

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

*Mexico – Definitive Anti-dumping Measures
on Beef and Rice
(Complaint with Respect to Rice)*

(AB-2005-6)

APPELLEE SUBMISSION
OF THE UNITED STATES OF AMERICA

September 6, 2005

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Panel Report, <i>Argentina – Poultry Anti-Dumping Duties</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003
Appellate Body Report, <i>Brazil – Aircraft</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999
Appellate Body Report, <i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997
Appellate Body Report, <i>EC – Bed Linen 21.5</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/R, adopted 24 April 2003
Appellate Body Report, <i>EC – Cast Iron Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
Appellate Body Report, <i>EC – Hormones</i>	Appellate Body Report, <i>European Communities – Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998
Appellate Body Report, <i>India – Patents</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998
Panel Report, <i>Japan – Agricultural Products II</i>	Panel Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/R, adopted 19 March 1999, as modified by the Appellate Body Report, WT/DS76/AB/R
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Panel Report, <i>Thailand – Steel Angles</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R
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Appellate Body Report, <i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001
Appellate Body Report, <i>US – Wheat Gluten Safeguard</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001
Appellate Body Report, <i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. This submission responds to the Appellant Submission that Mexico filed on July 27, 2005 with respect to the report of the Panel in *Mexico – Definitive Anti-Dumping Measures on Beef and Rice (Complaint with Respect to Rice)* (“Panel Report”).¹ For the reasons set out in this submission, the United States requests the Appellate Body to reject each of Mexico’s appeals and requests for findings and determinations.

A. *Introduction.*

2. This dispute involves a U.S. challenge to 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. The Panel correctly found that several aspects of this measure were 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”).

3. The United States also challenged certain provisions of Mexico’s Foreign Trade Act (“FTA”). The Panel correctly found that each of the challenged provisions is inconsistent “as such” with Mexico’s obligations under the AD Agreement and/or the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”).

B. *The Appellate Body Should Reject Mexico’s Appeal that Certain U.S. Claims Were Not Within the Panel’s Terms of Reference.*

4. During the Panel proceedings, Mexico raised a number of meritless procedural objections in an unsuccessful effort to shield its WTO-inconsistent measures from the Panel’s scrutiny. The Panel properly rejected Mexico’s arguments and made the findings the United States had requested. Mexico is repeating its efforts on appeal, albeit on different grounds than it submitted to the Panel. Mexico says it is appealing the Panel’s rejection of its claim that the U.S. panel request was inconsistent with Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”) because it included legal claims in the panel request that were not in the U.S. consultation request. In actuality, Mexico never argued this to the Panel. In any event, its arguments lack merit, and they provide no basis for reversing any of the Panel’s findings.

C. *The Panel Correctly Found WTO-Inconsistencies in Mexico’s Imposition of Antidumping Duties on U.S. Long-Grain White Rice.*

5. ***Economía’s Use of a Stale Period of Investigation:*** In the *Rice* investigation, the petitioning industry (“petitioner”) asked the Mexican investigating authority, Economía, to use March – August 1999 as the period of investigation (“POI”) for its dumping investigation and March – August of 1997, 1998, and 1999 for its evaluation of injury. Economía accepted the

¹ WT/DS295/R, circulated June 6, 2005.

petitioner's 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.

6. The Panel correctly found that by choosing to base its determination of injury on a period of investigation which ended more than fifteen months before the initiation of the investigation, Mexico failed to comply with Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement. Mexico's arguments in response to the Panel's findings amount to little more than assertions that the AD Agreement creates no obligations with respect to this issue and that Economía's investigation was objective and based on positive evidence because Mexico says it was. Mexico has provided no basis to reverse the Panel's findings, and the Appellate Body should uphold them.

7. ***Economía's Decision to Limit Its Investigation to Only Six Months of 1997, 1998, and 1999:*** The petitioner in the rice investigation asked Economía to examine only the March to August time period because imports were allegedly concentrated in this period. Economía agreed with the petitioner 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).

8. The Panel correctly found that Economía's investigation was inconsistent with Article 3.1 of the AD Agreement because it was not based on positive evidence and did not allow for an objective examination as it necessarily, and without any proper justification, provided only a part of the picture of the situation. The Panel also correctly found that the particular choice of the limited POI was not that of an unbiased and objective investigating authority. Finally, the Panel correctly found that Mexico breached Article 3.5 of the AD Agreement because Economía failed to examine "all relevant evidence" before it. Mexico's arguments on this issue mischaracterize the Panel's legal findings, disregard its factual findings, and provide no basis for reversing the Panel's conclusions.

9. ***Economía's Conduct of its Injury Analysis:*** The Panel correctly found that Mexico breached Articles 3.1 and 3.2 of the AD Agreement by failing to conduct an objective examination, based on positive evidence, of the price effects and import volumes of the allegedly dumped imports. Mexico's arguments in response to the Panel's findings amount to little more than a recitation of previous Appellate Body and panel findings that do not support its position; a bald assertion that the AD Agreement establishes no particular methodologies so Mexico's methodology is necessarily permissible; and unfounded attacks on the ways in which the Panel weighed the evidence before it. Mexico fails to recognize that an investigating authority's ability to devise its own methodologies in the first instance does not mean that the authority is free to use a methodology that results in an investigation that is not objective and based on positive evidence – as Mexico's did. The Panel's findings were correct, and the Appellate Body should uphold them.

10. ***Economía’s Failure to Exclude Firms with Antidumping Margins of Zero Percent from the Antidumping Measure:*** Economía found that two of the U.S. exporters that it examined were not dumping. Nevertheless, Economía applied the antidumping measure to both exporters, and each exporter remains subject to future reviews and the possible application of antidumping duties. The Panel correctly found that Economía’s action breached Article 5.8 of the AD Agreement. Mexico’s arguments on appeal are based on a misinterpretation of Article 5.8 and provide no basis for reversing the Panel’s findings.

11. ***Economía’s Application of an Adverse “Facts Available” Dumping Margin to a Cooperative Non-Exporting Company:*** The U.S. rice exporter Producers Rice was a fully cooperative respondent that participated in Economía’s dumping investigation and demonstrated that it had no shipments of the subject merchandise during the POI. Nevertheless, Economía applied an adverse facts available-based dumping margin, taken from the petition, to the firm. The Panel correctly found that Economía’s action breached Article 6.8 and paragraph 7 of Annex II of the AD Agreement. Mexico does not even attempt to address the merits of the U.S. claim, and it does not address the substance of the Panel’s findings. Its arguments provide no basis for reversing the Panel’s findings, and the Appellate Body should reject them.

12. ***Economía’s Application of an Adverse “Facts Available” Dumping Margin to U.S. Exporters and Producers That it Did Not Even Investigate:*** The Panel correctly found that Economía breached Articles 6.1, 6.8, 6.10, and 12.1 and paragraph 1 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-based margin, taken from the petition, to every other producer and exporter in the United States.

13. First, the Panel found that Economía breached Article 6.10 by “remaining entirely passive in the identification of exporters or producers interested in the investigation, and by not calculating an individual margin of dumping for each exporter or producer that was known or should reasonably have been known” to it. Mexico’s arguments with respect to this issue simply assert points that are not in dispute and fail to address the substance of the Panel’s analysis.

14. Second, the Panel correctly found that Economía breached Articles 6.1 and 6.8 and paragraph 1 of Annex II because it applied the facts available to every other exporter and producer of long-grain white rice in the United States without first providing them the individual notice and opportunity to respond that these provisions require. Mexico’s arguments on appeal are based on a selective and incomplete reading of the relevant WTO provisions that seeks to shift its own obligations onto the government of the exporting country and provides no basis for reversing the Panel’s findings.

15. Third, the Panel correctly found that Economía breached Article 12.1 of the AD Agreement by failing to provide notice that it had initiated an investigation to each of the interested parties known to have an interest in the investigation. Mexico’s argument that it notified the exporters and producers that it knew of – in addition to being contradicted by the

facts – simply begs the question of what it means to be “known to the investigating authorities” within the meaning of Article 12.1 and fails to demonstrate any error in the Panel’s findings.

D. *The Panel Correctly Found That Several Provisions of Mexico’s Foreign Trade Act Are Inconsistent “As Such” with Mexico’s WTO Obligations.*

16. **Article 53 of the FTA:** Article 53 of the FTA 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. The Panel correctly found that this provision is inconsistent “as such” with Articles 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement because it prevents Economía from providing exporters and producers the full 30-day response time that the AD and SCM Agreements require. Mexico argues on appeal that it is only required to provide a full 30-day response time to firms that it sends the questionnaire to at the outset of an investigation. The Panel rejected this argument, and the Appellate Body should as well.

17. **Article 64 of the FTA:** Article 64 of the Foreign Trade Act requires Economía to apply the highest margin obtained from the facts available to any firm that does not receive an individual margin. The Panel correctly found that this requirement is inconsistent “as such” with Mexico’s obligations under Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement. Mexico’s arguments on appeal rely on a selective reading of fragments of Article 6.8 and Annex II of the AD Agreement and provide no basis for reversing the Panel’s findings.

18. **Article 68 of the FTA:** Article 68 of the Foreign Trade Act requires Economía to conduct reviews of producers that were found not to be dumping or receiving countervailable subsidies during the original investigation. The Panel correctly found that this requirement is inconsistent with Mexico’s obligations under Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement. Mexico’s arguments to the contrary are based on a misinterpretation of the relevant WTO provisions and provide no basis for reversing the Panel’s findings.

19. 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 Panel correctly found that 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. Mexico argues that the AD and SCM Agreements are “silent” with respect to the conditions that a Member may impose on the conduct of reviews and that its “representativeness” requirement is therefore permissible. Mexico is wrong, and the Appellate Body should uphold the Panel’s findings.

20. **Article 89D of the FTA:** Article 89D of the Foreign Trade Act addresses the expedited review provisions of the AD and SCM Agreements. Like Article 68, Article 89D imposes an impermissible “representativeness” requirement as a condition for obtaining such reviews. The

Panel correctly found that this requirement is inconsistent with Mexico's obligations under Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement. Once again, Mexico mistakenly argues that the AD and SCM Agreements are silent on this issue. The Appellate Body should reject Mexico's argument.

21. **Article 93V of the FTA:** 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. The Panel correctly found that 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. Although Mexico argues that the Panel's analysis of this provision breached Article 11 of the DSU, it fails to substantiate its arguments and seeks to rely on facts that it never submitted to the Panel. Mexico's arguments provide no basis for reversing the Panel's findings.

22. **Articles 68 and 97 of the FTA:** Articles 68 and 97 of Mexico's Foreign Trade Act preclude Economía from conducting reviews of antidumping and countervailing duties while a judicial review of the underlying antidumping or countervailing duty measure is ongoing. The Panel correctly found that this requirement is inconsistent with Mexico's obligations under Articles 9.3 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement. Mexico's argumentation on this issue focuses primarily on disputing the Panel's factual findings, which are not properly subject to appeal. Mexico's legal argumentation is based on a misinterpretation of the term "definitive duty" and provides no basis for reversing the Panel's findings.

II. ARGUMENT

A. *The Panel Correctly Found that the U.S. Panel Request Was Consistent With Article 6.2 of the DSU.*

23. During the Panel proceeding, Mexico raised a number of unfounded procedural objections regarding many of the U.S. claims. The Panel correctly rejected them. Now, on appeal, Mexico is renewing its request, although on different grounds than it used before the Panel. Mexico's arguments lack merit, and the Appellate Body should reject them.

24. The substantive basis for Mexico's procedural appeal is that the U.S. panel request contained several legal claims that did not appear in the U.S. consultation request. Mexico argues that the Panel erred in allegedly finding this to be not inconsistent with Article 6.2 of the DSU, and asks the Appellate Body to reverse the Panel's alleged findings.²

² See, e.g., Mexico's Appellant Submission, paras. 1, 6.

25. As an initial matter, Mexico mischaracterizes the Panel’s findings. The Panel made no findings on whether it was consistent with Article 6.2 of the DSU to include claims in a panel request that were not included in the consultation request because Mexico never made such an allegation. In actuality, Mexico argued that it was inconsistent with Articles 4.5 and 4.7 of the DSU to include such claims in the panel request. This can be seen in paragraphs 7.38 to 7.45 of the Panel Report, which analyzes Mexico’s Article 4.5 and 4.7 arguments. It can also be seen in Mexico’s Appellant submission, which asserts that “Mexico clearly argued that there had been a violation of Article 6.2 of the DSU,” but then cites an excerpt from its first written submission discussing Articles 4.5 and 4.7.³ Mexico’s error can also be seen in the appeal notice itself, which purports to appeal the Panel’s findings concerning Article 6.2 of the DSU, but cites the paragraphs of the Panel Report that relate to the Panel’s findings concerning Articles 4.5 and 4.7 of the DSU.⁴

26. In actuality, Mexico’s only claims before the Panel concerning Article 6.2 of the DSU were that some of the claims in the U.S. panel request allegedly failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, and that one section of the request allegedly failed to identify a specific measure at issue.⁵ Neither of these claims had anything to do with the U.S. consultation request; neither of them even mentioned the U.S. consultation request. The Panel rejected Mexico’s arguments on both of these claims, and Mexico did not appeal the Panel’s findings.⁶ Furthermore, the Panel did consider whether it had jurisdiction to consider the U.S. claims that were not in the consultation request when it evaluated Mexico’s Article 4.5 and 4.7 claims, and it concluded that it did.

27. Therefore, even if Mexico had argued that the U.S. panel request was inconsistent with Article 6.2 of the DSU because it included legal claims that did not appear in the consultation request, its arguments would have failed. The same reasoning the Panel applied in rejecting Mexico’s claims under Article 4 of the DSU would have applied to the Article 6.2 issue that Mexico is now raising. It is well established that a Panel’s terms of reference are established by the panel request, not the consultation request,⁷ and at least one panel has rejected the argument

³ Mexico’s Appellant Submission, para. 3. Similarly, each of the panel findings that Mexico cites in its Appellant submission related to Mexico’s Article 4.5 and 4.7 claims. *See* Mexico’s Appellant Submission, nn.4, 5, 23, *citing* Panel Report, paras. 7.41, 7.43, 7.45, respectively.

⁴ WT/DS295/6, para. 1 and n.1.

⁵ Panel Report, para. 7.27.

⁶ Mexico’s Notice of Appeal only references the paragraphs in the panel report addressing Mexico’s Article 4.5 and 4.7 claims, not the paragraphs addressing its Article 6.2 claims. *See* WT/DS295/6, para. 1 and n.1.

⁷ *See, e.g.,* Appellate Body Report, *US – German Steel*, para. 124 (stating that “pursuant to Article 7 of the DSU, a panel’s terms of reference are governed by the request for establishment of a panel.”).

that Mexico is urging here.⁸ Furthermore, in disputes where the Appellate Body has examined whether a particular legal claim was within a panel’s terms of reference, it has looked to whether the claim was included in the panel request, not the consultation request.⁹

28. It would make little sense to limit the legal claims that may be included in a panel request to those included in the consultation request because one of the purposes of consultations is to foster a better understanding of the relevant measures and concerns of the various Members in order to promote a satisfactory adjustment of the matter. For example, the Appellate Body discussed this aspect of the consultation process in finding that there need not be a precise identity between the *measures* that were the subject of the consultations and the *measures* identified in the panel request:

We do not believe . . . that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the SCM Agreement, require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel. As stated by the Panel, “[o]ne purpose of consultations, as set forth in Article 4.3 of the SCM Agreement, is to ‘clarify the facts of the situation’, and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel.”¹⁰

29. If there is no need to have a precise and exact identity between the *measures* included in the consultation and panel requests, the same logic would apply with respect to the legal claims concerning the measures. Consultations are often the first time that the Member maintaining the measure provides a detailed description of the measure and relevant facts and legal documents, and it is unrealistic to expect that a complaining Member will be able to work out all of its claims and positions in advance of those discussions. As the Panel stated in addressing Mexico’s arguments pertaining to Article 4 of the DSU:

[T]he fact that certain provisions were added to the list of alleged violations in the request for establishment compared to the request for consultations is a consequence of the consultation

⁸ Specifically, the panel in *Japan – Agricultural Products II* rejected Japan’s argument that the United States could not pursue a claim under Article 7 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* that was included in the panel request, but not the consultation request. The Panel reasoned that it was the panel request that established its terms of reference, and the panel request included the Article 7 claim. Panel Report, *Japan – Agricultural Products II*, para. 8.4(i).

⁹ See, e.g., Appellate Body Report, *Brazil – Desiccated Coconut*, p. 22 (stating that “all claims must be included in the request for establishment of a panel in order to come within the panel’s terms of reference”); Appellate Body Report, *India – Patents*, para. 89 (stating that “a claim *must* be included in the request for establishment of a panel in order to come within a panel’s terms of reference”) (emphasis in original).

¹⁰ Panel Report, n. 56, citing Appellate Body Report, *Brazil Aircraft*, para. 132 (footnote in AB report omitted in the panel report).

process which serves the purpose of clarifying the facts of the situation enabling the complainant to focus the scope of the matter with respect to which it seeks the establishment of a panel.¹¹

30. Mexico anchors its argument on the fact that Articles 4.4 and 6.2 of the DSU each refer to the “legal basis” of a complaint.¹² As it fleetingly acknowledges, however, this is not all that the two articles say. The DSU reflects the difference between requests for panels and requests for consultations by providing different requirements for each. With respect to panels, the DSU requires that a request for the establishment of a panel provide a “brief summary of the legal basis of the complaint sufficient to present the problem clearly.”¹³ However, with respect to consultations, the DSU merely requires that requests for consultations give “an indication” of the legal basis for the complaint.¹⁴

31. Finally, it is worth noting that Mexico’s own practice in WTO dispute settlement proceedings indicates that it does not believe its own arguments on this issue. For example, Mexico’s panel request in *United States – Cement from Mexico* includes approximately 70 discrete legal claims that it did not include in its consultation request. To provide just one illustrative comparison, Mexico’s consultation request stated that:

The determination of the Commission to the effect that “all or almost all” US producers from southern United States would suffer material injury in the event of the anti-dumping measure being terminated was inconsistent with Articles 4 and 11.3 of the Anti-Dumping Agreement.¹⁵

By contrast, the portion of Mexico’s panel request addressing the very same issue stated that:

The Commission’s finding that “all or almost all” of the producers in the “Southern Tier” of the United States would suffer material injury in the event of termination of the anti-dumping duties is inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.7, 3.8, 4.1(ii), 6.1, 6.2, 6.4, 6.9, 11.1, 11.3, and 11.4 of the Anti-Dumping Agreement.¹⁶

32. Mexico’s approach in *United States – Cement from Mexico* is not an isolated example.¹⁷

¹¹ Panel Report, para. 7.43.

¹² See, e.g., Mexico’s Appellant Submission, para. 9(i).

¹³ DSU, Art. 6.2.

¹⁴ DSU, Art. 4.4.

¹⁵ WT/DS281/1, Section B.3.

¹⁶ WT/DS281/2, Section B.3.

¹⁷ For example, there is a similar lack of identity in Mexico’s consultation and panel requests in *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*. Cf. WT/DS282/1 with WT/DS282/2.

33. In summary, although the Panel did not address the precise issue that Mexico is raising (because Mexico never raised the issue before the Panel), it did correctly reject Mexico's argument that the U.S. panel request was inconsistent with Article 6.2 of the DSU with respect to providing a sufficient summary of the legal basis of the complaint.¹⁸ It also correctly rejected Mexico's argument that the inclusion of additional legal provisions not listed in the consultation request was inconsistent with Articles 4.5 and 4.7 of the DSU.¹⁹ Mexico's arguments to the contrary are without merit and the Appellate Body should reject them.

B. *Mexico Has Demonstrated No Basis for Reversing the Panel's Findings Concerning the Claims Relating to Economía's Injury Determination.*

34. The Panel made findings concerning three claims that the United States raised with respect to Economía's injury determination. Each of these claims related to Economía's limited efforts to gather and examine data in the *Rice* investigation, and implicated, *inter alia*, Article 3.1 of the AD Agreement. Article 3.1 provides that:

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

35. The Appellate Body has described Article 3.1 as "an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to injury determinations.²⁰ The Appellate Body has also observed that "[t]he thrust of the investigating authorities' obligation, in Article 3.1, lies in the requirement that they base their determination on 'positive evidence' and conduct an 'objective examination'."²¹ The Panel properly analyzed Mexico's obligations under this and other provisions of Article 3, and after a thorough examination of the facts in this dispute, correctly determined that Economía's investigation of injury was not based on "positive evidence" and that Economía failed to conduct the "objective examination" that Article 3.1 requires. Mexico's arguments on appeal fail to demonstrate any error in the Panel's findings.

¹⁸ Panel Report, paras. 7.26-7.37.

¹⁹ Panel Report, paras. 7.39-7.45.

²⁰ Appellate Body Report, *Thailand – Steel Angles*, para. 106.

²¹ Appellate Body Report, *United States – Hot-Rolled Steel*, para. 192.

1. The Panel Correctly Found That Mexico Acted Inconsistently with Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement by Choosing to Base its Injury Determination on a Period of Investigation Which Ended More than Fifteen Months Before the Initiation of the Investigation.

36. The first of the three injury issues that Mexico is appealing concerns Economía's decision to base its dumping and injury analyses on a data set that ended fifteen months prior to the initiation of its investigation, and nearly three years prior to the final determination. The Panel correctly found that by choosing to proceed in this manner, Economía acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement.²² Mexico's arguments to the contrary provide no basis for reversing the Panel's findings, and the Appellate Body should uphold them.

37. The Panel made a number of factual findings that provide useful background for the matters in dispute. The petitioner, the Mexican Rice Council (Consejo Mexicano del Arroz, A.C. or "CMA"), filed its petition on June 20, 2000. The Mexican investigating authority initiated its investigation six months later, on December 11, 2000. It published its final determination on June 5, 2002.²³ The petitioner asked Economía to define the period of investigation ("POI") for the dumping analysis as March to August 1999, and the POI for the injury analysis as March to August 1997, 1998, and 1999.²⁴ Economía accepted the petitioner's request, with the result that there was a 15-month gap between the end of the POI (August 1999) and the initiation of the investigation (December 2000).²⁵ Economía took no steps during its investigation to update its dumping and injury data to account for this 15-month gap.²⁶ Nor did Economía give any practical or other reasons, either during the investigation or during the Panel proceedings, why it was unable to take any such steps to update its data.²⁷ The only reason Economía gave for selecting the particular POI was that the petitioner requested it to do so, and that its general practice is to accept whatever POI the petitioner requests.²⁸ In its final determination, Economía determined, on the basis of dumping and injury data that was by then three to five years old, that imports from the United States were causing injury to the domestic industry.

²² The Panel exercised judicial economy with respect to the U.S. claims under Article 1 of the AD Agreement and Article VI of the GATT 1994. Panel Report, para. 7.65.

²³ See Panel Report, paras. 2.2-2.4, 2.7, 7.64.

²⁴ Panel Report, para. 7.64.

²⁵ Panel Report, para. 7.64.

²⁶ Panel Report, para. 7.64.

²⁷ Panel Report, para. 7.64.

²⁸ Panel Report, para. 7.64.

38. The Panel correctly found that Economía’s decision to base its findings on such stale data was inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement. Its analysis was straightforward and thorough. It first examined Article 3.1 of the AD Agreement, which requires injury determinations to be based on positive evidence and involve an objective examination.²⁹ The Panel noted that the choice of POI is crucial in this respect, because “it determines the data that will form the basis for the assessment of dumping, injury and the causal relationship between dumped imports and the injury to the domestic industry.”³⁰

39. The Panel then noted that there is no “specific and express” rule concerning the POI to be used in antidumping investigations.³¹ Nevertheless, the Panel concluded, and Mexico agreed, that an investigating authority’s discretion in setting a POI is not boundless. Although the Panel felt it was not necessary to “decide in the abstract” whether the POI must always end as close as practicable to the date of initiation of the investigation (as the United States had argued), it did feel that “there is necessarily an inherent real-time link” between the investigation that leads to the imposition of an antidumping measure and the data on which the investigation is based.³²

40. The Panel found textual support for its view in several provisions of the AD Agreement and the GATT 1994, including Article VI:2 of the GATT 1994 and Article 3.5 of the AD Agreement.³³ Article 3.5, for example, indicates that an investigating authority must demonstrate that dumped imports *are causing* injury. Given these requirements, and in light of the inevitability of using “historical” data to draw conclusions about the present, the Panel found that “more recent data is likely to be inherently more relevant and thus especially important to the investigation.”³⁴ The Panel found contextual support for its interpretation in Article 14.2 of the AD Agreement,³⁵ and it found further “useful support” in a Recommendation of the Anti-Dumping Committee.³⁶

41. On the basis of its analysis, the Panel concluded that “[i]t is necessary to base a determination of dumping causing injury on data that is pertinent or relevant with regard to the

²⁹ Panel Report, para. 7.55.

³⁰ Panel Report, para. 7.56.

³¹ Panel Report, para. 7.57.

³² Panel Report, para. 7.57.

³³ Panel Report, para. 7.57.

³⁴ Panel Report, para. 7.58.

³⁵ Panel Report, para. 7.59-7.60.

³⁶ Specifically, the *Recommendation concerning the Periods of Data Collection for Anti-Dumping Investigations*, G/ADP/6, adopted May 5, 2000. See Panel Report, para. 7.62 & nn.76-77. Mexico attributes more importance to the recommendation than the Panel did. Mexico Appellant’s submission, paras. 62-63. The Panel, recognizing that the Recommendation is non-binding and creates no new obligations, stated only that it provided further support for its independent interpretation of the AD Agreement. Panel Report, para. 7.62.

current situation, taking into account the inevitable delay caused by the practical need to conduct an investigation.”³⁷ The Panel further stated with respect to this “inevitable delay” that:

The requirement of a time-consuming and sometimes complicated investigation to demonstrate the existence of dumping and the ensuing injury poses a practical impediment to a complete identity in time between the imposition of the measure and the conditions for such imposition, i.e. dumping causing injury. Although this practical problem may lead to the situation in which any determination of dumping causing injury has by the time of the imposition of the measure become more of a proxy than a real time assessment of the current situation, it would, in our view, not be correct to be led by the practical necessity to examine the past to assess the present to accept that an investigating authority could justifiably base itself on old data to the exclusion of more recent data which was available and usable. To the contrary, the fact that an investigation of up to 12 months may have to be conducted to determine dumping, injury and the causal link magnifies the importance of having a period of data collection which ends as closely as possible to the date of initiation, as by the time of the possible imposition of the measure another 12 months may have passed.³⁸

42. The Panel then examined the facts of the *Rice* investigation, and correctly found that the 15-month gap between the end of the POI and the initiation of the investigation was sufficient to “impugn the reliability” of Economía’s investigation:

This fifteen month gap between the end of the period of investigation and the initiation of the investigation amounts to a relatively lengthy hiatus. A great deal could have happened - or changed - over a fifteen month period, and there is simply no evidence on record in respect of it. A hiatus of such a duration is, in our view, sufficiently long as to impugn the reliability of the period of investigation to deliver, for the purposes of a determination, evidence that has the requisite pertinence or relevance (see para. 7.55 supra). In other words, given the passage of time and the uncertainty about the factual situation in that relevant interim, the information lacks credibility and reliability, thereby failing to meet the criterion of “positive evidence” pursuant to Article 3.1 of the AD Agreement.³⁹

43. The Panel thus concluded that the rice investigation was inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement.

44. Mexico’s arguments in response to the Panel’s findings provide no basis for reversing them. Mexico first makes the transparently incorrect assertion that the U.S. claim on this issue was that Economía’s use of a stale POI was inconsistent with Article 5.1 of the AD Agreement

³⁷ Panel Report, para. 7.61.

³⁸ Panel Report, para. 7.63.

³⁹ Panel Report, para. 7.64.

and that all of the other U.S. claims were premised on such a finding.⁴⁰ Mexico’s own citation of the U.S. panel request completely refutes its argument. As Mexico properly notes, the relevant portion of the U.S. request stated that Mexico’s antidumping measure was inconsistent with “Article VI of the GATT 1994 and Articles 1, 3.1, 3.2, 3.4, 3.5, and 4.1 of the AD Agreement because Mexico . . . failed to collect or examine recent data”⁴¹ There is no mention of any breach of Article 5.1 of the AD Agreement, and the Appellate Body should summarily reject Mexico’s arguments to the contrary.

45. Mexico next argues that the Panel’s finding of an inherent “real-time link” between the investigation leading to the imposition of a measure and the data on which the investigation is based contradicts its recognition that the data itself will inevitably relate to the past.⁴² But Mexico’s citation of the Panel’s findings omits the portion of the report where the Panel addresses this very point. As the United States noted above, the Panel acknowledged that the need to conduct an investigation means there will be an “inevitable delay” between the imposition of a measure and the data providing the basis for doing so. Nevertheless, the Panel concluded that it would “not be correct to be led by the practical necessity to examine the past to assess the present to accept that an investigating authority could justifiably base itself on old data to the exclusion of more recent data which was available and usable,”⁴³ as Economía did in the *Rice* investigation. Thus, Mexico’s assertion that there was a contradiction in the Panel’s reasoning is baseless.

46. Mexico also takes issue with the Panel’s observation that Articles 3.5 and 11.1 of the AD Agreement and Article VI of the GATT 1994 use the present tense, because certain provisions in the French and Spanish versions of the AD Agreement refer to terms in the future tense.⁴⁴ In Mexico’s view, this indicates that the terms should not be interpreted in “the narrow and literal sense.” It is not clear what Mexico means by this. The Panel reached its conclusions after interpreting the ordinary meaning of the terms used, in their context, including the context provided by Article VI of the GATT 1994. Mexico has failed to provide any reasons why the Panel should have disregarded the drafters’ use of the present tense or concluded that the use of the present tense should be interpreted to mean the distant past instead.

⁴⁰ Mexico’s Appellant Submission, paras. 36-38.

⁴¹ Mexico’s Appellant Submission, para. 34, citing WT/DS295/2 (Sept. 22, 2003).

⁴² Mexico’s Appellant Submission, paras. 41-44.

⁴³ Panel Report, para. 7.63.

⁴⁴ Mexico’s Appellant Submission, paras. 45-46.

47. Mexico also argues that if the purpose of an antidumping investigation were to offset dumping which is presently causing injury, the AD Agreement would explicitly say so.⁴⁵ It is difficult to understand Mexico’s argument in light of the language in Article VI:2 of GATT 1994 stating that an antidumping measure may be imposed to “offset or prevent” dumping, and the language in Article VI:1 of GATT 1994 stating that dumping is to be condemned if it “causes or threatens to cause” material injury. Mexico has also disregarded all of the other textual evidence that the Panel referred to in reaching its conclusions. Once again, Mexico has failed to provide any reason why the Panel should have disregarded the use of the present tense in the terms in question.

48. Finally, Mexico asserts that it is wrong to assume that the “remoteness” of a POI (from the initiation of an investigation) implies a direct violation of Article 3.1 of the AD Agreement and that the Panel was wrong to consider that the use of such a POI is *per se* inconsistent with the AD Agreement.⁴⁶ But the Panel never made such a finding. On the contrary, the Panel went to great lengths to explain that an objective examination of positive evidence under Article 3.1 would entail consideration of the most recent information only “to the extent possible,” and “taking into account the inevitable delay caused by the need for an investigation, as well as any practical problems of data collection in any particular case.”⁴⁷ What the Panel was unwilling to accept was that an investigating authority “could justifiably base itself on old data to the exclusion of more recent data that was *available and usable*.”⁴⁸

49. Thus, while Mexico asserts that the Panel failed to analyze the “applicability” of the data that Economía used in its dumping and injury analyses,⁴⁹ the Panel actually did nothing of the sort. Mexico is simply ignoring the numerous factual findings that the Panel reached and that formed an integral part of its conclusion that Economía failed to make a determination of injury that was based on positive evidence, and which involved an objective examination. Specifically:

- Economía’s sole reason for choosing the particular POI was that the petitioner had requested it;
- Economía used the POI even though it had ended 15 months prior to the initiation date;
- Economía made no attempt to update any of the data during the investigation to reflect what had occurred in the 15 months between the end of the POI and the initiation date;

⁴⁵ Mexico’s Appellant Submission, para. 49.

⁴⁶ Mexico’s Appellant Submission, paras. 54-58.

⁴⁷ Panel Report, para. 7.58.

⁴⁸ Panel Report, para. 7.63 (Emphasis supplied).

⁴⁹ Mexico’s Appellant Submission, para. 61.

- Economía imposed the definitive anti-dumping measures on June 5, 2002, almost three years after the end of the POI;
- Mexico did not argue to the Panel that practical problems necessitated the use of this particular POI; and
- Mexico did not argue that it was not possible or practical for other reasons to update the information to cover the 15 months or part thereof from the end of the period of investigation to the initiation date.⁵⁰

50. As the Panel noted in its report, Mexico acknowledged that an investigating authority's discretion in using a certain POI is not boundless, and it admitted that it would be "preposterous" to suggest that an antidumping measure could be imposed on the basis of an investigation that used ten-year-old data.⁵¹ Mexico also accepted "that it would be desirable that the period of investigation end as closely as practicable to the date of initiation of the investigation."⁵² Therefore, while Mexico argues that the Panel should have found that Mexico's interpretation with respect to this issue was a permissible one,⁵³ it is not clear how its interpretation differs from the Panel's. At root, Mexico seems to be arguing little more than that Economía's approach was objective and based on positive evidence because Mexico says it was. The Panel found otherwise, and the Appellate Body should uphold the Panel's findings.

2. The Panel Correctly Found That Mexico Acted Inconsistently with Articles 3.1 and 3.5 of the AD Agreement by Limiting its Injury Analysis to Only Six Months of the Years 1997, 1998, and 1999.

51. The second of the three injury issues that Mexico is appealing concerns Economía's decision to allow the petitioners to set the POI for its dumping analysis as March – August 1999 and its subsequent decision to examine only March – August of 1997, 1998, and 1999 for its injury analysis. The Panel correctly found that by conducting its investigation in this manner, Economía acted inconsistently with Articles 3.1 and 3.5 of the AD Agreement. Mexico's arguments to the contrary provide no basis for reversing the Panel's findings, and the Appellate Body should uphold them.

52. The Panel made several factual findings concerning this issue that provide useful background to the matters in dispute. Specifically, the petitioners in the rice investigation urged Economía to limit its injury examination to only half of each of the years in the three-year POI (specifically, March to August of 1997, 1998, and 1999) because they believed the March –

⁵⁰ Panel Report, para. 7.64.

⁵¹ Panel Report, para. 7.57.

⁵² Panel Report, para. 7.57.

⁵³ Mexico's Appellant Submission, para. 29.

August period reflected the period of highest import penetration.⁵⁴ Although Economía collected injury data for all of 1997-1999, it accepted the petitioners' request and limited its analysis of that data to the March to August period for each of the three years in question, thus disregarding all of the data for September-February of 1997, 1998, and 1999.⁵⁵

53. The Panel correctly found that Economía's decision to ignore half of the injury data for each of the years in the POI was inconsistent with Articles 3.1 and 3.5 of the AD Agreement. With respect to its Article 3.1 findings, the Panel first found that, "absent any proper justification for doing so, an examination on the basis of an incomplete set of data cannot be objective, nor does the selective use of certain data for the injury analysis constitute a proper establishment of the facts on which to base the examination."⁵⁶ It then found that Economía's use of the POI that the petitioners had selected was not unbiased and objective.⁵⁷ On the basis of both of these findings, the Panel properly concluded that:

the injury analysis of the Mexican investigating authority in the rice investigation which was based on data covering only six months of each of the three years examined, is inconsistent with Article 3.1 of the AD Agreement as it is not based on positive evidence and does not allow for an objective examination, as it necessarily, and without any proper justification, provides only a part of the picture of the situation. In addition, we find that the particular choice of the limited period of investigation in this case was not that of an unbiased and objective investigating authority as the authority was aware of, and accepted, the fact that the period chosen reflected the highest import penetration, thus ignoring data from a period in which it can be expected that the domestic industry was faring better.⁵⁸

54. In addition, the Panel also correctly found that "Mexico acted inconsistently with Article 3.5 of the AD Agreement as it failed to base its determination of the existence of a causal relationship between the dumped imports and the alleged injury to the domestic industry on *all relevant evidence* before the authorities, as required by Article 3.5 of the AD Agreement."⁵⁹ The Panel exercised judicial economy on the U.S. claims that Economía's approach also breached Articles 1 and 6.2 of the AD Agreement.

55. Mexico's arguments on this issue mischaracterize the Panel's legal findings, disregard its factual findings, and provide no basis for reversing the Panel's conclusions. For example, Mexico asserts that there is no obligation in the AD Agreement to analyze a full three years' worth of data in injury investigations, and that it was wrong for the Panel to:

⁵⁴ See Panel Report, paras. 7.83 (referring to the petition and Economía's preliminary determination), 7.85.

⁵⁵ Panel Report, para. 7.75.

⁵⁶ Panel Report, para. 7.81-7.82, 7.86.

⁵⁷ Panel Report, paras. 7.83-7.86.

⁵⁸ Panel Report, para. 7.86.

⁵⁹ Panel Report, para. 7.87.

[A]ssume that, as a general rule, information for three full years should be analyzed and, for this reason, if any WTO Member conducts an analysis of injury using parts of each year and compares them, there is a presumption that their methodology is not objective and so they bear the burden of proving that their analysis is objective.⁶⁰

56. But the Panel never made such a finding. On the contrary, the Panel specifically stated that “the AD Agreement does not set forth any express requirement regarding the choice of the period of investigation for the purpose of conducting an injury analysis.”⁶¹ It was Economía, not the Panel, that established a three-year POI, and Economía collected data for the entirety of that period. It then disregarded half of the data it had collected. The United States established a *prima facie* case that Economía’s approach was inconsistent with Articles 3.1 and 3.5 of the AD Agreement, and it fell to Mexico to rebut that *prima facie* case. Mexico failed to do so.

57. Moreover, the Panel acknowledged that there could be situations in which it would be valid to examine only parts of years; Mexico simply failed to provide a convincing and valid reason for its approach.⁶² Mexico specifically stated that reasons relating to “seasonality” were not relevant, for example.⁶³ The only rationale that Mexico provided for Economía’s decision to ignore all of the data for the September to February time periods was that Economía looked at March to August for the dumping determination and that focusing on March to August for the injury determination was necessary to avoid “distortions.”⁶⁴ But it never explained what those alleged distortions were. As the Panel properly found:

[I]t seems that what Mexico refers to as distortions are certain developments which occur in the remaining six months which perhaps undo part of the effect of the imports that entered the country during the six months that were examined. This is precisely the kind of information we consider it is necessary to examine in order for the determination to be that of an objective and unbiased investigating authority.⁶⁵

58. In any event, Mexico’s arguments about the need to avoid distortions are largely beside the point. As the Panel properly found, the only rationale that Economía gave for its approach in its published determinations was that the petitioners asked it to focus on the March to August time period because they believed the March to August period “reflected the period of highest import penetration.”⁶⁶ The Panel also found that Economía confirmed this fact in its preliminary determination, and that Economía clearly accepted the link between the production of paddy rice

⁶⁰ Mexico’s Appellant Submission, para. 76.

⁶¹ Panel Report, para. 7.77.

⁶² Panel Report, para. 7.82.

⁶³ See Panel Report, n.97.

⁶⁴ Panel Report, para. 7.82.

⁶⁵ Panel Report, para. 7.82.

⁶⁶ Panel Report, para. 7.83.

and the imports of subject merchandise that the petitioner had made.⁶⁷ Mexico’s assertion that each of these findings was “incorrect” fails to recognize that the Panel based its findings on Economía’s own published findings.⁶⁸ Mexico also fails to recognize that, as factual findings, these points are not within the scope of appellate review.

59. As the Panel noted in its report, Economía’s decision to disregard the injury data for “an important part of the year in which the domestic industry was fully operational” was inconsistent with Article 3.1 of the AD Agreement for some of the same reasons that the Appellate Body set forth in the *US – Hot-Rolled Steel* dispute when it reasoned that:

[I]t may be highly pertinent for investigating authorities to examine a domestic industry by part, sector or segment. However, as with all other aspects of the evaluation of the domestic industry, Article 3.1 of the *Anti-Dumping Agreement* requires that such a sectoral examination be conducted in an “objective” manner. In our view, this requirement means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry. Different parts of an industry may exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry, even if coupled with an examination of the whole industry, may give a misleading impression of the data relating to the industry as a whole, and may overlook positive developments in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry. We note that the reverse may also be true - to examine only the parts of an industry which are performing well may lead to overlooking the significance of deteriorating performance in other parts of the industry.⁶⁹

60. Mexico’s attempts to argue the irrelevance of *US – Hot-Rolled Steel* are without merit, and serve only to demonstrate why the Appellate Body’s reasoning is, in fact, applicable to the present dispute. For example, Mexico states that the *US – Hot-Rolled Steel* report “refers to a situation in which information necessary to evaluate the state of the domestic industry was disregarded.”⁷⁰ The United States showed, and the Panel found, that this description aptly describes Economía’s rice investigation, because Economía disregarded the injury data for half of its POI.

⁶⁷ Panel Report, para. 7.83.

⁶⁸ Mexico’s Appellant Submission, para. 89.

⁶⁹ Panel Report, para. 7.84, *citing* Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.

⁷⁰ Mexico’s Appellant Submission, para. 88(d).

61. The Appellate Body should also reject Mexico’s attempt to refer to a table containing its own “facts” that allegedly contradict the Panel’s factual findings (which the Panel based on Economía’s published determinations).⁷¹ As the United States pointed out during the panel proceedings, Economía lacked accurate data on imports of U.S. long-grain white rice.⁷² The petitioners’ import data, for example, included unknown quantities of glazed rice and parboiled rice, as well as short-grain rice and medium-grain rice.⁷³ Therefore, there is no uncontroverted basis to conclude that the data in Mexico’s table (which fails to identify its source) accurately reflects the true level of imports of U.S. long-grain white rice during the three-year injury POI. The Panel correctly declined to make any factual findings with respect to the figures in Mexico’s table,⁷⁴ and the Appellate Body should disregard it as well.

62. Finally, Mexico’s arguments regarding paragraph 7.85 of the Panel’s report again misstate the Panel’s findings. First, the Panel did not say that an injury analysis must compare the March – August period to the September – February period, as Mexico alleges.⁷⁵ Rather, the Panel said that, unless there is a proper justification for a different approach, an investigating authority must examine all of the data before it (which, in the rice investigation, included not only the March – August data, but also the September – February data).⁷⁶ Second, there is no contradiction between the first and second sentences of paragraph 7.85.⁷⁷ In the first sentence, the Panel finds that the “acceptance of the period of investigation proposed by applicants because it allegedly represented the period of highest import concentration and would thus show the most negative side of the state of the domestic industry is not what can be expected of an objective and unbiased investigating authority.” In other words, the overall approach – examining only the data that one party believed was better for its case – was inconsistent with Article 3.1 of the AD Agreement. In the second sentence, the Panel merely emphasizes this point: In light of the inherent bias in Economía’s approach, the actual production levels and states of the industry in March – August and September – February were irrelevant.

63. In addition to its finding that Economía’s biased methodology breached Article 3.1 of the AD Agreement, the Panel also properly found that Economía’s decision to ignore the evidence for half of each of the three years of the POI was inconsistent with Article 3.5 of the AD Agreement.⁷⁸ Article 3.5 of the AD Agreement states that the demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of “all relevant evidence” before the investigating authorities. Although

⁷¹ Mexico’s Appellant Submission, paras. 83-84.

⁷² The Panel Report contains a discussion of the unreliability and bias of the methodology that Economía used to determine U.S. import volumes. *See* Panel Report, paras. 7.100-7.107.

⁷³ *See, e.g.*, U.S. Oral Statement at Second Panel Meeting, para. 13.

⁷⁴ Mexico initially submitted the table in its Second Written Submission to the Panel; it was not contained in Economía’s published determinations.

⁷⁵ Mexico’s Appellant Submission, para. 78.

⁷⁶ Panel Report, para. 7.81.

⁷⁷ Mexico’s Appellant Submission, para. 79.

⁷⁸ Panel Report, para. 7.87.

Mexico asserts that the Panel’s Article 3.5 finding was tied to its Article 3.1 findings,⁷⁹ it makes no effort to explain how Economía’s decision to disregard half of the injury information was consistent with the obligation to base its determination of “all relevant evidence” before it.

64. In summary, Mexico’s arguments on this issue provide no basis for the Appellate Body to reverse the Panel’s findings. The Appellate Body should uphold them.

3. The Panel Correctly Found That Mexico Acted Inconsistently with Articles 3.1 and 3.2 of the AD Agreement by Failing to Conduct an Objective Examination Based on Positive Evidence of the Price Effects and Volume of Dumped Imports as Part of its Injury Analysis.

65. Mexico also appeals the Panel’s finding that Mexico breached Articles 3.1 and 3.2 of the AD Agreement by failing to conduct an objective examination, based on positive evidence, of the price effects and import volumes of the allegedly dumped imports.⁸⁰ As with the previous issues that we have already discussed, Mexico’s arguments on this issue provide no basis for reversing the Panel’s findings.

66. At the outset, the United States notes that Mexico’s arguments on this issue amount to little more than a recitation of previous Appellate Body and panel findings that do not support its position; a bald assertion that the AD Agreement establishes no particular methodologies for determining injury so Mexico’s methodology is necessarily permissible; and unfounded attacks on the ways in which the Panel weighed the evidence before it. The United States will address each of these in turn.

67. First, contrary to Mexico’s assertions, the panel and Appellate Body findings in the *Thailand – Steel Angles* case that Mexico cites do not justify the approach that Economía took in its investigation.⁸¹ In actuality, the Appellate Body findings that Mexico cites were addressing a question that is not applicable to the matters at issue in this dispute, and the panel’s findings actually support the approach that the *Rice* panel took in this dispute.

68. The issue the Appellate Body was examining was whether it was necessary for an investigating authority to base its injury determinations only on reasoning and facts that were disclosed to the parties in an antidumping investigation, or whether it could also take into account information on the confidential record of the investigation.⁸² The United States never disputed that Economía was entitled to take confidential information into account in reaching its determinations, so that matter was never at issue. Moreover, Mexico never asserted that there

⁷⁹ Mexico’s Appellant Submission, para. 90.

⁸⁰ The Panel exercised judicial economy with respect to the U.S. claims that Economía’s approach to this issue also breached Article 6.8 and Annex II of the AD Agreement.

⁸¹ See Mexico’s Appellant Submission, paras. 96-98, 105.

⁸² Appellate Body Report, *Thailand – Steel Angles*, para. 111.

was additional factual information on the confidential record of the investigation that supported Economía’s determinations, and it never disclosed any such facts to the Panel.

69. Similarly, Mexico cites the *Thailand – Steel Angles* panel report for the well-recognized notion that Article 3 of the AD Agreement contains no particular methodology that authorities must employ.⁸³ The United States agrees with this principle and has at no point during this dispute claimed that Economía was obligated to use a particular methodology in order to comply with the requirements of Article 3. But Mexico’s citation of the *Thailand – Steel Angles* report fails to recognize that an investigating authority’s ability to devise its own methodologies in the first instance does not mean that the authority is free to use a methodology that results in an investigation that is not objective and based on positive evidence.⁸⁴ On the contrary, as the *Thailand – Steel Angles* panel noted in the very sentence following the one that Mexico cites, it “could possibly be shown in a given case that a particular methodology has introduced a flaw in an authority’s analysis.”⁸⁵

70. That is exactly what happened in the present case. The Panel undertook a careful and comprehensive examination of Economía’s establishment and evaluation of the facts and concluded that its analysis was inconsistent with the requirement in Articles 3.1 and 3.2 of the AD Agreement to conduct an objective examination based on positive evidence.⁸⁶

71. The Panel based its conclusion on a series of factual findings regarding the extent to which Economía based its determinations of import volumes and price effects on assumptions instead of facts. For example, the Panel found that Economía based its analysis of import volumes on the unsupported assumptions that:

- any rice that entered Mexico below a certain price was necessarily long-grain white rice, and any rice that entered above that price was necessarily not long-grain white rice (an assumption that Economía itself recognized was flawed);⁸⁷
- the proportion of long-grain white rice to all rice imports in 1997 and 1998 (years for which Economía lacked data) was the same as the proportion found in 1999;⁸⁸ and

⁸³ Mexico’s Appellant Submission, para. 105, quoting Panel Report, *Thailand – Steel Angles*, para. 7.159.

⁸⁴ *Compare* Appellate Body Report, *EC – Bed Linen 21.5*, para. 113 (stating that the absence of a specified methodology for calculating the volume of the “dumped imports” does not give an investigating authority unfettered discretion to “pick and choose whatever methodology they see fit” Rather, the methodology must ensure that the determination is made on the basis of “positive evidence” and involves an “objective examination.”).

⁸⁵ Panel Report, *Thailand – Steel Angles*, para. 7.159.

⁸⁶ Panel Report, para. 7.116.

⁸⁷ Panel Report, paras. 7.104, 7.111.

⁸⁸ Panel Report, paras. 7.104, 7.111.

- imports of Riceland Foods, Inc. (“Riceland”) and the Rice Company increased in 1997 and 1998 at the same rates as those of Farmers Rice Milling Company (“Farmers Rice”) (an exporter that, like Riceland, was not dumping).⁸⁹

72. In light of all these unjustified assumptions, the Panel properly found that it was “clear” that Economía’s analysis of import volumes “did not base itself on positive evidence . . . and the authority has failed therefore to properly establish the facts.”

73. Similarly, the Panel found that Economía’s analysis of price effects simply assumed that the price of subject imports fell because the price for all rice entered under the relevant tariff line fell, and because prices for non-dumped rice fell.⁹⁰ The Panel correctly found that “an investigating authority conducting an objective and unbiased investigation could not have reached the conclusion that the dumped imports were decreasing on the basis of the flawed analysis based on unsubstantiated assumptions made by the Mexican investigating authority” and that Economía’s “flawed assumptions are clearly not ‘positive evidence’ on which an examination of the price effects of dumped imports is to be based.”⁹¹

74. Mexico’s only response to the Panel’s factual and legal findings is to assert that Article 3 of the AD Agreement establishes no particular methodologies that it was required to use,⁹² accuse the Panel of bias,⁹³ and claim that Economía could not have collected more information than it did.⁹⁴ None of these arguments provides a basis for reversing the Panel’s findings.

75. First, the United States has already explained why an investigating authority’s ability to devise its own methodologies in the first instance does not mean the authority is free to use a methodology that results in an investigation that is unobjective and not based on positive evidence. The Panel explained at length why it concluded that Economía based its analysis of import volumes and price effects on assumptions instead of facts, and why Economía’s analysis was therefore inconsistent with the requirements of Articles 3.1 and 3.2 of the AD Agreement. Mexico has provided no substantive response to these findings.

76. Second, Mexico has made no claims under Article 11 of the DSU with respect to this issue, so the Appellate Body should reject Mexico’s claim of bias outright.⁹⁵

77. Finally, an important factor underlying the Panel’s findings was Economía’s failure to gather the information it needed to conduct a proper investigation. Mexico’s assertion in its

⁸⁹ Panel Report, paras. 7.101-102, 7.112.

⁹⁰ Panel Report, para. 7.113.

⁹¹ Panel Report, para. 7.113.

⁹² Mexico’s Appellant Submission, para. 106.

⁹³ Mexico’s Appellant Submission, para. 108.

⁹⁴ Mexico’s Appellant Submission, para. 110.

⁹⁵ Mexico’s Appellant Submission, para. 108.

Appellant submission that it was not possible for Economía to collect additional information is simply wrong.⁹⁶ As the Panel correctly found, there were at least two readily available means that Economía could have used to collect the information it needed to conduct its investigation in an objective and unbiased manner.⁹⁷ First, Economía could have gathered more accurate information if it had properly informed all of the interested parties it could reasonably be considered to have knowledge of and had sent its antidumping questionnaire to a larger number of exporters.⁹⁸ Second, Economía could have obtained the information it needed from the *pedimentos* (customs declarations).

78. As the Panel correctly found, the *pedimentos* contained a wide variety of information that was directly relevant to the issues that Economía was investigating, including specific information on the volume and value of each shipment of long-grain white rice into Mexico during the POI, the terms of sale of each shipment, the identity of each foreign exporter, and the identity of each importer of record.⁹⁹ Thus, if Economía had consulted the *pedimentos*, it would have been able to obtain a substantial amount of directly relevant data that would have “constituted a more objective basis of evidence for making a reasonable estimate of the amount of dumped imports” than the biased data it used.¹⁰⁰ But Economía failed to consult them.

79. In sum, the Panel correctly found that Economía’s analysis of import volumes and price effects was inconsistent with Articles 3.1 and 3.2 of the AD Agreement. Its findings on this issue are well-grounded in the facts of this investigation when applied to the objectivity and positive evidence requirements of Article 3.1, and the Appellate Body should uphold them.

C. *Mexico Has Demonstrated No Basis for Reversing the Panel’s Findings Concerning the Claims Relating to Economía’s Dumping Determination and its Application of the Antidumping Measure.*

80. In addition to its appeals of the Panel’s findings concerning Economía’s injury investigation, Mexico also appeals three sets of findings relating to the dumping investigation and the application of the antidumping measure. The first set of findings arose from Economía’s decision to apply the measure to two U.S. exporters that it investigated and that it found were not dumping. The second set of findings concerns Economía’s decision to apply an adverse, facts available-based antidumping margin taken from the petition to the U.S. exporter Producers Rice Mill Inc. (“Producers Rice”), a firm that participated fully in Economía’s investigation and that demonstrated that it had no shipments during the POI. The third set of findings pertains to Economía’s decision to apply adverse, facts available-based antidumping margins taken from the

⁹⁶ Mexico’s Appellant Submission, para. 110.

⁹⁷ Panel Report, para. 7.114.

⁹⁸ Panel Report, para. 7.114. The United States discusses Economía’s failure to notify all “known” exporters of the subject merchandise in Section II.C.3 of this submission.

⁹⁹ Panel Report, para. 7.115, *citing* Mexico First Answers to Questions, question 15.

¹⁰⁰ Panel Report, para. 7.115.

petition to U.S. exporters and producers that it never even investigated. The United States discusses each of these issues below.

81. With respect to each set of findings, the Panel carefully analyzed the facts and the relevant provisions of the AD Agreement and found, correctly, that Mexico was in breach of its WTO obligations. Mexico's arguments on appeal provide no basis for reversing any of the Panel's findings, and the Appellate Body should uphold them.

1. The Panel Correctly Found That Mexico Acted Inconsistently with Article 5.8 of the AD Agreement by Not Terminating the Investigation on Two U.S. Exporters Which the Authority Found to Have Exported at Undumped Prices and by Not Excluding These Two Exporters from the Application of the Definitive Antidumping Measure.

82. As the United States noted immediately above, the first set of adverse findings that Mexico is appealing with respect to its dumping determination and its application of the antidumping measure arises from Economía's decision to apply the measure to two U.S. exporters that it investigated and that it found were not dumping. The Panel correctly found that Economía's refusal to exclude the two exporters from the measure was inconsistent with Article 5.8 of the AD Agreement.

83. The two exporters in question were Farmers Rice and Riceland. Economía investigated both firms and concluded that neither firm was dumping. Since neither firm was dumping, there were no *dumped* imports from either firm that could have been causing injury to the Mexican rice industry. Nevertheless, Economía applied the rice antidumping measure to both firms, and each firm remains subject to future reviews and the possible application of antidumping duties.¹⁰¹

84. Article 5.8 of the AD Agreement states in pertinent part that:

An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is de minimis, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be de minimis if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing

¹⁰¹ As the United States will discuss in Section II.D.4 below, the possibility of review and the application of duties arises from Article 68 of the FTA, which provides, *inter alia*, for the review of imports from producers "for whom no positive margin of price discrimination or subsidization was determined in the investigation." The Panel correctly found that this aspect of Article 68 is inconsistent "as such" with Article 5.8 of the AD Agreement.

Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

85. The Panel found that the term “margin of dumping” in the second and third sentences of Article 5.8 refers to the individual margin of dumping of an exporter or producer, rather than a country-wide margin. It reached this conclusion after carefully examining the use of the term in several other articles of the AD Agreement¹⁰² and finding that “whenever the Agreement refers to the determination of a margin of dumping, it refers to the margin of dumping calculated for the individual exporter.”¹⁰³ In light of this finding, the Panel further found that “the investigation which is to be immediately terminated under the second sentence of Article 5.8 of the AD Agreement is the investigation in respect of the individual exporter for which a zero or *de minimis* margin was established.”

86. The Panel found support for its conclusion by examining the immediate context of the term “margin of dumping” in Article 5.8.¹⁰⁴ The fourth sentence of Article 5.8 makes clear that when an investigating authority conducts a negligibility analysis, it must examine the volume of dumped imports “from a particular country.” As the Panel correctly found, this contextual evidence demonstrates that when the drafters of the AD Agreement intended to make a particular Article 5.8 analysis on a country-wide basis, they did so explicitly.

87. Further support for the Panel’s finding can be found in the third sentence of Article 5.8, which states that the margin of dumping is to be considered *de minimis* if the margin is less than 2 percent, “expressed as a percentage of the export price.” Export prices are inherently firm-specific, not country-wide. If the drafters had intended to require termination only if the weighted average margin of dumping for all of the investigated firms was *de minimis*, they presumably would have said so explicitly. This is exactly what they did in Article 9.4 of the AD Agreement, which specifically requires authorities to calculate the “all others” rate on the basis of the “weighted average margin of dumping” calculated for the selected exporters and producers.¹⁰⁵

88. None of Mexico’s arguments on this issue provide a basis for reversing the Panel’s findings. For example, although Mexico argues that the Panel erred by not examining the meaning of the term “investigation” and the phrase “shall be terminated promptly,”¹⁰⁶ it fails to explain why it believes the Panel would have reached a different conclusion if it had done so. If anything, Mexico’s interpretive approach would have had the opposite effect. The “dumping”

¹⁰² Specifically, Articles 2, 6.10, 8.1, 9.4, 9.5, and 12.2.1 of the AD Agreement.

¹⁰³ Panel Report, para. 7.140.

¹⁰⁴ Panel Report, para. 7.141.

¹⁰⁵ Similarly, Article 12.2.1 of the AD Agreement requires investigating authorities that publish a public notice of provisional measures to set out “the margins of dumping” Thus, if the drafters of Article 5.8 had intended to require termination only when all of the margins of dumping are *de minimis* or less, they knew how to say so.

¹⁰⁶ Mexico’s Appellant Submission, para. 123.

side of an antidumping investigation is essentially a series of parallel investigations of individual exporters and producers, with each exporter or producer submitting its own normal value and export price data, and the investigating authority calculating an individual margin of dumping for each one. It is this very aspect of the dumping calculation that makes it possible for an investigating authority to exclude from the antidumping measure those individual firms that are investigated and found not to be dumping. Thus, if the Panel had begun its analysis by interpreting the term “investigation,” it would likely have concluded that the dumping investigation is a firm-specific exercise.¹⁰⁷

89. Similarly, Mexico’s attempt to rely on Article 17.4 of the AD Agreement to distinguish between the imposition of measures and the levying of duties serves only to demonstrate the problematic implications of taking Mexico’s argument to its logical conclusion. Mexico argues that it is permissible to apply a measure to an exporter with a *de minimis* margin as long as no duties are collected because Article 17.4 distinguishes between the imposition of measures and the levying of duties.¹⁰⁸ But if Mexico is correct that Article 17.4 justifies applying a measure to an exporter with a *de minimis* margin of dumping, then why would it not similarly be permissible to impose an antidumping measure on exporters in cases where all of the margins are below *de minimis*, or where the investigating authority reaches a negative determination of injury, as long as no duties are collected? The answer is that it would be improper for an authority to apply the measure in any of these cases, because Article 5.8 of the AD Agreement would preclude it from doing so. Article 17.4 is irrelevant.¹⁰⁹

¹⁰⁷ The firm-specific nature of the dumping calculation refutes the EC’s argument that the use of the term “country” in various parts of the AD Agreement is somehow relevant to this issue. See EC’s Third Party Submission, paras. 19-24. For example, Article 6.10 states that an investigating authority shall, as a rule, determine an individual margin of dumping for each known exporter and producer of the product under investigation. Similarly, the entire structure of Article 2 of the AD Agreement (which sets out the rules for the dumping determination) is focused on various firm-specific adjustments. Article 6 of the AD Agreement sets out various obligations that apply with respect to individual exporters and producers. See, e.g., Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 152. Article 9.2 of the AD Agreement emphasizes that the imposition of antidumping duties should specify the “supplier or suppliers of the product concerned,” and only permits an authority to name the supplying country instead of the individual suppliers when it is “impracticable” to name the individual suppliers. All of these provisions demonstrate that a dumping analysis is inherently a firm-specific exercise.

¹⁰⁸ Mexico’s Appellant Submission, para. 124, bullet 1.

¹⁰⁹ The EC makes a similarly flawed argument when it asserts that it would be permissible for an investigating authority to initiate an antidumping investigation in cases where the petitioner fails to identify any “known” exporters or producers. See EC’s Third Party Submission, para. 20. There is no textual basis for the EC’s assertion that the requirement in Article 5.2(ii) to notify the “known” exporters is “secondary” to the requirement to identify the country concerned, and its citation of Article 12.1.1 ignores that the *chapeau* of Article 12.1 requires the investigating authority to notify the “interested parties known to the investigating authorities to have an interest” in the investigation. Furthermore, the EC also argues that there is no need for an investigating authority to seek out the identity of exporters that are not named in the petition, and that it is permissible to apply the facts available to “unknown” exporters and producers. See *id.*, para. 26. Thus, in the EC’s view, it would be permissible for an investigating authority to initiate an investigation on the basis of a petition that did not identify any “known” exporters, publish a notice of the initiation of an antidumping investigation in its official journal, send its

(continued...)

90. Furthermore, Mexico’s accusation that the Panel is adding words to Article 5.8 that are not there¹¹⁰ ignores that it is Mexico itself that is actually seeking to do so. As the Panel noted, Article 5.8 calls for the termination of an investigation when the “margin” of dumping is *de minimis* or less. If the drafters had intended instead to only require termination when all of the “margins” of dumping were *de minimis*, they surely could have said so.¹¹¹ Mexico’s assertion that the drafters would have referred to “the investigations” if they had intended the article to apply to individual exporters fails to recognize that Article 5.8 refers to “investigation” in the singular because “investigation” is linked to “the margin of dumping,” which also is used in the singular.

91. Mexico also argues that the purpose of an antidumping investigation is to undertake a review of products, not exporters, and that the role of the investigating authority is to determine whether the “dumped imports” are causing injury.¹¹² But Mexico fails to recognize the implications of its argument. As the Appellate Body stated in *EC – Bed Linen 21.5*, the provisions of Article 3 of the AD Agreement cannot be construed to suggest that Members may include imports from producers found *not* to be dumping in the volume of dumped imports.¹¹³ By the same token, neither Article 5.8 nor Article 1 of the AD Agreement can be construed to permit Members to include in the scope of an antidumping measure an exporter or producer that is investigated and found not to be dumping. In such circumstances, the exported products are not *dumped* imports at all, and therefore cannot be found to be “dumped imports” that are causing injury to the domestic industry.

92. In addition, Mexico argues that Article 3.3 of the AD Agreement demonstrates that the Article 5.8 *de minimis* calculation applies to the country as a whole, and not to individual firms.¹¹⁴ But Article 3.3 has nothing to do with the dumping determination. Article 3.3 is an injury provision that uses the definition of *de minimis* in Article 5.8 as a means to establish a threshold for determining which countries may be cumulated for injury purposes. The cumulation analysis is country-wide by its very nature. To the extent that Article 3.3 is relevant at all, it shows once again that when the drafters intended for a particular calculation to be done on a country-wide basis, they said so explicitly.

¹⁰⁹ (...continued)

questionnaire to nobody, and then apply the facts available to every exporter or producer in the entire country. While this outcome might be expedient for the investigating authority (and beneficial for the petitioner), it is not consistent with the terms of the AD Agreement.

¹¹⁰ Mexico’s Appellant Submission, para. 124, bullet 2.

¹¹¹ Panel Report, para. 7.143.

¹¹² Panel Report, para. 124, bullet 4.

¹¹³ Appellate Body Report, *EC – Bed Linen 21.5*, paras. 111-113 (emphasis in original). The Appellate Body also stated elsewhere in that report that it “saw no conflict between the provisions requiring producer-specific determinations and the need to calculate, for purposes of determining injury, the total volume of dumped imports from producers or exporters originating in a particular exporting country as a whole.” *Id.*, para. 143.

¹¹⁴ Mexico’s Appellant Submission, para. 126.

93. Moreover, Mexico is wrong in stating that the Panel’s interpretation would lead to a “manifestly absurd and unreasonable result” and make the application of measures “unmanageable.”¹¹⁵ On the contrary, an investigating authority can conduct a single investigation of multiple firms, and then terminate its investigation with respect to specific firms by stating in its final determination that it will exclude from the measure those firms that were investigated and found not to be dumping. In the unlikely event that an excluded firm subsequently began to dump,¹¹⁶ the investigating authority would have the option of commencing a new investigation.

94. Finally, Mexico’s argument that Economía acted consistently with Article 5.8 because it terminated the investigation of Farmers Rice and Riceland as soon as it concluded that they had margins of zero is simply not credible because Economía applied the antidumping measure to both firms.¹¹⁷ By Mexico’s logic, an investigating authority that reached a negative injury finding and terminated its investigation by imposing an antidumping measure would be acting in accordance with its WTO obligations. Obviously, this is not correct.

95. In sum, the Panel correctly found that Economía’s failure to exclude Farmers Rice and Riceland from the antidumping measure was inconsistent with Article 5.8 of the AD Agreement. Mexico’s arguments to the contrary are without merit, and the Appellate Body should uphold the Panel’s finding.

2. The Panel Correctly Found That Mexico Acted Inconsistently with Article 6.8 and Paragraph 7 of Annex II of the AD Agreement in its Application of a Facts Available-based Dumping Margin to the Non-shipping Exporter Producers Rice.

96. The next issue that Mexico is appealing concerns Economía’s decision to apply an adverse, facts available-based antidumping margin taken from the petition to the U.S. exporter Producers Rice Mill Inc. (“Producers Rice”). The Panel correctly found that Economía breached Article 6.8 and paragraph 7 of Annex II of the AD Agreement by applying the petition margin to Producers Rice. As was the case before the Panel, Mexico does not even attempt to address the merits of the U.S. claim, and it does not address the substance of the Panel’s findings. Mexico’s

¹¹⁵ Mexico’s Appellant Submission, para. 129.

¹¹⁶ There is no reason to assume that a firm that is found not to be dumping in an investigation, and excluded from the measure, would subsequently begin to dump. Unlike a firm that is investigated and found to be dumping, a firm that is investigated and found not to be dumping has demonstrated that it is able to sell in the export market without engaging in such practices. If the firm is able to sell without dumping when there is no antidumping measure in place, it will presumably continue doing so thereafter (particularly if its competitors are subject to the measure), since firms normally seek to maximize their profits. Thus, there is no reason to assume that there would be any need for an investigating authority to conduct a new investigation. *See also* Panel Report, n.144 (discussing this same issue).

¹¹⁷ Mexico’s Appellant Submission, para. 142.

arguments provide no basis for reversing the Panel’s findings, and the Appellate Body should reject them.

97. Before turning to the reasons why Mexico’s arguments lack merit, the United States will briefly discuss the factual background to this issue and the reasons why the Panel’s findings were correct. As one of only two U.S. exporters identified in the petition as “known” exporters of the subject merchandise, Producers Rice received a copy of Economía’s antidumping questionnaire at the outset of the investigation.¹¹⁸ It participated fully in the dumping and injury portions of the investigation and demonstrated that it had no shipments of subject merchandise during the POI.¹¹⁹ Despite this full cooperation, Economía concluded that Producers Rice had “failed to appear” in the investigation and it applied to Producers Rice an adverse, facts available margin taken from the petition.¹²⁰ The petition margin, at 10.18 percent, was almost three times as high as the sole calculated margin of dumping that Economía found.¹²¹

98. The United States argued to the Panel that Economía’s application of a facts available-based margin to Producers Rice was inconsistent with Article 6.8 of the AD Agreement, and that its choice of a margin – the adverse, 10.18 percent margin taken from the petition – was inconsistent with paragraph 7 of Annex II of the AD Agreement.¹²² The Panel agreed with the United States that Economía’s application of the petition margin breached Article 6.8 and paragraph 7 of Annex II of the AD Agreement.¹²³

99. The Panel’s finding with respect to paragraph 7 of Annex II was correct. Paragraph 7 of Annex II plainly states that if investigating authorities have to base their findings on information from a secondary source – such as the petition – they should do so with special circumspection, including (where practicable) by checking the information from other independent sources at their disposal. As the Panel found, Economía took absolutely no steps to check the biased information in the petition against independent sources, and it did not use the information with special circumspection.¹²⁴ Mexico did not contest these facts before the Panel.¹²⁵ It merely argued that, because Producers Rice had no shipments, Economía was entitled to apply a facts available-based margin to the firm.¹²⁶

100. Mexico’s arguments in its Appellant’s submission provide no basis for reversing the Panel’s findings. Instead of focusing on the substance of the Panel’s reasoning, Mexico makes

¹¹⁸ Panel Report, para. 7.167.

¹¹⁹ Panel Report, para. 7.167.

¹²⁰ Panel Report, para. 7.167.

¹²¹ See Panel Report, para. 7.167 & n.164.

¹²² See, e.g., Panel Report, para. 7.160.

¹²³ Panel Report, para. 7.168.

¹²⁴ Panel Report, para. 7.167.

¹²⁵ Similarly, Mexico has not raised a DSU Article 11 claim with respect to these factual findings.

¹²⁶ See, e.g., Panel Report, para. 7.146 & n.146.

the perplexing assertion that the United States never claimed that the facts available-based antidumping margin was inconsistent with Mexico's WTO obligations, and that the Panel therefore exceeded its terms of reference. Mexico is wrong.

101. As Mexico correctly notes,¹²⁷ the Panel's terms of reference were to examine the matter identified in the panel request "in light of the relevant provisions of the covered agreement cited by the United States." As is plainly evident from the panel request itself, the U.S. specifically cited paragraph 7 of Annex II of the AD Agreement as one of the "relevant provisions" at issue with respect to Economía's treatment of Producers Rice.¹²⁸ Moreover, the United States explained in its submissions to the Panel precisely why it believed that the particular 10.18 percent margin – and not just the application of a facts available-based margin *per se* – was inconsistent with paragraph 7 of Annex II.

102. For example, in the factual background section of its first written submission, the United States explained several ways in which the petition margin was based on flawed data and unsupported assumptions that served to increase the dumping margin.¹²⁹ The United States then reiterated these points in the legal argument section of its submission in explaining why the margin breached paragraph 7 of Annex II.¹³⁰ In subsequent submissions, the United States noted that Mexico was failing to contest the U.S. claim and that Mexico's response to Question 25 from the Panel demonstrated that the United States was correct.¹³¹

103. Therefore, there is no basis for Mexico's assertion that the United States never challenged the consistency of the petition margin with paragraph 7 of Annex II.¹³² The Panel correctly found that Economía's application of the margin to Producers Rice was inconsistent with paragraph 7 of Annex II, and the Appellate Body should uphold the Panel's finding.

¹²⁷ Mexico's Appellant Submission, para. 146.

¹²⁸ See WT/DS295/2, para. 1(f).

¹²⁹ U.S. First Written Submission to the Panel, paras. 159-165; see also Panel Report, para. 7.146 & n.145.

¹³⁰ U.S. First Written Submission to the Panel, paras. 181-183.

¹³¹ See, e.g., U.S. Oral Statement at the First Panel Meeting, para. 54 (stating that Mexico was not contesting the U.S. claim); U.S. Second Written Submission to the Panel, paras. 79-84 (noting that Mexico's response to the Panel's questions demonstrated conclusively that Economía breached paragraph 7 by applying the petition margin as facts available). Not surprisingly, Mexico did not assert to the Panel that the United States was only challenging the application of the facts available *per se*, and not the antidumping margin itself.

¹³² See, e.g., Mexico's Appellant Submission, paras. 150-151.

- 3. The Panel Correctly Found That Mexico Acted Inconsistently with Articles 6.1, 6.8, 6.10, and 12.1 and Paragraph 1 of Annex II of the AD Agreement in its Application of a Facts Available-based Dumping Margin to the U.S. Producers and Exporters That it Did Not Investigate.**

104. The final issue that Mexico is appealing with respect to the dumping investigation and Economía's application of the antidumping measure is the Panel's finding that Economía breached Articles 6.1, 6.8, 6.10, and 12.1 and paragraph 1 of Annex II of the AD Agreement by applying adverse, facts available-based antidumping margins taken from the petition to U.S. exporters and producers that it never even investigated. Mexico's arguments fail to identify any errors in the Panel's reasoning and the Appellate Body should uphold the Panel's findings.

105. The factual background to this issue is set out in detail in the Panel's report.¹³³ In brief, the petition in the antidumping investigation listed only two "known" exporters of the subject merchandise (Producers Rice and Riceland). Although the petition also referred several times to a third U.S. exporter (the Rice Company), it did not include that exporter in the list of "known" exporters. Economía published its notice of initiation of the rice investigation and sent its antidumping questionnaire to Producers Rice and Riceland and to the U.S. Embassy in Mexico City. It did not take any steps to identify other U.S. exporters or producers, and it did not send the questionnaire to any other exporter or producer, including the Rice Company.¹³⁴ Nevertheless, Economía declared that it was investigating every exporter or producer of long-grain milled rice in the United States. The Rice Company and a second exporter, Farmers Rice, subsequently learned of the investigation and came forward on their own to participate. At the end of the investigation, Economía found that Producers Rice had no shipments of the subject product during the POI, and that Riceland and Farmers Rice were not dumping. It calculated a 3.93 percent dumping margin for the Rice Company. Economía classified every other U.S. exporter and producer of the subject merchandise – including Producers Rice – as uncooperative respondents and assigned them a 10.18 percent margin, taken from the petition, as adverse facts available. Economía did not apply a neutral "all others" rate, calculated in accordance with Article 9.4 of the AD Agreement, to any exporter or producer.

106. The Panel correctly found that Economía's decision to conduct its investigation in this manner breached Articles 6.1, 6.8, 6.10, and 12.1 and paragraph 1 of Annex II of the AD Agreement. Mexico's arguments in response fail to address the substance of the Panel's findings and provide no basis for reversing them.

107. For example, Article 6.10 of the AD Agreement states that investigating authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. One of the questions before the Panel was whether it was consistent with Article 6.10 for Economía to only calculate individual margins of dumping for the two exporters that the petitioners identified as "known" exporters in the petition and the two other exporters that learned of the investigation on their own when Economía had access to

¹³³ See, e.g., Panel Report, paras. 7.196-7.200.

¹³⁴ As the Panel explains in its report, there was substantial evidence on the record demonstrating that the petitioners' list of two "known" exporters was incomplete; nevertheless, Economía took no steps to identify additional exporters and producers. See Panel Report, paras. 7.197-7.199.

information indicating that the petitioners' list was incomplete and that it could have used to identify all of the other exporters and producers of the subject merchandise in the United States.

108. The Panel carefully analyzed the extent of the obligation in Article 6.10, including the ordinary meaning of the term “known”, the context provided by other provisions of the AD Agreement, such as the obligation in Articles 1, 5, and 6 to conduct an “investigation”, and the previous examination of this term by the Appellate Body.¹³⁵ The Panel then correctly concluded that the “known” exporters or producers within the meaning of Article 6.10 of the AD Agreement are those “that an unbiased and objective investigating authority properly establishing the facts would be reasonably expected to become conversant with” or, stated differently, “those that an objective and unbiased investigating authority properly establishing the facts and conducting an active investigation could have and should have reasonably been considered to have knowledge of.”¹³⁶ The Panel then found that Economía breached Article 6.10 by “remaining entirely passive in the identification of exporters or producers interested in the investigation, and by not calculating an individual margin of dumping for each exporter or producer that was known or should reasonably have been known” to it.¹³⁷

109. Rather than address the substance of the Panel’s analysis and show why (in Mexico’s opinion) it was wrong, Mexico argues that Article 6.10 requires investigating authorities to determine individual dumping margins “for each known exporter or producer and not for all of them”¹³⁸ and that “[t]here is no provision in the AD Agreement which requires an IA to take any action in addition to publishing the public notice of initiation and making notifications, such as identifying each and every one of the foreign producers and exporters.”¹³⁹ But the Panel did not find that Article 6.10 requires an investigating authority to identify and calculate an individual margin of dumping for every exporter or producer of the subject merchandise; in fact, it specifically stated that an investigating authority is not required to “actively identify each and every foreign exporter or producer of the subject product” because “such a reading would read the term ‘known’ out of the Agreement’s requirement to calculate an individual margin only for each ‘known’ exporter or producer of the subject product.”¹⁴⁰ Thus, Mexico’s arguments on this

¹³⁵ To be specific, the Appellate Body’s finding in *US – Wheat Gluten Safeguard* that:

"[T]he ordinary meaning of the word "investigation" suggests that the competent authorities should carry out a "systematic inquiry" or a "careful study" into the matter before them. The word, therefore, suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study - to use the treaty language, an "investigation" - must actively seek out pertinent information".

Panel Report, para. 7.185, *citing* Appellate Body Report, *US – Wheat Gluten Safeguard*, para. 53 (footnote omitted).

¹³⁶ Panel Report, para. 7.187.

¹³⁷ Panel Report, para. 7.201.

¹³⁸ Mexico’s Appellant Submission, para. 166.

¹³⁹ Mexico’s Appellant Submission, para. 174.

¹⁴⁰ Panel Report, para. 7.189.

issue do nothing more than assert a point that is not in dispute, and beg the question of what it means to be a “known” exporter or producer within the meaning of Article 6.10.

110. Similarly, a second key question that the Panel needed to address in order to resolve this issue was whether it was consistent with Mexico’s WTO obligations for Economía to apply an adverse, facts available-based dumping margin to the U.S. exporters and producers to which Economía never even sent its antidumping questionnaire. The Panel carefully examined the facts available provision itself (Article 6.8 of the AD Agreement), as well as the other substantive provisions that are relevant to determining whether an investigating authority’s application of the facts available is proper (such as Article 6.1 and Annex II, paragraph 1 of the AD Agreement), and concluded that an investigating authority cannot apply the facts available to a particular exporter or producer without first sending the exporter or producer a copy of its questionnaire and asking it to reply:

We are of the view that the requirement of Article 6.1 of the AD Agreement is more than a matter of mere procedural rectitude, but is fundamental to a correct application of *inter alia* Article 6.8 of the AD Agreement We consider that in case an interested party has not been properly notified and informed of the information it is required to submit under Article 6.1 of the AD Agreement, it cannot be argued to have refused access to or to otherwise have withheld necessary information or to have significantly impeded the investigation. This is evidenced also by . . . paragraph 1 of Annex II of the AD Agreement¹⁴¹

111. Instead of addressing the Panel’s interpretation of all of the various provisions at issue, including Article 6.1 and paragraph 1 of Annex II, Mexico focuses solely on the text of Article 6.8 of the AD Agreement.¹⁴² Mexico’s approach is wrong. As the Panel’s report demonstrates, a proper interpretive analysis must examine all of the relevant provisions at issue. For example, the Appellate Body has previously stated that Article 6 of the AD Agreement:

“establishes a framework of procedural and due process obligations.” Its provisions “set out evidentiary rules that apply *throughout* the course of the anti-dumping investigation, and provide also for due process rights that are enjoyed by ‘interested parties’ *throughout* such an investigation.”¹⁴³

¹⁴¹ Panel Report, paras. 7.193-7.194.

¹⁴² Mexico’s Appellant Submission, para. 179-180.

¹⁴³ Appellate Body Report, *EC – Cast Iron Fittings*, para. 138 (footnotes omitted; emphasis in original), citing Appellate Body Report, *Thailand – Steel Angles*, para. 109 and Appellate Body Report, *EC – Bed Linen 21.5*, para. 136. The Appellate Body has also found that “[i]n a similar manner to Article 6, Article 12 establishes a framework of procedural and due process obligations” Appellate Body Report, *Thailand – Steel Angles*, para. 110.

112. This “framework of procedural and due process obligations” includes Article 6.1, which the Appellate Body has emphasized creates obligations with respect to individual exporters and producers:

[S]everal provisions of Article 6 refer expressly or by implication to individual exporters or producers. Article 6 requires all interested parties to have a full opportunity to defend their interests. In particular, Article 6.1 requires authorities to give all interested parties notice of the information required and ample opportunity to present in writing evidence that those parties consider relevant. Articles 6.2, 6.4, and 6.9 provide other examples of the kind of opportunities that investigating authorities must give each interested party.¹⁴⁴

113. Paragraph 1 of Annex II of the AD Agreement then reiterates this obligation by requiring investigating authorities to ensure that respondents receive proper notice of the rights of the investigating authorities to use the facts available.¹⁴⁵ Although Article 6.8 permits investigating authorities to apply the facts available to firms that fail to provide necessary information, they “are *not* entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required.”¹⁴⁶

114. Contrary to the suggestions in Mexico’s Appellant Submission, the obligations in Article 6.1 and paragraph 1 of Annex II do not apply solely to the exporters and producers that the petitioners list as “known” exporters in their petition; rather, they explicitly apply to “[a]ll interested parties in an anti-dumping investigation.”¹⁴⁷ Therefore, if an investigating authority takes the approach that Economía takes, which is to claim that it is including every exporter and producer of the subject product in its antidumping investigation, it cannot simply publish a general notice in its *Diario Oficial* announcing the initiation of an antidumping investigation and apply a facts available-based margin to any firms that do not come forward on their own and enter an appearance in the proceeding. Rather, as the Panel correctly found, the investigating authority must fulfill the obligations of Article 6.1 and paragraph 1 of Annex II with respect to each individual exporter and producer that it includes in the investigation by sending the exporter or producer a copy of the antidumping questionnaire, asking it to respond, and ensuring that it understands that a failure to respond may result in the application of a margin based on the

¹⁴⁴ Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 152 (emphasis added).

¹⁴⁵ See Appellate Body Report, *US – Hot-Rolled Steel*, para. 79 (emphasis added) (stating that paragraph 1 of Annex II “is specifically concerned with ensuring that respondents receive proper notice of the rights of the investigating authorities to use facts available”).

¹⁴⁶ Panel Report, *Argentina – Ceramic Tiles*, para. 6.55.

¹⁴⁷ AD Agreement, Art. 6.1. See also Panel Report, para. 7.192 (stating that “the AD Agreement makes clear that the investigation concerns not just the exporters and producers made known to the authorities by the applicant, or that make themselves known, but relates to all interested parties.”)

facts available. If the investigating authority fails to take these steps, then it cannot apply a facts available-based margin to that exporter or producer.¹⁴⁸

115. Apart from its bald assertions that Economía applied the facts available consistently with Article 6.8 of the AD Agreement and that Economía was under no obligation to identify every single U.S. exporter or producer of long-grain white rice, Mexico's only other arguments with respect to this issue are that Economía acted consistently with Article 6.1.3 of the AD Agreement and that the AD Agreement requires the government of the exporting country to identify and inform all of its relevant exporters and producers that the importing country has initiated an antidumping investigation. Neither of these arguments provides a basis for reversing the Panel's findings. First, the United States argued, and the Panel found, that Economía breached Article 6.1 itself by failing to provide all of the interested parties in the investigation the notice that Article 6.1 requires.¹⁴⁹ Therefore, Mexico's argument that Economía acted consistently with Article 6.1.3 of the AD Agreement is entirely beside the point.

116. Second, there is no textual basis for Mexico's argument that it was the U.S. government, and not Economía, that had an obligation to identify and notify the U.S. exporters and producers that Economía was purporting to investigate.¹⁵⁰ As the Panel correctly found, the AD Agreement requires investigating authorities to provide notice to the government of the exporting country because the government is an interested party in its own right,¹⁵¹ not because the exporting country government must do the work that the investigating authority is obliged to undertake.¹⁵² And contrary to Mexico's assertions, Footnote 15 of the AD Agreement merely establishes a starting point for the 30-day response period in cases where the exporting government transmits a questionnaire on behalf of the investigating authority; it does not create an independent obligation for the exporting government to identify the "known" exporters and producers in the first instance.¹⁵³

117. Finally, the Panel also properly found that Economía breached Article 12.1 of the AD Agreement by failing to provide notice to each of the interested parties known to have an interest in the investigation that it had initiated an investigation.¹⁵⁴ Like its arguments concerning Article 6.10 of the AD Agreement, Mexico's argument that it notified the exporters and producers that it

¹⁴⁸ Panel Report, para. 7.200. Alternatively, an investigating authority may limit its investigation in accordance with Article 6.10 of the AD Agreement, and not include a particular exporter or producer in its investigation. In that case, however, it may only apply a neutral "all others" rate, calculated in accordance with Article 9.4 of the AD Agreement, to the unexamined exporters and producers.

¹⁴⁹ Panel Report, para. 7.200.

¹⁵⁰ Mexico's Appellant Submission, paras. 173, 182(a).

¹⁵¹ AD Agreement, Art. 6.11(ii).

¹⁵² Panel Report, para. 7.199.

¹⁵³ The Panel does not interpret footnote 15 in its report because Mexico did not make any arguments concerning the footnote during the panel proceeding.

¹⁵⁴ Panel Report, para. 7.200.

knew of – in addition to being contradicted by the facts – simply begs the question of what it means to be “known to the investigating authorities” within the meaning of Article 12.1.

118. In sum, Economía limited its investigation of the U.S. rice exporters and producers by only sending its antidumping questionnaire to the two firms that the petitioner designated as “known” exporters in the petition. Then, having taken this action, it applied an adverse, facts-available based margin taken from the petition, instead of a neutral margin, to the unexamined firms. The Panel properly rejected Mexico’s argument that the AD Agreement allows for such a biased and non-objective approach for imposing antidumping margins. Mexico’s arguments provide no basis for reversing the Panel’s findings that Mexico’s approach breached Articles 6.1, 6.8, 6.10, and 12.1 and paragraph 1 of Annex II of the AD Agreement and the Appellate Body should uphold them.

D. *Mexico Has Demonstrated No Basis for Reversing the Panel’s Findings Concerning the Claims Relating to Mexico’s Foreign Trade Act.*

119. In addition to its appeals of findings relating to the *Rice* antidumping investigation, Mexico is also appealing several adverse findings by the Panel relating to Mexico’s Foreign Trade Act. These provisions include: Article 53, which establishes the deadlines for interested parties to respond to questionnaires in Mexican antidumping and countervailing duty proceedings; Article 64, which requires Economía to always apply the “highest” margin based on the facts available to exporters or producers who are assigned facts available-based dumping or countervailing duty margins; Articles 68 and 89D, which require Economía to conduct reviews of exporters and producers that should have been excluded from measures and to deny reviews to exporters and producers that are entitled to receive them; Article 93V, which requires Economía to impose fines on certain importers that import goods that are like or identical to goods subject to an antidumping or countervailing duty investigation; and Articles 68 and 97, which require Economía to reject requests for reviews if judicial review proceedings have been initiated, for as long as such proceedings have not been finalized.

120. The Panel correctly found that each of these provisions is inconsistent “as such” with Mexico’s WTO obligations. Mexico’s arguments to the contrary provide no basis to reverse the Panel’s findings, and the Appellate Body should uphold them.

1. *Article 2 of the FTA Does Not Shield Mexico’s Laws From Scrutiny By WTO Panels.*

121. Before turning to the merits of the Panel’s Foreign Trade Act findings, the United States will first address Mexico’s argument that Article 2 of the Foreign Trade Act operates to prevent a Panel from finding any provision of the FTA to be inconsistent “as such” with Mexico’s WTO obligations because it allegedly requires Economía to apply the Foreign Trade Act in a manner that is consistent with Mexico’s WTO obligations. Mexico raised this argument with respect to each of the provisions of the FTA that the United States challenged, and the Panel rejected it

each such time.¹⁵⁵ As the Panel correctly found, Article 2 of the FTA cannot shield Mexico's law from claims that other FTA provisions are inconsistent "as such" with Mexico's WTO obligations, and Mexico's arguments to the contrary provide no grounds for reversing the Panel's findings.

122. Although Mexico argues in one part of its Appellant submission that the Panel failed to address its arguments concerning Article 2 of the FTA,¹⁵⁶ it concedes elsewhere in its submission that the Panel did in fact address them.¹⁵⁷ The Panel's discussion of the issue is comprehensive and bears setting out in full:

7.224 We finally note that Mexico argues that in Mexican law, international agreements such as the WTO agreements are "self-executing" and automatically applicable in Mexico, and that any domestic law has to be applied in a manner which is compatible with Mexico's international obligations. While we understand the important role given to Mexico's international commitments by providing for the direct effect of international agreements such as the WTO Agreements in Mexican law, we do not consider that for this reason, Mexico's laws would be shielded from any review of the consistency of these laws with the WTO Agreements or that such laws can never be found to be inconsistent with the WTO Agreements. The fact that provision is made for the direct effect of the WTO Agreements does not automatically and inevitably ensure a correct interpretation of the WTO Agreements, at least not in a situation where there is also a distinct domestic legal provision which manifestly conflicts with the terms of the Agreements. In our view, the direct effect of the WTO Agreements in Mexican law may prove important in case the domestic law leaves the authority with discretion to apply the law in a WTO consistent manner. However, in case the domestic law which implements Mexico's international commitments with regard to for example the AD Agreement and SCM Agreement, as does the Act, is clear and manifestly conflicts with and effectively impairs the enjoyment of the rights which the affected party is unconditionally entitled to under the WTO Agreement, as is the case here, then the direct effect of the WTO Agreements cannot shield the domestic law from such scrutiny by WTO panels.²⁰⁴

204 While Mexico is right in saying that a Member's law is assumed to be a good faith implementation of its commitments until proven otherwise, it is therefore also correct to assume that by drafting the law the way it did, Mexico assumingly considered it was implementing its commitments in a WTO consistent manner, and it can thus be assumed that the executive authority will simply execute what the law requires it do without questioning the legal validity of such obligations in light of the WTO Agreement. In fact to find otherwise, and taking the Mexican argument to its logical conclusion, would imply that it does not matter at all what the law says since the WTO Agreements have direct effect and they prevail. Such a reading which renders the domestic legal provisions completely irrelevant cannot be correct.

7.225 This is especially so in case the challenged provisions do not leave any room for interpretation but are clearly inconsistent with the WTO Agreement. Absent any contrary indication that the law does not mean what the text of the law indicates it means, the challenged

¹⁵⁵ See Panel Report, paras. 7.224-225 & nn.213, 221, 223, 230, 237.

¹⁵⁶ See, e.g., Mexico's Appellant Submission, para. 214.

¹⁵⁷ Mexico's Appellant Submission, para. 217.

provision of the law is inconsistent with the Agreement. In this case, Mexico has not provided any such evidence, quite to the contrary, it has vigorously defended its law as being consistent as such with the WTO Agreement¹⁵⁸

123. As the Panel correctly found, each of the FTA provisions that the United States challenged clearly requires Economía to take a certain action. With the exception of Article 93V of the FTA, Mexico did not disagree. Rather, Mexico simply argued, incorrectly, that each of the required actions was consistent with its WTO obligations. Mexico has failed to explain how Article 2 of the FTA can override the clear requirements of each of the challenged provisions when Mexico sees no conflict between the provisions and its WTO obligations.

2. The Panel Correctly Found That Article 53 of Mexico’s Foreign Trade Act Is Inconsistent “As Such” with Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement.

124. The first of the FTA provisions at issue is Article 53, which establishes the deadlines for interested parties to respond to questionnaires in Mexican antidumping and countervailing duty proceedings. The Panel correctly found that Article 53 was inconsistent as such with Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement.

125. As with most of the other FTA provisions at issue in this dispute,¹⁵⁹ Mexico did not contest the U.S. interpretation of Article 53, which provides that interested parties in antidumping investigations “shall” submit their questionnaire responses “within a period of 28 [working] days from the day following the publication of the initiating resolution.”¹⁶⁰ The disagreement between the parties revolved instead around the proper interpretation of Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement, and the consequences of that interpretation for the WTO-compatibility of Article 53.

126. The particular portion of Article 6.1.1 that is at issue is the first sentence, which states that “Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.”¹⁶¹ Mexico interprets this language as creating an obligation to provide a 30-day response time only when an authority sends the questionnaire to an interested party at the time that it initiates its investigation.¹⁶² As the Panel correctly found, however, this is not what Article 6.1.1 says:

¹⁵⁸ Panel Report, paras. 7.224-225.

¹⁵⁹ The exception is Article 93V of the FTA, which the United States addresses in Section II.D.6 below.

¹⁶⁰ The full text of Article 53 is reproduced in para. 7.216 of the Panel Report.

¹⁶¹ AD Agreement Art. 6.1.1. Footnote 15 of the AD Agreement is appended to Article 6.1.1 and states that “[a]s a general rule, the time limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.”

¹⁶² See, e.g., Mexico’s Appellant Submission at paras. 230, 233(b).

We consider that Article 6.1.1 of the AD Agreement clearly provides that any exporter or foreign producer receiving a questionnaire shall be given 30 days for reply. This 30-day rule does not make a distinction between those exporters that received a questionnaire at the time of initiation because they happened to be known to the applicant and were thus informed of the initiation, and those that make themselves known or the existence of which becomes known to the authorities and to which questionnaires are sent following initiation.¹⁶³

127. Mexico disputes the Panel's findings by pointing to language in the *Argentina – Poultry Anti-Dumping Duties* panel report that allegedly supports its position.¹⁶⁴ In actuality, however, Mexico is taking the *Argentina – Poultry Anti-Dumping Duties* language out of context and ignoring other language in that report which undermines its own position and plainly supports the *Rice* panel's findings. For example, the *Argentina – Poultry Anti-Dumping Duties* panel found that:

On its face, Article 6.1.1 is straightforward. In accordance with the first sentence of that provision, *exporters or foreign producers receiving questionnaires used in an anti-dumping investigation must be given at least 30 days for reply*. Since the second sentence of Article 6.1.1 envisages extensions of the 30-day period provided for in the first sentence of Article 6.1.1, *that 30-day period is an absolute minimum that must be granted to exporters from the outset. . . .*¹⁶⁵

Thus, the *Argentina – Poultry Anti-Dumping Duties* panel agreed with the *Rice* panel that the 30-day period is the absolute minimum that an investigating authority must provide to exporters and producers that receive a questionnaire.

128. Furthermore, the *Argentina – Poultry Anti-Dumping Duties* panel did not distinguish between the obligations that pertain to exporters and producers that are sent the questionnaire at the outset of the investigation and those that only receive the questionnaire later in the investigation; in fact, it was quite the opposite. Argentina initiated its antidumping investigation on January 25, 1999, and the Argentine investigating authority sent its antidumping questionnaire to five Brazilian exporters on February 16, 1999.¹⁶⁶ Brazil did not allege any breach of Article 6.1.1 with respect to this initial group of exporters. The dispute pertained instead to a second group of seven exporters that the investigating authority only became aware of after the investigation was initiated.¹⁶⁷ The second group of exporters received the antidumping questionnaire on September 15, 1999,¹⁶⁸ eight months after the investigation was

¹⁶³ Panel Report, para. 7.220.

¹⁶⁴ Mexico's Appellant Submission at paras. 229 and 233(b), citing Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.145.

¹⁶⁵ Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.140 (emphasis added). It is not surprising that the *Argentina – Poultry Anti-Dumping Duties* report supports the *Rice* Panel's analysis; one of the panelists in the present case was also a panelist in *Argentina Poultry*.

¹⁶⁶ See, e.g., Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.126.

¹⁶⁷ Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.126.

¹⁶⁸ Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.126.

initiated, and it was this second group that the Panel found was entitled to a 30-day response period.¹⁶⁹

129. Thus, the *Argentina – Poultry Anti-Dumping Duties* panel report directly supports the *Rice* panel’s finding that an exporter is entitled to a 30-day response time regardless of when it receives the questionnaire. Mexico can only support its argument to the contrary by reading words into Article 6.1.1 that are not there. Mexico’s interpretive approach is wrong. It is well-established that the role of the treaty interpreter is to interpret the words the drafters actually used, and not the words the interpreter may have preferred they had used.¹⁷⁰ Article 6.1.1 of the AD Agreement plainly states that an investigating authority must provide a 30-day response time to any producer or exporter that receives an antidumping questionnaire. Article 53 of the FTA prevents Economía from providing a full 30-day response period to all exporters and producers that are entitled to receive one.¹⁷¹ Therefore, the Panel’s finding that Article 53 is inconsistent “as such” with Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement is correct, and the Appellate Body should uphold it.

3. The Panel Correctly Found That Article 64 of Mexico’s Foreign Trade Act Is Inconsistent “As Such” with Article 6.8 and Paragraphs 1, 3, 5 & 7 of Annex II of the AD Agreement and Article 12.7 of the SCM Agreement.

130. The second of the FTA provisions at issue in this appeal is Article 64, which requires Economía to always apply the “highest” margin of dumping or subsidization obtained from the facts available to exporters or producers who are assigned facts available-based dumping or countervailing duty margins. The Panel correctly found that, because it imposes this requirement, Article 64 is inconsistent “as such” with Article 6.8 and paragraphs 1, 3, 5, and 7 of Annex II of the AD Agreement and Article 12.7 of the SCM Agreement. Mexico’s arguments in response fail to address the substance of the Panel’s findings and provide no basis for reversing them.

131. Although the portion of Mexico’s Appellant submission discussing Article 64 is relatively lengthy, the legal reasoning underpinning its appeal of this issue is set out entirely in paragraph 245 thereof, which contains several subparagraphs. The United States will discuss each of these subparagraphs in turn and explain why none of them provides a basis for reversing the Panel’s finding that Article 64 is inconsistent “as such” with Mexico’s WTO obligations.

¹⁶⁹ See Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.138, 7.144.

¹⁷⁰ See Appellate Body Report, *EC – Hormones*, para. 181 (stating that “[t]he fundamental rule of treaty interpretation requires a treaty interpreter to read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used.”)

¹⁷¹ For example, Article 53 would have precluded Economía from providing a 30-day response period to the seven exporters in the *Argentina – Poultry Anti-Dumping Duties* investigation.

132. Mexico first argues in subparagraph (a) of paragraph 245 that Article 64 cannot be inconsistent “as such” with Mexico’s WTO obligations because of the operation of Article 2 of the FTA. The United States has already explained in Section II.D.1 above why Mexico’s arguments with respect to Article 2 lack merit and provide no basis for reversing the Panel’s findings.

133. Mexico next argues in subparagraph (b) of paragraph 245 that the Panel failed to interpret the text of Article 6.8 and paragraphs 1, 3, 5, and 7 of Annex II of the AD Agreement in accordance with the rules of treaty interpretation in Article 31 of the Vienna Convention because it allegedly failed to take into account the ordinary meaning of the terms used and did not take into account places where the agreement “remains silent” on this issue. Mexico provides absolutely no reasoning in support of these assertions, except to the extent that it makes further points in the subparagraphs that follow. Therefore, the United States will not discuss subparagraph (b) further.

134. In subparagraph (c) of paragraph 245, Mexico argues that the Panel should have found that Article 64 of the FTA is consistent with paragraph 3 of Annex II of the AD Agreement because that paragraph only requires investigating authorities to take information into account if it is verifiable. Article 64, however, requires Economía to apply the highest facts available regardless of whether an exporter or producer submitted information that was verifiable. Therefore, as the Panel correctly found, Article 64 is inconsistent as such with paragraph 3 of Annex II of the AD Agreement.

135. In subparagraph (d) of paragraph 245, Mexico argues that the Panel should have found that Article 64 is consistent with paragraph 5 of Annex II of the AD Agreement because, in Mexico’s view, paragraph 5 entitles an investigating authority to reject information that is not ideal in at least one respect. But paragraph 5 states that a failure to supply information that is not ideal in all respects does not justify an investigating authority from disregarding the information if the interested party that submitted it acted to the best of its ability in doing so. By requiring Economía to always apply the highest facts available, Article 64 prevents Economía from taking into account whether a party has acted to the best of its ability. Accordingly, Article 64 is inconsistent as such with paragraph 5 of Annex II.

136. In subparagraph (e) of paragraph 245, Mexico argues that Article 64 of the FTA is consistent with paragraphs 1 and 7 of Annex II of the SCM Agreement because paragraph 1 purportedly states that investigating authorities will be free to make determinations on the basis of the facts available if a party fails to provide requested information and because paragraph 7 states that a failure to cooperate may lead to a result that is less favorable than if the party had provided the requested information. In actuality, however, paragraph 1 says that an investigating authority “should specify in detail the information required” and “should ensure the party is aware” that the investigating authority may make determinations on the basis of the facts available if the party fails to supply the requested data. Article 64 requires Economía to apply the highest facts available-based margin in all cases, even if the investigating authority fails to

provide the notice that paragraph 1 of Annex II requires. Therefore, Article 64 of the FTA is inconsistent as such with paragraph 1 of Annex II.

137. Similarly, paragraph 7 of Annex II states that an investigating authority that bases its findings on secondary sources (such as the petition) should do so with special circumspection, including by checking the information against other independent sources where practicable. By requiring it to apply the highest facts available in all cases, Article 64 prevents Economía from using the special circumspection that paragraph 7 requires, and it effectively nullifies the requirement to check the information against other independent sources because Economía must use the highest facts available even if the other independent sources contradict it. Therefore, Article 64 is inconsistent “as such” with paragraph 7 of Annex II.

138. Finally, Mexico argues in subparagraph (f) of paragraph 245 that, in light of the language of paragraph 7, there is “no reason to disregard” the option of applying the highest margin possible. But the Panel never said that an investigating authority must necessarily “disregard” the highest margin possible. On the contrary, the Panel explicitly stated that the application of the “best information available” might lead in a particular case to the use of the highest margin.¹⁷² As the Panel correctly found, however, there is no basis in Article 6.8 or paragraphs 1, 3, 5, or 7 of Annex II of the AD Agreement to always apply the highest margin as a matter of course.

139. In conclusion, the Panel correctly found that the requirement in Article 64 of the FTA that Economía always apply the highest facts available is inconsistent as such with Article 6.8 and paragraphs 1, 3, 5, and 7 of Annex II of the AD Agreement. Mexico’s arguments to the contrary provide no basis for reversing the Panel’s findings and the Appellate Body should reject them.

4. The Panel Correctly Found That Article 68 of Mexico’s Foreign Trade Act Is Inconsistent “As Such” with Articles 5.8, 9.3, and 11.2 of the AD Agreement and Articles 11.9 and 21.2 of the SCM Agreement.

140. The next provision of the FTA at issue is Article 68, which the Panel found was inconsistent “as such” with Mexico’s WTO obligations in two ways. First, Article 68 requires Economía to conduct reviews of exporters and producers that should have been excluded from antidumping measures in accordance with Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement. Second, Article 68 requires Economía to deny reviews to exporters and producers that Articles 9.3 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement entitle them to receive if the exporters and producers are unable to demonstrate a “representative” volume of sales during the review period. Mexico’s arguments fail to provide a basis for reversing the Panel’s findings, and the Appellate Body should uphold them.

¹⁷² Panel Report, para. 7.238, n.210.

a. The Panel Correctly Found That Article 68 of Mexico’s Foreign Trade Act Is Inconsistent “As Such” with Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement.

141. The first portion of Article 68 at issue states in pertinent part that:

Final countervailing duties shall be reviewed annually at the request of a party or ex officio by the Ministry at any time, *as shall imports from producers for whom no positive margin of price discrimination or subsidization was determined in the investigation . . .*¹⁷³

142. The Panel made a factual finding that “Article 68 of the Act thus requires the review of producers for which during the original investigation it was determined that they had not been engaged in dumping practices or had not received any subsidies.”¹⁷⁴ Mexico did not dispute this fact during the proceeding; it simply argued that the imposition of this review requirement was not inconsistent with Mexico’s WTO obligations.

143. The Panel disagreed with Mexico and correctly found that Article 68 was inconsistent as such with Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement. The Panel based its finding on many of the same reasons that it set forth when discussing Economía’s refusal to exclude Farmers Rice and Riceland from the rice antidumping measure.¹⁷⁵

In our view, and for the reasons set forth above when discussing the US claims concerning the inclusion in the Anti-dumping measures on rice of the two exporters found not to have been dumping during the period of investigation, we find that Article 5.8 of the AD Agreement requires the termination of the investigation with regard to such exporters found not to have been dumping above de minimis levels, and requires that such exporters be excluded from the measures imposed. The logical consequence of such an exclusion of producers found not to have been dumping is that they can not subsequently be subjected to administrative or changed circumstances reviews. While we agree with Mexico that the specific requirements concerning de minimis do not apply in the case of reviews of the duties imposed, this does not imply that Article 68 of the Act dealing with reviews cannot be inconsistent with Article 5.8 of the AD Agreement insofar as it imposes the review of measures with regard to producers to which such measures should not have been applied in the first place. The possibility of reviewing the zero per cent duty margin imposed on such non-dumping exporters also reveals the important meaning of the imposition of such a zero per cent duty which, in spite of its appearance, does not equal the termination of the investigation as required by Article 5.8 of the AD Agreement. We therefore find that Article 68 of the Act is as such inconsistent with Article 5.8 of the AD Agreement. For the same reasons, mutatis mutandis, Article 68 of the Act is in breach of Article 11.9 of the SCM Agreement.

¹⁷³ Panel Report, para. 7.250, citing Article 68 of the FTA (emphasis added).

¹⁷⁴ Panel Report, para. 7.251.

¹⁷⁵ The United States addressed Farmers Rice and Riceland in Section II.C.1 above.

144. Mexico's arguments in response to the Panel's findings are similar to the arguments it raised with respect to Farmers Rice and Riceland, and similarly without merit. Mexico first argues that Article 68 is consistent with Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement because Economía terminates its investigations as soon as it concludes that a given exporter or producer has a *de minimis* dumping margin.¹⁷⁶ Of course, Mexico again ignores that Economía will then proceed to apply the antidumping measure to that exporter in spite of the negative dumping determination. As the United States has previously noted, Mexico's logic would permit an investigating authority that terminated its investigation with a negative injury finding to impose an antidumping measure and claim that it was acting consistently with its WTO obligations. Obviously, this is not correct.

145. Mexico's second argument is to repeat its specious assertion that reviewing exporters and producers that should have been excluded from the scope of an antidumping measure cannot breach Article 5.8 of the AD Agreement because Article 5.8 only applies to investigations.¹⁷⁷ The Panel correctly rejected this argument, finding that if Article 5.8 requires an investigating authority to exclude a particular exporter from an antidumping measure at the outset, it necessarily follows that the investigating authority cannot turn around and subject that very same exporter to a review under the very measure that it should have been excluded from in the first place.¹⁷⁸

146. Furthermore, Article 3 of the AD Agreement conditions the application of an antidumping measure on a demonstration that the dumped imports are causing injury to the domestic industry. The requirement to demonstrate injury arises in the investigation phase, not the review phase. Therefore, using Mexico's reasoning, it would be permissible to conduct reviews of exporters and producers even in cases where the investigating authority reached a negative determination of injury, because the obligation to demonstrate injury only applies in the investigation phase. Obviously, this cannot be a correct interpretation of the requirements of the AD Agreement.

147. Mexico's third argument repeats its earlier assertion that Article 17.4 of the AD Agreement distinguishes between the imposition of measures and the levying of duties and that this distinction somehow authorizes Economía to include firms that are investigated and found not to be dumping (or causing injury) within the scope of an antidumping measure. The United States explained in Section II.D.1 above why Article 17.4 is actually irrelevant to this issue, and why taking Mexico's argument to its logical conclusion would permit an investigating authority to impose an antidumping measure on exporters in cases where all of the margins are below *de*

¹⁷⁶ Mexico's Appellant Submission, para. 255-256.

¹⁷⁷ Mexico's Appellant Submission, para. 259(a).

¹⁷⁸ Panel Report, para. 7.251.

minimis, or where the investigating authority reaches a negative determination of injury, as long as no duties are collected.¹⁷⁹

148. Finally, Mexico argues that the U.S. panel request claimed that Article 68 of the FTA was inconsistent with Article 5.8 and other provisions of the AD Agreement because, *inter alia*, it “appears to require reviews of respondent exporters that were not assigned a positive margin in an investigation”,¹⁸⁰ and that the Panel should have determined whether Article 68 does in fact require such actions.¹⁸¹ The United States does not understand the point Mexico is trying to make. The Panel did in fact examine whether Article 68 requires Economía to conduct reviews of firms that received zero margins of dumping in the investigation, and whether the imposition of such a requirement is inconsistent with Article 5.8 of the AD Agreement as the United States had alleged. As the Panel correctly found, it does, and it is.

149. In summary, the Panel correctly found that Article 68 is inconsistent “as such” with Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement because it requires Economía to conduct reviews of exporters and producers that were investigated and found not to be dumping or receiving countervailable subsidies. The Appellate Body should reject Mexico’s assertions to the contrary and uphold the Panel’s findings.

b. The Panel Correctly Found That Article 68 of Mexico’s Foreign Trade Act Is Inconsistent “As Such” with Articles 9.3 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement.

150. In addition to the findings discussed immediately above, the Panel also correctly found that Article 68 is inconsistent “as such” with Articles 9.3 and 11.2 of the AD Agreement and with Article 21.2 of the SCM Agreement because it 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” in order to obtain a review. Mexico’s arguments to the contrary provide no basis for reversing the Panel’s findings, and the Appellate Body should reject them.

¹⁷⁹ Notwithstanding Mexico’s statements to the contrary, imposing a measure on a non-dumping exporter has real consequences, as the Panel correctly found:

“The possibility of reviewing the zero per cent duty margin imposed on such non-dumping exporters also reveals the important meaning of the imposition of such a zero per cent duty which, in spite of its appearance, does not equal the termination of the investigation as required by Article 5.8 of the AD Agreement.”

Panel Report, para. 7.251.

¹⁸⁰ WT/DS295/2, Section 2(c).

¹⁸¹ Mexico’s Appellant Submission, para. 257-258.

151. There is no dispute between the parties that Article 68 of the FTA requires exporters and producers seeking reviews to demonstrate that the volume of their exports during the review period were “representative,” and the Panel made a factual finding to that effect.¹⁸² The dispute revolves instead around the consequence of that requirement in light of Articles 9.3 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement. The Panel correctly found that none of these WTO provisions permit an investigating authority to impose such a requirement as a condition for obtaining a review:

7.257 It is clear that these provisions do not as such require a showing of representativeness of sales volumes in order for a duty to be reviewed. With regard to duty assessment or administrative reviews Article 9.3 of the AD Agreement clearly states that the amount of the anti dumping duty shall not exceed the margin of dumping as established under Article 2. Therefore, Article 9.3.2 states that provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. The only condition imposed by Article 9.3.2 is that a request for refund shall be duly supported by evidence. In our view, the “evidence” referred to in this context of determining final liability for the product relates to the information required to determine a margin of dumping in line with Article 2 of the AD Agreement, i.e. normal value and export price information. *Article 9.3 thus does not require the exporters concerned to first demonstrate that the sales made during the review period were “representative” in order for the authority to be obliged to review the duties and refund the duties paid in excess of the margin of dumping.* Neither does Article 2 of the AD Agreement provide that the number of export sales of an exporter has to be “representative” for the authority to be able to determine a margin of dumping for this exporter. It would in our view be inconsistent with the Agreement to refuse to refund the duties paid in excess of the margin of dumping, because only a small number of such export sales were made. Article 9.3.2 of the AD Agreement requires that any duty paid in excess of the margin of dumping is to be refunded, and the number of export sales is thus completely irrelevant in this respect. We therefore conclude that no such requirement can be imposed on the exporter when it is requesting the refund of the duties paid in excess of the margin of dumping through an administrative review.

7.258 With regard to changed circumstances review, Article 9.3 and 11.2 of the AD Agreement similarly does not include a requirement of “representativeness” in order for the exporter to be entitled to request a changed circumstances review. *The only requirements imposed by Article 11.2 of the AD Agreement on the request by an exporter for such a review are that a reasonable period of time has lapsed, and that the interested party requesting the review submits positive information substantiating the need for a review.* As the second sentence of Article 11.2 of the AD Agreement makes clear, such positive information relates to whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. *If those conditions are met, Article 11.2 of the AD Agreement stipulates that the authorities shall review the need for the continued imposition of the duty. In our view, Article 11.2 of the AD Agreement thus requires an authority*

¹⁸² Panel Report, para. 7.253.

*to review the need for the continued imposition of the duty in case these two requirements are met.*¹⁸³

152. Mexico disagrees with the Panel, but the primary basis of its argument is a mischaracterization of the relevant AD and SCM Agreement provisions. To be specific, Mexico argues that the only obligation laid down in Articles 9.3 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement is that the investigating authority must initiate reviews, and that the provisions do not contain any obligation with respect to the conduct of those reviews.¹⁸⁴ Mexico's argument seeks to elevate form over substance because refusing to conduct a review of a firm that is unable to demonstrate a "representative" volume of sales is tantamount to refusing to initiate the review in the first place. But in any event, even a cursory examination of the text of the provisions demonstrates that Mexico is mistaken.

153. Contrary to Mexico's assertion, none of the AD and SCM Agreement provisions at issue limit their obligations to initiating a review; none of them even refers to initiating a review. As the Panel noted in the excerpt of its report set out above, Article 9.3.2 states that Members "shall" make provision for a prompt refund, "upon request," of "any" duty paid in excess of the margin of dumping. Moreover, the refund "shall" normally take place within 12 months of the date on which the importer requests the review, duly supported by evidence. Plainly, the obligation to make a "prompt refund" entails more than simply initiating a review. Rather, the Member must conduct the review and refund "any" excess duty. Article 9.3.2 does not permit a Member to condition refunding the excess duties on a demonstration of a "representative" volume of sales.

154. Similarly, Article 11.2 of the AD Agreement does not merely say that an administering authority shall "initiate" a review; rather, it says the authority shall "review" the need for continued imposition of the duty. Article 21.2 of the SCM Agreement, which is virtually identical to Article 11.2 of the AD Agreement, states the same. An authority cannot meet its obligation to "review" the need for the duty by merely initiating the review and then refusing to conduct it. Neither provision permits a Member to condition the conduct of a review on a showing of a "representative" volume of sales, and Mexico's arguments to the contrary lack merit.

155. In addition to mischaracterizing the relevant AD and SCM Agreement provisions, Mexico also misunderstands the interaction between the customary rules of treaty interpretation and the requirements of Article 68 of the FTA. Specifically, Mexico correctly notes that the fact that a treaty provision is silent on a specific issue must have some meaning.¹⁸⁵ Articles 9.3.2 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement are not silent with respect to

¹⁸³ Panel Report, paras. 7.257, 7.258 (emphasis added).

¹⁸⁴ Mexico's Appellant Submission, para. 264.

¹⁸⁵ Mexico's Appellant Submission, para. 264, citing Appellate Body Report, *US – German Steel*, paras.

the requirements that an exporter or producer must meet in order to be entitled to reviews, however. On the contrary, they are quite explicit.

156. As the Panel noted, Articles 9.3.2 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement require an investigating authority to conduct reviews when requested by an exporter or producer that meets the relevant conditions, which do not include a showing of a “representative” volume of sales.¹⁸⁶ Article 68 of the FTA, by contrast, “requires *as a rule* that *each time* an interested party is unable to show that the volume of exports during the review period was representative, such a review is to be denied.”¹⁸⁷ Therefore, Article 68 of the FTA is inconsistent “as such” with Articles 9.3.2 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement.

157. Mexico also argues that the AD and SCM Agreements leave Members free to develop their own structures for their antidumping and countervailing duty systems, provided that they do not conflict with the provisions in the respective agreements.¹⁸⁸ What Mexico fails to recognize, however, is that Article 68 does conflict with Articles 9.3.2 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement because it requires Economía to deny reviews that the AD and SCM agreements require it to perform. The Panel’s findings were correct, and the Appellate Body should uphold them.

5. The Panel Correctly Found That Article 89D of Mexico’s Foreign Trade Act Is Inconsistent “As Such” with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement.

158. Article 89D of the FTA is the provision of Mexican law that relates to the expedited review provisions of the AD and SCM Agreements. The Panel correctly found that Article 89D is inconsistent “as such” with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement because, similar to Article 68, it requires Economía to deny reviews that the two WTO agreements require it to conduct. Mexico’s arguments to the contrary provide no basis for reversing the Panel’s findings, and the Appellate Body should reject them.

159. The issue that Article 89D presents is virtually identical to the Article 68 issue that the United States discussed immediately above. The Panel made a factual finding that Article 89D requires Economía to deny expedited reviews to exporters and producers that are unable to demonstrate that they made a “representative” volume of exports during the review period in

¹⁸⁶ Panel Report, paras. 7.257, 7.258. The “silence” in the AD and SCM Agreements with respect to showings of representativeness demonstrates that the drafters did not include such a showing as a permissible condition for obtaining reviews.

¹⁸⁷ Panel Report, para. 7.259.

¹⁸⁸ Mexico’s Appellant Submission, para. 264, *citing* Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 158.

question.¹⁸⁹ The legal question, therefore, was whether Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement permit an investigating authority to deny reviews on such a basis. The Panel correctly found that they do not:

In our view, [Article 9.5 of the AD Agreement] clearly does not subject the right to an expedited new shipper review to a showing of a "representative" volume of export sales as does Article 89D of the Act. Article 9.5 of the AD Agreement provides that the authorities shall promptly carry out a review, provided that the exporters or producers who have not exported the product subject to a duty during the period of investigation can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti dumping duties on the product. In sum, in case a producer or exporter which (i) has not exported the product to the country concerned during the period of investigation and (ii) is not related to an exporter or producer already subject to the duty requests a new shipper review, the authority is required to promptly carry out such a review. Article 89 D of the Act on the other hand provides that an exporter may request an expedited review in case it (i) has not exported during the period of investigation, (ii) is not related to an exporter or producer that is already subject to a duty, and (iii) can demonstrate that the volume of exports during the review period is representative. We consider that to the extent that Article 89 D of the Act subjects the entitlement to a prompt review to a showing of representative volumes of export sales, it is inconsistent with Article 9.5 of the AD Agreement, which does not allow an authority to deny a request for reasons other than the two mentioned above and explicitly set forth in Article 9.5 of the AD Agreement.¹⁹⁰

* * * *

Article 19.3 of the SCM Agreement . . . similarly provides for the right to an expedited review of an exporter whose exports are subject to a definitive duty but who was not actually investigated for reasons other than a refusal to cooperate. Article 19.3 of the SCM Agreement does not subject this right to any other conditions than the fact that the exporter's product is subject to a definitive duty and that he was not actually investigated for reasons other than a refusal to cooperate. For reasons, similar to those expressed earlier, we consider that Article 89 D of the Act is inconsistent with Article 19.3 of the SCM Agreement as it imposes an additional requirement not provided for in Article 19.3 of the SCM Agreement for the exporters to be entitled to an expedited review. The mandatory language of Article 89 D of the Act inevitably implies that an authority will reject a request for an expedited review by an exporter whose product is subject to a countervailing duty but who was not actually investigated for a reason other than a refusal to cooperate in case no representative volume of export sales were made during the period of review which is inconsistent with the clear obligation in Article 19.3 of the SCM Agreement to provide for such reviews in such circumstances.¹⁹¹

160. Once again, Mexico's arguments to the contrary are based on an apparent misunderstanding of the interaction between the customary rules of treaty interpretation and the requirements of Article 89D of the FTA. As Mexico notes, the fact that a treaty provision is

¹⁸⁹ Panel Report, para. 7.266.

¹⁹⁰ Panel Report, para. 7.266.

¹⁹¹ Panel Report, para. 7.268.

silent on a specific issue must have some meaning.¹⁹² Like Articles 9.3.2 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement, however, Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement are not silent with respect to the requirements that an exporter or producer must meet in order to be entitled to an expedited review.

161. As the Panel noted, Article 9.5 of the AD Agreement requires an investigating authority to conduct an expedited review when requested by an exporter or producer that meets two conditions: (i) it must not have exported the product to the country concerned during the period of investigation; and (ii) it must not be related to an exporter or producer already subject to the duty.¹⁹³ Similarly, Article 19.3 of the SCM Agreement requires an investigating authority to conduct an expedited review when requested by an exporter or producer that is subject to a definitive duty and that meets a single condition: it must not have been investigated for reasons other than a refusal to cooperate.¹⁹⁴ Article 89D, by contrast, requires Economía to deny requests from such exporters or producers if they are unable to demonstrate that they made a “representative” volume of export sales during the review period. Therefore, Article 89D is inconsistent “as such” with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement.

162. As it did in its arguments concerning Article 68 of the FTA, Mexico also argues that the AD and SCM Agreements leave Members free to develop their own structures for their antidumping and countervailing duty systems, provided that they do not conflict with the provisions in the respective agreements.¹⁹⁵ Article 89D does conflict with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement, however, because it requires Economía to deny reviews that the AD and SCM agreements require it to perform. The Panel’s findings were correct, and the Appellate Body should uphold them.

6. The Panel Correctly Found That Article 93V of Mexico’s Foreign Trade Act Is Inconsistent “As Such” with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement.

163. Article 93V of the FTA is a provision of Mexican law that requires Economía to impose fines on certain importers that import goods that are like or identical to goods subject to an antidumping or countervailing duty investigation.¹⁹⁶ The Panel correctly found that Article 93V provides for a specific action against dumping or subsidization that is not provided for in Article 18.1 of the AD Agreement or Article 32.1 of the SCM Agreement and that the provision is

¹⁹² Mexico’s Appellant Submission, para. 272, *citing* Appellate Body Report, *US – German Steel*, para. 65.

¹⁹³ Panel Report, para. 7.266.

¹⁹⁴ Panel Report, para. 7.268.

¹⁹⁵ Mexico’s Appellant Submission, para. 273, *citing* Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 158.

¹⁹⁶ *See, e.g.*, Panel Report, para. 7.278.

inconsistent “as such” with Mexico’s WTO obligations.¹⁹⁷ Although Mexico does not contest the Panel’s conclusion that Article 93V is a specific action against dumping or subsidization, it asserts that the Panel breached Article 11 of the DSU by finding that the provision is mandatory. Mexico’s arguments provide no basis for reversing the Panel’s findings, and the Appellate Body should reject them.

164. Mexico asserts that the Panel breached Article 11 of the DSU by failing to analyze the Spanish version of Article 93V and by failing to analyze elements of the provision that allegedly show that it is discretionary. Neither assertion has merit. First, Mexico’s argument that the Panel based its findings exclusively on the English version of Article 93V is belied by the fact that the English language version of the panel report addresses both the Spanish text of Article 93V and its English translation, and the Spanish version of the report only addresses Article 93V in Spanish.¹⁹⁸ Mexico has pointed to nothing in the Panel report or in the panel proceedings (which Mexico argued in Spanish) to substantiate its argument that the Panel failed to examine the Spanish text, which is particularly implausible in light of the fact that one of the panelists was a native Spanish speaker.¹⁹⁹

165. Furthermore, although Mexico now takes issue with the English translation of Article 93V that the Panel included in its report,²⁰⁰ it did not contest the accuracy of the translation before the Panel. (As Mexico appears to recognize, the United States took the translation verbatim from the English version of Mexico’s WTO notifications.²⁰¹) Mexico has made no effort to explain how it could have been inconsistent with Article 11 of the DSU for the Panel to examine the English version of its WTO notification when Mexico never contested it.

166. The second ground for Mexico’s Article 11 claim also lacks merit. Mexico asserts that the Panel failed to examine additional elements of Article 93V that, in Mexico’s view, show that the provision is discretionary.²⁰² The first of these elements is language stating that Economía shall impose a fine when the imports in question “are considered likely” to undermine the remedial effect of the duty. Inasmuch as the Panel report explicitly sets out the text in question,²⁰³ there is no basis for Mexico’s assertion that the Panel overlooked it. Moreover, to the extent that the language is relevant at all, it simply confirms that Economía must impose a fine if it finds that the conditions in Article 93V are met. The United States made this point before the Panel, and Mexico did not dispute it.

¹⁹⁷ Panel Report, para. 7.278.

¹⁹⁸ See Panel Report (in English and Spanish), para. 7.279 and n. 229.

¹⁹⁹ Panelist Ross is Venezuelan, and her native language is Spanish.

²⁰⁰ Mexico’s Appellant Submission, para. 282.

²⁰¹ See *Notification of Laws and Regulations Under Article 18.5 and 32.6 of the Relevant Agreements*, Mexico, G/ADP/N/1/MEX/1/Suppl.2 and G/SCM/N/1/Mex/1/Suppl. 1, at 14 (Apr. 24, 2003); *Notification of Laws and Regulations Under Article 18.5 of the Agreement*, G/ADP/N/1/MEX/1, at 12 (18 May 1995).

²⁰² Mexico’s Appellant Submission, para. 283.

²⁰³ Panel Report, para. 7.273.

167. The other “additional element” that Mexico cites is text in Article 93 of the FTA that purportedly states that “[t]he fine shall only be imposed once the suspected offender has been heard.” It is not surprising that the Panel never addressed this text, because Mexico failed to submit it to the Panel (Mexico’s appellant submission is the first time that Mexico has even mentioned it). The United States sees no possible basis for concluding that the Panel breached Article 11 of the DSU by not considering a fact that Mexico failed to submit to it.²⁰⁴

168. Finally, Mexico argues that the Panel failed to consider Mexico’s argument that Economía has never imposed such a fine.²⁰⁵ As the United States noted before the Panel, however, Mexico was unable to point to any case where it found that the conditions for imposing a fine were met, and yet it decided not to impose one. As the Panel correctly found, the text of the provision itself is mandatory, and the Panel’s finding that Article 93V was inconsistent “as such” with Mexico’s WTO obligations was entirely consistent with Article 11 of the DSU.

7. The Panel Correctly Found That Articles 68 and 97 of Mexico’s Foreign Trade Act Are Inconsistent “As Such” with Articles 9.3 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement.

169. The final set of Mexican legal provisions at issue is Articles 68 and 97 of the FTA. The Panel correctly found that Articles 68 and 97 are inconsistent “as such” with Articles 9.3 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement because they require Economía to reject requests for reviews if judicial review proceedings have been initiated, for as long as such proceedings have not been finalized.²⁰⁶ Mexico’s arguments to the contrary ignore uncontested factual findings by the Panel and barely address the substance of the Panel’s legal findings. The Appellate Body should reject them.

170. The bulk of Mexico’s argumentation on this issue is based on the remarkable assertion that Article 68 of the FTA bears no relation to the prohibition of reviews while judicial review proceedings are ongoing and that there is nothing in Article 97 preventing Economía from conducting reviews.²⁰⁷ Mexico’s assertion is remarkable because the facts which underlay the Panel’s findings on this point were uncontested as the Panel noted in its report.²⁰⁸ It was Mexico itself which first explained (during consultations) that the two provisions of the FTA operate in this manner, and Exhibit US-20 was a letter from Economía to a U.S. exporter that rejected a review request precisely because the antidumping measure was under judicial review and thus

²⁰⁴ In any event, the text does nothing to undermine the Panel’s finding that Article 93V is mandatory; if the offender fails to sway Economía and the conditions in Article 93V are met, then Economía must impose a fine.

²⁰⁵ Mexico’s Appellant Submission, para. 284.

²⁰⁶ Panel Report, para. 7.290.

²⁰⁷ Mexico’s Appellant Submission, paras. 294, 296.

²⁰⁸ Panel Report, para. 7.289.

Articles 68 and 97 of the FTA required it to do so. The substance of this letter is set out in the Panel’s report.²⁰⁹

171. Furthermore, even if Mexico had contested the matter, it remains the case that the Panel found as a matter of fact that Articles 68 and 97 work together to preclude reviews while judicial proceedings are ongoing. Under Article 17.7 of the DSU, appeals are limited to “issues of law covered in the panel report and legal interpretations developed by the panel.” Thus, the Panel’s factual findings with respect to Articles 68 and 97 are not properly a subject for appellate review, and Mexico has not asserted that the Panel acted inconsistently with DSU Article 11 in making those factual findings.

172. The remainder of Mexico’s argumentation on this issue focuses entirely on the alleged consistency of Article 97 of the FTA with Mexico’s WTO obligations. Mexico does not even address the Panel’s legal findings that Article 68 of the FTA is inconsistent with Articles 9.3 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement. Accordingly, Mexico has provided no basis for the Appellate Body to reverse those findings by the Panel.

173. Finally, Mexico’s arguments regarding Article 97 of the AD Agreement provide no basis for reversing the Panel’s finding that the provision is inconsistent with Articles 9.3 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement. Mexico simply asserts that a duty is not “definitive” until any litigation regarding the duty is complete, and it recites various irrelevant policy considerations regarding the alleged benefits of its approach.²¹⁰ Mexico makes no effort to analyze the text of the relevant WTO provisions or to explain why the Panel’s interpretation of the provisions was wrong.

174. In actuality, the Panel properly concluded that a product becomes subject to “definitive” duties at the time that an antidumping or countervailing measure is imposed, and not only when the final liability for the duties is later determined.²¹¹ Support for the Panel’s finding is found in Article 11.2 of the AD Agreement, which states that Members “shall” review the need for the continued imposition of the duty, upon request, if a reasonable period of time has elapsed since the imposition of “the definitive anti-dumping duty.” When Article 11.2 is interpreted in the context of Article 11.1 (which refers to the “anti-dumping duty” remaining in force), it is clear that the term “imposition of the definitive duty” in Article 11.2 refers to the imposition of the AD or CVD measure itself.

175. Neither Articles 9.3 and 11.2 of the AD Agreement nor Article 21.2 of the SCM Agreement permits an authority that has imposed an AD or CVD measure to refuse a review on the grounds that the measure is not “definitive” until the end of judicial review. Therefore, the

²⁰⁹ Panel Report, para. 7.289.

²¹⁰ In actuality, Mexico’s approach causes substantial harm to exporters and producers that are denied reviews as the United States demonstrated before the Panel.

²¹¹ Panel Report, para. 7.296 and n.236.

Panel properly concluded that Articles 68 and 97 of the FTA are inconsistent as such with each of those provisions because they require Economía to deny reviews on such grounds. Mexico's arguments to the contrary are without merit, and the Appellate Body should reject them.

III. CONCLUSION

176. For the reasons set forth in this submission, the United States respectfully requests that the Appellate Body reject each of Mexico's appeals and requests for findings and determinations and uphold all of the relevant Panel findings in their entirety.
