

***MEXICO – DEFINITIVE ANTI-DUMPING MEASURES
ON BEEF AND RICE***

(WT/DS295)

**FIRST SUBMISSION OF
THE UNITED STATES OF AMERICA**

March 22, 2004

Table of Contents

I.	INTRODUCTION	1
II.	PROCEDURAL BACKGROUND	2
III.	FACTUAL BACKGROUND	2
	A. The Mexican Rice Market	2
	B. The Imposition of Antidumping Duties on U.S. Imports	4
IV.	SUMMARY OF LEGAL ARGUMENT	11
	A. The Imposition of Antidumping Duties on U.S. Long-Grain White Rice	12
	B. Mexico’s Foreign Trade Act and its FCCP	14
V.	LEGAL ARGUMENT	15
	A. Economía’s Use of a Stale Period of Investigation Breached Articles VI(2) of GATT 1994 and Articles 1, 3.1, 3.2, 3.4, and 3.5 of the AD Agreement	15
	B. Economía Breached Articles 1, 3.1, 3.5 and 6.2 of the AD Agreement by Limiting Its Examination of Injury to Only Six Months of 1997, 1998, and 1999	18
	1. Economía's Injury Analysis Breached Article 3.1 of the AD Agreement	18
	a. Economía’s Injury Investigation Was Not Based on “Positive Evidence”	19
	b. Economía Failed to Conduct an “Objective” Examination	21
	2. Economía’s Injury Analysis Breached Articles 3.5 and 6.2 of the AD Agreement	24
	C. Economía’s Conduct of its Injury Analysis Breached Articles 3.1, 3.2, 3.4, 3.5, 6.8, 12.2, and Annex II of the AD Agreement	25
	1. Economía Breached Articles 3.1, 3.2, and 6.8 and Annex II of the AD Agreement by Failing to Collect the Evidence on Price Effects and Volumes That it Needed to Conduct its Injury Analysis in an Objective Manner	25
	a. Economía Failed to Conduct an Objective Examination of Price Effects	25
	b. Economía Failed to Conduct on Objective Evaluation of Volume	27
	c. Economía Breached Article 6.8 and Paragraphs 1 and 7 of Annex II of the AD Agreement by Basing Its Evaluation of Injury on the Facts Available	28
	2. Economía Breached Articles 3.1 and 3.2 of the AD Agreement by Failing to Objectively Consider Whether There Was a Significant Increase in the Volume of Dumped Imports or Significant Price Effects	29
	3. Economía Breached Articles 3.1 and 3.4 of the AD Agreement by Failing to Conduct an Objective Analysis of the Relevant Economic Factors ..	31
	4. Economía Breached Articles 3.1, 3.2, and 3.5 of the AD Agreement By	

	Including Non-Dumped Imports in its Evaluation of Volume, Price Effects, and the Impact of the Dumped Imports on the Domestic Industry	32
5.	Economía Breached Article 12.2 of the AD Agreement by failing to provide in sufficient detail the findings and conclusions reached on all issues of law	35
D.	Economía’s Failure to Exclude Firms with Antidumping Margins of Zero Percent from the Antidumping Measure is Inconsistent with Article 5.8 of the AD Agreement	36
E.	Economía’s Application of an Adverse “Facts Available” Dumping Margin to Producers Rice and to U.S. Producers and Exporters that It Did Not Examine is Inconsistent with Article VI:2 of the GATT 1994, Articles 1, 6.1, 6.2, 6.6, 6.8, 6.10, 9.3, 9.4, 9.5, 12.1, and 12.2 of the AD Agreement, and Paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement	37
	1. Analysis of Articles 6.1, 6.8, 6.10, and 9.4 of the AD Agreement, and Paragraph 1 of Annex II of the AD Agreement	38
	2. Economía’s Application of an Adverse “Facts Available” Dumping Margin to Producers Rice Breached Articles 6.8, 9.4, and 9.5, and Paragraphs 3, 5, 6, and 7 of Annex II of the AD Agreement	45
	a. The Facts Available Margin Was Adverse	45
	b. Producers Rice Was A Fully Cooperative, Known Respondent	47
	c. Economía’s Application of an Adverse Facts Available Margin to Producers Rice Breached Articles 6.2, 6.4, 6.8, 9.4, and 9.5, and Paragraphs 3, 5, 6, and 7 of Annex II of the AD Agreement	49
	3. Economía’s Application of an Adverse “Facts Available” Dumping Margin to the U.S. Producers and Exporters that It Did Not Examine Breached Articles 6.1, 6.2, 6.6, 6.8, 6.10, 9.4, 9.5, 12.1, and Paragraphs 1 and 7 of Annex II of the AD Agreement	53
	a. Articles 6.6, 6.10, 9.4 and 9.5	54
	b. Articles 6.1, 6.2, and 6.8, and Paragraph 1 of Annex II	55
	c. Paragraph 7 of Annex II	56
	d. Article 12.1	56
	4. Economía’s Failure to Provide Sufficient Information on the Findings and Conclusions of Fact and Law and the Reasons that Led to the Imposition of the Adverse, Facts Available-Based Margin on Producers Rice and the Unexamined Exporters and Producers Breached Article 12.2 of the AD Agreement	57
	5. Economía’s Application of an Adverse, Facts Available-Based Margin to Producers Rice and the Unexamined Exporters and Producers Breached Articles 1 and 9.3 of the AD Agreement	59
	6. Economía Breached Article VI:2 of GATT 1994 By Levying an Antidumping Duty Greater Than the Margin of Dumping	60
F.	Articles 53, 64, 68, 89D, 93V, and 97 of Mexico’s Foreign Trade Act, and Section 366 of Mexico’s FCCP, are Inconsistent “As Such” with Several of Mexico’s Obligations Under the AD and SCM Agreements	61

1.	The Legislation of a Member Breaches That Member’s WTO Obligations If the Legislation Mandates Action that Is Inconsistent with Those Obligations	61
2.	Article 53 of the 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	62
	a. The Relevant Provisions of the AD and SCM Agreements	62
	b. Article 53 is Inconsistent “As Such” with Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement	63
3.	Article 64 of the 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	64
	a. Article 64 is Inconsistent “As Such” with Article 9.4 of the AD Agreement	65
	b. Article 64 is Inconsistent “As Such” with Article 6.8 and paragraphs 1, 3, 5, and 7 of Annex II of the AD Agreement, and with Articles 12.7 and 19.3 of the SCM Agreement	66
	c. Article 64 is Inconsistent “As Such” with Articles 9.3 and 9.5 of the AD Agreement, and with Article 19.3 of the SCM Agreement	68
4.	Article 68 of the Foreign Trade Act is Inconsistent “As Such” with Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement	69
	a. The Relevant Provisions of the AD and SCM Agreements	69
	b. Article 68 is Inconsistent “As Such” with Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement	69
5.	Article 68 of the Foreign Trade Act is Inconsistent “As Such” with Articles 9.3 and 11.2 of the AD Agreement, and with Article 21.2 of the SCM Agreement	70
	a. The Relevant Provisions of the AD and SCM Agreements	70
	b. Article 68 of the Foreign Trade Act is Inconsistent “As Such” with Articles 9.3 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement	71
6.	Article 89D of the Foreign Trade Act is Inconsistent “As Such” with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement	72
	a. The Relevant Provisions of the AD and SCM Agreements	73
	b. Article 89D is Inconsistent “As Such” with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement	73
7.	Article 93V of the Foreign Trade Act is Inconsistent “As Such” with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement	75
	a. The Relevant Provisions of the AD and SCM Agreements	75
	b. Article 93V is Inconsistent “As Such” with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement	76
	i. Article 93V Is “Specific” to Dumping or Subsidization	77

ii.	Article 93V Is “Against” Dumping or Subsidization	78
iii.	Article 93V Is Not “In Accordance with the Provisions of GATT 1994,” as Interpreted by the AD and SCM Agreements	79
8.	Article 366 of Mexico’s FCCP and Articles 68 and 97 of Mexico’s Foreign Trade Act 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	79
a.	The Relevant Provisions of the AD and SCM Agreements	79
b.	Article 366 and Articles 68 and 97 are Inconsistent with AD Agreement Articles 9.3, 9.5, and 11.2, and SCM Agreement Articles 19.3 and 21.2	81
VI.	CONCLUSION	84

I. INTRODUCTION

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

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

3. The United States proceeds in this submission as follows:

- First, the United States describes the procedural and factual background of the matter referred to the Panel, including the facts surrounding Mexico’s decision to impose antidumping duties on imports of long-grain white rice from the United States.
- Second, the United States summarizes its legal arguments, including its claims directed at Mexico’s Foreign Trade Act and its Federal Code of Civil Procedure.
- Third, the United States demonstrates that the Mexican investigating authority failed to conduct its antidumping investigation in accordance with the requirements of the AD Agreement and GATT 1994. These failures arose in part from Mexico’s decision to allow the petitioning industry (over the objection of the respondents) to decide which time period, and which time of the year, should be analyzed for dumping and injury. The United States also shows that the investigating authority breached WTO rules by applying the antidumping measure to firms that were not dumping, and by applying an adverse “facts available” margin to firms that it did not investigate and to a firm that had no shipments to Mexico during the investigated period.
- Fourth, the United States establishes that several provisions of Mexico’s Foreign Trade Act and one provision of its Federal Code of Civil Procedure are inconsistent “as such” with Mexico’s obligations under the AD Agreement and the SCM Agreement. Each of the provisions at issue is inconsistent “as such” because it mandates action inconsistent with various provisions of one or both Agreements.

II. PROCEDURAL BACKGROUND

4. On June 16, 2003, the United States requested consultations with the Government of Mexico pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“Dispute Settlement Understanding” or “DSU”), Article 17.3 of the AD Agreement, and Article 30 of the SCM Agreement, with respect to Mexico’s definitive antidumping measure on long-grain white rice and certain provisions of Mexico’s Foreign Trade Act and its Federal Code of Civil Procedure (as well as certain other measures). This request was circulated to WTO Members on June 23, 2003 (WT/DS295/1). Pursuant to this request, the United States and Mexico held consultations on July 31 and August 1, 2003. These consultations provided helpful clarification, but failed to resolve the dispute.

5. On September 19, 2003, the United States requested the establishment of a panel pursuant to Article 6 of the DSU, Article 17.4 of the AD Agreement, and Article 30 of the SCM Agreement (WT/DS295/2). The Dispute Settlement Body (“DSB”) considered this request at its meeting on October 2, 2003, at which time Mexico objected to the establishment of a panel.

6. On November 7, 2003, the United States renewed its request for the establishment of a panel. The Panel was established at the DSB meeting of November 7, 2003 (WT/DSB/M/157), with the following terms of reference:

To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS295/2, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

III. FACTUAL BACKGROUND

A. The Mexican Rice Market

7. This dispute concerns trade in rice. Not the rice grown in fields (called “rough” or “paddy” rice), but the rice that leaves a mill with its outer husk and bran layers removed.¹

¹ *Resolución por la que se acepta la solicitud de parte interesada y se declara el inicio de la investigación antidumping sobre las importaciones de arroz blanco grano largo, mercancía clasificada en la fracción arancelaria 1006.30.01 de la Tarifa del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia*, Diario Oficial de la Federación, 11 de diciembre de 2000, para. 24 (Exhibit US-1); *Resolution Accepting the Request of the Interested Party and Declaring Initiation of an Anti-dumping Investigation on Imports of Long Grain White Rice, Merchandise Classified in Tariff Code 1006.30.01 of*
(continued...)

8. Mexico has not one, but two growing seasons for paddy rice: spring/summer (“S/S”) and fall/winter (“F/W”). The S/S season yields the largest crop.² In fact, the S/S season accounts for nearly 90 percent of the total paddy rice harvest in any one year, while the F/W season accounts for the remaining 10 percent.³ Paddy rice from the S/S season is planted in May - July⁴ and harvested in October - December.⁵ In contrast, paddy rice from the F/W season is planted in January - February and harvested in June - July.⁶ In Mexico, unlike other countries, paddy rice is often shipped to the mills immediately after harvest because many growers lack sufficient drying and storage facilities that are needed to avoid spoilage of the crop.⁷ This means that, in any one

¹ (...continued)

the Schedule Under the General Import Tax Law, Originating in the United States of America, Regardless of the Country From Which They Were Imported, Diario Oficial de la Federación, December 11, 2000, para. 24 (“Initiation Notice”) (Exhibit US-2).

² See *Structure of the Mexican Rice Industry: Implications for Strategic Planning*, TAMRC Int’l Market Research Rep. No. IM 2-00, at 3 (“TAMRC Report”). The TAMRC Report was cited and placed on the record by various parties to the investigation. It was first placed on the record by the U.S. exporters who cited it (at pages 16-19) and attached excerpts from it (pages 3-7 and 10) in their February 22, 2001 written arguments on injury and causation. The next party to rely on the TAMRC Report was an importer, Empacadora el Fresno, S.A. de C.V., who cited it at pages 12-16 of its February 22, 2001 written submission on injury and causation. Finally, on April 17, 2001, in response to a request from Mexico dated March 23, 2001 (Question 38 of the request for additional information), the U.S. exporters provided Mexico (at Annex 5) with a complete copy of the report. The United States has attached the entire document to this submission (Exhibit US-3). See also Neftalí Calixto Cruz, El Arroz: Su Cultivo en México, at 21, attached as Annex J to Antidumping Petition (“El Arroz”) (Exhibit US-4).

³ These calculations were made on the basis of data reported by the Mexican Secretariat of Agriculture, which were included in Petition Annex K (Exhibit US-5). See Table “Main Crops - Production: Spring/Summer Cycles 1990-1998,” Annex K at 3, and Table “Main Crops - Production: Fall/Winter Cycles 1989/90 - 1997/98,” Annex K at 4. For instance, in 1998 the F/W paddy rice crop amounted to 51,964 metric tons (“Mts”), while the S/S paddy rice crop amounted to 406,149 Mts. *Id.* Hence, the F/W paddy rice crop represented 11.34 percent (or 51,964/458,113) of the paddy rice crop for the whole of 1998.

⁴ *El Arroz*, at 22 (Exhibit US-4).

⁵ *Id.* Cf. TAMRC Report, at 3 (paddy rice from S/S season is harvested from November - January) (Exhibit US-3).

⁶ *El Arroz*, at 22 (Exhibit US-4).

⁷ TAMRC Report, at 5 (Exhibit US-3). “Rice is typically harvested as ‘green’ rice at 20% moisture content in Mexico. The green rice must then be transported immediately to drying facilities to prevent spoilage losses. Because few Mexican farmers own their own drying facilities, most Mexican growers must transport their green rice directly to mills.” *Id.* See also *Resolución final de la investigación antidumping sobre las importaciones de arroz blanco grano largo, mercancía clasificada en la fracción arancelaria 1006.30.01 de la Tarifa de la Ley de los Impuestos Generales de Importación y Exportación, originarias de los Estados Unidos de América, independientemente del país de procedencia*, Diario Oficial de la Federación, 5 de junio de 2002 (Exhibit US-6); *Final Determination Regarding the Anti-dumping Investigation Upon the Imports of White Rice Long Grain, Merchandise Classified Under Tariff Section 1006.30.01 of the General Import Tax Law, Original from the United States of America, Regardless of the Country From Which They Were Imported*, Diario Oficial de la Federación, Second Section 1, June 5, 2002, para. 321 (“Mexican-grown rice is shipped to the mills immediately after harvest,

(continued...)

year, the bulk of production of milled rice takes place in October - December, while the remainder becomes available in June - July.

9. Rice consumption, on the other hand, is not seasonal. Mexican consumers eat rice all year long; moreover, the Mexican appetite for milled rice has increased steadily over the past several years. In 1990, for example, rice consumption in Mexico stood at only 440,000 metric tons (“Mts”).⁸ By 1999, that figure had grown to 605,000 Mts.⁹

10. In order to grow rice, producers need access to water for the fields and drying facilities to prevent spoilage.¹⁰ Both are in short supply in Mexico. As a result, Mexico is not self-sufficient when it comes to rice. “Because domestic production of rice in Mexico has fallen short of demand over the years, Mexico has come to rely on imports to make up the difference. . . . On average between 1989 and 1998, imports accounted for 45% of the Mexican rice supply.”¹¹

11. As one might imagine, “[m]ost rice is imported [into Mexico] when rice supplies from domestic production dwindle each year”¹² – that is, from March to August (which includes the June – July period when domestic production of milled rice is at a seasonal low) and not from September to February (which includes the October – December period when domestic production of milled rice is at a seasonal high).

B. The Imposition of Antidumping Duties on U.S. Imports

12. Notwithstanding its dependence on imports and the presence of imports for more than a decade, Mexico imposed antidumping duties on imports of long-grain milled rice from the United States on June 5, 2002. Mexico’s action was precipitated by a petition filed with the previous administrator of Mexico’s antidumping law, the Secretariat of Commerce and Industrial Development (“SECOFI”), on June 2, 2000.¹³ The petition was filed by the Mexican Rice Council (Consejo Mexicano del Arroz, A.C. or “CMA”). The CMA is a private association that

⁷ (...continued)

given that very few growers own drying facilities.”) (“*Final Determination*”) (Exhibit US-7).

⁸ *TAMRC Report*, at 12 (Exhibit US-3).

⁹ *Id.*

¹⁰ *Id.* at 3-5.

¹¹ *Id.* at 6.

¹² *Id.* at 10.

¹³ *Solicitud de Investigación Antidumping contra las Importaciones de Arroz Blanco Originarias de los Estados Unidos de América*, June 2, 2000 (“*CMA Petition*”). Due to a name change, the investigation was begun by SECOFI, but completed by the current administrator of Mexico’s antidumping law, the Secretaría de Economía (“Economía”).

includes all of the domestic millers and a significant number of paddy rice growers in Mexico.¹⁴ The data supporting the petition was provided by the three largest privately owned mills in Mexico and six cooperatives.¹⁵

13. In its petition, the CMA stated that long-grain paddy rice is grown in six U.S. states.¹⁶ As support for certain allegations in the petition, the CMA attached an annual report on the U.S. rice industry published by the U.S. Department of Agriculture (“USDA”).¹⁷ That report states at page six that long-grain rice is grown in Arkansas, Louisiana, California, Mississippi, Texas, and Missouri. According to the report, plantings of long-grain rice in these states reached an estimated 2.73 million acres (or 1.09 million hectares) in 1999.¹⁸ While it did not provide a precise figure, the report stated that there are a “large number of rice farmers” in the United States.¹⁹ Despite these facts, the CMA’s petition named only two U.S. exporters: Producers Rice Mill, Inc. (“Producers Rice”), and Riceland Foods, Inc. (“Riceland”).²⁰ This listing of only two exporters is surprising because (a) both companies are located in Arkansas, and the petition expressly stated that rice is grown in six U.S. states; and (b) the petition repeatedly mentions a third U.S. exporter, The Rice Company (“Rice Company”), elsewhere in the document.²¹ Indeed, at Annex H of the petition, the Rice Company is described as “one of the largest U.S. exporters as regards paddy rice and white milled rice.”²²

14. To support its allegation of dumping, the CMA consulted official Mexican import data for “Export Price” and a government publication in the United States for “Normal Value.”²³

¹⁴ *Initiation Notice*, para. 27a (Exhibits US-1&2).

¹⁵ *Id.* at paras. 27b, 27c, and 27m. These mills were Schettino Hermanos S. de R.L. de C.V., Industrializadora de Productos Agrícolas de la Cuenca del Papaloapan, S.A. de C.V., and Grupo de Empresas Veracruzanas, S.A. de C.V.

¹⁶ The petition identified five U.S. states in which “long grain varieties predominate” and a sixth state in which long-grain rice production is exceeded by production of short- and medium-grain varieties. *CMA Petition*, at 10 (Exhibit US-8).

¹⁷ *See id.* at Annex S (*Rice Situation and Outlook Yearbook*, Econ. Research Service, U.S. Dep’t of Agriculture, November 1999 (“*Rice Yearbook*”)) (Exhibit US-9).

¹⁸ *Petition Annex S* at 5 (Exhibit US-9).

¹⁹ *Id.* at 22.

²⁰ *CMA Petition*, at 17. *See also id.* at 24, Response to Q19 (“*Initiation Questionnaire*”) (Exhibit US-8).

²¹ The petition mentions the Rice Company multiple times in connection with a freight adjustment reflecting the cost of transporting rice from the mill to the Mexican border. *See id.* at 23, 24, 44 and Annex H (Exhibit US-10). The preliminary and final determinations refer to the same entity as the “Rice Corporation.” Both names are correct.

²² *Petition Annex H*, at 2. (Exhibit US-10).

²³ Article 2.1 of the AD Agreement states that “a product is to be considered as being dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like

Specifically, the allegation of Export Price was based on unit values drawn from official customs declarations, known as “*pedimentos de importación*,” for a sample of transactions involving four companies that allegedly imported only long-grain white rice during the period of investigation (“POI.”)²⁴ *Pedimentos* are typically prepared by an importer’s customs broker and contain a wealth of information, including the volume and value of the shipment, the terms of sales, the freight expense involved, the name of the importer of record, and the identity of each foreign exporter (and its corresponding address).²⁵

15. While the entirety of each *pedimento* is considered confidential and not available to the public, the CMA was able to obtain an abstract of the information contained in the *pedimentos* from the Mexican Secretariat of the Treasury (which runs Mexico’s Customs Service, with whom the *pedimentos* are filed).²⁶ These abstracts are known as “listings” (“listados”), and they provide import values and 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.

16. For Normal Value, the CMA relied on the USDA’s *Rice Yearbook* for 1999, which set out monthly midpoint historical prices for long-grain white rice in the United States on a multi-

²³ (...continued)

product when destined for consumption in the exporting country.” (Emphasis added.)

²⁴ *Initiation Notice*, at paras. 30, 36-8, and 41 (Exhibits US-1&2); *CMA Petition*, at 21-23 (Exhibit US-8). While both the notice of initiation and the public version of the petition discuss how petitioners determined that the sample companies imported long grain rice, they are silent as to how, if at all, (a) the CMA determined that these four companies do not also import medium- and short-grain white rice, and (b) the investigating authority confirmed the accuracy of this assumption.

Next, the petitioners subtracted a “freight adjustment” from Export Price. They based the adjustment, though, on either quotations or invoices (the evidence is contradictory) to move paddy rice. *Initiation Notice*, para. 31 (“sales invoices”/“facturas de venta”) (Exhibits US-1&2); *CMA Petition*, paras. 24 (“quotations”/“cotizaciones”) and 44 (describing the confidential portion of Petition Annex H as “Quotations”/“Cotizaciones” from The Rice Company) (Exhibit US-8). Paddy rice is not subject merchandise. Moreover, the freight rates were for 50 kg bundles, even though a study contained in the petition stated that paddy rice is normally shipped in bulk using either rail cars or barges. See Petition Exhibit G, at 2 (Exhibit US-11).

²⁵ The official format of the *pedimentos* is published every year as part of the “Miscelánea de Comercio Exterior” (which roughly translates as “Amendments to the Tax Law Applicable to Foreign Trade Activities”). During 1999, the year used by the CMA to frame its dumping allegation, two *Misceláneas* were in force. The 1998 *Miscelánea*, published on March 16, 1998 (which was in force from January 1, 1999 through March 31, 1999), and the 1999 *Miscelánea*, published on March 31, 1999 (which was in force from April 1, 1999 through December 31, 1999). The official format of the *pedimentos* is set forth in Annex 1 to each *Miscelánea*. Annex 22 of each *Miscelánea* provides detailed instructions for filling in the *pedimentos*. The format of the *pedimentos* and the instruction sheet applicable in 1999 are reproduced as Exhibit US-12. Field 19 in each *pedimento* and instruction sheet requests the name of the foreign supplier involved, together with its business address.

²⁶ *Initiation Notice*, paras. 30 and 41 (Exhibits US-1&2).

year basis, including data for the period March - August 1999.²⁷ The USDA prices the CMA provided, however, were for sales of “U.S. grade No. 2” rice, a high grade (and thus comparatively expensive) rice.²⁸ The CMA then compared that high grade rice to all of the rice imports that they had designated as long-grain rice in their calculation of Export Price, regardless of the actual grade.

17. Finally, the petition did not claim that the U.S. exporters sold dumped long-grain milled rice into Mexico during a recent period of time. Instead, it claimed that they dumped subject rice into Mexico during March – August 1999, which was nearly a year before the petition was filed.²⁹ Furthermore, for purposes of the injury investigation, the CMA urged SECOFI to examine only the same six-month period (*i.e.*, March to August) for the years 1997, 1998, and 1999.³⁰

18. Despite the fact that the March to August period is precisely when imports of milled rice are at their highest and domestic production (*i.e.*, milling) is at its lowest, SECOFI accepted the CMA’s petition, including its choice of periods for investigation. It initiated its investigation on December 11, 2000 – more than fifteen months after the most recent period to be covered by the investigation (March - August 1999).

19. Questionnaires were sent to U.S. exporters on December 11, 2000. However, instead of sending questionnaires to all known exporters, SECOFI only sent questionnaires to the two U.S. exporters named in the petition: Producers Rice and Riceland. Without explanation, it did not send a questionnaire to the Rice Company.³¹ Also without explanation or apparent reason, SECOFI neglected to consult the customs declarations (*i.e.*, the “*pedimentos*”), which would have (a) identified every U.S. exporter of long-grain rice to Mexico during the POI, and (b) enabled SECOFI to determine whether the information on Export Price, including freight charges, was accurate and adequate.

20. Subsequent to initiation and prior to the preliminary determination, two exporters to which SECOFI did not send questionnaires came forward to ask for copies: the Rice Company and Farmers Rice Milling Company (“Farmers Rice”). Both companies, together with Producers Rice and Riceland, submitted questionnaire responses to SECOFI on February 22, 2001 and March 6, 2001.³² In addition to the questionnaire responses, Producers Rice, Riceland, Rice

²⁷ *Id.* at paras. 29 and 48; *CMA Petition*, at 26-29 (Exhibit US-8).

²⁸ *Id.*, Petition Annex E at 56-7 and note 59 (Exhibit US-13).

²⁹ *Notice of Initiation*, para. 2 (Exhibits US-1&2); *CMA Petition*, at 2 (Exhibit US-8).

³⁰ *Id.* at 34 and 36.

³¹ As noted above, Rice Company was mentioned multiple times in the petition.

³² *Resolución preliminar de la investigación antidumping sobre las importaciones de arroz blanco grano largo, mercancía clasificada en la fracción arancelaria 1006.30.01 de la Tarifa de la Ley del Impuesto General de*
(continued...)

Company, Farmers Rice, and the USA Rice Federation (a trade association based in the United States) made a submission commenting upon (and contesting various aspects of) the petition and notice of initiation. For example, they argued that the POI was flawed, both in terms of its remoteness in time and because entire periods were excluded (*i.e.*, September to February) when domestic production of milled rice tended to be at its peak.³³

21. The Secretariat of the Economy (“Economía,” SECOFI’s successor agency) published its preliminary determination on July 18, 2001. In it, Economía determined that Riceland, Rice Company, and Farmers Rice were not dumping.³⁴ As to the fourth exporter, Producers Rice, Economía preliminarily determined that it made no sales of subject rice to Mexico during the POI.³⁵ In short, no one was found to be dumping.

22. Economía’s preliminary determination also found that there was no evidence of injury to the domestic industry,³⁶ and that, to the extent there was any, the financial difficulties of the domestic industry were structural in nature and resulted from endemically low profit margins coupled with high levels of short-term debt.³⁷ These problems caused the industry to close certain mills prior to the POI.³⁸ The authority also determined that imports of long-grain milled rice from Argentina had a significant negative impact upon the domestic industry. Specifically, Economía found:

- imports from Argentina grew from zero to 33 percent of total imports during the last year of the injury POI;
- imports from Argentina were priced 19.1 percent below the weighted price of total imports;

³² (...continued)

Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia, Diario Oficial de la Federación, 18 de julio de 2001, paras. 36-7 and 39-40 (Exhibit US-14); *Preliminary Resolution of the Anti-dumping Investigation Regarding the Importation of White Rice Long Grain, the Merchandise Classified Under Tariff Section 10006.30.01 of the General Import Tax Law, Originating from the United States of America, Regardless of the Country From Which They Were Imported*, Diario Oficial de la Federación, July 18, 2001, at paras. 36-7 and 39-40 (“*Preliminary Determination*”). (Exhibit US-15.)

³³ *Id.* at para. 66.

³⁴ *Id.* at paras. 103 (Riceland), 124 (Rice Company), and 143 (Farmers Rice).

³⁵ In its February 22, 2001 questionnaire response, Producers Rice reported that it had no sales of long-grain white rice to Mexico during the POI. There is no evidence in the record that the investigating authority ever contested (or rejected) this representation.

³⁶ *Id.* at para. 411. Economía found no deterioration of sales volumes or sales revenues for most of the domestic industry; insufficient evidence that the domestic industry had suffered an accumulation of inventory; and no drop in employment. *See, e.g.*, paras. 410(m), 410(ñ), 410(q).

³⁷ *Id.* at para. 410(s).

³⁸ *Id.* at para. 410(o).

- imports from the United States were priced higher than imports from Argentina; and
- imports from Argentina, and not the United States, were taking market share from the domestic industry.³⁹

23. Notwithstanding these findings, Economía did not terminate the investigation. On the contrary, the investigation was continued in part because Economía “deemed” 41 percent of the subject imports during the POI to have been dumped.⁴⁰ Economía reached this conclusion because it treated Producers Rice, which had reported that it had no exports to Mexico during the POI, as an uncooperative party and assigned it a rate “less favorable to the party than if the party did cooperate.” This “adverse facts available” rate was the 10.18 percent margin alleged in the petition.⁴¹ Then Economía assigned the same rate to all other exporters that it had chosen not to investigate. As explained earlier, Economía could have used the *pedimentos* to identify all the exporters who were not named in the petition and, on the basis of that information, it would have been able to request information from those exporters by way of sending them an individual questionnaire. Economía’s efforts to investigate as few of the exporters as possible led it to conclude that 41 percent of all imports were being “dumped.”⁴²

24. In paragraph 416 of the preliminary determination, Economía announced that there were various “aspects” of the investigation that it wanted to “delve” into further for purposes of the final determination. Nearly one year later, on June 5, 2002, Economía published its final determination.

25. Based on a POI that was by then nearly three years old, Economía determined that all but two exporters (Farmers Rice and Riceland) were dumping. It also determined, based on an analysis of injury data that was then three to five years old, that imports from the United States were causing injury to the domestic industry.

26. In Section V of this submission, the United States will examine the final determination in greater detail. In this section, we offer a summary to highlight certain facts.

³⁹ *Id.* at paras. 216, 243, 410(j), and 410(n).

⁴⁰ *Id.* at para. 410(h).

⁴¹ *Id.* at paras. 72, 144, and 410(h). Economía did not apply provisional measures against any imports, including those from Producers Rice, presumably because Article 7 of the AD Agreement requires a finding of injury due to imports, which was lacking.

⁴² *Id.* At no time prior to the preliminary determination did Economía inform an exporter that its questionnaire response was missing necessary information or that the exporter was significantly impeding the investigation.

27. First, Economía's findings with respect to a number of factors were skewed at the outset by Economía's decision to limit its analysis to only the March to August period of each of the years under examination, and by and its failure to examine any data between August 1999 and the initiation of the investigation in December 2000.

28. Second, Economía failed to examine all of the 14 injury factors that an investigating authority must examine under Article 3.4 of the AD Agreement. In particular, despite evidence of factors such as quality and consumer preferences that affect purchasing decisions, Economía gave no consideration to factors affecting domestic prices.

29. Third, Economía found that several of the factors showed improvements in the condition of the industry during the period of injury analysis. For example, it found that production had increased 6.5 percent in 1999,⁴³ shipments had increased 4.8 percent in 1998 and 0.1 percent in 1999,⁴⁴ employment increased 2.7 percent in 1998 and 7.7 percent in 1999,⁴⁵ wages went up 16.2 percent in 1999,⁴⁶ and cash flow grew by 157 percent in 1998 and 189 percent in 1999.⁴⁷ Also, Economía analyzed the industry's capacity to raise capital as the inverse of indebtedness, since the higher the level of indebtedness, the lower the capacity to raise capital. It found that the ratio of total liabilities to total assets dropped from 71 percent in 1998 to 69 percent in 1999.⁴⁸

30. Fourth, with respect to other factors, Economía reached conclusions that were inconsistent with its findings. For example:

- Inventories: According to the final determination, inventories dropped by 73.5 percent in 1998 and increased by only 7.3 percent in 1999.⁴⁹ Nevertheless, Economía concluded that there was inventory accumulation during the period of injury analysis.⁵⁰
- Market share: The market share of the domestic producers was essentially stable during the period of injury analysis – that is, 87.1 percent in 1997, 88.5 percent in 1998, and 88.1 percent in 1999.⁵¹ Nevertheless, Economía concluded that

⁴³ *Final Determination*, para. 303 (Exhibits US-6&7).

⁴⁴ *Id.* at para. 307.

⁴⁵ *Id.* at para. 333.

⁴⁶ *Id.* at paras. 335, 390 and 392.

⁴⁷ *Id.*, at para. 349.

⁴⁸ *Id.* at para. 354. No data was ever reported for 1997.

⁴⁹ *Id.* at para. 318.

⁵⁰ *Id.*

⁵¹ *Id.* at para. 314.

domestic producers lost market share.⁵²

31. Fifth, there is no evidence in the record that the investigating authority examined any exporters other than the four mentioned earlier in this submission. There is also no evidence in the record that any of the four exporters refused access to or failed to provide information sought by Mexico, or otherwise significantly impeded the investigation. Despite this fact, Economía treated Producers Rice and every other exporter and producer in the United States, with the exception of the three remaining exporters that it investigated (*i.e.*, Rice Company, Farmers Rice, and Riceland), as “uncooperative” respondents and assigned them an adverse facts available rate of 10.18 percent taken from the petition.⁵³ In doing so, Economía made no attempt to corroborate the information in the petition that formed the basis of the 10.18 percent rate.

32. Lastly, although Economía determined that Farmers Rice and Riceland were not dumping, it did not exclude them from the final antidumping measure. Rather, it included them in the measure, and simply set their duty rates at zero percent.⁵⁴ As a consequence of this action, each firm remains subject to future reviews under Article 9 of the AD Agreement and possible imposition of antidumping duties.⁵⁵

IV. SUMMARY OF LEGAL ARGUMENT

33. Mexico breached various provisions of the AD Agreement and GATT 1994 when it imposed antidumping duties on imports of long-grain white rice from the United States. In

⁵² *Id.* at para. 315. As explained earlier, the majority of Mexican milled rice is produced in October - December, following the harvest of the S/S paddy rice crop, and the remainder is produced in May - July, following the harvest of the F/W paddy rice crop. This means that, by adopting the six-month POI proposed by the CMA (March - August), Economía calculated the market share of the domestic industry at a point in time during the year when local production of milled rice was at a seasonal low while imports were at a seasonal high. This made the market share of the domestic producers appear much lower than it would have been if it had been calculated over the whole year, taking into consideration as well the period (September - February) with low imports and abundant domestic production.

⁵³ *Id.* at para. 400(C).

⁵⁴ *Id.* at para. 400(A).

⁵⁵ As explained more fully in Section V.F, below, the possibility of review and application of antidumping duties results from Article 68 of Mexico’s Foreign Trade Act. That provision provides, *inter alia*, for the review of imports from exporters “for whom no positive margin of price discrimination or subsidization was determined in the investigation.” The English translations of the Foreign Trade Act provisions addressed in this submission were drawn from the English version of Mexico’s WTO notification. *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) (“Mexico’s 2003 WTO Notification”). The original Spanish-language texts of the provisions are contained in the Spanish-language version of the same document. *See Notificación de Leyes y Reglamentos de Conformidad con el Párrafo 5 del Artículo 18 y el Párrafo 6 del Artículo 32 de los Acuerdos Correspondientes*, Mexico, G/ADP/N/1/MEX/1/Suppl.2 and G/SCM/N/1/Mex/1/Suppl. 1 (24 de abril de 2003). The language quoted in this footnote can be found at page 9 of *Mexico’s 2003 WTO Notification*.

addition, various provisions of Mexico's Foreign Trade Act and its Federal Code of Civil Procedure ("FCCP) are inconsistent "as such" with WTO rules.

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

34. Mexico selected a period for its rice investigation that ended more than fifteen months prior to the date of initiation of the investigation. By the time Economía issued its final determination, this gap had stretched to nearly three years. These periods were so remote in time that the information collected by the investigating authority was incapable of providing a basis for an objective finding of dumping, injury, and causation (as those terms are defined and used in the AD Agreement) or a determination based on positive evidence. As a result, Mexico breached Article VI:2 of GATT 1994 and Articles 1, 3.1, 3.2, 3.4, and 3.5 of the AD Agreement.

35. Mexico also breached various provisions of the AD Agreement and GATT 1994 by limiting its inquiry to only those months when imports were at their highest and domestic production of milled rice was at its lowest. By conducting its analysis in this manner, the investigating authority not only undermined the objectivity of its analysis, but it also ensured that its determinations were not based on "positive evidence" for the simple reason that it failed even to *examine* the evidence pertaining to half of the period under review. These actions contravened Article VI:2 of GATT 1994 and Articles 1, 3.1, 3.5, and 6.2 of the AD Agreement.

36. In addition, Economía breached WTO rules by failing to collect adequate data for the periods that it did examine. Then it failed to objectively consider the data, using it selectively and drawing conclusions contrary to the evidence. It also failed to explain sufficiently the findings and conclusions it reached on all issues of law. These actions breached Articles 3.1, 3.2, 3.4, 3.5, 6.8, 12.2, and Annex II of the AD Agreement.

37. In addition, Mexico breached Article 5.8 of the AD Agreement by applying the antidumping measure to Farmers Rice and Riceland. Mexico examined both firms and concluded that they were not dumping. Having reached that conclusion, Mexico could not apply the antidumping measure to them or subject them to the prospect of future reviews.

38. Furthermore, Mexico was required by its WTO obligations, especially Articles 6.10 and 9.4 of the AD Agreement, to apply a neutral "all others" rate for Producers Rice that was not based on adverse facts available. Producers Rice cooperated fully with Mexico's investigation. There is, in particular, no evidence that it denied investigators access to its files, withheld information from investigators, or "significantly" impeded the investigation. Lacking this predicate, Mexico could not, consistent with Articles 1, 6.2, 6.4, 6.8, 9.3, 9.4, and 9.5 of the AD Agreement, paragraphs 3, 5, 6, and 7 of Annex II of the AD Agreement, and Article VI:2 of GATT 1994, apply an adverse, facts available dumping margin to Producers Rice.

39. In addition, for the exporters and producers it did not investigate, Mexico could not,

consistent with Articles 1, 6.1, 6.2, 6.6, 6.8, 6.10, 9.3, 9.4, and 9.5 of the AD Agreement, paragraphs 1 and 7 of Annex II, and Article VI:2 of GATT 1994, apply an adverse facts available-based rate taken from the petition. In *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, the Appellate Body found that the calculation method set forth in Article 9.4 for determining the ceiling for the “all others” rate precludes the use of any margins which are calculated, even in part, using facts available.⁵⁶ The rate applied by Mexico to U.S. rice exporters is not based in part on facts available, as was the case in *United States – Hot-Rolled Steel*. It is based entirely on facts available. Not only that, but the 10.18 percent rate is adverse facts available – a clear breach of Mexico’s WTO obligations.

40. Furthermore, Mexico breached Article 6.8 and paragraph 7 of Annex II of the AD Agreement by using the petition margin without corroborating the underlying information that the petitioner used to calculate the margin.

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

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

43. In sum, Mexico’s imposition of an antidumping measure on long-grain milled rice lacked a legal basis. SECOFI, and later Economía, used an unacceptably old and results-driven period of investigation and review for dumping and injury. Within the injury period of analysis, the investigating authority selectively considered the evidence – giving little consideration to evidence that was not consistent with an affirmative finding of injury, drawing conclusions that were not supported by the record evidence, and failing to draw conclusions contrary to an affirmative finding of injury.

⁵⁶ Report of the Appellate Body, *United States – Hot-Rolled Steel from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 122 (“*United States – Hot-Rolled Steel AB*”).

44. Finally, without any justification, the investigating authority applied adverse antidumping duties (a) to an exporter that demonstrated that it had not shipped subject rice during the POI, and (b) to other exporters and producers that were not named in the investigation and that were never sent a questionnaire.

B. Mexico's Foreign Trade Act and its FCCP

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

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

47. Second, Article 64 of the Foreign Trade Act codifies the "facts available" approach that Mexico applied in the rice investigation to Producers Rice and unexamined exporters and producers. This provision breaches the AD and SCM Agreements for many of the same reasons that Mexico's approach in the rice investigation breached WTO rules.

48. Third, Article 68 of the Foreign Trade Act requires reviews of respondent exporters that were not assigned a positive margin in an investigation, and requires respondent exporters seeking reviews to demonstrate that their volume of exports during the period of review was "representative." This provision breaches Articles 5.8, 9.3, and 11.2 of the AD Agreement, and Articles 11.9 and 21.2 of the SCM Agreement.

49. Fourth, Article 89D of the Foreign Trade Act requires new shippers requesting expedited reviews to demonstrate that the volume of their exports during the period of review was "representative." This provision breaches Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement by impermissibly restricting the ability of firms to obtain such reviews.

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

51. Finally, Article 366 of Mexico's FCCP and Articles 68 and 97 of Mexico's Foreign Trade Act preclude Mexican authorities from conducting reviews of antidumping and countervailing duties while a judicial review of the underlying antidumping or countervailing duty measure is

ongoing. By requiring the Mexican authorities to reject requests for such reviews, Article 366 and Articles 68 and 97 breach Articles 9.3, 9.5, and 11.2 of the AD Agreement, and Articles 19.3 and 21.2 of the SCM Agreement.

V. LEGAL ARGUMENT

52. The United States will begin this section of its submission by addressing the ways in which Economía's choice of a POI for purposes of its dumping and injury analyses resulted in numerous breaches of the AD Agreement. The United States will then discuss breaches arising from the manner in which Economía conducted its injury analysis, followed by breaches arising from Economía's failure to exclude from the antidumping measure two firms that it examined and found not to be dumping.

53. The United States will then turn to Economía's conduct of its dumping analysis, and in particular the improper way in which Economía limited its investigation to just a few exporters of long-grain white rice and applied adverse, facts available-based margins to every other producer and exporter in the United States (including Producers Rice, which participated fully in the investigation and demonstrated that it had no shipments to Mexico during the period of investigation).

54. Finally, the United States will explain why several provisions of Mexico's Foreign Trade Act and its FCCP are inconsistent with WTO rules.

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

55. The purpose of an antidumping measure is not to punish exporters for past dumping practices. Rather, it is to "offset or prevent" dumping that is presently causing or threatening to cause material injury to a domestic industry in the importing country.⁵⁷

56. A Member is not offsetting or preventing injurious dumping if the dumping or injury has completely ceased or never existed.⁵⁸ Thus, in order to impose an antidumping measure, the investigating authority must examine, as part of its initial investigation pursuant to Article 5 of

⁵⁷ GATT Art. VI:2.

⁵⁸ However, as the panel found in *United States - Anti-dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea*, once an investigating authority has found dumping and injury in an initial investigation, a measure may be maintained (subject to the review provisions in Article 11 of the AD Agreement) despite the temporary absence of dumping. Report of the Panel, WT/DS99/R, adopted 19 March 1999, paras. 6.24-6.34 ("*United States - DRAMs from Korea*").

the AD Agreement, a period of time that is as close to the date of initiation as practicable.⁵⁹

57. Article 5.1 of the AD Agreement states that the purpose of a dumping investigation is to determine the “existence, degree and effect of any alleged dumping.” The ordinary meaning of the term “existence” is “[c]ontinued being: continuance in being.”⁶⁰ Hence, the purpose of a dumping investigation is not to test whether foreign exporters may have dumped at some point in the past, but whether dumping is occurring at the present time. As such, to make this determination, the period subject to investigation must cover a period of time as close to the date of initiation as practicable. Numerous provisions in Article VI and the AD Agreement support this interpretation, including, but not limited to:

- Article VI of GATT 1994, which defines dumping and injury in the present tense (e.g., dumping “is” causing or threatening to cause injury).
- Article 2 of the AD Agreement, which defines “dumping” in the present tense (e.g., “being” dumped and Export Price “is” lower than Normal Value).
- The whole point of the examination pursuant to Article 3.4 of the AD Agreement is to examine the present “state” of the domestic industry;⁶¹ not its condition during some remote time period.
- Similarly, Article 3.5 establishes a test for causation that seeks to determine whether the dumped imports “are” causing or threatening to cause injury.
- The “clearly foreseen” and “imminent” standards in Article 3.7 suggest a period of investigation that is as recent as practicable.
- The term “domestic industry” is defined in Article 4 and used in many provisions of the AD Agreement, most notably Articles 3.4 and 5.4. In Article 5.4, the term clearly refers to those producers in existence at the time the petition is filed. Absent some contrary indication in the agreement, it follows that the “domestic

⁵⁹ In a May 6, 2000 recommendation, the WTO Committee on Anti-Dumping Practices (“ADP Committee”) stated that the POI for dumping investigations should end as “close to the date of initiation as is practicable.” *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations*, G/ADP/6, 16 May 2000. While recommendations by the ADP Committee are not legally binding, they reflect that the Members have acknowledged the importance of relying on recent data. See also Panel Report on *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, para. 7.287 (“*Argentina – Poultry*”) (noting the Committee’s recommendation).

⁶⁰ *The Compact Edition of the Oxford English Dictionary* 3025 (Oxford Univ. Press 1971), at 926 (“Oxford Dictionary”).

⁶¹ The ordinary meaning of the term “state” is “[a] combination of circumstances or attributes belonging for the time being to a person or thing.” *Id.* at 3025 (emphasis added).

industry” examined in Article 3.4 is the same set of producers – not a different set of producers who may have produced the like product in the past.

- Article 5.8 of the AD Agreement describes the negligibility standard for both injury and the volume of imports in the present tense (*i.e.*, "is negligible").

58. Finally, in *United States - DRAMs from Korea*, the panel stated that “[u]nder the AD Agreement, a Member is entitled to impose antidumping duties with prospective effect on the basis of an examination of past dumping during a recent period of investigation”⁶² In the context of that case, this language is probably best viewed as dicta. Nonetheless, it is entirely accurate and instructive for present purposes.

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

60. There is no excuse for this disregard of Mexico’s WTO obligations. While investigating authorities have discretion to select the POI most suited to the product and producers under investigation, that discretion is not boundless. The period investigated cannot be so remote in time that the information collected by the investigating authority is incapable of providing a basis for an objective finding of dumping, injury, and causation (as those terms are defined in the AD Agreement).

61. In the present case, Economía failed to satisfy the legal requirements for imposing an antidumping measure on imports of long-grain white rice. 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

⁶² *United States - DRAMs from Korea*, para. 6.33 (emphasis added).

domestic industry was not objective or based on positive evidence as required by Articles 3.1 and 3.5 of the AD Agreement.

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

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

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

64. 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.

1. Economía's Injury Analysis Breached Article 3.1 of the AD Agreement

65. Article 3.1 of the AD Agreement reads as follows:

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

The Appellate Body has described Article 3.1 as “an overarching provision that sets forth a Member’s fundamental, substantive obligation” with respect to injury determinations.⁶³ In the Appellate Body’s view, “[t]he thrust of the investigating authorities’ obligation, in Article 3.1, lies in the requirement that they base their determination on ‘positive evidence’ and conduct an

⁶³ 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. 106 (“*Thai Steel AB*”).

‘objective examination’.’⁶⁴ For the following reasons, Economía’s investigation of injury was not based on “positive evidence,” and Economía did not conduct the “objective examination” that Article 3.1 requires.

a. Economía’s Injury Investigation Was Not Based on “Positive Evidence”

66. As the Appellate Body stated in *United States - Hot-Rolled Steel*, the term “positive evidence” relates to “the quality of the evidence that authorities may rely upon in making a determination. . . . [T]he evidence must be of an affirmative, objective and verifiable character, and . . . it must be credible.”⁶⁵ Economía’s investigation of injury was not based on “positive evidence” for the simple reason that it failed even to examine the evidence pertaining to half of the period of injury analysis.

67. To be more specific, the petitioners in the rice investigation asked Economía to examine only the March to August time period, because this period allegedly reflected the main import activity of the product under investigation.⁶⁶ Economía agreed that imports were concentrated during that period,⁶⁷ and consequently limited its injury analysis to the data for March - August of each of the years at issue in its investigation (1997, 1998, 1999). This narrowed focus is evident throughout the preliminary and final determinations.⁶⁸

68. As a result of this decision, however, Economía ignored the evidence pertaining to September - February of 1997/98, 1998/99, and 1999/2000. This omission irretrievably skewed the injury analysis.

69. As the United States has previously explained, there are two seasons in Mexico for growing paddy rice: spring/summer (“S/S”), and fall/winter (“F/W”). Paddy rice from the S/S

⁶⁴ *United States - Hot-Rolled Steel AB*, para. 192.

⁶⁵ *Id.*

⁶⁶ *See, e.g., Preliminary Determination*, para. 64 (Exhibits US-14&15).

⁶⁷ *See id.* at para. 65.

⁶⁸ *See, e.g., id.* at paras. 215-217, 227-229 (with respect to the volume of the allegedly dumped imports), 258-266 (with respect to the alleged effect of the imports on prices), 277-283 (with respect to the alleged effect of the imports on domestic production), 297-299 (with respect to the market share of the imported product), and 300-314 (with respect to sales); *Final Determination*, paras. 211-212, 213, 217-218 (with respect to the volume of the allegedly dumped imports), 263, 267, 279 (with respect to the alleged effect of the imports on prices), 307-308, 318-319, and 325-326 (with respect to the alleged effect of the imports on domestic production) (Exhibits US-6&7).

season is planted in May-July⁶⁹ and harvested in October-December.⁷⁰ Paddy rice from the F/W season is planted in January-February and harvested in June-July.⁷¹ In both cases, the paddy rice is shipped to the millers immediately after harvest (because the rice must be dried to prevent spoilage and Mexican growers lack sufficient drying and storage facilities) for milling.⁷²

70. In any given year, however, the crop from the S/S season is much larger than the crop from the F/W season.⁷³ Thus, most of the milled rice produced in Mexico is obtained from the S/S crop (which is harvested in October-December). This means that Economía's analysis, which was limited to the March-August time period, failed to take into account the production from the S/S harvest, which accounted for most of Mexico's annual production. Or, stated differently, Economía's analysis disregarded the portion of the year when domestic production of milled rice was at its seasonal high, and import penetration at its seasonal low.

71. Economía's findings with respect to at least two economic factors - the market share of the subject imports and capacity utilization - serve to illustrate the distortions that resulted from its approach. First, Economía found that the share of U.S. rice subject to the investigation as a percentage of Mexican apparent domestic consumption was 6.6 percent in March-August 1997, 7.1 percent in March-August 1998, and 6.5 percent in March-August 1999.⁷⁴ Given that Economía calculated the market share of the subject imports at the point in time during the year when imports were at their highest, its findings cannot be viewed as being based on "positive evidence." If Mexico had calculated the market share on the basis of data for the entire year (taking into consideration both the seasonal peaks and the seasonal lows in domestic production and import flows), the outcome would almost certainly have been quite different. Economía itself openly admitted when it selected the POI that imports were "concentrated" in the March - August period.⁷⁵

72. Second, Economía found that capacity utilization was 45.3 percent in March-August 1997, 45.5 percent in March-August 1998, and 50 percent in March-August 1999.⁷⁶ Again, since Economía calculated capacity utilization at the point in time within the year where domestic production of milled rice was at an annual low, one can only conclude that capacity utilization would have been significantly higher if Economía had calculated it on the basis of data for the

⁶⁹ *El Arroz*, at 22 (Exhibit US-4).

⁷⁰ *Id.* The *TAMRC Report* states that the millers receive the paddy rice from the S/S crop in November through January. *TAMRC Report*, at 3 (Exhibit US-3).

⁷¹ *El Arroz*, at 22 (Exhibit US-4).

⁷² *TAMRC Report*, at 5 (Exhibit US-3).

⁷³ *Id.* at 3. According to information contained in the petition, the S/S season accounts for nearly 90 percent of the total paddy rice harvest in any one year. See note 3 and accompanying text.

⁷⁴ *Final Determination*, para. 247 (Exhibits US-6&7).

⁷⁵ *Preliminary Determination*, para. 65 (Exhibits US-14&15).

⁷⁶ *Final Determination*, para. 325 (Exhibits US-6&7).

entire year, which would have reflected peak levels of domestic production of milled rice during the October-December period.

73. In fact, evidence on the record of the investigation supports the conclusion that Economía's approach distorted the capacity utilization figures. In paragraphs 328 and 331 of the final determination, Economía references the annual capacity utilization rates reported by three major mills (accounting for one third of domestic production of milled rice).⁷⁷ The average of the rates for the three mills was 71 percent in 1997, 71 percent in 1998, and 85.3 in 1999.⁷⁸ These facts suggest that if Economía had calculated capacity utilization rates for the entire Mexican industry without excluding data for half of the year (the half of the year where domestic production was at its highest), it would not have concluded that capacity utilization, while growing, had "remained at very low levels."⁷⁹

74. In sum, since Economía's analysis of the injury factors ignored the September-February time period, its determination was not, in the words of the Appellate Body, based on "affirmative, objective, verifiable, and credible" evidence pertaining to the real situation in the Mexican rice market during the *entire* period under review.

b. Economía Failed to Conduct an "Objective" Examination

75. Economía's decision to focus its investigation on only March to August of each year also prevented its examination from being objective. In *United States – Hot-Rolled Steel*, the Appellate Body stated that:

the term "objective examination" is concerned with the investigative process itself. The word "examination" relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word "objective", which qualifies the word "examination", indicates essentially that the "examination" process must conform to the dictates of those basic principles of good faith and fundamental fairness. In short, 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

⁷⁷ *Id.* at paras. 328 and 331.

⁷⁸ *Id.* at para. 331.

⁷⁹ *Id.* at para. 325.

thereof, of the investigative process.⁸⁰

76. In addition, “investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured.”⁸¹

77. But Economía did just that. It allowed the petitioners to choose which months of the year they would examine (notwithstanding the protests from the exporters), and it ignored the evidence for the remainder of the year. By taking this approach, Economía made it “more likely that, as a result of the fact-finding or evaluation process, they [would] determine that the domestic industry [was] injured.”

78. As the United States has previously noted, part of Economía’s injury analysis focused on usage of domestic installed capacity. Economía observed that capacity usage was 45.3 percent in March-August 1997, 45.5 percent in March-August 1998, and 50 percent in March-August 1999. Based on this information, it concluded that capacity usage was relatively low.⁸² This conclusion was a primary factor underlying the authority’s affirmative determination of injury.⁸³ However, Economía’s calculation of capacity usage over March-August reflected the level of domestic production of milled rice during June-July, which is the period within the year when import competition is at its highest. Hence, by limiting the analysis to March-August, Economía’s approach understated actual domestic capacity usage for the year as a whole, and thus made the industry appear less healthy than it actually was.

79. Similarly, Economía examined the performance of the domestic industry in terms of sales revenue during the March-August time periods. It found that the sales revenue of the domestic industry rose 3.7 percent in March-August 1998 (in comparison with March-August 1997), but fell 6.7 percent in March-August 1999 (in comparison with March-August 1998).⁸⁴ Economía concluded that this alleged contraction in sales revenue, coupled with increasing operating expenses, drove the domestic industry to post losses during 1999.⁸⁵ This alleged fall in 1999 sales revenue was another key factor underlying Economía’s affirmative finding of injury.⁸⁶

80. By focusing on data for the March-August time frame, however, Economía undermined the objectivity of its investigation. If Economía had included the September-February time

⁸⁰ *United States - Hot-Rolled Steel AB*, para. 193 (footnotes omitted).

⁸¹ *Id.* at para. 196.

⁸² *Final Determination*, para. 325 (Exhibits US-6&7).

⁸³ *Id.* at para. 391.

⁸⁴ *Id.* at para. 309.

⁸⁵ *Id.* at para. 343.

⁸⁶ *Id.* at para. 396.

period in its analysis, it would have been in a position to consider the industry's sales revenue data for the entire year. An objective examination would have taken into consideration that sales revenue would likely have been higher outside of the March - August time period, because the September - February period was the time of the year in which import volumes were low and domestic sales volumes at their seasonal high (given that most domestic production of milled rice enters the market in October-December). But Economía ignored the data for September-February, and thus was not able to consider whether any recovery of sales revenue from October through December offset (or overcompensated) any decline in sales revenue relating to the June-July production and reflected in the March-August data.⁸⁷

81. In *United States - Hot-Rolled Steel*, the Appellate Body 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, without drawing attention to the positive data in other parts of the industry.⁸⁸

⁸⁷ The following example may serve to illustrate the bias inherent in Economía's approach. Imagine that climactic factors result in a reduced harvest of paddy rice in June - July 1999 when compared with June - July 1998. As a result of this reduced harvest, production, sales volumes, and sales revenue of milled rice are smaller in June - July 1999 than in June - July 1998, and sales revenues for March - August 1999 show a decrease in comparison with March - August 1998.

Conversely, imagine also that climactic factors result in an increased harvest of paddy rice in October - December 1999 when compared with October - December 1998. As a result of this increased harvest, production, sales volumes, and sales revenue of milled rice are larger in October - December 1999 than in October - December 1998, and sales revenues for September 1999 - February 2000 show an increase in comparison with September 1998 - February 1999. Moreover, since the vast majority of milled rice is produced in Mexico in October - December, the increased revenues for September 1999 - February 2000 more than offset the reduction in revenues in March - August 1999. Nevertheless, since Economía's approach ignores the data for the September - February time period, Economía would conclude that sales revenues - and thus the health of the domestic rice industry - fell from 1998 to 1999.

In sum, the evidence pertaining to the September - February time frame (including sales revenue data relating to milled rice produced in October - December) was highly relevant, and the focus on just six months of each year precluded an objective analysis.

⁸⁸ *United States - Hot-Rolled Steel AB*, para. 204.

82. 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*.”⁸⁹

83. 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 those parts of the year when imports levels are high may overlook positive developments in other parts of the year, and thus give a misleading impression of the data relating to the condition of the industry as a whole. Yet this is exactly what Economía did. For these reasons, Economía breached Article 3.1 of the AD Agreement.

2. Economía’s Injury Analysis Breached Articles 3.5 and 6.2 of the AD Agreement

84. In addition, Economía’s decision to examine only the injury data for the March to August time period resulted in breaches of Articles 3.5 and 6.2 of the AD Agreement. Article 3.5 reads in pertinent part as follows:

It must be demonstrated that the dumped imports are, through the effects of dumping . . . causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities.⁹⁰

85. As shown above, the preliminary and final determinations in the rice investigation make abundantly clear that Economía did not examine “all relevant evidence” before it. Rather, it focused its analysis on the March - August time period that the petitioners preferred and ignored the evidence for the remainder of the year.

86. Article 17.6(i) of the AD Agreement states that in the assessment of the facts of a matter, “the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective.” Economía’s failure to evaluate all of the relevant facts on the record before it was neither unbiased, nor objective. Accordingly, the panel should find that Economía breached Article 3.5 of the AD Agreement.

87. Economía also breached Article 6.2 of the AD Agreement. Article 6.2 requires investigating authorities to give all interested parties a “full opportunity for the defence of their

⁸⁹ *Id.* at para. 206.

⁹⁰ AD Agreement, Article 3.5 (emphasis added).

interests.” The exporters and importers that participated in the investigation had argued to Economía that the POI was flawed, both in terms of its remoteness in time and because of the exclusion of the September – February time periods.⁹¹ Economía’s dismissal of their concerns prevented the firms from pointing to evidence in the missing months that might have supported their views, and thus breached Article 6.2.

88. Finally, by failing to conduct its examination “in accordance with” Articles 3.1 and 3.5 of the AD Agreement, Economía also breached Article 1 of the AD Agreement.

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

1. Economía Breached Articles 3.1, 3.2, and 6.8 and Annex II of the AD Agreement by Failing to Collect the Evidence on Price Effects and Volumes That it Needed to Conduct its Injury Analysis in an Objective Manner

89. Article 3.1 of the AD Agreement states that injury determinations must be based on “positive evidence” and must involve an “objective examination” of the volume of the dumped imports and their effect on prices in the domestic market for like products, and the consequent impact of the imports on domestic producers of such products.⁹² By failing to actively seek out information pertinent to these matters, Economía did not make it possible to conduct an objective examination of the injury factors, and consequently did not base its determination on positive evidence. Economía then compounded its error by basing its determination on the facts available, contrary to Article 6.8 and Annex II.

a. Economía Failed to Conduct an Objective Examination of Price Effects

⁹¹ See, e.g., *Preliminary Determination*, para. 66 (Exhibits US-14&15).

⁹² The Appellate Body has described Article 3.1 as an “overarching provision” that informs the more detailed obligations in the succeeding paragraphs of Article 3:

Article 3 as a whole deals with obligations of Members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a Member’s fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs. These obligations concern the determination of the volume of dumped imports, and their effect on prices (Article 3.2) The focus of Article 3 is thus on *substantive* obligations that a Member must fulfill in making an injury determination.

Report of the Appellate Body, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 by India*, WT/DS141/AB/RW, adopted April 24, 2003, para. 110 (“*EC Bed Linen 21.5 AB*”), quoting *Thai Steel AB*, para. 106 (italics added in *Thai Steel*; underlining added in *Bed Linen*).

90. An investigating authority that is analyzing price effects under Article 3.2 of the AD Agreement must consider whether there “has been significant undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases which otherwise would have occurred to a significant degree.”⁹³ This analysis entails a comparison of data or other information concerning prices for the dumped imports, on the one hand, and data or other information concerning prices for the domestic product, on the other hand. Although the Agreement does not require any particular methodology for making price comparisons and evaluating price effects,⁹⁴ the analysis must be objective and based on positive evidence.

91. But Economía failed even to attempt to collect information it needed to conduct a proper analysis. Instead, it chose to rely on the biased information sources that the petitioner had selected. Economía made no effort to identify exporters and importers other than the handful of those mentioned in the petition, and it only sent questionnaires to that limited group of exporters and importers. It did not send questionnaires to any purchasers.

92. Any number of sources would have provided Economía with direct and more accurate information than that on which it relied. If Economía had requested data from a broad range of importers of the products, it would have had accurate unit value data on the dumped imports. Had it requested sales information on the prices at which the importers made sales to their customers, it would have had accurate prices to compare with the domestic producers’ prices. Or had it sought information from purchasers, it would have been able to directly compare the prices they paid for the domestic product and the prices they paid for the dumped imported product.

93. Moreover, Economía failed to objectively examine the customs declarations (the “*pedimentos*”) for long-grain white rice that entered Mexico during the periods examined for the injury analysis.⁹⁵ If it had done so, it would have obtained specific information on the volume and value of each shipment, the terms of sale, the identity of each foreign exporter, and the identity of each importer of record. Thus, it would have had full import volume and value data on imports of the long-grain white rice that were found to be dumped. It could have then used that data in its investigation.

⁹³ The Appellate Body has described these obligations as “absolute. They provide for no exceptions, and they include no qualifications. They must be met by every investigating authority in every injury determination.” *EC Bed Linen 21.5 AB*, para. 109.

⁹⁴ *EC Bed Linen 21.5 AB*, para.113; Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted August 18, 2003, para. 7.284.

⁹⁵ See Section III.B, *supra*. Economía sought to obtain a sample of *pedimentos* from customs brokers. After many of the brokers failed to provide the documents, Economía abandoned the effort and did not use the ones it had collected. *Final Determination*, paras. 233-238.

94. But Economía did not do this. Instead, it compared the actual sales values reported by the domestic producers to fictitious unit values for the dumped imports that it derived using a convoluted methodology proposed by the petitioner. By conducting its analysis in this manner, Economía failed to conduct the objective examination of price effects that Article 3.1 of the AD Agreement requires.

b. Economía Failed to Conduct an Objective Evaluation of Volume

95. Economía also failed to conduct an objective evaluation of volume. Article 3.2 of the AD Agreement requires investigating authorities to “consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member.” Although Economía considered both absolute volumes and volumes relative to both production and consumption, it failed to collect the data it needed to do so in an objective manner.⁹⁶

96. Economía requested information from the domestic producers about production and sales volumes that it could use for the relevant comparisons, but it did not use the *pedimentos* or seek to obtain accurate import volume information from importers. If it had done so, Economía would have been in a position to make a more accurate estimate of consumption and would have had better data for the market share held by the dumped imports.

97. Furthermore, Rice Company – the only investigated firm found to have dumped – submitted export data for 1999 (the last year in the “injury” POI).⁹⁷ If Economía had wanted, it could have used this information and thus had volume and average unit value data for imports that actually fell within the category of dumped imports. Instead, Economía rejected the data because Rice Company had not provided similar data for 1997 and 1998, and it drew inferences about the volumes and prices of the dumped imports from data for non-dumped imports that Farmers Rice had provided.⁹⁸

98. After rejecting Rice Company’s data, Economía then used a methodology that the petitioners had proposed for estimating the import volume of long-grain white rice.⁹⁹ Economía relied on this methodology even though it “could only identify the long grain white rice imports corresponding to the investigated period and cannot be extrapolated to the previous similar periods.”¹⁰⁰ Stated differently, Economía rejected direct data from the one company that was

⁹⁶ *Final Determination*, paras. 217-261 (Exhibits US-6&7).

⁹⁷ *Id.*, paras. 226 and 228.

⁹⁸ *Id.*, paras. 226-227, 269, 270.

⁹⁹ *Id.*, para. 239.

¹⁰⁰ *Id.*, see also para. 232.

found to be dumping on the grounds that it had only supplied full data for the 1999 period of analysis, but it accepted the less accurate estimates preferred by petitioners even though those estimates also pertained only to the 1999 period of analysis.

99. In sum, Economía's failure to investigate or attempt to gather data from readily available sources and its rejection of accurate data that was supplied by the interested parties prevented it from conducting an objective examination of price and volume effects, and led to findings that were not based on positive evidence. In this manner, Economía breached Articles 3.1 and 3.2 of the AD Agreement.

c. Economía Breached Article 6.8 and Paragraphs 1 and 7 of Annex II of the AD Agreement by Basing Its Evaluation of Injury on the Facts Available

100. Finally, Economía breached Article 6.8 and paragraphs 1 and 7 of Annex II of the AD Agreement by improperly applying the "facts available" in its evaluation of injury.

101. Article 6.8 establishes, as a basic rule, that an investigating authority may only resort to the facts available where an interested party "refuses access to" or otherwise "does not provide" information that is "necessary" to the investigation, or otherwise "significantly impedes" the investigation. Paragraph 1 of Annex II of the AD Agreement requires investigating authorities to ensure that respondents receive proper notice of the rights of the investigating authorities to use the facts available.¹⁰¹ And 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.

102. Economía lacked accurate import volume and value data because it failed to send its antidumping questionnaire to exporters and importers other than the few designated as such in the petition, or to purchasers, and because it failed to consult the *pedimentos*. As a consequence of these omissions, it relied on secondary information instead – the facts that were available. But Article 6.8 and Annex II do not permit an investigating authority to base its analysis of injury on the facts available without first making an effort to obtain the data from the interested parties, or to use that data without first seeking to corroborate it against independent data sources at its disposal (including the *pedimentos*, which would have obviated the need to use the secondary data in the first place). Economía's decision to conduct its investigation in this manner breached Article 6.8 of the AD Agreement and paragraphs 1 and 7 of Annex II.

¹⁰¹ See *United States – Hot-Rolled Steel AB*, para. 79 (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 . . .").

2. Economía Breached Articles 3.1 and 3.2 of the AD Agreement by Failing to Objectively Consider Whether There Was a Significant Increase in the Volume of Dumped Imports or Significant Price Effects

103. Article 3.2 of the AD Agreement requires investigating authorities to consider “whether there has been a *significant* increase in the *dumped* imports, either in absolute terms or relative to production or consumption in the importing Member.”¹⁰² Economía recites the text of Article 3.2 in paragraph 243 of the final determination. However, nothing in the discussion that precedes or follows this recitation indicates that Economía actually considered whether there were *significant* absolute or relative increases in the volume of the *dumped* imports. Economía’s failure to conduct a proper examination of this issue breached Articles 3.1 and 3.2 of the AD Agreement.

104. Although Economía purports to discuss the volume issue at length, much of its discussion does not address the dumped imports. The only findings by Economía that have relevance to the required examination of dumped imports are contained in paragraph 244 (absolute volumes of the dumped imports), paragraph 248 (volumes of the dumped imports relative to apparent domestic consumption), paragraph 254 (volume of the dumped imports relative to internal consumption), and paragraph 259 (volumes of the dumped imports in relation to domestic production). The data that reflect the calculated volumes of the dumped imports show that those imports declined, both absolutely and relative to domestic production and consumption, during the three-year period selected for the injury analysis.

105. Turning first to paragraph 244, the evidence on the record shows that the dumped imports declined 3.2 percent from March – August 1997 to March – August 1998, and then rose by 1.2 percent from March – August 1998 to March – August 1999.¹⁰³ Thus, using Economía’s own calculations, the volume of the dumped imports declined over the course of the three year period of the injury analysis. Given these facts, Economía’s conclusion that “the dumped imports increased in the investigated period” is neither objective, nor unbiased.

106. Turning next to paragraph 248, the data on the record indicates that the dumped imports’ share of apparent domestic consumption (“CNA” or domestic production plus imports minus exports)¹⁰⁴ declined each year of the period of the injury analysis: from 5.7 percent in the March – August 1997 time period to 5.5 percent in the March – August 1998 time period, and then to 4.8 percent in March – August 1999.¹⁰⁵ In light of these steady declines, Economía could not objectively have found that CNA data was indicative of any increase, let alone a significant increase, in the volume of dumped imports relative to production.

¹⁰² AD Agreement, Article 3.2 (emphasis added).

¹⁰³ *Final Determination*, para. 244 (Exhibits US-6&7).

¹⁰⁴ *Id.*, para. 176.

¹⁰⁵ *Id.*, para. 248.

107. Economía next discussed the volume of the dumped imports as a share of internal consumption (“IC,” measuring consumption using domestic sales plus imports).¹⁰⁶ The data showed a slight decline in the dumped imports’ share. In March – August 1997, they constituted 6.9 percent of internal consumption; in March – August 1998, 6.5 percent of internal consumption; and in March – August 1999, 6.5 percent of internal consumption.¹⁰⁷ Objectively, an investigating authority could not find that these data reflected an increase, significant or otherwise, in the dumped imports’ share of internal consumption.

108. Furthermore, Economía’s evaluation of the IC data and the volume of the dumped imports as a share of IC was also flawed because the IC figure itself was understated in a way that was biased against the imported product. Economía explained in the final determination that it calculated the IC by adding the total volume of imports under tariff heading 1006.30.01 (imports of U.S. milled rice in general) to the sales volumes reported by domestic producers that represented only 67.6 percent of domestic production.¹⁰⁸ Economía then used that figure when it calculated the volume of the dumped imports as a share of internal consumption.¹⁰⁹ But if the IC calculation only contained 67.6 percent of domestic production, then the real IC figure was larger than Economía claimed, and the volume of the dumped imports as a share of the IC was less than Economía found. For this reason as well, Economía’s evaluation of volume and market share was not objective or unbiased.

109. Finally, Economía examined the volumes of the dumped imports in relation to domestic production.¹¹⁰ By Economía’s own calculations, the dumped imports’ share relative to domestic production at most remained flat throughout the period of the injury analysis: from 10.2 percent in March – August 1997 to 10.7 percent in March – August 1998, and then down to 10.1 percent in March – August 1999. Thus, the data on the volumes of the dumped imports in relation to domestic production provided no basis for an objective and unbiased investigating authority to conclude that the dumped imports increased – significantly or not.

110. In light of these facts, an objective and unbiased investigating authority would not have found that there was a significant increase in the dumped imports, either in absolute terms or relative to production or consumption in the importing Member, and Economía’s findings to the contrary breached Articles 3.1 and 3.2 of the AD Agreement.

111. Article 3.2 also requires the investigating authorities to consider whether there has been

¹⁰⁶ *Id.*, para. 180.

¹⁰⁷ *Id.*, para. 254.

¹⁰⁸ *Id.*, paras. 180 and 307.

¹⁰⁹ *See id.*, para. 254.

¹¹⁰ *Id.*, para. 259.

significant price undercutting by the dumped imports or whether the effect of those imports is to depress or suppress prices to a significant degree. Although Economía evaluated the effect of imports on prices, it failed to consider whether their effect was “significant.”¹¹¹ For this reason as well, Economía’s determination breached Articles 3.1 and 3.2 of the AD Agreement.

3. Economía Breached Articles 3.1 and 3.4 of the AD Agreement by Failing to Conduct an Objective Analysis of the Relevant Economic Factors

112. In addition to the breaches already discussed, Economía breached Articles 3.1 and 3.4 of the AD Agreement by failing to conduct an objective analysis of certain “relevant economic factors” that it was required to evaluate under Article 3.4.

113. The information on the record of the investigation for inventories, for example, showed that inventories decreased 73.5 percent from March – August 1997 to March – August 1998, and then increased 7.3 percent from March – August 1998 to March – August 1999.¹¹² Economía examined this data and concluded, remarkably, that the industry had “suffered an inventory accumulation.”¹¹³ Given the marked decline in inventories during the period of the injury analysis, an objective and unbiased investigating authority could not have found that inventories increased during that period.

114. Similarly, Economía evaluated the factor of “market share” in terms of internal consumption. The data showed the market share of the domestic producers remained stable during the period of injury analysis – that is, 87.1 percent in 1997, 88.5 percent in 1998, and 88.1 percent in 1999.¹¹⁴ Nevertheless, Economía concluded that domestic producers lost market share.¹¹⁵ Particularly given the inaccuracies in Economía’s calculation of domestic consumption, an objective and unbiased investigating authority could not have found that these data show a decline in market share.

115. Economía’s analysis of the Article 3.4 factors was also flawed because it failed to consider “factors affecting domestic prices.”¹¹⁶ Evidence on the record of the investigation showed that there are at least two types of long-grain white rice produced and sold in the

¹¹¹ See *id.*, paras. 262-296.

¹¹² *Id.*, para. 318.

¹¹³ See *id.*

¹¹⁴ *Id.* at para. 314. Economía did not examine the share of domestic producers in terms of apparent domestic consumption, or relative to domestic production.

¹¹⁵ *Id.* at para. 315.

¹¹⁶ It is well established that an investigating authority must evaluate each of the Article 3.4 factors. See, e.g., *Thai Steel AB*, para. 128.

domestic market by the Mexican producers,¹¹⁷ and that Mexican consumers are willing to pay up to a 20 percent premium for certain brands.¹¹⁸ Economía recognized in its dumping analysis that there were differences in the quality and grades of subject imports of white long grain rice.¹¹⁹ There is nothing in the final determination, however, indicating that Economía considered these quality differences in its injury analysis, or that Economía considered any other factors affecting domestic prices. Economía's failure to consider this factor breached Article 3.4 of the AD Agreement.

4. Economía Breached Articles 3.1, 3.2, and 3.5 of the AD Agreement By Including Non-Dumped Imports in its Evaluation of Volume, Price Effects, and the Impact of the Dumped Imports on the Domestic Industry

116. The AD Agreement requires investigating authorities to examine, on one hand, the volume and price effects of “the dumped imports,” and on the other, all relevant economic factors having a bearing on the state of the domestic industry. Through this overlapping examination of both “the dumped imports” and the domestic industry factors, the investigating authorities are able to examine the “consequent impact” of those “dumped imports” on the domestic industry.

117. In *EC Bed Linen 21.5*, the Appellate Body emphasized that investigating authorities are not permitted to include in the volume of the “dumped” imports any imports from producers that are not found to be dumping:

It is clear from the text of Article 3.1 that investigating authorities must ensure that a “determination of injury” is made on the basis of “positive evidence” and an “objective examination” of the volume and effect of imports that are *dumped* and to the exclusion of the volume and effect of imports that *are not dumped*. It is clear from the text of Article 3.2 that investigating authorities must consider whether there has been a significant increase in *dumped* imports, and that they must examine the effect of *dumped* imports on prices resulting from price undercutting, price depression, or price suppression.

Article 3.5 continues in the same vein as the initial paragraphs of

¹¹⁷ See *Initiation Notice*, at 6 (the petitioner indicated that domestically produced white rice comes in two varieties; “Philippine miracle” and “Morelos type”) (Exhibits US-1&2); *Final Determination*, para. 166 (referring to the “varieties” of white rice falling within the domestic like product.) (Exhibits US-6&7).

¹¹⁸ *TAMRC Report*, at 22 (Exhibit US-3).

¹¹⁹ See *Final Determination*, paras. 68, 70, 79, 92, 101 (Exhibits US-6&7).

Article 3 by requiring a demonstration that dumped imports are causing injury to the domestic industry "through the *effects of dumping*", which, of course, depends upon there being imports from producers or exporters that *are dumped*. In addition, Article 3.5 lists "volume and prices of imports *not* sold at dumping prices" as an example of "known factors *other than the dumped imports*" that are injuring the domestic industry at the same time as the dumped imports. . . .¹²⁰

Notwithstanding these requirements, Economía's injury examination focused on *all* imports of the investigated product from the United States, irrespective of whether the imports were dumped. This broadened focus is evident in numerous places in its determination.

118. For example, in discussing the relative volume of the imports, Economía framed the issue in terms of whether *the investigated imports* increased their market share.¹²¹

119. Economía followed this analytical framework throughout its volume and price discussions, by focusing its analysis and examination on the volume and price effects of the investigated products, *i.e.*, all imports of long grain white rice from the United States, whether dumped or not. Although Economía noted the data computed for *dumped* imports alone,¹²² its examination and the final affirmative determination show that in reaching the determination, it considered the volume and price effects of *all* imports from the United States of long grain white rice.¹²³

120. Economía's focus on *all* investigated imports, and not just the dumped imports, is most apparent in its discussion of price effects. At the beginning of its price effects analysis, Economía stated that:

According to articles 64 section II, paragraph A, of the Regulation of the Foreign Trade Statute and [Article 3.2 of the Antidumping Agreement], the Ministry analyzed the behavior of the prices of the investigated product imports, if these were lower than the domestic prices or if they had in another way the effect of lowering or

¹²⁰ *EC Bed Linen 21.5 AB*, paras. 111-112 (emphasis in original).

¹²¹ *Final Determination*, paras. 245, 250, 256 (Exhibits US-6&7).

¹²² *Id.*, paras. 243, 248, 254, 259, 285.

¹²³ Neither Economía's lengthy discussions of and consequent findings concerning the volumes and prices of *all* investigated imports, inclusive of non-dumped imports, nor its findings concerning the volumes and prices of all imports under tariff section 1006.30.01 (imports of U.S. milled rice in general) can, under Articles 3.2 and 3.5, be used to bolster its determination that the *dumped* imports are causing injury to the domestic industry.

impeding the rise of the domestic prices.¹²⁴

121. Economía then conducted an “analysis of the behavior of import prices,” in which it discussed the prices of two groups of imports: “prices of the imports from non-investigated countries,”¹²⁵ and “prices of the investigated imports.”¹²⁶ It did not separately discuss the prices of the dumped imports, except to conclude that since the prices of imports of U.S. milled rice in general dropped during the POI, and since the export prices of Farmers Rice (which was not dumping) had dropped, the prices of the dumped imports must also have dropped during the POI.¹²⁷

122. Economía then discussed the purported effects of the imports on domestic prices. As the discussion itself makes clear, however, Economía did not examine the effect of the dumped imports on domestic prices, but the effect of all imports on domestic prices.

123. For example:

- Economía compared the prices of the domestic products with the prices of all of the imported products (and not just the dumped products) after they entered Mexico.¹²⁸
- Economía noted that the prices of Farmers Rice and Riceland – which were not dumped – were below the domestic industry’s prices.¹²⁹
- Economía noted a fall in domestic prices that coincided with a decrease in the prices of all imports from the United States – whether dumped or not.¹³⁰
- Economía concluded that imports of the investigated product (and not just the

¹²⁴ *Final Determination*, para. 262 (emphasis added) (Exhibits US-6&7).

¹²⁵ *Id.*, paras. 264-266.

¹²⁶ *Id.*, paras. 267-270. As noted above, in this discussion, Economía stated that the behavior of non-dumping exporter Farmers Rice Milling “is a proper index of the behavior of the prices of the other two exporting companies.”

¹²⁷ *Id.*, para. 270. Economía found that the prices of U.S. milled rice imports decreased 0.9 percent in 1999, and that the prices of Farmers Rice dropped by 12.8 percent. It follows that if the prices of imports from companies other than Farmers Rice had also fallen significantly, the decrease in overall prices would have been much higher than 0.9 percent.

¹²⁸ *Id.*, para. 281.

¹²⁹ *Id.*, para. 282.

¹³⁰ *Id.*, para. 294.

dumped imports) were priced below the domestic product.¹³¹

124. In sum, Economía did not conduct an objective examination of the effect of the dumped imports alone, and its failure to do so breached Articles 3.1, 3.2, and 3.5 of the AD Agreement.¹³²

5. Economía Breached Article 12.2 of the AD Agreement by failing to provide in sufficient detail the findings and conclusions reached on all issues of law

125. Finally, Article 12.2 requires investigating authorities to set forth “in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities.” Several findings in Economía’s final injury determination belie an objective examination of volume, price effects, and impact, and are not adequately explained as Article 12.2 requires. Some examples, among many, are:

- Economía fails to explain how it took into account in its determination that imports of white long grain rice from Argentina were priced 4.5 percent below the price of the dumped imports from the United States, and that they grew from zero to 33 percent of total imports between 1998 and 1999.¹³³
- In the final determination, Economía found that:

[t]he reduction in Covadonga’s sales price was *not only* due to the effect of the imports from the United States of America, but to the cost adjustment the group achieved through the alternative of buying product at lower prices from countries other than the United States of America.¹³⁴
(Emphasis added.)

Economía does not explain how it could have determined that there was any causal relationship between the dumped imports from the United States and Covadonga’s sales price, given that Covadonga’s sales price *increased* when its sales of its imports from other countries were excluded from the calculation.¹³⁵

- Economía concluded that domestic producers lost sales volume in combination with a fall in domestic prices, which created a decline in sales revenues.

¹³¹ *Final Determination*, para. 295 (Exhibits US-6&7).

¹³² *EC Bed Linen 21.5 AB*, para. 111.

¹³³ *See Final Determination*, paras. 215, 291 (Exhibit US-6&7).

¹³⁴ *Id.*, para. 290.

¹³⁵ *See id.*, paras. 286 and 290.

However, the group of domestic companies from which Economía derived sales volume is not the same as the list from which it derived sales revenues.¹³⁶ In particular, the sales revenue data do not include the cooperatives.¹³⁷ Economía's evaluation fails to explain how it took this mismatch into account, or how it ensured that the cooperatives did not have revenue gains (which would have raised the total revenues for the domestic industry as a whole).

- For purposes of determining whether the subject imports and the domestic imports competed for sales to the same customers, Economía noted the statement by CMA that the clients for both groups of product are domestic rice distributors.¹³⁸ Yet it appears that, for the purposes of comparing prices of the two groups of products, Economía compared the imported product "prices" at the time they enter Mexico to the prices at which domestic producers sold their products to distributors. In fact, with respect to Covadonga's sales, it appears that Economía relied on prices for the related distributor's sales to its customers.¹³⁹ Economía failed to explain how it ensured that it was evaluating and considering comparable prices.

126. In sum, Economía's failure to set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities" breached Article 12.2 of the AD Agreement.

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

127. Economía determined in the antidumping investigation that two of the firms it examined – Farmers Rice and Riceland – had dumping margins of zero percent. Since neither firm was dumping, neither firm was causing any injury to the Mexican rice industry through the "effects of dumping." Nevertheless, Economía applied the antidumping measure to both firms, and each firm remains subject to future review and the possible application of antidumping duties. By failing to exclude Farmers Rice and Riceland from the antidumping measure, Economía breached Article 5.8 of the AD Agreement.

128. Article 5.8 of the AD Agreement states in pertinent part as follows:

¹³⁶ This is evident when comparing the list of domestic producers providing data on sales volume in paragraph 305 of the final determination with the list of domestic producers supplying data on sales revenues in paragraphs 275 and 309 of the final determination.

¹³⁷ *Final Determination*, para. 310 (Exhibits US-6&7).

¹³⁸ *Id.*, para. 191.

¹³⁹ *Id.*, para. 277.

An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis* . . . The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent.

129. Although Economía determined that Farmers Rice and Riceland were not dumping, it did not exclude them from the antidumping measure. Rather, it applied the measure to them, and simply set their individual duty rates at zero percent.¹⁴⁰ As a consequence of this action, each firm remains subject to future administrative review, and the possible imposition of antidumping duties.¹⁴¹

130. By treating Farmers Rice and Riceland in this manner, Economía breached Article 5.8 of the AD Agreement. The first sentence of the provision requires investigating authorities to terminate their investigations promptly as soon as they are satisfied that there is not sufficient evidence of dumping to proceed with the case. The second sentence is even more emphatic: there shall be “immediate” termination in cases where the authorities determine that the margin of dumping is less than two percent. Plainly, a dumping margin of zero is less than two percent. Therefore, Economía should have terminated its investigation with respect to Farmers Rice and Riceland, and its failure to do so breached Article 5.8.

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

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

¹⁴⁰ See *id.*, para. 400A (Exhibits US-6&7).

¹⁴¹ The possibility of review and the application of duties arises from Article 68 of Mexico’s Foreign Trade Act, which provides, *inter alia*, for the review of imports from producers “for whom no positive margin of price discrimination or subsidization was determined in the investigation.” See *Mexico’s 2003 WTO Notification*, at 9. The United States discusses Article 68 at length in Section V.F.4 of this submission.

investigation.”

132. The sole exception provided to this rule, set forth in the second sentence of Article 6.10, arises when the sheer number of potential interested parties is so large that making an individual determination for each exporter or producer would be “impracticable.” In such cases, authorities may limit their examination, either by using statistically valid samples or by examining the largest percentage of the volume of the exports which can reasonably be investigated.¹⁴² The Agreement then provides for the “residual” margin (*i.e.*, the margin assigned to the uninvestigated firms) to be based on the calculation method set out in Article 9.4 of the AD Agreement for determining the ceiling for the “all others” rate.

133. In this section of its first written submission, the United States will explain why Economía’s conduct of the rice investigation breached these rules.¹⁴³ Specifically, Economía improperly:

- sent its antidumping questionnaire to only two companies that were listed in the petition but claimed to be investigating every producer or exporter in the United States;
- calculated individual margins of dumping for one of those companies and two others that came forward on their own initiative and asked to be included in the investigation, but assigned an adverse “facts available” margin taken from the petition to Producers Rice, even though that firm demonstrated that it had no exports to Mexico during the POI; and
- treated all other exporters and producers in the United States as “uncooperative” respondents, and assigned them an adverse facts available margin taken from the petition, even though Economía never sent any of the affected companies a copy of the questionnaire or informed them of the consequences that would flow from not providing the information that it never requested them to provide.¹⁴⁴

134. Economía also failed to set forth in sufficient detail its findings and conclusions of fact and law and the reasons for the actions it took.

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

¹⁴² AD Agreement, Article 6.10.

¹⁴³ The United States is also challenging certain provisions of Mexican law codifying the approach that Economía took in the rice case. *See* Section V.F.

¹⁴⁴ *Final Determination*, para. 157 (Exhibits US-6&7).

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

136. Article 6.10 of the AD Agreement reads in pertinent part:

The authorities shall, as a rule, determine an individual margin of dumping for each known producer or exporter concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid . . . , or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

137. The Appellate Body emphasized in *EC Bed Linen 21.5* that Article 6.10 “requires, ‘as a rule’, that individual dumping margins be established for *each* producer or exporter.”¹⁴⁵ The rule is subject to a single exception, when the number of exporters or producers is so large that the determination of individual margins for each producer or exporter would be impracticable. In such cases, and only in such cases, an investigating authority may limit its examination to a subset of producers or exporters.¹⁴⁶

138. Article 6.10.2 of the AD Agreement supports this interpretation. Article 6.10.2 states:

In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome

¹⁴⁵ *EC Bed Linen 21.5 AB*, para. 125 and n. 157 (emphasis in original).

¹⁴⁶ *Id.*

to the authorities and prevent timely completion of the investigation. Voluntary responses shall not be discouraged. (Emphasis added.)

139. Thus, the presumption is that authorities will not limit their investigation to a subset of exporters or producers, and, if they do, they still must determine an individual margin for “voluntary” respondents who come forward and provide the necessary information, “except where the number of exporters or producers is so large that individual examination would be unduly burdensome. . . .” This requirement reflects the strong preference in the AD Agreement for the calculation of company-specific dumping margins.

140. Article 6.10.2, moreover, refers to cases in which the “authorities have limited their examination” and to situations in which individual margins shall nevertheless be determined for “any exporter or producer not initially selected” by such authorities (emphasis added). This language indicates that investigating authorities must either take affirmative steps to investigate every producer or exporter or else take affirmative steps to limit their investigation by selecting a subset of such producers and exporters. Article 6.10 does not permit an investigating authority to announce the initiation of an antidumping investigation, send its questionnaire to a few producers or exporters, deem every other producer or exporter in the country as also being investigated, and apply a dumping margin based on the “facts available” to any company that does not “appear.”

141. Articles 1, 5, 6.1, 6.5, 6.6, 6.8, and 9.4 of the AD Agreement, and paragraph 1 of Annex II, provide contextual support for the conclusion that Article 6.10 does not permit investigating authorities to take such a passive approach to their investigations. First, Articles 6.1 and 6.8 of the AD Agreement, and paragraph 1 of Annex II, provide that an investigating authority may only apply a dumping margin based on the “facts available” to a company for failing to provide information¹⁴⁷ if the authority has first specifically asked the party to provide the information and been refused. Second, Article 9.4 of the AD Agreement establishes that any margin that an investigating authority applies to a company that is not individually investigated in accordance with Article 6.10 must be a neutral “all others” margin, not a margin based on adverse facts available. Third, Articles 1 and 5 of the AD Agreement emphasize the obligation on authorities to conduct an “investigation,” and not to remain passive.

142. Article 6.8, the so-called “facts available” provision, states as follows:

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation,

¹⁴⁷ A failure to provide requested information is not the only situation that can lead to a facts available margin. For example, an investigating authority may have recourse to the facts available if requested data is provided but does not withstand scrutiny at verification.

preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph. (Emphasis added.)

143. Thus, Article 6.8 establishes, as a basic rule, that an investigating authority may only resort to the facts available where an interested party “refuses access to” or otherwise “does not provide” information that is “necessary” to the investigation, or otherwise “significantly impedes” the investigation. An investigating authority may not assign a margin based on adverse facts available when the authority has failed to request the information in the first place.

144. Article 6.1 of the AD Agreement then qualifies Article 6.8 further by establishing that the investigating authorities must indicate to the interested parties the information that they require:

All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question. (Emphasis added.)

145. Article 6.1 thus establishes that an investigating authority that has decided to include a particular exporter or producer “in the antidumping investigation” cannot simply announce that it has initiated the investigation and place the burden on the producer or exporter to come forward and “appear.” Rather, the investigating authority must affirmatively reach out to the interested party and “give notice” of the information that it requires.¹⁴⁸ 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.”¹⁴⁹

146. Paragraph 1 of Annex II of the AD Agreement then reiterates this point by requiring investigating authorities to ensure that respondents receive proper notice of the rights of the investigating authorities to use the facts available:¹⁵⁰

¹⁴⁸ The term “interested parties” is not limited to parties that have shipped during the POI or that have responded to a published initiation notice. Article 6.11(i) defines “interested parties” to include “an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product.”

¹⁴⁹ Report of the Panel, WT/DS189/R, adopted 5 November 2001, para. 6.54 (“*Argentina – Ceramic Tiles*”).

¹⁵⁰ See *United States – Hot-Rolled Steel AB*, para. 79 (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 . . .”).

As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry. (Emphasis added.)

147. In the view of the panel in *Argentina – Ceramic Tiles*, “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 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.”¹⁵¹

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

149. Finally, Article 9.4 of the AD Agreement sets out a calculation method for determining the ceiling for the antidumping margin for producers and exporters that they do not individually examine:

When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

- (i) the weighted average of dumping established with respect to the selected exporters or producers or,
- (ii) where the liability for payment of antidumping

¹⁵¹ *Argentina – Ceramic Tiles*, para. 6.55.

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 exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. . . .

150. Thus, Article 9.4 requires investigating authorities to assign a neutral “all others” rate to producers and exporters that they do not individually examine. The Appellate Body has described this rate as a “maximum limit, or ceiling” that investigating authorities “shall not exceed.”¹⁵² Inasmuch as the calculation method in Article 9.4 does not allow the resulting margin to contain *any* element of the facts available,¹⁵³ there is no basis for an interpretation of Article 6.10 that would permit investigating authorities to routinely assign total “facts available” margins to firms that they do not individually investigate.

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

152. First, Articles 1, 5, and 6.6 of the AD Agreement each support the conclusion that an investigating authority cannot claim to be investigating firms to which it never even sends a questionnaire. Article 1 of the AD Agreement, entitled “*Principles*,” provides that an antidumping measure shall only be applied “pursuant to investigations initiated and conducted in accordance with the provisions of [the AD] Agreement.” (Emphasis added.) The Appellate Body noted in *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* (“*Wheat Gluten*”) 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,

¹⁵² *United States – Hot-Rolled Steel AB*, para. 116.

¹⁵³ *Id.* at para. 122.

an “investigation” – must actively seek out pertinent information.¹⁵⁴

153. The Appellate Body then noted the obligation on an investigating authority to carry out a “full investigation” in order to conduct a “proper evaluation,” and stressed that it is the investigating authority, and not the interested parties, that must perform this task. To quote the Appellate Body, the “duties of investigation and evaluation preclude [the investigating authorities] from remaining passive in the face of possible shortcomings in the evidence submitted”¹⁵⁵

154. Article 5 of the AD Agreement then stresses the responsibility of the authorities to conduct a proper investigation throughout their inquiry, including at the time of initiation. Article 5.2, for example, requires a petition to include “the identity of each known exporter or foreign producer” of the product in question, and Article 5.3 requires the investigating authority to examine the “accuracy and adequacy” of that information. Similarly, Article 6.6 of the AD Agreement requires investigating authorities to “satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.”

155. Second, Article 5.8 states in pertinent part that:

An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. . . . (Emphasis added.)

If Article 6.10 were interpreted to allow investigating authorities to simply publish a notice of initiation, claim to be investigating every producer or exporter in the country at issue, and apply adverse facts available-based dumping margins to any that did not “appear,” then administering authorities would rarely be in a position to determine that there is “not sufficient evidence of dumping,”¹⁵⁶ and Article 5.8 would effectively be read out of the text, contrary to the principle of

¹⁵⁴ Report of the Appellate Body, WT/DS166/AB, adopted January 19, 2001, para. 53 (footnote omitted) (“*United States – Wheat Gluten AB*”).

¹⁵⁵ *Id.* at para. 55 (emphasis added). The Appellate Body discussed 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). *See id.* at paras. 53 and 55.

¹⁵⁶ The rare exception would be when the investigated industry was so small and so well informed that, despite the failure of the investigating authority to send questionnaires, all parties could reply in full and the investigating authority could be certain that it had examined each and every producer or exporter of the product at issue.

effectiveness of treaty interpretation.¹⁵⁷

156. Third, Article 9.5 of the AD Agreement provides the right to an expedited review using company-specific data for any exporter or producer that did not export the subject merchandise during the initial POI and that is not affiliated with companies subject to the antidumping duties on the subject merchandise. The AD Agreement does not expressly address how (absent recourse to sampling) an investigating authority should determine the margin to be initially applied to such an exporter or producer when it begins to ship. However, if Article 6.10 were interpreted to permit investigating authorities to deem the entire industry as having been “investigated” already because they had an opportunity to “appear” during the initial investigation, then there would be no opportunity for a “new shipper” to obtain such an expedited review. As with Article 5.8 above, such an interpretation would read Article 9.5 out of the text, contrary to the principle of effectiveness of treaty interpretation.

157. These provisions confirm that an investigating authority cannot simply publish a notice of initiation, send its antidumping questionnaire to whatever firms the petitioner has decided to list in the petition, claim thereby to be conducting an “investigation” of every exporter and producer in the country under investigation, and apply a facts available-based margin to any firms that do not “appear.”

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

158. During the rice investigation, Producers Rice fully cooperated with the investigating authority and demonstrated that it had no exports to Mexico during the POI; therefore, for the reasons set out in Section V.E.1 of this submission, Economía was obliged to assign the firm the residual “all others” margin calculated in accordance with Article 9.4. Economía chose instead to assign Producers Rice an adverse margin based on the facts available. In so doing, Economía breached Articles 6.8, 9.4, and 9.5 of the AD Agreement, and paragraphs 3, 5, 6, and 7 of Annex II.

a. The Facts Available Margin Was Adverse

159. For the following reasons, the facts available-based margin that Economía took from the petition and assigned to Producers Rice was adverse. First, at 10.18 percent, it was almost triple

¹⁵⁷ One of the corollaries of the “general rule of interpretation” in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility. *See, e.g.*, Report of the Appellate Body, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, at 21; *see also* Report of the Appellate Body, *Japan – Taxes on Alcoholic Beverages*, WT/DS8,10,11/AB/R, adopted 1 November 1996, para. 106.

the highest (3.93 percent) of the three margins that Economía calculated using company-specific data (the other two calculated margins were zero percent). Second, each component of the 10.18 percent margin was based on flawed data and unsupported assumptions that served to increase the dumping margin.

160. Although the dumping allegation in the petition contained many flaws, the United States will focus on just a few illustrations, beginning with the Export Price component.

161. In establishing the Export Price, the CMA acknowledged that the import data it was using was not specific to long-grain white rice.¹⁵⁸ To address this problem, it selected a sample of transactions from four companies who were identified in the abstracts of customs declarations (*i.e.*, the “*pedimentos*”) obtained by the CMA¹⁵⁹ as importers of milled rice. The main criterion for selection appears to have been the extent to which the companies in question “compete with industrial companies associated with the CMA.”¹⁶⁰

162. Next, the CMA subtracted a “freight adjustment” from the Export Price. This component of the calculation was also flawed because it was based on export sales of paddy rice, an unhulled rice that is not subject merchandise.¹⁶¹ Moreover, the freight rates were for 50 kg bundles of rice,¹⁶² even though a study included in the petition stated that paddy rice is normally shipped in bulk using rail or barges.¹⁶³ This discrepancy suggests that the sales were of unusually small quantities, which would have raised the freight costs. In addition, the sales were described as being from “mills located in Arkansas, Louisiana and Texas to the border transfer points of Brownsville, El Paso and Eagle Pass” (all in Texas).¹⁶⁴ This fact is also problematic, because a freight cost study included in the petition stated that Brownsville, Eagle Pass, and Laredo Texas are the only representative border crossings for sales of white rice, and that “respective rates to El Paso are about 15 percent greater” than rates to those three cities.¹⁶⁵ Despite these failings, the CMA subtracted the freight adjustment from the Export Price figure, and thus further increased the petition margin.

¹⁵⁸ *Initiation Notice*, para. 30 (Exhibits US-1&2); *CMA Petition*, at 21-3 (Exhibit US-8).

¹⁵⁹ See notes 23-26 and accompanying text.

¹⁶⁰ *CMA Petition*, at 19 (Exhibit US-8).

¹⁶¹ Paddy rice is imported under a different Mexican tariff section than hulled white rice. See *Preliminary Determination*, para. 48(A) (Exhibits US-14&15).

¹⁶² *CMA Petition*, at 24 (Exhibit US-8).

¹⁶³ Petition Annex G, at 2 (freight cost study by Department of Agricultural Studies, University of Texas A&M) (Exhibit US-11).

¹⁶⁴ *CMA Petition*, at 23-24 (name of exporter); *Initiation Notice*, para. 31 (dates of invoices) (Exhibits US-1&2).

¹⁶⁵ Petition Annex G, at 2 (Exhibit US-14). El Paso is located on the far western edge of the Texas border, beneath central New Mexico, far from the major rice areas in southeast Texas, Louisiana and Arkansas and significantly west of the locations of all four importers in the petition sample (Exhibit US-16).

163. Finally, the CMA calculated a Normal Value. As explained previously, the source of the Normal Value calculation was the USDA's *Rice Yearbook* for 1999, which set out average monthly mid-point historical prices for long-grain white rice in the United States on a multi-year basis, including the period March through August 1999.¹⁶⁶ The USDA prices, however, were for sales of "U.S. grade No. 2" rice, a high grade (and thus comparatively expensive) rice.¹⁶⁷ The CMA then compared that high grade rice to all of the rice imports that they had designated as long-grain rice in their Export Price calculation, regardless of grade.

164. While the public evidence in the record of the investigation does not identify which grades were included in the petition's Export Price "sample," other record evidence demonstrates that each of the respondents that Economía investigated during the investigation sold three or more "types" of long-grain rice to Mexico, and that Economía recognized that there were quality differences between the various types and took the differences into account in calculating the margins for those three producers.¹⁶⁸ The CMA did not do the same for the Normal Value in the petition, thus demonstrating that the Normal Value in the petition, which represented only higher-grade rice, was an adverse comparison for all import prices corresponding to lower-grade rice.

165. For all of these reasons, each component of the petition margin calculation was adverse; thus, combining these components necessarily resulted in an adverse dumping margin.

b. Producers Rice Was A Fully Cooperative, Known Respondent

166. Producers Rice was named in the petition and in the Initiation Notice.¹⁶⁹ Furthermore, the record demonstrates that Producers Rice was an "appearing party" that, with other respondent parties, established a domicile for legal purposes in Mexico in order to participate in the investigation, requested an extension of time to respond to Economía's questionnaire, provided a

¹⁶⁶ *Initiation Notice*, para. 29 (Exhibits US-1&2); *CMA Petition*, at 26-29 (Exhibit US-8).

¹⁶⁷ *Petition Annex E*, at 56-57 and note 59 ("U.S. No. 2—broken not to exceed 4 percent") (Exhibit US-13). Information on the relationship of percentages of broken grains to rice grades is contained in Annex M to the petition, at page 4 (Exhibit US-17).

¹⁶⁸ *See Final Determination*, para. 68 ("long grain rice is mainly classified according to the degree and maximum percentage of broken seeds. Among other characteristics, the degree refers to the maximum limits of damaged grains, broken seeds and off-white seeds, such as provided by the norm of the USA Agriculture Department.") (Exhibits US-6&7); *see also id.* at paras. 70, 79 (Farmers Rice exported to Mexico three types of long grain rice as described in para. 68, only two of which were also sold in the United States; for the third type, for which the difference was the "maximal percentage of broken grains," it was necessary to match to a "superior grain of rice" which had a higher price on the U.S. domestic market); paras. 92, 101 (Rice Company exported four types of long grain rice within the terms of para. 68 and sold all in the United States); (Riceland exported three types of long grain rice within the terms of para. 68, and sold two of those three types in the United States).

¹⁶⁹ *CMA Petition*, at 17 (Exhibit US-8); *Initiation Notice*, at para. 25 (Exhibits US-1&2).

timely response to that questionnaire, including arguments regarding flaws in the petition, requested and attended a technical information meeting, participated through its representative at the public hearing, offered post-hearing final allegations, and filed “additional remarks.”¹⁷⁰ Economía, however, disregarded all of these facts, and only took into account that Producers Rice did not export to Mexico during the six-month POI.¹⁷¹

167. As Economía explained in the preliminary determination, Producers Rice filed an affidavit in the investigation explaining that it did not export the subject merchandise to Mexico during the POI.¹⁷² Nothing in either the preliminary or final determinations indicates that the investigating authority had any reason to question the validity of this information, or that Economía ever requested any further proof of the accuracy of this information. Thus, the Panel should accept as a given that the investigating authority treated this fact as true and demonstrated by the appropriate evidence.

168. Inexplicably, however, both the preliminary and final determinations suggest that, because Producers Rice did not ship subject merchandise to Mexico during the POI, its active and cooperative participation in the investigation never occurred:

For the company Producers Rice Mill, Inc., and the other companies that did not appear in this phase of the investigation, based on articles 6.8 of the Agreement on the Application of Article VI of the General Agreement on Tariffs and Trade of 1994 and 54 of the Foreign Trade Law, the Ministry established the dumping margin of 10.18 percent applicable to long grain rice classified in tariff section 1006.30.01 of the General Import Tax Law, calculated based on the information submitted by the petitioner, in accordance with the methodology described in items 36 to 54 of the Initial Resolution [*i.e.*, the *Initiation Notice*] of the investigation published in the Federation Official Gazette dated

¹⁷⁰ See *Preliminary Determination*, paras. 27, 29 (“appearing party”), 29 (legal domicile in Mexico), 30 (extension request), 36, 41 (timely response on extended deadline, including arguments regarding flaws in the petition) (Exhibits US-14&15); see also *Final Determination*, paras. 27, 29 (“appearing party”), 29 (legal domicile in Mexico), 34-35 (requested/attended technical information meeting), 36-37, 62 (timely response on extended deadline, including arguments regarding flaws in the petition), 46 (present at public hearing), 47 (post-hearing final allegations), 48-49 (“additional remarks”) (Exhibits US-6&7).

¹⁷¹ See *Preliminary Determination*, para. 36 (Exhibits US-14&15); *Final Determination*, para. 62 (Exhibits US-6&7).

¹⁷² *Preliminary Determination*, para. 36 (Exhibits US-14&15); see also *Final Determination*, para. 62 (“Producers Rice Mill, Inc., stated that it did not perform any exports of the product investigated during the period of investigation”) (Exhibits US-6&7).

December 11, 2000.¹⁷³

169. In other words, Economía assigned a margin based on adverse facts available to Producers Rice.

c. Economía’s Application of an Adverse Facts Available Margin to Producers Rice Breached Articles 6.2, 6.4, 6.8, 9.4, and 9.5, and Paragraphs 3, 5, 6, and 7 of Annex II of the AD Agreement

170. Under Article 17.6(i) of the AD Agreement, a panel that is assessing the facts of a matter before it must determine whether the authority’s establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective. An unbiased and objective investigating authority would not have concluded that Producers Rice had failed to appear in the rice investigation, or that the necessary prerequisites for assigning an adverse facts available margin to Producers Rice were met. Economía’s decision to apply adverse facts available to Producers Rice in the absence of any legitimate grounds to do so was plainly inconsistent with Articles 6.2, 6.4, 6.8, 9.4, and 9.5, and Paragraphs 3, 5, 6, and 7 of Annex II of the AD Agreement.

171. First, Economía’s application of a facts available margin to Producers Rice breached Article 9.4. As the United States has already discussed, Article 6.10 of the AD Agreement creates two options for investigating authorities conducting antidumping investigations: they may calculate individual margins of dumping for each known producer or exporter, or they may investigate a sample of exporters and apply a neutral “all others” rate to everyone else, calculated in accordance with Article 9.4. Economía initially intended to individually examine Producers Rice, but the firm demonstrated that it had no shipments to Mexico during the POI. At that point, Economía should have assigned Producers Rice the “all others” rate calculated in accordance with Article 9.4. This conclusion flows from the text of Article 9.4 itself, which states that the margin assigned to exporters or producers “not included in the examination” shall not exceed the formula set out therein. By failing to apply a neutral all others rate to Producers Rice, Economía breached Article 9.4.

172. Article 9.5 of the AD Agreement provides contextual support for this interpretation. First, the function of Article 9.5 is to provide an accelerated review to determine the “individual

¹⁷³ *Preliminary Determination*, para. 144 (emphasis added) (Exhibits US-14&15); *see also Final Determination*, paras. 138 (“For the company Producers Rice Mill, Inc., . . . and the other companies that did not appear in this phase of the investigation . . . the Ministry calculated the dumping margin . . . based on the information submitted by the petitioner, and in accordance with the methodology . . . that corresponds to paragraphs 36 to 54 of the [Initiation Notice] published in the Federation Official Gazette dated December 11, 2000”) and 157 (“For the company Producers Rice Mill, Inc., and the other companies that did not appear in this phase of the investigation . . . the Ministry determined that the dumping margin applicable to long grain rice is of 10.18 percent”) (Exhibits US-6&7).

margins of dumping” for particular firms (such as Producers Rice) that did not “export[] the product to the importing Member during the period of investigation.” The placement of Article 9.5 directly after Article 9.4 suggests that the drafters contemplated that firms seeking review under 9.5 when they entered the export market would have previously been subject to an “all others” dumping margin calculated under Article 9.4, not a “facts available” margin calculated under Article 6.8. The specific textual link between Article 9.5 and Article 6.10 (“individual margins of dumping”) also supports this view.

173. Moreover, if it were proper for an investigating authority to deem a firm that made no shipments during the POI as having been “investigated” and, thus, “subject to the antidumping duties on the product,” then no non-shipping firms would be eligible for a review under Article 9.5. To interpret Article 6.10 in such a manner would write Article 9.5 out of the AD Agreement, contrary to the principle of effectiveness of treaty interpretation. By considering Producers Rice to have been investigated and thus assigning it a facts available-based margin, Economía has precluded it from receiving a review under Article 9.5, and thus breached that provision.

174. Economía’s treatment of Producers Rice also breached Article 6.8 of the AD Agreement and paragraphs 3, 5, 6, and 7 of Annex II. The United States has previously noted that under Article 6.8, an investigating authority may only resort to the facts available where an interested party “refuses access to” or otherwise “does not provide” information that is “necessary” to the investigation, or otherwise “significantly impedes” the investigation. Annex II of the AD Agreement then provides further details with respect to the application of the facts available. Paragraphs 3, 5, 6, and 7 state as follows:

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion . . . should be taken into account when determinations are made. . . .
5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.
6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

175. Economía's treatment of Producers Rice breached all four of these paragraphs. Turning first to paragraph 3, Economía did not "take into account" that Producers Rice was a fully cooperative respondent "when [its] determinations [were] made." Nor did it suggest that the shipment volume data that Producers Rice submitted, and the evidence supporting it, were untimely, unverifiable, or inappropriately submitted, or that taking Producers Rice's cooperation into account would cause the agency "undue difficulties." Instead, Economía "took into account" only the fact that Producers Rice lacked sales data that could be used to calculate a company-specific margin for the POI, and on that basis alone assigned it a facts available-based margin. In so doing, Economía breached paragraph 3 of Annex II.

176. Similarly, although the data submitted by Producers Rice could not be used to calculate an individual antidumping margin (since it had no shipments), there is no evidence that Producers Rice failed to "act to the best of its ability" in responding to the investigation questionnaire, and Economía cited none. Therefore, there was no justification for Economía to disregard the data, and its decision to do so breached paragraph 5 of Annex II.

177. Moreover, Economía never provided Producers Rice with any indications that its questionnaire response or the explanations and evidence provided therein were in any way unacceptable or unsatisfactory, and did not solicit any further explanations or evidence from the firm. In addition, Economía provided no explanations in the published final determination of its reasons for ignoring Producers Rice's cooperation. In this way, Economía breached paragraph 6 of Annex II.

178. Economía's application of an adverse facts available margin to Producers Rice also breached paragraph 7 of Annex II, in at least two ways. First, 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 than if the party did cooperate (*i.e.*, an adverse result). Read in the context of paragraph 5, 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. 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*.¹⁷⁴

179. Thus, Economía’s decision to assign an adverse facts available-based margin to Producers Rice breached the last sentence of paragraph 7.

180. Second, paragraph 7 of Annex II also contains the requirement to use “special circumspection” in basing findings on information from a secondary source such as the petition, and the requirement, “where practicable,” to check such information against other available data sources for accuracy.

181. The facts available rate that Economía assigned to Producers Rice was taken from the petition. While it may or may not have been acceptable to use the data contained in the petition for purposes of initiation (the United States takes no position on this issue), the data was not sufficient for purposes of the final determination.

182. For example, once actual sales and freight expense data specific to long-grain rice became available, there was no longer any justification for Economía to rely on demonstrably erroneous approximations to calculate a facts available Export Price.¹⁷⁵ Despite the fact that information placed on the record during the investigation had demonstrated that the information in the petition was either inaccurate or out-of-date, Economía applied the discredited petition margin to Producers Rice.

183. Because Economía failed to check the presumptions embodied in the petition against

¹⁷⁴ *United States – Hot-Rolled Steel AB*, para. 99.

¹⁷⁵ See notes 158-160 and accompanying text (regarding the calculation of Export Price in the petition).

independent data available during the investigation, much less to exercise “special circumspection” in its application of the petition information and presumptions, it breached paragraph 7 of Annex II. Finally, because Annex II is incorporated by reference into Article 6.8,¹⁷⁶ and because Economía failed to observe the provisions of Annex II, its application of an adverse margin to Producers Rice also breached Article 6.8.

184. Finally, Economía breached Articles 6.2 and 6.4 of the AD Agreement by failing to disclose to Producers Rice (and Farmers Rice, Riceland, and Rice Company) the Export Price information that the petitioner used in calculating the adverse facts available margin in the petition.

185. As previously discussed, the adverse facts available margin that Economía assigned to Producers Rice and the uninvestigated exporters and producers was taken from the petition. The export price component of that margin was based on an abstract (“*listado*”) of *pedimento* information that the CMA obtained from the Mexican Secretariat of the Treasury.¹⁷⁷ The abstracts were not, however, placed on the public record of the investigation.

186. Given the requirements of Article 6.4, Economía should have made the *listado* data available to Producers Rice (as well as Farmers Rice, Riceland, and Rice Company). The information was (1) relevant to the presentation of Producers Rice’s case, since it formed part of the petition margin that Economía applied to it and to the unexamined exporters and producers; (2) used by the authorities, for the reasons already stated; and (3) not confidential, since Economía provided it to the CMA. Accordingly, Producers Rice and the other U.S. exporters and producers were entitled to prepare presentations on the basis of the information, and Economía’s failure to give them an opportunity to do so breached Article 6.4 of the AD Agreement. Furthermore, by virtue of its breach of Article 6.4, Economía also breached Article 6.2 of the AD Agreement.¹⁷⁸

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

187. In light of the factual and legal bases set forth in the previous sections, Mexico breached numerous provisions of the AD Agreement by individually examining only three exporters or producers in the rice investigation and assigning an adverse facts available margin to every other

¹⁷⁶ See, e.g., Report of the Panel, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey (Egypt – Rebar)*, WT/DS211/R, adopted 1 October 2002, paras. 7.152-154 (citing *United States – Hot-Rolled Steel AB*, para. 75, for “incorporated by reference” and providing additional negotiating history of Annex II).

¹⁷⁷ See *supra*, para. 15; *Initiation Notice*, paras. 30 and 41 (Exhibits US-1&2).

¹⁷⁸ *EC – Pipe Fittings AB*, para. 149.

producer and exporter in the United States. The United States analyzes each of these breaches in greater detail below.

a. Articles 6.6, 6.10, 9.4, and 9.5

188. As discussed in detail above, Article 6.10 of the AD Agreement requires authorities either to determine an individual margin of dumping for each known exporter or producer or to select a more limited sample of such interested parties for examination in accordance with the second sentence of that Article. Economía made no effort to investigate each such exporter or producer, choosing instead to (i) send its questionnaire to just the two firms officially designated as exporters in the petition, (ii) investigate only those firms and two other firms that came forward on their own, and (iii) apply an adverse, facts available-based margin to every other producer and exporter in the United States. The United States submits that an objective and unbiased investigating authority would not have concluded that there were only two exporters or producers of long-grain white rice in the United States, that Economía's establishment of the facts with respect to this matter was improper, and that by conducting its investigation in this manner, Economía breached Article 6.10.

189. In addition, Article 6.6 of the AD Agreement requires that authorities "satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based." The petition identified only two U.S. exporters of long-grain milled white rice, and Economía apparently accepted that listing at face value (even though the petition itself relied upon data from another major exporter). Once again, an objective and unbiased investigating authority would not have reached such a conclusion, and Economía's establishment of the facts with respect to this matter was improper. For example, if Economía had wanted to, it could have consulted the "*pedimentos*" that Mexican Customs collects from importers. Had it done so, it would have been able to identify every exporter of long-grain white rice to Mexico during the POI.¹⁷⁹ But Economía took no such steps, and thereby breached Articles 6.6 and 6.10.

190. Also as discussed above, where an investigating authority limits its investigation in accordance with the second sentence of Article 6.10, the "all others" rate for exporters and producers that are not individually examined must be determined in accordance with Article 9.4 of the AD Agreement. The calculation method set forth in Article 9.4 of the AD Agreement establishes a "maximum limit, or ceiling" that investigating authorities "shall not exceed" in such circumstances.¹⁸⁰ Moreover, that calculation method does not allow the use of any margins

¹⁷⁹ As the Appellate Body stated in *United States – Wheat Gluten*, the "duties of investigation and evaluation preclude [the investigating authorities] from remaining passive in the face of possible shortcomings in the evidence submitted . . ." *United States – Wheat Gluten AB*, para. 55 (emphasis added).

¹⁸⁰ *United States – Hot-Rolled Steel AB*, para. 116.

established on the basis of the facts available.¹⁸¹ Because Economía ignored the Article 9.4 calculation method and instead applied a margin based entirely on adverse facts available to the non-examined producers and exporters, it breached Article 9.4.

191. Finally, as with Producers Rice, the consequence of Economía’s decision to “deem” every exporter or producer of long-grain white rice in the United States as having been “investigated” and, thus, “subject to the antidumping duties on the product,” is that no firm otherwise eligible for an expedited review under Article 9.5 of the AD Agreement will be able to receive one. In this manner, Economía has breached Article 9.5.

b. Articles 6.1, 6.2, and 6.8, and Paragraph 1 of Annex II

192. The right of exporters to know the allegations made against them and the “essential facts” under consideration by the investigating authority lie at the heart of many provisions within the AD Agreement. Article 6.1, for example, requires that “all interested parties” be given “notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.” Paragraph 1 of Annex II of the AD Agreement then reiterates this point by requiring investigating authorities to ensure that respondents receive proper notice of the rights of the investigating authorities to use the facts available.¹⁸² 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.”¹⁸³ Article 6.2 of the AD Agreement requires investigating authorities to give “all interested parties” a “full opportunity” to defend their interests. Article 6.4 of the AD Agreement requires investigating authorities, “whenever practicable,” to provide interested parties an opportunity to see non-confidential information that the authorities use and that is relevant to the presentation of their cases.¹⁸⁴

193. In the rice investigation, Economía only sent its antidumping questionnaire to the two rice exporters that the petitioners identified in the petition. All other producers and exporters in the United States were simply commanded in the initiation notice to “appear” before the authorities

¹⁸¹ *Id.* at para. 122.

¹⁸² *See id.* at para. 79 (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 . . .”).

¹⁸³ *Argentina – Ceramic Tiles*, para. 6.55.

¹⁸⁴ In the words of the Appellate Body, Article 6 of the AD Agreement “establishes a framework of procedural and due process protections” and “set[s] out evidentiary rules that apply *throughout* the course of the anti-dumping investigation, and provide[s] also for due process rights that are enjoyed by ‘interested parties’ *throughout* such an investigation.” 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*”), citing *Thai Steel AB*, para. 109, and *EC Bed Linen 21.5 AB*, para. 136.

in Mexico. Economía then applied an adverse, facts available-based margin to any firm that did not do so. By applying facts available to the unexamined firms when it never sent them copies of the antidumping questionnaire or took any other steps to ensure that they had received the notice that the AD Agreement requires, Economía breached Articles 6.1, 6.2, and 6.8 of the AD Agreement, and paragraph 1 of Annex II.

c. Paragraph 7 of Annex II

194. The United States explained above in Section V.E.2.c why Economía's application of an adverse, facts available-based margin taken from the petition to the fully cooperative firm Producers Rice was inconsistent with paragraph 7 of Annex II. Economía applied the same margin to the unexamined exporters and producers.

195. As was the case with respect to Producers Rice, there is no evidence on the record of the rice investigation to suggest that the unexamined exporters and producers – which were never sent a copy of Economía's antidumping questionnaire – were uncooperative in any way. Moreover, as previously explained, Economía failed to check the presumptions embodied in the petition against independent data available during the investigation, much less to exercise "special circumspection" in its application of the petition information to the unexamined producers and exporters. For both of these reasons, Economía's application of adverse facts available to the unexamined firms breached paragraph 7 of Annex II.

d. Article 12.1

196. Article 12.1 of the AD Agreement provides that when authorities are satisfied that there is sufficient evidence to justify initiating an antidumping investigation, "interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given" (emphasis added). As the panel noted in *Argentina – Poultry*, the textual distinction between the requirement to notify known interested parties and the requirement to give a public notice of the initiation demonstrates that simply publishing an initiation notice, without more, is not enough to meet the requirements of Article 12.1.¹⁸⁵ In *Argentina – Poultry*, Argentina defended its failure to give more detailed notice to certain interested parties by asserting that it lacked contact details for the exporters in question. The panel disagreed and found a breach of Article 12.1. After acknowledging that "knowledge of an exporter's interest in an investigation does not necessarily imply knowledge of contact details regarding that exporter," the panel nonetheless concluded:

In such circumstances, however, we consider that the nature of the Article 12.1 notification obligation is such that the investigating

¹⁸⁵ *Argentina – Poultry*, para. 7.133 (rejecting Argentina's contention that, by fulfilling the requirement to publish a notice of initiation of an investigation, it had fulfilled the requirement to notify).

authority should make all reasonable efforts to obtain the requisite contact details. Sending a letter [to the Brazilian Embassy in Argentina] with only a very general request for assistance, without specifying the exporters for which contact details are required, does not satisfy the need to make all reasonable efforts.¹⁸⁶

197. In the rice investigation, Economía's efforts to identify and obtain contact information for interested parties other than those listed in the petition were even more deficient than in the *Argentina – Poultry* case. As the United States discusses above, Economía failed to examine the accuracy and adequacy of the CMA's list of only two "known" exporters, a list that did not even include a third exporter, the Rice Company, whose website (portions of which were attached to the petition at Annex H) declares it to be "one of the largest U.S. exporters as regards paddy rice and white milled rice."¹⁸⁷ And it failed to consult the *pedimentos*, which would have identified every exporter during the POI. In this manner, Economía breached Article 12.1.

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

198. Article 12.2 requires that the public notice of any preliminary or final antidumping determination "shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." Despite this requirement, Economía provides no rationale whatsoever in the preliminary determination, and only the most summary rationale in the final determination, for its decision to base the margin for Producers Rice and the unexamined exporters and producers on adverse facts available; and not to calculate those margins in accordance with the neutral "cap" formula set forth in Article 9.4 of the AD Agreement.¹⁸⁸

199. The sole reference to this decision in the preliminary determination states:

¹⁸⁶ *Id.* at para. 7.132.

¹⁸⁷ It would not have been difficult for Economía to obtain contact information for other producers and exporters in the United States. For example, even if it had chosen not to consult the *pedimentos*, the USA Rice Federation publishes *The Rice Journal*, a guide to the U.S. rice industry that has been published since 1897. The 1999 and 2000 editions of the magazine included names, addresses, and phone numbers for every rice miller in the United States. The United States has attached the relevant pages of these publications to this submission as Exhibits US-18 and US-19, respectively.

¹⁸⁸ The notices do contain calculation details about how the "facts available" margin was calculated. This raises a separate concern, which the United States addresses elsewhere in this submission.

For the company Producers Rice Mill, Inc., and the other companies that did not appear in this phase of the investigation,¹⁸⁹ based on articles 6.8 of the Agreement on the Application of Article VI of the General Agreement on Tariffs and Trade 1994 and 54 of the Foreign Trade Law, the Ministry established the dumping margin of 10.18 percent applicable to long grain rice classified in the tariff section 1006.30.01 of the General Import Tax Law, calculated based on the information submitted by the petitioner, in accordance with the methodology described in items 36 to 54 of the Initiation Resolution of the investigation published in the Federation Official Gazette on December 11, 2000.¹⁹⁰

200. The final determination is not much more extensive:

Producers Rice Mill, Inc. stated that it did not make any export of the investigated product; therefore the Ministry qualified it according to the facts of which it had knowledge, which are described in paragraphs 138 to 157 of this determination.¹⁹¹

* * * *

For the company Producers Rice Mill, Inc, in accordance with paragraph 62 of this determination, and the other companies that did not appear in this phase of the investigation, in accordance with articles 6.8 of the Antidumping Agreement and 54 of the Foreign Trade Statute, the Ministry calculated the dumping margin applicable to long grain rice based on the information submitted by the petitioner, and in accordance with the methodology that is described in the following paragraphs and that corresponds to paragraphs 36 to 54 of the Initial Determination of the antidumping investigation published in the Federation Official Gazette dated December 11, 2000.¹⁹²

* * * *

¹⁸⁹ As the United States discussed in the previous section of this submission, the description of Producers Rice as a firm that “did not appear” was false. Producers Rice “appeared” before the investigating authority and certified that it had no exports to Mexico during the POI. *Preliminary Determination*, para. 36 (Exhibits US-14&15).

¹⁹⁰ *Id.* at para. 144.

¹⁹¹ *Final Determination*, para. 62 (Exhibits US-6&7).

¹⁹² *Id.* at para. 138.

For the company Producers Rice Mill, Inc., and the other companies that did not appear in this phase of the investigation, based on articles 6.8 of the Antidumping Agreement and [Article] 54 of the Foreign Trade Statute and in accordance with the statements made in paragraphs 138 to 156 of this determination, the Ministry determined that the dumping margin applicable to long grain rice is of 10.18 percent.¹⁹³

201. Furthermore, Economía's references to Article 54 of the Mexican Foreign Trade Act as a supposed basis for its decision to apply a facts available margin were unfounded, because the then-current version of Article 54 only provided for the application of the facts available when a firm failed to provide information requested in the antidumping questionnaire:

The Ministry may request the interested parties to produce evidence, information and data which it considers relevant, for which purpose the Ministry's questionnaires shall be used.

If the above request is not satisfied, the Ministry shall decide on the basis of the information available.¹⁹⁴

202. As already discussed, with the exception of Producers Rice (which *did* respond to the questionnaire), Economía never even sent the questionnaire to the firms that received the facts available-based margin.

203. In sum, Economía's preliminary and final determinations in the rice investigation failed to provide sufficient detail of the reasons why Economía calculated the antidumping margins for the uninvestigated firms on the basis of the facts available, and not on the basis of the neutral formula set forth in Article 9.4. In this manner, Economía breached Article 12.2 of the AD Agreement.

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

204. Article 9.3 of the AD Agreement states that "[t]he amount of anti-dumping duty shall not exceed the margin of dumping as established under Article 2." Article 2, in turn, outlines how an investigating authority must calculate the margin in the course of an investigation. Although the

¹⁹³ *Id.* at para. 157.

¹⁹⁴ *Notification of Laws and Regulations Under Article 18.5 of the Agreement*, G/ADP/N/1/MEX/1, at 6 (18 May 1995) ("*Mexico's 1995 WTO Notification*"). Subsequent amendment of the Foreign Trade Act did not affect Article 54. See *Mexico's 2003 WTO Notification*, at 8.

calculations described in Article 2 cannot be applied directly with respect to exporters not individually examined, the Article 9.4 “cap” does so indirectly by ensuring that margins calculated under Article 2 serve as the basis for the residual margins calculated in accordance with Article 9.4. Because Economía failed to calculate the residual margin on the basis of the neutral formula set forth in Article 9.4, the amount of the margin it assigned to Producers Rice and the unexamined exporters and producers exceeded the margin of dumping established under Article 2, and thus breached Article 9.3.

205. Finally, Article 1 of the AD Agreement provides that “[a]n antidumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement” (emphasis added; footnote omitted). Because Economía’s conduct of the rice investigation breached numerous other provisions of the AD Agreement, Economía also breached Article 1.

6. Economía Breached Article VI:2 of GATT 1994 By Levying an Antidumping Duty Greater Than the Margin of Dumping

206. Article VI:2 of GATT 1994 provides in pertinent part that:

In order to offset or prevent dumping, a contracting party may levy on any dumped product an antidumping duty not greater in amount than the margin of dumping in respect of such product. For purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1. . . .

207. As noted by the Panel in *U.S. – 1916 Act (EC)*, Article VI and the AD Agreement form an “inseparable package of rights and disciplines.”¹⁹⁵ Thus, “Article VI should not be interpreted in a way that would deprive it or the Anti-Dumping Agreement of meaning.”¹⁹⁶

208. As demonstrated in the immediately preceding sections of this submission, Economía impermissibly assigned an adverse margin to non-shipper Producers Rice and to the other non-examined companies in the rice investigation. As a result of the adverse assumptions made in assigning that margin to those companies, the antidumping duty levied on their products was “greater in amount than the margin of dumping in respect of such products” which could permissibly have been calculated in accordance with the provisions of the AD Agreement. Because the duties Mexico levied on these “all others” companies was, and continues to be,

¹⁹⁵ Panel Report, *United States – Anti-Dumping Act of 1916 (U.S. – 1916 Act (EC))*, WT/DS136/R, adopted September 26, 2000, para. 6.97 (quoting Report of the Appellate Body, *Argentina – Safeguard Measures on Imports of Footwear (Argentina – Footwear)*, WT/DS121/AB/R, adopted January 12, 2000, para. 81, which used this language to describe the relationship between Article XIX of GATT 1994 and the Safeguards Agreement).

¹⁹⁶ Panel Report, *U.S. – 1916 Act (EC)*, para. 6.97.

greater in amount than the appropriate margin of dumping, Mexico violated Article VI:2 of GATT 1994.

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

209. In this section, the United States will demonstrate that several provisions of Mexico’s Foreign Trade Act and one provision of its FCCP are inconsistent “as such” with Mexico’s obligations under the AD Agreement and the SCM Agreement. Each of the provisions at issue is inconsistent “as such” because it mandates action inconsistent with various provisions of one or both Agreements.

210. The first provision at issue is Article 53 of the Foreign Trade Act, which sets the deadlines for interested parties in antidumping investigations to respond to information requests. The second provision is Article 64 of the Foreign Trade Act, which codifies the “facts available” approach that Mexico applied in the rice investigation to Producers Rice and the unexamined exporters and producers. The third provision is Article 68 of the Foreign Trade Act, which requires reviews of exporters that were found not to be dumping in an investigation, and requires exporters seeking reviews to demonstrate that their volume of exports during the period of review was “representative.”

211. The next provision at issue is Article 89D of the Foreign Trade Act, which requires firms requesting expedited reviews to demonstrate that the volume of their exports during the period of review was “representative.” Article 89D is followed by Article 93V of the Foreign Trade Act, which provides for the application of fines on importers that enter products subject to antidumping and countervailing duty investigations while such investigations are underway.

212. Finally, the United States will discuss Article 366 of Mexico’s FCCP and Articles 68 and 97 of Mexico’s Foreign Trade Act, which 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.

1. The Legislation of a Member Breaches That Member’s WTO Obligations If the Legislation Mandates Action that Is Inconsistent with Those Obligations

213. It is well-established in GATT and WTO panel and Appellate Body practice that legislation of a Member breaches that Member’s WTO obligations if the legislation *mandates* action that is inconsistent with those obligations or precludes action that is consistent with those

obligations.¹⁹⁷

214. The Appellate Body has explained that “the concept of mandatory as distinguished from discretionary legislation was developed by a number of GATT panels as a threshold consideration in determining when legislation as such – rather than a specific application of that legislation – was inconsistent with a Contracting Party’s GATT 1947 obligations.”¹⁹⁸ This approach has continued under the WTO system, as panels and the Appellate Body have continued to apply the mandatory/discretionary distinction in considering whether a Member’s legislation is WTO-consistent.

2. Article 53 of the 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

215. Article 53 of the Foreign Trade Act establishes the deadlines for interested parties to respond to questionnaires in antidumping and countervailing duty investigations. Article 53 is inconsistent “as such” with Mexico’s obligations under Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement.

a. The Relevant Provisions of the AD and SCM Agreements

216. Article 6.1.1 of the AD Agreement provides as follows:

Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.¹⁵ Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

¹⁵ As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire

217. Article 12.1.1 of the SCM Agreement is identical in all relevant respects to Article 6.1.1 of the AD Agreement:

¹⁹⁷ See, e.g., Report of the Panel, *United States – Section 129 of the Uruguay Round Agreements Act*, WT/DS221/R, adopted August 30, 2002, para. 6.22 (stating that “[i]t is clear to us that a Member may challenge, and a WTO panel rule against, a statutory provision of another Member ‘as such’ . . . , provided the statutory provision ‘mandates’ the Member either to take action which is inconsistent with its WTO obligations or not take action which is required by its WTO obligations.”) (footnotes omitted).

¹⁹⁸ Reports of the Appellate Body, *United States - Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, para. 88 (“*U.S. 1916 Act AB Report*”).

Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply.⁴⁰ Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

⁴⁰ As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire

218. Thus, under both provisions, a Member must provide a respondent at least 30 days to respond to an antidumping or countervailing duty questionnaire (counted from the date of receipt), and an investigating authority should, after due consideration, grant extensions of this time period, upon cause shown, “whenever practicable.”

b. Article 53 is Inconsistent “As Such” with Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement

219. Article 53 of the 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. Article 53 provides that:

The interested parties shall submit their arguments, information and evidence in conformity with the applicable legislation, within a period of 28 days from the day following the publication of the initiating resolution.¹⁹⁹

220. The language of the provision is straightforward, and mandatory: Interested parties “shall” submit their questionnaire responses within 28 days after the investigating authority publishes its initiation notice. Although the 28 days referenced in the Foreign Trade Act are working days (the AD and SCM Agreements refer to calendar days), this provision breaches WTO rules in two ways.

221. First, Article 53 counts the 28 days from the date the initiation notice is published, and not from the date of receipt of the questionnaire. Therefore, since Mexico only sends the questionnaire to the producers or exporters that the petitioner chooses to name in the petition, Article 53 will normally preclude Economía from providing any other exporters or producers the 30 days to respond that Articles 6.1.1 and 12.1.1 require.

¹⁹⁹ *Mexico’s 2003 WTO Notification*, at 8. The Spanish text of the provision reads “Dentro de los 28 días contados a partir del día siguiente a aquel en que se publique la resolución de inicio, las partes interesadas deberán presentar los argumentos, información y pruebas conforme a lo previsto en la legislación aplicable.”

222. Second, Article 53 provides the investigating authorities with no discretion to extend the 28 day time frame for any reason. It also leaves the authorities with no ability to give “due consideration” to extension requests, much less to grant them, whether practicable or not.

223. For these reasons, Article 53 of the Foreign Trade Act is inconsistent “as such” with Mexico’s obligations under Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement.

3. Article 64 of the 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

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

225. Article 64 reads in pertinent part as follows:

. . . . The Ministry shall determine a countervailing duty on the basis of the highest margin of price discrimination or subsidization obtained from the facts available, in the following cases:

- I. When the producers fail to appear at the investigation; or
- II. When the producers fail to provide the information in a proper and timely fashion, significantly impede the investigation, or supply information or evidence that is incomplete, incorrect or does not derive from their accounts, thus preventing the determination of an individual margin of price discrimination or subsidization;
or

- III. When the producers have not exported the product subject to investigation during the investigation period.

The facts available shall be understood to mean those substantiated by evidence and data provided by the interested parties or additional parties in a proper and timely fashion, and by the information gathered by the investigating authority.²⁰⁰

a. Article 64 is Inconsistent “As Such” with Article 9.4 of the AD Agreement

226. Article 9.4 of the AD Agreement provides for the application of a neutral “all others” margin to producers and exporters that are not individually examined in an antidumping investigation and that do not receive their own individual calculated margins. Normally, the application of Article 9.4 will yield a margin no higher than the weighted average of the margins for the examined respondents.

227. Article 64 of the Foreign Trade Act requires the Mexican administering authority to breach this provision, because it requires the authority to blindly apply the highest margin obtained from the facts available to at least two categories of firms that should receive the neutral

²⁰⁰ See Mexico’s 2003 WTO Notification, at 8-9 (emphasis added). The equivalent Spanish text reads:

La Secretaría determinará una cuota compensatoria con base en el margen de discriminación de precios o de subvenciones más alto obtenido con base en los hechos de que se tenga conocimiento, en los siguientes casos:

I. Cuando los productores no comparezcan en la investigación; o

II. Cuando los productores no presenten la información requerida en tiempo y forma, entorpezcan significativamente la investigación, or presenten información or pruebas incompletas, incorrectas or que no provengan de sus registros contables, lo cual no permita la determinación de un margen individual de discriminación de precios o de subvenciones; o

III. Cuando los productores no hayan realizado exportaciones del producto objeto de investigación durante el período investigado.

Se entenderá por los hechos de que se tenga conocimiento, los acreditados mediante las pruebas y datos aportados en tiempo y forma por las partes interesadas, sus coadyuvantes, así como por la información obtenida por la autoridad investigadora.

Id. (Spanish) at 9-10. In Mexico’s WTO notifications, the term “cuota compensatoria,” applicable both in an AD and a CVD context, has been translated as “countervailing duty.” A more appropriate, if literal, translation would be “compensatory duty”.

all other's margin.

228. First, Article 64 requires the investigating authority to apply the highest margin to firms that are never even sent a questionnaire (on the grounds that the firms have “failed to appear.”) However, if a firm is never sent a questionnaire, then it is not part of the investigation in the first instance, and it should receive a neutral all others rate calculated in accordance with Article 9.4.

229. Second, Article 64 requires the investigating authority to apply the highest margin to firms – like Producers Rice – that cooperate fully in the investigation and demonstrate that they did not ship the subject merchandise to Mexico during the POI. But if the absence of shipments leads the investigating authority to exclude a firm from further investigation, then the firm should receive the neutral all others margin, not a margin based on the highest facts available.

230. By requiring the Mexican investigating authority to apply adverse facts available in both of these scenarios, Article 64 of the Foreign Trade Act is inconsistent “as such” with Article 9.4 of the AD Agreement.

b. Article 64 is Inconsistent “As Such” with Article 6.8 and paragraphs 1, 3, 5, and 7 of Annex II of the AD Agreement, and with Articles 12.7 and 19.3 of the SCM Agreement

231. Article 64 of the Foreign Trade Act is also inconsistent “as such” with Article 6.8 of the AD Agreement and paragraphs 1, 3, 5, and 7 of Annex II. By requiring the investigating authority to apply the highest margin of dumping obtained from the facts available to (a) unexamined exporters and producers; and (b) firms that participate in an antidumping investigation and prove that they had no exports during the POI, Article 64 prohibits the investigating authority from making and applying the case-specific judgments that Annex II of the AD Agreement requires, and otherwise prohibits compliance with Article 6.8.

232. For example, paragraph 1 of Annex II requires investigating authorities to “specify in detail the information required from any interested party,” and to “ensure that the party is aware” that if the information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available. . . .” In short, Paragraph 1 requires authorities to provide a questionnaire to interested parties from which it is seeking information, and to “ensure” that each such party is aware of the consequences of not responding to that questionnaire. Article 64, however, requires the investigating authority to apply the “highest” margin to any party that “does not appear,” even if it never sent the party a copy of the questionnaire. By requiring the investigating authority to apply the facts available in this manner, Article 64 breaches paragraph 1 of Annex II.

233. Similarly, paragraphs 3 and 5 of Annex II require investigating authorities to “take[] into account” timely, verifiable information, even when it is not “ideal in all respects.” Article 64, by

contrast, requires the use of the highest margin for any company that does not receive a calculated company-specific margin, thus precluding the investigating authority from taking such information into account. Moreover, it requires this outcome even for firms – such as Producers Rice – that have acted to the best of their ability and demonstrated that they had no exports during the POI. By requiring the investigating authority to disregard such information, Article 64 breaches paragraphs 3 and 5 of Annex II.

234. In addition, paragraph 7 of Annex II authorizes the use of facts that are “less favourable” to a party (*i.e.*, adverse) only when the party “does not cooperate and thus relevant information is being withheld from the authorities.” Article 64 of the Foreign Trade Act breaches this limitation in at least two respects. First, if an investigating authority fails to send a copy of its questionnaire to a particular firm, there will be no factual basis to conclude that the firm has failed to cooperate or that it is withholding relevant information if it fails to “appear.” Nevertheless, subparagraph I of Article 64 will require the investigating authority to apply the highest adverse facts available to that firm.

235. Second, if a firm participates fully in an investigation and demonstrates that it had no shipments of subject merchandise during the period of investigation, then the firm has not failed to cooperate, and it has not withheld relevant information from the authorities. Nevertheless, subparagraph III of Article 64 would require application of the highest margin of dumping or subsidization to that firm.

236. Therefore, in both cases, Article 64 breaches paragraph 7 of Annex II.

237. Furthermore, it is not just subparagraphs I and III of Article 64 that breach Article 6.8 and Annex II; subparagraph II of Article 64 does so as well. The first part of Paragraph 7 of Annex II requires authorities to use “special circumspection” when applying the facts available and, where practicable, to “check” information from secondary sources such as the petition. This requirement applies even when the secondary source information is being used for an adverse margin applied to an uncooperative respondent. Because all three subparagraphs of Article 64 require authorities instead to blindly apply the highest margin on the record of the investigation, without regard to such corroboration, all three subparagraphs of Article 64 breach Paragraph 7 of Annex II.

238. The same principle applies to Article 12.7 of the SCM Agreement, the “facts available” provision of that Agreement. Although the SCM Agreement does not include an explicit set of rules, comparable to Annex II in the AD Agreement, for application of the facts available, that absence does not relieve an investigating authority of the duty to act in an objective and unbiased manner in implementing that provision. Article 64 deprives the investigating authority of discretion to evaluate the quality of the “facts available” margins contained in the petition in view of information obtained in the course of the proceeding, and of the discretion to evaluate the appropriateness of using adverse facts available for parties which were cooperative during the

proceeding. Thus, Article 64 of the Foreign Trade Law breaches Article 12.7 of the SCM Agreement.

239. Finally, Article 19.3 of the SCM Agreement requires any countervailing duty to be levied “in the appropriate amounts in each case.” Nothing in the SCM Agreement justifies a determination that the “appropriate amount” of duty for parties that have not shipped or that have not even been asked to respond to a questionnaire is necessarily the highest margin of subsidization suggested by, for example, the petitioning industry. By requiring the administering authority to blindly apply the highest margin of subsidization to such firms, Article 64 of the Foreign Trade Act breaches Article 19.3 of the SCM Agreement.

c. Article 64 is Inconsistent “As Such” with Articles 9.3 and 9.5 of the AD Agreement, and with Article 19.3 of the SCM Agreement

240. In addition to the provision discussed immediately above, Article 19.3 of the SCM Agreement also contains a provision for expedited reviews of exporters who were not actually investigated in the original investigation “for reasons other than a refusal to cooperate.” Neither a firm like Producers Rice (which is sent a questionnaire and reports that it had no sales during the POI) nor a firm that is never sent the questionnaire in the first place can objectively be described as having “refused” to cooperate. Nevertheless, since Article 64 of the Foreign Trade Act “deems” these firms to have been investigated, treats them as having failed to cooperate, and requires the investigating authority to apply the highest margin of facts available to them, they will not be eligible to receive an expedited review. By precluding such firms from receiving reviews, Article 64 of the Foreign Trade Act breaches Article 19.3 of the SCM Agreement.

241. Furthermore, Article 9.5 of the AD Agreement provides for expedited reviews of exporters and producers that did not export during the POI if they are not related to an exporter or producer that is subject to the duties on the product. Article 64 of the Foreign Trade Act breaches that provision because it requires the investigating authorities to blindly apply the highest margin of dumping even to firms that did not export. Since those firms are also “deemed” to be have been investigated, and thus “subject to the antidumping duties” on the product, they will not qualify for an expedited review either.²⁰¹

242. Finally, Article 9.3 of the AD Agreement provides that the amount of any antidumping duty shall not exceed the margin of dumping as established under Article 2. By requiring the administering authority to blindly apply the highest margin of dumping to unexamined firms and firms with no shipments during the POI instead of a neutral margin calculated in accordance with

²⁰¹ This problem is compounded by the requirement in Article 68 of the Foreign Trade Act, which the United States is challenging in its own right below, that firms seeking expedited reviews must demonstrate that their volume of exports during the period of review was “representative.”

Article 9.4 of the AD Agreement, Article 64 requires the investigating authority to apply an excessive amount of duties, and thereby breaches Article 9.3.

4. Article 68 of the Foreign Trade Act is Inconsistent “As Such” with Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement

243. Article 68 of the Foreign Trade Act is the provision of Mexican law that applies to the review of final antidumping and countervailing duty margins determined in investigations. By requiring investigating authorities to conduct reviews of producers that were found not to be dumping or receiving countervailable subsidies during the original investigation, Article 68 is inconsistent with Mexico’s obligations under Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement.

a. The Relevant Provisions of the AD and SCM Agreements

244. Article 5.8 of the AD Agreement reads in pertinent part that:

An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis* . . .

245. Article 11.9 of the SCM Agreement is identical in all relevant respects to Article 5.8 of the AD Agreement:

An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is *de minimis* . . .

b. Article 68 is Inconsistent “As Such” with Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement

246. Article 68 of the Foreign Trade Act is inconsistent as such with Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement, because it requires the investigating authorities to conduct reviews of producers that were found not to be dumping or receiving countervailable subsidies during antidumping and countervailing duty investigations. Article 68

reads in pertinent part as follows:

Final countervailing duties shall be reviewed annually at the request of a party or *ex officio* by the Ministry at any time, as shall imports from producers for whom no positive margin of price discrimination or subsidization was determined in the investigation. . . .²⁰²

247. As noted above, however, Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement require Members to terminate investigations *immediately* when they determine that the margin of dumping or subsidy is *de minimis* or less. By requiring the Mexican investigating authority to review imports from producers that they previously investigated and found not to be dumping or receiving countervailable subsidies, Article 68 is inconsistent with both provisions.

5. Article 68 of the Foreign Trade Act is Inconsistent “As Such” with Articles 9.3 and 11.2 of the AD Agreement, and with Article 21.2 of the SCM Agreement

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

a. The Relevant Provisions of the AD and SCM Agreements

249. Article 9.3 of the AD Agreement reads in pertinent part as follows:

The amount of anti-dumping duty shall not exceed the margin of dumping as established under Article 2.

* * * * *

When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping.

²⁰² See Mexico’s 2003 WTO Notification, at 9 (emphasis added). The equivalent Spanish text reads: “Las cuotas compensatorias definitivas deberán revisarse anualmente a petición de parte o en cualquier tiempo de oficio por la Secretaría, al igual que las importaciones provenientes de productoras a quienes en la investigación no se les haya determinado un margen de discriminación de precios o de subvenciones positivo. . . .” *Id.* (Spanish) at 10.

A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.²⁰³

250. Article 11.2 of the AD Agreement reads as follows:

The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result, of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

251. Article 21.2 of the SCM Agreement is virtually identical to Article 11.2 of the AD Agreement:

The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result, of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

b. Article 68 of the Foreign Trade Act is Inconsistent “As Such”

²⁰³ Articles 9.3 and 9.3.2 of the AD Agreement.

**with Articles 9.3 and 11.2 of the AD Agreement and Article
21.2 of the SCM Agreement**

252. Article 68 of the Foreign Trade Act is inconsistent “as such” with Articles 9.3 and 11.2 of the AD Agreement and Article 21.1 of the SCM Agreement because it limits access to administrative reviews in a WTO-inconsistent manner. Article 68 states in pertinent part that:

The party requesting a review shall satisfy the Ministry that the volume of exports to Mexico during the review period is representative.²⁰⁴

253. The language of Article 68 is mandatory: parties seeking reviews of antidumping or countervailing duty margins “shall” demonstrate that the volume of their exports during the review period was “representative.” However, neither Articles 9.3 and 11.2 of the AD Agreement nor Article 21.2 of the SCM Agreement permit a Member to impose a “representativeness” requirement as a condition for obtaining a review. The right to obtain a refund under Article 9.3.2 arises when a party that has paid “any” amount of duty in excess of the margin of dumping makes a “request for a refund, duly supported by evidence,” and not just when the party has paid such duties on a “representative” amount of exports.

254. Similarly, Article 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement give interested parties the “right” to obtain a review to determine “whether the continued imposition of the duty is necessary to offset dumping or subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both.” The only conditions precedent in Article 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement are that a “reasonable period of time” have elapsed since the imposition of the definitive duty, and that the requesting party submit “positive information substantiating the need for a review.” Nothing in Articles 11.2 and 21.2 conditions a party’s ability to exercise this right on a previous demonstration that it had a “representative” amount of exports during the period of review. Thus, by requiring the Mexican investigating authority to deny a review unless a party demonstrates that its exports were “representative,” Article 68 is inconsistent “as such” with the AD and SCM Agreements.

255. For both of these reasons, Article 68 of the Foreign Trade Act is inconsistent “as such” with Mexico’s obligations under Articles 9.3 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement.

6. Article 89D of the Foreign Trade Act is Inconsistent “As Such” with

²⁰⁴ See Mexico’s 2003 WTO Notification, at 9. The equivalent Spanish text reads: “La solicitante de una revisión deberá demostrar ante la Secretaría que el volumen de las exportaciones realizadas a México durante el período de revisión es representativo.” *Id.* (Spanish) at 10.

Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement

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

a. The Relevant Provisions of the AD and SCM Agreements

257. Article 9.5 of the AD Agreement reads in pertinent part as follows:

If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. . . .

258. Similarly, Article 19.3 of the SCM Agreement provides in pertinent part that:

Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

259. Thus, a producer or exporter is entitled to an expedited review under Article 9.5 of the AD Agreement if it meets two conditions: (1) it must not have exported the product to the importing Member during the period of investigation; and (2) it must not be related to any of the exporters or producers that are subject to the antidumping duty measure. Article 19.3 of the SCM Agreement provides for an expedited review when a producer or exporter was not investigated in the original countervailing duty investigation, for reasons other than a refusal to cooperate.

b. Article 89D is Inconsistent “As Such” with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement

260. Article 89D of the Foreign Trade Act is inconsistent “as such” with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement because it impermissibly limits access to expedited reviews. Article 89D reads as follows:

Article 89D – Producers of goods subject to a final countervailing duty who exported no such goods during the period under investigation in the proceedings that gave rise to such duty may request the Ministry to initiate a procedure for new exporters with a view to assessing individual margins of price discrimination, provided that:

I. Their exports to the national territory of the goods subject to countervailing duties were subsequent to the period under investigation in the proceedings that gave rise to the countervailing duty. The requesting party shall satisfy the Ministry that the volume of exports during the period of review is representative; and

II. They show that they are not related in any way to the producers or exporters in the exporting country determined to be subject to a specific countervailing duty.²⁰⁵

261. Article 89D is inconsistent with Article 9.5 of the AD Agreement in at least two ways. First, Article 89D requires a producer to demonstrate that the volume of exports during the

²⁰⁵ *Mexico's 2003 WTO Notification*, at 12. The Spanish text of the provision reads:

ARTICULO 89 D - Los productores cuyas mercancías estén sujetas a una cuota compensatoria definitiva y que no hayan realizado exportaciones de esas mercancías durante el período investigado en el procedimiento que dio lugar a la cuota compensatoria de que se trate, podrán solicitar a la Secretaría el inicio de un procedimiento para nuevos exportadores a efecto de que ésta se pronuncie sobre los márgenes individuales de discriminación de precios, siempre que:

I. Hayan efectuado operaciones de exportación al territorio nacional de la mercancía objeto de cuotas compensatorias con posterioridad al período investigado en el procedimiento que dio lugar a la cuota compensatoria de que se trate. La parte solicitante deberá demostrar ante la Secretaría que el volumen de las exportaciones realizadas durante el período de revisión son representativas; y

II. Demuestren que no tienen vinculación alguna con los productores o exportadores del país exportador a quienes se les haya determinado cuota compensatoria específica.

Id. (Spanish) at 13-14.

review period was “representative.” There is no such requirement in Article 9.5. Second, Article 89D only permits producers to receive expedited reviews. Article 9.5, however, explicitly allows both producers and non-producing exporters to receive them.

262. Article 89D is also inconsistent with Article 19.3 of the SCM Agreement. As previously stated, a producer or exporter that was not investigated in the original countervailing duty investigation for reasons other than a refusal to cooperate may receive an expedited review under Article 19.3. Under Article 89D, however, in order to obtain such a review, a producer must also demonstrate that the volume of its exports was representative. This condition is not permitted under Article 19.3 of the SCM Agreement. In addition, as with Article 9.5 of the AD Agreement, the provision is inconsistent with Article 19.3 of the SCM Agreement because it only permits producers – and not non-producing exporters – to obtain reviews.

263. For these reasons, Article 89D of the Foreign Trade Act is inconsistent “as such” with Mexico’s obligations under Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement.

7. Article 93V of the Foreign Trade Act is Inconsistent “As Such” with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement

264. Article 93V of the Foreign Trade Act is a provision of Mexican law that requires the Mexican investigating authority to impose fines on importers that import goods that are like or identical to goods subject to an antidumping or countervailing duty investigation. For the following reasons, Article 93V constitutes a non-permissible specific action against dumping or a subsidy that is inconsistent with Mexico’s obligations under Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement.

a. The Relevant Provisions of the AD and SCM Agreements

265. Article 18.1 of the AD Agreement reads as follows:

No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement. (Footnote omitted.)

266. Similarly, Article 32.1 of the SCM Agreement reads as follows:

No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement. (Footnote omitted.)

267. In *United States – Continued Dumping and Subsidy Offset Act* (“CDSOA”), the Appellate Body analyzed Articles 18.1 and 32.1 and explained that the provisions establish two conditions that must be met for a measure to be governed by them. First, the measure must be “specific” to dumping or subsidization. Second, the measure must be “against” dumping or subsidization. If both of these conditions are met, then the measure falls within the scope of the prohibition contained in the provisions, and one must then determine whether the measure has been “taken in accordance with the provisions of GATT 1994,” as interpreted by the relevant Agreement. If the measure has not been so taken, then it would be inconsistent with Article 18.1 of the AD Agreement or Article 32.1 of the SCM Agreement, as the case may be.²⁰⁶

b. Article 93V is Inconsistent “As Such” with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement

268. Article 93 of the Foreign Trade Act is a provision that requires the Mexican Ministry to punish certain activities under Mexican law. Article 93V pertains in particular to the punishment of those who import goods that are like or identical to goods subject to an antidumping or countervailing duty investigation. Article 93 provides in pertinent part that:

It shall be the responsibility of the Ministry to punish the following infringements:

* * *

- (V) Importation, once the investigation is under way, of identical or like goods in significant quantities, as compared to total imports and domestic production, within a relatively short period, when in the light of the timing and the volume of the imports and other circumstances such imports are considered likely to undermine the remedial effect of the countervailing duty: by a fine equivalent to the amount resulting from the application of the final countervailing duty to the imports entered for up to five months following the date of initiation of the investigation. This penalty shall only be applied once the Ministry has issued the resolution determining the final countervailing duties²⁰⁷

²⁰⁶ Report of the Appellate Body, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217, 234/AB/R, adopted January 27, 2003, paras. 224-236 (“*United States – CDSOA*”).

²⁰⁷ See *Mexico’s 1995 WTO Notification*, at 12; *Mexico’s 2003 WTO Notification*, at 14. The Spanish text of the provision, as amended, reads:

Corresponde a la Secretaría sancionar las siguientes infracciones:

(continued...)

As the United States explains below, the action that Article 93V requires the Mexican Ministry to take constitutes a specific action against dumping or subsidization, in a manner that does not accord with GATT 1994, as interpreted by the AD and SCM Agreements.

i. Article 93V Is “Specific” to Dumping or Subsidization

269. The Appellate Body set out its understanding of the phrase “specific action against dumping” in *United States – CDSOA*:

In our view, the ordinary meaning of the term “specific action against dumping” of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of “dumping.” “Specific action against dumping” of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of “dumping” are present.²⁰⁸ (Footnote omitted.)

270. The Appellate Body further explained that:

a measure that may be taken only when the constituent elements of dumping or a subsidy are present, is a “specific action” in response to dumping within the meaning of Article 18.1 . . . or a “specific action” in response to subsidization within the meaning of Article 32.1 In other words, the measure must be inextricably linked to, or have a strong correlation with, the constituent elements of dumping or of a subsidy. Such link or correlation may . . . be

²⁰⁷ (...continued)
* * * *

Importar, una vez iniciada la investigación, mercancías idénticas o similares en volúmenes significativos, en relación con el total de las importaciones y la producción nacional, en un período relativamente corto, cuando por su temporalidad, su volumen y otras circunstancias, se considere probable que socaven el efecto reparador de la cuota compensatoria, con una multa equivalente al monto que resulte de aplicar la cuota compensatoria definitiva a las importaciones efectuadas hasta por los cinco meses posteriores a la fecha de inicio de la investigación respectiva. Esta sanción sólo será procedente una vez que la Secretaría haya dictado la resolución en la que se determinen cuotas compensatorias definitivas

Id. (Spanish) at para. 15.

²⁰⁸ *United States – CDSOA*, para. 238. The Appellate Body also stated that “[g]iven that Article 18.1 of the *Anti-Dumping Agreement* and 32.1 of the *SCM Agreement* are identical except for the reference in the former to dumping, and in the latter to a subsidy, we are of the view that this finding is pertinent to both provisions.” *Id.*

derived from the text of the measure itself.²⁰⁹

271. On its face, Article 93V is “specific” to the activity of dumping or subsidization. First, the provision explicitly applies only to the importation of goods that are like or identical to those subject to an ongoing antidumping or countervailing duty investigation. Second, the fine that the Ministry must impose in accordance with the provision is specifically tied to the amount of compensatory duties calculated during that investigation. Third, the fine can be collected *only* after issuance of an antidumping or countervailing duty order. Fourth, an antidumping or countervailing duty order can be issued *only* after a determination that the constituent elements of dumping or subsidization do in fact exist. For all of these reasons, there is a “clear, direct and unavoidable connection” between the determination that the constituent elements of dumping or subsidization exist and the imposition of a fine under Article 93V.²¹⁰ Therefore, Article 93V is “specific action” related to dumping or a subsidy within the meaning of Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement.

ii. Article 93V Is “Against” Dumping or Subsidization

272. Article 93V is also “against” dumping or subsidization. In *United States – CDSOA*, the Appellate Body found that the *Continued Dumping and Subsidy Offset Act* was a measure “against” dumping and subsidization even though there was no direct contact between the measure and the imported good or entity responsible for the dumped or subsidized good. In the words of the Appellate Body, “there is no requirement that the measure must come into direct contact with the imported product, or entities connected to, or responsible for, the imported good such as the importer, exporter, or producer.”²¹¹ In the view of the Appellate Body, it was enough that the measure had an “adverse bearing” on dumping and subsidization and that it created an incentive to terminate such practices.²¹²

273. If the *Continued Dumping and Subsidy Offset Act* was “against” dumping and subsidization, then Article 93V is even more so. Here, the measure *does* come into direct contact with the “entities connected to, or responsible for,” the imported good. The connection is self-evident. Section 93V comes into direct contact with the importers of the dumped or subsidized goods because they must pay the fine. It comes into direct contact with the foreign producers and exporters of the goods because the risk of the fine will dissuade importers from purchasing their goods. And the fines are only applied if the foreign producer or exporter has been found to be dumping or to have received countervailable subsidies. The operation of the provision will thus dissuade the practice of dumping or subsidization. Accordingly, Article 93V is “against” dumping or subsidization.

²⁰⁹ *Id.* at para. 239.

²¹⁰ *Compare id.* at para. 242.

²¹¹ *Id.* at para. 253.

²¹² *Id.* at para. 256.

iii. Article 93V Is Not “In Accordance with the Provisions of GATT 1994,” as Interpreted by the AD and SCM Agreements

274. Article 93V is not in accordance with the provisions of GATT 1994, as interpreted by the AD and SCM Agreements. In *United States – CDSOA*, the Appellate Body stated that “to be in accordance with Article VI of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*,” a response to dumping must take the form of definitive anti-dumping duties, provisional measures, or price undertakings.²¹³ The Appellate Body further stated that “to be in accordance with the GATT 1994, as interpreted by the SCM Agreement,” a response to subsidization must take the form of definitive countervailing duties, provisional measures, price undertakings, or multilaterally-sanctioned countermeasures under the WTO dispute settlement system.²¹⁴ None of these responses encompasses the imposition of a fine. Therefore, in light of the Appellate Body’s findings in *United States – CDSOA*, Article 93V is not in accordance with the provisions of GATT 1994, as interpreted by the AD and SCM Agreements.

275. Thus, Article 93V of the Foreign Trade Act is a non-permissible specific action against dumping or a subsidy, contrary to Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement.

8. Article 366 of Mexico’s FCCP and Articles 68 and 97 of Mexico’s Foreign Trade Act 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

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

a. The Relevant Provisions of the AD and SCM Agreements

277. Article 9.3 of the AD Agreement reads in pertinent part as follows:

The amount of anti-dumping duty shall not exceed the margin of

²¹³ *Id.* at para. 269.

²¹⁴ *Id.* at para. 269.

dumping as established under Article 2.

* * * * *

When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.²¹⁵

278. Article 9.5 of the AD Agreement reads in pertinent part as follows:

If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. . . .

279. Similarly, Article 19.3 of the SCM Agreement provides in pertinent part that:

Any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter.

280. Article 11.2 of the AD Agreement reads as follows:

The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided

²¹⁵ Articles 9.3 and 9.3.2 of the AD Agreement.

that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result, of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

281. Article 21.2 of the SCM Agreement is virtually identical to Article 11.2 of the AD Agreement:

The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive countervailing duty, upon request by any interested party which submits positive information substantiating the need for a review. Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset subsidization, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result, of the review under this paragraph, the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.

b. Article 366 and Articles 68 and 97 are Inconsistent with AD Agreement Articles 9.3, 9.5, and 11.2, and SCM Agreement Articles 19.3 and 21.2

282. Article 366 of the FCCP and Articles 68 and 97 of the Foreign Trade Act are inconsistent with AD Articles 9.3, 9.5, and 11.2, and SCM Agreement Articles 19.3 and 21.2, because they preclude the Mexican investigating authorities from conducting the reviews that those provisions require. Article 366 reads as follows:

The process will be suspended, when a decision cannot be reached until a resolution in another matter is made, and in any other

special case determined by the Law.²¹⁶

283. Article 68 of the Foreign Trade Act reads in pertinent part:

Final countervailing duties shall be reviewed annually at the request of a party . . . as shall imports from producers for whom no positive margin of price discrimination or subsidization was determined in the investigation. . . .²¹⁷

284. Article 97 of the Foreign Trade Act reads:

Any interested party may, in respect of the resolutions and actions referred to in Article 94, paragraph (V),²¹⁸ choose to resort to the alternative dispute settlement mechanisms If such mechanisms are chosen:

* * * *

II. Only the resolution issued by the Ministry as a result of the decision emanating from the alternative mechanisms shall be considered final;

* * * *

285. By its terms, Article 366 of the FCCP requires Mexico to “suspend” any reviews of antidumping and countervailing duties while the orders imposing those duties are subject to judicial (including binational panel) review, because it is not possible to reach a decision in such reviews until the court action resolves whether the order was properly imposed.

286. Similarly, Article 68 of the Foreign Trade Act only allows for the review of “final” duties, and under Article 97 of the Foreign Trade Act, only determinations issued at the end of a judicial proceeding (including a “binational panel” review) can be considered “final.” The preclusion of reviews applies not only to the exporters or producers that are plaintiffs in the judicial action, but also to all other producers and exporters that are subject to the antidumping or countervailing

²¹⁶ El proceso se suspenderá, cuando no pueda pronunciarse la decisión, sino hasta que se pronuncie una resolución en otro negocio, y en cualquier otro caso especial determinado por la ley.

²¹⁷ See Mexico's 2003 WTO Notification, at 9 (emphasis added). The equivalent Spanish text reads: “Las cuotas compensatorias definitivas deberán revisarse anualmente a petición de parte o en cualquier tiempo de oficio por la Secretaría, al igual que las importaciones provenientes de productoras a quienes en la investigación no se les haya determinado un margen de discriminación de precios o de subvenciones positivo. . . .” *Id.* (Spanish) at 10.

²¹⁸ Article 94, paragraph (V) refers to resolutions “[f]ixing the final countervailing duty or the actions by which it is implemented.”

duties (which, given Mexican practice, means every producer or exporter of the product in the country subject to the order). On this basis, Mexico has denied several requests by U.S. producers and exporters to obtain reviews of the duties applied to their exports.²¹⁹

287. As a legal matter, the various WTO review provisions set out above do not permit investigating authorities to refuse reviews on such grounds. Article 9.5 of the AD Agreement, for example, requires investigating authorities to “promptly carry out a review” to determine individual margins of dumping for new shippers who meet the specified criteria, and Article 19.3 of the SCM Agreement entitles “any” exporter whose exports are subject to a definitive duty and who meets the article’s other criteria to receive an expedited review. Nothing in either article entitles a Member to deny a review simply because that party or another party has requested a judicial review of the underlying antidumping or countervailing duty measure imposing the duties. Therefore, Articles 68 and 97 of the Foreign Trade Act and Article 366 of the FCCP breach Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement.

288. Similarly, Articles 11.2 of the AD Agreement and 21.2 of the SCM Agreement each state that Members “shall” conduct reviews of definitive anti-dumping and countervailing duties, “upon request,” after a reasonable period of time. Although both provisions permit a Member to require the requesting party to substantiate the need for a review, neither provision allows a Member to refuse a review on the grounds that the antidumping or countervailing duty measure is subject to judicial review. By requiring Mexican authorities to refuse reviews on such grounds, Articles 68 and 97 of the Foreign Trade Act, and Article 366 of the FCCP, breach Article 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement.

289. Finally, Article 9.3.2 of the AD Agreement states that Members “shall” provide for “a prompt refund, upon request, of any duty paid in excess of the margin of dumping.” Mexico, however, asserts that Article 366, Article 68, and Article 97 preclude it from doing so. For this reason, the provisions are inconsistent with Article 9.3.2.

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

²¹⁹ An example of one such denial is attached hereto as Exhibit US-20.

take years.²²⁰

VI. CONCLUSION

291. For the foregoing reasons, the United States respectfully requests 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 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;
- (6) 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;

²²⁰ For example, Mexico imposed an antidumping measure on imports of U.S. beef in 2000. The binational panel reviewing the measure issued its decision on March 15, 2004, and remanded the determination to Mexico for further proceedings. Thus, the legal proceedings continue, four years after SECOFI put the measure in place. In the meantime, Mexico has denied requests by U.S. exporters for reviews.

- (7) 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;
- (8) 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;
- (9) 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;
- (10) 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;
- (11) 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;
- (12) 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;
- (13) 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;
- (14) 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;
- (15) 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;
- (16) 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;
- (17) 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

- (18) 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.

292. 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.
