Mexico - Definitive Antidumping Measures on Beef and Rice (DS 295)
(Complaint with Respect to Rice)

August 20, 2004

Answers of the United States to
Questions of the Panel in Relation to the Second Substantive Meeting with the Parties

Questions concerning the period of investigation (the "POI")

1. In its answer to question number 2 (b) of Panel's questions in relation to the first substantive meeting with the parties (the "Panel's questions"), Mexico replies that "the petitioners in an investigation suggest a POI in their application for initiation; the investigating authority analyses the information and evidence contained in the application and decides what POI it will use, which is reflected in the determination concerning the initiation of the investigation". Could Mexico further explain what the criteria are for reviewing the POI suggested by the petitioners? In other words, in which case would Mexico consider the POI as suggested by the petitioner to be inappropriate?

Answer:

1. During the second Panel meeting, Mexico stated that Economía examines whether the petitioner has provided export price ("EP") and normal value ("NV") information, as well as injury information for at least a six month period. Mexico also stated that Economía ensures that the petitioner has provided the dumping information for a period that overlaps with ("corresponds to") the injury information. Mexico stated that the AD Agreement requires a petitioner to provide evidence of dumping and injury, but it disclaimed any obligation to obtain updated data.

2. Mexico's response demonstrates that Economía's analysis is with respect to the adequacy of the information that the petitioners submit within the suggested period of investigation ("POI"); it does not analyze whether the particular POI itself – *i.e.*, the suggested time period – is proper, or whether it includes the most recent available information. This conclusion is further illustrated by Mexico's response to question 5 from the Panel, where Mexico said "in principle the period of investigation proposed by a petitioner is adequate in terms of performing a dumping analysis and that it can serve as a basis for the injury analysis." The United States discusses this issue further in response to question 2 below.

2. In its answer to question 5 of the Panel's questions, Mexico is saying that "in principle the period of investigation proposed by a petitioner is adequate in terms of performing a dumping analysis and that it can serve as a basis for the injury analysis", but that "the IA has the authority to modify the initial period of investigation provided that it receives relevant arguments, accompanied by pertinent evidence, which lead it to consider that the period is not adequate".

(a) Could Mexico explain this apparent contradiction between the process as explained in its answer to question 2(b) in which it stated that it is the IA which analyses and decides whether the POI is appropriate and its answer to question 5 (i.e. petitioners suggest a POI which is accepted unless the other interested parties come up with convincing arguments supported by pertinent evidence that this POI is inappropriate)?

(b) Could Mexico explain how this process of changing the POI after initiation works in practice (e.g. will new questionnaires have to be sent to interested parties in light of the changed POI?)? Has this ever happened in Mexican practice?

Answer:

3. Mexico stated during the second Panel meeting that Economía can "extend" the POI if the importers provide sufficient evidence to justify such a change. It also stated that the types of evidence that might lead to a modification of the POI would include economic factors that might have had an effect on prices, or cyclical problems.

4. Mexico's response illustrates again that Economía accepts the POI that the petitioners propose, and it places the burden on the importers and foreign producers and exporters to demonstrate that an alternative POI should be used instead. Economía does not appear to place any burden on the petitioners to justify the use of a period that is not as close to the initiation date as practicable. In addition, the idea that Economía would merely "extend" the POI suggests that it would still use the petitioners' selected POI, even if it also included some more recent data.

5. Mexico also stated at the second Panel meeting that it has extended the POI that the petitioners requested in very few cases. The United States is not aware of any such cases. The United States is also unaware of any cases where Economía has used a POI different than the one the petitioners requested. As the United States noted in its response to question 2 in the first set of Panel questions, Economía accepted the POI suggested by the petitioners in all of the antidumping investigations initiated against U.S. products in 2004. Moreover, the lengths of the POIs varied widely, and the gap between the end of the POI and the date of initiation was as long as 20 months.[1]

3. The United States argues on various occasions that the purpose of an anti-dumping investigation is to determine whether a domestic industry is presently injured by dumping that is presently occurring (see e.g. United States answer to question 1 of the Panel's questions), and refers in support of this argument to the use of the present tense in *inter alia* Article 2 and 3.4, 3.5, and 5.8 Anti-Dumping Agreement (the "AD Agreement").

[1] *See* U.S. Response to First Panel Question 2.

What would be the United States view on the argument that it is the definitional nature of these provisions which explains the use of the present tense and that this use of the present tense in such definitional provisions is thus uninformative of the alleged requirement of the closeness in time between the application of a measure and the conditions for application of the measure?

Answer:

6. The United States does not agree with the above-referenced argument. Article 1 of the AD Agreement states that an antidumping measure "shall be applied only under the circumstances provided for in Article VI of GATT 1994 . . . ." Article VI:2 of the GATT 1994 states, in turn, that "[i]n order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." The ordinary meaning of the term "offset" is "set off as an equivalent *against*; cancel out by, balance by something on the other side or of contrary nature; counterbalance, compensate."[2] The ordinary meaning of the term "prevent" is "[a]ct or do in advance. . . . Act before, in anticipation of, or in preparation for (a future event, a point in time)."[3] An investigating authority will only be in a position to "cancel out" or "balance" or "act in preparation for" dumping if it imposes a measure with respect to activity that is presently occurring or that has not yet occurred.

7. Similarly, Article VI:1 of the GATT 1994 states that dumping is to be condemned if it "causes or threatens" material injury to a domestic industry. The term "causes" indicates that the dumping and injury is occurring in the present, and the term "threatens" indicates that the injury may occur in the future. If the drafters had intended instead to permit the imposition of antidumping measures when the conditions for doing so only existed in the past, they could have used the terms "caused or threatened" material injury. They did not.

8. An investigating authority may impose an antidumping measure on another Member's exports only if it is able to make an objective determination, based on positive evidence, that the conditions for doing so are present at the time it imposes the measure. Although this determination will inevitably have to consider information that pertains to the past, simply because there is a lag in the availability of current information, this "past" information is serving as a proxy for the present. Therefore, the investigating authority must collect and examine a data set that includes the most recent available information.

9. In the rice investigation, there was a nine month gap between the end of the petitioners' suggested POI and the date the petition was filed. The gap stretched to 15 months by the time Economía initiated its investigation. By the time of the final determination, the injury

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[2] *New Shorter Oxford English Dictionary*, 1985 (1993) (emphasis in original).

[3] *New Shorter Oxford English Dictionary*, 2348 (1993).

information that Economía was using for its determination was 3 to 5 years old. Economía's failure to collect or examine recent data, and its failure to update its injury information over the course of its investigation, left it with no basis for an objective evaluation of present dumping and injury.

4. In paragraph 23 of its second submission, Mexico asserts that it is *desirable* that the POI ends as closely as possible to the date of initiation of the investigation, but that no such obligation exists. Could Mexico explain why it considers that this closeness in time is desirable in light of its argument that the purpose of an anti-dumping investigation is not to offset or prevent dumping presently causing injury, but to offset dumping that caused injury *in the past* or threatened to cause injury in the past (as argued e.g. in Mexico's second oral statement, para. 18)?

Answer:

10. At the second Panel meeting, Mexico stated that, while it is desirable to have the POI end as closely to the initiation date as practicable, its industries are not always sufficiently organized to provide more recent data. The United States is confused by Mexico's statement. Once an investigating authority initiates an investigation, it sends its own questionnaires to the foreign producers and exporters, and to the domestic producers and importers. Given this fact, the organization of the domestic industry when it prepares the petition would not seem relevant to the selection of a proper POI, and it would not seem to justify using a stale POI when the exporters and producers are able to supply more recent data.

11. Furthermore, while it is to be expected that the dumping POI would end prior to the initiation of the investigation (otherwise, the foreign exporters and producers could avoid the imposition of an antidumping order by temporarily raising their export prices or lowering their home market prices), an objective investigating authority should collect updated injury information during the investigation, to ensure that the data used includes the most recent available data.

12. In its second written submission, Mexico stated that it would be "preposterous" for a Member to base its findings on information that is ten years old.[4] In the rice investigation, however, Economía based its findings on data that was three to five years old. The United States fails to see why, if it would be "preposterous" to use data that was ten years old, it is acceptable to use information that is three to five years old. In either case, an investigating authority that failed to collect recent information would have no idea whether dumped imports were causing injury to the domestic industry as of the date that it initiated its investigation, much less on the date that it published its final determination.

[4] Mexico's Second Written Submission, para. 21.

Questions concerning the use of facts available and the all others rate

5. In its answer to question 17 (b) of the Panel's questions, Mexico argues that it was under no obligation to obtain the pedimentos to identify all of the exporters. At the same time, it argues that "to have sought to obtain them would have considerably delayed the initiation of the investigation". Can Mexico explain whether the investigating authority considered obtaining the pedimentos but decided in the end not to do so because of the delay it would cause ? If so, would it not have been possible for the authority to consult a small number of pedimentos, simply to check whether such a sample would lead to more exporters being identified, without unnecessarily delaying the investigation?

Answer:

13. Mexico confirmed at the second Panel meeting that the *listados* name the volume and value of each shipment, the *pedimento* number, and the name of the importer of record. Therefore, if Economía had so chosen, it could have used the *listados* to identify a sample of shipments from a sample of importers (such as the largest percentage of the volume of exports that it could reasonably investigate), requested just those *pedimentos*, and in that way could have obtained the contact information for those known exporters and producers.

14. Mexico also stated at the second Panel meeting that there is a 40-day lag between the date of entry of a particular shipment and the date that the shipment appears in the *listados*. If this is true, then in June 2000, when the petitioners filed the petition, Economía would have had information as current as April, 2000. Similarly, by the December 2000 initiation of the investigation, Economía would have had information current to October 2000. In either case, it would have had access to data that was substantially more current than August 1999, which is the final month of its dumping and injury POIs.

6. Could Mexico explain what happens if the petitioners do not mention any known exporters in their petition (a possibility envisaged by the US in its second submission, para 66): will no questionnaires be sent and no individual margin of dumping be calculated for anyone? Does the authority verify whether an exporter mentioned by the petitioner in the application actually exists?

Answer:

15. At the second Panel meeting, Mexico stated that it would not initiate an investigation if the petitioners identified no known exporters, because the AD Agreement requires petitioners to identify the known exporters. Mexico's answer does not explain, however, what it would do if the petitioners claimed not to know the identity of any of the exporters, or if Economía would take any steps to verify such an assertion. For example, there is no evidence in the record of the rice investigation suggesting that Economía took any steps at all to verify the petitioners' identification of only two "known" exporters in the petition (or to question their failure to

identify the Rice Company as a known exporter). The record does, however, show that Economía is perfectly willing to apply the facts available in setting dumping margins for exporters and producers that the petitioners do not identify, and that are never sent the questionnaire. Mexico has not satisfactorily explained why it is willing to take this approach when the petitioners identify only two exporters, but would not do the same if the petitioners identified none.

7. The United States on various occasions mentions the fact that apart from the two exporters listed as "known exporters" by the petitioner in the application, the application also contained information and referred for example in Annex H to another exporter, the Rice Corporation, which later appeared and took part in the investigation out of its own initiative. (See e.g. para. 13 United States first submission). According to the United States, did the application contain any other names of United States exporters, in addition to these three?

Answer:

16. In addition to the numerous references to The Rice Company in the petition, petition annex M contains contact information for the USA Rice Council and the Rice Millers' Association. The description of the Rice Millers' Association states that its members represent 97 percent of all U.S. milled rice production.[5] Therefore, Economía had contact information for U.S. industry associations that could have provided it with a virtually complete listing of U.S. exporters and producers of long-grain white rice.

17. Petition Annex M (as well as the petition itself) also notes that long-grain white rice is grown in Arkansas, Mississippi, Missouri, Texas, and Louisiana.[6] Rice millers are located in each of those states.[7] Nevertheless, the petitioners limited their listing of the "known" exporters to Producers Rice and Riceland, two Arkansas corporations.[8]

8. Could Mexico indicate whether the "Official form for exporting companies investigated for price discrimination" (MEX-5) is the same as the actual questionnaire that was sent to the known exporters or is it a form which exporting companies who have not been identified by the petitioners need to return to the authority in order to be sent the questionnaire and to be examined individually?

9. The United States notes in its first submission with regard to the listados that "These abstracts are known as "listings" ("listados"), and they provide import values and

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[5] Petition Annex M at 4 (Exhibit US-17).

[6] Petition Annex M at 2 (Exhibit US-17); Petition at 10 (Exhibit US-8).

[7] *See* Exhibits US-18&19 (excerpts from *Rice Journal*).

[8] *See* Petition at 17 (Exhibit US-8).

import volumes, along with the identity of the importer of record. Even these abstracts were apparently considered to be confidential information, and they were not placed on the public record of the investigation." (United States first written submission, para. 15). Could Mexico confirm that this is all the information contained in the listados? In Mexico, are these listados as well as the pedimentos themselves considered as confidential information?

Answer:

18. Mexico stated during the second Panel meeting that the *listados* as well as the *pedimentos* are confidential information. It also stated, wrongly, that it did not disclose the *listados* to the domestic industry. As the United States noted during the second Panel meeting, the petitioners explicitly state in their petition that they obtained the export price that they used for the petition margin from the *listados*.[9] Therefore, contrary to Mexico's suggestion, Mexico did in fact provide confidential customs valuation information to its domestic industry for use in the antidumping case.

19. Furthermore, in its second submission, Mexico made the remarkable admission that the Mexican Customs Service enters into agreements with certain Mexican industry associations to provide *pedimentos* to them.[10] The United States does not understand how Mexico can possibly justify its practice of sharing this customs valuation information with its domestic industries, in light of its admission that the information is confidential.

10. In its answer to question 17 (b) of the Panel's questions, Mexico stated that "For the purposes of initiating an investigation, Mexico sees no requirement in the AD Agreement to obtain the *pedimentos* or to identify all of the exporters. The IA therefore did not attempt to obtain them, because it considered that it was under no obligation to do so. To have sought to obtain them would have considerably delayed the initiation of the investigation (by approximately 40 days), because as many as 1,183 transactions were conducted in 1997, 1,088 in 1998 and 1,207 in 1999. As stated in the preceding reply, the IA relied on the list of *pedimentos* to initiate the investigation."

(a) Could Mexico clarify that the 40 days delay referred to in this answer relates to the time it would have taken to obtain the information from the Ministry actually holding the *pedimentos*? Or does this delay include the time it would have taken to go through the pedimentos to find *e.g* the names of exporters?

Answer:

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[9] *See, e.g.,* Petition at 21 (final sentence), 23, 44 (referencing Annex F) (Exhibit US-8).

[10] Mexico's Second Written Submission, para. 57.

20. Mexico has previously stated that obtaining the *pedimentos* would delay initiation of the investigation by approximately 40 days. If this period did not include the time needed to examine the *pedimentos*, Mexico would have stated a period longer than 40 days.

21. Moreover, as the United States noted in its second written submission, Mexico's "40-day" estimate is almost certainly overstated, because the dumping POI only covered the period March – August 1999.[11] Therefore, Economía would not have needed to obtain the *pedimentos* for 1997 and 1998 for purposes of identifying the contact information for the "known" exporters.

22. In any event, if Mexico's position is that it would have taken 40 days to obtain the *pedimentos*, then there is no basis for its assertion that obtaining them would have delayed the initiation of the investigation. Although the petitioner filed its petition in June 2000, Economía did not initiate the investigation until December 2000.[12] Therefore, if Economía had requested the *pedimentos* in June after the petition was filed, it would have received them almost five months prior to the date of initiation. Even if it had waited to request them until October, Economía still would have received the *pedimentos* well in advance of the initiation date.

23. On the other hand, Mexico also stated during the second Panel meeting that there is a 40-day lag between the date of entry of a particular shipment and the date that the shipment appears in the *listados*. If Mexico's response to this question 10(a) abandons its previous explanations and asserts instead that the 40-day delay only refers to the alleged time lag, then the United States refers the Panel to its response to question 5 above.

(b) Could Mexico indicate whether the only two relevant documents in this respect are (i) the pedimentos in which all of the information including the identity of the exporter is included, and (ii) the listados, an abstract of the pedimentos containing only limited information, or does there exist a third type of document which is also called a listado and which is actually an electronic version of the pedimentos?

Answer:

24. The United States noted in response to question 17(b) in the first set of Panel questions that the petitioners in the *Crystal Polystyrene* case used *pedimentos* that they obtained from the Mexican government to separate out imports of the subject product from other, non-subject merchandise imported under the same tariff heading.[13] The reason for the U.S. comment was to illustrate that the *pedimentos* could in fact be used to obtain accurate volume and value data that Economía could have used in its investigation.

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[11] *See* U.S. Second Written Submission, para. 58 and n.43.

[12] *See* U.S. First Written Submission, paras. 12, 18.

[13] *See* U.S. Reply to First Panel Question 17(b), para. 52 and accompanying footnotes.

25. On July 30, 2004, Economía published its preliminary determination in the *Crystal Polystyrene* case. The foreign respondents in that case challenged the antidumping margin in the petition on the grounds that the export price component of the petition margin was based on imports of both subject and non-subject merchandise. Economía rejected the respondents' argument on the grounds that the petitioners had obtained detailed information from the *pedimentos*.[14] Thus, the *Crystal Polystyrene* preliminary determination demonstrates again that, contrary to Mexico's arguments, it is possible to use the *pedimentos* to obtain detailed volume and value data.

26. Furthermore, in its response to question 15 in the first set of Panel questions, Mexico justified its refusal to examine the *pedimentos* by arguing that it would not have been possible to identify with precision the precise amount of imports of long-grain white rice. But in *Crystal Polystyrene*, Economía accepted the use of *pedimentos*, when they accounted for 73.6 percent of total imports of the subject merchandise during the POI.[15] Thus, Economía is clearly willing to use information from *pedimentos* that represent less than 100 percent of total imports during the POI, when it suits the interests of its domestic industry.

27. As the United States has previously stated, we are noting Mexico's use of *pedimentos* that it supplied to its 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.

Questions concerning the non-shipping exporter

11. (a) What is the view of the parties concerning the reference in the last sentence of Article 9.5 AD Agreement to the term "guarantees" rather than

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[14] The preliminary determination states in pertinent part:

> The Ministry considers invalid the argument of Atofina Petrochemicals [one of the foreign respondents] given that the sample of the import *pedimentos* [*pedimentos fisicos de importacion*] provided by the petitioners accounted for 73.6 percent of the total volume imported during the period of investigation under headings 3903.19.02 and 3903.19.99 of Mexico's Tariff Schedule, and for this reason [this sample] was considered representative. On the basis of this information, petitioners were capable of identifying the type of product bought by each purchaser, the terms of sale, the means of transportation, the way in which the product was packed (bags or bulk) as well as the value and volume of the imports . . . ."

See Preliminary Determination of the Antidumping Investigation on Imports of Crystal Polystyrene, Currently Classifiable under Headings 3903.19.02 and 3903.19.99 of the Schedule of the Law on the General Tax on Import and Exports, Originating from the United States of America, Independently of the Country of Export, paras 75-76 (emphasis added) (Exhibit US-27).

[15] *See id.*

anti-dumping "duties"?

Answer:

28. The third sentence of Article 9.5 prohibits an investigating authority from levying antidumping duties on the entries of an exporter or producer seeking an expedited review while the review is underway. The fourth sentence of Article 9.5 permits the authority to withhold appraisement of those entries, or request a guarantee, to preserve the possibility of retroactively levying duties on the entries if the authority reaches an affirmative finding of dumping. The guarantees might take the form of bonds or cash deposits, for example.

(b) In the view of the parties, is the appropriate level of the guarantee that may be requested from a new shipper under Article 9.5 AD Agreement in any way limited by the AD Agreement, and, if so, where in the AD Agreement is this limit to be found ?

Answer:

29. Article 9.4 of the AD Agreement states that "the antidumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of antidumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of the exporters or producers not individually examined."

30. Thus, for example, if an authority were to investigate the largest volume of exports that could reasonably be investigated under Article 6.10, it would be under an obligation to apply a duty rate calculated in accordance with Article 9.4 to any exporter or producer not included in the examination. The text does not distinguish between firms that were known and firms that were unknown, or firms that had shipments during the POI and firms that did not. On the contrary, Article 9.4 creates an across-the-board ceiling on the permissible margin that may be assigned to any exporter or producer that "is not included" in the initial investigation.

31. Article 9.5 of the AD Agreement provides a basis for an exporter or producer that did not export during the POI to obtain an individual margin. Nothing in Article 9.5 requires an exporter or producer to seek an individual margin, however. The producer or exporter may choose instead to accept the imposition of antidumping duties on its exports at the "all others" rate established in accordance with Article 9.4. Inasmuch as the neutral "all others" margin would apply to the exporter's or producer's exports in the absence of an expedited review, there is no logical basis

to interpret Article 9.5 as allowing an authority to require guarantees during the expedited review at a level higher than the all other's margin.

32. Furthermore, Article 9.3 of the AD Agreement states that "[t]he amount of the antidumping duty shall not exceed the margin of dumping as established under Article 2." Although the all other's margin is not directly established under Article 2, it is indirectly established under that article, because it is a weighted average of the calculated margins. Thus, Article 9.3 of the AD Agreement also supports the conclusion that the margin assigned to exporters and producers that did not ship during the POI (and thus the guarantees for those margins) may not exceed the neutral all other's margin.

33. In addition, the chausette in Article 9.4 requires authorities to disregard any margins established under Article 6.8 when calculating the all other's margin. This fact also supports the conclusion that the all other's margin (and thus any guarantee of that margin) is meant to be a neutral number, and not adverse.

34. Finally, Article 7.2 of the AD Agreement limits the cash deposit or bond that an authority may apply as a provisional measure to an amount "not greater than the provisionally estimated measure of dumping." This text provides further support for the conclusion that the appropriate level for an Article 9.5 guarantee would be not greater than the estimated measure of dumping for the company at issue - *i.e.*, the neutral all other's margin from the investigation.

(c) According to the parties, are non-shipping exporters to be considered as an interested party in the sense of Article 6.11 (i) AD Agreement, *i.e.* an exporter or foreign producer or the importer of a product subject to investigation?

Answer:

35. Non-shipping exporters are "exporters or producers" of the product subject to investigation, even if they are not exporting the product during the investigation. Therefore, they are interested parties within the meaning of Article 6.11(i) of the AD Agreement. It is important to note, however, that 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, 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. As the panel stated in *Argentina – Definitive Anti-dumping Measures on Imports of Ceramic Floor Tiles from Italy,* "an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit."[16]

[16] Report of the Panel, WT/DS189/R, adopted 5 November 2001, para. 6.54 ("*Argentina – Ceramic Tiles*"). The Panel also stated that "the inclusion, in an Annex relating specifically to the use of best information available under Article 6.8, of a requirement to specify in detail the information required, strongly implies that
(continued...)

(d) Are the parties of the view that "non-shipping exporters" and "new shippers" are one and the same thing under the AD Agreement? If so, why? If not, are they in the parties' view nevertheless entitled to the same treatment? What is the basis for this view in the Agreement?

Answer:

36. The United States has used the term "new shipper" as shorthand for exporters that did not export the subject merchandise to the importing Member during the POI, that subsequently do export the merchandise and then seek an expedited review under Article 9.5 of the AD Agreement. In this sense, "new shippers" are a subset of "non-shipping exporters." As the United States discussed in response to the Panel's question 11(b) above, Article 9.4 of the AD Agreement creates an across-the-board ceiling on the permissible margin that may be assigned to any exporter or producer that "is not included" in the initial investigation. The United States is not aware of any basis in the AD Agreement for concluding that "new shippers" should be treated differently than other non-shipping exporters merely because they seek an expedited review under Article 9.5.

Questions concerning the law as such

12. With regard to Article 2 of Mexico's Foreign Trade Act (the "FTA"):

(a) Could Mexico explain whether the administration has the discretion to apply the law in a manner which goes against the clear meaning of the law if it considers that this is what is required in order for Mexico to comply with the AD Agreement?

(b) In the view of Mexico, is it relevant for the application of Article 2 FTA that some of the amendments to the FTA challenged by the United States in the current proceedings were introduced after the end of the Uruguay Round and the entry into force of the Anti-Dumping Agreement?

(c) Is it the view of Mexico that the provisions of the FTA challenged by the United States in the present case are all consistent with the WTO Anti-Dumping Agreement?

Answer:

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[16] (...continued)
investigating authorities 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." *Id.*, para. 6.55.

37. The fact that each of the challenged provisions was introduced after the end of the Uruguay Round is evidence that, in Mexico's view, the provisions are consistent with the AD Agreement, the SCM Agreement, and the GATT 1994. Mexico's repeated insistence before this Panel that the challenged provisions are not contrary to its WTO obligations provides further evidence that Mexico sees no conflict between these provisions and the WTO agreements. Given Mexico's view that, as a matter of Mexican municipal law, the actions that the challenged laws require are consistent with WTO rules, Mexico does not, as a matter of municipal law, have discretion to disregard their mandates. Therefore, Article 2 of the FTA cannot shield Mexico from claims that the challenged provisions of its domestic law are, in fact, in breach of its WTO obligations.

38. Mexico's approach throughout this dispute has been to try to interpret its WTO obligations in a way that is consistent with what its laws require, and not the reverse. The fact that it is taking this approach suggests that Mexico may have been misinterpreting its WTO obligations when it drafted its law. Thus, it is all the more important for the Panel to clarify the WTO provisions at issue in this dispute, and determine whether Mexico's laws are consistent with these WTO provisions as clarified.

13. The Mexican law provides that interested parties shall submit their arguments and evidence within a period of 28 days from the day following the publication of the initiating resolution. (Article 53 FTA). How many days are given to exporters that appear following initiation?

Answer:

39. The panel in the *Argentina Poultry* dispute concluded that Argentina breached Article 6.1.1 of the AD Agreement when it provided only 20 days for a group of respondents to respond to questionnaires that it sent for the first time approximately eight months after initiation.[17] The same panel stressed that the 30-day period provided for in the first sentence of Article 6.1.1 "is an absolute minimum that must be granted to exporters from the outset," and that the extensions provided for in the second sentence of that provision are in addition to, not in lieu of, the 30-day period provided for in the first sentence.[18] Article 53 of the FTA, however, when applied to companies not identified as "known" exporters in the petition (and thus not sent the questionnaire immediately following initiation), legally forecloses both the 30-day response period and an opportunity for an extension of that period. Therefore, Article 53 is inconsistent as such with Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement.

14. In its answer to question 31 of the Panel's questions, Mexico replies in the first

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[17] Report of the Panel, *Argentina–Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, paras. 7.134 (when questionnaires sent), 7.136-7.147.

[18] *Argentina Poultry,* para. 7.140.

sentence that "representativeness" is not a requirement for initiating a review. In the second sentence, Mexico adds that the interested party will be required in the course of the review to demonstrate such representativeness so that it can be assigned a margin of dumping. Is it the argument of Mexico that it is not a requirement for *initiating* a review, but it is a requirement in order to be *successful in obtaining* a review? Could Mexico explain to what extent it considers this distinction to be relevant?

Answer:

40. As the United States has previously noted, Mexico's argument is form over substance. Whether one characterizes it as a requirement to initiate a review of the margin, or a requirement to conduct a review of the margin, or a requirement to obtain a new individual margin, the fact remains that Articles 68 and 89D of the FTA require exporters and producers to demonstrate a representative volume of sales in order to change the level of duties levied against them. The AD and SCM Agreements do not permit authorities to impose such a condition.

15. On page 19 of its second submission, the United States argues that an investigating authority may not apply facts available to exporters that were never sent a questionnaire and asked to respond. Does this imply that in the United States view a facts available duty can be applied only to known exporters? Or would the United States argue that a residual rate based on the facts available for unknown exporters is possible?

Answer:

41. Articles 6.10 and 9.4 of the AD Agreement establish two approaches for calculating antidumping margins: either the authority examines and calculates an individual margin for every exporter or producer of the subject merchandise in the country under investigation, or it examines fewer than all exporters and producers. In the latter case, the maximum permissible margin that may be applied to the unexamined exporters or producers is the neutral all other's margin calculated in accordance with Article 9.4 of the AD Agreement. This limitation applies regardless of whether the exporter or producer is known or unknown, and whether it had exports during the POI or not. Although the all other's margin would apply to the unknown exporters, it would not be a facts available margin, because it would be calculated under Article 9.4, and not under Article 6.8.

42. The obligations of Articles 6.1, 6.8, and Annex II of the AD Agreement apply to those individual exporters and producers that an investigating authority includes in its investigation. If an investigating authority fails to provide an exporter or producer the individual notice that those provisions require, then the authority cannot claim to be including the exporter or producer "in the investigation," and it will not have the ability to apply a margin based on the facts available to that exporter or producer. Nothing in Articles 6.1 or 6.8, or Annex II, suggests that the applicability of the facts available rules varies depending on whether a particular exporter is "known" to the investigating authority.

43. Therefore, it would not normally be permissible for an authority to apply a margin based on the facts available to an unknown exporter. Rather, that firm would be entitled to the neutral all other's margin calculated in accordance with Article 9.4 of the AD Agreement. If the domestic industry would prefer instead that the exporter receive an individual margin, it could simply do a better job of identifying the known exporters in the first place.

44. It is possible to imagine a situation where every investigated exporter is assigned a margin based on the facts available. In that case, an investigating authority would not be able to apply one of the methods listed in Article 9.4(i) and (ii) in determining the all other's rate.[19] The present case does not involve such a scenario, however.

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[19] *See* Appellate Body Report, *United States – Hot-Rolled Steel from Japan*, WT/DS184/AB/R, adopted 23 August 2001, paras. 125-126.