in paragraph 37 that “producers stopped new purchases of tuna harvested from setting on dolphins” is accurate. However, it is no longer sufficient to simply refer to “setting on dolphins” because, under AIDCP-compliant dolphin encirclement fishing practices, encircling dolphins does not equate to the substantial dolphin mortalities experienced prior to the La Jolla Agreement, and in the vast majority of cases does not result in any dolphin mortalities at all.<sup>4</sup> Therefore, on the date of the expiry of the RPT (the relevant time for assessing the counterfactual in this arbitration), a distinction must be made between AIDCP-compliant and unregulated dolphin encirclement fishing methods. Care must be taken when assessing the evidence of the United States so that evidence related to unregulated dolphin encirclement is distinguished from and not attributed to AIDCP-compliant dolphin encirclement.

5. Fourth, Mexico does not dispute that, today, U.S. consumers would likely have similar preferences with respect to unregulated dolphin encirclement fishing practices, and that such preferences would “remain” an “important driver of demand in the U.S. market” for tuna caught by unregulated dolphin encirclement. However, this is not the case for AIDCP-compliant dolphin encirclement. U.S. consumer preferences today, and at the time of the expiry of the RPT, are shown in a September 2016 consumer survey in Exhibit MEX-71.<sup>5</sup> According to the survey, a majority of Americans believe that “dolphin safe” means that no dolphins were injured or killed in the course of capturing tuna, and that the definition of “dolphin safe” should be that no dolphins were injured or killed in the course of capturing tuna.<sup>6</sup> Moreover, an overwhelming number of adults believe that it is important to have environmentally-sustainable seafood products that ensure the health of the whole ecosystem, including dolphins, and not just the health of dolphins in particular.<sup>7</sup> Thus, if the tuna measure permitted U.S. consumers to be fully informed of the environmental virtues of AIDCP-compliant fishing and the disadvantages of alternative fishing methods, they would prefer tuna products containing tuna caught in the manner used by the Mexican tuna fleet:

- Mexican tuna products labelled with the AIDCP-certified dolphin safe label would contain tuna that was caught under a strict, award-winning regulatory regime that protects dolphins to the fullest extent possible, that is environmentally sustainable, and that reliably certifies that no dolphins were killed or seriously injured during the set in which the specific tuna in the can was caught.
- In contrast, other tuna products labelled with a non-AIDCP dolphin safe label would contain tuna that was caught without protections for dolphins, by

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<sup>3</sup> Ibid.

<sup>4</sup> Mexico's written submission, paras. 72-73, citing Panel Report, *US – Tuna II (Mexico)*, paras. 7.609-7.612.

<sup>5</sup> Public Opinion Strategies, Dolphin Safe National Survey (Exhibit MEX-71).

<sup>6</sup> Ibid., pp. 6 and 8.

<sup>7</sup> Ibid., p. 14.

fishing methods that regularly kill dolphins, and processed and distributed through systems that cannot assure that no dolphins were killed or seriously injured during the fishing set in which the tuna was caught. Moreover, the tuna may have been caught using methods that are not environmentally sustainable for tuna and other sea life.

6. Thus, to the extent that canneries, distributors, and U.S. retailers of tuna products in the U.S. market continue to perceive that there is a consumer preference for tuna products containing tuna that was not harvested using dolphin encirclement, that perception is based on outdated consumer preferences relating to unregulated dolphin encirclement that no longer apply to AIDCP-regulated dolphin encirclement in the ETP and are therefore not relevant to the circumstances at the time of expiry of the RPT. This disconnect will be remedied under Mexico's first scenario in its counterfactual and under the United States' alternative counterfactual, wherein Mexican tuna products would be labelled with the AIDCP-certified dolphin safe label. The virtues of the highly-regulated fishing method used by the Mexican fleet (i.e., almost no bycatch of non-target species, and long-term sustainability of tuna and other fisheries) would be advertised, and because it is undertaken in the most dolphin-safe manner possible under the strictly supervised procedures of the AIDCP, it would not be overshadowed by the mere fact that dolphins were encircled.

7. With respect to this last point, the very attributes of AIDCP-compliant dolphin encirclement that the United States is repeatedly criticizing in this dispute (i.e., the chasing and encirclement of dolphins) are the attributes that make this fishing method, when regulated under the AIDCP, one of the most environmentally sustainable commercial tuna fishing methods available.

**17. With reference to paragraph 94 of the United States' written submission, please comment on the United States' assertions that: (a) "[d]olphin safe yellowfin canned tuna ... is sold in the U.S. market, but it is sold in relatively small quantities because demand is weak" (emphasis original); and (b) "US consumers do have access to canned yellowfin, both dolphin safe and non-dolphin safe", but the product is not demanded.**

8. In its written submission, the United States ignores that consumption of canned yellowfin tuna is determined at the intersection of the demand and the supply. It is not because consumption is small that demand is weak. As explained in Mexico's submission, the United States confuses the concept of consumption with the concept of demand.

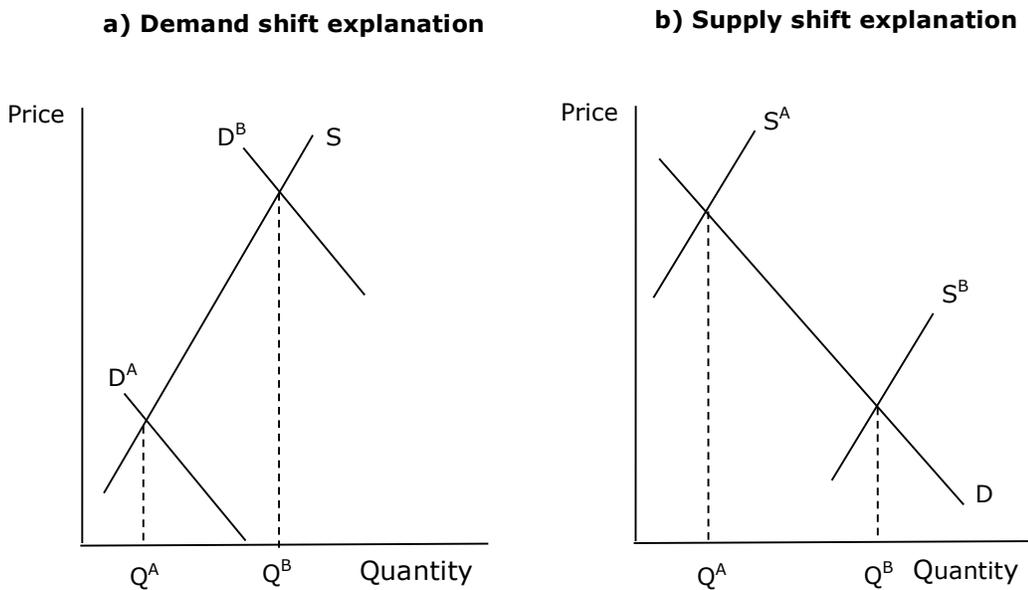
9. In recent years, the consumption of yellowfin tuna has been small in the United States. Consumption of canned yellowfin tuna was large, however, before the tuna measure was adopted. An explanation of why the consumption of canned yellowfin tuna is low must explain why the consumption of canned yellowfin tuna has declined since the adoption of the tuna measure. Figure 1 contrasts competing explanations for the small consumption of canned yellowfin tuna in the United States. In both panels a) and b), the consumption before the tuna measure is labelled as  $Q^B$ , and the consumption after the tuna measure is denoted by  $Q^A$ . Consumption before the tuna measure is large and consumption after the tuna measure is small.

10. The demand-side explanation of weak consumption of canned yellowfin tuna suggested by the United States is illustrated in panel a) of Figure 1. Consumption of yellowfin tuna was large before the tuna measure, and following the United States argument, this would mean a large demand illustrated by the line  $D^B$ . To explain the small consumption currently observed requires the demand to shift inward to  $D^A$ . The question is

what could have caused the demand to shift inward? The tuna measure does not impact consumer preference for canned yellowfin tuna, so this cannot be the answer. The United States brought up concerns over mercury in tuna. However, these concerns do not seem important, as the consumption of canned albacore tuna has increased since the tuna measure and the concentration of mercury in albacore tuna is similar to that of yellowfin tuna.<sup>8</sup>

11. Panel b) of Figure 1 shows the supply-side explanation of weak consumption of canned yellowfin tuna in the United States. Before the tuna measure, consumption of canned yellowfin tuna in the United States was large because of large domestic supplies from the harvest of yellowfin tuna in the ETP.<sup>9</sup> The supply of canned yellowfin tuna before the tuna measure is illustrated by the line  $S^B$  in panel b) of Figure 1. The movement of the U.S. fleet outside of the ETP and the introduction of the tuna measure removed the most important source of yellowfin tuna to the United States, and yellowfin tuna then had to be sourced elsewhere at greater costs. This caused the supply of yellowfin tuna to shift to the left to the line labelled  $S^A$ , reducing consumption from  $Q^B$  to  $Q^A$ .

12. The demand-side explanation offered by the United States is not supported by events that have occurred since the tuna measure. The supply-side explanation offered by Mexico is consistent with empirical facts supported by Exhibit US-10 (BCI).<sup>10</sup>



**Figure 1: Competing explanations of small consumption of canned yellowfin tuna in the U.S.**

<sup>8</sup> Mexico’s written submission, para. 134.

<sup>9</sup> Mexico’s written submission, para. 129.

<sup>10</sup> See Exhibit US-10(BCI), p. 10.

**18. With reference to paragraphs 109 and 110 of the United States' written submission, please comment on the United States' assertions that "Mexico is not the sole supplier" of yellowfin tuna and that "U.S. canneries are not operating at full capacity", as demonstrated by the fact that United States' production was much greater in 2008 and 2001-2003, which indicates that United States' production of yellowfin tuna could increase quickly.**

13. The United States is correct that yellowfin tuna is produced elsewhere in the world and that U.S. canneries do not operate at full capacity. However, these facts are not important for the calculations of the level of nullification or impairment.

14. With respect to suppliers of canned yellowfin tuna other than Mexico, the relevant question is whether the tuna measure currently prevents these countries from exporting canned yellowfin tuna to the United States and whether the modification or withdrawal of the measure would increase their exports to the United States. Suppliers of canned yellowfin tuna located in South East Asia currently are not impacted by the tuna measure and, hence, there is no reason to expect that they would increase the supply of canned yellowfin tuna to the United States if the tuna measure was withdrawn or otherwise modified. The countries that would be impacted by modifications to the tuna measure are those that harvest tuna in the ETP. Other than Mexico, there are a few Central and South American countries that harvest tuna in the ETP. However, these countries have small production capacities and could not compete with Mexico canned yellowfin tuna products because they are located further from the United States and their exports are subject to U.S. import tariffs. More significantly, under a separate part of U.S. law not at issue in these proceedings, the United States maintains complete embargoes on imports of yellowfin tuna products from Belize, Bolivia, Colombia, Honduras, Nicaragua, Panama, Vanuatu, Venezuela, and Peru, as these countries have chosen not to seek an "affirmative finding" from the Department of Commerce that they are in compliance with the AIDCP.<sup>11</sup> This means that an export response by other countries to modifications to the tuna measure would be small.

15. With respect to the excess capacity of U.S. canneries, the question is why would the removal or revision of the tuna measure cause U.S. canneries to increase their production? Most of U.S. tuna canning capacity is located in American Samoa. Fisheries in that area are not currently affected by the tuna measure so there would be no increase in production from modifications to the measure. One possible response would be the U.S. fleet moving to the ETP and then transporting their catch all the way to American Samoa for processing. As described in Mexico's written submission, this would not be economically feasible.<sup>12</sup> Hence, although the United States has excess production capacity, there is no argument that could explain why the United States would produce more in the short run in response to the removal of the tuna measure.

**19. With reference to paragraph 117 of the United States' written submission, please comment on the United States' assertion that ETP catches are regulated by the IATTC and that increases of the level Mexico assumes would encounter supply constraints.**

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<sup>11</sup> NOAA Fisheries, Tuna/Dolphin Embargo Status Update, available at <http://www.nmfs.noaa.gov/pr/dolphinsafe/embargo2.htm> (Exhibit MEX-72).

<sup>12</sup> Mexico's written submission, para. 176.

16. Mexico's economic model does not assume that the Mexican fleet would harvest substantially more yellowfin tuna. Rather, the Mexican industry could purchase tuna from other countries for use in producing tuna products for the Mexican market. As discussed above, most other countries fishing for yellowfin tuna in the ETP are completely banned from exporting it to the United States.

**20. Please comment on why Mexico has not marketed yellowfin tuna products in the US market with a label indicating that the tuna was harvested in a manner consistent with the AIDCP or in some other fashion that signals to consumers the compliance of Mexican producers with the AIDCP.**

17. The tuna measure prohibits the use of the AIDCP-certified label or any other statements that explain the dolphin protection aspects of AIDCP-compliant fishing.<sup>13</sup> Thus, the Mexican industry is prohibited from informing the U.S. market about the impact on dolphins from the two different methods of dolphin encirclement — i.e., AIDCP-compliant and unregulated.<sup>14</sup>

18. The effect of this aspect of the tuna measure is not in dispute. As previously determined by the Appellate Body,

... the US measure not only sets out certain conditions for the use of a label, but, in addition, it enforces a prohibition against the use of any other label containing the terms "dolphin-safe", "dolphins", "porpoises", or "marine mammals" on a tuna product that does not comply with the requirements set out in the measure. Moreover, the enforcement of the US measure does not require proving that a given conduct is deceptive under a law against deceptive practices. Rather, the measure at issue establishes that including on the label of a tuna product the term "dolphin-safe", or even using any label or mark that refers to dolphins, porpoises, or marine mammals without meeting the conditions set forth in the measure, is, in itself, a violation of Section 45 of Title 15 of the *United States Code*. In effect, the measure at issue establishes a single definition of "dolphin-safe" and treats any statement on a tuna product regarding "dolphin-safety" that does not meet the conditions of the measure as a deceptive practice or act.<sup>15</sup>

19. This aspect of the tuna measure remains unchanged.

20. As explained in Mexico's response to question 16, above, it is important for Mexican tuna products to be labelled so as to distinguish AIDCP-compliant dolphin encirclement from unregulated dolphin encirclement because of the massive dolphin mortalities associated with the latter. If U.S. consumers are not informed about this difference, the historic problems associated with dolphin encirclement will be attributed to all forms of dolphin encirclement

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<sup>13</sup> Mexico's written submission, para. 15.

<sup>14</sup> Ibid.

<sup>15</sup> Appellate Body Report, *US – Tuna II (Mexico)*, para. 195 (footnotes omitted). See also Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 6.8 ("The DPCIA and the implementing regulations also prohibit any reference to dolphins, porpoises, or marine mammals on the label of a tuna product if the tuna contained in the product does not comply with the labelling conditions spelled out in these instruments"); Appellate Body Report, *US – Tuna II (Mexico)*, para. 193 ("The US measure thus covers the entire field of what 'dolphin-safe' means in relation to tuna products in the United States").

and will overshadow the fact that AIDCP-compliant fishing is one of the most environmentally sustainable methods to fish tuna.

**21. With reference to paragraph 20 of Mexico's MP, please elaborate on Mexico's statement that the United States tuna market "falsely distinguishes between dolphin-safe and non-dolphin-safe tuna products" (emphasis added). In what sense does Mexico argue that the current market distinction between dolphin-safe and non-dolphin-safe tuna is "false"? In Mexico's view, would all market distinctions between dolphin-safe and non-dolphin-safe tuna necessarily be "false"?**

21. The distinction is false because tuna products from the United States and other countries are being labelled as "dolphin safe" when the dolphin safe status of the tuna in those products cannot be assured – i.e., the eligibility, certification and tracking of the tuna cannot be verified. This is because of the deficiencies in the tuna measure. In this sense, the U.S. tuna product market is being supplied by tuna products that are purportedly dolphin safe but in fact might not be.<sup>16</sup>

22. Accurate labelling is particularly important in this dispute because the tuna measure is a consumer information measure. If labels are inaccurate, consumers will act based on incorrect information.

23. The distinctions are "false" in all cases where tuna products are labelled dolphin safe when the dolphin safe status of that tuna cannot be assured. On the date of expiry of the RPT, the only tuna products for which dolphin safe status could be assured were those containing tuna caught in the AIDCP-supervised ETP that met the fishing method requirements of the current tuna measure (i.e., tuna products of Ecuador). In this sense, the dolphin safe labels on all other tuna products were "false".

**22. In Mexico's view, is the sensitivity of US consumers to dolphin-safe tuna attributable solely to the Tuna Measure?**

24. See response to question 16 regarding U.S. consumer preferences regarding dolphin-safe tuna and the perceptions of canneries, retailers and distributors of those preferences. For the purpose of assessing the level of the nullification or impairment caused by the tuna measure, what matters is the sensitivity of the principal distribution channels in the U.S. market (i.e., retailers and distributors) to dolphin-safe tuna in the light of the regulated definition of "dolphin safe" – in particular, the prohibition in that definition that prevents a distinction to be made between dolphin encirclement in an AIDCP-compliant manner and dolphin encirclement in an unregulated manner. This aspect of the dolphin-safe issue is attributable solely to the tuna measure.

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<sup>16</sup> Panel Report, *US – Tuna II (Mexico)* (Article 21.5 – Mexico), paras. 7.168, 7.233, 7.372, 7.382, 7.454, 7.463, 7.500, 7.502, 7.602.

**23. Mexico's calculation of losses to the Mexican tuna industry from the Tuna Measure is based on "the exports of Mexican tuna products to the United States if it were not for the tuna measure" (MEX-2, p. 3). Could Mexico please elaborate on what it means by the term "if it were not for the Tuna Measure"? In particular, does Mexico mean "as if the Tuna Measure had never existed", or "as if the Tuna Measure has been withdrawn (or brought into conformity with WTO law) upon the expiry of the Reasonable Period of Time"?**

25. Mexico means that the tuna measure would be brought into conformity with WTO law (i.e., its counterfactual and two counterfactual scenarios) or withdrawn (i.e., the US alternative counterfactual) upon expiration of the reasonable period of time. By the phrase "if it were not for the tuna measure", Mexico means "but for the failure of the United States to bring the WTO-inconsistent tuna measure into conformity with its WTO obligations before the expiry of the RPT".

**24. Please indicate the evidentiary basis for Mexico's statement that "American and Mexican consumers likely have very similar preferences for canned yellowfin tuna over canned generic tuna" (MEX-2, p. 16).**

26. The basis for the statement that "American and Mexican consumers likely have very similar preferences for canned yellowfin tuna over canned generic tuna" is explained in the relevant paragraph on page 16 of Exhibit MEX-2 (Mexico's methodology paper) as follows: "[w]ith access to canned yellowfin tuna, U.S. consumers would rapidly learn about its superior quality just like Mexican consumers who currently have access to canned yellowfin tuna. There is no reason for American consumers to have a different appreciation for canned yellowfin tuna than Mexican consumers, especially given the large Latino population in the United States". This is a relatively simple presumption, as the comparison is between yellowfin tuna meat, which is considered to be a "gourmet" product that sells at a price "premium" in the U.S. market,<sup>17</sup> and generic tuna meat, which is a lower-priced product consisting mostly of lower-quality tuna meat mixed in some cases with higher-quality albacore or yellowfin tuna meat. There seems to be no reason to assume that a large supply of competitively-priced Mexican products containing the same yellowfin tuna meat that is considered a "gourmet" product in the U.S. market would not be preferred by U.S. consumers over products containing a blend of mostly lower-quality "generic tuna" meat.

27. Given the small supply of yellowfin tuna products in the U.S. market, Mexico could not identify any direct evidence of American preferences for yellowfin tuna compared to generic tuna as compared to Mexican preferences. In both the United States and Mexico, tuna is not a staple or a traditional food product, and it is consumed in similar ways. Considered that it is treated similarly by consumers in both countries, it is reasonable to assume, for the purpose of the Arbitrator's assessment of the counterfactuals, that there would be similar preferences for the reasons outlined above and on page 16 of Mexico's methodology paper.

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<sup>17</sup> See U.S. written submission, paras. 22 ("Tuna product produced from yellowfin tuna – and marketed as 'yellowfin' – is also sold in the gourmet market"), 23 ("canned yellowfin can command a higher price within the gourmet market"), footnote 54 to para. 23 ([[ ... ]]).

## 1.2 Questions related to the counterfactuals

**25. With reference to paragraph 22 of Mexico's MP and to paragraph 51 of Mexico's written submission, please elaborate on the claim that "[b]ecause 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".**

28. Under the first scenario of Mexico's counterfactual, tuna products containing tuna caught by AIDCP-compliant dolphin encirclement would, on the date of expiry of the RPT, receive the "dolphin safe" label and would compete on a level competitive field with all other tuna products because consumers would be fully informed of the dolphin protection and sustainable fisheries implications of Mexico's fishing method. In other words, Mexican tuna products would compete throughout the entire U.S. market.

29. In the second scenario of Mexico's counterfactual, the WTO-consistent application of eligibility, certification and tracking and verification requirements to all tuna products would mean that, on the date of expiry of the RPT, almost all tuna products that currently "falsely" receive the "dolphin safe" label (see Mexico's response to question 21) would no longer be eligible for the label. This includes U.S. origin tuna products and tuna products from other countries that, as of the end of the RPT, were not supported by adequate certification and tracking and verification systems. Thus, in that scenario, Mexican tuna products would compete on a level competitive field with all other tuna products because, with the exception of tuna products from Ecuador, none would qualify for the dolphin safe label. Because imports from Ecuador are small, only a small portion of tuna products in the U.S. market could have a dolphin-safe label. Thus, Mexican tuna products would essentially compete throughout the entire U.S. market, just like they would in the first scenario. Therefore, the level of nullification or impairment under the second scenario is essentially the same as the level of nullification or impairment under the first scenario.

**26. With reference to pages 34-35 of MEX-2, please explain Mexico's assertion that "[t]he counterfactual reasonably assumes that the only imports of dolphin-safe tuna that will occur if the United States brings itself into compliance are from Ecuador".**

30. On the date of the RPT, the only tuna being caught in a manner that complies with the eligibility, certification and tracking requirements in a verifiable manner are those caught by the Ecuadorean fleet in the ETP because that fleet fishes in accordance with the requirements of the AIDCP. Thus, in the short run (the relevant length of time for the counterfactual), Ecuadorean tuna products containing this tuna will be the only tuna products eligible for the dolphin-safe label. The volume of exports of those products can reasonably be assumed to remain at prevailing quantities, which are small.

31. Mexico notes that the Panel in the first compliance proceedings determined that captains outside the ETP were insufficiently trained to be able to validate whether dolphins were killed or seriously injured when harvesting tuna.<sup>18</sup> The Panel also determined that the measure did not provide for mechanisms to ensure that specific lots of tuna could be

<sup>18</sup> Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.233 ("In the Panel's view, the United States has not rebutted Mexico's showing that 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, in contradiction with the objectives of the amended tuna measure").

matched to captains' certifications all the way from the point of harvest through storage on board the fishing vessel, trans-shipping, off-loading, brokering, and production of tuna products.<sup>19</sup> Therefore, even putting aside the issue of the eligibility of fishing methods for the dolphin-safe label, the compliance Panel's findings indicate that non-ETP tuna products would not have been consistent with a WTO-compliant tuna measure during 2014.

**27. With reference to paragraph 49 of Mexico's written submission, please explain why, under Mexico's first counterfactual, the fact that producers of tuna products (other than Mexican producers) can promote their products caught using methods other than dolphin encirclement and thus distinguish them from Mexican tuna products "would not materially alter the level of nullification or impairment estimated in Mexico's methodology paper". Could Mexico explain how its model could account, if at all, for different consumer preferences for dolphin-safe products relative to products fished using AIDCP-certified dolphin encirclement methods?**

32. There is no need for the model to account for different consumer preferences. As explained above in response to question 25, as far as consumer preferences are concerned, it is reasonable to assume under the counterfactuals that Mexican tuna products will compete on a levelled playing field in the U.S. market.

33. As explained in Mexico's response to question 16, above, and as demonstrated in the recent consumer survey (Exhibit MEX-71), consumer preferences in the U.S. market have evolved such that sustainable fishing practices that protect the marine ecosystem as a whole are most desirable. Under Mexico's first scenario in its counterfactual and under the United States' alternative counterfactual, the AIDCP-certified dolphin safe label can be affixed to Mexican tuna products so that consumers can be informed that the tuna contained therein was not caught using unregulated encirclement. In such circumstances, it is reasonable to assume that consumers will choose tuna caught by a sustainable fishing practice over tuna caught by unsustainable alternative fishing practices. Thus, while products containing tuna that was caught using alternative fishing practices could advertise that their tuna was not caught by encircling dolphins, they could not advertise that they contain tuna that was caught using sustainable fishing methods if one of the principal commercial fishing methods were used.

34. The sustainability of AIDCP-compliant dolphin encirclement also gives Mexican tuna products a competitive advantage over tuna products containing tuna caught by unsustainable fishing methods in the second scenario under Mexico's counterfactual. Under that counterfactual, the great majority of the U.S. market will be supplied by tuna products that are not labelled as dolphin-safe because they cannot satisfy WTO-consistent labelling requirements.<sup>20</sup>

35. With respect to both scenarios in Mexico's counterfactual and to the United States' alternative counterfactual, it would not be reasonable to assume that consumers would prefer to purchase tuna products caught by fishing methods such as gillnets, longlines, trawls and FAD sets – all of which are unsustainable, and which the Panels in the original proceedings and first compliance proceedings found were harmful to dolphins, and posed risks to dolphins at least equivalent to those posed by AIDCP-compliant fishing methods.

<sup>19</sup> Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, footnote 515 and paras. 7.358-7.359 (BCI), 7.369, and 7.381.

<sup>20</sup> Mexico's written submission, paras. 16, 50-52; Mexico's methodology paper, para. 22.

The United States has not provided any evidence of a tuna products manufacturer or retailer promoting those fishing methods to consumers as beneficial for dolphins or the environment.

**28. In the light of the fact that the Appellate Body reversed several of the first Article 21.5 panel's findings and conclusions on the WTO-consistency of the 2013 Tuna Measure, please address whether the two counterfactuals Mexico developed at pp. 3-4 of MEX-2 depend upon or proceed from views about the "calibration" of the Tuna Measure that have not been settled by prior WTO dispute settlement proceedings. If appropriate, please indicate the paragraph(s) of the panel and/or Appellate Body report(s) that establish or support the theories of WTO-inconsistency and compliance upon which Mexico's two counterfactuals are based.**

36. The two scenarios presented in Mexico's counterfactual do not depend upon or proceed from the views about the "calibration" of the tuna measure that have not been settled by the prior proceedings in this dispute.

37. The 2013 tuna measure as a whole was found in the first compliance proceedings and in the recommendations and rulings of the DSB to be inconsistent with Article 2.1 of the TBT Agreement and with Articles I:1 and III:4 of the GATT 1994.<sup>21</sup> With respect to the violations of the GATT 1994, it was also found not to be saved by the general exceptions in Article XX of that Agreement.<sup>22</sup> For the purposes of this arbitration, what matters is that there are specific Appellate Body findings and DSB recommendations and rulings that the measure as a whole is WTO-inconsistent. The two scenarios in Mexico's counterfactual are based on the tuna measure being modified so that it is WTO-consistent "as a whole" with the covered agreements. While Mexico presents two options to achieve WTO-consistency, another option is available, as evidenced by the United States' alternative counterfactual, involving the complete withdrawal of the tuna measure.

38. Under the first scenario, the detrimental impact on Mexican tuna products (Article 2.1), the failure to accord immediately and unconditionally an advantage to Mexican tuna products (Article I:1), and the loss of competitive opportunities for Mexican tuna products (Article III:4) are eliminated. This is accomplished by allowing the AIDCP-certified dolphin-safe label to be used on Mexican tuna products in the U.S. market. Such an action will bring the tuna measure, as a whole, into consistency with these WTO provisions. "Calibration" has no bearing on these violations, nor does it have any bearing on eliminating these violations so that the measure "as a whole" becomes WTO-consistent. This also applies to the alternative counterfactual posed by the United States.

39. Under the second scenario, the detrimental impact and loss of competitive opportunities remain. Thus, the tuna measure, as a whole, is *per se* inconsistent with Articles I:1 and III:4 of the GATT 1994 and discriminates within the meaning of the first step of the discrimination test in Article 2.1 of the TBT Agreement. Clearly, calibration has no bearing on these aspects of the violations. For the purpose of assessing Mexico's

<sup>21</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.266, 7.340, 7.360, 8.1-8.2. In this regard, the Appellate Body reversed the approach taken by the compliance panel in making separate findings of consistency and inconsistency with WTO obligations of each of the individual elements of the tuna measure. Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.159, 7.229-7.230, 7.280-7.282.

<sup>22</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.360, 8.1-8.2.

counterfactual in this arbitration, calibration also has no bearing on the application of Article XX of the GATT 1994 and the second step of the discrimination test under Article 2.1. Keeping in mind that this second scenario results in a WTO-consistent measure, the scenario assumes that tuna products from outside the ETP have to comply with the same or equivalent requirements in order to be eligible to use the label. The application of this high standard across all fishing methods and oceans essentially assumes “zero” calibration and thereby meets or exceeds the standards of even-handedness and non-arbitrariness required by Article 2.1 and the chapeau for Article XX.<sup>23</sup> Thus, it will bring the measure into compliance with these two agreements.

40. Although Mexico limits its counterfactual to two scenarios, a third scenario could have utilized a lower regulatory standard than the AIDCP in the ETP that allowed for “appropriately calibrated” differential treatment between fisheries, such that it met the standards to achieve WTO-consistency under Article 2.1 and the chapeau of Article XX. However, such a scenario is not used in Mexico’s counterfactual. There is no basis for determining that such an alternative measure is calibrated. Therefore, the issue of calibration does not arise in this arbitration.

41. Mexico reiterates that Mexico’s methodology paper need only present a counterfactual that is “plausible” or “reasonable”, which can be said of both of the scenarios used in the counterfactual.<sup>24</sup> Mexico also reiterates that the United States’ alternative counterfactual would not materially reduce the level of nullification or impairment shown in Mexico’s methodology paper, provided that the projected market conditions are appropriately assessed.<sup>25</sup>

**29. With reference to paragraphs 74 and 78 of the United States' written submission, please respond to the United States' argument that Mexico's two alternative counterfactuals are “contradictory”. In responding, please elaborate on the relationship between the two counterfactuals.**

42. Mexico does not understand the basis for the United States’ argument that the two scenarios in Mexico’s counterfactual are “contradictory”.

43. From a legal compliance perspective, the scenarios merely reflect two different ways to bring the tuna measure into compliance with Article 2.1 of the TBT Agreement and Articles I:1 and III:4, and XX of the GATT 1994. In the first scenario, the detrimental impact with respect to the denial of an advantage and the loss of competitive opportunities is eliminated. In the second scenario, these impacts remain (i.e., they are not eliminated) but, instead, any differences in the conditions for use of the label between Mexico and other

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<sup>23</sup> The concept allows a level of differential treatment to exist, provided that it is appropriately calibrated. If there is no differential treatment, as is the case in the second scenario in Mexico’s counterfactual, there is no need to undertake a calibration analysis. At paragraph 52 of its written submission, Mexico states that “calibration is assumed in this second counterfactual (discussed below in the context of the assumptions in the United States’ proposed counterfactual)”. Mexico would like to correct this statement. Calibration is addressed in the second scenario by applying the same or equivalent standard across all fisheries such that the level of calibration is zero. No assumption can be made that the United States would be allowed to apply lesser requirements to non-ETP tuna products.

<sup>24</sup> See Mexico’s written submission, paras. 53-56.

<sup>25</sup> Ibid., para. 60.

countries are eliminated. In this way, the tuna measure is brought back into compliance with the WTO provisions, albeit in a different way. There is no contradiction.

44. For the purpose of determining the level of the nullification or impairment, both scenarios level the playing field in the U.S. market by allowing Mexican tuna products to compete across the market, albeit in different ways (see response to question 25). There is no contradiction.

**30. At paragraph 17 of Mexico's MP, Mexico argues that the appropriate counterfactual is one where "the WTO-inconsistent discriminatory aspects of the original and amended Tuna Measure were eliminated". Does this mean that, in Mexico's view, the measure at issue in these arbitration proceedings consists of both the original and the amended (i.e. 2013) measure? Please comment in the light of footnote 59 of the arbitrator's decision in *US – COOL*.**

45. The 2013 tuna measure is at issue in this proceeding, that is, the tuna measure as amended by the 2013 Final Rule. The relevant discriminatory aspect of the measure is that Mexican tuna products are denied access to the dolphin-safe label while tuna products of the United States and other countries are granted access. This aspect of the original tuna measure (and indeed, most of the original tuna measure) was not changed by the 2013 tuna measure, so the reference to the original measure was not intended to have a substantive difference.

**31. Mexico's calculation of losses to the Mexican tuna industry from the Tuna Measure is based on "the exports of Mexican tuna products to the United States if it were not for the tuna measure" (MEX-2, p. 3). Could Mexico please elaborate on what it means by the term "if it were not for the Tuna Measure"? In particular, does Mexico mean "as if the Tuna Measure had never existed", or "as if the Tuna Measure has been withdrawn (or brought into conformity with WTO law) upon the expiry of the Reasonable Period of Time"?**

46. See Mexico's response to question 23, above.

### **1.3 Questions relating to the economic methodologies proposed by the parties**

**32. With reference to page 10 of MEX-2, in Mexico's view, could a premium for canned yellowfin tuna reflect other factors beyond quality differences? Could it reflect, among other things, differences in labelling?**

47. When considering the premium for yellowfin tuna, the objective is to remove everything else that could affect willingness to pay but for the tuna species itself. Many attributes of canned tuna (i.e. in oil, in water, use of spices) can easily be changed and should therefore not be considered in the value of the premium. This is why the regression model for the premium for canned yellowfin tuna in Exhibit MEX-2 (Mexico's methodology paper) (see Tables 6 and 7 and Appendix D) controls for the brand, the type of container, the flavour, the pack, addition of salt, the region and the form. What is then identified with the dummy for canned yellowfin tuna is the premium that consumers have paid for canned yellowfin tuna compared to canned generic tuna. There is also additional value in yellowfin tuna because of the form that is offered compared to generic tuna. The form is intrinsic to

the tuna species and cannot be changed by the canneries and this is therefore relevant in the calculation for the premium.

48. With the exception of de minimis quantities, all tuna products sold in the U.S. market are "dolphin-safe" under the current tuna measure. The premium identified from a comparison of the prices between these "dolphin-safe" products therefore reflects something other than the dolphin-safe label. The premium discussed in the methodology paper only refers to the intrinsic qualities of yellowfin tuna, in which we can include the form, relative to generic tuna. Other attributes are held constant for both generic and yellowfin tuna.

**33. With reference to paragraph 33 of the United States' written submission and paragraphs 77-81 of Mexico's written submission, please identify the evidentiary basis for your assertion that the three major US retailers are committed to selling only dolphin-safe tuna products. Please also provide the evidentiary basis for your assertion that the US retailers were "pressured" to make statements to this effect.**

49. It is important to highlight that it is already resolved that – where the dolphin-safe label is widely available, as is currently the case – being able to use the label is necessary to have access to the major distribution channels in the U.S. market. In the original proceedings, the Appellate Body explained:

The Panel found that the "dolphin-safe" label has "significant commercial value on the US market for tuna products". The Panel further found that Mexico had presented evidence concerning retailers' and final consumers' preferences regarding tuna products, which, in the Panel's view, confirmed the value of the "dolphin-safe" label on the US market. On this basis, the Panel agreed with Mexico that access to the "dolphin-safe" label constitutes an "advantage" on the US market. These findings have not been appealed.<sup>26</sup>

This led the Appellate Body to determine:

In our view, the factual findings by the Panel clearly establish that the lack of access to the "dolphin-safe" label of tuna products containing tuna caught by setting on dolphins has a detrimental impact on the competitive opportunities of Mexican tuna products in the US market.<sup>27</sup>

In the first compliance proceedings, the Appellate Body found that this modification of the conditions of competition continued under the 2013 tuna measure.<sup>28</sup>

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<sup>26</sup> Appellate Body Report, *US- Tuna II (Mexico)*, para. 233 (footnotes omitted).

<sup>27</sup> Appellate Body Report, *US- Tuna II (Mexico)*, para. 235.

<sup>28</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.238 ("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").

50. To be clear, Mexico did not state in its written submission that “the three major US retailers are committed to selling only dolphin-safe tuna products”, nor did the United States in its submission. The assertion of the United States was that some retailers have a policy of not purchasing tuna products made with tuna caught by encircling dolphins, and therefore that such retailers would not purchase Mexican tuna products even if they were eligible for the dolphin-safe label. Mexico showed that the largest U.S. retailer actually did not make the commitment described by the United States. For several other retailers, Mexico showed that the letters cited by the United States as evidence were sent in response to requests from the Department of Commerce and used identical language, indicating that the Department of Commerce had provided the language for the retailers to use.

51. Thus, for example, the letter from Costco to the Department of Commerce states as follows:

In the United States, our company is a substantial seller of canned tuna, including branded items and those sold under our Kirkland Signature (private label) trademark. The branded and private label canned tuna items that we sell bear “dolphin safe” labels.

Even though allowed by the laws of the United States, Costco Wholesale does not, and would not, sell canned tuna in the United States that we knew to be produced from the intentional encirclement of dolphins. To do otherwise would be inconsistent with what we believe to be the preferences of many of our customers and with our interest as a company in reducing harmful bycatch associated with harvesting of seafood.<sup>29</sup>

The letter from Kroger to the Department of Commerce states:

In the United States, our company is a substantial seller of canned tuna, including branded items and those sold under our Kroger private label. The branded and private label canned tuna items that we sell bear “dolphin safe” labels.

Even though allowed by the laws of the United States, The Kroger Co. does not, and would not, sell canned tuna in the United States that we knew to be produced from the intentional encirclement of dolphins. To do otherwise would be inconsistent with what we believe to be the preferences of many of our U.S. customers and with our interest as a company in reducing harmful bycatch associated with harvesting of seafood.<sup>30</sup>

Target’s letter to the Department of Commerce states as follows:

In the United States, Target is a substantial seller of canned tuna, and the canned tuna items that we sell, including our private label, bear “dolphin safe” labels.

Target does not, and would not, intentionally sell canned tuna in the United States that we knew to be produced from the intentional encirclement of dolphins. To do otherwise would be inconsistent with what we believe to be

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<sup>29</sup> Exhibit US-40, p. 8.

<sup>30</sup> Exhibit US-40, p. 10.

the preferences of many of our customers and with our interest as a company in reducing harmful bycatch associated with harvesting of seafood.<sup>31</sup>

52. Also in the documentation submitted by the United States was an email it sent to another retailer, stating:

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.<sup>32</sup>

The email does not contain any information about the AIDCP or about the distinction between regulated and unregulated dolphin encirclement, nor does it mention alternative fishing methods or their effects on the sustainability of dolphins and other sea life.

53. Mexico submits that, in the absence of more detailed information on what the Department of Commerce officials said to the retailers, the above evidence strongly supports the conclusion that the Department of Commerce pressured retailers to send letters with the language that it provided to them. The retailers' responses bear too much similarity for it to be coincidental.

54. Finally, although Mexico has already explained why the documents submitted by the United States with older communications from retailers to EII do not support the U.S. position, it should be noted that the 2007 letter from Food Lion strongly supports Mexico's position. That letter states "Food Lion is not taking a position on whether Delores maintains 'dolphin-safe' methods for catching tuna" and "in the interest of being a food corporate citizen and for other business reasons, Food Lion has decided to cease purchasing canned tuna products unless and until such time as the manufacturer receives the 'dolphin-safe' certification."<sup>33</sup> In other words, if the tuna measure were withdrawn or amended to allow AIDCP-certified products be labelled dolphin-safe, this retailer and others would carry Mexican tuna products. Other evidence on the record also demonstrates that companies will carry Mexican tuna products if those products have a dolphin-safe label.<sup>34</sup>

**34. With reference to footnote 165 of the United States' first written submission, please respond to the United States' argument that Mexico's choice of model is incorrect, and that an "AIDS" model should have been used instead.**

55. The Almost Ideal Demand System (AIDS) is an empirical model of demand. The AIDS model, as well as other empirical models of demand, is typically used to estimate elasticities of demand (own-price, cross-price and income). This is what Chiang et al. (2016) (Exhibit US-8) does. An empirical model of demand like AIDS can indeed be informative for the calibration of the model in Exhibit MEX-2 (Mexico's methodology paper). Page 15 of Mexico's methodology paper refers to several papers that use AIDS modelling for evidence of the shape of the demand for canned tuna (see Exhibits MEX-8, MEX-12, MEX-13 and

<sup>31</sup> Exhibit US-40, p. 13.

<sup>32</sup> Exhibit US-40, p. 11.

<sup>33</sup> Exhibit US-40, p. 3 (emphasis added).

<sup>34</sup> See Mexico's written submission, footnote 77 (referring to Exhibit MEX-36 (BCI)), para. 92 and footnote 88 (referring to Exhibit MEX-45 (BCI)).

MEX-14). Moreover, the Mexican model is based on evidence of the strength of the U.S. demand by being calibrated on observed consumption for 2014. Accordingly, the United States' arguments in paragraph 94 and footnote 165 of its written submission are incorrect.

56. Although an AIDS model can be informative of values for elasticities, it cannot provide information about consumers' valuation of different tuna species. The appropriate model for that purpose, as used in Mexico's methodology paper, is a hedonic model (see pages 17-19 in Exhibit MEX-2). In addition, the purpose of an AIDS model is only empirical and limited to the demand. It cannot be used to create a counterfactual where demand curves and supply curves move in response to a shock such as modifications to the tuna measure.

**35. With reference to page 14 of MEX-2, how would the results be affected if, instead of wholesale prices, retail prices were used for calibration? Furthermore, how would the results be affected if, instead of calibrated prices, the price of United States' canned tuna were used?**

57. What is relevant for the calculation of the level of nullification or impairment is the price that would be paid to Mexican exporters of canned tuna. Retail prices could be used for the calibration of the model, but for this to be correctly done it would require modelling of the demand at retail and then modelling what happens between the wholesale and retail levels. Given that what is required to calculate the level of nullification or impairment are the wholesale border prices, calibrating the demand at retail only would add an unnecessary layer of complication to the model.

58. There is no such thing as calibrated prices. The price that is used for the calibration of the U.S. demand is the average observed price of imported canned tuna, which is a U.S. price for canned tuna.

**36. With reference to page 34 of MEX-2, please clarify how the estimated premium of \$2.84/kg in the United States relates to the premium estimated econometrically.**

59. The premium of \$2.84/kg is obtained when solving Mexico's calibrated model after modification to the tuna measure. It is not a premium estimated empirically. As expected, it is smaller than the total premium estimated econometrically of \$5.83/kg (\$1.18/kg + \$4.65/kg; see pages 18 and 20 of Exhibit MEX-2). With the removal of the tuna measure's discriminatory impact, consumption of canned yellowfin tuna in the United States will increase because of an increase in Mexican exports of yellowfin tuna to the United States. The model shows that increased supply of yellowfin tuna in the United States from modifications to the measure causes a decline in the price of yellowfin tuna and a decline in its premium.

**37. With reference to paragraph 105 of the United States' written submission, please comment on the United States' assertion that the logistic distribution is not an appropriate assumption of the willingness to pay because yellowfin tuna own price elasticity is very high.**

60. The United States criticizes the choice of a logistic distribution function, arguing that consumers are sensitive to prices. But with the logistic distribution, the demand for canned yellowfin tuna is sensitive to its price. The table below shows how the elasticity of demand for canned yellowfin tuna changes under the assumption of the model for a series of prices

for canned yellowfin tuna, keeping the price of skipjack constant at \$5/kg. For all prices considered, the demand is elastic.

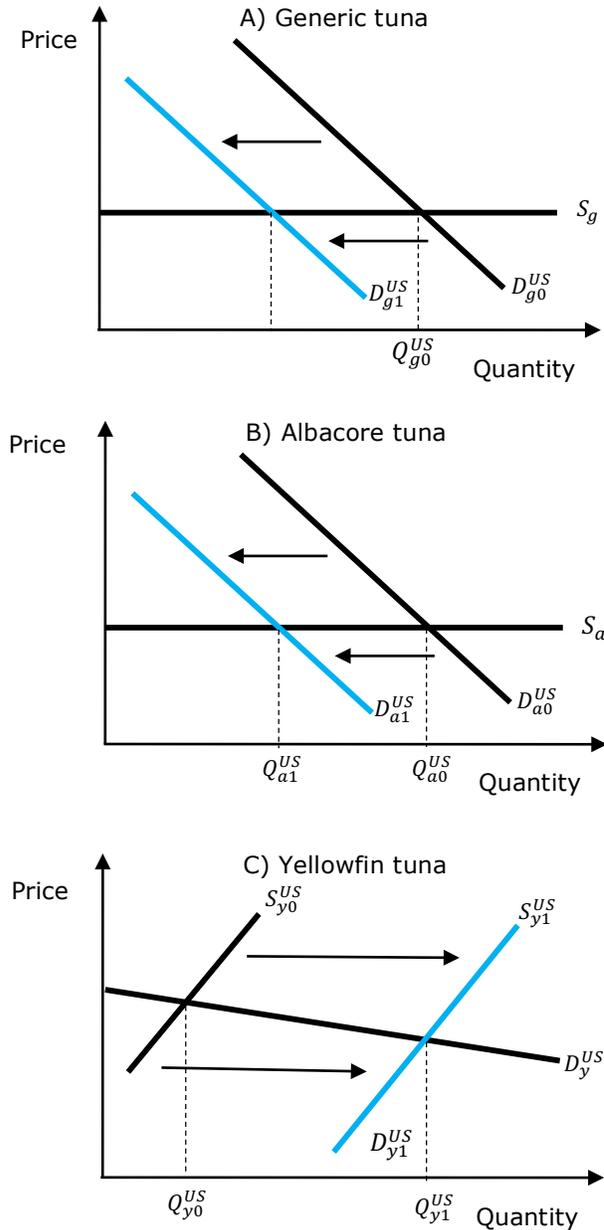
**Table 1: Elasticity of demand for canned yellowfin tuna**

<b>Price of canned yellowfin tuna</b>	<b>Elasticity of demand</b>
10	-10.53
9	-8.93
8	-6.85
7	-4.50
6	-2.62
5	-1.60

61. The results of the model are not sensitive to the choice of the distribution function. Indeed, a normal distribution function would have produced very similar results (see Mexico's response to question 71).

**38. At paragraph 103 of its written submission, the United States asserts that its tuna market is made up by several products: "light tuna" (low-end portion of the market) and "white tuna" (i.e. albacore) that dominates the high-end portion of the market. At paragraph 127 of its written submission, Mexico states that "albacore tuna is a premium product comparable in quality to yellowfin tuna". In light of the above, please explain why, in Mexico's model, albacore is bundled together with all other canned tuna, rather than being singled out. Please also explain how the derivation of the demand for yellowfin tuna would be affected by considering the categories "generic tuna (without albacore)", "yellowfin" and "albacore" separately.**

62. The reason why skipjack and generic tuna (as well as a few other tuna species) are bundled together is because their demands would respond in the same manner to the decrease in the price of canned yellowfin tuna in the United States following modifications to the tuna measure. Figure 2 illustrates how the U.S. canned tuna market would respond to the removal of the tuna measure. The figure is similar to Figure 2 of Mexico's written submission, except that the generic tuna market is broken down into a generic tuna market and an albacore tuna market. The supplies of generic and albacore tuna to the United States are assumed perfectly elastic as in Mexico's methodology paper.



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

63. Modifications to the tuna measure open the U.S. market to Mexican tuna, thus shifting the supply of yellowfin tuna to the United States from  $S_{y0}^{US}$  to  $S_{y1}^{US}$  in panel C) and decreasing the price of canned yellowfin tuna in the United States. This then causes the demand for canned generic tuna and canned albacore tuna to shift inward in panels A) and B) because canned generic and albacore tuna are substitute products to canned yellowfin tuna (Exhibit US-8). The demands for canned generic tuna and canned albacore tuna can be bundled

together into a single group because their demands respond in the same way to the decline in the price of canned yellowfin tuna. This is true even though they are of different qualities.

64. It would be possible to make a model with individual demands for canned generic tuna and canned albacore tuna. This would mean increasing the number of equations in the model by about 50 percent, adding complexity to the model and making it less transparent. One major difficulty in this more complicated model would be in correctly specifying and calibrating a multi-variate distribution function that describes consumers' preferences for the three different tuna species.

65. Adding such equations to the model would likely not provide more accurate calculations, and it would come at a heavy cost in terms of complexity and transparency.

**39. In Mexico's view, would the methodology outlined in paragraph 125 of the United States' written submission (leaving aside the values given or particular data used by the United States) be an appropriate way of determining the level of nullification or impairment caused by the Tuna Measure? If not, why not?**

66. No, it is not an appropriate method. As described in Mexico's written submission, a proper counterfactual keeps everything but the tuna measure constant. It is obvious that the economic conditions that prevailed in the 1987-89 period are very different than those prevailing in 2014. Other factors that make the 1987-89 period inadequate include the location of U.S. canneries, the U.S. canning capacity, the Mexican canning capacity and improved trading conditions since the adoption of NAFTA in 1994. Because of how all these factors have evolved between 1987-89 and 2014, the 1987-89 period is not a proper counterfactual and causes a gross underestimation of the level of nullification or impairment in the market based approach proposed by the United States.

67. A market-based approach as proposed by the United States could work if the base period is very close to the counterfactual period that follows the expiration of the RPT. For example, suppose that the tuna measure became effective starting in 2013 and that the expiration of the RPT is January 1, 2014. In such a case, it would be reasonable to use the 2012 trade values to calculate the level of nullification or impairment for 2014 because 2012 and 2014 are sufficiently close to each other that we would expect the market conditions, but for the tuna measure, to be similar.

**40. With reference to paragraph 128 of the United States' written submission, in Mexico's view, how many years would need to be taken into account in order to obtain an appropriate representative import level?**

68. There is no number of years that would make the import level representative in the U.S. methodology. The years before the adoption of the tuna measure are not appropriate because of the reasons discussed above. The counterfactual must be based on the year following the expiration of the RPT and keep everything but the tuna measure constant. This is not the case when using data from before 1990.

#### 1.4 Questions regarding the assumptions of the economic methodologies

**41. At paragraph 73 of the United States' written submission, the United States argues that it is "reasonable to conclude that the commitments made to EII or directly to customers by the vast majority of producers, distributors, exporters, importers, and retailers that serve the U.S. tuna product market to not produce, hold, or sell tuna or tuna product that was harvested by setting on dolphins would remain in place". In Mexico's view, assuming that the United States' argument is correct, how could the Arbitrator assess these commitments in determining the level of nullification or impairment? What effect, if any, would they have on the model presented by Mexico?**

69. At most, the positive evidence put forward by the United States indicates that "some", not the "vast majority", of canneries, retailers, distributors, exporters and importers have made such commitments as of the date of expiry of the RPT. Mexico addresses the deficiencies in this evidence in detail in its written submission.<sup>35</sup> Among other things, Mexico showed that at least some of the major market participants already disregard their "commitments" to EII, such as by procuring tuna from suppliers not approved by EII.

70. To the extent that some market participants have such commitments, this issue is fully addressed in Mexico's responses to questions 16 and 25. To the extent that these commitments existed in the market on the date of expiry of the RPT, it is reasonable for the Arbitrator to conclude that, under the counterfactuals, the effect of these commitments would be neutralized, the conditions of competition in the market would be levelled, and Mexican tuna products would be able to compete across the market. Thus, any "commitments" would not impact on the level of nullification or impairment.

**42. With reference to page 14 of MEX-2, please explain how Mexico's model would be affected by relaxing the assumption, reflected in equation (11), that "only canned generic tuna is available".**

71. This is an assumption made to calibrate the model. It has a very marginal consequence, as yellowfin tuna accounts for only about 1.2 percent of total U.S. canned tuna consumption (Exhibit US-17). Doing the calculations differently would marginally shift the U.S. demand equations for canned tuna.

**43. With reference to page 23 of MEX-2, please provide justification for the assumptions that "[a]ll exports of frozen and canned tuna are assumed to be yellowfin" and that "[i]mports of frozen and canned tuna are assumed to be generic tuna, mostly skipjack".**

72. Table 2 shows the production quantity and value of Mexico's tuna production from Table 8 of MEX-2. The table shows that most of Mexico's production is for yellowfin tuna. Other tuna species represent only 11 percent of all Mexican production by volume. Because most of Mexico's production is yellowfin tuna, it is the tuna species that it will most likely export.

<sup>35</sup> Mexico's written submission, paras. 71-96.

**Table 2: Mexico's production of tuna**

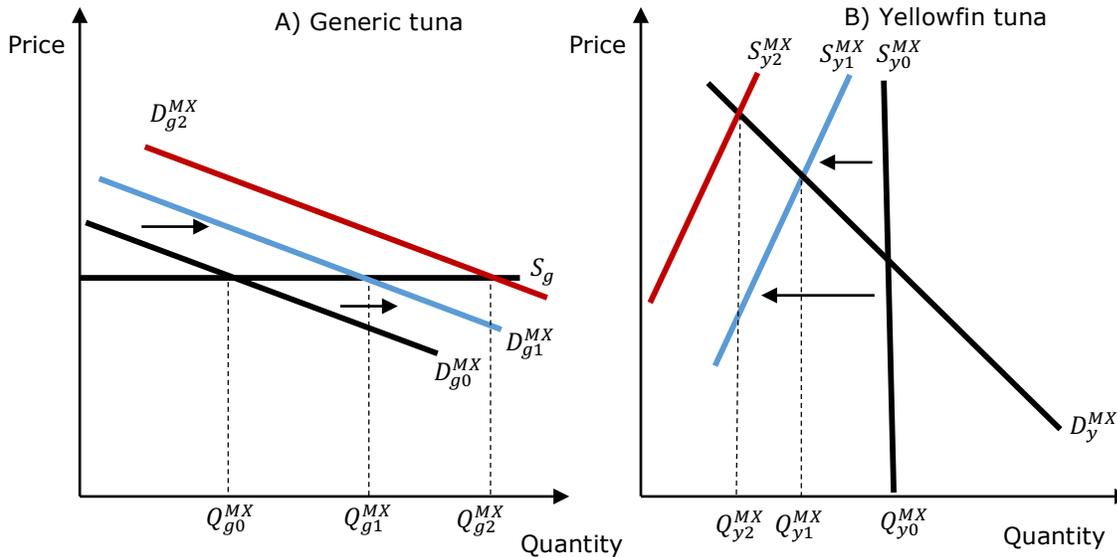
	<b>Quantity</b> (metric tonnes live weight)	<b>Value</b> (`000 dollars)
Yellowfin tuna	144,651	91,464
Other	17,771	59,590

73. A second reason is that Mexico's yellowfin tuna is differentiated from most of the tuna available in the United States. Consumption of canned yellowfin tuna in the United States has been very small in recent years because of the high cost of procurement for yellowfin tuna (Exhibit US-10 (BCI)). This leaves a large segment of the U.S. market empty for Mexican exports to fill, for a product over which it has a competitive advantage.

**44. With reference to page 28 of MEX-2, please provide justification for the assumptions that "Mexico imports yellowfin tuna that is canned domestically for domestic consumption to replace some of the canned yellowfin tuna exported to the United States" and that "nearly all of the yellowfin tuna harvested and canned by Mexican firms [is] to be exported to the United States".**

74. The first quote is part of the explanation of the solution of the model to the modifications of the tuna measure. Additional explanations for this result were provided in Mexico's written submission in paragraphs 151 to 154 and Figures 2 and 3. Figure 3 below reproduces Figure 3 of Mexico's written submission and is slightly modified to provide additional explanations.

75. The effect of the modifications of the tuna measure is to increase Mexican exports of canned yellowfin tuna to the United States. If Mexico does not import yellowfin tuna to replace some of the yellowfin tuna exported to the United States, the supply of canned yellowfin tuna would shift to  $S_{y2}^{MX}$ . The price of canned yellowfin tuna in Mexico would then be high, hence giving an incentive to Mexican canneries to find supplies of raw yellowfin tuna from other countries to replace some of the canned yellowfin tuna exported to the United States. The import of yellowfin tuna from other countries shifts the supply of canned yellowfin tuna to Mexico to  $S_{y1}^{MX}$  and increases consumption of canned yellowfin tuna in Mexico relative to the no import case. It also decreases the price of canned yellowfin tuna both in Mexico and in the United States.



**Figure 3: Mexican tuna market – modifications to U.S. tuna measure (Figure 3 of Mexico's written submission)**

76. The calculations of the level of nullification or impairment assume that only tuna caught and processed in Mexico can be exported to the United States. With imports of raw yellowfin tuna equivalent to about 20,000 metric tonnes of canned yellowfin tuna, nearly all yellowfin tuna caught and processed in Mexico is exported to the United States. Mexican imports of yellowfin tuna could be larger than 20,000 metric tonnes, but it would not matter, as then all Mexican canned yellowfin tuna is exported to the United States. This is shown in Table 3. Assuming Mexican imports of 23,000 metric tonnes, the model is at a corner solution where all Mexican production of canned yellowfin tuna is exported to the United States. Then, assuming greater Mexican import volumes of yellowfin tuna do not matter and the model yields the same solutions for the export losses.

**Table 3: Model's solution under alternatives for Mexican imports of yellowfin tuna**

Mexican imports of yellowfin tuna (canned equivalent metric tonnes)	U.S. imports of Mexican canned yellowfin tuna (metric tonnes)	Price of canned yellowfin tuna in the United States (\$/kg)	Export losses (million dollars)
20,000	63,568	7.84	472.3
21,000	64,331	7.82	477.4
22,000	65,095	7.81	482.4
23,000	65,500	7.80	485.0
24,000	65,500	7.80	485.0
25,000	65,500	7.80	485.0

**45. With reference to page 29 of MEX-2, please provide justification for the assumption that “Mexico would import from other ETP countries the equivalent of 20,000 metric tonnes of canned yellowfin tuna”. In particular, please explain:**

**a. How has the figure 20,000 been generated?**

77. As shown above, 20,000 metric tonnes is nearly the quantity where all Mexican origin canned yellowfin tuna is exported to the United States. Table 3 (above) shows that Mexican imports of yellowfin tuna greater than 20,000 metric tonnes are possible but would not substantially impact the value of export losses.

78. The second justification is that, as shown in Table 10 of MEX-2, the catch of yellowfin tuna from other ETP countries is plentiful enough to provide a quantity equivalent to 20,000 metric tonnes of canned yellowfin tuna to Mexico.

**b. What would change if the model allowed other ETP countries to export yellowfin tuna to the United States?**

79. Nothing. Other ETP countries are not in position to compete with Mexico in the U.S. market for canned yellowfin tuna. This is because of Mexico's competitive advantage from its nearby location, its large production capacity, its low marginal cost and its access to the U.S. market free of import tariffs. It is also because most of the tuna products from other ETP countries are completely banned by other U.S. measures from exporting yellowfin tuna products to the United States.

**c. Do these countries currently export yellowfin tuna to the United States, and if so, does it receive the tuna-safe label?**

80. As discussed above in Mexico's response to question 18, yellowfin tuna products from Belize, Bolivia, Colombia, Honduras, Nicaragua, Panama, Vanuatu, Venezuela, and Peru are subject to a complete embargo by the United States.

81. The only countries fishing in the ETP that are eligible to export yellowfin tuna products to the United States are Spain, Ecuador, Guatemala, and El Salvador. The U.S. import statistics for 2014 show that there were no imports of canned tuna products from Guatemala, and that the imports from El Salvador (27,000 kg) and Spain (339,000 kg) were de minimis.<sup>36</sup> The statistics do not indicate if any of the imports were of canned yellowfin, but Mexico does not believe that those countries, or Ecuador, export yellowfin tuna products to the United States.

**46. At paragraph 151 of Mexico's written submission, Mexico states that relaxing the assumption of a perfectly elastic world supply of generic tuna would have no qualitative effects. Please also explain whether and in what direction relaxing this assumption would change quantitative estimates of the level of nullification or impairment.**

<sup>36</sup> International Trade Commission, HTS 160414 (2014-2015), generated at <https://dataweb.usitc.gov/>. The tariff items 1604.14.10, 1604.14.22 and 1604.14.30 are the classifications for tuna in airtight containers (Exhibit MEX-76).

82. Relaxing the assumption of a perfectly elastic world supply does not have qualitative effects in the sense that the economics are the same regardless of the value for the elasticity of world supply.

83. The quantitative effects of relaxing the assumption that the world supply is perfectly elastic were shown in Tables 3 and 4 and paragraphs 162 to 168 of Mexico's written submission. The tables are reproduced below in Tables 4 and 5 for cases where the world supply elasticity equals 10 or 1.

**Table 4: Model solutions with Mexican imports of yellowfin tuna (world export supply elasticity equals 10)**

	United States	Mexico
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

**Table 5: Model solutions with Mexican imports of 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

84. 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.

85. It is assumed in the model when relaxing the assumption of a perfectly elastic world supply that the increase in Mexican imports of canned generic 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 overestimate the decline in the world price of canned generic tuna in response to modifications to the tuna measure. Despite that, the quantitative effects of relaxing the assumption of a perfectly elastic world supply are relative small.

## 1.5 Questions related to data

**47. With reference to page 6 of MEX-2, please explain how, if at all, differences in unit values across suppliers might also reflect the presence or absence of a “dolphin-safe” label under which tuna is imported in the United States?**

86. Based on evidence submitted by the United States in the first compliance proceeding, the only imports that are self-reported as containing non-dolphin safe tuna are from Mexico.<sup>37</sup> Imports from all other countries are routinely allowed to use the dolphin-safe label based simply on self-declarations.

87. Beside the dolphin-safe label, the unit values may reflect other attributes of canned tuna. This includes the tuna species, the type of container, added flavours, etc. Imports from certain countries are small so that the imports of one product can have an important impact on the unit value.

**48. With reference to paragraphs 84 and 85 of the United States' written submission, please comment on the United States' statements that “[t]o determine the value of the dolphin safe label ... would require detailed data on U.S. purchases of tuna product with and without the dolphin safe label” and that “Mexico's dataset does not allow for any comparison of labelled and unlabelled tuna products”. In the same vein, and with reference to paragraph 85 of the United States' written submission, does Mexico agree with the United States that it “appears to be undisputed” that the level of data concerning the United States tuna product market is not available to correctly use a partial equilibrium analysis in the present proceeding?**

88. It is accurate that the data available to Mexico do not allow for the estimation of the value of the dolphin safe label to the average U.S. consumer in comparison to no label or to alternative labels that inform about the impact of tuna fisheries on dolphins. The data do not contain such information. But even if the data contained that information, estimation of the value of the dolphin safe label to consumers might not be possible because the tuna measure in effect prevents virtually all sales of canned tuna that does not receive the dolphin safe label.

89. The United States does not argue that it is undisputed that the level of data available precludes the use of a partial equilibrium model. It does argue that it is undisputed that the data necessary to estimate the value to consumers of the dolphin-safe tuna label are not available. Mexico agrees that the data do not allow for the estimation of the value that consumers place, on average, in the dolphin-safe tuna label.

90. The inability to estimate consumers' willingness to pay for the label is not limiting because of the counterfactual considered. In the counterfactual described by Mexico, and the alternative one described by the United States, there is no co-existence of dolphin-safe labelled canned tuna and canned tuna not labelled as dolphin safe. The counterfactual does not exclude that Mexican tuna uses a label that informs of the treatment of dolphins.

91. Mexico disagrees that the absence of an estimate of consumers' willingness to pay for the dolphin-safe label prevents the use of a partial equilibrium model. Indeed, the model

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<sup>37</sup> William Jacobson Second Witness Statement (July 21, 2014), Appendix 1, footnote \* (Exhibit MEX-75) (Exhibit US-86 in the first Article 21.5 proceeding).

used by Mexico is a partial equilibrium model where all tuna is on equal footing. There is no differentiation for the dolphin safe label under the appropriate counterfactual. As all tuna is treated the same way, and there is no differentiation in value from the dolphin-safe label, then not knowing the value of the dolphin-safe label to consumers is not limiting for the model.

92. Moreover, another reason why the value of the dolphin-safe label to consumers is not necessary for a partial equilibrium model is that most of the value for the label is in providing access to the major distribution channels in the U.S. market. This is not a value coming from the willingness of consumers to pay for the dolphin-safe label, but rather from having access to the major distribution channels in the U.S. market.

**49. With reference to page 18 of MEX-2, please provide justification for the deletion of "observations for UPC where the quantity sold is zero". Please explain how this deletion affects the measurement of the willingness to pay.**

93. The U.S. Nielsen data (MEX-15) contain all of the UPC codes for canned tuna. Several of these products were not sold at the time when the data were collected and may not have been sold for years. The quantities for these products appear as zero. When there are zero sales, there are no price data. Hence, deleting the zero quantity observations is the only way to proceed. It is not possible to do the regression without the deletion of the zero quantity observations.

**50. With reference to paragraph 104 of the United States' written submission, relating to the regressions used by Mexico to estimate the price premium for yellowfin, please comment on the United States' assertions that the "the data is not detailed enough to do a proper analysis", "the regression does not account for albacore" (a premium product like yellowfin), and "the dataset is not representative of the entire market, as demonstrated by the need to remove over 60 per cent of observations due to lack of data".**

94. The regression analysis provides evidence that a premium is paid for canned yellowfin tuna in the United States. Indeed, the regression model does not account for albacore tuna explicitly, as the dataset does not allow for the identification of which product is albacore tuna. It does, however, account of the form of tuna, which is one of the most important attributes in the added value of albacore tuna. By not making the distinction between skipjack and albacore tuna, the regression model is consistent with the partial equilibrium model where skipjack and albacore tuna are bundled together.

95. As explained in question 49, deleting observations with zero quantities is not a matter of choice but a necessity. The observations deleted were for products that were not offered.

## **2 FOR THE UNITED STATES**

### **2.1 Factual and general questions**

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

96. N.A.

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

97. N.A.

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

98. N.A.

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

99. N.A.

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

100. N.A.

## **2.2 Questions related to the proposed counterfactuals**

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

101. N.A.

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

102. N.A.

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

103. N.A.

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

104. N.A.

### **2.3 Questions relating to the economic methodologies presented by the parties**

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

105. N.A.

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

106. N.A.

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

107. N.A.

**63.**With reference to paragraph 173 of Mexico's written submission, please comment on Mexico's statement that "the consumption of canned yellowfin tuna in the United States is too small to properly derive a demand curve" and that "the approach in Mexico's methodology model is a sensible way of deriving a demand curve".

108. N.A.

#### **2.4 Questions regarding the assumptions of the economic methodologies**

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

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

109. N.A.

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

110. N.A.

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

111. N.A.

#### **2.5 Questions related to data**

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

112. N.A.

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

113. N.A.

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

114. N.A.

### 3 FOR THE PARTIES

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

115. Determining the approach that will most accurately discharge the Arbitrator's mandate under Article 22.7 is the key consideration that should guide the Arbitrator in developing the methodology that it applies, including with respect to the WTO-consistent counterfactual that it chooses to use. In this regard, the Arbitrator in *US – Gambling (Article 22.6 – US)* described the "key consideration" guiding its analysis as follows:

Our mandate under Article 22.7 of the DSU is to determine whether the level of suspension proposed by Antigua is "equivalent" to the level of nullification or impairment of its benefits. Our starting point, in this determination, must be Antigua's proposed level of suspension. In determining whether this proposed level is "equivalent", we must take care to ensure that the level of suspension is neither reduced to a level lower than the level of nullification or impairment of benefits accruing to the complaining party, such as to adversely affect that party's rights, nor exceeds the level of nullification or impairment of benefits, such that it would become punitive. This is the key consideration that must, in our view, guide our assessment of the US challenge to Antigua's choice of counterfactual.<sup>38</sup>

116. For the purposes of discharging its mandate, the Arbitrator is not limited to merely choosing one or the other of the methodologies — including the WTO-consistent counterfactuals — as proposed by the parties. Rather, the Arbitrator "may be required to adopt an approach or methodology that differs from those proposed by the parties".<sup>39</sup> In doing so, arbitrators in previous arbitrations have broadly followed the approach proposed by the party requesting the countermeasures, to which they have made the adjustments and modifications considered necessary. In *US – Gambling (Article 22.6 – US)*, for example, the arbitrator developed its own approach,<sup>40</sup> determining that "we will attempt to stay as closely to the approaches proposed by the parties as possible", and "[w]e will broadly follow the spirit of Antigua's original approach, while making the necessary adjustments in light of

<sup>38</sup> Decision by the Arbitrator, *US – Gambling (Article 22.6 – US)*, para. 3.24.

<sup>39</sup> Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, para. 4.25. See also Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US II)*, para. 4.16.

<sup>40</sup> Decision by the Arbitrator, *US – Gambling (Article 22.6 – US)*, paras. 3.172-3.174.

our analysis above".<sup>41</sup> Similarly, in *US – COOL (Article 22.6 – US)*, the Arbitrator determined that:

We will examine all elements of Canada's and Mexico's methodologies in determining whether the proposed level of suspension is equivalent to the level of nullification [or] impairment. The reason is that, for the purposes of making our own determination, we will consider all elements of methodologies that are on the table, retaining those elements of the proposed methodologies that we conclude are acceptable. Likewise, we will consider the United States' EDM to assess its comparative merits and shortcomings, and to ascertain which elements if any of the EDM may assist us in deciding upon the approach to adopt for our reasoned estimate of the level of nullification or impairment.<sup>42</sup>

117. In the present case, the Arbitrator's dilemma is a positive one — the parties have each proposed a counterfactual that generally appears to be reasonable and plausible. On one hand, Mexico has proposed a counterfactual in which WTO-consistency is achieved by making appropriate amendments to the tuna measure. On the other hand, the United States has proposed a counterfactual in which WTO-consistency is achieved through the withdrawal of the tuna measure. As Mexico has explained in its written submission, applying the United States' counterfactual would not materially reduce the level of the nullification or impairment shown in Mexico's methodology paper, provided that the projected market conditions are appropriately assessed.<sup>43</sup>

118. Therefore, in Mexico's view, it does not matter which of the proposed counterfactual scenarios the Arbitrator chooses to use, as long as the other elements in the methodology that it applies to determine the level of the nullification or impairment are based on reasonable assumptions and projections of market conditions supported by positive, cogent evidence.

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

119. The results of the model are not sensitive to the choice of the distribution function. The R files shared with the Arbitrator allows one to change the distribution function to a normal distribution function. Table 6 shows the results of the model assuming a normal distribution. These results are very similar to those in Table 12 of MEX-2, showing that the results are not sensitive of the choice of distribution function.

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<sup>41</sup> Decision by the Arbitrator, *US – Gambling (Article 22.6 – US)*, para. 3.174. See also Decision by the Arbitrator, *US – Offset Act (Byrd Amendment) (Canada) (Article 22.6 – US)*, para. 3.113 ("Our decision is to reject the United States' model in favour of a modified version of the model proposed by the Requesting Parties").

<sup>42</sup> Decision by the Arbitrator, *US – COOL (Article 22.6 – US)*, para. 4.19.

<sup>43</sup> Mexico's written submission, para. 60.

**Table 6: Model solutions with distribution of preferences following a normal distribution**

	United States	Mexico
Consumption of yellowfin tuna (metric tonnes)	63,912	21,528
Consumption of generic tuna (metric tonnes)	229,119	51,477
Price of yellowfin tuna (\$/kg)	7.91	7.86
Price of generic tuna including tariff and charge (\$/kg)	5.00	5.32
Exports of yellowfin tuna (metric tonnes)	0	63,912
Imports of yellowfin tuna (metric tonnes)	63,912	20,000
Exports of generic tuna to the U.S. (metric tonnes)	0	0
Imports of generic tuna from other countries (metric tonnes)	51,769	28,477

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

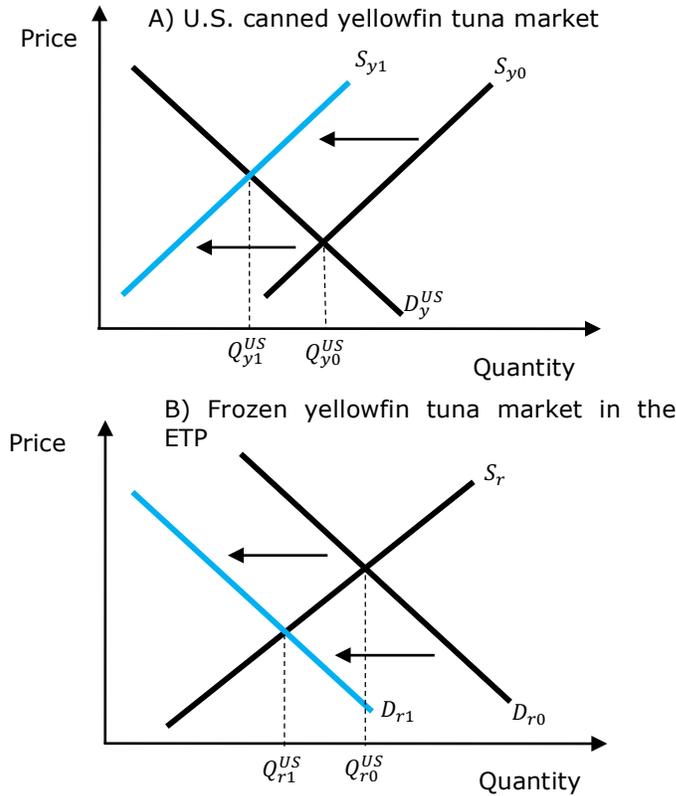
120. The relevant question concerns what happened at the retail market for canned yellowfin tuna in the United States following the adoption of the tuna measure. The claim by the United States is that the demand for yellowfin tuna has declined in the United States for certain reasons. Mexico claims that the tuna measure has caused a decline in the supply of canned yellowfin tuna to the United States because the measure excludes supplies from an important region located near the United States.

121. When looking at prices for yellowfin tuna and determining what has happened since 1987, it is important to understand where prices for yellowfin tuna are measured because changes in prices will be different depending on where prices are measured. Figure 4 shows how the effect of the tuna measure must be understood differently depending on the stage of the supply chain, given Mexico's explanation of the market effect of the tuna measure.

122. The immediate effect of the tuna measure is a shift to the left in the supply of canned yellowfin tuna to the United States shown in panel a) of Figure 4. The tuna measure effectively banned tuna harvested from an important source of inexpensive yellowfin tuna. The loss of an inexpensive source of yellowfin tuna means an increase in the cost of supply canned yellowfin tuna to the U.S. market. In panel a) of Figure 4, the effect is represented as a shift to the left of the supply of canned yellowfin tuna to the United States from  $S_{y0}$  to  $S_{y1}$  hence increasing the price of canned yellowfin tuna on the United States market.

123. Panel b) of Figure 4 shows the market for frozen yellowfin tuna. The effect of the tuna measure is to decrease the demand for yellowfin tuna from the ETP because that tuna is no longer welcomed on the U.S. market. That is, the largest market in the world for canned tuna, the United States, adopted a law that discriminates against tuna caught in the ETP causing the U.S. fleet to move out of the region and U.S. canneries to no longer accept tuna of ETP origin. The effect is obviously a decline in the demand for tuna from the ETP. In

panel b) of Figure 4, this is represented by a shift to the left of the demand for frozen yellowfin tuna from  $D_{r0}$  to  $D_{r1}$ , causing the price of frozen yellowfin tuna to decline.



**Figure 4: Effects of the tuna measure on the frozen and canned yellowfin markets**

124. It is nearly impossible to find a time series of price data for yellowfin tuna. The only source of price data that is related to the United States is for frozen tuna. A 1992 report on the U.S. tuna industry by the U.S. International Trade Commission shows U.S. exvessel prices from 1990 to 1992, just before and after the instauration of the tuna measure.<sup>44</sup> The trend has been for a decline in the price of frozen tuna. The report comments that:

The categories most affected by the dolphin-safe policy are yellowfin over 20 pounds and skipjack between 4 and 7.5 pounds. The supply of this category of yellowfin declined, but demand declined even more; thus, the price dropped by 18 percent immediately after the dolphin-safe announcement in April 1990.<sup>45</sup>

The report also states:

<sup>44</sup> U.S. International Trade Commission, "Tuna: Current Issues Affecting the U.S. Industry," USITC Publication 2547 (Aug. 1992), p. 2-11 (Exhibit MEX-73).

<sup>45</sup> Ibid., p. 2-10 (footnotes omitted).

The price of imported yellowfin dropped precipitously during the second quarter of 1990 after the U.S. canners announced their dolphin-safe policy. The price then recovered the following quarter but generally declined through the end of 1991. The price of domestic yellowfin gradually trended downward during 1990-91 and did not fall sharply during the second quarter of 1990, as did the price of imported yellowfin.<sup>46</sup>

125. Related to this same subject, James Joseph of the IATTC wrote in 1994 that:

One result of the U.S. canners' "dolphin-safe" policy was a sudden change in the world trade in tuna. The United States, the most important market for canned tuna in the world, was in effect closed to imports of large yellowfin from the eastern Pacific. Much of this catch was diverted to Europe, the second largest market; the resulting abundance of supply and the lack of competition from U.S. canners led to a precipitous fall in the price paid for the fish in Europe. This, in turn, affected the prices paid in other markets elsewhere in the world.<sup>47</sup>

126. The price data from page 2-11 of the International Trade Commission report and the quotations above are consistent with panel b) of Figure 4 that shows a decline in demand that causes a decrease in the price of frozen tuna. Because of its lower price, yellowfin tuna from the ETP then started being shipped to markets where it was not sold before as stated in MEX-65.

127. Mexico did not find prices for canned yellowfin tuna at retail or wholesale. However, a newspaper article from 1999 provides evidence that the tuna measure caused the retail price of tuna in the United States to increase in response to the tuna measure:

August Felando, president of the American Tunaboat Association, the largest group of American-flagged tuna boats, said the embargo could disrupt the supply of tuna in the United States. "The U.S. fishermen cannot supply all the tuna that's required for the U.S. market," he said.

The embargo affects the nations whose boats use nets to catch yellowfin tuna in the eastern Pacific - Mexico, Panama, Venezuela, Ecuador and Vanuatu, an island nation in the Southwest Pacific.

Brenda Killian, associate director of the Earth Island Institute in San Francisco, an environmental group that brought the lawsuit, said yellowfin tuna was included in the fish canned and sold under many national and supermarket brand names as "chunk light."

Ms. Killian said it accounted for 20 to 30 percent of the canned yellowfin sold in this country and 5 to 8 percent sold worldwide.

Tuna Prices Likely to Rise

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<sup>46</sup> Ibid., pp. 2-10 and 2-13.

<sup>47</sup> J. Joseph, "The Tuna-Dolphin Controversy in the Eastern Pacific Ocean: Biological, Economic and Political Aspects", *Ocean Development and International Law*, Vol. 25 (1994), p. 7 (Exhibit MEX-65) (footnote omitted).

She said the ban could cause canned tuna prices to rise a few pennies a can because canners would be forced to buy tuna caught farther away in the western Pacific by methods that did not endanger dolphins.<sup>48</sup>

128. The potential increase in the price of canned tuna noted in the quotation above can only be generated by a shift to the left in the supply the left as in panel a) of Figure 4. A decline in consumer demand as argued by the United States cannot generate such increase in retail prices.

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<sup>48</sup> New York Times, "Judge Orders Tuna Import Ban Over Dolphin Kill" (Aug. 29, 1999), available at <http://www.nytimes.com/1990/08/30/us/judge-orders-tuna-import-ban-over-dolphin-kill.html> (Exhibit MEX-74).