

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)



Executive Summary of the United Mexican States

25 November 2016

1. Mexico's methodology paper demonstrates that the amended 2013 Tuna Measure (Tuna Measure) in place at the expiration of the reasonable period of time (RPT) on 13 July 2013 has caused significant monetary losses to the Mexican tuna industry from reduced export revenues. Because the United States has not brought the Tuna Measure into conformity with its obligations, Mexico is seeking authorization to suspend concessions in the amount of USD \$472.3 million.

2. Under Article 22.4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), the level of suspension must be "equivalent to the level of the nullification or impairment". In the present case, the Arbitrator's mandate under Articles 22.6 and 22.7 of the DSU is to determine whether the proposed level of the suspension of concessions requested by Mexico is equivalent to the level of the nullification or impairment of benefits accruing to Mexico as a result of the United States' failure to bring its WTO-inconsistent Tuna Measure into compliance. To determine the level of benefits to suspend, Mexico has compared the actual circumstances of the U.S. market for Mexican tuna products during 2014 (first calendar year after the expiration of the RPT on 13 July 2013) to a counterfactual in which the WTO-inconsistent discriminatory aspects of the original and amended Tuna Measure were eliminated. The difference between those circumstances is the amount of the nullification or impairment caused by the amended Tuna Measure.¹

3. Mexico's methodology and calculations are based on a calibrated partial equilibrium model of the American and Mexican canned tuna markets. The calculations assume a counterfactual for 2014 where there is no measure for the labeling of tuna as "dolphin-safe" that discriminates in a WTO-inconsistent manner between Mexican tuna products and tuna products from the United States and other countries.

4. The structure of Mexico's model to calculate the level of nullification or impairment is as follows. First, demand equations for tuna products in the United States and Mexico are derived based on consumers' preference for yellowfin tuna and generic tuna (all other tuna) and consumption values in 2014. Second, supply equations for canned yellowfin tuna and canned generic tuna to the United States and Mexico are derived based on observed supply in 2014. Third, the model finds the market equilibrium under the counterfactual where the Tuna Measure is removed. The model's solution yields increased exports of Mexican canned yellowfin tuna products to the United States. Under this counterfactual, based on values observed for 2014, Mexico exports a total of USD \$495 million (63,568 metric tonnes x USD \$7.79/kg) of canned tuna to the United States. Trade loss for Mexico is calculated by deducting from the aforementioned figure the actual value of exports of Mexican canned tuna to the United States in 2014 (USD \$22.65 million), which gives rise to an amount of USD \$472.3 million annually.

5. In response, the United States proposes a "market-based approach" that builds on the comparison, on a prospective basis, of the U.S. imports from Mexico of tuna product with the measure in place to the level of imports that would occur if the measure were withdrawn. The approach used by the United States is flawed in many ways. For example, the U.S. calculations are based on data from the late 1980s. The amount of time elapsed is too long to make the late 1980s a proper counterfactual for 2014 as markets for canned tuna have very much changed since then. Further, the U.S. methodology assumes that retailers accounting for 46.4

¹ The relevant data is more readily available on a calendar year basis and 2014 is the most immediate calendar year following the end of the RPT. This approach is consistent with Mexico's approach in the Article 22.6 arbitration in *US – COOL* where the RPT expired on 23 May 2013 and the baseline year for Mexico's and the arbitrator's analysis was calendar year 2014.

percent of the U.S. market for tuna products will not purchase and offer for sale Mexican tuna products because the tuna was caught using the AIDCP-certified dolphin encirclement fishing method.² In addition, the United States assumes that 100 percent of tuna products from all other sources will be able to use the dolphin-safe label.³ All of these assumptions are incorrect.

6. Mexico's methodology paper need only present a counterfactual that is "plausible" or "reasonable". It is not for an arbitrator to speculate on what might have been the "most likely" scenario of compliance by the Member concerned;⁴ rather, a counterfactual should reflect at least a "plausible" or "reasonable" compliance scenario.⁵ For the United States to merely present an alternative methodology, scenario or 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".⁶ This standard is consistent with the burden of proof applied in other arbitrations, including *EC – Hormones (US) (Article 22.6 – EC)*, *EC – Bananas III (Ecuador) (Article 22.6 – EC)* and *US – 1916 Act (EC) (Article 22.6 – US)*.

7. Thus, the United States bears the initial burden of establishing a *prima facie* case that the level of suspension of benefits requested by Mexico is not in accordance with the requirements of the DSU. The United States has failed to discharge its burden. There are significant mischaracterizations and misinterpretations of economic concepts in the United States' criticisms of Mexico's methodology, and also legal errors in the alternative methodology that the United States proposes. Mexico's comprehensive analysis is the appropriate approach under the circumstances, and it has been properly applied to accurately estimate the level of nullification and impairment caused by the amended Tuna Measure. The United States' incorrect criticisms and flawed alternative "market-based approach" that relies on historical levels of U.S. imports of Mexican tuna and tuna products prior to 1990 (1987-1989) are therefore insufficient to establish a *prima facie* case that Mexico's methodology is inconsistent with DSU Article 22.4. Thus, there is no basis to reject the use of 2014 as the period of reference in Mexico's methodology paper or to use the United States' projections.

8. In the event that the Arbitrator disagrees and finds instead that the United States has established a *prima facie* case, in whole or in part, then Mexico submits that even if the alternative counterfactual proposed by the United States is used, the level of nullification or impairment will not change, provided that reasonable assumptions are made under that counterfactual. That counterfactual assumes a scenario whereby Mexican tuna products can use the AIDCP-certified dolphin-safe label, and all other tuna products can use a dolphin-safe label provided that it is accurate and does not deceive U.S. consumers. The level of the

² U.S. written submission, paras. 135-136.

³ U.S. written submission, paras. 71, 76 and 123.

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

⁵ *US – Gambling (Article 22.6 – US)*, paras. 3.26-3.27 and 3.56.

⁶ Decisions by the Arbitrators, *US – COOL*, para. 4.12.

nullification or impairment estimated by Mexico will be no lower, and possibly higher, under the U.S. counterfactual.⁷

The measure to be analyzed is the 2013 Tuna Measure

9. As the Arbitrator confirmed, its sole mandate in this arbitration is to either confirm or determine the appropriate level of suspension for the purposes of Article 22 of the DSU with respect to the 2013 Tuna Measure. This is consistent with the provisions of the DSU and the *Understanding between the United States and Mexico regarding Procedures under Articles 21 and 22 of the DSU*,⁸ since the arbitration is based on the DSB's recommendations and rulings pursuant to Article 21.5 in the first compliance proceeding, specifically with regard to the nullification and impairment sustained by Mexico as a result of the United States' failure to bring the tuna measure, as amended by the 2013 Final Rule, into compliance before the expiry of the RPT on 13 July 2013.⁹ Thus, Mexico's model is based on the 2013 Tuna Measure.

Appropriateness of Mexico's Partial Equilibrium Model

10. The partial equilibrium model presented by Mexico is fully consistent with the proposed counterfactual for the calculation of the export losses to Mexico. A simulation using a partial equilibrium model is the proper method to employ given the data available and the amount of time since the adoption of the tuna measure. Mexico follows a state-of-the-art approach in its simulation.¹⁰ Simulations in partial equilibrium models have been used in previous disputes at the WTO (e.g., *US – Upland cotton*, *US – COOL*). The partial equilibrium model of Mexico focuses very precisely on the issue at hand, which is the modification of the Tuna Measure in a manner that is consistent with WTO obligations.

⁷ In its description of the history in paragraph 11 of its written submission, the United States omits to mention that the United States maintained a *complete embargo* on imports of Mexican yellowfin tuna products from 1999 until 2000, although the embargo had been found inconsistent with the United States' GATT obligations in 1991. *US – Tuna (Mexico) (GATT)*. The United States also omits that, in connection with the creation of the AIDCP, in the 1995 Panama Declaration the United States committed to revise the definition of "dolphin-safe" in the tuna measure to match that of the AIDCP. See Panel Report, *US – Tuna II (Mexico)*, paras. 2.35–2.39. Moreover, the United States sought to implement that commitment until the Hogarth court ruling in 2007. See Panel Report, *US – Tuna II (Mexico)*, paras. 4.23–4.24 and 7.332. Mexico reaffirms that its tuna industry has been improperly blocked from the U.S. market for over 25 years. Mexico also notes that the United States incorrectly states that Mexico initiated the WTO proceedings in 2009; Mexico initiated the proceedings in 2008, shortly after the United States indicated it was giving up on implementing its commitment. WT/DS381/1 (28 Oct. 2008).

⁸ *Understanding between the United States and Mexico regarding Procedures under Articles 21 and 22 of the DSU, US – Tuna II (Mexico)*, WT/DS381/19 (7 Aug. 2013).

⁹ Recourse to Article 22.2 of the DSU by Mexico, *Tuna II (Article 22.2 – Mexico)*, p. 2 ("As required by Article 22.4 of the DSU, the level of suspension of concessions proposed by Mexico is equivalent on an annual basis to the level of the nullification or impairment of benefits accruing to Mexico under the covered agreements due to the United States' failure to bring its Tuna measure into compliance by 13 July 2013 or to otherwise comply with the recommendations and rulings of the DSB in *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*"); Dispute Settlement Body, Minutes of Meeting (13 May 2016), WT/DSB/M/376, para. 7.6 ("Mexico's request for the suspension of concessions complied with all of the requirements under Article 22.2 of the DSU, in particular the failure by the United States to comply with the DSB's recommendations and rulings within the reasonable period of time").

¹⁰ See Exhibit US-57 p. 139.

11. Mexico's partial equilibrium model captures the essential features of the canned tuna market in the United States and Mexico. The production of canned tuna in Mexico is mostly specialized in the production of canned yellowfin tuna, which is of higher quality than the average tuna quality consumed in the United States.

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

Supply and demand equations for the U.S. Market

13. Mexico's model is based on the total supply of canned tuna to the United States observed in 2014. At the margin, the price of canned tuna in the U.S. market is determined by the world supply of canned tuna to the United States. The world supply of canned tuna to the United States is assumed perfectly elastic in Mexico's model because the United States is a relatively small market for canned tuna but this can be adjusted.¹¹

14. The total U.S. import cost of canned tuna products (which is the sum of the import value, the duties and the charges, divided by the import quantities) in 2014 was on average USD \$5.00/kg, significantly more than the import cost of tuna from Mexico, which was USD \$4.06/kg. The supply of canned tuna to the United States under the Tuna Measure is for what is labeled as "generic" tuna in Mexico's methodology paper. Generic tuna is a composite category that includes all canned tuna currently offered in the United States. This is mostly skipjack, but it also includes albacore and tongol. This generic tuna is of an overall lower quality than Mexican canned yellowfin tuna.

15. With regard to the demand for tuna products, the total consumption of canned tuna in the United States in 2014 was 330,264 metric tonnes. As mentioned before, most of that canned tuna is generic tuna, with marginal volumes of canned yellowfin tuna products. However, this does not mean that there is no demand for canned yellowfin tuna in the United States.

16. Yellowfin tuna products are superior in quality to generic tuna products because they offer a more desirable solid pack for canning with a firm and mild tasting meat. The model recognizes the quality difference between generic and yellowfin tuna. The model assumes that consumers can purchase two types of canned tuna: generic and yellowfin. The results of an econometric analysis show that U.S. consumers have been paying a significant premium for canned yellowfin tuna. If generic tuna and yellowfin tuna are offered at the same price, almost all consumers will purchase yellowfin tuna over generic tuna. Consumers' preferences are modeled using a choice model that is standard in economics. Demand equations for canned generic tuna and canned yellowfin tuna are derived by aggregating individual consumers' demand for yellowfin and generic tuna. The demand model is calibrated using a conservative approach in which it is assumed that the mean willingness to pay for yellowfin tuna is lower than the premium currently observed.

17. Contrary to the United States' explanation that the weak consumption of yellowfin tuna in the United States is a consequence of a weak demand, there is strong demand for canned yellowfin tuna in the United States. Observed small consumption volumes of canned yellowfin tuna reflect the intersection of the demand and the supply for that product. Because, under the Tuna Measure, canned yellowfin tuna is supplied at a high cost to the United States, the

¹¹ The R code in Exhibits MEX-100-f and MEX-100-g allows for adjusting the world supply of canned generic tuna to the United States.

U.S. demand for canned yellowfin tuna meets the supply to the United States of canned yellowfin tuna at a small volume. Mexico has put forward evidence of an increase in the price of raw yellowfin tuna paid by U.S. canneries. The decline in U.S. cannery receipts for yellowfin tuna is a consequence of the Tuna Measure, was not caused by U.S. consumers valuing yellowfin tuna less, and reflects world market conditions for yellowfin tuna products.¹²

18. Although the United States argues that consumers are not willing to pay a premium for canned yellowfin tuna, Mexico's methodology paper provides significant evidence that U.S. consumers are willing to pay such a premium. This premium is reflected in the data. If consumers were not willing to pay a premium for canned yellowfin tuna, as it is currently selling for a high price, there would be no consumption of yellowfin tuna in the United States. In Mexico's model, albacore tuna is bundled together with all other canned tuna. The regression model provides evidence that U.S. consumers are willing to pay a premium for canned yellowfin tuna versus the average (generic) canned tuna consumed in the United States. This is the appropriate way to provide evidence of willingness to pay for canned yellowfin tuna because it is consistent with the construction of the model. The regression model provides the necessary information to support that there is a premium for yellowfin tuna.¹³

19. Another argument that the United States claims as evidence that there is little demand for yellowfin tuna is that some yellowfin tuna is mixed with skipjack in light tuna. However, for the model in Mexico's methodology paper, the mixing of yellowfin tuna or albacore tuna in light meat tuna is not problematic. 100 percent canned yellowfin tuna is the product that Mexico would export to the United States and is of higher quality than the yellowfin tuna mixed into light tuna. The model is calibrated for canned yellowfin tuna that is marketed as such, versus all other (generic) canned tuna. Whether the generic canned tuna contains some yellowfin or not is captured in the value of the mean premium.

20. The United States has also raised the issue that yellowfin contains more mercury than skipjack tuna, hence depressing the demand for yellowfin tuna. However, according to the U.S. government itself, the mercury content in albacore tuna is essentially the same as in yellowfin tuna.¹⁴ With increased U.S. consumption of canned albacore tuna since the adoption of the Tuna Measure and with its consumption occupying nearly a third of the U.S. canned tuna market by volume, it is clear that mercury is not a primary concern of a large segment of U.S. consumers. Thus, mercury issues do not have a material impact on purchases of yellowfin tuna products in the U.S. market.

21. Mexico's methodology model does not assume any shift in demand. The increased consumption for canned yellowfin tuna in the United States comes from a decline in the price that comes from an increase in supply from the introduction of supplies of canned yellowfin tuna from Mexico. In this regard, an elastic demand for yellowfin tuna products explains why the consumption of yellowfin increases substantially with the decline of the price of yellowfin tuna in the United States. An elastic demand means that consumption is sensitive to changes in the price of a good. The modification of the Tuna Measure under the counterfactual yields

¹² The shift of the U.S. fleet out of the ETP/away from yellowfin and to the Western and Central Pacific/to skipjack in the late 1980's and early 1990's closely mirrors the decline in consumer consumption of canned tuna in the U.S. market. It is reflective of the declining quality of generic tuna with the removal of yellowfin from the supply chain.

¹³ See Tables 5, 6 and 7 of Mexico's methodology paper (Exhibit MEX-2).

¹⁴ See U.S. Food and Drug Administration, "Mercury Levels in Commercial Fish and Shellfish (1990-2010)", available online at <http://www.fda.gov/Food/FoodborneIllnessContaminants/Metals/ucm115644.htm> (Exhibit MEX-64).

a decline in the price of yellowfin tuna products in the United States. Because the demand for yellowfin tuna products is elastic, even a small decline in the price of canned yellowfin tuna yields a large increase in the consumption of canned yellowfin tuna. Thus, as the price of yellowfin canned tuna declines, many consumers naturally switch from the consumption of canned generic tuna to the consumption of canned yellowfin tuna, namely, the modification of the Tuna Measure would bring about a significant decline in the price of canned yellowfin tuna in the United States and hence a very large increase in consumption because the demand is elastic.

22. U.S. consumer preferences for the "dolphin safe" label today, and at the time of the expiry of the RPT, are shown in a September 2016 consumer survey submitted by Mexico.¹⁵ According to this 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.¹⁶ 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.¹⁷ Thus, if the tuna measure permitted U.S. consumers to be fully informed of the dolphin protection and 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.

23. Contrary to the argument of the United States, the model in Mexico's methodology paper captures the necessary market realities of the U.S. canned tuna market to properly calculate the level of nullification or impairment. These market realities include differentiation in the canned tuna market and U.S. consumers' willingness to pay a premium for canned yellowfin tuna over canned generic tuna.

Supply and demand equations for the Mexican Market

24. Regarding Mexican supply, the counterfactual considers that the Mexican tuna industry produces canned tuna using domestically caught yellowfin and skipjack, as well as yellowfin tuna imported for canning. That is, Mexican production capacity is not limited by domestic catch under the counterfactual and allows for imports of unprocessed yellowfin tuna from other ETP countries. Mexican canneries operated in 2014 with a single day shift. This means that production could easily be expanded using imported yellowfin tuna. The export volume to the United States is limited to yellowfin tuna caught by the Mexican fleet and canned yellowfin tuna made from imported tuna is consumed in Mexico.

25. The United States incorrectly describes Mexico's model when stating that "Mexico has a completely elastic supply curve (i.e., Mexican industry could supply an unlimited quantity of canned yellowfin at no increasing marginal cost)."¹⁸ As Mexico has explained, the supply curve of canned yellowfin tuna by Mexican canneries is initially perfectly elastic, but for a quantity equal to the Mexican production of yellowfin tuna in 2014 it becomes perfectly inelastic. The model assumes that Mexican canneries could increase production by importing yellowfin tuna from other countries. Furthermore, the model assumes a constant marginal

¹⁵ Public Opinion Strategies, Dolphin Safe National Survey (Exhibit MEX-71).

¹⁶ Ibid., pp. 6 and 8.

¹⁷ Ibid., p. 14.

¹⁸ U.S. written submission, para. 88.

cost (perfectly elastic supply) for the Mexican production of canned yellowfin tuna up to the assumed production capacity where it increases to infinity (perfectly inelastic supply).

26. The demand for canned tuna in Mexico is modeled in the same way as the demand for canned tuna in the United States. It is calibrated based on consumption observed in 2014.

Model Solution

27. Imports from Mexico are cost competitive compared to other imports because of geographic proximity to the U.S. market and lower customs duties. Thus, modifications of the tuna measure would bring new inexpensive supplies of canned yellowfin tuna from Mexico into the U.S. market. Accordingly, the removal of the tuna measure is appropriately modeled as a shift to the right of the supply of canned yellowfin tuna on the United States market.

28. The broad geographic scope of the sources of supply for U.S. production and imported products encompasses the many regions in which dolphins are killed and seriously injured during tuna fishing operations. 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's canned yellowfin tuna products because they are located further from the United States and these countries have chosen not to seek an "affirmative finding" from the Department of Commerce that they are in compliance with the AIDCP.¹⁹ This means that an export response by other countries to modifications to the Tuna Measure would be small and that only Mexico's exports to the United States would be significantly impacted by the removal of the tuna measure. Similarly, because imports from all other ocean regions have been permitted to use the dolphin-safe label without independent observer monitoring or comprehensive tracking and verification systems, no tuna products from those other regions have been affected by the Tuna Measure, and therefore they would also not be affected by the withdrawal of the Tuna Measure.

29. The model shows that because transportation costs between Mexico and the United States are small, the removal of the tuna measure would yield large exports of Mexican canned yellowfin tuna to the United States.

30. Arbitrage between Mexico and the United States causes the price of canned yellowfin tuna to equalize between the two countries once transportation costs are accounted for. The model is solved assuming that Mexico imports yellowfin tuna products that are canned domestically for domestic consumption to replace some of the canned yellowfin tuna exported to the United States. Other Central and South American countries harvest tuna in the ETP. The proximity of these countries to Mexico means a low cost of transporting tuna to Mexico. Many vessels would directly unload their catch in Mexico.

31. Under the counterfactual considered in Mexico's methodology paper, tuna products made from tuna caught by other fleets can be sold on the Mexican domestic market. The scenario considered assumes that Mexico would import from other ETP countries the equivalent of tuna for producing 20,000 metric tonnes of canned yellowfin tuna. With this Mexican import volume of yellowfin tuna, nearly all of the yellowfin tuna harvested and canned by Mexican firms to be exported to the United States. Other ETP countries are not in a 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. Mexican imports of yellowfin tuna

¹⁹ NOAA Fisheries, Tuna/Dolphin Embargo Status Update, available at <http://www.nmfs.noaa.gov/pr/dolphinsafe/embargo2.htm> (Exhibit MEX-72).

from other ETP countries are a natural outcome of economic forces operating under the removal of the Tuna Measure.

32. The model finds that with the removal of the tuna measure, 21.5 percent of U.S. consumption of canned tuna would be from canned yellowfin tuna imported from Mexico. This is a reasonable market share given the low production costs for canned tuna in Mexico, the absence of duties for U.S. imports of canned tuna from Mexico and the small transportation cost for canned yellowfin tuna given the proximity of Mexico to the United States. Moreover, in 1987, canned yellowfin tuna occupied at a minimum 22 percent of the consumption of canned tuna in the United States.²⁰ With the removal of the tuna measure, a similar market share would be observed with the difference that canned yellowfin tuna would be produced in Mexico rather than in the United States before the adoption of the tuna measure.

33. Under Mexico's counterfactual, Mexico exports a total of USD \$495 million (63,568 metric tonnes x USD \$7.79/kg) of canned tuna to the United States. Therefore, deducting from this figure the actual value of exports of Mexican canned tuna to the United States in 2014 (USD \$22.65 million) yields a trade loss to Mexico of USD \$472.3 million annually.

The United States' Market-Based Approach is unreliable

34. Apart from employing a counterfactual that is not correctly defined, the "market-based approach" proposed by the United States is flawed and underestimates losses from the tuna measure to Mexico.

35. The calculation of the United States is based on the historical import volumes of canned tuna from Mexico before the adoption of the tuna measure. However, these historical figures are not instructive of the levels of imports if the Tuna Measure were withdrawn. A proper counterfactual keeps everything but the measure of interest constant. It is obviously not the case that market conditions when the original tuna measure was enacted in 1990 are the same as in 2014. For instance, the United States maintained a trade embargo on imports of Mexican tuna from 1980 to 1986, which arose from a dispute over the scope of territorial waters and fishing rights. Therefore, the period immediately following the termination of the embargo is not representative of open market conditions.

36. In addition, the reference of the United States concerning Mexico's share of U.S. imports of tuna products of 3.9 percent on a weight basis for the 1987-89 period²¹ does not correspond to what would be observed with the removal of the Tuna Measure in 2014. Indeed, Mexican firms now have a much better access to the U.S. market than in the period between 1987 and 1989 because Mexico is a signatory of North American Free Trade Agreement (NAFTA). Therefore, Mexico can export canned tuna to the United States free of duties. Moreover, the Mexican canned tuna industry has developed since the adoption of the tuna measure to increase its production and become much more cost competitive, including by building canneries devoted exclusively to producing tuna products. In addition, unlike the 1987 to 1989 period, the market conditions for canned yellowfin tuna observed in 2014 have left the U.S. market almost empty of canned yellowfin tuna.

37. The United States' assumption that retailers accounting for 46.4 percent of the U.S. market for tuna products will not purchase and offer for sale Mexican tuna products because the tuna was caught using the AIDCP-certified dolphin encirclement fishing method²² is incorrect. The United States' assumption is incorrectly based on the premise that the dolphin-

²⁰ Mexico's Response to Arbitrator's question 119.

²¹ U.S. written submission, para. 130.

²² U.S. written submission, paras. 135-136.

safe label itself has no value because the market is only concerned with the narrow question of whether or not dolphins were encircled in the process of harvesting the tuna. This is contradicted by the findings of the Panels and Appellate Body in the prior proceedings. Besides, the United States' premise depends almost exclusively on information and activities related to Earth Island Institute (EII) which refers to historic "unregulated" dolphin encirclement and ignores the AIDCP dolphin-safe requirements and the success of the Mexican fleet in protecting dolphins for over twenty years. Furthermore, the letters submitted by the United States as "evidence" to demonstrate that U.S. retailers would not carry Mexican tuna products are unreliable since they rather demonstrate that the United States is "shaping" consumer expectations in the market to comport with its outdated perspective on dolphin mortalities in the ETP large purse seine fishery. In fact, the United States has mischaracterized the content of most of the letters, and the current policies of the great majority of the retailers as published on their websites actually suggest that they would carry Mexican products. The published policies of the retailers are much more compelling evidence of the retailers' policies than the letters submitted by the United States.

38. As part of its counterfactual, the United States endorses EII's purported dolphin-safe program, arguing in effect that if the United States were to withdraw the Tuna Measure, EII should be viewed as controlling use of the dolphin-safe label. However, the Arbitrator should not base the counterfactual on the United States' speculation about whether a new label might be created by a non-governmental entity and whether it could convince retailers that such a label would be more meaningful than the AIDCP dolphin-safe label. Indeed, if the United States were to withdraw the measure entirely, the AIDCP dolphin-safe label would become the only official dolphin-safe label in the U.S. market, and, in particular, the only label endorsed by the U.S. government through its role in the AIDCP. Mexico also submitted evidence demonstrating that major suppliers and retailers use tuna sources that are not authorized by EII, showing that EII does not have the market power attributed to it by the United States.

39. The United States also bases its counterfactual on the assumption that 100 percent of tuna products from all other sources will be able to use the dolphin-safe label.²³ Under the United States' proposed counterfactual, the U.S. Federal Trade Commission (FTC) consumer labelling rules apply generally and all tuna products would be able to use a dolphin-safe label provided that such label is accurate so that consumers are not deceived. Thus, tuna products from the United States and other countries would be able to use a dolphin-safe label provided that such a label is accurate so that U.S. consumers are not deceived. However, it would not be reasonable to assume that consumers and retailers, let alone the FTC, would accept that a "dolphin-safe" label could be used on tuna products containing tuna that was caught in a fishing set or gear deployment in which dolphins were killed or seriously injured, and/or in circumstances where it is impossible to verify that the product contains only tuna that was caught in a dolphin-safe manner. Thus, some form of mechanism will have to be put in place by tuna product suppliers so that dolphin-safe claims can be verified. The implementation of such procedures will take time and will involve costs. Some suppliers will invest the time and money to adopt and implement, others will not. Accordingly, it is unreasonable for the United States to assume that 100 percent of the tuna products containing tuna caught outside the ETP will immediately be eligible to use a dolphin-safe label.

Conclusion

²³ U.S. written submission, paras. 71, 76 ("all tuna product that currently qualifies as dolphin safe would continue to qualify for the label") and 123.

40. For the reasons explained in Mexico's methodology paper (based on the detailed econometric analysis) and in its submission, Mexico reaffirms its requested authorization to suspend concessions equal to USD \$472.3 million annually, which is the level of the nullification or impairment resulting from the failure of the United States to comply with the recommendations and rulings of the DSB and bring the Tuna Measure into consistency with the covered agreements after the expiry of the RPT. If the Arbitrator disagrees with some of the assumptions of Mexico's model, Mexico invites the Arbitrator to use the R code submitted by Mexico to calculate the amount of nullification or impairment under the assumptions it considers reasonable.