

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)



**Comments of the United Mexican States on the United States' Responses to the
Questions Following the Arbitrator's Meeting with the Parties**

16 November 2016

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| US – 1916 Act (EC) (Article 22.6 – US) | Decision by the Arbitrators, <i>United States – Anti-Dumping Act of 1916, Original Complaint by the European Communities – Recourse to Arbitration by the United States under Article 22.6 of the DSU</i> , WT/DS136/ARB, 24 February 2004, DSR 2004:IX, p. 4269 |

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| Number | Title |
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| MEX-131 | National Marine Fisheries Service, NMFS Trade Query |
| MEX-132 | Institute of Medicine, "Balancing Choices: Supporting Consumer Seafood Consumption Decisions" (October 2006), available at http://www.aboutseafood.com/sites/all/files/11762_Seafood%20Choices%20Fact%20Sheet.pdf |
| MEX-133 | Wall Street Journal, "Tuna Tariff Sparks Trade Fight between Grocery-Store Rivals" (April 29, 2002), available at http://www.wsj.com/articles/SB1020042198850357920 |
| MEX-134 | National Research Council, <i>Dolphins and the Tuna Industry</i> (National Academy Press, 1992) |
| MEX-135 | R. Parker, "The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict", 12 <i>Georgetown International Environmental Law Review</i> 1 (1999-2000) |
| MEX-136 | Tomek & Robinson, <i>Agricultural Product Prices</i> , 4th ed. (Cornell University Press, 2003), pp. 139-141 |
| MEX-137 (BCI) | Confidential Affidavit |
| MEX-138 | Survey Data |
| MEX-139 | U.S. Food and Drug Administration, "Mercury in Fish: Cause for Concern?" (May 1995), pp. 2, 3 and 5 and National Fisheries Institute, "Science Based Perspective on New Mercury Study" (November 14, 2016) |
| MEX-140 | IATTC, Resolution C-12-07 (June 2012) |
| MEX-141 | D. Chong and J. Druckman, Framing Theory, 10 <i>Annual Review of Political Science</i> 103 (2007) |
| MEX-142 | World Customs Organization, Harmonized System Chapter 3 |

2. TO THE UNITED STATES

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

1. In its response to this question, the United States did not address the facts that (i) the U.S. government has reported that the mercury content of yellowfin and albacore are the same, and (ii) albacore products comprise a third of sales in the United States.¹ It also does not address that in 2014, total U.S. imports and landings of yellowfin tuna and albacore tuna were very similar – which would not be expected if consumers were avoiding yellowfin tuna.² Thus, the United States has failed to rebut Mexico's evidence that mercury issues do not have a material impact on purchases of yellowfin tuna products in the U.S. market.³

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

2. In its response to this question, the United States seems to argue that a lack of vertical integration in the U.S. industry somehow gives it an advantage over Mexico's vertically integrated industry.

3. Mexico is not aware of any reason why a cannery that does not own vessels would be better able to "optimize quality", as the United States claims without support,⁴ than a vertically integrated cannery. Canneries without their own supply have to purchase through a variety of middlemen, such as tuna brokers, and are unable to directly monitor the source of the fish or the methods used to catch them. The United States did not explain why that would be an advantage.

4. The United States asserts, but does not explain, how a lack of vertical integration would give the Ecuadorian industry a special ability to purchase tuna from the WCPO when ETP harvests are low.⁵ Mexico is not aware of any regulatory or economic reason why the Mexican

¹ Mexico's written submission, para. 134.

² In 2014, the United States imported 25.7 million kilos of albacore tuna and tuna products (mostly canned tuna), valued at USD \$134.4 million. Also in 2014, the United States imported 18.2 million kilos of yellowfin tuna valued at USD \$169.6 million, but that does not include any canned yellowfin tuna because the United States does not collect separate import statistics on canned yellowfin. National Marine Fisheries Service, NMFS Trade Query (Exhibit MEX-131).

³ According to a report on the subject by the Institute of Medicine of the U.S. National Academies of Science, in testing conducted by FDA, canned light tuna has an average of 0.12 parts per million (ppm) of methylmercury per can, and canned albacore tuna has an average of 0.35 ppm. Institute of Medicine, "Balancing Choices: Supporting Consumer Seafood Consumption Decisions" (October 2006), available at http://www.aboutseafood.com/sites/all/files/11762_Seafood%20Choices%20Fact%20Sheet.pdf (Exhibit MEX-132). To put these amounts into perspective, FDA has set a limit of 1.00 ppm for mercury in fish – and the 1.00 ppm limit has a ten-fold safety factor. See U.S. Food and Drug Administration, "Mercury in Fish: Cause for Concern?" (May 1995), pp. 2, 3 and 5; National Fisheries Institute, "Science Based Perspective on New Mercury Study" (November 14, 2016) (Exhibit MEX-139).

⁴ United States' responses to the questions following the Arbitrator's meeting, para. 4.

⁵ United States' responses to the questions following the Arbitrator's meeting, para. 5.

industry could not supplement the harvest of its own fleet with imports of tuna from other countries, and it indeed already does so.

5. In fact, the United States' arguments about the lack of vertical integration being an advantage is contradicted by the Ecuadorian industry itself:

Industry representatives in Ecuador highlighted two factors as critically important to their success in a globally competitive market. First, several of the plants in Ecuador, including Salica, NIRSA, Marbelize and Isabel are vertically integrated into industrial purse seining. In fact, some, such as Salica, began as fishing operations and later expanded into tuna processing. All firms with their own fleets highlighted vertical integration as one of the keys to their success, particularly as supply constraints tightened in 2010. In addition to securing supply, vertically integrated fishing-processing firms assured that their supply would qualify for duty free access to the EU and the US by meeting rules of origin.⁶ (emphasis added, footnote omitted)

6. As Mexico discussed in its opening statement, Tri-Marine recently announced it is closing its cannery in American Samoa in December 2016. The plant had reopened in January 2015 after a \$70 million investment and four years of rebuilding and expansion.⁷ Thus, even with a modern plant, the cannery was unable to operate economically.

7. In summary, the United States has confirmed that the U.S. canning industry is not vertically integrated, and the evidence supports the conclusion that a lack of vertical integration is a disadvantage.

130. In Exhibit US-10, it is reported that [[...]]. How should the Arbitrator interpret this statement in the light of Mexico's claim that low availability of yellowfin tuna in the United States tuna market is due to low supply of this product? Does this statement conflict with the United States' statement, in paragraph 27 of its written submission, that "low percentages of yellowfin being processed by U.S. canneries do not indicate lack of availability of dolphin safe yellowfin"?

8. The claim made by Mexico is that the price of raw yellowfin tuna is high and hence the price of canned yellowfin tuna is high, and this results in sales of small volumes of canned yellowfin tuna to the United States.⁸ The statements in Exhibit US-10 (BCI) are consistent with this claim. When discussing availability, the price at which certain volumes of raw yellowfin tuna and canned yellowfin tuna are available should also be discussed.

9. Mexico observes that at the beginning of its response to this question, the United States agrees that [[...]].⁹ However, in the remainder of its response, the United States omits the importance of the price in determining consumption volumes of canned yellowfin tuna in the United States.

⁶ Hamilton et al., Market and Industry Dynamics in the Global Tuna Supply Chain, FFA (June 2011) p. 197 (Exhibit US-7).

⁷ Undercurrent News, "Tri Marine suspends canning, seeks buyer for American Samoa facility" (Oct. 13, 2016), available at <https://www.undercurrentnews.com/2016/10/13/tri-marine-suspends-canning-seeks-buyer-for-american-samoa-facility/> (Exhibit MEX-78).

⁸ Mexico's written submission, paras. 122-126.

⁹ United States' responses to the questions following the Arbitrator's meeting, para. 6.

10. It is true that there are large volumes of yellowfin tuna, including canned yellowfin tuna, in the world. But what determines the volumes of canned yellowfin tuna in the United States is the price at which canned yellowfin tuna can be sold in the United States. The Arbitrator did not quote the entire statement from Exhibit US-10 (BCI). It is the rest of that statement that explains the reason why volumes of canned yellowfin tuna (referred as "supply") are small. The full quote is as follows:

[[...]]¹⁰

Whether the limited supply in the world market is in terms of relative volumes of yellowfin tuna compared to other species or in absolute terms, the quote is clear that the outcome of that "limited supply" is higher pricing. This is consistent with Mexico's claim.

11. The United States mischaracterizes Exhibit US-10 (BCI) regarding the potential to increase production.¹¹ The question asked in Exhibit US-10 (BCI) is as follows:

Would increasing production through adding an additional shift increase the marginal cost of production (additional costs per unit of production)?

This question says nothing specific to yellowfin tuna. As [[...]] processes mostly skipjack, it most likely answered the question referring to skipjack. The answer to the question is provided as follows:

[[...]]¹²

Given that the production of larger volumes would reduce production costs, the question is why is this cannery not producing larger volumes? The answer is simply that it cannot access additional volumes of raw material (yellowfin or other tuna species) at a low enough price to take advantage of decreasing production costs.

12. The United States refers to Exhibit US-10 (BCI) for evidence that "[[...]]"¹³ Mexico agrees with that quotation. This fact means that as the price of canned yellowfin tuna increases, consumption volumes in the United States decrease more than proportionally. It also means that as new supplies of canned yellowfin tuna from Mexico enter the U.S. market with the removal of the tuna measure, the price of canned yellowfin tuna in the United States would fall. This would be followed by a large increase in consumption volumes of canned yellowfin tuna, as shown in Mexico's methodology paper.¹⁴

13. The quote from page 10 of Exhibit US-10 (BCI) indicates that consumers [[...]] However, it does not say that the demand for canned yellowfin tuna has gone down since the introduction of the tuna measure and in no way does it imply that demand is weak in the United States. It also does not say anything about U.S. consumption volumes of canned yellowfin tuna if its price declines. The high value for the elasticity of demand clearly indicates that consumption would surge with a decrease in the price of canned yellowfin tuna.

14. In addition, Mexico disagrees that the survey results submitted by the United States in Exhibit US-148 about what tuna species consumers "look for" reflects what the market would be like under the counterfactual. The major suppliers to the U.S. market currently offer little canned yellowfin tuna, so it is not a widely available option. Consumers can only "look for"

¹⁰ Exhibit US-10 (BCI), p. 10.

¹¹ United States' responses to the questions following the Arbitrator's meeting, para. 13.

¹² Exhibit US-10 (BCI), p. 1.

¹³ United States' responses to the questions following the Arbitrator's meeting, para. 10.

¹⁴ Mexico's methodology paper, p. 33, Table 12.

items that are presently available to them. The circumstances affecting this survey result would change in a counterfactual scenario in which AIDCP-certified dolphin-safe yellowfin tuna products from Mexico are allowed to become widely available to U.S. consumers (i.e., where the tuna measure is withdrawn).

15. All of the products sold by Tuny in the United States are blended mixed-tuna products, similar in composition to most of the (predominantly skipjack) products that are currently sold in the U.S. market. The fact that one of the Mexican producers has offered small quantities of a lower cost product to sell in some small retailers, i.e., in the current circumstances under the tuna measure, is expected under the tuna measure.

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

16. This question from the Arbitrator is based on the mischaracterization by the United States of Mexico's model. Mexico's model is not based on an assumption that supply is limited (i.e. that volumes are small because of the high price of yellowfin tuna). That is rather an empirical fact as Exhibits US-10 (BCI) and US-17 show.

17. As Mexico's model is not based on an assumption that the supply of yellowfin tuna on the U.S. market is limited, there are no changes to make to Mexico's model specifically related to the question from the Arbitrator.

18. The response of the United States is a general comment on Mexico's model without providing a response specific to the question from the Arbitrator. That is because, again, limited supply is not an assumption of the model but an empirical fact.

19. The calibration of Mexico's model is based on the observation that canned yellowfin tuna volumes are very small in the United States (1.5% according to Exhibit US-10 (BCI) and 1.2% according to Exhibit US-17).

20. Part of the response by the United States is about the estimated premium for canned yellowfin tuna using the data in Exhibit MEX-15. The motive for using weighted least squares was discussed at the meeting with the Arbitrator in Mexico's response to question 100. The mean willingness to pay estimates produced by the United States are based on unweighted regressions and incorrectly weighted regressions. The calculations from the incorrect estimates produce negative values for the mean willingness to pay that are obviously incorrect based on the simple observation that canned yellowfin tuna is a superior, i.e. premium, product for which consumers are willing to pay a premium (i.e. positive mean willingness to pay).

21. The new element, to which the United States had alluded to at the meeting with the Arbitrator, is the claim that the square root weights should be used in weighted regressions. However, the United States does not offer any support for that contention, which seems to be based on an incorrect understanding of basic statistical methods.

22. The Ordinary Least Square (OLS) estimator is given by $\hat{\beta} = (X'X)^{-1}X'y$ where X is a $n \times k$ matrix of explanatory variables, y is a $n \times 1$ vector of dependent variable, $\hat{\beta}$ is $k \times 1$ vector of estimated coefficients, n is the number of observations and k is the number of coefficients to estimate. The weighted OLS estimator is given by $\hat{\beta}_w = (X'WX)^{-1}X'Wy$, where W is a $n \times n$ diagonal matrix of weights.

23. It is possible to produce weighted least-squares by multiplying the dependent and the independent variables of a regression model by the square root of the regression weights. This is explained in introductory textbooks and on the Wikipedia webpage about OLS at https://en.wikipedia.org/wiki/Least_squares#Weighted_least_squares. To illustrate, write $\tilde{X} = \text{diag}(\sqrt{W})X$ and $\tilde{y} = \text{diag}(\sqrt{W})y$. With the scaled matrix of explanatory variable and scaled vector of dependent variable, the weighted OLS estimator is $\hat{\beta}_w = (\tilde{X}'\tilde{X})^{-1}\tilde{X}'\tilde{y} = (X'\text{diag}(\sqrt{W})'\text{diag}(\sqrt{W})X)^{-1}X'\text{diag}(\sqrt{W})'\text{diag}(\sqrt{W})y = (X'WX)^{-1}X'Wy$.

24. This "trick" can be used when a least-squares routine in a statistical software program does not offer an option for weighting. But regression packages in common statistical software programs (e.g., R or Stata) make this unnecessary. Weighting in these regression packages requires specifying the weights as the variable W rather than the square root of that variable, like the United States argues. The United States unnecessarily takes the square root of the weights and hence obtains incorrect values for the premium for canned yellowfin tuna.

25. There is no need to model other supplies of canned yellowfin tuna to the United States other than those of Mexico under the counterfactual, as Mexico explains in response to question 123. Export volumes of canned yellowfin tuna are currently very small (Exhibits US-10 (BCI) and US-17). These small volumes come from countries, including the United States, that are not affected by the tuna measure. Therefore, their exports would not be affected directly by the tuna measure and hence cannot increase in response to the removal of the tuna measure. Moreover, these volumes of canned yellowfin tuna would actually be replaced by exports from Mexico with the removal of the tuna measure.

132. Historical data that the United States provides in Exhibit US-62 show that the composition of Mexico's exports to the United States has changed between 1989 and 2014. In 1989, imports of tuna from Mexico into the United States represented 22.1% of US imports of loin of tuna and 0% of US imports of canned tuna. In 2014, these shares were 0% and 3.6%, respectively. Furthermore, Mexico's share in the imports of canned tuna into the United States grew in the period 2013-2015. Could the United States comment on these figures and explain how these trends support an analysis based on historical data?

26. In its response to this question, the United States continues to unreasonably insist on using conditions from 30 years ago as the baseline for the counterfactual. There is no reasonable basis for assuming that today's Mexican industry is the same as it was in 1987, or that conditions for Mexican exports in 1987-89 are those that would apply under the counterfactual in 2014. For example, Mexico has already submitted evidence showing that the Mexican canning industry was inefficient in the late 1980s, as its canneries were not dedicated to processing tuna products.¹⁵

27. In discussing Ecuador as its example, the United States omits to discuss that Starkist and Bumble Bee – two of the three companies that currently dominate the U.S. market – chose years ago to locate much of their production for the U.S. market in Ecuador. A 2002 Wall Street Journal article described their operations at that time as follows:

Both Bumble Bee and StarKist have sizable operations in Ecuador. But there's a big difference, and it explains why the two are on opposite sides of the great tuna-tariff debate. StarKist's Ecuador operation cleans, cooks and packages tuna and ships it to the U.S. in cans --

¹⁵ Mexico's responses to the questions following the Arbitrator's meeting, para. 228.

actually, mostly in pouches -- where the imports then are hit with decades-old tariffs, ranging from 12.5% for water-packed tuna to 35% for oil-packed.

Bumble Bee's business model is craftier. It does all the labor-intensive fish work, called "loining," at its 2,000-employee Ecuador plant. But its [sic] saves the canning for later, shipping cooked filets to two largely automated plants in California and Puerto Rico. In that way, Bumble Bee pays an effective duty of just 1.5%.

* * *

Even if the tariffs on Ecuadorian tuna are eliminated, StarKist officials insist they have no intention of moving out of Samoa. The island sits on the edge of the world's richest tuna-fishing grounds, and almost the entire U.S. tuna fishing fleet, numbering 33 boats, is based there. The U.S. tax code offers lucrative tax credits to U.S. companies with operations in Samoa.¹⁶

The fact that U.S. canneries have had significant investments in Ecuador obviously has had an important influence on from where they source their imports, and may override other considerations such as tariffs.

28. If the Arbitrator wishes to use volumes from 30 years ago for the calculation of nullification or impairment, it is not Mexico's share of exports to the United States that would be most appropriate, but rather the volume share of canned yellowfin tuna on the U.S. market before the tuna measure. In its response to question 119, Mexico shows that canned yellowfin tuna represented at a minimum 22 percent of U.S. consumption of canned tuna in 1987. At that time, most of that yellowfin tuna was caught by U.S. vessels in the ETP and canned in the United States. Now, with the removal of the tuna measure, given the existing infrastructures and other market realities in 2014, that yellowfin tuna would be caught by Mexican vessels and canned in Mexico. That is what Mexico's model shows. And based on historical data, 22 percent is a reasonable market share for canned yellowfin tuna in the United States.

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

29. The United States argues that: the distinction between unregulated and AIDCP-compliant dolphin encirclement does not exist in the U.S. market; there is no evidence that U.S. consumers prefer the latter over the former; U.S. consumers simply distinguish against tuna caught by dolphin encirclement regardless of the method; and the distinction between unregulated and AIDCP-compliant dolphin encirclement is not one that would be made under the counterfactual. This is manifestly incorrect. The tuna measure is the cause of this lacunae in consumer information, and the elimination of the tuna measure under the counterfactual will enable U.S. consumers to make their purchasing decisions based on full information which will include, importantly, the difference between these two types of dolphin encirclement.

¹⁶ Wall Street Journal, "Tuna Tariff Sparks Trade Fight between Grocery-Store Rivals" (April 29, 2002), available at <http://www.wsj.com/articles/SB1020042198850357920> (Exhibit MEX-133).

30. The United States has introduced into evidence a new consumer survey (Exhibit US-148). That survey was apparently prepared solely for the purpose of this dispute. Its results are fundamentally biased by the wording of the following question:

Q: There are different ways to catch tuna. One fishing method involves intentionally chasing and capturing dolphins in a huge net because tuna sometimes congregate under pods of dolphins. Even if the dolphins are released from the net, **they still suffer from being captured.** Assuming that no dolphins are seriously injured or killed, do you believe that tuna caught by intentionally chasing and capturing dolphins should be labeled as "dolphin safe"? (emphasis added)

Prefacing the actual question with a suggestion like the one highlighted above is called "framing" and is known to cause severe biases in responses.¹⁷ For that reason, the survey is unreliable and irrelevant to the assessment of the level of nullification or impairment.

31. The survey results in Exhibit US-148 must be contrasted with the three sets of survey results (from surveys conducted in 2010 and 2016, which updated the original survey in 2003) introduced into evidence by Mexico. The latter predated this dispute, and were part of a larger, unrelated survey. At footnote 80 of its responses, the United States comments that the survey provided in Exhibit MEX-71 did not have detailed backup information, Mexico is submitting that information as Exhibit MEX-138. The detail in that exhibit confirms the completeness and credibility of the survey as well as the fact it was part of a larger unrelated survey (please note that the reference to September 2015 in the trend comparisons in the back up documentation is a typo and should be September 2016). At paragraph 12 and footnote 147 of its responses, the United States observes that Mexico did not report the result to a question asked in the earlier survey in Exhibit MEX-63, namely "[w]hen purchasing canned tuna products, which of the following do you look for". That question and the responses are shown in question T-1 Exhibit MEX-138 and shows that the 6 percent figure for "yellowfin" referred to by the United States increased to 7 percent in the updated survey. As explained by Mexico, the responses to that question reflect the fact that yellowfin is not widely available in the U.S. market and are not helpful to assessing the level of nullification or impairment.

32. Mexico emphasizes that the evidence on the record clearly shows that it is essential for Mexican tuna products to advertise the AIDCP-certified dolphin-safe label in order to distinguish those tuna products from the mortalities caused by unregulated dolphin encirclement and other harmful interactions. If the United States is correct that all consumers care about is whether dolphins were encircled or not, then there was never any need, nor is there a current need, for the restrictions on use of the dolphin-safe label. Tuna products could simply be labeled "no dolphin encirclement" and, where the tuna has been harvested using dolphin encirclement, either "AIDCP-certified dolphin safe" or without a dolphin-safe label (for unregulated dolphin encirclement). The fact that the dolphin-safe label is prohibited is an implicit admission that the AIDCP-certified dolphin-safe label would have meaning to U.S. consumers.

¹⁷ D. Chong and J. Druckman, Framing Theory, 10 Annual Review of Political Science 103 (2007) (Exhibit MEX-141).

33. Mexico has previously shown that there is unregulated setting on dolphins outside the ETP,¹⁸ that dolphins are killed and seriously injured in tuna fisheries worldwide,¹⁹ and that tuna caught in such fisheries can be sold as dolphin-safe in the U.S. market because it is not from the ETP.²⁰ U.S. consumers have never been given the option of buying AIDCP dolphin-safe tuna in the major retail distribution channels.

34. The United States does not disagree that the Mexican industry cannot advertise that its products are dolphin-safe. Rather, it suggests that the Mexican industry could advertise that its products are sustainable. It does not explain why the Mexican industry would engage in such an expense when its products are excluded from the major distribution channels because the tuna measure prevents them from having a dolphin-safe label.

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

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

35. The United States asserts that companies in the lists published by EII have expressly committed to EII's current "standard." There are two main weaknesses in this assertion. First, the Mexican industry is not seeking to sell to companies from other countries that catch or process tuna into tuna products, so the behaviour of supply chain companies is not relevant to Mexico's model. Second, Mexico previously demonstrated that major suppliers to the U.S. market such as Bumble Bee are sourcing tuna from sources not approved by EII, and that Safeway and Wegman's (among others) carry products of those suppliers.²¹ In other words, the commitments to EII are not meaningful. The United States has never responded to that evidence.

36. With regard to the letters from retailers in Exhibit US-40, it is obvious that they do not reflect either the current tuna measure (which defines "dolphin-safe" to include certification that no dolphins were killed or seriously injured, regardless of ocean region or fishing method) or EII's policies. The United States seeks to read into the letters statements that they do not contain. For example:

¹⁸ Panel Report, *US – Tuna II (Mexico)*, para. 7.306. See also Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.241.

¹⁹ Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.129 ("Like the original panel and the Appellate Body (and, we note, the United States itself), we accept that tuna fisheries other than the ETP large purse seine fishery may, and in fact have, caused significant harms to dolphins"), 7.130 ("Mexico has submitted substantial evidence showing that gillnets kill and seriously injure dolphins"), 7.131 ("Mexico has presented convincing evidence that 'longline fishing operations kill and maim dolphins'"), 7.132 ("In its response, Mexico summarized a substantial number of reports and studies testifying to the deleterious effects that tuna fishing methods other than setting on dolphins may have on dolphins. This evidence presents a compelling case that various tuna fishing methods around the world are negatively impacting the health and well-being of dolphin populations").

²⁰ Panel Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.233. See also Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.106, 7.137, 7.158, 7.163, 7.253, and footnote 611.

²¹ Mexico's written submission, paras. 86-88.

- Publix expressly declined to make any "pledge" to EII.
- Food Lion stated that it was "not taking a position on whether Dolores maintains 'dolphin-safe' methods for catching tuna."
- The 1999 statement from Albertson's says that it is acting "in keeping with the ... dolphin-safe policy adopted by American canned tuna processors". That policy was (and is) not to encircle dolphins and nothing more. It did not commit to any EII standard.
- Southeastern Grocers refers to "dolphin-safe" but not to dolphin encirclement.

37. Even the more recent letters that the U.S. government solicited from (and drafted for) certain retailers reflect only the original tuna measure, in that they do not state that the retailers would refuse to carry tuna products containing tuna captured while killing or injuring dolphins. In other words, those letters reflect only the original tuna measure under which tuna harvested outside the ETP could be labelled dolphin-safe even if dolphins were killed or seriously injured during their capture.

38. Mexico reiterates that the letters solicited by the Department of Commerce specifically for this dispute settlement proceeding are not credible evidence of the actual policies of the retailers.²²

39. Mexico also reiterates that under the tuna measure, "dolphin-safe" means what the tuna measure says it means. There is no independent definition in the U.S. market.

40. There is no basis on which the Arbitrator could exclude any retailer from being a possible purchaser of Mexican AIDCP-certified dolphin-safe tuna products under the counterfactual.

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

41. The United States admits that the commitments do not distinguish between unregulated and AIDCP-compliant dolphin encirclement. As explained in Mexico's written submission and responses to the Arbitrator's questions, under the counterfactual the tuna measure will be withdrawn and the U.S. market, including distributors and consumers, will be informed of the difference between these two fundamentally different types of dolphin interaction. As a whole, the evidence regarding the commitments is therefore not relevant to the counterfactual being assessed by the Arbitrator.

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

42. Mexico's evidence has clearly established that a precondition to selling tuna products to the principal distribution channels in the U.S. market is a dolphin-safe label and that the ability to use the AIDCP-certified dolphin-safe label along with the sustainability of Mexico's fishing method will give Mexican tuna products a competitive advantage in the U.S. market.

43. In this regard, Mexico notes that the Appellate Body considered in the first compliance proceedings that, "[a]s the original panel found and as both participants have acknowledged in these compliance proceedings, access to the dolphin-safe label constitutes an 'advantage'

²² See Mexico's written submission, paras. 77-90; Mexico's responses to the Arbitrator's concerning substance, paras. 50-54.

on the US market for tuna products by virtue of that label's 'significant commercial value'".²³ Further, the Appellate Body found that the tuna measure's denial of access to the dolphin-safe label for Mexican tuna products containing tuna harvested using the AIDCP-compliant dolphin encirclement method has a detrimental impact on the competitive opportunities of such products in the U.S. market.²⁴

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

- a. How do you reconcile your argument about 2015, and not 2014, being the appropriate period for assessing the counterfactual with your agreement with Mexico's contention that the Arbitrator should use the short term for the assessment of the nullification or impairment?**
- b. Please elaborate on what are the factors that should be taken into account for assessing the appropriate period in this particular case. Please also provide your legal basis.**

44. The United States has not established that 2014 is an inappropriate period for assessing the level of nullification or impairment. 2014 represents the first full calendar year following the end of the reasonable period of time (RPT), which is an appropriate date for the counterfactual to start.²⁵ As in the arbitration in *US – Upland Cotton*, there is a legitimate basis for assuming that Mexico's chosen period of reference leads to a reasonable estimation of the effects, the choice of 2014 is in principle legitimate, and there is nothing to indicate this period would be unrepresentative.²⁶ Simply presenting an alternative period (i.e., 2015) is insufficient to rebut the level of nullification or impairment in Mexico's methodology paper. In *US – COOL*, the Arbitrator stated that "[i]n the absence of a demonstration that the proposing party's methodology is incorrect, the mere submission of an alternative methodology would not meet the objecting party's burden of proof".²⁷ Thus, there is no basis to reject the use of 2014 as the period of reference in Mexico's methodology paper.

45. The Arbitrator's decision in *US – 1916 Act*, which is cited by the United States in its response to this question, did not concern assessing nullification or impairment using a counterfactual and is not relevant to this Arbitration.

²³ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.236, citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 234 (referring to Panel Report, *US – Tuna II (Mexico)*, paras. 7.310, 7.314, and 7.316-7.317). See also Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.45, citing Appellate Body Report, *US – Tuna II (Mexico)*, para. 235.

²⁴ Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, paras. 7.236 and 7.238.

²⁵ Decision by the Arbitrator, *US – Gambling (22.6 – US)*, para. 3.41. See also Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US II)*, para. 4.118.

²⁶ Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US II)*, paras. 4.116-4.118.

²⁷ Decisions by the Arbitrators, *US – COOL*, para. 4.12.

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

46. The United States provided no evidence to support its assertion that the major U.S. producers would market their product as "not produced from the intentional encirclement of dolphins." It is simply a hypothetical.

47. In fact, Mexico presented evidence that the pending antitrust lawsuits brought by major U.S. retailers against Starkist, Bumble Bee, Chicken of the Sea and Tri-Marine allege that there has been an illegal conspiracy to withhold non-FAD-caught tuna products from the market, and that the U.S. Department of Justice is investigating to determine whether to bring criminal charges.²⁸ The weight of the evidence, therefore, indicates that the major U.S. suppliers do not wish to draw attention to the fact that most of their supply is the product of environmentally destructive fishing methods such as FADs and longlines. Under those circumstances, it is extremely unlikely that those suppliers would want to initiate further transparency about fishing methods.²⁹

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

48. Mexico agrees with the United States that if the tuna measure were withdrawn, Mexican products could bear the AIDCP dolphin-safe label. In fact, under the counterfactual, the AIDCP label would be the only dolphin-safe label in the U.S. market backed by a stringent certification, tracking and verification program supervised and enforced by governments. Mexican products could also have labels highlighting that the tuna was caught in a sustainable manner.

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

²⁸ Mexico's written submission, paras. 82-83.

²⁹ The examples in Exhibit US-161 provided by the United States of products stating they are "FAD-free" are a product sold in Australia and a photo of a U.S. grocery private label brand from a four-year old newspaper article. (The third product identified by the United States as labelled "FAD-free" (Ocean Naturals) is not so labelled.) The United States submitted no evidence that the three brands that dominate the U.S. market – Starkist, Bumble Bee and Chicken of the Sea – offer products with such labels.

49. It is correct that the data provided in Exhibit US-144 are not available for 2014. There is also no data that allow for the breakdown of canned tuna that uses some yellowfin tuna in a blend and high-end canned products containing 100 percent yellowfin tuna.

50. As explained in Mexico's response to question 108, the data in Exhibit MEX-15 cover part of 2014 and 2015. But these data are not used directly to calibrate Mexico's model. They are used to provide evidence of willingness to pay a premium for canned yellowfin tuna by U.S. consumers.

51. The United States offers an incorrect comparison of European and U.S. prices. Mexico offered in its response to question 124 a more appropriate comparison. Very importantly, that comparison takes into account the change in the exchange rate between the U.S. dollar and the Euro. Considering the change in the exchange rate, the total export price after adding tariff and charges is \$7.37/kg. This is much more than the price at which Mexico can supply canned yellowfin tuna onto the U.S. market.

52. The reason that greater volumes of canned yellowfin tuna are supplied to the European market than on the U.S. market is simply that the economics favor exports to Europe. Observe in Exhibit US-144 that exports to Europe come from several countries, many exporting relatively small quantities to Europe. For exporters in these countries, it is not profitable to set up channels to sell to the United States in small volumes.

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

53. The question is about whether the small export volumes of canned tuna from Mexico to the United States can be considered *de minimis*. In the view of Mexico, these volumes are small enough that they can be considered *de minimis*. The United States has the opposite view that the small volumes are not *de minimis*.

54. The determination of whether the volumes can be considered *de minimis* is somewhat arbitrary. Whether or not it is considered *de minimis* does not affect the calculations of the export losses performed in Mexico's methodology model. Mexican export volumes to the United States are taken into account in Mexico's methodology paper. For instance, on page 36 of Exhibit MEX-02, Mexico removes export values observed in 2014 to calculate the net export loss.

55. Part of the response of the United States to question 139 focuses on the choice of methodology. At the meeting with the Arbitrator, the United States agreed that the price wedge should not be used. The United States has also mentioned, in response to question 61, that the level of data required to use the price wedge method is not available or does not exist.

56. Exhibit US-57 explains that the price wedge method and other methods to measure the impact of non-trade barriers are not always most appropriate. Exhibit US-57 states on page 139:

Analyzing a policy or policy reform using statistical methods such as those discussed in Chapter 3 requires the policy or reform to have been in place for a sufficient period of time for its effects to be observable in the data. However, if policymakers are interested in an ex-ante assessment of its likely effects, a different approach is needed. Another possible scenario is that the reform has been in place for a while, but

that no appropriate counterfactual is available to benchmark its effect.
In this case, a simulation approach is suitable even if data are available.

The case of the removal of the tuna measure falls into the latter category, in which the tuna measure has been in place "for a while" and there is no immediate economic counterfactual that is available. Exhibit US-57 supports Mexico's view that the price wedge is not appropriate for use in this case and that a simulation using a partial equilibrium model is appropriate.

57. Mexico's model follows the guidance described on page 139 of Exhibit US-57 regarding the four steps to be taken in a typical trade policy simulation.

1. Choose a theoretical model that is appropriate to predict the effects of the policy under consideration.
2. Collect the corresponding trade (including import and export flows as well as tariffs) and production data for the specific sector before the policy change.
3. Select values for the model's key parameters, e.g., elasticities.
4. Change the value of the policy variables of interest and recalculate the prices and trade volume for comparison with the baseline one.

58. Consistent with the guidelines in Exhibit US-57, Mexico's methodology model uses a state-of-the-art approach based on simulations that are the most appropriate given the realities of the tuna market, including U.S. small import volumes from Mexico, and the tuna measure.

59. The response to question 139 offered by the United States is a red herring. It does not address the question asked by the Arbitrator.

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

60. The United States does not address the main points of paragraph 181 of Mexico's written submission or dispute that there are no canneries on the U.S. west coast that process whole tuna. The United States only states that U.S. vessels could fish for tuna in the ETP and deliver it to some third country for processing into loins, for later export to a U.S. cannery. In fact, it would be expensive and inefficient for vessels based in the United States to travel to Ecuador or American Samoa to deliver tuna to processors, so presumably the United States contemplates that the tuna would be sold/transferred to carrier vessels at some port in the western Pacific (note that transshipments by purse seine vessels at sea are prohibited in the ETP).³⁰ Moreover, in 2014, no U.S. vessel had a DML (dolphin mortality limit assigned under the AIDCP) allowing it to use the dolphin encirclement method in the ETP.

³⁰ IATTC, Resolution C-12-07 (June 2012) ("No at-sea transshipment of tuna and tuna-like species and sharks caught by fishing vessels other than LSTLFVs [large-scale tuna longline fishing vessels] shall be allowed."), p. 2 (Exhibit MEX-140).

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

- a. Please explain the discrepancy between these two figures.**
- b. What in the United States' view would be a reasonable margin of increase in Mexico's exports of canned tuna products in Mexico's model?**

61. The proper counterfactual year is 2014 and not 2015 as the United States argues in its response.

62. Mexico comments on the four points addressed in the U.S. response below.

- i. Using Available Data to Calculate Mean Willingness to Pay

63. The estimated premium based on Exhibit MEX-15 offered by the United States in Exhibit US-150 is incorrect given either that no weights are applied or there is improper weighting from taking the square root of the weights.³¹ If one accepts that the estimated premium can be used to calculate the mean willingness to pay, the table below shows the correct values based on properly weighted regressions. The code to estimate the premium for canned yellowfin tuna is provided in Exhibit MEX-100-b. The mean willingness to pay is calculated following the method in Exhibit US-150.

Estimated premium for canned yellowfin tuna and mean willingness to pay

| | Weighted OLS | | | |
|---------------------------------|---------------------------|----------|-------------------------|----------|
| | Number of units as weight | | Total volumes as weight | |
| | 12 weeks | 52 weeks | 12 weeks | 52 weeks |
| Estimated premium (\$/kg) | 4.67 | 4.63 | 3.95 | 3.76 |
| Mean willingness to pay (\$/kg) | 0.26 | 0.22 | -0.46 | -0.65 |

64. What the table above ignores is that consumers are also willing to pay an additional premium because of the form in which canned yellowfin tuna is sold. The form is an intrinsic attribute of a tuna species. As calculated in Exhibit MEX-02, the premium for canned yellowfin tuna for the form is \$1.18/kg. Adding this premium to the estimated premium obtained from the yellowfin dummy variable, yields the mean willingness to pay estimates in the following table:

³¹ See comments on United States' response to question 131 above.

Estimated premium for canned yellowfin tuna and mean willingness to pay
when adding the premium for the form

| | Weighted OLS | | | |
|---------------------------------|---------------------------------------|----------|-------------------------------------|----------|
| | Number of units as weight 12 weeks | 52 weeks | Total volumes as weight 12 weeks | 52 weeks |
| Estimated premium (\$/kg) | 5.85 | 5.81 | 5.13 | 4.94 |
| Mean willingness to pay (\$/kg) | 1.44 | 1.40 | 0.72 | 0.53 |

65. The tables above show appropriate calculations for the mean willingness to pay, much higher than the incorrect values for the mean willingness to pay values calculated by the United States.

ii. Accounting for the Retail Mark-up

66. All the arguments of the United States in this second point are already addressed in Mexico's Methodology paper.

67. The arguments of the United States in this second point seem to be motivated by a lack of understanding of Mexico's model and a lack of understanding of the material in Exhibit US-174.

68. The U.S. demand equations in the model are correctly calibrated based on import prices as shown in table 11 of MEX-02. This import price is a wholesale price. Mexico's Methodology paper calculates the markup between retail and wholesale in Mexico for canned tuna. This is done for the proper calibration of the model given the data available. This is explained on page 27 of Exhibit MEX-02. The markup in Mexico is indeed small compared to the markup in the United States because of vertical integration in the Mexican canned tuna market.

69. It is correct that the premium for canned yellowfin tuna is estimated from retail data available in Exhibit MEX-15. However, as stated in Mexico's Methodology paper:

Because the model applies at wholesale and only retail data are available, it is assumed that the wholesale-to-retail markup for generic and yellowfin tuna are the same. This is a reasonable assumption because it costs the same to take canned yellowfin tuna and canned generic tuna from wholesale to retail because these canned products are of similar sizes and weights. Thus, it is expected that the retail premium for canned yellowfin tuna is fully transmitted from retail to wholesale.³²

70. The United States asserts in its response to question 141 in paragraph 113 that "[i]n general, the mark-up from import to retail is based on the price of the product and is higher for gourmet products because these have fewer close substitutes and are purchased by consumers who have lower marginal utility of income." But the United States does not offer references or data to back up this assertion. And unlike what the United States claims, the mark up reflects costs and there is no reason that costs are different for canned yellowfin tuna or canned generic tuna.

71. Because the model is already set up at the proper stage of the supply chain, i.e. import/wholesale, there is no reason to make any adjustment for a wholesale to retail markup. The "corrections" that the United States make are unnecessary and bias the results of the model.

³² Exhibit MEX-2, p. 16.

72. Even though the correction is unnecessary, Mexico has attempted to understand the method for the correction that the United States proposes but was not successful. Among many efforts, Mexico has attempted to find the complete publication for Exhibit US-174 but did not find the original document. The short excerpt provided by the United States does not allow an understanding of the context of the data in Exhibit US-174. It is unclear why the publication provides data for 2007 and what is the exact purpose of that publication.

73. Exhibit US-174 appears to be related to the food dollar series constructed by the Economic Research Service of the U.S. Department of Agriculture, which provides an accounting of the costs in food supply chains. These calculations are based on a number of assumptions. What Exhibit US-174 says is that the cost allocation is done by assuming that the same percentage is applied to domestic products and imported products. This is a very strong (i.e., extreme) assumption as it means that, for instance, transportation costs are proportional to the value of a product rather than its weight or size. The excerpt from the book by Tomek and Robinson provided in Exhibit MEX-136 shows how the wholesale-to-retail markup can be properly modeled.³³ The method is very different than that used in Exhibit US-174.

74. If there were a reason to make adjustments to the model because of an unaccounted-for markup, the material in Exhibit US-174 does not offer the information necessary to perform such a correction.

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

75. Mexico has explained in its comments on the United States' responses to questions 134 and 146 that the United States has failed to establish that any major retailer would refuse to carry Mexican products that were labelled dolphin-safe, and further that its methodology for calculating the purported percentage of such retailers is seriously flawed and unreliable.

76. The United States proposes a method for adjusting the demand for canned yellowfin tuna if a segment of consumers is not willing to purchase tuna caught by setting on dolphins. However, the correction proposed by the United States is inconsistent with the theoretical foundations of the model derived in Mexico's methodology paper. The change made by the United States assumes that consumers first make their choice between canned generic tuna and canned yellowfin tuna. Then, in a second stage, among those that choose canned yellowfin tuna in the first stage, 46.6 percent of them then decide not to purchase canned tuna at all after realizing that yellowfin tuna from Mexico is caught by encircling dolphins. That is, a large segment of the demand disappears. This makes the correction proposed by the United States completely incorrect.

77. In response to question 146(e), Mexico showed in Exhibit MEX-100-f how the model can be modified if it is accepted that a share of distributor would not be willing to sell tuna caught by setting on dolphins.

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

78. Mexican imports of unprocessed yellowfin tuna from other South American countries would be a natural outcome of economic forces from the increase in Mexican exports of canned tuna to the United States. As shown by Mexico, the 20,000 metric tonnes, measured in canned tuna equivalent, is readily available from South American countries. The United States has not identified a proper economic reason as to why this assumption could be invalid. The fact that Ecuador already exports to the United States does not invalidate Mexico's modeling

³³ Tomek & Robinson, *Agricultural Product Prices*, 4th ed. (Cornell University Press, 2003), pp. 139-141 (Exhibit MEX-136).

assumption. There is plenty of yellowfin tuna captured by other countries in the ETP. Given Mexico's installed canning capacity, competitive advantages and proximity to the United States, new imports of raw yellowfin tuna by Mexico are expected in response to the removal of the tuna measure.

79. Overall, the modifications proposed by the United States to Mexico's model are based on an incorrect estimate of the premium for canned yellowfin tuna; an unnecessary correction for the wholesale to retail markup; an incorrect adjustment to the model to account for refusal to sell Mexican canned tuna; and a failure to consider the incentives for Mexican canneries to import raw yellowfin tuna in response to the tuna measure.

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

80. The United States agrees that Mexican products would have a competitive advantage for canned tuna packed in oil. Under the counterfactual, Mexican products would be able to use the AIDCP dolphin-safe label and would gain access to the principal distribution channels in the U.S. market. Mexican products in oil would have at least a 35 percent price advantage over products from most other countries, including the current major suppliers to the U.S. market.

81. The other comments in the United States' response are not relevant to the question.

3. TO BOTH PARTIES

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

- a. only solid-pack tuna or also tuna in chunk;
- b. only fillets or other pieces;
- c. only tuna products in olive oil or also other ambient tuna;
- d. all such tuna products, or only tuna products within a certain price-range below the top price range (if the latter, please provide details); and
- e. tuna caught by purse seine fishing and stored in brine in the vessel.

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

82. Mexico agrees with the United States that there is not a rigid definition of "high end." Mexico's position is that 100 percent yellowfin products – including in chunk form – are higher quality than the vast majority of predominantly skipjack products currently sold in the U.S. market. Whether or not there are a few sales of specialty products at higher prices than those at which some Mexican products are currently sold in small retailers is not relevant to Mexico's model.

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

83. Mexico reaffirms that the approach proposed by the United States is not appropriate because it is based on data from 25 to 30 years ago. This method should not be considered for the determination of the amount of impairment or nullification.

84. Regarding the response given by the United States to this question, Mexico has already addressed several elements of the U.S. response elsewhere.

- The issue of the markup is addressed above in Mexico's comments on the United States' response to question 141. Mexico does not understand, once again, the "corrections" for the markup that the United States does.
- The United States uses incorrectly weighted regressions as explained above in comments on the United States' response to question 131.
- The data for Europe are not appropriate because they are for 2015 and the value of the U.S. dollars compared to the Euro increased by 20% between 2014 and 2015. See Mexico's comments on the United States' response to question 138.

85. Comments about the share of retailers that the United States estimates are not willing to purchase canned yellowfin tuna from Mexico are provided below in relation to question 146.

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

86. The United States agrees with Mexico that Exhibit MEX-15 provides the best information available about retail price data.

87. The United States also presents trade data on U.S. imports of canned tuna, broken down between albacore tuna and other tuna. The United States observes that a premium is paid for canned albacore tuna. A simple comparison of import prices for 2014 shows that the premium for albacore tuna is \$1.34/kg (i.e. \$5.44/kg – \$4.10/kg). This premium underestimates the value of the premium compared to skipjack because the "other" tuna product category includes some quantities of canned yellowfin tuna. Moreover, this premium may also be underestimated because of other attributes (e.g. packed in oil) of the imported canned albacore that are negatively correlated with the albacore canned tuna product.

88. At the request of the Arbitrator, Mexico estimated in its response to question 79, using data in Exhibit MEX-15, the premium for canned yellowfin tuna in a model that includes a dummy variable for albacore tuna. The estimated premium for albacore tuna is between \$3.00/kg and \$3.50/kg based on weighted OLS. This premium is larger than the one calculated in the previous paragraph for the reasons discussed. The regressions show that there is an additional premium paid for canned yellowfin tuna relative to canned albacore tuna (the difference between the respective estimated premiums for albacore and yellowfin) between \$2.50/kg and \$3.00/kg. Adding a premium of \$2.50/kg to the observed price for canned albacore tuna of \$5.44/kg yields a price of \$7.94/kg for canned yellowfin tuna. This is higher than the price at which Mexico can supply canned yellowfin tuna and higher than the solution generated in Mexico's methodology model. In light of this, the results from Mexico's model are reasonable and consistent with reality.

89. Mexico also notes that the United States has not submitted evidence in support of its claim that albacore "is usually packed in solid form." In fact, it is regularly sold in "chunk" form, as shown below:



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

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

90. Mexico set forth its comments on the United States' claims about purported commitments to EII in relation to question 134 above.

b. To the United States: The Arbitrator notes the United States' statement, in paragraphs 33 and 35 of its written submission, that the 46.4% figure was calculated on the basis of data in the table presented in Exhibit US-38. Please explain step-by-step how this figure was calculated on the basis of that data.

91. The United States' response to this question demonstrates that the manner in which the 46.4 percent figure is constructed depends upon a number of unsupported assumptions and approximations that render it unreliable.

92. For example, to determine the total size of the U.S. retail grocery market/retail consumption with respect to tuna products — a key element in the United States' calculations — the United States uses an unsupported estimate from the manuscript of an unpublished working paper that "[a]pproximately 70% of canned tuna in the US is sold in grocery

retailers".³⁴ No basis for this approximate estimate is described or cited in the draft manuscript, and the United States provides no other evidence to corroborate this figure.

93. Further, with respect to four retailers whose statements are included in Exhibit US-40, but whose sales of canned tuna products are not covered in [[...]] Exhibit US-38 (BCI) — i.e., [[...]] — the United States estimates their shares of sales on the basis of their respective shares of total grocery sales in 2014, as provided in Exhibit US-175.³⁵ However, the shares of canned tuna retail sales for *other* retailers in Exhibit US-41 are based on their sales data in US-38 (BCI) compared to total supply in the U.S. market as shown in Exhibit US-6, which results in much smaller market shares. For example, based on [[...]], [[...]] Similarly, [[...]] Thus, there is no direct correlation between a retailer's market share of total grocery sales and its market share of canned tuna sales. The United States' unsupported assumption that canned tuna sales shares match total grocery sales share therefore likely [[...]] its estimates for [[...]].

94. In addition, the United States indirectly estimates the shares of canned tuna sales (and sales volumes) in 2014 and 2015 for [[...]] on the basis of [[...]].³⁶ There is nothing to indicate that [[...]] accurately reflects the actual market share of canned tuna sales in 2014 or 2015. As above, this assumption is entirely unsupported and unreasonable, and it cannot be relied upon to provide an accurate result.

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

95. Mexico's comments in relation to question 134 above demonstrated that the letters do not indicate any specific commitment to EII, and certainly cannot reasonably be interpreted to encompass more recent changes to EII's policies or the current tuna measure itself. Mexico disagrees that those documents are relevant for evaluating retailers' behaviour under the counterfactual.

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

96. The United States' response to this question is evasive. The simple response is that Mexico has submitted evidence that [[...]].³⁷ It is pertinent that the United States' Exhibit US-41 contains a line that [[...]] from the "total covered by statements and DOD," reducing the purported percentage of coverage of retailers with purported non dolphin encirclement policies to [[...]]. The United States' own analysis therefore recognizes that Walmart did not make the commitment that the United States requested from it.

³⁴ United States' responses to the questions following the Arbitrator's meeting, para. 154, citing Exhibit US-8, p. 5. These estimates are used to split "Total US Consumption" between "Estimate of Retail Consumption".

³⁵ United States' responses to the questions following the Arbitrator's meeting, para. 154.

³⁶ United States' responses to the questions following the Arbitrator's meeting, para. 155.

³⁷ See Confidential Affidavit (Exhibit MEX-106 (BCI)).

97. There is no basis for the Arbitrator to exclude Wal-Mart from the available market for Mexican tuna products.

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

98. N/A.

147. Is there a reason to think that US retailers would not sell tuna products produced from tuna caught by setting on dolphins even if consumers were willing to purchase such products, for instance because of potential reaction from NGOs in case the Tuna Measure were withdrawn?

99. Mexico reiterates the points made in its comments on the U.S. responses to question 133. The United States' response to this question completely ignores the fact that, under the counterfactual, U.S. distributors (including retailers) will, for the first time, be informed by the AIDCP-certified dolphin-safe label of the difference between unregulated and AIDCP-compliant dolphin encirclement.

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

100. Mexico has previously explained at length why market conditions from the 1980s cannot reasonably be used as a basis for the determination of nullification and impairment during the year 2014. It is particularly remarkable that, in support of its argument for using the 1987-89 period as the basis for comparison, the United States relies on market conditions from the 1970s, which is over 40 years ago.

101. Mexico reaffirms its position that the United States should be not allowed to take advantage of the exceedingly long period during which it has maintained import restrictions and discriminatory measures on Mexican tuna products as a mechanism for reducing the level of nullification and impairment.

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

102. The United States' response to this question simply seeks to denigrate the quality of Mexico's tuna products. Mexico has previously shown that 100 percent yellowfin tuna products – both in chunk and solid form – are higher quality than the vast majority of tuna products currently offered for sale in the United States.

103. The U.S. market is a large, high value market in relation to which Mexico has unique advantages, in terms of proximity, tariff treatment, and other factors. The fact that Mexico is not currently exporting large volumes to the European Union – where Mexico has no special advantages, and in fact faces disadvantages such as tariff barriers – is not relevant to Mexico's model.

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

104. The United States agreed with Mexico that the difference reflects the use of different time periods.

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

105. Contrary to the claim of the United States, Mexico did not state during the hearing or in any submission that only the dolphin encirclement method catches large yellowfin tuna. Mexico said that FAD sets catch very small, juvenile tuna. Mexico submitted evidence showing that based on statistics from the ETP in 2015, the average weight of tuna caught with FADs was 2.5 kg.³⁸

106. The data in the United States' chart is consistent with Mexico's point that FAD fishing catches small, juvenile yellowfin. Mexico never suggested that unassociated sets did not catch larger yellowfin; it submitted data showing that during the hearing.

107. The United States cites to the canning practices of the specialty producer Wild Planet to claim that 10 kg. tuna can be produced as "solid pack", but Wild Planet does not produce yellowfin products.³⁹ Yellowfin tuna weighing 10 kg. are also juveniles, and it is unclear why the United States believes that the harvesting of juvenile yellowfin tuna is praiseworthy.

108. In any event, the United States has not provided direct evidence that small yellowfin tuna can be canned into chunk or sold pack products in an economic manner. In contrast, the affidavit in Exhibit MEX-137 (BCI) explains that processing larger yellowfin tuna produces a higher yield and better-tasting product than using juvenile tuna.

109. Mexico also notes that the data provided by the United States on average tuna sizes was incomplete or inaccurate. The average size of yellowfin tuna harvested in the Eastern Atlantic by purse seine in 2012 was less than 15 kg.⁴⁰ The mean weight of yellowfin tuna harvested in the WCPO taken across all gear types in 2015 was 4.73 kg.⁴¹ It is unclear from where the United States obtained its figure for the Indian Ocean, but the document it provided indicates that the average weight of yellowfin caught by all methods in 2013 was under 10 kg.⁴²

³⁸ See Exhibit MEX-83; Mexico's responses to the questions following the Arbitrator's meeting, para. 45; and Exhibit MEX-98.

³⁹ Mexico erred in previously stating that no canned tuna products in the U.S. market are labelled as skipjack. The chunk light tuna products that dominate the U.S. market are not identified as containing skipjack, but there are some products that advertise it.

⁴⁰ See Exhibit US-185, p. 27, black line in graph.

⁴¹ See Exhibit US-183, p. 3.

⁴² See Exhibit US-184, p. 9, dotted line in graph.

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

110. The United States' data indicates that 27 percent of the European Union's imports of canned and loined tuna is yellowfin tuna, which is consistent with projections in Mexico's model for the U.S. market under the counterfactual. It is also interesting to note the United States' report that in the United Kingdom, "demand has shifted to chunk-style lightmeat packed in brine' due to health and price considerations."⁴³

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

111. Mexico agrees in its response to this question that Figure 1 in Exhibit MEX-79 included both fresh and frozen yellowfin tuna.

112. The United States chose not to show figures for prices of imports of fresh and frozen yellowfin tuna. Mexico showed in its response to this question figures for prices for landings and imports for frozen albacore, skipjack and yellowfin tuna. These figures clearly show a sharp increase in the price of frozen yellowfin compared to albacore and skipjack.

113. Mexico disagrees that fresh and frozen prices for yellowfin do not track each other's. The figure below compares import prices for fresh and frozen yellowfin based on data in Exhibit MEX-104. The figure clearly shows that U.S. import prices for fresh and frozen tuna track each other's, in particular since 2000. Observe that the figure presented in paragraph 202 of the U.S. response shows similar price values for fresh and frozen yellowfin tuna. The United States does not discuss the price of frozen yellowfin tuna that is shown in the right panel of that figure.

114. U.S. import prices are those that are relevant here. Prices measured elsewhere in the world are not necessarily representative of products that enter or can enter into the U.S. market. The data in the figure in paragraph 203 of the U.S. response end in 2006 and more recent data would have likely shown an increase in prices similar to those in the figure below and in the other figures presented by Mexico in response to this question.

⁴³ United States' response to the questions following the Arbitrator's meeting, footnote 323.

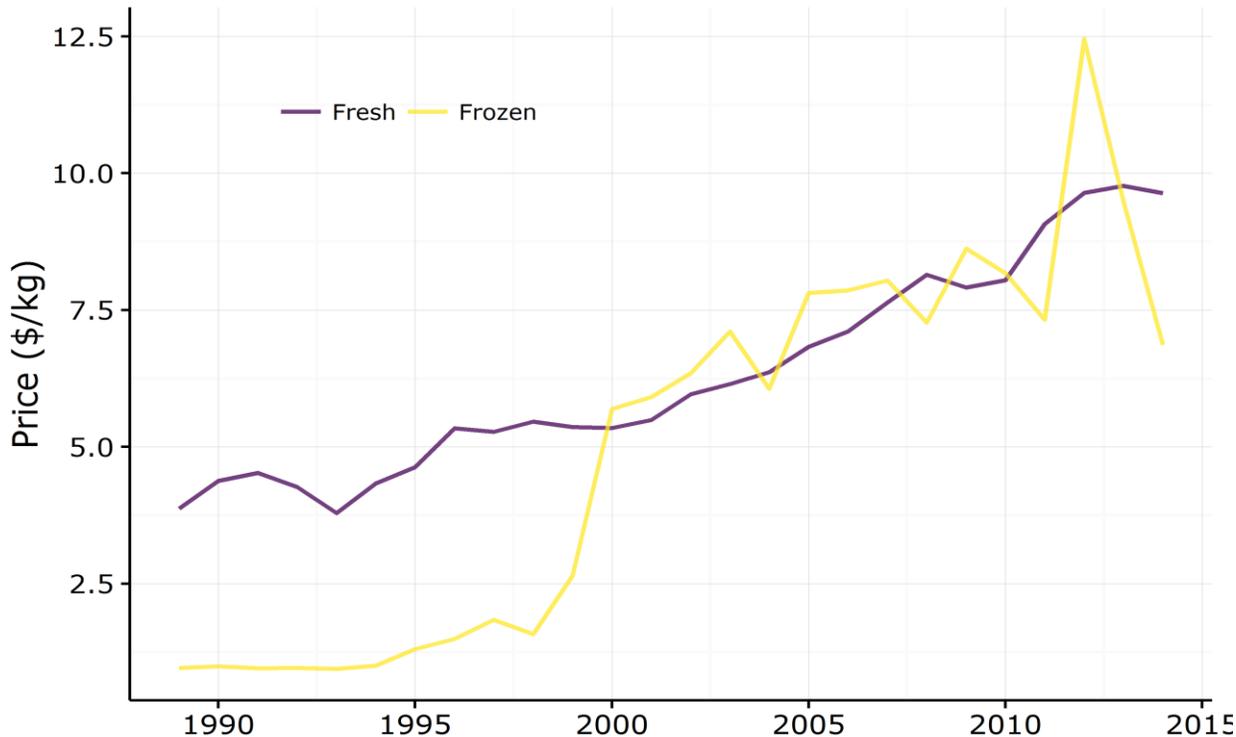


Figure: U.S. import price of fresh and frozen yellowfin tuna

115. The figure in paragraph 205 of the United States response is not what the United States claims and therefore cannot be compared with the data in the figure above for the United States. The description of the product is not the one that the United States claims it to be. First, the United States did not properly report the HS code. The HS code for fresh yellowfin tuna is 030232 rather than 030332 (030332 is the classification for the fish known as "plaice"). Second, the complete and correct description of the two relevant product classifications is the following:

03.03 Fish, frozen, excluding fish fillets and other fish meat of heading 03.04.

0303.42 -- Yellowfin tunas (*Thunnus albacares*)

03.02 Fish, fresh or chilled, excluding fish fillets and other fish meat of heading 03.04.

0302.32 -- Yellowfin tunas (*Thunnus albacares*)⁴⁴

That is, these product codes exclude yellowfin fillets, livers and other fish meat of heading 0304, which covers:

03.04 Fish fillets and other fish meat (whether or not minced), fresh, chilled or frozen.

0304.39 -- Other⁴⁵

⁴⁴ World Customs Organization, Harmonized System Chapter 3 (Exhibit MEX-142).

⁴⁵ Ibid.

This means that the HS codes 030342 and 030232 exclude fillets, and fillets are loins. As such, the price data reported by the United States are for low value tuna parts. The valuable part of tuna, fillets or loins, are included in HS code 0304 and within that HS code it is not possible to distinguish between fresh and frozen yellowfin tuna.

116. The response by the United States provides insights of the impact of the tuna measure. The second figure in paragraph 200 of the U.S. response shows that U.S. imports of *Yellowfin, Whole, Frozen* sharply declined once the tuna measure was adopted. This contradicts the United States' claim in paragraph 108 that the tuna measure did not cause supply restriction to U.S. canneries. The reason that an increase in the import price of yellowfin is not observed after the adoption of the tuna measure is that U.S. canneries started importing lower quality yellowfin tuna. As the U.S. International Trade Commission stated:

As noted above, the shift by some foreign and most U.S. fishermen from the large-yellowfin fishery to the fisheries for skipjack and small yellowfin entails an effective decline in average unit value received by the fishermen, even if canner-contracted prices by fish category do not change. That is, small tuna of any one species receive a lower price from the canner than do large tuna of the same species because the processing costs for the former exceed those for the latter.⁴⁶

117. Overall, the evidence presented by the United States and Mexico in response to this question shows an increase in the price of yellowfin tuna compared to other tuna species and that the tuna measure restricted U.S. access to yellowfin tuna. These facts are consistent with Mexico's claim that the tuna measure and market conditions in the world market for yellowfin tuna have created a void in canned yellowfin tuna in the U.S. canned tuna market.

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

118. The United States' response concedes that producers located in South East Asia and American Samoa are not currently affected by the tuna measure.

119. The United States then repeats its argument that – notwithstanding they are unaffected by the measure – those canneries would start producing more yellowfin products if the measure were withdrawn. The United States also cites to non-representative 2015 data on EU import values, ignoring the significant shift in the exchange rate between the dollar and the euro in 2015.

120. The key point remains that the Mexican industry has a cost advantage and can supply yellowfin tuna products to the United States more efficiently than producers elsewhere.

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

⁴⁶ U.S. International Trade Commission, "Tuna: Current Issues Affecting the U.S. Industry, USITC Publication 2547 (Aug. 1992), p. 3-18 (Exhibit MEX-73).

121. Mexico's prior response to this question already rebutted the United States' arguments. It remains unreasonable to assume that conditions in the Mexican industry and in the U.S. and world markets were the same in 2014 than they were in the late 1980s.

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

122. The United States' response to this question is convoluted, but the United States concedes that most of the countries fishing in the ETP are embargoed from exporting yellowfin tuna to the United States. Obviously those countries are not affected by the tuna measure.

123. With regard to which countries were authorized to use the dolphin encirclement method, the United States completely avoids the year 2014 – the year immediately following the expiration of the RPT – and tries to emphasize data for 2017, which is *next year*. This reflects the U.S. approach of trying to avoid the requirement to use the short-term as the measure of nullification and impairment. The United States also cites data on the yellowfin catch of the fleets of Ecuador, Spain and the United States, but not for yellowfin caught by dolphin encirclement. In 2014, the U.S. purse seine fleet caught 1,106 tons and the Spanish fleet caught 763 tons; those figures are negligible. The Ecuadorian fleet caught 49,039 tons, but since only one Ecuadorian vessel had a DML that year, virtually all of this tuna was not caught using the dolphin encirclement method. The U.S. data confirms Mexico's position that no other ETP country is materially affected by the tuna measure.⁴⁷

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

124. The United States agreed with Mexico that the countries that currently export yellowfin tuna products to the United States are not affected by the tuna measure. Accordingly, there is no reason to believe there would be a change in non-ETP sources if the tuna measure were withdrawn.

125. The United States again repeats its disagreement with Mexico's model. Mexico addresses this issue in its comment on the U.S. response to question.

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

126. Mexico agrees that the initial shift away from yellowfin by U.S. canneries was not because of a shift to selling fresh tuna. Rather, the shift resulted from the relocation of the U.S. fleet and other sourcing arrangements to the West and Central Pacific that focused on skipjack tuna.

127. For support for this fact, see the following excerpt from a 1992 report of the U.S. National Academy of Sciences:

Until about 1975, U.S. tuna companies assured themselves of reliable raw tuna supplies through contractual and equity-sharing agreements

⁴⁷ In its response to this question, the United States continues to disparage the dolphin encirclement method, but does not explain why countries – including the United States – have recently begun requesting DMLs for additional vessels to use that method.

with "independent" tuna fleets or by maintaining "corporate" tuna fleets. However, during the late 1970s and early 1980s, the size of the international tuna purse-seine fleet and the number of nations involved in tuna purse seining increased dramatically. As a result, these companies divested themselves of their corporate U.S. fleets, entered into fewer long-term contractual arrangements with independent U.S. fleets, and began procuring raw tuna supplies on the international market from the lowest bidder. During this period, many U.S. tuna vessels were sold to nations with lower fuel and labor costs and more advantageous tax climates. This conduct put independent U.S. tuna boats at a competitive disadvantage in terms of harvesting costs during this period when the growing global tuna harvest was holding down raw tuna prices and canners had many new supply sources. According to IATTC and NMFS data, the U.S.-flag high-seas tuna purse-seine fleet operating in the ETP declined from 124 vessels in 1971 to 36 vessels in 1985. In 1991 the fleet consisted of only 11 vessels. Eight had moved to the western Pacific fishery and 6 of the 11 remaining in the ETP had licenses to fish in the western Pacific (NMFS, unpublished data).⁴⁸

128. Another report explains:

From 1980 to 1988, the U.S. fleet in the ETP shrank from 94 vessels catching 115,000 tons of tuna while killing 15,000 dolphins (yielding a kill rate of 133 dolphins per thousand tons of tuna) to 40 vessels catching 97,000 tons of tuna while killing 19,700 dolphins. In other words, the U.S. fleet kill rate (measured in dolphins killed per thousand tons of tuna) *increased* from 133 to 203 over the period.⁴⁹ (emphasis original)

129. The U.S. International Trade Commission stated similarly:

There was a marked shift in the location of the U.S. tuna purse seine fleet during 1990-91 from the ETP to the Western Tropical Pacific (table D-3).⁵⁰

And:

In general, U.S. processors are using more skipjack tuna, mainly from increasing U.S. vessel catches in the WTP, and are importing raw tuna from a wider variety of sources, with increases most evident in imports from Ghana and Ecuador (where U.S. processors have developed ownership and other investment links). Also, there was an increase in nontraditional import sources such as Spain and France; however, the secondary embargo eliminated these sources by the end of 1991.⁵¹

⁴⁸ National Research Council, *Dolphins and the Tuna Industry* (National Academy Press, 1992), pp. 30 and 31 (Exhibit MEX-134).

⁴⁹ R. Parker, "The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict", 12 *Georgetown International Environmental Law Review* 1 (1999-2000), footnote 69 (Exhibit MEX-135).

⁵⁰ U.S. International Trade Commission, *Tuna: Current Issues Facing the U.S. Industry*, USITC Publication 2547 (August 1992), p. 2-1 (Exhibit MEX-73).

⁵¹ *Ibid.*, p. 2-6.

130. Accordingly, the shift in readily available supplies from ETP-caught yellowfin to WCPO-caught skipjack was the main reason for the decline in deliveries of yellowfin tuna to U.S. canneries.