MEXICO – DEFINITIVE ANTI-DUMPING MEASURES ON BEEF AND RICE

(Complaint with Respect to Rice)

(WT/DS295)

SECOND SUBMISSION OF
THE UNITED STATES OF AMERICA

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I. Introduction

1. In its first submission, the United States explained that Mexico's imposition of an antidumping measure on U.S. long-grain white rice breached numerous provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). The United States also explained that several provisions of Mexico's *Foreign Trade Act* ("FTA") and its *Federal Code of Civil Procedure* ("FCCP") are inconsistent with provisions of the AD Agreement and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

2. Mexico's responses to the United States' claims have barely addressed the substance of the U.S. arguments. Instead, Mexico has mostly replied with broad assertions that the AD and SCM Agreements create no obligations with respect to the issues that the United States has raised, and that Mexico has freedom to do whatever it wants. Mexico is incorrect. The AD and SCM Agreements do place obligations on Mexico, and Mexico has failed to rebut the U.S. *prima facie* case that Mexico has breached these obligations.

3. The purpose of this submission is not to repeat all of the arguments made to date, although the United States continues to maintain all of the views that it has expressed in previous submissions and statements. These include the U.S. rebuttals to the arguments that Mexico made in its first submission, which the United States set out at length in its oral statement at the first Panel meeting. Rather, this submission will focus on some key issues, including issues that have arisen as a result of Mexico's replies to the Panel's questions.

4. In particular, Section II of this submission will address Economía's decision to base its determinations on a stale period of investigation ("POI"). Sections III and IV will then discuss Economía's improper examination of only half of the evidence for the POI, and its failure to collect the information it needed to conduct an objective examination of injury and to base its determinations on positive evidence.

5. In Section V of the submission, the United States will discuss Economía's failure to exclude from the antidumping measure two exporters that it examined and found not to be dumping. Section VI will then address Economía's failure to investigate the U.S. exporters and producers of long-grain white rice in accordance with WTO rules, and in particular its decision to apply an adverse, facts available-based margin taken from the petition to the vast majority of the exporters and producers of long-grain white rice in the United States, including an exporter that participated in the investigation and demonstrated that it had no exports to Mexico during the POI.

6. Section VII will then discuss the inconsistencies between the FTA and the FCCP, on the one hand, and Mexico's WTO obligations, on the other.

7. Finally, Section VIII of this submission sets out a list of U.S. claims that Mexico has, to date, simply ignored or not even attempted to rebut.

II. Economía's Use of a Stale Period of Investigation Breached Articles VI:2 and VI:6 of the GATT 1994 and Articles 1, 3.1, 3.2, 3.4, and 3.5 of the AD Agreement

8. The United States' first submission presented the facts and legal arguments necessary to establish that Economía's use of a stale POI in the rice investigation breached Articles 1, 3.1, 3.2, 3.4, and 3.5 of the AD Agreement, and Articles VI:2 and VI:6 of the GATT 1994. Mexico has barely responded to the U.S. claims, and the Panel should reject the few responses that Mexico has offered.

A. Mexico Is Unable to Point to Any Legitimate Grounds Justifying Economía's Use of a Stale POI

9. The purpose of an antidumping investigation is to determine whether a domestic industry is presently injured (or threatened with injury) by dumping that is presently occurring.[1] Therefore, an investigating authority must seek to base its determinations of dumping and injury on a period that includes the most recent available information. If an investigating authority chooses instead to examine information that does not include the most recent available information, it must be able to justify its approach and explain why, despite its approach, its determinations are objective, unbiased, and based on positive evidence.

10. Mexico's response to the Panel's question 2(c) has confirmed that Economía had no justification for its decision to base its injury determination on stale data, except that it selected the POI that the petitioner asked it to examine. It took this approach even though the foreign respondents and the importers objected.[2] Mexico has also confirmed that Economía did not seek to use a POI that ended as close to the initiation date as practicable.[3]

11. Furthermore, Mexico has not contested that Economía took no steps to update the injury information after it initiated its investigation, with the result that its final determination of injury was based on data that was three to five years old.

12. Mexico's sole defense on this issue is that it interprets the AD Agreement as placing no limits on the age of the information that an investigating authority may use in reaching its determinations of dumping and injury, and that Economía is under no obligation to obtain the most recent information available when it conducts its investigations.[4] For the reasons set out below, as well as in previous U.S. submissions and statements, Mexico is wrong on both counts.

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[1] *See* U.S. First Written Submission, para. 57.

[2] *See, e.g.,* Preliminary Determination, para. 66 (Exhibits US-14&15).

[3] Mexico's Response to Panel Question 2(c).

[4] Mexico's Response to Panel Questions 2(a) and 2(c).

B. A Proper Interpretation of the AD Agreement and the GATT 1994 Demonstrates That an Investigating Authority Must Base its Injury Investigations on a Period that Includes the Most Recent Available Information

13. The United States has already identified numerous provisions in the AD Agreement and the GATT 1994 that illustrate the need for investigating authorities to base their injury investigations on a period that includes the most recent available information.[5] This obligation flows from the very nature of the injury investigation itself.

14. For example, Article 3.7 of the AD Agreement requires an investigating authority to base a determination of threat of material injury:

> on facts, and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

If an investigating authority fails to evaluate data that includes the most recent available data, it will not be in a position to make judgments about situations that are imminent; at most, it will be able to make predictions about situations that might have been imminent at some time in the past.[6] Thus, Article 3.7 of the AD Agreement presumes that the investigating authority is making its determination based on data that include the most recent available information.

15. Similarly, Article 3.4 of the AD Agreement requires an investigating authority to evaluate all relevant economic factors, including actual and potential decline in sales, profits, etc., and actual and potential negative effects on cash flow, inventories, etc. The term "potential" refers to the future, and implies that the investigating authority is evaluating data that includes information that is as current as possible.

16. In addition, Article VI:1 of the GATT 1994 states that dumping "is to be condemned if it causes or threatens material injury," and Article VI:6(a) states that a contracting party may only levy an antidumping duty if it finds that the dumping is such as to cause or threaten material injury (emphasis added). Both of these provisions imply that the injury is occurring in the present (or threatening to occur in the near future). Again, an objective investigating authority will only be in a position to make determinations about the present, or the near future, if it is examining a period that includes the most recent data available.

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[5] *See* U.S. First Written Submission, para. 57.

[6] Similarly, footnote 10 to Article 3.7 states that one situation that might support an affirmative finding of threat of material injury is where "there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices." An investigating authority will only be in a position to make predictions about the "near future" if it is basing those predictions on information that includes recent data.

17. As the United States noted in response to the Panel's question 1, the necessity for an investigating authority to consider events that happened in the past does not give an authority free rein to choose which part of the past to consider.[7] In the rice investigation, Economía made no effort to collect information for the period between the end of the POI (August 31, 1999) and the initiation of the antidumping investigation (December 11, 2000), and it made no effort to update its data thereafter. The more than fifteen-month gap between the end of the POI and the date of initiation, and the nearly three-year gap between the end of the POI and the final determination, means:

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

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

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

18. In summary, Mexico's argument that the AD Agreement places no limits on the age of the information that an investigating authority may use in reaching its determinations of dumping and injury should be rejected. The Panel should therefore find that Economía's use of a stale POI in its antidumping investigation of U.S. long-grain white rice breached Articles 1, 3.1, 3.2, 3.4, and 3.5 of the AD Agreement and Articles VI:2 and VI:6(a) of the GATT 1994.

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

19. The United States' submissions and statements have further demonstrated that Economía's decision to allow the petitioners to set the POI for its dumping analysis as March - August 1999 and its subsequent decision to focus on only March to August of 1997, 1998, and 1999 for its injury analysis resulted in breaches of Articles 1, 3.1, 3.5, and 6.2 of the AD Agreement. Mexico's response to the Panel's questions on this issue have served only to confirm again the bias and lack of objectivity inherent in its approach.

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[7] *Compare* Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/R, adopted April 24, 2003, para. 113 ("*EC – Bed Linen 21.5 AB*") (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.").

20. First, Mexico has flatly confirmed in its response to the Panel's question 5 that the sole reason for Economía's decision to base its dumping analysis on the March to August time period was that the petitioner requested it to examine that period. It also confirmed that instead of using a neutral approach, Economía always assumes that the POI that the petitioner suggests is appropriate; if the foreign respondents disagree, it places the evidentiary burden on them to demonstrate that it should use another period instead. Moreover, when the respondents in the rice investigation did come forward and object to the POI, Economía summarily rejected their concerns.[8] Mexico's claim that its approach was justified by footnote 4 of the AD Agreement is without merit, because footnote 4 addresses the determination of whether sales have been made below cost over an extended period of time. The present dispute does not involve that issue.

21. Second, Mexico has reiterated again in its response to the Panel's question 3 that the sole reason for Economía's decision to base its injury analysis on the March to August time period was that the petitioner requested it to examine that period. Mexico's statement that Economía conducted its injury analysis on the basis of the "period selected by the petitioners" speaks volumes. As Economía's initiation notice and preliminary determination make clear, the petitioner requested Economía to examine the March to August time period specifically because the petitioner believed imports were concentrated in that period, and Economía initiated the case on that basis.[9] An objective and unbiased investigating authority would not have permitted the petitioner to control the investigation in this manner.[10]

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[8] *See, e.g.,* Preliminary Determination, para. 66 (Exhibits US-14&15).

[9] *See, e.g.,* paragraph 111 of the Notice of Initiation and paragraph 64 of the Preliminary Determination, where Economía stated that, according to the petitioners:

> [T]he main importing activity of the finished product [milled rice] takes place in the period that goes from March through August in which there are no harvests of paddy rice and that for this reason such period adequately reflects importing activities.

Rice Initiation Notice, para. 111 (Exhibits US-1&2); Preliminary Determination, para. 64 (Exhibits US-14&15). In both determinations, Economía reached the conclusion that, according to the information provided by the petitioners:

> [I]mports tend to concentrate in the period from March through August of each year, which corresponds to the period of investigation proposed by the petitioners.

Notice of Initiation, para. 112 (Exhibits US-1&2); Preliminary Determination, para. 65 (Exhibits US-14&15).

[10] The Appellate Body stated in *United States – Hot-Rolled Steel AB* that:

> an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favoring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.

(continued...)

22. Third, although Economía did rely on its views of when imports were concentrated when it decided which period to examine,[11] Mexico's response to the Panel's question 3 rejects the idea that Economía took "seasonality" into account in making this decision. Therefore, there are absolutely no grounds to conclude that concerns about seasonality justified the approach that Economía took.

23. Fourth, Mexico's response to question 3 also confirms that Mexico did collect data for every month in the three-year injury POI; it simply chose not to examine half of that information.[12] By contrast, a proper injury analysis looks at the evidence for the entire POI. Indeed, the very fact that the non-examined half of each of the three years reflects a large portion of domestic production makes it vital for an investigating authority to examine the evidence for the entire POI. This is especially so when an investigating authority allows the petitioner to select the investigated period.[13]

24. The Appellate Body made a similar point in *United States – Hot-Rolled Steel AB*, when it found that an investigating authority could not objectively examine a domestic industry if it focused on just one part of that industry. As the Appellate Body stated:

> 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 . . . 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,

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[10] (...continued)
Report of the Appellate Body, *United States – Hot-Rolled Steel from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 193 (emphasis added; footnotes omitted) ("*United States – Hot-Rolled Steel AB*").

[11] *See, e.g,* Notice of Initiation, para. 112 (Exhibits US-1&2); Preliminary Determination, para. 65 (Exhibits US-14&15).

[12] In its response to the Panel's question 4, Mexico states that Economía collected data through December 1999. The United States believes Mexico is mistaken, and that Economía actually collected data only through August 1999.

[13] Mexico's suggestion that its approach was justified in part by the fact that the petitioner had evidence of dumping for the March – August period makes no sense. *See* Mexico's Response to Panel Question 3, final paragraph. Once Economía initiated the investigation, it was completely able to seek full-year data in its dumping and injury questionnaires. The availability of information to the petitioner prior to initiation cannot excuse Economía's subsequent decision to examine evidence for only half of the POI.

> without drawing attention to the positive data in other parts of the industry.[14]

25. In sum, "an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of 'objectiv[ity]' in Article 3.1 of the *Anti-Dumping Agreement*."[15]

26. The Appellate Body's observations are equally valid with respect to the examination of the entirety of the injury data relating to an industry. The economic performance of a domestic industry may vary over the course of a year. To examine only one part of the year may overlook positive developments in other parts of the year, and thus give a misleading impression of the data relating to the condition of the industry as a whole. Yet this is exactly what Economía did.

27. Moreover, Economía's decision to ignore the evidence for half of each of the three years of the POI precluded it from conducting an objective examination of the causal relationship between the allegedly dumped imports and any injury to the domestic industry.[16] Economía's approach ensured that its examination was not based on all relevant evidence before it, as Article 3.5 of the AD Agreement requires.

28. In summary, the defenses that Mexico has advanced in response to the U.S. claims should be rejected. The Panel should find that Economía's decision to allow the petitioners to set the POI for its dumping analysis as March - August 1999 and its subsequent decision to focus on only March to August of 1997, 1998, and 1999 for its injury analysis resulted in breaches of Articles 1, 3.1, 3.5, and 6.2 of the AD Agreement.

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

29. The United States' submissions and statements have also demonstrated that Economía's injury analysis breached Articles 3.1, 3.2, 3.4, 3.5, 6.8, 12.2, and Annex II of the AD Agreement on at least four different grounds.

30. The first of these flaws arose from Economía's failure to collect the evidence on import volumes and price effects that it needed to conduct its injury analysis in an objective manner, and its improper use of the facts available. The second flaw arose from its failure to objectively consider whether there was a significant increase in the volume of dumped imports or significant price effects. The third flaw arose from Economía's failure to conduct an objective analysis of

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[14] *United States – Hot-Rolled Steel AB*, para. 204.

[15] *Id.,* para. 206.

[16] As stated above, Mexico confirmed in its reply to the Panel's question 3 that it did collect data for every month of the three-year POI, although it only examined half of that information.

certain "relevant economic factors" that it was required to evaluate under Article 3.4 of the AD Agreement. The fourth flaw arose from Economía's inclusion of non-dumped imports in its evaluation of volume, price effects, and the impact of the dumped imports on the domestic industry. Economía also failed to provide in sufficient detail the findings and conclusions reached on all issues of fact and law, and thus breached Article 12.2 of the AD Agreement.[17] Mexico's previous arguments on these issues have failed to rebut our *prima facie* case, and we will not repeat our earlier arguments here.

31. In Mexico's response to the Panel's questions, however, Mexico further demonstrates that Economía breached Articles 3.1, 3.2, and 6.8 of the AD Agreement, as well as Annex II, by failing to collect the information on price effects and volumes that it needed to conduct its injury analysis in an objective manner and to base its determinations on positive evidence.

32. To be specific, Mexico's responses to the Panel's questions 10, 12, and 15 confirm that numerous types of non-subject rice entered during the POI under tariff heading 1006.30.01 of Mexico's tariff schedule, and demonstrate that Economía failed properly to separate the subject imports from the non-subject imports before it conducted its injury analysis.

33. Mexico argues that Economía did separate the subject imports from the non-subject imports, and that it used several methodologies to do so.[18] In actuality, however, the only methodology that Economía used was the one supplied by the petitioner.[19] The petitioner's methodology was based on a flawed statistical procedure that focused on isolating imports of short-grain and medium-grain rice using monthly <u>average</u> prices for those products in the <u>U.S.</u> market, that arbitrarily assumed that any rice that entered Mexico above a certain price <u>had</u> to be short-grain or medium grain and <u>could not</u> be long-grain white rice, and that did not even address the question of how to separate imports of glazed rice and parboiled rice, which were also not part of the subject product.[20] Moreover, even that analysis applied only to 1999. Economía simply guessed at import levels for 1997 and 1998.[21]

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[17] The United States also demonstrated in its response to the Panel's question 8 that Economía failed to examine a consistent set of producers of long-grain white rice when it conducted its injury analysis. As a consequence, Economía's injury analysis did not constitute an "objective examination" of the domestic industry as defined in Article 4.1 of the AD Agreement, and its conclusions were not supported by the "positive evidence" that Article 3.1 requires. *See* U.S. Response to Panel Question 8, paras. 21-23.

[18] *See* Mexico's Response to Panel Question 12.

[19] *See* Final Determination, para. 239 (Exhibits US-6&7).

[20] In fact, paragraphs 229-232 of the final determination, setting out Economía's methodology, make no reference to any attempt to separate out glazed rice and parboiled rice.

[21] *See* Final Determination, para. 239 (Exhibits US-6&7).

34. Furthermore, Mexico is mistaken in claiming that Economía also sought to base its injury determination on information obtained from the exporters.[22] In actuality, Economía only sought volume and value information from Farmers Rice, Riceland, The Rice Company, and Producers Rice.[23] Two of those companies were not dumping (Farmers Rice and Riceland), and one had no exports to Mexico during the POI (Producers Rice). Economía never even sent its questionnaire to any other U.S. exporters or producers.

35. Mexico is also mistaken in claiming that Economía sought to separate the subject imports from the non-subject imports using information on the total volume of imports from the United States.[24] The fact that the import data contained both subject and non-subject merchandise in tariff heading 1006.30.01 is what created the need to separate the two in the first place.

36. Finally, Mexico's response to the Panel's question 15 confirms that Economía ignored one reliable and neutral method that would have allowed it to collect the information that it needed to conduct an objective examination of the injury factors, and to base its determination on positive evidence – namely, consulting the *pedimentos*.

37. Mexico confirms in its response to question 15 that the *pedimentos* identify the volume and value of each import. Thus, Mexico's objections notwithstanding, it is indisputable that Economía could have used the *pedimentos* to obtain volume and value data that would have been specific to the subject merchandise, and substantially more accurate than the information on which it relied.

38. Mexico objects to using the *pedimentos* by arguing that the description field in the *pedimentos* does not necessarily describe in sufficient detail the product being imported (*i.e.*, long-grain vs. short-grain, etc.), and that Economía would have needed to consult the invoices in cases where the description was not sufficiently precise.[25] The invoices, however, are attached to the *pedimentos*. Moreover, even if Economía had only used the *pedimentos* that specifically identified the imports as long-grain white rice, it still would have had a substantial amount of precise data on volumes and values that it could have used in its determinations.

39. Mexico also argues that there were a large number of transactions during the POI, and that it would have been "impractical" to consult each and every *pedimento*. Even if Economía had only consulted a representative sample, however, it still would have had better volume and value data that it could have used in performing its analyses for all three years of the POI.

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[22] *See* Mexico's Response to Panel Question 12.

[23] *See* Final Determination, para. 226 (Exhibits US-6&7).

[24] *See* Mexico's Response to Panel Question 12.

[25] *See id.,* paragraphs two and four.

40. In addition, Mexico confirmed in its response to question 15 that the *pedimentos* identified the exporter and importer for each shipment. Thus, if Economía had consulted the *pedimentos* and encountered questions about the content of a particular shipment, Economía could have consulted either party, and confirmed the nature of the merchandise. In this way, Economía could have ensured that it had accurate information on volumes and values for the entire POI.

41. Alternatively, since the *pedimentos* listed the names and addresses of the exporters and importers, Economía could have simply sent them (or either one) its questionnaire, and asked them to provide the necessary information. The exporters and importers themselves held the information that would have enabled Economía to determine the volume and value of the imports that were dumped, so taking this course would have provided Economía with direct and more accurate information than that on which it relied. But Economía failed to do so, choosing instead to send its questionnaire only to the parties that the petitioner selectively identified. And when certain importers sought to submit copies of *pedimentos* and invoices as record evidence, Economía rejected this information.[26]

42. Finally, in considering whether Economía should have consulted the *pedimentos,* the Panel may wish to keep in mind the evidence that the United States submitted in response to question 17 from the Panel, which demonstrates that Mexico has been willing to use the *pedimentos* to benefit domestic industries seeking the imposition of antidumping measures.[27] Mexico has gone so far as to release actual *pedimentos* to its domestic industry, and has allowed them to use the *pedimentos* to support their allegations of dumping and injury. Moreover, in Economía's antidumping investigation of *Crystal Polystyrene from the United States*, the petitioners used the *pedimentos* to separate out the imports of the subject product from other, non-subject merchandise imported under the same tariff heading;[28] the fact that they were able to do so demonstrates that Economía could have done the same.

43. In summary, Mexico's arguments in defense of Economía's flawed injury analysis should be rejected. The Panel should find that Economía's injury analysis breached Articles 3.1, 3.2, 3.4, 3.5, 6.8, 12.2, and Annex II of the AD Agreement.

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[26] *Compare* Preliminary Determination, paras. 33(B) and 35(C)(discussing the submission of the information) *with* para. 61 (rejection of the information). (Exhibits US-14&15). Economía justified its rejection of the information on the grounds that the importers did not file a public version; by contrast, when the petitioner failed to provide a public version of the *pedimento* data it used to support the petition, Economía did not reject the information.

[27] *See* U.S. Response to Panel Question 17, paras. 51-53 and accompanying footnotes.

[28] *See id.*, para. 52 & n.55. The United States has noted Mexico's release of *pedimentos* to petitioners as a way of illustrating Mexico's willingness to use them in a way that favors the interests of its domestic industries. The United States does not mean to suggest, however, that releasing the *pedimentos* to private industry is appropriate.

V. Economía's Failure to Exclude Farmers Rice and Riceland from the Antidumping Measure Is Inconsistent with Article 5.8 of the AD Agreement

44. The United States has demonstrated in its previous submissions and statements that Article 5.8 of the AD Agreement requires Members to exclude from antidumping measures firms that are individually examined in an antidumping investigation and found not to be dumping. The United States has also demonstrated that Mexico's failure to exclude Farmers Rice and Riceland from the antidumping measure on long-grain white rice breached Article 5.8.

45. Until it filed its response to the Panel's questions, Mexico's only response to the U.S. arguments had been to argue that it was entitled to apply the measure to Farmers Rice and Riceland because it found other firms to be dumping. Its response to the Panel's question 20 has gone even further, however. Mexico has now confirmed that it will impose an antidumping measure on every producer and exporter in the investigated country as long as it finds at least one exporter to be dumping at more than *de minimis* levels.[29] This includes applying the measure to producers that are investigated and found not to be dumping. Presumably, this would even include a situation where Economía examines every firm in the industry and finds that all but one are not dumping. Mexico has also confirmed that Economía will not examine whether the weighted average margin of all exporters is greater than *de minimis* when it decides to impose an antidumping measure.[30] Thus, it is indisputable that Mexico takes a company-specific approach to determine whether there are grounds to impose an antidumping measure; it fails to recognize, however, that it must also take a company-specific approach in excluding firms from the measure.

46. Furthermore, Mexico argued in its answer to question 20 that a company that is subjected to an antidumping measure in Mexico will be assigned an antidumping duty that corresponds to its own "specific" margin. In actuality, however, the vast majority of exporters and producers will be assigned an adverse facts-available based margin taken from the petition. This was certainly the case in the rice investigation, because Economía actually found only one firm to be dumping. The other firms were either investigated and found not to be dumping (Farmers Rice and Riceland), had no exports (Producers Rice), or were simply "deemed" to be dumping (the unexamined exporters and producers) without any investigation at all.[31]

47. The outcome of the rice investigation illustrates the consequences of Mexico's refusal to apply Article 5.8 on a firm-specific basis. By "deeming" every exporter and producer in the investigated country as being included in the investigation and applying an adverse, facts available-based margin to the unexamined exporters and producers, Economía will almost

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[29] *See* Mexico's Response to Panel Question 20.

[30] *See id*.

[31] *See* Final Determination, para. 400 (Exhibits US-6&7).

certainly find at least one firm to be dumping in every antidumping investigation, and thus it will never find a basis to terminate an investigation due to *"de minimis*" dumping margins.[32] Mexico's interpretation of Article 5.8 effectively reads the *de minimis* dumping margins language out of the AD Agreement.

48. Mexico's interpretation of Article 5.8 as not requiring firm-specific exclusions from antidumping measures fails to take into account that the second and third sentences of Article 5.8 refer to the "margin" of dumping being *de minimis*. The United States noted at the first Panel meeting that the Appellate Body has interpreted the term "margin" in Article 9.4 of the AD Agreement as referring to the "individual margin of dumping determined for each of the investigated exporters and producers" of the investigated product.[33] Nothing in the text of Article 5.8 of the AD Agreement suggests that the term "margin" should be interpreted differently in Article 5.8 than in Article 9.4, and Mexico has suggested no reason for doing so.

49. The fourth sentence of Article 5.8 of the AD Agreement provides contextual support for the U.S. view that a Member must exclude individual firms from the antidumping measure if their individual "margin" of dumping is *de minimis* or less. That sentence states that the "volume" analysis is normally done on a country-wide basis. In the absence of similar language in Article 5.8 suggesting that the dumping analysis is to be done on a country-wide basis, the immediate context within Article 5.8 supports the conclusion that the *de minimis* standard is to be done on a company-specific basis.[34]

50. Furthermore, arguments such as those put forth by the EC regarding the alleged meaning of the term "investigation" fail to overcome the conclusion that Article 5.8 requires Members to exclude firms that are investigated and found not to be dumping from the application of antidumping measures. The EC claims that the term "country" is used in various places in the AD Agreement and the GATT 1994, and that the concept of dumping involves a "strong connotation of a country-wide assessment."[35] In actuality, however, the concept of dumping involves a strong connotation of <u>firm-specific</u> assessment.

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[32] The only case where the language will have meaning for Mexico is where Economía individually investigates <u>every</u> exporter and producer of the subject product in the country under investigation and calculates a zero or *de minimis* margin of dumping for each of them. Such a scenario, rare even when a Member observes its obligation to identify and notify potential respondents, becomes exceedingly rare when a Member systematically ignores this obligation.

[33] *United States – Hot-Rolled Steel AB*, para. 118.

[34] Although the European Communities ("EC") recognized the country-wide nature of the "volume" analysis in its response to the Panel's question, it failed to recognize the import of this fact. *See* EC Response to Panel Question B to the EC, para. 10.

[35] *See id.*, para. 2.

51. 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.[36] 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.

52. Moreover, contrary to the EC's suggestions, there is no "internal inconsistency" involved in terminating an antidumping investigation on a firm-specific basis, and no risk that doing so will lead to "parallel" investigations.[37] Nor will interpreting Article 5.8 to require the exclusion of firms with zero margins of dumping require or lead to "several company specific cases or investigations."[38] 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.

53. In summary, Economía investigated Farmers Rice and Riceland and found that neither firm was dumping. Therefore, Economía should have excluded both firms from the application of the antidumping measure. The Panel should find that Economía's failure to do so breached Article 5.8 of the AD Agreement.

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

54. The United States' first submission presented the facts and legal arguments necessary to establish that Economía breached numerous provisions of the AD Agreement and the GATT 1994 by:

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[36] The Appellate Body noted in *United States – Japan Sunset AB* that Article 6.1 is one of several provisions in Article 6 that, either explicitly or by implication, create obligations with respect to each individual exporter or producer. Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, DS/244/AB/R, adopted January 9, 2004, para. 152 ("*United States – Japan Sunset AB*").

[37] *Compare* EC's First Written Submission, para. 8; EC Response to Panel Question A, para. 6.

[38] *See* EC Response to Panel Question B, para. 8.

- sending its antidumping questionnaire to only two companies that were listed in the petition while claiming to be investigating every producer or exporter in the United States;

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

- treating all other exporters and producers in the United States as "uncooperative" respondents, and assigning them an adverse facts available margin taken from the petition, even though Economía never sent any of the affected companies a copy of the questionnaire or informed them of the consequences that would flow from not providing the information that it never requested them to provide.[39]

55. Mexico has failed to rebut this *prima facie* case. Its defense has amounted to little more than a bald assertion that the AD Agreement contains no obligations with respect to this topic, and that it has complete freedom in deciding how to treat exporters and producers that the petitioner does not designate as "known" exporters in the petition.[40] Mexico has also argued that it has complete freedom to apply the facts available to such firms, including "less favorable," or "adverse," facts available from the petition.[41] Mexico has confirmed this view in its response to the Panel's questions.[42]

56. In actuality, however, Mexico's responses to the Panel's questions serve only to further demonstrate the flaws in its interpretation of the AD Agreement, and the WTO-inconsistency of Economía's actions. The Panel should reject Mexico's arguments.

A. An Objective and Unbiased Investigating Authority Would Have Taken Steps to Investigate Additional Exporters of the Subject Merchandise

57. Mexico's response to the Panel's question 17 confirms that the *pedimentos* identify the exporters of the subject merchandise, and that Mexico therefore knew the identity of every exporter of the subject merchandise to Mexico during the POI. Economía's failure to review the *pedimentos* to obtain the contact information for those exporters, or to take any other steps to

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[39] Final Determination, para. 157 (Exhibits US-6&7).

[40] *See, e.g.,* Mexico's First Written Submission, paras. 140-41.

[41] *See id.,* para. 159.

[42] *See* Mexico's Response to Panel Questions 16(b), 17(b).

investigate more than just the two exporters that the petitioner designated as such in the petition, was neither objective, nor unbiased.

58. First, Mexico's argument that examining the *pedimentos* would have caused a "significant delay" in the initiation of the investigation is not credible. Economía only investigated dumping for March to August 1999, so there was no need for it to examine the *pedimentos* for 1997 and 1998 before it initiated the investigation. This means that even under Mexico's theory, reviewing the *pedimentos* would have taken approximately two weeks at most.[43] Given that it took Economía six months to initiate the investigation, the need to spend two weeks to gather the information it needed to contact the "known" exporters would not have dissuaded an objective and unbiased investigating authority.[44]

59. Second, if Economía believed that examining the *pedimentos* would have taken too much time, it could have chosen instead to take other steps to identify additional exporters. For example, the United States noted in its first submission that if Economía had consulted the *Rice Journal*, it would have obtained the names, addresses, and phone numbers for every rice miller in the United States.[45] If Economía had taken that approach, there would have been no need to consult the *pedimentos* at all.

60. Third, Mexico mischaracterizes the U.S. arguments on this issue when it claims that it was under no obligation to identify all of the exporters of long-grain white rice in the United States. The United States agrees that there is no such obligation. On the contrary, the second sentence of Article 6.10 explicitly permits an investigating authority to limit its investigation either to a reasonable number of interested parties by using statistically valid samples, or to the largest percentage of the volume of the exports which could reasonably be investigated. Therefore, Economía only needed to identify enough exporters to allow it to take either approach. An objective and unbiased administering authority would have done so.

61. Fourth, Economía's failure to conduct a proper investigation of the known exporters was particularly biased and non-objective because of the consequences for the firms that it did not individually investigate. Economía treated every exporter or producer in the United States as being included in the investigation, even when it failed to send them a copy of its questionnaire.

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[43] Mexico states that it would have taken 40 days to examine all of the *pedimentos* for 1997, 1998, and 1999. *See* Mexico's Response to Panel Question 17(b). The *pedimentos* for 1999 constituted 35 percent of the total number for 1997-1999. *Id.* Therefore, even on Mexico's theory, examining only the *pedimentos* for 1999 should have taken fewer than 14 days.

[44] Furthermore, Economía's conduct of the antidumping investigation took eighteen months. Thus, even if reviewing the *pedimentos* had taken two weeks, Economía presumably could have gained back that time over the course of the entire investigation. Since Economía failed to collect any dumping or injury information after August 1999, Mexico cannot credibly argue that a two-week delay would have had any impact on its data collection.

[45] *See* U.S. First Written Submission, n. 187, and Exhibits US-18&19.

It then applied an adverse, facts available-based margin taken from the petition to any firm that did not learn of the investigation on its own and appear at the clerk's office in Mexico City to obtain a copy of the questionnaire.[46] Given the negligible consequences for the petitioner of a slight additional delay in initiation, an objective and unbiased investigating authority would have taken the necessary time to ensure that the due process rights of the foreign respondents were adequately protected.[47]

62. Finally, Mexico's response to the Panel's question 17(c) demonstrates that Economía failed to satisfy itself as to the accuracy of the petitioner's listing of only two exporters, as Articles 5.3 and 6.6 of the AD Agreement require. Although Economía used the *listado* data to check the volume and value data that the petitioner submitted, it was not able to use that source to confirm the identity of the exporters, and it did not check the *pedimentos*.

63. In summary, the defenses that Mexico has advanced to the U.S. claims should be rejected. The Panel should find that Economía's failure to determine an individual margin of dumping for each of the exporters identified in the *pedimentos*, or at least for a reasonable number of those exporters (using valid samples) or the largest percentage of them that could reasonably be investigated, was inconsistent with Mexico's obligations under Articles 6.6 and 6.10 of the AD Agreement. The Panel should also find that Economía's failure to apply a neutral "all others" rate calculated in accordance with Article 9.4 of the AD Agreement to the unexamined exporters and producers was inconsistent with Mexico's obligations under Articles 9.4 and 9.5 of the AD Agreement. Finally, the Panel should find that Economía's failure to provide individual notice to the exporters and producers that it was including in its investigation was inconsistent with Mexico's obligations under Article 12.1 of the AD Agreement.

B. Mexico Is Misinterpreting the Requirements of the AD Agreement That Are Relevant to the Application of Antidumping Margins to Unexamined Exporters and Producers, and Producers That Did Not Ship During the POI

64. In addition to the breaches that it caused by its decision to investigate only the two exporters that the petitioner designated as such in the petition and two other exporters that came forward on their own, Economía also breached numerous provisions of the AD Agreement and the GATT 1994 by applying an adverse, facts available-based margin taken from the petition to Producers Rice and the unexamined exporters and producers. Mexico's only response to the U.S. claims on this issue has been to argue repeatedly that the AD Agreement creates no obligations with respect to "unknown" exporters and producers, or exporters that had no shipments during the POI, and that Article 6.8 of the AD Agreement authorized it to apply

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[46] *See* Rice Initiation Notice, para. 153 (Exhibits US-1&2).

[47] If Economía had applied a neutral "all others" margin calculated in accordance with Article 9.4 of the AD Agreement to the uninvestigated exporters and producers, then its failure to contact additional exporters and producers would have been less of an issue.

adverse facts available to such firms. Mexico even goes so far as to claim in its replies to the Panel's questions that an investigating authority only needs to consider the exporters that are "known" to the petitioner, and not those known to itself.[48] Mexico's interpretation is incorrect.

65. The illogic of Mexico's interpretation can perhaps best be seen by considering the response that the EC provided to the Panel's question 1(A) to the EC. Like Mexico, the EC disclaims any need for an investigating authority to take any steps to identify exporters other than those listed in the petition.[49] The EC further argues that it would be permissible for an investigating authority to initiate an antidumping investigation even if the petitioner only identifies the exporting country, and identifies no exporters or producers at all.[50] The EC has also agreed with Mexico that an investigating authority is under no obligations with respect to "unknown" exporters or producers, and that it is permissible to apply facts available-based margins to those firms.

66. Thus, taken to its logical conclusion, the EC's and Mexico's interpretation of Articles 6.10 and 9.4 and the facts available provisions would permit 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, and then send its questionnaire to nobody. Then, unless a firm learned of the investigation on its own, entered an appearance, and obtained a copy of the questionnaire, the authorities could apply the petition margin to the entire country without having to examine anyone. 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.

67. As the United States has previously discussed, Mexico's interpretation is based on a flawed interpretive approach that relies on partial citations of Articles 6.8 and 6.10, viewed in isolation, and divorced from the broader context of the overall AD Agreement. Mexico's approach is wrong. A proper interpretive approach must take into account the entirety of the AD Agreement. This means Mexico must take into account all of the provisions that it has ignored to date, including in particular:

- Article 6.1 and paragraph 1 of Annex II, which prohibit an authority from applying the facts available to an exporter or producer unless it has been sent a copy of the questionnaire and informed of the consequences of not responding;

- The second sentence of Article 6.8, which explicitly states that the provisions of Annex II shall be observed in applying Article 6.8;

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[48] *See* Mexico's Response to Panel Question 16.

[49] *See, e.g.,* EC's Third Party Submission, para. 16.

[50] *See* EC's Response to Panel Question 1(A), para. 3.

- Articles 1 and 5, which require an authority to carry out an active "investigation" and not remain passive;[51]

- Articles 5.3 and 6.6, which require a Member to satisfy itself as to the accuracy of the information submitted by interested parties on which its findings are based;

- Article 12.1, which requires a Member to provide individual notice to interested parties, in addition to a public notice; and

- Paragraph 7 of Annex II, which does not allow an authority to apply a margin that is "less favorable" to a party (i.e., adverse) unless the party does not cooperate and withholds relevant information.[52]

68. Mexico must also explain how its interpretation is consistent with Article 9.5 of the AD Agreement. Article 9.5 permits certain exporters to receive an expedited review if they can demonstrate, among other conditions, 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." (Emphasis added.) This provision applies specifically to exporters and producers who did not export the subject merchandise to the importing Member during the POI.

69. However, Mexico claims to include every exporter or producer of the product in its investigations, and it applies the antidumping duties on the product to all of them (either because they receive an individual calculated rate or because they are assigned the adverse, facts available rate taken from the petition). This includes firms that did not export to Mexico during the POI. Mexico's treatment of Producers Rice is a case in point.

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[51] The Appellate Body noted in *United States – Wheat Gluten AB* that the ordinary meaning of the term "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.

Report of the Appellate Body, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities,* WT/DS166/AB/R, adopted January 19, 2001, para. 53 (footnote omitted). The Appellate Body addressed these matters in the context of interpreting Articles 3 and 4.2(a) of the *Agreement on Safeguards* (which requires investigating authorities to examine "all relevant factors" having a bearing on the state of the domestic industry). The Appellate Body also noted the obligation on an investigating authority to carry out a "full investigation" in order to conduct a "proper evaluation." *Id.,* para. 55.

[52] The United States discussed each of these provisions in detail in its first written submission. *See* U.S. First Written Submission, paras. 131-157, 196-197.

70. Therefore, because Producers Rice and the unexamined exporters and producers are all "subject to the antidumping duties on the product," they do not qualify for an expedited review under Article 9.5 of the AD Agreement. On the contrary, they will remain subject to the adverse, facts available-based margin taken from the petition, which in all likelihood will result in their exclusion from the Mexican market. By reading Article 9.5 out of the AD Agreement, Mexico's interpretation breaches the principle of effectiveness of treaty interpretation.

C. An Investigating Authority May Not Apply a Margin Based on the Facts Available to an Exporter or Producer That Was Never Even Sent the Questionnaire and Asked to Respond

71. When all of the provisions of the AD Agreement that are relevant to this issue are properly taken into account, it becomes clear that the drafters of the AD Agreement established a framework that prohibits an investigating authority from applying a margin based on the facts available to an exporter or producer that was never even sent the questionnaire and asked to respond.

72. Article 6 and Annex II of the AD Agreement are the provisions most relevant to this point. The Appellate Body has described Article 6 as an article that:

> "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."[53]

73. This "framework of procedural and due process obligations" includes Article 6.1 of the AD Agreement, which requires investigating authorities to give interested parties "in an anti-dumping investigation" notice of the information that they require and ample opportunity to present in writing all evidence which the interested parties consider relevant in respect of the investigation in question. Moreover, the Appellate Body has emphasized that Article 6.1 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

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[53] Report of the Appellate Body, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted August 18, 2003, para. 138 ("*EC – Pipe Fittings AB*") (footnotes omitted; emphasis in original), *citing* Report of the Appellate Body, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001, para. 109 ("*Thai Steel AB*") and *EC Bed Linen 21.5 AB*, 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 . . . ." *Thai Steel AB*, para. 110.

> 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.[54]

74. 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.[55] 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."[56]

75. Given these requirements, Economía cannot simply publish a general notice in its *Diario Oficial* announcing the initiation of an antidumping investigation, purport to be investigating every producer and exporter in the subject country, 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, it must observe the procedural and due process obligations that are contained in Article 6 and that it owes to interested parties throughout the investigation. This means that if Economía is including a particular exporter "in an anti-dumping investigation,"[57] it must give notice to that individual exporter by sending the exporter a copy of the questionnaire, asking it to respond, and ensuring that the exporter understands that a failure to respond may result in the application of a margin based on the facts available. If it fails to take these steps, then it cannot apply a facts available-based margin to that exporter.

76. Alternatively, an investigating authority may choose to 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. Article 9.4 does not limit the application of the neutral margin to those exporters and producers that are "known" to the investigating authority, either; the authority must apply the margin to all of the unexamined firms.

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[54] *United States – Japan Sunset AB*, para. 152 (emphasis added).

[55] *See United States – Hot-Rolled Steel AB*, 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 . . . .").

[56] Report of the Panel, *Argentina – Definitive Anti-dumping Measures on Imports of Ceramic Floor Tiles from Italy,* WT/DS189/R, adopted 5 November 2001, para. 6.55.

[57] *See* AD Agreement, Art. 6.1.

77. Regardless of the approach it chooses, an investigating authority cannot apply a facts available-based margin to an exporter or producer that is never sent the questionnaire.[58]

78. In the rice investigation, Economía limited its investigation by only sending its antidumping questionnaire to the two firms that the petitioner designated as "known" exporters in the petition. Then, having made this decision, it applied an adverse, facts-available based margin taken from the petition, instead of a neutral margin, to Producers Rice and the unexamined firms. Mexico's argument that the AD Agreement allows for such a biased and non-objective approach for imposing antidumping margins should be rejected. For the reasons set forth in this submission and the United States' previous submissions and statements, the Panel should find that Economía's actions breached Article VI:2 of the GATT 1994, Articles 1, 6.1, 6.2, 6.4, 6.6, 6.8, 6.10, 9.3, 9.4, 9.5, 12.1, and 12.2 of the AD Agreement, and Paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement.

D. Mexico Has Confirmed That Economía Breached Paragraph 7 of Annex II

79. Finally, Mexico's response to the Panel's question 25 demonstrates conclusively that Economía's application of the petition margin to Producers Rice and the unexamined exporters and producers was inconsistent with paragraph 7 of Annex II of the AD Agreement.

80. Paragraph 7 of Annex II requires investigating authorities to use "special circumspection" when basing their findings on information from a secondary source, including (where practicable) by checking the information against other independent sources at their disposal, such as official import statistics and customs returns. Moreover, the last sentence of paragraph 7 provides that, if an interested party does not cooperate and withholds information from the investigating authorities, this situation could lead to a result that is less favorable to the party

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[58] The negotiating history behind Articles 6.10 and 9.4 of the AD Agreement demonstrates that the drafters of the AD Agreement were quite concerned that producers and exporters that were not individually examined in an antidumping investigation could be prejudiced as a result. As a result of these concerns, the drafters gave a great deal of attention to the question of how a Member might be able to investigate fewer than all of the relevant exporters or producers, while still protecting the interests of the unexamined firms. The outcome of these discussions was to provide for the use of representative samples, and to require the application of a neutral "all others" rate to the unexamined firms. *See*, *e.g., Principles and Purposes of Anti-dumping Provisions, Communication from the Delegation of Hong Kong*, MTN.GNG/NG8/W/46, at 7 (July 3, 1989); *Submission of Japan on the Amendments to the Anti-dumping Code,* MTN.GNG/NG8/W/48, at 6 (Aug. 3, 1989) (proposing that the rate applied to unexamined exporters and producers "shall not exceed that of weighted average of dumping margins confirmed through the actual investigations"); *Submission of Japan on the Amendments to the Anti-dumping Code, Corrigendum*, MTN.GNG/NG8/W/48/Corr.1 (Aug. 16, 1989); *Meeting of 20-21 and 24 November 1989*, MTN.GNG/NG8/14, at para. 9 (Jan. 18, 1990); *Meeting of 31 January - 2 February and 19-20 February 1990,* MTN.GNG/NG8/15, at 28-29, 38 (Mar. 19, 1990).

Nothing in the negotiating history of Articles 6.10 and 9.4 of the AD Agreement suggests that the drafters intended to allow Members to ignore the requirements of Article 9.4 with respect to any unexamined exporters or producers.

than if the party did cooperate (*i.e.,* an adverse result). Read in the context of paragraph 5 of Annex II, which requires consideration of whether the party acted to the best of its ability, this implies that when a party does cooperate and does not withhold information, it should not be assigned a facts available margin that is adverse.

81. While the fact that Producers Rice had no shipments during the period of investigation may have precluded Economía from calculating an individual margin of dumping for the firm, it did not provide a basis for determining that the firm had failed to cooperate or that it had withheld information. As the Appellate Body stated in *United States – Hot-Rolled Steel*:

> parties may very well 'cooperate' to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of 'cooperating' is in itself not determinative of the end result of the cooperation. Thus, investigating authorities should not arrive at a 'less favorable' outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has 'cooperated' with the investigating authorities, within the meaning of paragraph 7 of Annex II of the *Anti-Dumping Agreement*."[59]

82. Similarly, there is no evidence on the record of the rice investigation to suggest that the unexamined exporters and producers – which were never sent a copy of Economía's antidumping questionnaire and asked to reply – were uncooperative in any way. Nevertheless, Mexico applied the adverse, facts available-based petition margin to them. There is also no evidence in the record to suggest that Economía took any steps to check the biased presumptions embodied in the petition against independent data available during the investigation, much less to exercise "special circumspection" in its application of the petition margin to Producers Rice and the unexamined producers and exporters.[60]

83. Mexico concedes in its answer to the Panel's question 25 that it did not observe the requirements of paragraph 7 of Annex II when it applied the facts available to Producers Rice.[61] Mexico claims that it was under no obligation to do so. It also failed to observe paragraph 7 with respect to the unexamined exporters and producers. As with so many other issues, Mexico is only able to justify its actions by focusing on a fragment of text – in this case the reference in paragraph 1 of Annex II to applying the facts available – without regard to all of the other

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[59] *United States – Hot-Rolled Steel AB*, para. 99.

[60] The United States discussed several biases contained in the petition in our first submission. *See* U.S. First Written Submission, paras. 13-16, including footnote 24, and paras. 159-165 and accompanying footnotes. These biases included the freight adjustment in the petition, which used freight rates for 50 kg bundles of paddy rice, even though paddy rice is normally transported in bulk (suggesting that the sales were for particularly small quantities, which would have raised the freight costs). Mexico concedes in its response to the Panel's question 11 that rice is normally transported in large volumes, and in bulk.

[61] *See* Mexico's Response to Panel Question 25.

provisions of the AD Agreement that constrain the application of the facts available. These include the final sentence of Article 6.8, which states that investigating authorities "shall" observe the provisions of Annex II – including paragraph 7 – when they use the facts available.

84. Contrary to Mexico's assertions, Economía was subject to paragraph 7 of Annex II when it applied the facts available to Producers Rice and the unexamined firms. The Panel should therefore find that Economía's failure to observe the requirements of that provision was inconsistent with Mexico's WTO obligations.

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

85. In our previous submissions and statements, the United States demonstrated that several articles of Mexico's Foreign Trade Act and its Federal Code of Civil Procedure are inconsistent "as such" with various provisions of the AD Agreement and the SCM Agreement. Mexico has largely agreed with the U.S. interpretation of the operation of the various articles of the FTA and the FCCP; it has focused its defense instead on our interpretation of the relevant WTO obligations. For the most part, this defense has been composed of broad assertions that the AD and SCM Agreements create no obligations with respect to the matters addressed by the challenged provisions. The United States has previously explained why Mexico's arguments are wrong, and why the Panel should reject them.[62]

86. Mexico has also argued that the U.S. arguments on this issue have failed to take into account the interrelationship between the AD and SCM Agreements and Mexico's domestic law. The United States has previously explained why this argument is incorrect as well, and why the Panel should reject it too.[63]

87. Moreover, Mexico's replies to the Panel's questions have also failed to rebut the U.S. *prima facie* case. In question 28, the Panel asks Mexico whether it would be required to amend a law in the event that the DSB adopted a panel report finding the law to be WTO-inconsistent. Mexico fails to respond directly to the question, stating only that it would be obligated to remove the inconsistency. It is not at all clear what this means. The important point, however, is that the stated scenario will only arise if the Panel finds the laws to be WTO-inconsistent. Mexico views each of the actions that the challenged provisions require as consistent with its WTO obligations;

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[62] *See* U.S. First Written Submission, paras. 209-290; U.S. Oral Statement at the First Panel Meeting, paras. 56-93; U.S. Closing Statement at the First Panel Meeting, paras. 7-8; U.S. Response to Panel Questions, paras. 68-84.

[63] *See* U.S. Oral Statement at the First Panel Meeting, paras. 58-61; U.S. Response to Panel Questions, paras. 73-75.

therefore, Mexico does not, as a matter of its municipal law, have any ability not to perform the actions the challenged provisions require.

88. Furthermore, because Mexico sees no conflict between its WTO obligations and the actions that the challenged provisions require, the scenario that the Panel sets out in question 29 can also arise, if at all, only if the Panel itself finds the laws to be WTO-inconsistent (and the Dispute Settlement Body adopts that finding). At that point, Mexico would be in the same position as any other Member whose laws are found to be inconsistent with WTO rules – it will need to determine what steps are necessary to remove the inconsistency between the laws and its WTO obligations.

89. Similarly, Mexico states in response to the Panel's question 30 that the WTO agreements would prevail over the Foreign Trade Act in the event that a certain provision of the law were found inconsistent with WTO rules. Again, even if this were true, the key point is that Economía is the administrator of the FTA, and Economía views each of the challenged provisions as consistent with WTO rules. Therefore, in Mexico's view, there is no conflict, and thus there is no basis in Mexico's municipal law for the WTO Agreement to override any of the challenged provisions.

90. In reply to the Panel's question 31, Mexico puts forward one of its few substantive responses to the U.S. statutory claims by asserting that Article 68 of the FTA does not require an exporter to demonstrate that its volume of exports was "representative" as a *sine qua non* for the initiation of a review. It states that the exporter "should" make this demonstration during the course of the proceeding itself, however. It made this point in its first submission as well.[64] Mexico's argument is without merit. As the United States demonstrated in its response to this same question, Economía does in fact require exporters seeking reviews to make such a demonstration; Economía addresses the issue in the initiation notice itself.[65]

91. In any event, Mexico's argument seeks to elevate form over substance. Rejecting a review request in the course of a proceeding for a failure to demonstrate a "representative" volume of sales is tantamount to rejecting the review at the outset.[66] In either event, Article 68

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[64] *See* Mexico's First Written Submission, para. 210 (stating that Articles 68 and 89D require ("*exigen*") such a demonstration).

[65] *See* U.S. Response to Panel Question 31, paras. 76-81 and Exhibit US-24.

[66] Moreover, the fact that Mexico applies an adverse facts available margin, taken from the petition, to the vast majority of exporters and producers in the countries it investigates makes it unusually difficult for an exporter to achieve (and thus be in a position to demonstrate) a representative volume of exports as Mexico defines the term in its response to the Panel's question 31(b), and thus to obtain the review that the AD Agreement entitles it to receive.

precludes firms from obtaining a review; therefore, it is inconsistent as such with Articles 9.3 and 11.2 of the AD Agreement, and with Article 21.2 of the SCM Agreement.[67]

92. Mexico's response to the Panel's question 33 attempts to defend Article 89D of the FTA by pointing to Article 47 of its regulations. The cited provision does nothing to rebut the U.S. *prima facie* case that Article 89D is inconsistent "as such" with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement. Article 47 establishes rules for determining the costs of production for trading companies.[68] It appears in the section of Mexico's antidumping regulations that sets out the methodologies that Economía is to apply in calculating antidumping margins. It is similar in content to the provisions set out in Article 2 of the AD Agreement. Article 47 has nothing to do with the question of who is entitled to obtain an expedited review, however. And even if it did, the hierarchy of laws in the Mexican legal system is such that the regulations are subordinate to the FTA; the decree that implemented Article 89D makes clear that the regulations continue in effect only insofar as they are not inconsistent with the provisions of the decree (including Article 89D).[69]

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[67] Mexico makes the same assertion with respect to Article 89D of the FTA in its response to the Panel's Question 32. As the United States demonstrated in its response to Panel Question 32, Mexico's arguments about Article 89D are similarly without merit, and the Panel should reject them as well. *See* U.S. Response to Panel Question 32, paras. 82-84 and Exhibit US-25.

[68] The provision states, in its entirety:

> ARTICLE 47. In the case of trading enterprises, the buying cost shall be taken as the cost of production. Under the terms of the first paragraph of Article 44 of these Regulations, the selling cost shall be determined in the ordinary course of trade. Purchases by trading enterprises shall be considered as such when they do not involve losses for the supplying enterprises, i.e. purchases are at prices exceeding production cost plus the overheads of the suppliers. The Ministry shall verify the production costs and suppliers' overheads before making the comparison.
>
> When the purchases by trading enterprises which generate profits for the suppliers are representative, the production cost for the former shall be calculated on the buying cost recorded during the period of investigation. Alternatively, the production cost shall be estimated according to the computed value determined by the Ministry for the supplier enterprises. For the purposes of calculating overheads and the profit margin, the proportions derived at enterprise level shall apply to actual buying costs.
>
> When the trading enterprise is located in a country other than the country of origin of the goods, the production cost shall be the cost incurred in the country of origin, plus all costs and expenses involved in transporting and importing the goods from the country of origin to the country of consignment. In such cases, the overheads and profit shall be that of the country of consignment.

See Notification of Laws and Regulations Under Article 18.5 of the Agreement, Mexico, G/ADP/N/1/MEX/1, at 20 (18 May 1995).

[69] *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 (Apr. 24, 2003), at 17 (second transitional

(continued...)

93. Finally, Mexico's response to the Panel's question 34 seeks to convince the Panel that no issue arises from the fact that Article 366 of Mexico's FCCP and Articles 68 and 97 of Mexico's FTA preclude Mexican authorities from conducting reviews of antidumping and countervailing duties while a judicial review of the underlying antidumping or countervailing duty measure is ongoing, because the interested parties may post a bond in lieu of paying the duties themselves while the litigation is underway. The AD and SCM Agreements do not contain a provision allowing a Member to "cure" its breach by arguing that the breach itself causes no harm to the affected exporters. But in any event, the supposed ability to post a bond does nothing to ameliorate the negative effects of the preclusion of reviews, or to remedy the WTO breaches that result therefrom.

94. The United States previously submitted to the Panel, as Exhibit US-20, a letter from Economía to Sun Land Beef Company ("Sun Land"), a U.S. beef exporter that is subject to Mexico's antidumping measure on certain U.S. beef products. That measure, which was imposed in July 2000, is being reviewed by a "binational panel" established under Chapter Nineteen of the *North American Free Trade Agreement*. In Exhibit US-20, Economía denies Sun Land's request for a review on the grounds that Articles 68 and 97 of the FTA preclude it from conducting the review while the NAFTA litigation is underway. Although the binational panel recently remanded the beef determination to Economía for further proceedings, the litigation continues, four years after the antidumping measure was imposed.

95. Under the AD Agreement, antidumping duties are assessed against the importers, not the exporters or producers. Thus, it is the importer, and not the exporter or producer, that has to decide whether it is willing to post a bond as security against potential antidumping duties. The importer's decision to post a bond is more often based on the importer's commercial considerations than on the exporter's interests. For example, given the choice, importers are often attracted to exporters with low or zero margins, and thus disinclined to import product from exporters with higher margins (even if they can post a bond in lieu of paying the duties at the time of importation). Indeed, an importer's other suppliers with low antidumping margins may view the posting of a bond for their higher-margin competitors as adverse to their own interests, and leverage their business with the importer on the basis that it not take such actions.

96. This has certainly been the case with respect to Sun Land. As the attached affidavit from the Vice President of Sun Land indicates,[70] after Mexico refused to conduct a review of Sun Land while the NAFTA litigation was ongoing, Sun Land's importer informed Sun Land that it was not willing to post a bond with respect to <u>any</u> of Sun Land's beef products that are subject to the Mexican antidumping measure. In addition, Sun Land was unable to find another importer

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[69] (...continued)
provision).

[70] Affidavit of Lester D. Padget (June 7, 2004) (Exhibit US-26).

willing to post a bond. As a consequence of its inability to obtain a review and post a bond, Sun Land has been effectively locked out of the Mexican market for the products subject to the antidumping measure.

97. Thus, the preclusion of reviews by Articles 68 and 97 of the FTA and Article 366 of the FCCP causes real and substantial commercial harm to exporters that are subject to Mexican antidumping measures. It also presents exporters that are subject to Economía's adverse, facts available-based petition margins with two mutually exclusive choices: they can seek judicial review of the order itself, knowing that doing so will preclude them from obtaining an administrative review that might reduce their margin, thus guaranteeing their exclusion from the market for a period of years; or they can seek an administrative review in an effort to reduce their margin, and thus forfeit any chance to challenge the legitimacy of the order in court.[71] Neither the AD Agreement nor the SCM Agreement permits a Member to impose such a choice under its domestic law.

98. In summary, Mexico's arguments in defense of the challenged provisions of the FTA and the FCCP should be rejected. The Panel should find that each of the provisions is inconsistent "as such" with the relevant WTO rules.

VIII. Mexico Has Failed to Contest Numerous U.S. Claims

99. Finally, the United States notes again that Mexico has failed to date to contest – let alone rebut – numerous U.S. claims. Specifically:

- Mexico has failed to respond to the claim that Economía breached Article 3.4 of the AD Agreement by failing to evaluate the effect of quality differences on domestic prices;

- Mexico has failed to address the claim that Mexico breached Article 6.6 of the AD Agreement by failing to satisfy itself that the petitioner's list of only two "known" exporters was accurate;

- Mexico has failed to explain how an objective and unbiased authority could have concluded that there were only two exporters or producers of long grain white rice in the entire United States, particularly when the petition itself made numerous references to a third exporter;

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[71] In addition, if they forfeit their chance to seek judicial review and wait to seek an administrative review instead, they run the risk that a different firm will request judicial review in the meantime. In that case, they will find themselves with no remedy at all, because Mexico refuses to conduct administrative reviews of any firm if any other firm is seeking judicial review. *See* U.S. First Written Submission, para. 286; Mexico's First Written Submission, paras. 300-302.

- Mexico has failed to respond to the U.S. claim that its application of the adverse, facts available margin taken from the petition to Producers Rice and the unexamined exporters and producers breached Articles 9.3 and 9.5 of the AD Agreement;

- Mexico has not responded to the claim that Mexico breached Articles 6.2 and 6.4 of the AD Agreement by failing to provide the U.S. exporters and producers the *listado* information that it gave to the Mexican industry, if that information was not confidential;

- Mexico has not contested the claim that the margin contained in the petition was adverse (or "less favorable") within the meaning of paragraph 7 of Annex II;

- Mexico has provided no reply to the claim that Mexico's failure to provide notice to interested parties breached Article 12.1 of the AD Agreement;

- Mexico has provided only a conclusory reply to the claims that its published determination with respect to dumping and injury was inconsistent with Article 12.2 of the AD Agreement;

- Mexico has not contested our claim that Article 64 of the FTA breaches Article 9.5 of the AD Agreement or Article 19.3 of the SCM Agreement;

- Mexico has not contested our claim that Article 64 breaches paragraph 7 of Annex II by requiring the investigating authority to apply the highest facts available on the record in all cases;

- Mexico has not contested that Article 93V of the FTA is "specific" to dumping or subsidization; "against" dumping or subsidization; and not "in accordance with the provisions of GATT 1994," as interpreted by the AD and SCM Agreements; and

- Mexico has not contested our claim that Article 366 of the FCCP and Articles 68 and 97 of the FTA breach Article 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement.

IX. Conclusion

100. For the foregoing reasons, and for the reasons set out in the United States' first submission, in its responses to the Panel's questions, and at the first Panel meeting, the United States respectfully reiterates its request that the Panel find that:

(1) Economía's use of a POI that ended more than fifteen months prior to the initiation of the antidumping investigation and nearly three years prior to the final determination is inconsistent with Mexico's obligations under Article VI:2 and VI:6(a) of GATT 1994 and Articles 1, 3.1, 3.2, 3.4, and 3.5 of the AD Agreement;

(2) Economía's limitation of its injury analysis to only six months of 1997, 1998, and 1999 is inconsistent with Mexico's obligations under Articles 1, 3.1, 3.5, and 6.2 of the AD Agreement;

(3) Economía's failure to collect the evidence on price effects and volumes that it needed to conduct its injury analysis in an objective manner is inconsistent with Mexico's obligations under Articles 3.1, 3.2, and 6.8 and Annex II of the AD Agreement;

(4) Economía's failure to objectively consider whether there was a significant increase in the volume of dumped imports or whether the dumped imports had a significant effect on prices is inconsistent with Mexico's obligations under Articles 3.1 and 3.2 of the AD Agreement;

(5) Economía's failure to conduct an objective analysis of the relevant economic factors is inconsistent with Mexico's obligations under Articles 3.1 and 3.4 of the AD Agreement;

(6) Economía's inclusion of non-dumped imports in its evaluation of volume, price effects, and the impact of the dumped imports on the domestic industry is inconsistent with Mexico's obligations under Articles 3.1, 3.2, and 3.5 of the AD Agreement;

(7) Economía's failure to provide in sufficient detail the findings and conclusions reached on all issues of fact and law with respect to its determination of injury is inconsistent with Mexico's obligations under Article 12.2 of the AD Agreement;

(8) Economía's failure to exclude firms with antidumping margins of zero percent from the antidumping measure is inconsistent with Mexico's obligations under Article 5.8 of the AD Agreement;

(9) Economía's application of an adverse facts available-based dumping margin to the non-shipping exporter Producers Rice is inconsistent with Mexico's obligations under Articles 6.2, 6.4, 6.8, 9.4, and 9.5 of the AD Agreement and Paragraphs 3, 5, 6, and 7 of Annex II;

(10) Economía's application of an adverse facts available-based dumping margin to the U.S. producers and exporters that it did not investigate is inconsistent with

Mexico's obligations under Articles 6.1, 6.6, 6.8, 6.10, 9.4, 9.5, and 12.1 of the AD Agreement and paragraphs 1 and 7 of Annex II;

(11) Economía's failure to provide sufficient information on the findings and conclusions of fact and law and the reasons that led to the imposition of the adverse facts available-based margin on Producers Rice and the unexamined U.S. exporters and producers is inconsistent with Mexico's obligations under Article 12.2 of the AD Agreement;

(12) Economía's application of an adverse facts available-based margin to Producers Rice and the unexamined U.S. exporters and producers is inconsistent with Mexico's obligations under Articles 1 and 9.3 of the AD Agreement;

(13) Economía's levying of an antidumping duty greater than the margin of dumping is inconsistent with Mexico's obligations under Article VI:2 of GATT 1994;

(14) 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;

(15) Article 64 of Mexico's Foreign Trade Act is inconsistent "as such" with Articles 6.8, 9.3, 9.4, and 9.5 of the AD Agreement, paragraphs 1, 3, 5, and 7 of Annex II of the AD Agreement, and Articles 12.7 and 19.3 of the SCM Agreement;

(16) 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;

(17) 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;

(18) 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; and

(19) Articles 68 and 97 of Mexico's Foreign Trade Act, and Section 366 of Mexico's FCCP, are inconsistent "as such" with Articles 9.3, 9.5, and 11.2 of the AD Agreement, and Articles 19.3 and 21.2 of the SCM Agreement.

101. The United States further requests that the Panel recommend that Mexico bring its measures into conformity with its obligations under the AD Agreement, the SCM Agreement, and GATT 1994.

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