



25 April 2017

(17-2219)

Page: 1/33

Original: English

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

DECISION BY THE ARBITRATOR

Addendum

This *addendum* contains Annexes A to B to the Decision by the Arbitrator to be found in document WT/DS381/ARB.

LIST OF ANNEXES

ANNEX A

WORKING PROCEDURES OF THE ARBITRATOR

Contents		Page
Annex A-1	Working Procedures of the Arbitrator	A-2
Annex A-2	Procedures of the Arbitrator Concerning Business Confidential Information	A-5
Annex A-3	Additional Working Procedures of the Arbitrator on Partially Open Meetings	A-6

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	Executive summary of the arguments of Mexico	B-2
Annex B-2	Executive summary of the arguments of the United States	B-10

ANNEX A

WORKING PROCEDURES OF THE ARBITRATOR

Contents		Page
Annex A-1	Working Procedures of the Arbitrator	A-2
Annex A-2	Procedures of the Arbitrator Concerning Business Confidential Information	A-5
Annex A-3	Additional Working Procedures of the Arbitrator on Partially Open Meetings	A-6

ANNEX A-1

WORKING PROCEDURES OF THE ARBITRATOR

Adopted on 7 June 2016

Modified on 3 August 2016

1. In its proceedings, the Arbitrator shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Arbitrator and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Business Confidential Information (BCI), as defined in the Arbitrator's Additional Procedures Concerning Business Confidential Information, shall be submitted and treated in accordance with those Additional Procedures.

3. The Arbitrator shall conduct its internal deliberations in closed session. The parties shall be present at meetings only when invited by the Arbitrator to appear before it. The Arbitrator may, upon request by a party, authorize that party to lift the confidentiality, by way of delayed viewing, of its own statements made during the Arbitrator's meeting with the parties. Such lifting of confidentiality will be authorized only where it does not impair or otherwise interfere with either the rights of the other party or the integrity and promptness of the dispute settlement process. Moreover, such lifting of confidentiality shall be in accordance with additional working procedures, to be adopted by the Arbitrator after consulting with the parties. A request that the Arbitrator adopt additional working procedures to facilitate this lifting of confidentiality shall be made to the Arbitrator no fewer than six weeks before the meeting where the statements in question will be delivered.

4. Each party has the right to determine the composition of its own delegation when meeting with the Arbitrator. Each party shall have responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Mexico shall transmit to the Arbitrator and to the United States a communication explaining the basis for its request, including the methodology and data supporting it, in accordance with the timetable adopted by the Arbitrator.

6. Each party to the dispute shall also transmit to the Arbitrator a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Arbitrator.

7. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its written submission to the Arbitrator. If the United States requests such a ruling in its written submission to the Arbitrator, Mexico shall submit its response to the request in its written submission. If Mexico requests such a ruling in its written submission to the Arbitrator, the United States shall submit its response to the request prior to the substantive meeting, at a time to be determined by the Arbitrator in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

8. Each party shall submit all factual evidence to the Arbitrator no later than in its written submission, except with respect to evidence necessary for purposes of rebuttal, answers to

questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Arbitrator shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the substantive meeting.

9. Where the original language of exhibits is not a WTO working language, the submitting party shall submit a translation into the WTO working language of the submission at the same time. The Arbitrator may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Arbitrator may grant reasonable extensions of time for the filing of such objection upon a showing of good cause. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

10. In order to facilitate the work of the Arbitrator, each party is invited to make its submissions in accordance with the WTO Editorial Guide for Submissions, as relevant and to the extent that it is practical to do so.

11. To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party shall sequentially number its exhibits throughout the course of the proceedings. For example, exhibits submitted by Mexico could be numbered MEX-1, MEX-2, etc. If the last exhibit in connection with the first submission was numbered MEX-5, the first exhibit of the next submission thus would be numbered MEX-6.

Questions

12. The Arbitrator may at any time pose questions to the parties, orally or in writing, including prior to the substantive meeting.

Substantive meeting

13. Each party shall provide to the Arbitrator the list of members of its delegation in advance of each meeting with the Arbitrator and no later than 5.00 p.m. the previous working day.

14. The substantive meeting of the Arbitrator with the parties shall be conducted as follows:

- a. The Arbitrator shall invite the United States to make an opening statement to present its case first. Subsequently, the Arbitrator shall invite Mexico to present its point of view. Before each party takes the floor, it shall provide the Arbitrator and other participants at the meeting with a provisional written version of its statement. Each party shall make available to the Arbitrator and the other party the final version of its statement, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.
- b. After the conclusion of the statements, the Arbitrator shall give each party the opportunity to ask each other questions or make comments, through the Arbitrator. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Arbitrator, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's written questions within a deadline to be determined by the Arbitrator.
- c. The Arbitrator may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Arbitrator shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Arbitrator.
- d. Once the questioning has concluded, the Arbitrator shall afford each party an opportunity to present a brief closing statement, with the United States presenting its statement first.

Executive summaries

15. The description of the arguments of the parties in the Decision of the Arbitrator shall consist of executive summaries provided by the parties, which shall be annexed as addenda to the decision. These executive summaries shall not in any way serve as a substitute for the submissions of the parties in the Arbitrator's examination of the case.

16. Each party shall submit an executive summary of the facts and arguments as presented to the Arbitrator in its written submissions and oral statements, in accordance with the timetable adopted by the Arbitrator. Each such executive summary shall not exceed 15 pages. The Arbitrator will not summarize in a descriptive part, or annex to its decision, the parties' responses to questions.

Service of documents

17. The following procedures regarding service of documents shall apply:

- a. Each party shall submit all documents to the Arbitrator by filing them with the DS Registry (office No. 2047).
- b. Each party shall file five (5) paper copies of all documents it submits to the Arbitrator. However, when exhibits are provided on CD-ROMS/DVDs, four (4) CD-ROMS/DVDs and two (2) paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.
- c. Each party shall also provide an electronic copy of all documents it submits to the Arbitrator at the same time as the paper versions, preferably in Microsoft Word format, either on a CD-ROM, a DVD or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, with a copy to ***.***@wto.org, ***.***@wto.org, ***.***@wto.org, ***.***@wto.org, and ***.***@wto.org. If a CD-ROM or DVD is provided, it shall be filed with the DS Registry.
- d. Each party shall serve any document submitted to the Arbitrator directly on the other party. Each party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Arbitrator.
- e. Each party shall file its documents with the DS Registry and serve copies on the other party by 5.00 p.m. (Geneva time) on the due dates established by the Arbitrator. A party may submit its documents to another party in electronic format only, subject to the recipient party's prior written approval and provided that the Arbitrator's Secretary is notified.
- f. The Arbitrator shall provide the parties with an electronic version of its decision, as well as of other documents as appropriate. When the Arbitrator transmits to the parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

Modification of Working Procedures

18. The Arbitrator reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

PROCEDURES OF THE ARBITRATOR CONCERNING BUSINESS CONFIDENTIAL INFORMATION¹ (DS381)

Adopted on 7 June 2016

1. These procedures apply to any business confidential information (BCI) that a party submits to the Arbitrator.
2. For the purposes of these procedures, BCI is defined as any information that has been designated as such by the party submitting the information and that is not available in the public domain and the release of which could reasonably be considered to cause or threaten to cause harm to an interest of the person or entity that supplied the business information to the party.
3. No person may have access to BCI except a member of the Secretariat or the Arbitrator, a party's employee participating in the dispute, and a party's outside advisor for purposes of this dispute. However, an outside advisor is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, export, or import of tuna or tuna products. When a party provides BCI to an outside advisor who is an employee or officer of an industry association of such enterprises, that party shall obtain written assurances from such advisor that he or she has read and understands these procedures and will not disclose any BCI in contravention of these procedures.
4. A party obtaining access to BCI as a result of the BCI being submitted in this dispute shall treat it as confidential, i.e. shall not disclose that information other than to those persons authorized to receive it pursuant to these procedures. Each party shall have responsibility in this regard for its employees as well as any outside advisors for the purposes of this dispute. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute.
5. A party submitting or referring to BCI in a document shall mark the cover and each page of the document to indicate the presence of BCI in the document as follows: BCI shall be placed between double brackets (for example, [[xx,xxx.xx]]). The cover and the top of each page of the document shall contain the notice "Contains Business Confidential Information". Any BCI that is submitted in electronic form shall be clearly marked with the phrase "Contains BCI" on a label on the storage medium, and clearly marked with the phrase "Contains BCI" in the electronic file name.
6. The parties and the Arbitrator shall store all documents containing BCI so as to prevent unauthorized access to such information.
7. The Arbitrator shall not disclose BCI, in its decision or in any other way, to persons not authorized under these procedures to have access to BCI. The Arbitrator may, however, make statements of conclusion drawn from such information. Before the Arbitrator makes its decision publicly available, the Arbitrator shall give each party an opportunity to ensure that the decision does not contain any information that it has designated as BCI.

¹ These procedures are adopted according to, and are an integral part of, the Arbitrator's Working Procedures of 7 June 2016.

ANNEX A-3**ADDITIONAL WORKING PROCEDURES OF THE ARBITRATOR ON PARTIALLY OPEN MEETINGS****Adopted on 18 October 2016**

Having regard to paragraph 3 of the Arbitrator's Working Procedures, and having received a request from the United States for the adoption of additional working procedures to facilitate the lifting of the confidentiality of its statements at the Arbitrator's meeting with the parties, the Arbitrator has, after consulting with the parties, adopted the following Additional Working Procedures:

1 DEFINITIONS

1.1. For the purposes of these Additional Working Procedures:

- a. "Disclosing party" means any party that wishes to lift the confidentiality of its statements at the Arbitrator's meeting with the parties;
- b. "Non-disclosing party" means any party that wishes to maintain the confidentiality of its statements at the Arbitrator's meeting with the parties;
- c. "Statement" means:
 - i. A party's opening oral statement;
 - ii. A party's closing oral statement;
 - iii. A party's oral responses to questions from the Arbitrator concerning (a) issues of law; and (b) the disclosing party's own exhibits, arguments, or positions (referred to in these Working Procedures as a "paragraph 1.1(c)(iii) question");excluding, however, any part or section of those items that discloses, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party. Any part or section of the items that discloses, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party shall, prior to the delayed viewing, be redacted in accordance with the procedures provided for in Section 4 of these Additional Working Procedures.
- d. "Delayed viewing" means the broadcasting by the WTO Secretariat, after the conclusion of the Arbitrator's meeting with the parties, of the statements of disclosing parties that have been recorded and redacted in accordance with Sections 3 and 4 of these Additional Working Procedures.

2 GENERAL

2.1. Disclosure by a disclosing party of its statements at the Arbitrator's meeting with the parties shall be by way of delayed viewing. The viewing shall be in a room inside the WTO Secretariat building. It will be open to officials of WTO Members and Observers, and, upon registration with the Secretariat, to accredited journalists, accredited representatives of non-governmental organizations, and other interested persons, including members of the public. The names of all persons registered to attend the delayed viewing will be shared with the parties. To this effect, the Secretariat will place a notice on the WTO website, informing the public of the delayed viewing and including a link through which members of the public can register to attend. The notice shall specify: (a) that the names of all persons registered to attend the delayed viewing will be shared with the parties; and (b) that no person attending the delayed viewing is allowed to use electronic devices to record any portion of the broadcast.

2.2. The date of the delayed viewing will be decided by the Arbitrator after consulting with the parties. The redacted recording will be broadcast once, simultaneously in English and Spanish.

3 RECORDING OF STATEMENTS

3.1. In accordance with the usual practice of the WTO, the audio of the entirety of the Arbitrator's meeting with the parties (including the floor recording and interpretation) shall be recorded and entered into the dispute record.

3.2. The entirety of a disclosing party's opening and closing oral statements shall be video recorded, except as provided for in paragraph 3.7.

3.3. A disclosing party's oral responses to paragraph 1.1(c)(iii) questions shall also be video recorded, except as provided for in paragraph 3.4. A disclosing party shall advise the Arbitrator, prior to responding to a paragraph 1.1(c)(iii) question, if its response to that question discloses, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party.

3.4. To facilitate the implementation of paragraph 3.3:

- a. The Arbitrator shall, when it sends advance questions to the parties, indicate which questions it considers meet the definition in paragraph 1.1(c)(iii) of these Additional Working Procedures.
- b. Either disputing party shall promptly inform the Arbitrator if it considers (a) that a question indicated by the Arbitrator as meeting the definition in paragraph 1.1(c)(iii) does not meet that definition; or (b) that a question not indicated by the Arbitrator as meeting the definition in paragraph 1.1(c)(iii) meets that definition. The Arbitrator, after hearing the views of the other disputing party, will decide whether the question meets the definition in paragraph 1.1(c)(iii).
- c. Spontaneous questions asked by the Arbitrator during the course of the meeting shall not be recorded.

3.5. The video recording foreseen under paragraphs 3.2 and 3.3 shall be entered into the dispute record.

3.6. The video recording foreseen under paragraphs 3.2 and 3.3 shall be made from a single camera. The camera shall be set at the same position, zoom, and focus throughout the meeting.

3.7. In addition to the video recording foreseen under paragraphs 3.2 and 3.3, a secondary video recording, using a separate video recording channel but captured from the video camera referenced in paragraph 3.6 will be made of the entirety of the Arbitrator's meeting with the parties for back-up purposes. Except where the primary video recording is technically defective, this secondary video will not be used when the Secretariat compiles the video for the delayed viewing, and will be deleted once the procedures provided for in Section 4 of these Additional Working Procedures have been completed.

3.8. A disclosing party shall advise the Arbitrator prior to addressing its own or another party's BCI in its statements. When a disclosing party so advises, both video recordings will be discontinued for the relevant portion of the statement, after which the video recordings will be resumed. At the conclusion of a disclosing party's statement, the Arbitrator will ask the non-disclosing party to confirm that none of its own BCI was disclosed during the video recorded portion of the statement. In the interests of ensuring an efficient meeting, a disclosing party is invited to structure its statements so as to first deliver a non-BCI portion before delivering a portion that contains BCI.

4 REDACTION OF RECORDED STATEMENTS

4.1. In order to ensure, pursuant to paragraph 3 of the Arbitrator's Working Procedures, that disclosure by a disclosing party of its statements at the Arbitrator's meeting with the parties does not impair or otherwise interfere with either the rights of a non-disclosing party or the integrity and promptness of the dispute settlement process, statements recorded pursuant to Section 3 of these Additional Working Procedures shall be redacted as described in this Section prior to delayed viewing.

4.2. A disclosing party shall indicate, in the final written version of its opening and closing oral statements, which paragraphs disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party. For example, a disclosing party could use the following phrases in the final written version of its opening and closing oral statements: *Beginning of discussion of [non-disclosing party]'s submissions* and *End of discussion of [non-disclosing party]'s submissions*. Paragraphs that disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party shall be redacted from the video recording. In order to avoid unnecessary discontinuity in the delayed viewing, a disclosing party is invited to structure its statements in such a way as to separate those statements that disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party.

4.3. Pursuant to paragraph 3.3 of these Additional Working Procedures, where a response to a paragraph 1.1(c)(iii) question discloses, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party, that response shall be redacted from the video recording.

4.4. Following the conclusion of the Arbitrator's meeting with the parties, the Arbitrator will review the recorded statements and the final written versions of a disclosing party's opening and closing oral statements. Using the paragraph numbers contained in the final written version of a disclosing party's opening and closing oral statements, the Arbitrator will identify to the disputing parties any paragraphs additional to those identified by the disclosing party pursuant to paragraph 4.2 that, in the Arbitrator's view, disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party. These paragraphs will be redacted from the video recording, except as provided for in paragraph 4.7.

4.5. Following the conclusion of the Arbitrator's meeting with the parties, the Arbitrator will review the video recording of a disclosing party's oral responses to paragraph 1.1(c)(iii) questions. The Arbitrator will identify to the disputing parties, by reference to the question number, any responses additional to the responses identified by the disclosing party pursuant to paragraph 3.3 of these Additional Working Procedures that, in the Arbitrator's view, disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party. These responses will also be redacted from the video recording, except as provided for in paragraph 4.7.

4.6. If a non-disclosing party considers that any part of the video-recorded statements not identified by a disclosing party (pursuant to paragraphs 4.2 and 4.3 of these Additional Working Procedures) or redacted by the Arbitrator (pursuant to paragraph 4.4 or 4.5 of these Additional Working Procedures) discloses, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party, that party may bring such part of the video-recorded statements to the attention of the Arbitrator (through the Secretariat) and the disclosing party. Such notification should be made within a deadline to be specified by the Arbitrator, and should identify the particular paragraph of the relevant opening or closing statement (or, where relevant, third party statement), or the particular response by question number, and indicate how, in the view of the notifying party, it discloses, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party. Before the Arbitrator makes a decision regarding any identified issue, the disclosing party will be afforded an opportunity to explain where appropriate why, in its view, the identified part of the video-recorded statements does not disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party.

4.7. If a disclosing party considers that any part of the video-recorded statements redacted by the Arbitrator (pursuant to paragraph 4.4 or 4.5 of these Additional Working Procedures) does not disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party, that party may bring such part of the video-recorded statements to the attention of the Arbitrator (through the Secretariat) and the non-disclosing party. Such notification should be made within a deadline to be specified by the Arbitrator, and should identify the particular paragraph of the relevant opening or closing statement (or, where relevant, third party statement), or the particular response by question number, and indicate how, in the view of the notifying party, it does not disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party. Before the Arbitrator makes a decision regarding any identified issue, the non-disclosing party will be afforded an opportunity to explain where appropriate why, in its view, the identified part of the video-recorded statements does disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party.

4.8. The Arbitrator is mindful of the need to ensure the promptness of the dispute settlement process. Therefore, in the interests of ensuring the workability and efficiency of these Additional Working Procedures, where a paragraph of a disclosing party's opening or closing oral statements, or a disclosing party's response to a paragraph 1.1(c)(iii) question, is found to disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party, the entire paragraph or response will be redacted, even if the paragraph or response also contains content that does not disclose, directly or indirectly, the exhibits, arguments, or positions of a non-disclosing party.

4.9. If either party requests to view the redacted video recording prior to the delayed viewing, the Arbitrator will invite both parties to attend a preview session, accompanied by a representative of the Secretariat, on the premises of the WTO. The preview session will be held on a date to be determined by the Arbitrator in consultation with the parties.

4.10. The Arbitrator retains the right to modify these procedures after consulting with the parties.

ANNEX B

ARGUMENTS OF THE PARTIES

Contents		Page
Annex B-1	Executive summary of the arguments of Mexico	B-2
Annex B-2	Executive summary of the arguments of the United States	B-10

ANNEX B-1**EXECUTIVE SUMMARY OF THE ARGUMENTS OF MEXICO**

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 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.

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.

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

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

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 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,

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.

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).

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.

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

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 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.

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 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 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

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).

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 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

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.

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 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

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

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

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-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.

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

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

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.

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

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.

ANNEX B-2**EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES****SUMMARY OF U.S. WRITTEN STATEMENT**

1. Mexico's Methodology Paper dramatically overestimates the level of nullification or impairment attributable to the U.S. dolphin safe labeling measure. In lieu of Mexico's fatally flawed model, the United States puts forward an approach based on levels of U.S. imports from Mexico prior to the adoption in 1990 of the original Dolphin Protection Consumer Information Act (DPCIA). Such a historical, market-based approach is the most appropriate in the light of the available data and is consistent with the approach taken by past Article 22.6 arbitrators.

I. THE U.S. TUNA PRODUCT MARKET

2. The measure at issue is the U.S. dolphin safe labeling measure for tuna products.¹ The measure sets out the minimum conditions under which tuna product may be marketed as "dolphin safe." The U.S. canned tuna product market is an approximately \$1.5 billion market. Eighty percent of the market is served by three companies: Bumblebee, Chicken of the Sea, and StarKist ("the big three"), which produce tuna product from U.S. and foreign canneries. About half the U.S. market is supplied by canneries located in the United States and its territories.

A. U.S. Consumer Preferences for Tuna Product

3. U.S. consumers of canned tuna have definite preferences with respect to price, taste, texture, and whether the tuna product was produced in a dolphin safe manner, in particular that it was not produced from the intentional encirclement of dolphins. There is no overriding demand for tuna product produced from yellowfin tuna as Mexico claims, and U.S. consumers are disinclined to purchase tuna product produced by setting on dolphins. Therefore, demand for Mexican canned tuna is low, irrespective of the U.S. dolphin safe labeling requirements.

1. U.S. Consumer Preference for Less Expensive Tuna Product

4. The U.S. canned tuna market is "characterized by high volume and low margins." Since the advent of canned tuna in the 1900s, it has been considered a low cost and practical source of protein for the U.S. consumer. The literature indicates that there is a "psychological limit" for U.S. consumers against paying more than \$1 for a can of tuna. Consistent with that proposition is the fact that as the per can cost approaches \$1, U.S. demand for canned tuna weakens.

2. U.S. Consumers Preference for Canned Albacore

5. Although the U.S. market is generally characterized by high volume, low value products, some tuna products are sold at a premium. In the canned market, that differentiation occurs largely between premium canned albacore, which is sold as "white" tuna, and discount canned tuna, which is sold as "light" tuna and generally contains skipjack tuna, alone or in combination with other species. Under U.S. Food and Drug Administration (FDA) regulations, canned tuna can be labeled "white meat" if it is 100 percent albacore, while tuna product produced from other species generally qualifies for the "light meat" label. Canned tuna can also be labeled by species – albacore, skipjack, yellowfin, etc. – if it is 100 percent composed of that species.

6. U.S. consumers have a preference for canned albacore over tuna product containing other tuna species due to albacore's mild flavor, firm texture, and light color. Many U.S. consumers are

¹ "Tuna product" refers to a "food item which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days." In other words, "tuna product" is tuna that has undergone some processing and is not sold as "fresh" tuna. In light of the fact that much of the other processed products are ultimately processed into canned tuna, much of the data in the literature regarding "tuna product" focuses on canned tuna rather than the other smaller-volume tuna products.

willing to pay a price premium for albacore, as shown by the fact that the average retail price for canned albacore is \$5.32 a pound, while the average retail price for skipjack is \$3.17 a pound. Exhibit MEX-15 shows that sales of canned albacore accounted for 29 percent of canned tuna sales during the covered period by weight but 40 percent by value. This preference for albacore is distinct from consumer preferences in other countries, as the U.S. market consumes 19 percent of global production of canned tuna overall but 55-60 percent of world consumption of albacore.

3. Weak U.S. Consumer Demand for Canned Yellowfin

7. Dolphin safe tuna product sold in the United States can be, and is, produced from yellowfin. Such tuna product is either sold as "yellowfin" or as "light tuna." Canned yellowfin can command a higher price within the gourmet market, but demand is limited, and so much of the canned yellowfin produced for the U.S. market is labeled as "light tuna" – often canned with skipjack – rather than as "yellowfin." A 2005 investigation found that only about half the cans of yellowfin are labeled as such, and industry officials explained that vessels producing for the U.S. market catch more yellowfin than can be sold as a gourmet product. Canned yellowfin has long been marketed to U.S. consumers as "light meat," and that practice continues today.

8. Another factor dampening demand for yellowfin tuna product is consumer concerns regarding mercury in canned tuna. Mercury is present in marine creatures, particularly in the larger predators, such as albacore and yellowfin, and to a lesser extent in smaller fish, such as skipjack. One of the reasons that producers process yellowfin and skipjack together and sell it as "light tuna," rather than selling cans of 100 percent yellowfin, is to lower the per can mercury level of canned yellowfin and produce a safer product that is consistent with FDA regulations.

9. U.S. cannery receipts tell a consistent story of weak demand for canned yellowfin. In 1987, when the U.S. fleet was still operating in the ETP, 46.1 percent of U.S. cannery receipts were yellowfin. But the next year, yellowfin's share dropped to 31.6 percent. Between 1991 and 1999, the percentage was between 17.3-24.3 percent (with albacore increasing to 33.8 percent by 1999 and skipjack constituting about half of the total). In the 2000s, the share of yellowfin continued to drop. Since 2009, the share of yellowfin has been below 7 percent, while the share of albacore has been above 35 percent and the share of skipjack has been above 46 percent.

10. These low percentages of yellowfin being processed by U.S. canneries do not indicate lack of availability of dolphin safe yellowfin. Market data show that about 40 percent of the yellowfin-labeled canned tuna was produced by the big three brands, all of which sell only dolphin safe products. This suggests that if there were greater demand for canned yellowfin, the market would have met that demand. The fact that the tuna industry has instead produced less and less canned yellowfin over the last few decades indicates how weak U.S. consumer demand for canned yellowfin is, even where that tuna product is marketed as "dolphin safe."

4. Weak Demand for Canned Tuna Produced from Setting on Dolphins

11. It is established that U.S. consumers prefer dolphin safe tuna product and that this "sensitiv[ity]" is driven by a desire not to purchase tuna produced from setting on dolphins. As the original panel discussed, in the 1980s, in reaction to purse seine vessels killing tens to hundreds of thousands of dolphins in the ETP every year, one NGO, Earth Island Institute (EII), led a media campaign to raise consumer awareness of the issue. This campaign produced significant results, as the big three and other companies changed their purchasing policies in April 1990 to not purchase tuna from vessels that set on dolphins. These policies remain in place today because canned tuna produced from the intentional harassment and capture of dolphins remains an important issue for consumers. As the original panel noted, these policies "suggest[] that the producers themselves assume that they would not be able to sell tuna products that do not meet dolphin-safe requirements, or at least not at a price sufficient to warrant their purchase."

12. The most engaged actor on the dolphin safe issue is EII. EII has its own standard for "dolphin safe," which includes a prohibition on setting on dolphins. Companies that agree to adhere to the EII dolphin safe standard, pay a licensing fee, and otherwise promise to comply with EII requirements, can use the EII label. EII reportedly has commitments from 90 percent of all tuna companies to, *inter alia*, not produce, hold, or sell tuna product produced from setting on dolphins. In general, EII has certified compliance of upstream companies, such as producers and

distributors. EII has agreements with 159 processing and fishing companies in 51 countries and territories. All major exporting and importing countries are represented. For the United States, 53 companies have agreements with EII, including many of the largest players in the U.S. market. The vast majority of tuna product sold at retail in the United States passes through at least one of these companies, the major exception being Mexican tuna product.

13. In light of the fact that EII's focus is primarily on upstream companies, the United States contracted a leading market research firm to provide specific data as to the retail market, which accounts for about 70 percent of all sales of canned tuna. Based on that list, the United States reviewed the evidence as to dolphin safe policies of the companies that have the largest share of the U.S. market. This evidence confirms the thrust of the EII data, *i.e.*, that major U.S. retailers are sensitive to the demands of their consumers, and, as such are committed to selling only "dolphin safe" tuna product and will not carry tuna product produced from setting on dolphins. In addition, the United States is aware of a statement by Walmart, the leading seller of tuna product in the United States, stating that all major brands it sells are not produced from setting on dolphins and that purchasing decisions are governed by Walmart's sustainability policy, rather than whether the tuna product qualifies for the dolphin safe label under the U.S. measure.

14. As demonstrated and reinforced by these policies, there is no demand for Mexican tuna product in this segment of the market. Further, this lack of demand relates to the substance of Mexico's fishing practices not the measure at issue. Including Walmart, the retailers covered by statements account for 66 percent of retail market share, 46.4 percent of total consumption.

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

15. The United States is the largest consumer of canned tuna, with an estimated 19 percent share of the global market. Approximately 50-55 percent of the canned tuna supplying the U.S. market is produced by U.S. processors, using U.S.-caught tuna and imported tuna for canning. The other 45-50 percent of the market is supplied by canned tuna imports. The top exporters of canned tuna product to the United States are Thailand, Ecuador, Vietnam, the Philippines, and Indonesia, which together account for 93 percent of canned tuna imports into the United States.

II. THE LEVEL OF SUSPENSION OF CONCESSIONS PROPOSED BY MEXICO IS NOT EQUIVALENT TO THE LEVEL OF NULLIFICATION OR IMPAIRMENT

16. Pursuant to Article 22.6 of the DSU, the United States objected to Mexico's proposed level of suspension of concessions because that proposed level is not equivalent to the level of nullification or impairment attributable to the measure. Article 22.4 of the DSU is explicit and requires that the "level of suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of nullification or impairment." Mexico's calculations suffer from conceptual flaws and methodological errors that result in estimates of the level of nullification or impairment that are not accurate and inconsistent with Article 22.4 of the DSU.

A. Mexico Has Proposed Incorrect Counterfactuals

17. Mexico describes its proposed counterfactual as one where "the WTO-inconsistent discriminatory aspects of the original and amended Tuna Measure were eliminated." However, a Member has discretion as to how to implement DSB recommendations and rulings. Further, past WTO arbitrators have indicated that the normal counterfactual for calculating nullification or impairment is withdrawal of the measure. There is no precedent for an arbitrator choosing a counterfactual that based on a complainant's theory of compliance that is not related to the DSB recommendations and rulings. Withdrawal of the measure is thus the appropriate counterfactual.

B. Mexico's Model Is Fundamentally Flawed and Overstates of the Level of Nullification or Impairment

18. Mexico's proposed level of \$472.3 million dramatically overstates the level of nullification or impairment because it is calculated using a deeply flawed economic model.

1. Mexico's Model Is Not Appropriate in Light of Available Data

19. In this context, the generally accepted way to use partial equilibrium analysis would be to determine the value of the U.S. dolphin safe label and model the effect of its removal on the equilibrium price and quantity of Mexican tuna product sold in the United States. To determine the value of the dolphin safe label would require detailed data on U.S. purchases of tuna product with and without the dolphin safe label, including store-by-store sales of tuna by type, accounting for product characteristics, and including information on the timing of sales and whether sales were made at promotional values. It appears to be *undisputed* that this level of data concerning the U.S. tuna product market is not available. Mexico's dataset does not include retailer-level data that would allow the comparison between particular types of labeled and unlabeled tuna product that would be necessary to estimate the value of the dolphin safe label.

20. Mexico's partial equilibrium model thus does not seek to measure the value of the U.S. dolphin safe label and the effect of its removal. Rather, Mexico's model asks a wholly different question, namely what is the demand for canned yellowfin tuna in the U.S. market if one assumes: 1) canned yellowfin's access to the U.S. market is so severely restricted that current consumption is not indicative of demand; 2) U.S. consumers have a strong preference for canned yellowfin tuna (including produced by setting on dolphins) over all other canned tuna; and 3) Mexico is the only possible supplier of canned yellowfin tuna to the U.S. market. Mexico's model is simply not an appropriate model to use for this case given the available data and also because Mexico's assumptions have no basis in the real world.

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

21. Mexico's model is defined by a series of demand equations and that are specified almost entirely based on assumptions. Specifically, the model is based on the assumptions that: (1) yellowfin tuna product has been so restricted in its entry into the U.S. market that current consumption levels have no relationship to demand; (2) the Mexican and U.S. tuna product markets constitute a single market with an identical consumer preference for yellowfin tuna product; (3) Mexico is the only possible supplier of yellowfin tuna product to the U.S. market; and (4) Mexico has a completely elastic supply curve. Each of the four key assumptions is incorrect, and Mexico's model results in an inflated level of nullification or impairment.

a. There Is No Pent-Up Demand for Canned Yellowfin

22. Mexico's model is premised on the assumption that canned yellowfin tuna has been almost entirely barred from the U.S. market such that the current U.S. consumption of canned yellowfin does not reflect demand. The model then disregards all evidence of U.S. consumer preferences, as reflected in actual consumption, and derives demand based on assumptions. But the underlying assumption is incorrect: dolphin safe yellowfin canned tuna *is* sold in the U.S. market but it is sold in small quantities because demand is weak.

23. Contrary to Mexico's assumptions, there are numerous other sources of canned yellowfin in the U.S. market that are not adversely affected by the U.S. dolphin safe labeling measure and thus are available on an unrestricted basis. For example, all of the "big three" companies sell all-yellowfin dolphin safe tuna products in the United States. Other tuna processors also sell canned yellowfin on the U.S. market. Indeed, from 2010-2015, dolphin safe yellowfin accounted for between 4.3 and 6.7 percent of the tuna processed by U.S. canneries. U.S. canneries sourced this dolphin safe yellowfin from both U.S. vessels and foreign vessels.

24. If demand for canned yellowfin tuna were strong, dolphin safe canned yellowfin would sell in higher quantities given the available supply of yellowfin caught in a dolphin safe manner, but that is not the case. Sales of tuna products containing 100 percent yellowfin are dwarfed by sales of albacore and lightmeat tuna. Further, much of the dolphin safe yellowfin produced for the U.S. market is not marketed as "yellowfin" at all, but sold (often combined with skipjack) as "lightmeat". There is simply not sufficient demand for even the amount of dolphin safe yellowfin currently available. In this regard, Mexico's evidence suggests the same is true for *non-dolphin safe* canned yellowfin, since Exhibit MEX-15 indicates that both leading Mexican brands, Tuny and Dolores, market "chunk light" products in the United States.

25. The absence of demand for yellowfin tuna product is further confirmed by the fact that the decline in the quantity and share of the yellowfin processed by U.S. canneries continued after the measure went into effect. The share of tuna processed by U.S. canneries made up by yellowfin was already falling before the DPCIA was enacted – from 46.1 percent in 1987 to 33.2 percent in 1990 – and fell to 23.0 percent in 1991. Instead of stabilizing at that level, however, (or rising back to the earlier level), the share of tuna processed by U.S. canneries represented by yellowfin has steadily fallen. Mexico's story of the measure operating as a supply restriction does not explain this continued decline in yellowfin's share of the U.S. cannery receipts.

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

b. The U.S. and Mexican Markets Are Not One Market with a Strong Preference for Canned Yellowfin

27. Another factor driving the outcome of Mexico's model is its assumption that the United States and Mexico constitute a single market with a strong preference for canned yellowfin. The model sets the willingness to pay for yellowfin, distribution of willingness to pay, and the elasticity of demand for tuna equal across the two countries. This leads to a result that is almost entirely driven by the percentage of consumption between the two countries, because the "intensity of demand" parameter is the only variable that differs between the U.S. and Mexican demand equations. However, Mexico's assumption is incorrect, and, consequently, the parameters of Mexico's model relating to U.S. demand are all inaccurate.

28. First, there is no reason to believe that Mexican and U.S. consumers have the same preferences concerning canned tuna. Mexican and U.S. consumer preferences for food products often differ. For example, Mexican and U.S. consumers have different preferences concerning chicken meat, with U.S. consumers preferring white meat and Mexican consumers preferring dark meat. Preferences are also different with respect to cheeses and fruits and vegetables.

29. Mexico submits no evidence substantiating its assertion that "[t]here is no reason for U.S. consumers to have a different appreciation for canned yellowfin tuna than Mexican consumers." The fact that 17 percent of Americans are Hispanic suggests that some part of that 17 percent of the U.S. population may have preferences similar to Mexican consumers but does not support the idea that U.S. consumers *generally* have the same preferences as Mexican consumers. Indeed, the fact that Hispanic Americans are regarded as a subgroup with distinct preferences suggests that the opposite is true. Further, the evidence indicates that U.S. and Mexican consumers differ in their willingness to purchase tuna product produced from setting on dolphins.

30. Second, the assumption that U.S. consumers have a strong preference for canned yellowfin vis-à-vis canned "generic" tuna is also refuted by the available evidence. The U.S. tuna product market is made up of a variety of products – not "yellowfin" and "generic." The low-end portion of the market is composed of light tuna and is heavily influenced by cost. The high-end portion of the market is dominated by albacore. Some products labeled yellowfin also fall into the high-end portion of the market, although demand for such products is low because U.S. consumers do not prefer it to canned albacore.

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

32. Further, the \$2 per kg value assigned to the mean willingness to pay for canned yellowfin over "generic" tuna is divorced from the reality of the U.S. market. Mexico suggests that this figure is conservative in light of a regression analysis that suggested an estimated premium on yellowfin tuna of \$1.13-\$4.67 per kg, yet Mexico acknowledges that the data is not available "to calibrate the distribution of preference for canned yellowfin tuna versus canned generic tuna." Mexico also asserts, in contradiction to its price premium assumption, that "canned yellowfin tuna is priced to compete with other canned tuna products." Further, the regression does not properly represent the price premium for yellowfin, as, *inter alia*, the data is not detailed enough to do a proper analysis and the regression does not account for albacore.

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

34. Thus, the key assumptions underlying the demand side of Mexico's model are not supported by the evidence. The demand parameters set based on those assumptions are, therefore, also incorrect. Specifically: (i) Equations 1 and 2 are wrong in assuming a market in which all premium product is yellowfin; (ii) Equation 3 is wrong in establishing a mean willingness to pay of \$2 per kg. for yellowfin over all other tuna products; (iii) the intensity of demand parameter introduced in Equation 5 wrongly assumes that the only difference between the U.S. and Mexican markets is the quantity of tuna consumed; and (iv) the logistic distribution assumed in Equation 8 is inappropriate because it ignores the fact that tuna sales are highly sensitive to price and, therefore, willingness to pay is not distributed in this manner. These equations are central to Mexico's model and, consequently, Mexico's model is critically flawed.

c. Mexico Is Not the Only Supplier of Canned Yellowfin

35. Another key assumption underlying Mexico's model is that Mexico is the only potential supplier of yellowfin tuna product to the U.S. market. Mexico assumes that, once the alleged latent demand for yellowfin has been awakened, only Mexican producers will be able to respond to it. Mexico asserts that U.S. canneries could not increase production and that Mexico is the only supplier of yellowfin tuna product to the U.S. market. These assumptions are incorrect.

36. First, yellowfin tuna is caught and processed throughout the world; Mexico is not the sole supplier. The data presented in Exhibit MEX-15 shows that at least 30 different brands from North America, Europe, Asia, and South America marketed all-yellowfin tuna products in the U.S. market. Similarly, U.S. cannery receipts show that U.S. canneries purchase from U.S. vessels and import yellowfin each year for processing. Data from regional fisheries management organizations (RFMOs) similarly show that many countries' vessels harvest yellowfin.

37. Second, if there were a sudden increase in U.S. demand for canned yellowfin, the Mexican industry would not be the only one to respond. U.S. canneries are not operating at full capacity, and there is no reason to think that other tuna industries in other countries could not also increase production. In particular, canneries in Thailand and Ecuador – the two largest exporters of canned tuna to the United States – are operating at about 80 and 70 percent capacity. Consequently, there is every reason to believe that the tuna processing industries in these countries would increase production to meet any increased U.S. demand for canned yellowfin.

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

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

39. Mexico's model assumes that Mexico has the ability to increase production of canned yellowfin without increasing marginal cost. This assumption is incorrect because (1) the United States is a sufficiently important consumer of canned tuna that a shift in demand of the size Mexico envisions would affect world prices of cannery grade yellowfin; and (2) Mexico could not import large quantities of yellowfin from other ETP fishing nations at no increased cost.

40. On the second point, the supply of yellowfin in the ETP is not unlimited and an increase of the kind Mexico assumes would encounter hard supply constraints. Catches of tuna in the ETP are regulated by the IATTC, and the latest IATTC report found that recent fishing mortality rates are slightly below the MSY level, suggesting that yellowfin tuna was in an overfished state. This suggests that the IATTC would take action if catches of yellowfin in the ETP increased substantially. Indeed, at the 2016 meeting of the IATTC, the Commission adopted interim harvest control rules for yellowfin tuna that would trigger measures to reduce catch.

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

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

III. THE APPROPRIATE CALCULATION OF THE LEVEL OF NULLIFICATION OR IMPAIRMENT

A. The Appropriate Counterfactual Is Withdrawal of the Measure

43. A Member has discretion as to how to implement DSB recommendations, and past WTO arbitrators have indicated that the normal counterfactual is withdrawal of the measure. The United States uses this counterfactual to calculate the level of nullification or impairment. Under this counterfactual, it is reasonable to conclude that all tuna product currently meeting the dolphin safe labeling requirements, as well as tuna product produced from setting on dolphins consistent with the AIDCP, could be sold with some label suggesting it is "dolphin safe." It is also reasonable to conclude that producers and retailers of tuna product not produced from setting on dolphins will continue to seek to differentiate their product from tuna product produced from setting on dolphins. Finally, it is reasonable to conclude that the commitments made to EII or directly to customers by the vast majority of producers, distributors, exporters, importers, and retailers that serve the U.S. tuna product market to not produce, hold, or sell tuna or tuna product produced from setting on dolphins would remain in place.

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

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

45. Where relevant data were available, previous arbitrators have used historical trade data to determine the level of nullification or impairment. Such an approach is appropriate here. Prior to 1990, there was no dolphin safe labeling measure or other instrument addressing dolphin safety concerns. As such, levels of Mexican exports to the United States prior to 1990 during years when there was no measure and market access was not limited are instructive as to the levels of imports from Mexico that might exist if the measure were withdrawn. The U.S. model, therefore, uses Mexican exports during the three years preceding 1990 (1987-1989).

46. The U.S. approach uses Mexico's share of U.S. tuna imports during the relevant period rather than absolute quantities of imports for two reasons. First, U.S. consumption of tuna product has declined since the period before the DPCIA was adopted, and a volume-based approach would not account for this decline. Second, data on imports of "tuna product," as such, is only available beginning in 1989. It is preferable not to base a historical analysis on data from a single year, as that year may not be representative. The U.S. model therefore uses Mexico's share of imports of all tuna (*i.e.*, tuna products and fresh tuna) during the three years prior to 1990. This may overestimate the level of nullification and impairment, but is likely very close to Mexico's historical share of tuna product imports because: (1) tuna product is a substantial subset of the "all tuna" category, accounting for between 90.3 and 98.0 percent of U.S. imports of all tuna, by volume, since 1989; and, (2) Mexico's share of U.S. imports of tuna product in 1989 (3.8 percent) was very close to Mexico's share of U.S. imports of all tuna (3.4 percent).

47. On this basis, the United States identified U.S. imports of tuna from Mexico in the three years prior to 1990 and calculated Mexico's market share, by volume, which was 3.9 percent. The United States also notes that in 1987 Mexico's import share reached its high of 5.8 percent. Thus, 3.9 percent is a reasonable estimate of what Mexico's annual share of U.S. imports of tuna product would be in the absence of the U.S. measure, and 5.8 percent represents the highest possible level of potential imports that could be affected by the U.S. measure (without taking into account U.S. consumer preferences for tuna product not produced from setting on dolphins).

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

49. To establish the value of U.S. imports of Mexican tuna product under the counterfactual, the United States multiplied the projected quantity of Mexican tuna product imports by the average import price of tuna products from the world, excluding Mexico, for 2013-2015. Excluding imports from Mexico from the calculation of the average price of tuna product accounts for any price difference between Mexican tuna product and other tuna product due to the ineligibility of Mexican product for the label. Based on this calculation, the annual value of U.S. imports of Mexican tuna product under the counterfactual would be \$51.8 million, based on a 3.9 percent share of tuna product imports, and \$77.1 million, based on a 5.8 percent share.

50. From this projected value of U.S. imports of Mexican tuna product under the counterfactual, it is necessary to subtract the value of current U.S. imports of Mexican tuna product to identify how much higher such imports would be if the U.S. measure were withdrawn. Using the average actual value of U.S. imports of Mexican tuna product for 2013-2015 produces a result of \$32.9 million, based on a 3.9 percent import share, and an upward bound of \$58.1 million, based on Mexico's historical high import share.

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

51. As noted above, this market-based approach does not take into account the current U.S. consumer preference for tuna product produced from fishing methods other than setting on dolphins. In light of this fact, and the fact that under the counterfactual producers and retailers would still be able differentiate products produced from fishing methods other than setting on

dolphins from products produced from setting on dolphins, the figures listed in the preceding section should be discounted to arrive at an accurate level of nullification or impairment.

52. The market impact of this consumer preference can be found in the commitments that the many companies serving the U.S. market have made to EII. These commitments do not depend on the content of U.S. law and likely would not change if the measure were withdrawn. It is difficult to estimate how much of the U.S. market is covered by commitments to EII, although 90 percent is a reasonable estimate, since about 90 percent of tuna companies globally have made commitments to EII. At a minimum, the discount must reflect the policies of individual retailers on the record. Retailers accounting for 46.6 percent of total U.S. tuna product consumption have policies not to sell tuna product produced by setting on dolphins or policies that are not affected by the dolphin safe labeling measure. It is necessary, therefore, to reduce by that amount the projections of Mexican exports of tuna product to the United States under the counterfactual. To do so, the U.S. model, after calculating the estimated value of imports of Mexican tuna product, multiplied that figure by 0.53, to reflect the market share available to tuna product produced from setting on dolphins, before subtracting the value of Mexico's actual imports.

53. Thus, the level of nullification or impairment, adjusted for consumer preferences, would amount to **\$8.5 million**, using the average actual value of U.S. imports of Mexican tuna product for 2013-2015, and **\$21.9 million**, using Mexico's historical high import share.

V. CONCLUSION

54. The United States requests that the Arbitrator find that the level of suspension of concessions requested by Mexico is in excess of the appropriate level of nullification or impairment. The more appropriate level would be about **\$8.5 to \$21.9 million** per year.

SUMMARY OF U.S. OPENING STATEMENT

55. The question in this proceeding is whether Mexico's request for authorization to suspend concessions is "equivalent" to the level of nullification or impairment caused by the measure, and if not, then what the equivalent level is. The United States has shown that Mexico's request is not consistent with the requirements of the DSU. As a result, it is appropriate to move to the second part of the question. The U.S. analysis and calculations show that the level of nullification or impairment should be no more than \$8.5 to \$21.9 million per year.

I. MEXICO'S MODEL IS FUNDAMENTALLY FLAWED AND IS NOT CAPABLE OF ACCURATELY ESTIMATING THE LEVEL OF NULLIFICATION AND IMPAIRMENT

56. The evidence shows that the three critical assumptions underlying Mexico's model are all incorrect and that Mexico's calculation of nullification or impairment is grossly inflated.

A. The Measure Does Not Ban the Sale of Canned Yellowfin in the United States

57. One of the key assumptions underlying Mexico's model is that the U.S. measure "effectively bans" sales of canned yellowfin in the United States. Based on this assumption, Mexico estimates the level of nullification or impairment by modeling the introduction of a hypothetical new product in the U.S. market, instead of modeling the removal of the labelling standards. In doing so, Mexico ignores the data on actual U.S. imports and consumption of canned yellowfin and derives demand for the product based on incorrect assumptions.

58. The U.S. measure is neither a *de facto* nor a *de jure* prohibition on the sale of canned yellowfin. Many countries around the world catch and process yellowfin. Yellowfin is the second most produced tuna species, by volume, in the global tuna industry. The majority of this catch is by purse seine vessels and destined for the global canned market. Exhibit MEX-15 shows that U.S.-produced and imported canned yellowfin products are sold in the U.S. market. Mexico also exports canned tuna to the United States. Mexico was the sixth largest source of U.S. canned tuna imports in 2014-2015, accounting for 3.6 percent of all canned tuna imports, by volume. Mexico's share of U.S. imports of canned tuna is consistent with Mexico's share of U.S. imports of other major seafood products, such as shrimp, crab, and sardines.

59. Further, evidence proves that a lack of demand, not lack of supply, is responsible for the fact that canned yellowfin accounts for only 1-2 percent of U.S. canned tuna consumption. First, yellowfin accounted for a larger share of U.S. cannery receipts in the 1980s than it does today, but during that time it largely was sold not as "yellowfin," but, combined with skipjack, as "light tuna." Thus, the fact that U.S. canneries used to purchase more yellowfin does not mean that there ever was strong demand for all-yellowfin products. Second, the steady decline in U.S. cannery purchases of yellowfin over the last three decades confirms the lack of U.S. consumer demand for canned yellowfin. Third, the behavior of tuna producers in the U.S. market, in supplying increasing quantities of albacore products while canning yellowfin with skipjack as light tuna, also confirms the lack of U.S. consumer demand for yellowfin. Fourth, the rise of U.S. wholesale and retail tuna prices during the early 1990s refutes Mexico's claim that the decline in U.S. cannery yellowfin purchases was caused by the measure restricting supply.

60. There are several factors that have driven down demand for canned yellowfin, including: (1) yellowfin is the only type of tuna caught in association with dolphins, which U.S. consumers strongly do not prefer; (2) growing preference for albacore; and, (3) a preference for light tuna containing exclusively or primarily skipjack, which has a lower mercury content than yellowfin and is less expensive. Thus, the evidence refutes Mexico's claim that the U.S. measure effectively bars sales of canned yellowfin in the U.S. market. Consequently, the decision to disregard existing consumer data and to derive a demand function based entirely on the assumption of a tremendous unobserved preference for canned yellowfin is wrong.

B. Mexico Is Not the Only Possible Supplier of Canned Yellowfin

61. Another major assumption underlying Mexico's model is that Mexico is the only possible supplier of canned yellowfin to the U.S. market, or the only possible supplier of low cost canned yellowfin. Based on this assumption, Mexico's model equates "canned yellowfin" with Mexican canned tuna exports to the United States and ignores all other potential sources of canned yellowfin. In reality, however, Mexico is not the supplier of a unique product, either canned yellowfin or "low cost" canned yellowfin, and U.S. consumers *do not* have a preference for Mexican canned yellowfin over all other types of canned tuna.

62. As already explained, Mexico is far from the only source of cannery grade yellowfin, and the U.S. tuna product market is deeply integrated into the global tuna industry. A significant amount of tuna purchased by U.S. canneries has been caught by foreign flagged vessels, and imports account for nearly half of all canned tuna on the U.S. market. The sources of U.S. tuna product imports include Members whose fleets are among the top harvesters of yellowfin and Members that purchase tuna from the top harvesters of yellowfin. Not surprisingly, numerous tuna companies, both U.S. and foreign, market all- or partly-yellowfin products in the U.S. market. Thus there are many current suppliers of canned yellowfin to the U.S. market that have the capacity to supply significantly more canned yellowfin if U.S. demand were greater.

63. Mexico now acknowledges this is the case, but claims that only Mexican canned yellowfin would enter the U.S. market on the grounds that: 1) Mexico is a unique producer of low-cost yellowfin; and 2) there is "no reason" that if the scenario Mexico models comes to pass that the domestic and foreign competitors of Mexico would increase their production of canned yellowfin for the U.S. market. The evidence on the record proves otherwise.

64. First, Mexico presents no evidence regarding the cost of production of its industry or the industries of other Members to prove that the Mexican industry is the lowest cost producer of canned yellowfin. In fact, the available evidence indicates that this is not the case. Other countries have much greater advantages in terms of low-cost tuna processing. Mexico's claim is also contradicted by the fact that its model assumes that Ecuadorian yellowfin is interchangeable with Mexican yellowfin and by the fact that Mexican products are not currently the least expensive canned yellowfin products on the U.S. market.

65. Second, Mexico is wrong when it claims that there is "no reason" that, if the scenario Mexico models comes to pass, other domestic and foreign tuna industries would not increase sales canned yellowfin on the U.S. market. The basis of Mexico's claim is that other producers would not be affected by the removal of the U.S. measure, but this is not what Mexico modeled. Mexico modeled the introduction of a new product for which there is significant, untapped consumer

demand, such that the product sells at a higher price and in much greater quantities than canned yellowfin does. The U.S. import price generated by Mexico's model is significantly higher than the current import price of Mexican canned tuna and of canned tuna from other countries that produce canned yellowfin. It is also significantly more than the current average EU import price for canned yellowfin. It is simply unreasonable to assume, as Mexico does, that all producers of canned yellowfin would not react to the dramatically increased demand assumed in Mexico's model by increasing production of that product for the U.S. market.

66. In short, the available evidence contradicts Mexico's claim that it is the only possible supplier of canned yellowfin, low cost or otherwise, to the U.S. market. Thus, the decision to equate U.S. imports of canned yellowfin with Mexican canned tuna exports is wrong and cannot be used to accurately calculate the level of nullification and impairment in this dispute.

C. Mexico's Demand Equations Are Incorrect

67. Mexico used a choice model to depict demand in the U.S. and Mexican markets but derived the demand equations based entirely on assumptions rather than on the highly disaggregated consumer-level data or academic studies that would normally be used to construct such a model. The evidence proves that the assumptions Mexico made are incorrect.

68. First, Mexico's assumption that the United States and Mexico are a single market, in which consumers have the same preferences, is contradicted by the evidence. The evidence shows that U.S. and Mexican consumers have different preferences concerning many different food products, including canned tuna. For example, U.S. consumers have a distinct preference for canned albacore that Mexican consumers do not share, and Mexican consumers have a much stronger preference for canned yellowfin. Also, U.S. consumers have demonstrated a preference for tuna not caught by setting on dolphins that seems to be absent among Mexican consumers. Finally, Mexico's claim that Mexican canned tuna is a gourmet product that is "competitively-priced" with "generic" products and that, therefore, U.S. consumers could not possibly *not* prefer it, is incorrect. In fact, the Mexican canned yellowfin products sold on the U.S. market are not gourmet products and are not priced competitively with bargain-end products.

69. Second, Mexico's unsubstantiated assumption that U.S. demand for canned tuna is represented by a logistically distributed \$2 per kg. mean willingness to pay for canned yellowfin over other types of canned tuna is inconsistent with a properly structured consumer choice model and refuted by the evidence on the record. Mexico asserts that its assumption of a \$2 per kg. mean willingness to pay a premium for yellowfin is conservative because it is less than the premium calculated using its weighted OLS regression. But Mexico ignores the fact that the \$2 per kg. is *more* than the premium calculated using the OLS regressions. Scaling the distribution function such that 6.6 percent of consumers are willing to pay a premium of \$4.65 per kg. is wrong regardless because only 1-2 percent of consumers are paying the current premium. Also, the fact that nearly half of all canned tuna in the United States is sold on sale confirms that the logistic distribution Mexico chose is not accurate for the U.S. market. Finally, the import prices of yellowfin tuna products in the EU demonstrate that, if U.S. demand for yellowfin were such that the United States would import 63,568 metric tons of canned yellowfin if the U.S. import price rose to \$7.84 per kg., many countries other than Mexico would supply the product.

70. Third, Mexico's "intensity of demand" parameter is inconsistent with the appropriate use of a consumer choice model and is contradicted by the evidence. In Mexico's model, all consumer preferences other than the preference for yellowfin are represented by a single variable that reflects total consumption in the United States and Mexico. Because this is essentially the only variable that differs between U.S. and Mexican demand, it is the main factor driving the outcome of the model. This is inconsistent with the appropriate use of a choice model, as a properly specified model would derive demand for products based on the product characteristics valued by consumers. Further, Mexico's use of the intensity of demand parameter is inconsistent with the evidence, since it is not correct that the entire U.S. canned tuna market represents the market for canned yellowfin. Only 1-2 percent of all consumption of canned tuna is yellowfin, and at most only 6 percent of consumers, according to Mexico's own consumer survey, even look for canned yellowfin. But Mexico's use of the demand intensity parameter assumes that the U.S. market for canned *yellowfin* is the same as the U.S. market for *all canned tuna*. In reality, the fact that the U.S. market for all canned tuna is larger than the Mexican one does not mean that the U.S. market

for canned yellowfin is proportionally as large. That is why, to accurately reflect demand, a model must be based on economic data, not unreasonable assumptions.

II. THE U.S. MODEL PROVIDES A REASONABLE ESTIMATE OF THE LEVEL OF NULLIFICATION AND IMPAIRMENT

71. The United States has presented a model that provide a reasonable estimate of the level of nullification and impairment, and Mexico has not shown that the period prior to 1990 is inappropriate to use to estimate Mexico's market share if the measure were withdrawn.

72. First, the agreement between the United States and Mexico concerning U.S. imports of Mexican tuna between 1987 and 1989 did not restrict imports during the period. In only one year, 1987, did U.S. imports of Mexican tuna product come close to the agreed level. In 1988 and 1989, U.S. imports from Mexico were only 29.7 and 47.5 percent of the agreed levels. Additionally, evidence of Mexico's share of U.S. imports of all tuna product during the period prior to the 1980 embargo confirms that Mexico's import share for 1987-1989 was representative of Mexico's share in the absence of any measure affecting Mexican exports to the United States.

73. Second, the available evidence suggests that NAFTA would not make a significant difference in Mexico's market share of U.S. imports of tuna product. Trends in Mexico's market share of the products most similar to tuna product reveal that NAFTA did not have a large or long-lasting effect on Mexico's import share. Mexico's share of U.S. crab, shrimp, and sardine imports all rose in the years following NAFTA (although noting close to the 2,056 percent increase in Mexico's share of canned tuna imports predicted by Mexico's model), but all later declined to pre-NAFTA levels (all except sardines within 5 years of NAFTA coming into force). Data on U.S. imports of canned tuna from other countries that have experienced a change in tariff treatment also suggests that using Mexico's pre-NAFTA market share is not unreasonable.

74. Third, the location and capacity of U.S. canneries and the capacity of Mexican canneries are controlled for by using Mexico's market share of all tuna as the baseline. In the 1980s, when there were more U.S. canneries in the EPO region and Mexico's canning capacity was lower, Mexico exported tuna loins and frozen tuna to the U.S. market. As Mexico's canning industry developed, the balance of Mexico's exports shifted towards canned tuna. The U.S. model controls for shifts in the balance of Mexico's exports to the United States by using Mexico's historical share of imports of all tuna to estimate Mexico's share of tuna product imports in the absence of the measure, while multiplying the estimated quantity of imports from Mexico by the higher price of all tuna product rather than the lower price of raw tuna for canning.

75. In conclusion, the U.S. model is consistent with models used in previous arbitrations and generates a reasonable outcome. Mexico has not shown that this is not the case. Thus, the level of nullification and impairment of \$8.5 to \$21.9 million per year is appropriate.
