

***MEXICO – ANTI-DUMPING DUTIES ON
STEEL PIPES AND TUBES FROM GUATEMALA***

(WT/DS331)

**EXECUTIVE SUMMARY OF THE
THIRD PARTY SUBMISSION OF
THE UNITED STATES**

September 4, 2006

1. The United States makes this third party submission to provide the Panel with its view of the proper legal interpretation of certain provisions of the *Agreement on Article VI of the General Agreement on Tariffs and Trade 1994* (the “AD Agreement”) and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the “DSU”) that are relevant to this dispute. The United States addresses in this submission the proper interpretation of: (1) Article 5.2 of the AD Agreement; (2) Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement; and (3) Article 19.1 of the DSU. The United States also comments on several aspects of the factual record in this dispute.

2. Guatemala claims that Mexico breached Article 5.2 of the AD Agreement because it initiated an investigation based on an application that lacked sufficient evidence of dumping and injury. Specifically, regarding dumping, Guatemala argues that the evidence contained in the application concerning normal value – one sales invoice and one price quote – was insufficient for purposes of initiation because: (1) the invoice and price quote are not related to the exporter named in the application; (2) the price quote is not an “actual” sales price; (3) the single sale represented by the invoice was compared to a multiple-month average export price; and (4) evidence of prices for two models is not representative of the “full range of products under investigation.”¹ Regarding injury, it argues that the evidence in the application was insufficient because it included volume and price information for “all imports” entering the country under two tariff classifications, despite the fact that other imported pipes and tubes that also entered the country under these tariff classifications had been “explicitly excluded from the investigation.”²

3. Article 5.2 of the AD Agreement does not dictate that an application must contain a particular form or quantum of evidence regarding dumping or injury. Rather, it requires that an application contain such information as is “reasonably available to the applicant.” What is “reasonably available” necessarily depends on the circumstances of each case.³

4. Thus, depending on the circumstances, an investigating authority may decide to initiate an investigation based on an application that contains home-market pricing information solely from a producer not identified in the application. Article 5.2(iii) requires only that an application contain home-market price information specific to “the product in question” (*i.e.*, the “allegedly dumped product” referred to in sub-paragraph (ii)).

5. Similarly, an investigating authority is not required to summarily reject an application based partially or solely on a price quote, as opposed to an “actual” price. Article 5.2(iii) refers to “information on” prices, and a price quote provides “information on” prices. If the drafters had intended to require nothing short of “actual” prices – regardless of the circumstances – they would have done so.⁴ Nor is an investigating authority required to summarily reject an application (1) that only provides home-market pricing information with respect to some, but not

¹ See First Written Submission of Guatemala, paras. 69-80.

² First Written Submission of Guatemala, para. 81.

³ See *United States – Hot-Rolled Steel (AB)*, para 84 (“The word ‘reasonable’ implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is ‘reasonable’ in one set of circumstances may prove to be less than ‘reasonable’ in different circumstances.”).

⁴ See, *e.g.*, AD Agreement, Article 2.2.2 (requiring that, when constructing normal value for purposes of determining dumping, the amounts for administrative, selling, and general costs and for profits shall be based on “actual data”).

all, models or types of the product in question⁵ or (2) that provides information on the volume of the allegedly dumped imports using import data from tariff classifications that are broader than the product in question. Again, the relevant question is whether more specific or accurate information was “reasonably available” to the applicant.⁶

6. Guatemala claims that, “based on the specific circumstances of the investigation in question,” Mexico breached Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement because it selected a period of investigation that was too remote to allow for the gathering of positive evidence to be used as the basis for an objective examination of injury – in much the same way as occurred in *Mexico – Rice*. Mexico, on the other hand, attempts to distinguish this case from *Mexico – Rice*.

7. It is worth recalling that the panel in *Mexico – Rice* did not base its findings solely on the “temporal gap” between the period of investigation and the initiation of the investigation. As the Appellate Body recognized:

The Panel, as trier of the facts, gave weight to other factors: (i) the period of investigation chosen by [Mexico’s authority] was that proposed by the petitioner; (ii) Mexico did not establish that practical problems necessitated this particular period of investigation; (iii) it was not established that updating the information was not possible; (iv) no attempt was made to update the information; and (v) Mexico did not provide any reason – apart from the allegation that it is Mexico’s general practice to accept the period of investigation submitted by the petition – why more recent information was not sought. Thus, it is not only the remoteness of the period of investigation, but also these other circumstances that formed the basis for the Panel to conclude that a *prima facie* case was established.⁷

8. Based on the submissions the United States has received in this dispute, many of these “other circumstances” appear to be present in this case in much the same way as they were in *Mexico – Rice*. Mexico acknowledges that, as in *Mexico – Rice*, the period of investigation chosen by its authority was that proposed by the petitioner,⁸ and Mexico did not assert during the investigation or in its first written submission that it was not possible to update the information. Moreover, Mexico has not asserted that it attempted to update this information during the investigation. It also has not provided any reason why more recent information was not sought.

9. Mexico makes three points in attempting to distinguish this case from *Mexico – Rice*: (1) the gap between the end of the period of investigation and the initiation of the investigation was “only” eight months in this case, whereas it was 15 months in *Mexico – Rice*; (2) its authority performed a more thorough examination of the petition here, and that examination caused delay

⁵ See *United States – Softwood Lumber AD Final (Panel)*, paras. 7.121-7.123.

⁶ See also *United States – Softwood Lumber AD Final (Panel)*, para. 7.54 (“It seems to us that the ‘reasonably available’ language was intended to avoid putting an undue burden on the applicant to submit information which is not reasonably available to it. It is not, in our view, intended to require an applicant to submit all information that is reasonably available to it. . . . This is particularly true where such information might be redundant or less reliable than information contained in the application.”).

⁷ *Mexico – Rice (AB)*, para. 167.

⁸ First Written Submission of Mexico, para. 164.

in the initiation of the investigation; and (3) in *Mexico – Rice*, Mexico’s authority accepted the period of investigation proposed by the petitioner knowing that that period reflected the maximum penetration of imports.⁹

10. With respect to Mexico’s first point, the United States appreciates that there is a difference between a 15-month gap between the period of investigation and the initiation of an investigation and an eight-month gap. The United States, recalls, however, that the panel in *Mexico – Rice* considered not only this gap, but also the gap between the period of investigation and the imposition of final anti-dumping duties. In *Mexico – Rice*, this gap was two years and nine months. In this case, the gap is two years and thirteen days.

11. With regard to Mexico’s second point, Mexico has failed to explain why a more thorough review of a petition would justify lengthening the gap between the period of investigation and initiation in this case. Even if Mexico’s authority performed a more thorough examination of the petition,¹⁰ and that examination caused a delay in initiating the investigation, Mexico could have established a more recent period of investigation to reflect the delay: the period of investigation was not set in stone when it was proposed by the petitioner. Moreover, notwithstanding Mexico’s explanation that initiation in this dispute was delayed because its authority undertook a more thorough investigation than was undertaken in *Mexico – Rice*, in the *Rice* dispute there was a much longer delay between the filing of the petition (on June 2, 2000) and the initiation of the investigation (December 11, 2000) than in this dispute (petition filed on May 22, 2001; investigation initiated August 24, 2001).

12. With regard to Mexico’s third point (*i.e.*, unlike in this dispute, the period proposed by the petitioner in *Mexico – Rice* was the period of maximum import penetration), nothing in the panel or Appellate Body reports suggests this was a factor in the analysis of the “stale” period of investigation. The issue of seasonal differences in imports arose in *Mexico – Rice* not in the context of a “stale” period of investigation but in the context of an incomplete period of investigation (*i.e.*, the six-month period of each year when imports of rice were at their peak).

13. As explained by the Appellate Body, the panel in *Mexico – Rice* found that Mexico’s injury analysis, which was based on data covering only six months of each of the three years examined, did not allow for an “objective examination,” as required by Article 3.1 of the AD Agreement, for two reasons:

[F]irst, whereas the injury analysis was selective and provided only a part of the picture, no proper justification was provided by Mexico in support of this approach; and secondly, [Mexico’s investigating authority] accepted the ‘period of investigation proposed by the applicants because it allegedly represented the period of highest import penetration and would thus show the most negative side of the state of the domestic

⁹ First Written Submission of Mexico, para. 161. While Mexico lays out four separate subparagraphs in paragraph 161, the points in the second and third subparagraphs appear to be the same.

¹⁰ Mexico does not appear to argue that its authority examined the period of investigation proposed in this petition more closely than in the petition in *Mexico – Rice*. Instead, it appears the authority’s examination of the petition related to issues not relevant to that period. *See* First Written Submission of Mexico, para. 164.

industry.’¹¹

14. In this case, while Mexico’s authority accepted the six-month period proposed by the petitioner, there does not appear to be any evidence that this period represented the period of highest import penetration. Guatemala appears to acknowledge this in paragraph 259 of its first written submission.

15. Thus, the Panel in this case must determine, in essence, whether an injury analysis that is based on data covering only six months of each of the three years examined allows for an “objective examination” where the investigating authority chose the period proposed by the petitioner and provided no justification in support of examining only parts of years, but where there is no evidence that imports were higher during the six-month periods selected.

16. In the view of the United States, examining data relating to the whole year normally “would result in a more accurate picture of the ‘state of the domestic industry’ than an examination limited to a six-month period.”¹² While there may be circumstances in which there could be “convincing and valid reasons for examining only parts of years”¹³, an investigating authority cannot simply assume that the six-month periods proposed by a petitioner will provide an accurate picture of the state of the domestic industry.

17. Indeed, in most circumstances it would be difficult to “demonstrate[] that the dumped imports are, through the effects of dumping, . . . causing injury”¹⁴ by looking at six-month snapshots over a three-year period. For example, while dumped imports may increase and the domestic industry’s condition may have deteriorated from the first half of the first year to the first half of the third, the condition of the industry may be due to a natural disaster that destroyed most of the industry’s production capacity in the second half of the first year. But six-month snapshots would mistakenly suggest that the industry was injured by dumped imports, not by the natural disaster.

18. The burden should not fall on exporters and foreign producers to investigate what happened to the domestic industry during those months that are disregarded by the authority, in the hope of persuading the authority to investigate a continuous period. While the petitioners admitted in their petition in *Mexico – Rice* that the six-month period reflected the period of highest import penetration,¹⁵ it will not always be so easy for exporters and foreign producers to discover the biases that may result from a discontinuous period of investigation.

19. As the panel found in *Mexico – Rice*, Article 3.1 of the AD Agreement “impose[s] certain obligations on the . . . investigating authorities with regard to the completeness of the data used as the basis for its determination.”¹⁶ The United States agrees with Guatemala that an objective

¹¹ *Mexico – Rice (AB)*, para. 176.

¹² *Mexico – Rice (AB)*, para. 183.

¹³ *Mexico – Rice (Panel)*, para. 7.82.

¹⁴ AD Agreement, Article 3.5.

¹⁵ *Mexico – Rice (Panel)*, para. 7.83.

¹⁶ *Mexico – Rice (Panel)*, para. 7.77.

determination cannot be based on an incomplete series of data unless the investigating authority provides a justified explanation for doing so.¹⁷

20. Guatemala requests that, if the Panel were to find in Guatemala’s favor, the Panel should suggest that Mexico “immediately end the measure” at issue in this dispute. The Panel should decline Guatemala’s request and provide the recommendation set forth in DSU Article 19.1 that Mexico bring its measure into conformity with its obligations under the relevant agreements.

21. In general, panels have declined requests to make suggestions under Article 19.1 of the DSU, and for good reason. A Member generally has many options available to it to bring a measure into conformity with its WTO obligations. As the panel noted in *US – Softwood Lumber ITC Investigation*, Article 21.3 of the DSU makes clear that “the choice of means of implementation is decided, in the first instance, by the Member concerned.”¹⁸

22. Guatemala asserts that the situation in this dispute is analogous to the situation in *Argentina – Poultry*, where the panel suggested repeal of the anti-dumping measures in question because the panel could not “perceive how Argentina could properly implement our recommendation without revoking the anti-dumping measure at issue in this dispute.”¹⁹ However, it is counterintuitive that a panel should provide guidance where guidance is needed least (*i.e.*, where there is only one “way”²⁰ to implement the recommendations, and that way is clear).²¹

23. Moreover, in this particular case, it would be difficult to square a suggestion that Mexico “immediately” end the measure with Article 21.3 of the DSU. That provision recognizes that it may be impracticable to comply “immediately” and creates a process to determine a reasonable period of time to comply – *after* the report has been adopted, and *after* the Member concerned informs the DSB of its intentions in respect of implementation. Article 21.3 also expresses a clear preference (a) for a reasonable period proposed by the Member concerned and approved by the DSB, (b) for a period of time “mutually agreed by the parties to the dispute” and (c) as a last resort, a period of time determined through binding arbitration. The panel plays no role in that process. As a result, a suggestion from the panel to “immediately” end the measure would insert the panel inappropriately in the process to determine the time in which to comply.

¹⁷ First Written Submission of Guatemala, para. 257.

¹⁸ *US – Softwood Lumber ITC Investigation (Panel)*, para. 8.8.

¹⁹ *Argentina – Poultry (Panel)*, para. 8.7.

²⁰ Article 19.1 of the DSU refers to “ways” to implement the panel’s recommendations, not to a single “way.”

²¹ Guatemala also notes Mexico’s announced intentions regarding the implementation of the rulings and recommendations in *Mexico – Rice* in support of its request. In the view of the United States, however, a dispute involving a different measure and a different complaining party does not support a request for a suggestion under DSU Article 19.1, even though some of the claims in the two disputes are similar to one another.