MEXICO – DEFINITIVE ANTI-DUMPING MEASURES ON BEEF AND RICE

(WT/DS295)

EXECUTIVE SUMMARY OF THE FIRST SUBMISSION OF THE UNITED STATES OF AMERICA

April 1, 2004

I. Introduction

1. In this dispute, the United States is challenging various aspects of the definitive antidumping measure that the Government of Mexico ("Mexico") imposed on imports of long-grain white rice from the United States. Several aspects of this measure are inconsistent with Mexico's obligations under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").

2. The United States is also challenging certain provisions of Mexico's Foreign Trade Act and its Federal Code of Civil Procedure ("FCCP"). These provisions are inconsistent "as such" with Mexico's obligations under the AD Agreement and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

II. The Imposition of Antidumping Duties on U.S. Long-Grain White Rice

A. Economía's Use of a Stale Period of Investigation Breached Articles VI:2 of GATT 1994 and Articles 1, 3.1, 3.2, 3.4, and 3.5 of the AD Agreement

3. The purpose of an antidumping measure is not to punish exporters for past dumping practices. Rather, it is to "offset or prevent" dumping that is presently causing or threatening to cause material injury to a domestic industry in the importing country. A Member is not offsetting or preventing injurious dumping if the dumping or injury has completely ceased or never existed. Thus, in order to impose an antidumping measure, the investigating authority must examine, as part of its initial investigation pursuant to Article 5 of the AD Agreement, a period of time that is as close to the date of initiation as practicable.

4. In the present case, the petitioning industry selected the POI that it wanted Economía to examine for the dumping investigation and the evaluation of injury, and Economía accepted its request over the objection of the U.S. exporters and the importers. As a consequence, there was more than a fifteen-month gap between the end of the POI (August 1999) and the initiation of the investigation (December 2000). Economía did not even collect, much less examine, any data for that fifteen-month period. By the time Economía issued its final determination on June 5, 2002, this gap had stretched to nearly three years.

5. These periods were so remote in time that the information collected by the investigating authority was incapable of providing a basis for an objective finding of dumping, injury, and causation (as those terms are defined and used in the AD Agreement) or a determination based on positive evidence. For example, the more than fifteen-month gap between the end of the POI and the date of initiation (and the nearly three-year gap between the end of the POI and the final determination) means:

- Economía's examination of volume and price effects was not objective or based on positive evidence as required by Articles 3.1 and 3.2 of the AD Agreement;

- Economía's examination of "all relevant economic factors" having a bearing on the state of the domestic industry was not objective or based on positive evidence as required by Articles 3.1 and 3.4 of the AD Agreement; and

- Economía's determination that the dumped imports were "causing" injury to the domestic industry was not objective or based on positive evidence as required by Articles 3.1 and 3.5 of the AD Agreement.

6. Economía also lacked the information it needed to determine that the subject imports are being dumped, and that they are the cause of present material injury (or threat) to the domestic industry producing the like product.

7. Thus, the imposition of an antidumping measure on long-grain white rice from the United States breached Articles 1, 3.1, 3.2, 3.4, and 3.5 of the AD Agreement and Article VI:2 of the GATT 1994.

B. Economía Breached Articles 1, 3.1, 3.5, and 6.2 of the AD Agreement by Limiting Its Examination of Injury to Only Six Months of 1997, 1998, and 1999

8. The petitioner in the rice investigation asked Economía to examine only the March to August time period, because this period allegedly reflected the main import activity of the product under investigation. Economía agreed that imports were concentrated during that period, and consequently limited its injury analysis to the data for March - August of each of the years at issue in its investigation (1997, 1998, 1999). Economía's decision to conduct its analysis in this manner resulted in breaches of Articles 1, 3.1, 3.5, and 6.2 of the AD Agreement.

9. First, Economía's investigation of injury was not based on "positive evidence." As the Appellate Body stated in *United States - Hot-Rolled Steel*, the term "positive evidence" relates to "the quality of the evidence that authorities may rely upon in making a determination. . . . [T]he evidence must be of an affirmative, objective and verifiable character, and . . . it must be credible." Economía's investigation of injury was not based on "positive evidence" for the simple reason that it failed even to examine the evidence pertaining to half of the period of injury analysis.

10. Second, Economía's decision to focus its investigation on only March to August of each year also prevented its examination from being objective. To examine only those parts of the year when imports levels are high may overlook positive developments in other parts of the year, and thus give a misleading impression of the data relating to the condition of the industry as a whole. But this is exactly what Economía did.

11. These actions contravened Article VI:2 of GATT 1994 and Articles 1, 3.1, 3.5, and 6.2 of the AD Agreement.

C. Economía's Conduct of its Injury Analysis Breached Articles 3.1, 3.2, 3.4, 3.5, 6.8, 12.2, and Annex II of the AD Agreement

12. Separate and apart from the breaches arising from Economía's choice of a POI, Economía's conduct of its injury analysis was inconsistent with WTO rules.

13. First, Article 3.1 of the AD Agreement states that injury determinations must be based on "positive evidence" and must involve an "objective examination" of the volume of the dumped imports and their effect on prices in the domestic market for like products, and the consequent impact of the imports on domestic producers of such products. By failing to actively seek out information pertinent to these matters, Economía did not make it possible to conduct an objective examination of the injury factors, and consequently did not base its determination on positive evidence. Economía then compounded its error by basing its determination on the facts available, contrary to Article 6.8 and Annex II.

14. Second, Article 3.2 of the AD Agreement requires investigating authorities to consider "whether there has been a *significant* increase in the *dumped* imports, either in absolute terms or relative to production or consumption in the importing Member." Nothing in the discussion of this issue indicates that Economía actually considered whether there were *significant* absolute or relative increases in the volume of the *dumped* imports. Economía's failure to conduct a proper examination of this issue breached Articles 3.1 and 3.2 of the AD Agreement.

15. Third, Economía breached Articles 3.1 and 3.4 of the AD Agreement by failing to conduct an objective analysis of certain "relevant economic factors" that it was required to evaluate under Article 3.4.

16. Fourth, Economía breached Articles 3.1, 3.2, and 3.5 of the AD Agreement by focusing its injury analysis on *all* imports of the investigated product from the United States, irrespective of whether the imports were dumped, instead of conducting an objective examination of the effect of the dumped imports alone.

17. Finally, Economía failed to explain sufficiently the findings and conclusions it reached on all issues of law, and thus breached 12.2 of the AD Agreement.

D. Economía's Failure to Exclude Firms with Antidumping Margins of Zero Percent from the Antidumping Measure Is Inconsistent with Article 5.8 of the AD Agreement

18. Economía also breached WTO rules by failing to exclude two of the firms it examined – Farmers Rice and Riceland – from the antidumping measure. Farmers Rice and Riceland each had dumping margins of zero percent. Since neither firm was dumping, neither firm was causing any injury to the Mexican rice industry through the "effects of dumping." Nevertheless,

Economía applied the antidumping measure to both firms, and each firm remains subject to future review and the possible application of antidumping duties. By treating Farmers Rice and Riceland in this manner, Economía breached Article 5.8 of the AD Agreement.

E. Economía's Application of an Adverse "Facts Available" Dumping Margin to Producers Rice and to U.S. Producers and Exporters that It Did Not Examine Is Inconsistent with Article VI:2 of the GATT 1994, Articles 1, 6.1, 6.2, 6.6, 6.8, 6.10, 9.3, 9.4, 9.5, 12.1, and 12.2 of the AD Agreement, and Paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement

19. A basic principle underlying the AD Agreement, embodied in Article 1, is that antidumping measures shall be applied "only . . . pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." The Agreement provides for conducting investigations based on the actual data of individual interested parties, and Article 6.10 of the AD Agreement requires "as a rule" that the authorities "shall determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation."

20. The sole exception provided to this rule, set forth in the second sentence of Article 6.10, arises when the sheer number of potential interested parties is so large that making an individual determination for each exporter or producer would be "impracticable." In such cases, authorities may limit their examination, either by using statistically valid samples or by examining the largest percentage of the volume of the exports which can reasonably be investigated. The Agreement then provides for the "residual" margin (*i.e.,* the margin assigned to the uninvestigated firms) to be based on the calculation method set out in Article 9.4 of the AD Agreement for determining the ceiling for the "all others" rate.

21. Economía's conduct of the rice investigation breached these rules. Specifically, Economía improperly:

- sent its antidumping questionnaire to only two companies that were listed in the petition but claimed to be investigating every producer or exporter in the United States;

- calculated individual margins of dumping for one of those companies and two others that came forward on their own initiative and asked to be included in the investigation, but assigned an adverse "facts available" margin taken from the petition to Producers Rice, even though that firm demonstrated that it had no exports to Mexico during the POI; and

- treated all other exporters and producers in the United States as "uncooperative" respondents, and assigned them an adverse facts available margin taken from the petition, even though Economía never sent any of the affected companies a copy

of the questionnaire or informed them of the consequences that would flow from not providing the information that it never requested them to provide.

1. Analysis of Articles 6.1, 6.8, 6.10, and 9.4 of the AD Agreement, and Paragraph 1 of Annex II of the AD Agreement

22. The core legal provisions implicated by this issue are Articles 6.10 and 9.4 of the AD Agreement, Articles 6.1 and 6.8 of the AD Agreement, and paragraph 1 of Annex II. These provisions require investigating authorities to either individually examine and then calculate an individual margin of dumping for every producer or exporter of the product in the country under investigation, or else, if the authorities limit their examination to a subset of exporters or producers, to assign a neutral "all others" rate to those producers and exporters that are not individually examined. An investigating authority is not permitted to do what Economía did in the rice investigation – which was to individually investigate just a few exporters, and then assign an adverse facts available-based margin to everyone else.

23. This conclusion flows from the text of Article 6.10, which requires, "as a rule," that individual dumping margins be established for *each* producer or exporter. The rule is subject to a single exception, when the number of exporters or producers is so large that the determination of individual margins for each producer or exporter would be impracticable. In such cases, and only in such cases, an investigating authority may limit its examination to a subset of producers or exporters. Article 6.10 does not permit an investigating authority to announce the initiation of an antidumping investigation, send its questionnaire to a few producers or exporters, deem every other producer or exporter in the country as also being investigated, and apply a dumping margin based on the "facts available" to any company that does not "appear."

24. Articles 1, 5, 6.1, 6.5, 6.6, 6.8, and 9.4 of the AD Agreement, and paragraph 1 of Annex II, provide contextual support for the conclusion that Article 6.10 does not permit investigating authorities to take such a passive approach to their investigations.

25. First, Articles 6.1 and 6.8 of the AD Agreement, and paragraph 1 of Annex II, provide that an investigating authority must make known to the exporters or producers the information that is required of them. This informs the nature of the examination to be undertaken by authorities under Article 6.10 in determining margins: an investigating authority cannot simply wait for exporters or producers to respond to a general notice and then apply the facts available to any firms that do not appear; rather, the authorities must actively seek to identify individual exporters and producers, inform them of the information that is needed, and ensure they understand the consequences of not supplying the requested information.

26. Second, Article 9.4 requires investigating authorities to assign a neutral "all others" rate to producers and exporters that they do not individually examine. The Appellate Body has described this rate as a "maximum limit, or ceiling" that investigating authorities "shall not

exceed."[1] Inasmuch as the calculation method in Article 9.4 does not allow the resulting margin to contain *any* element of the facts available, there is no basis for an interpretation of Article 6.10 that would permit investigating authorities to routinely assign total "facts available" margins to firms that they do not individually investigate.

27. Third, Articles 1, 5, 6.5, and 6.6 of the AD Agreement provide context for confirming that Articles 6.1, 6.8, 6.10, 9.4, and paragraph 1 of Annex II, require an investigating authority to (1) actively determine the universe of potential respondents; (2) actively send questionnaires to those producers or exporters from which it is seeking information; and (3) either take active steps to investigate every known producer and exporter, or else examine a representative sample and assign a neutral "all others" margin that is not based on the facts available to everyone else.

2. Economía's Application of an Adverse "Facts Available" Dumping Margin to Producers Rice Breached Articles 6.8, 9.4, and 9.5, and Paragraphs 3, 5, 6, and 7 of Annex II of the AD Agreement

28. Given these requirements, Economía breached its WTO obligations by applying a margin based on adverse "facts available" to Producers Rice. Producers Rice was named in the petition and in the Initiation Notice. The record demonstrates that Producers Rice was an "appearing party" that, with other respondent parties, established a domicile for legal purposes in Mexico in order to participate in the investigation, requested an extension of time to respond to Economía's questionnaire, provided a timely response to that questionnaire, including arguments regarding flaws in the petition, requested and attended a technical information meeting, participated through its representative at the public hearing, offered post-hearing final allegations, and filed "additional remarks." Economía, however, disregarded all of these facts, and only took into account that Producers Rice did not export to Mexico during the six-month POI.

29. Under Article 17.6(i) of the AD Agreement, a panel that is assessing the facts of a matter before it must determine whether the authority's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective. An unbiased and objective investigating authority would not have concluded that Producers Rice had failed to appear in the rice investigation, or that the necessary prerequisites for assigning an adverse facts available margin to Producers Rice were met. Economía's decision to apply adverse facts available to Producers Rice in the absence of any legitimate grounds to do so was inconsistent with Articles 1, 6.2, 6.8, 9.3, 9.4, and 9.5 of the AD Agreement, paragraphs 3, 5, 6, and 7 of Annex II of the AD Agreement, and Article VI:2 of GATT 1994.

30. In addition, Economía breached Articles 6.2 and 6.4 of the AD Agreement by failing to disclose to Producers Rice (and Farmers Rice, Riceland, and Rice Company) the Export Price

[1] Report of the Appellate Body, *United States – Hot-Rolled Steel from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 116.

information that the petitioner used in calculating the adverse facts available margin in the petition.

3. Economía's Application of an Adverse "Facts Available" Dumping Margin to the U.S. Producers and Exporters that It Did Not Examine Breached Articles 6.1, 6.2, 6.6, 6.8, 6.10, 9.4, 9.5, 12.1, and Paragraphs 1 and 7 of Annex II of the AD Agreement

31. Economía breached Articles 6.1, 6.2, 6.6, 6.8, 6.10, 9.4, 9.5, and 12.1 of the AD Agreement, and paragraphs 1 and 7 of Annex II of the AD Agreement, by individually examining only three exporters or producers in the rice investigation and assigning an adverse facts available margin to every other producer and exporter in the United States.

32. For example, Economía made no effort to investigate each exporter or producer of the subject merchandise, choosing instead to (i) send its questionnaire to just the two firms officially designated as exporters in the petition, (ii) investigate only those firms and two other firms that came forward on their own, and (iii) apply an adverse, facts available-based margin to every other producer and exporter in the United States. An objective and unbiased investigating authority would not have concluded that there were only two exporters or producers of long-grain white rice in the United States. Economía's establishment of the facts with respect to this matter was improper, and that by conducting its investigation in this manner, Economía breached Article 6.10.

33. Similarly, Article 6.6 of the AD Agreement requires that authorities "satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based." The petition identified only two U.S. exporters of long-grain milled white rice, and Economía apparently accepted that listing at face value (even though the petition itself relied upon data from another major exporter). Once again, an objective and unbiased investigating authority would not have reached such a conclusion, and Economía's establishment of the facts with respect to this matter was improper.

34. Furthermore, in *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, the Appellate Body found that the calculation method set forth in Article 9.4 for determining the ceiling for the "all others" rate precludes the use of any margins which are calculated, even in part, using facts available. The rate applied by Economía to U.S. rice exporters was not based in part on facts available, as was the case in *United States – Hot-Rolled Steel*. It was based entirely on facts available. Not only that, but the 10.18 percent rate was adverse facts available – a clear breach of Mexico's WTO obligations.

35. Economía also breached Article 6.8 and paragraph 7 of Annex II of the AD Agreement, by using the petition margin without corroborating the underlying information that the petitioner used to calculate the margin. As was the case with respect to Producers Rice, there is no evidence on the record of the rice investigation to suggest that the unexamined exporters and

producers – which were never sent a copy of Economía's antidumping questionnaire – were uncooperative in any way. Moreover, as previously explained, Economía failed to check the presumptions embodied in the petition against independent data available during the investigation, much less to exercise "special circumspection" in its application of the petition information to the unexamined producers and exporters.

36. Finally, Economía's efforts to identify and obtain contact information for interested parties other than those listed in the petition were inadequate. Economía failed to examine the accuracy and adequacy of the CMA's list of only two "known" exporters, a list that did not even include a third exporter, the Rice Company, which was described in the petition (at Annex H) as "one of the largest U.S. exporters as regards paddy rice and white milled rice." In this manner, Economía breached Article 12.1 of the AD Agreement, which requires authorities to notify interested parties about the initiation of an investigation.

4. Economía's Failure to Provide Sufficient Information on the Findings and Conclusions of Fact and Law and the Reasons that Led to the Imposition of the Adverse Facts Available-Based Margin on Producers Rice and the Unexamined Exporters and Producers Breached Article 12.2 of the AD Agreement

37. Article 12.2 of the AD Agreement requires that the public notice of any preliminary or final antidumping determination "shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." Despite this requirement, Economía provided only the most summary rationale for its decision to base the margin for Producers Rice and the unexamined exporters and producers on adverse facts available. Furthermore, Economía's references to Article 54 of the Mexican Foreign Trade Act as a supposed basis for its decision to apply a facts available margin to these firms were unfounded.

5. Economía's Application of an Adverse Facts Available-Based Margin to Producers Rice and the Unexamined Exporters and Producers Breached Articles 1 and 9.3 of the AD Agreement and Article VI:2 of GATT 1994

38. Article 9.3 of the AD Agreement states that "[t]he amount of anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Because Economía failed to calculate the residual margin on the basis of the neutral formula set forth in Article 9.4, the amount of the margin it assigned to Producers Rice and the unexamined exporters and producers exceeded the margin of dumping established under Article 2, and thus breached Article 9.3.

39. Article 1 of the AD Agreement provides that an antidumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.

Because Economía's conduct of the rice investigation breached numerous other provisions of the AD Agreement, Economía also breached Article 1.

40. Finally, as a result of the adverse assumptions made in assigning an adverse margin to non-shipper Producers Rice and to the other non-examined companies in the rice investigation, the antidumping duty levied on their products was "greater in amount than the margin of dumping in respect of such products" which could permissibly have been calculated in accordance with the provisions of the AD Agreement. Because the duties Mexico levied on these "all others" companies was, and continues to be, greater in amount than the appropriate margin of dumping, Mexico violated Article VI:2 of GATT 1994.

III. Mexico's Foreign Trade Act and its FCCP

A. Articles 53, 64, 68, 89D, 93V, and 97 of Mexico's Foreign Trade Act, and Section 366 of Mexico's FCCP, are Inconsistent "As Such" with Several of Mexico's Obligations Under the AD and SCM Agreements

41. Various provisions of Mexico's Foreign Trade Act and its FCCP are inconsistent with Mexico's WTO obligations.

42. First, Article 53 of the Foreign Trade Act requires interested parties to present arguments, information, and evidence to the investigating authorities within 28 days of the day after publication of the initiation notice. This provision breaches Articles 6.1.1 and 12.1.1 of the AD and SCM Agreements, respectively, by counting the time to respond from the date of initiation instead of the date of receipt, and by preventing the investigating authorities from considering and granting extension requests.

43. Second, Article 64 of the Foreign Trade Act is the provision of Mexican law that applies to the calculation of individual antidumping and countervailing duty margins and the application of margins to exporters and producers that are not individually examined and that do not receive individual margins. The provision does not, however, provide for the application of a neutral "all others" margin to the unexamined firms. Rather, Article 64 requires the investigating authorities to apply a margin based on adverse facts available – specifically, the highest margin obtained from the facts available – to any firm that does not receive an individual margin. Article 64 requires this outcome even for a firm, like Producers Rice, that participates in the investigation and demonstrates that it had no exports during the period of investigation. By requiring the investigating authorities to assign rates in this manner, Article 64 is inconsistent "as such" with Mexico's obligations under Articles 6.8, 9.3, 9.4, and 9.5 of the AD Agreement, paragraphs 1, 3, 5, and 7 of Annex II of the AD Agreement, and Articles 12.7 and 19.3 of the SCM Agreement.

44. Third, Article 68 of the Foreign Trade Act is the provision of Mexican law that applies to the review of final antidumping and countervailing duty margins determined in investigations. By requiring investigating authorities to conduct reviews of producers that were found not to be

dumping or receiving countervailable subsidies during the original investigation, Article 68 is inconsistent with Mexico's obligations under Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement.

45. In addition, Article 68 of the Foreign Trade Act also requires producers and exporters seeking reviews of their own antidumping or countervailing duty margins to demonstrate that their sales during the review period were "representative." The imposition of this "representativeness" requirement is inconsistent as such with Articles 9.3 and 11.2 of the AD Agreement, and with Article 21.2 of the SCM Agreement.

46. Fourth, Article 89D of the Foreign Trade Act is the provision of Mexican law that implements the expedited review provisions of the AD and SCM Agreements. By impermissibly restricting the ability of parties to obtain such reviews, Article 89D breaches Mexico's obligations under Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement.

47. Fifth, Article 93V of the Foreign Trade Act provides for the application of fines on importers that enter products subject to antidumping and countervailing duty investigations while such investigations are underway. This provision constitutes a non-permissible specific action against dumping or a subsidy that is inconsistent with Mexico's obligations under Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement.

48. Finally, Article 366 of Mexico's FCCP and Articles 68 and 97 of Mexico's Foreign Trade Act preclude Mexican authorities from conducting reviews of antidumping and countervailing duties while a judicial review of the underlying antidumping or countervailing duty measure is ongoing, including a "binational panel" review under Chapter Nineteen of the *North American Free Trade Agreement*. By requiring the Mexican authorities to reject requests for such reviews, Articles 366, 68, and 97 breach Articles 9.3, 9.5, and 11.2 of the AD Agreement, and Articles 19.3 and 21.2 of the SCM Agreement.

49. Article 64 of the Foreign Trade Act exacerbates the harm caused by the fact that Articles 366, 68 and 97 preclude the Mexican authorities from conducting the reviews that WTO rules require. As previously discussed, Article 64 requires Economía to apply an adverse, facts available-based antidumping or countervailing duty margin to *every* producer or exporter in the country subject to the investigation, other than those few that receive individual rates, even if the firms subject to the adverse, facts available-based margins demonstrate that they had no shipments during the period of review or were never even sent a questionnaire. These firms lose twice: Economía first assigns them an adverse (often petition-based) margin that has no relation to reality but effectively locks them out of the Mexican market, and it then denies them any review, and thus any opportunity to obtain an individual rate, over the course of a judicial challenge that may take years.