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MEXICO – DEFINITIVE ANTI-DUMPING MEASURES ON BEEF AND RICE

Complaint with Respect to Rice

Report of the Panel

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Thailand – H-Beams	Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by the Appellate Body Report, WT/DS122/AB/R, DSR 2001:VII, 2741
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I. INTRODUCTION

1.1 On 16 June 2003, the Government of 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 ("DSU"), Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), and Article 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), with respect to Mexico's definitive anti-dumping measures on beef and long-grain white rice, published in the *Diario Oficial* on 28 April 2000 and 5 June 2002 respectively, as well as any amendments thereto or extensions thereof and any related measures and also with respect to certain provisions of Mexico's Foreign Trade Act and its Federal Code of Civil Procedure.[1] Mexico and the United States held consultations on 31 July and 1 August 2003, but failed to settle the dispute.

1.2 On 19 September 2003, the United States requested the establishment of a panel[2] pursuant to Article 6 of the DSU, Article 17.4 of the AD Agreement, and Article 30 of the SCM Agreement. At its meeting on 7 November 2003, the Dispute Settlement Body (the "DSB") established a Panel in accordance with Article 6 of the DSU to examine the matter referred to the DSB by United States in document WT/DS295/2.[3] At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "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".

1.3 On 4 February 2004, the United States requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

> "If there is no agreement on the panelists within 20 days after the date of the establishment of a Panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request".

1.4 On 13 February 2004, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. Crawford Falconer

Members: Ms. Marta Calmon Lemme
Ms. Enie Neri de Ross

1.5 China, the European Communities, and Turkey reserved their rights to participate in the Panel proceedings as third parties.

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[1] WT/DS295/1, G/L/631, G/ADP/D50/1,G/SCM/D54/1.

[2] WT/DS295/2. The United States did not include claims with respect to the anti-dumping measure on beef in its request for the establishment of a Panel.

[3] WT/DS295/3.

1.6 The Panel met with the parties on 17-18 May 2004 and on 3 August 2004. It met with the third parties on 18 May 2004.

1.7 The Panel submitted its interim report to the parties on 11 March 2005. The Panel submitted its final report to the parties on 25 May 2005.

II. FACTUAL ASPECTS

2.1 This dispute concerns the imposition of definitive anti-dumping duties by Mexico on imports of "long-grain white rice" from the United States. The United States also challenges a number of provisions of Mexico's Foreign Trade Act and a provision of its Federal Code of Civil Procedure on an "as such" basis.

2.2 On 2 June 2000, the Mexican Rice Council (Consejo Mexicano del Arroz, A.C. or "CMA") filed a petition with the Secretariat of Commerce and Industrial Development ("SECOFI"), the administrator of Mexico's anti-dumping law at that time[4].

2.3 The initiation of the investigation was published in the *Diario Oficial de la Federación* dated 11 December 2000. The investigated product was defined as "long-grain white rice". "Long-grain white rice" is produced from *paddy rice* or whole rice. After drying and cleaning (and storing), *paddy rice* is ground to produce whole rice with the layers of bran that still cover the grain. Later, the whole rice is further ground with machines to extract the bran layers through abrasion. After the bran layers have been taken away from the grain, the rice is called regular ground white rice. Machines will then separate the whole grains from the broken ones, and sort them out by size, thus producing various types of rice including the "long-grain white rice".[5]

2.4 The period of investigation for the purpose of the dumping determination covered the period of 1 March to 31 August 1999. For the purpose of injury examination, the Ministry of Economy (SECOFI's successor agency that administers the Mexican anti-dumping laws) analyzed data for the same period of 1 March to 31 August for the years 1997, 1998 and 1999[6]. The Ministry of Economy ("Economía") notified the initiation of the anti-dumping investigation to the petitioners, to the Government of the United States and to the two exporters that were specifically identified as the "exporters" in the petition, Producers Rice Mill Inc. ("Producers Rice") and Riceland Foods Inc. ("Riceland"), providing them with a copy of the petition and its attachments, as well as of the official questionnaire of the investigation.

2.5 Subsequent to initiation and prior to the preliminary determination, two additional exporters came forward to ask for copies of the questionnaire: The Rice Company("Rice Company")[7] and Farmers Rice Milling Company ("Farmers Rice"). Both companies, together with Producers Rice and Riceland, submitted questionnaire responses to Economía on 22 February 2001 and 6 March 2001. In addition to the questionnaire responses, Producers Rice, Riceland, Rice 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.

[4] Due to a name change, the investigation was completed by the current administrator of Mexico's anti-dumping law, the Ministry of Economy (Secretaria de Economía or "Economía").

[5] Final Determination (Exhibit MEX-11, US-6 and US-7), paras.5 and 161. More precisely, Economia has defined it as having the following characteristics: a) It is a graminaceous plant, of the genus Olyza, and the species Sativa; b) Of a white crystalline color; c) With proportions Length: Width greater than 2:1; d) With characteristic culinary uses. (Final Determination, para.5)

[6] The data gathered by Economía, however, seemed to have covered the full 3-year period of the investigation.

[7] This company is also referred to in the Final Determination as "The Rice Corporation".

2.6 Economía published its preliminary determination on 18 July 2001. In it, Economía determined that Riceland, Rice Company, and Farmers Rice were not dumping. As to the fourth exporter, Producers Rice, Economía preliminarily determined that it made no sales of subject rice to Mexico during the POI. Economía's preliminary determination also found that there was no evidence of injury to the domestic industry.

2.7 On 5 June 2002, Economía published its final determination. In it, Economía found no evidence of dumping regarding Farmers Rice and Riceland and imposed a zero per cent duty to these exporters. For the Rice Company, Economía found a 3.93 per cent margin of dumping and imposed a duty of 3.93 per cent. For the imports from the remaining US exporters, Economía imposed a duty of 10.18 per cent based on the facts available.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. UNITED STATES

3.1 The United States requests that the Panel make the following findings[8]:

(a) Economía's use of a POI that ended more than fifteen months prior to the initiation of the anti-dumping 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;

(b) 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;

(c) 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;

(d) 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;

(e) 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;

(f) 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;

(g) 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;

(h) Economía's failure to exclude firms with anti-dumping margins of zero per cent from the anti-dumping measure is inconsistent with Mexico's obligations under Article 5.8 of the AD Agreement;

[8] United States' first written submission, para. 291. In its oral statement at the first substantive meeting (para. 8) as well as in its second written submission (paras. 16 and 18), the United States also made a claim on Article VI:6(a) of GATT 1994.

(i) 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;

(j) Economía's application of an adverse facts available-based dumping margin to the US 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;

(k) 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 US exporters and producers is inconsistent with Mexico's obligations under Article 12.2 of the AD Agreement;

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

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

(n) 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;

(o) 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;

(p) 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;

(q) 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;

(r) 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

(s) Articles 68 and 97 of Mexico's Foreign Trade Act, and Section 366 of Mexico's Federal Code of Civil Procedure ("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.

3.2 The United States requests that, based on the above findings, the Panel recommend that Mexico bring its measures into conformity with its obligations under the AD Agreement, the SCM Agreement, and GATT 1994.

B. MEXICO

3.3 As a preliminary matter, Mexico requests that the Panel issue a preliminary ruling on the deficiencies of the United States' panel request and decline to rule on the complaints raised in breach of

Article 4.5, 4.7 and 6.2 of the DSU or Article 17.4 of the AD Agreement. Specifically, Mexico claims as follows[9]:

(a) The United States' panel request exhibits three basic deficiencies, i.e.:

(i) it does not present the problem clearly;

(ii) it does not identify a specific measure at issue; and

(iii) it raises complaints regarding matters that were not the subject of consultations.

(b) The above is contrary to DSU Articles 6.2, 4.5 and 4.7 and AD Agreement Article 17.4.

(c) Consequently, the United States' request was filed in a manner inconsistent with AD Agreement Article 17.5.

3.4 On the merits, Mexico requests that the Panel make the following determinations[10]:

(a) In regard to the challenge raised against the measures imposed on dumped imports of long-grain white rice:

(i) Mexico established its period of investigation without breaching its obligations under Article VI:2 of the GATT 1994 and Articles 1, 3.1, 3.2, 3.4 and 3.5 of the AD Agreement;

(ii) Mexico, in limiting its injury analysis to the months of March to August of 1997, 1998 and 1999, did not contravene its obligations under Articles 1, 3.1, 3.5, and 6.2 of the AD Agreement;

(iii) Mexico conducted its injury analysis in an objective manner by carrying out an objective examination based on positive evidence of price effects and volumes, without violating its obligations under Articles 3.1, 3.2 and 6.8 and Annex II to the AD Agreement;

(iv) Mexico objectively considered whether there was a significant increase in the volume of dumped imports and whether the dumped imports had a significant effect on prices, thus acting in a manner consistent with its obligations under Articles 3.1 and 3.2 of the AD Agreement;

(v) Mexico conducted an objective analysis of the relevant economic factors, thus meeting its obligations under Articles 3.1 and 3.4 of the AD Agreement;

(vi) Mexico did not violate its obligations under Articles 3.1, 3.2 and 3.5 of the AD Agreement;

(vii) Mexico provided in sufficient detail the findings and conclusions reached on all issues of fact and law with respect to its determination of injury, thus meeting its obligations under Article 12.2 of the AD Agreement;

(viii) Mexico, in imposing an anti-dumping measure of zero per cent, did not contravene its obligations under Article 5.8 of the AD Agreement;

[9] Mexico's first written submission, para. 309.
[10] Mexico's first written submission, para. 310.

(ix) Mexico, in applying a facts available-based dumping margin, did not act in a manner inconsistent with its 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 to the AD Agreement;

(x) Mexico, in applying a facts available-based dumping margin to the US producers and exporters that it did not investigate, did not violate its 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 to the AD Agreement;

(xi) Mexico provided sufficient information on its findings and conclusions of fact and law and the reasons that led the investigating authority to impose the facts available-based margin on *Producers Rice* and the unexamined US exporters and producers, without contravening its obligations under Article 12.2 of the AD Agreement;

(xii) Mexico, in applying a facts available-based margin to *Producers Rice* and the unexamined US exporters and producers, did not violate its obligations under Articles 1 and 9.3 of the AD Agreement; and

(xiii) Mexico did not levy an anti-dumping duty greater than the margin of dumping calculated and hence did not contravene its obligations under Article VI:2 of the GATT 1994;

(b) In regard to the challenge raised against the revision of the Foreign Trade Act:

(i) Article 53 of Mexico's Foreign Trade Act is consistent as such with Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement;

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

(iii) Article 68 of Mexico's Foreign Trade Act is consistent 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;

(iv) Article 89D of Mexico's Foreign Trade Act is consistent as such with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement;

(v) Article 93.V of Mexico's Foreign Trade Act is consistent as such with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement; and

(vi) Articles 68 and 97 of Mexico's Foreign Trade Act and Article 366 of Mexico's Federal Code of Civil Procedure are consistent 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.

3.5 In view of the foregoing, Mexico requests that the Panel conclude that the definitive anti-dumping measures adopted in respect of imports of long-grain white rice from the United States and the amendment of the Foreign Trade Act are consistent with Mexico's obligations under the AD Agreement, in particular Articles 1, 3, 5, 6, 9, 12, 18 and Annex II; the SCM Agreement, in particular Articles 11, 12, 19, 21 and 32; and the GATT 1994, in particular Article VI.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are set forth in their written and oral submissions to the Panel, and in their answers to questions. The parties' arguments as presented in their submissions are summarised in this section. The summaries are based on the executive summaries submitted by the parties.[11] The response of the United States to Mexico's request for a preliminary ruling as well as parties' written answers to questions from the Panel are set forth in the Annexes. (*See* list of annexes at page xi.)

A. FIRST WRITTEN SUBMISSION OF THE UNITED STATES

4.2 The following are the United States' arguments in its first written submission:

1. The imposition of anti-dumping duties on US long-grain white rice

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

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

4.4 In the present case, the petitioning industry selected the POI that it wanted Economía to examine for the dumping investigation and the evaluation of injury, and Economía accepted its request over the objection of the US 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 5 June 2002, this gap had stretched to nearly three years.

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

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

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

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

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

[11] All the footnotes in sections IV:A – IV:H are original footnotes of the parties.

4.7 Thus, the imposition of an anti-dumping 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

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

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

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

4.11 These actions contravened Articles 1, 3.1, 3.5, and 6.2 of the AD Agreement.

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

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

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

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

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

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

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

(d) Economía's Failure to Exclude Firms with Anti-dumping Margins of Zero per cent from the Anti-dumping Measure is Inconsistent with Article 5.8 of the AD Agreement

4.18 Economía also breached WTO rules by failing to exclude two of the firms it examined – Farmers Rice and Riceland – from the anti-dumping measure. Farmers Rice and Riceland each had dumping margins of zero per cent. 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 anti-dumping measure to both firms, and each firm remains subject to future review and the possible application of anti-dumping duties. By treating Farmers Rice and Riceland in this manner, Economía breached Article 5.8 of the AD Agreement.

(e) Economía's Application of an Adverse "Facts Available" Dumping Margin to Producers Rice and to US 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

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

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

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

- sent its anti-dumping 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.

(i) 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

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

4.23 This conclusion flows from the text of Article 6.10, which requires, "as a rule," that individual dumping margins be established for *each* producer or exporter. The rule is subject to a single exception, when the number of exporters or producers is so large that the determination of individual margins for each producer or exporter would be impracticable. In such cases, and only in such cases, an investigating authority may limit its examination to a subset of producers or exporters. Article 6.10 does not permit an investigating authority to announce the initiation of an anti-dumping 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."

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

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

4.26 Second, Article 9.4 requires investigating authorities to assign a neutral "all others" rate to producers and exporters that they do not individually examine. The Appellate Body has described this rate as a "maximum limit, or ceiling" that investigating authorities "shall not exceed."[12] Inasmuch as the calculation method in Article 9.4 does not allow the resulting margin to contain *any* element of the facts available, there is no basis for an interpretation of Article 6.10 that would permit investigating authorities to routinely assign total "facts available" margins to firms that they do not individually investigate.

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

[12] Report of the Appellate Body, *US – Hot-Rolled Steel*, para. 116.

(ii) 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

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

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

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

(iii) Economía's Application of an Adverse "Facts Available" Dumping Margin to the US 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

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

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

4.33 Similarly, Article 6.6 of the AD Agreement requires that authorities "satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based." The petition identified only two US exporters of long-grain 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.

4.34 Furthermore, in *US – Hot-Rolled Steel*, the Appellate Body found that the calculation method set forth in Article 9.4 for determining the ceiling for the "all others" rate precludes the use of any margins

which are calculated, even in part, using facts available. The rate applied by Economía to US rice exporters was not based in part on facts available, as was the case in *US – Hot-Rolled Steel*. It was based entirely on facts available. Not only that, but the 10.18 per cent rate was adverse facts available – a clear breach of Mexico's WTO obligations.

4.35 Economía also breached Article 6.8 and paragraph 7 of Annex II of the AD Agreement, by using the petition margin without corroborating the underlying information that the petitioner used to calculate the margin. As was the case with respect to Producers Rice, there is no evidence on the record of the rice investigation to suggest that the unexamined exporters and producers – which were never sent a copy of Economía's anti-dumping 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.

4.36 Finally, Economía's efforts to identify and obtain contact information for interested parties other than those listed in the petition were inadequate. Economía failed to examine the accuracy and adequacy of the CMA's list of only two "known" exporters, a list that did not even include a third exporter, the Rice Company, whose website, the content of which was attached to the petition as Annex H, describes it as "one of the largest US 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.

(iv) 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

4.37 Article 12.2 of the AD Agreement requires that the public notice of any preliminary or final anti-dumping 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.

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

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

4.39 Article 1 of the AD Agreement provides that an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. Because Economía's conduct of the rice investigation breached numerous other provisions of the AD Agreement, Economía also breached Article 1.

4.40 Finally, as a result of the adverse assumptions made in assigning an adverse margin to non-shipper Producers Rice and to the other non-examined companies in the rice investigation, the anti-

dumping duty levied on their products was "greater in amount than the margin of dumping in respect of such products" which could permissibly have been calculated in accordance with the provisions of the AD Agreement. Because the duties Mexico levied on these "all others" companies was, and continues to be, greater in amount than the appropriate margin of dumping, Mexico violated Article VI:2 of GATT 1994.

2. Mexico's Foreign Trade Act and its FCCP – 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

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

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

4.43 Second, Article 64 of the Foreign Trade Act is the provision of Mexican law that applies to the calculation of individual anti-dumping 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.

4.44 Third, Article 68 of the Foreign Trade Act is the provision of Mexican law that applies to the review of final anti-dumping 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.

4.45 In addition, Article 68 of the Foreign Trade Act also requires producers and exporters seeking reviews of their own anti-dumping 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.

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

4.47 Fifth, Article 93V of the Foreign Trade Act provides for the application of fines on importers that enter products subject to anti-dumping 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.

4.48 Finally, Article 366 of Mexico's FCCP and Articles 68 and 97 of Mexico's Foreign Trade Act preclude Mexican authorities from conducting reviews of anti-dumping and countervailing duties while a judicial review of the underlying anti-dumping 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.

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

B. FIRST WRITTEN SUBMISSION OF MEXICO

4.50 The following are Mexico's arguments in its first written submission:

1. Request for a preliminary ruling

(a) Introduction

4.51 Throughout these proceedings, the United States has not shown the slightest respect for the formal requirements governing the terms of reference of the Panel, affecting the latter's capacity to settle this dispute and Mexico's rights to due process. The request for the establishment of a panel does not fulfil the requirements laid down in Articles 4.5, 4.7 and 6.2 of the DSU, nor has the United States duly complied with Article 17.4 and 17.5 of the AD Agreement. Mexico's capacity for rebuttal was also impaired by the fact that Mexico did not receive the Spanish version of the United States' first written submission until 16 April 2004.

(b) Requirements for the request for establishment of a Panel

4.52 The Appellate Body has clarified the elements of the matter referred to the DSB,[13] specifying that flaws in a request for the establishment of a panel cannot be subsequently be cured.[14] Concepts such as "specific measures at issue" and "legal basis" are essential for an understanding of the nature of the matter referred to the DSB. Article 6.2 lays down the minimum requirements for a definition of a panel's terms of reference and the precise procedural stage at which this should be done. Under Article 6.2 of the DSU, "[i]t is not enough ... that 'the legal basis of the complaint' is summarily identified; the identification must 'present the problem clearly'".[15] In addition, a responding party is entitled to know what case it has to answer so that it can begin preparing its defence.[16]

[13] *US – Carbon Steel*, Report of the Appellate Body, paragraph 125.
[14] *EC – Bananas III*, Report of the Appellate Body, paragraph 143.
[15] *Korea – Dairy*, Report of the Appellate Body, paragraph 120.
[16] *Thailand – H-Beams*, Report of the Appellate Body, paragraph 88.

(c) Deficiencies in the request for the establishment of a Panel submitted by the United States

(i) Ambiguous and vague complaints which do not present the problem clearly

4.53 First of all, the United States submits that Mexico violated Article VI of the GATT 1994;[17] this is as ambiguous as to assert a violation of the AD and SCM Agreements as a whole. Second, the United States alleges violations of Article 4.1 of the AD Agreement[18] defining the "domestic industry", to which the facts referred to bear no relation. Third, the United States argues that Mexico breached the AD Agreement by applying the facts available to a US rice exporter,[19] whereas the provisions on which the United States relies do NOT refer to the case in question. Fifth, the United States is equally mistaken in saying that Mexico applied the facts available in establishing the anti-dumping margins assigned to US exporters that were not individually investigated.[20] The United States attempted to correct the omission in paragraph 40 of its first written submission.

(ii) Failure to identify a specific measure at issue

4.54 In paragraph 3 of the request for the establishment of a panel, the United States goes as far as to claim that Mexico breached a number of Articles of the AD and SCM Agreements, on the basis of "conversations" with a number of Mexican officials. It has been made clear that such conversations cannot be deemed to be a measure.[21] Consequently, the affirmation in the United States' request for the establishment of a panel clearly fails to identify a specific measure at issue

4.55 If, *arguendo*, the above were to constitute a measure, the manner in which the United States presents its argument would clearly constitute a failure to comply with Article 6.2 of the DSU since the problem would be far from being presented clearly, thus denying Mexico any basis for rebuttal.

(iii) Complaints which were at no time included by the United States in its consultations with Mexico, but which it nevertheless presents in its panel request

4.56 Pursuant to Article 4.5 of the DSU, WTO Members are under the obligation to attempt to achieve a solution in the course of the consultations, and failure to settle the dispute during the consultations is a precondition for entitlement to request the establishment of a panel under Article 4.7 of the DSU. In other words, the United States is required to request consultations on all matters included in the panel request. Article 17.4 of the AD Agreement confirms such a requirement and, according to the Appellate Body, consultations "... provide the parties an opportunity to define and delimit the scope of the dispute between them ...".[22] Thus, matters left outside the scope of the consultations could not be taken up in the panel

[17] Request for the establishment of a panel (WT/DS295/2), paragraph 1(a).

[18] *Ibid.*

[19] *Ibid.*, section 1(f). The provisions in question are Articles 6.6, 6.8 and 6.10, 9.3, 9.4 and 9.5 and paragraphs 1, 3, 5, 6 and 7 of Annex II of the Anti-Dumping Agreement.

[20] *Ibid.*, section 1(g).

[21] *Japan – Film*, Report of the Panel, paragraph 10.43. *US – Corrosion-Resistant Steel Sunset Review*, Report of the Appellate Body, paragraph 87.

[22] *Mexico – Corn Syrup (Article 21.5 – US)*, Report of the Appellate Body, paragraph 54.

request submitted by the United States; the provisions at issue are the following:

Provisions invoked	Paragraphs in the request for the establishment of a panel not included in the consultations
AD Article 1	Paragraphs 1(a), 1(g)
AD Article 4.1	Paragraph 1(a)
AD Article 11.2	Paragraph 2(c)
AD Article 18.1	Paragraph 2(e)
Paragraph 1 of Annex II	Paragraph 2(b)
Paragraph 3 of Annex II	Paragraph 2(b)
Paragraph 5 of Annex II	Paragraph 2(b)
Paragraph 6 of Annex II	Paragraph 2(b)
Paragraph 7 of Annex II	Paragraph 2(b)
SCM Article 12.5	Paragraph 2(b)
SCM Article 21.2	Paragraph 2(c)
SCM Article 32.1	Paragraph 2(e)
Article VI:2 of the GATT	Paragraph 1(i)

4.57 Even the United States claim in paragraph 1(a) of the panel request was not the subject of consultations with Mexico except in relation to the anti-dumping investigation on beef, as is expressly noted in the third paragraph of the request for consultations.

4.58 Mexico had already brought up these irregularities at the DSB meeting of 2 October 2003.[23]

(d) Conclusion

4.59 As the responding party, Mexico has a right to due process. The request for the establishment of a panel exhibits fundamental flaws that prevent Mexico from preparing its defence. In view of the foregoing, Mexico requests the Panel to issue a preliminary ruling on the deficiencies in the panel request submitted by the United States and to refrain from ruling on claims brought in contravention of Articles 4.5, 4.7 and 6.2 of the DSU and Article 17.4 and 17.5 of the AD Agreement.

2. Legal arguments

(a) Economía complied with Article VI:2 of the GATT 1994 and Articles 1, 3.1, 3.2, 3.4 and 3.5 of the AD Agreement with regard to the establishment of the Period of Investigation

4.60 Economía complied with Articles 1, 3.1, 3.2, 3.4 and 3.5 of the AD Agreement and VI:2 of the GATT, by correctly establishing the periods of investigation (for dumping purposes) and analysis (for determination of injury) in the anti-dumping investigation on imports of long-grain white rice originating in the United States, as a result of an objective examination based on positive evidence.

4.61 The United States argues that the examination of volume and effects on prices, the examination of "all relevant economic factors and indices" and the determination that the dumped imports caused injury were neither objective nor based on positive evidence because of the obsolescence of the information used. There is no provision in the AD Agreement which indicates how remote a period of investigation should be. Consequently, Mexico did not breach Article 3.2 of the Agreement.

4.62 Economía complied with Article 3.1, 3.2 and 3.4 of the AD Agreement by conducting an objective examination, based on positive evidence, of the volume of the imports, their effect on prices, and all relevant economic factors and indices. Moreover, the final determination notes that the *dumped*

[23] Minutes of the DSB meeting of 2 October 2003.

imports caused injury to the domestic industry during the period of analysis, so that there are no grounds for alleging lack of information for the purposes of such a determination.

(b) Economía complied with Articles 1, 3.1, 3.5 and 6.2 of the AD Agreement with regard to the establishment of the Period of Analysis

4.63 The United States argues that Economía violated Articles 1, 3.1, 3.5 and 6.2 of the AD Agreement in allowing the petitioner to set the period of investigation as March to August 1999 and in establishing the months of March to August 1997, 1998 and 1999 as the period of analysis.

4.64 The periods of investigation and analysis were established correctly and Economía carried out an objective examination based on positive evidence, making sure that the parties had an opportunity to defend their interests in accordance with Article 6.2. of the AD Agreement.

4.65 The AD Agreement does not specify in detail how the period of analysis should be included in an anti-dumping investigation. In order to prevent distortions stemming from seasonal market fluctuations, a comparison was made between AD Agreement Article 3.4 indicators for similar periods in 1997, 1998 and 1999. The Economía did not violate the AD Agreement in setting the period of analysis inasmuch as the Agreement does not prohibit the comparison of periods equivalent to the period of investigation for the purposes of injury determination.

4.66 The United States indicates that the spring/summer (S/S) (October to December) season yield of paddy rice is greater than the fall/winter (F/W) (June-July) yield and, consequently, domestic production of long-grain white rice is greater during the S/S season than during the F/W season. Hence, the United States argues that, by setting the period of analysis as March to August of each year, Economía acted in a manner inconsistent with the AD Agreement because it failed to analyse the S/S harvest period, which is that during which, according to the United States, imports decline. The reason for setting the period of analysis as March to August 1997, 1998 and 1999 was to maintain the objectivity of the analysis. The argument that there were increases in domestic production and falls in imports of long-grain white rice during the S/S season is without foundation insofar as domestic production of this product does not depend on domestic production of paddy rice; indeed, when there is a drop in the latter domestic producers of long-grain white rice rely on imported paddy rice. Domestic production of long-grain white rice therefore remains virtually constant throughout the year – as was the case in 1997, 1998 and 1999.

4.67 Furthermore, the domestic producers only proposed March to August 1999 as the period of investigation and, having found this period to be reasonable, Economía established it as such, without violating the AD Agreement. As stated in paragraph 68 of the preliminary determination, moreover, the exporters provided no evidence of the convenience to select another period of investigation.

4.68 The investigating authority established the period of analysis on the basis of previous periods comparable to the period of investigation, which does not contravene the AD Agreement. The investigating authority's examination was objective and based on positive evidence, since it used comparable information concerning the same seasonal segments.

4.69 The United States argues that, in setting the period of analysis, Economía acted inconsistently with the AD Agreement because it did not examine "all relevant evidence" as required by Article 3.5 of the AD Agreement and because, in disregarding the claims of exporters and importers concerning the exclusion of information pertaining to the periods from September to February and the remoteness in time of the period analysed, Economía did not provide an opportunity to the parties to defend their interests, thereby infringing Article 6.2 of the AD Agreement.

4.70 The period of analysis was established without contravening the AD Agreement and all relevant evidence was examined in the injury analysis. Since there was no infringement of Article 3.5 of the AD Agreement, it cannot be argued that Article 6.2 was violated as a result of a breach of Article 3.5.

4.71 The investigating authority complied with Article 6.2 of the AD Agreement in giving the parties attending the public hearing an opportunity to meet with other parties having adverse interests, and the exporting companies had a full *opportunity* to present their arguments in relation to the hearing, which they did.

(c) Economía conducted its injury analysis in accordance with Articles 3.1, 3.2, 3.4, 3.5, 6.8 and 12.2 and Annex II of the AD Agreement

4.72 Economía based its injury determination on positive evidence and on an objective examination of the effect on prices, the volume of imports, the impact on domestic prices and relevant economic factors, properly using the best information available and giving sufficient detail of its findings and conclusions on issues of fact and law. It thus complied with Articles 3.1, 3.2, 3.4, 3.5, 6.8 and 12.2 and Annex II of the AD Agreement.

4.73 The United States argues that Economía did not carry out an objective examination of the effect on prices inasmuch as it based its analysis on information selected by the petitioner and "did not send questionnaires to any purchasers". In addition, it submits that Economía did not examine the import declarations (*pedimentos de importación*). The United States says that Economía made no effort to identify exporters and importers other than those mentioned by the petitioner and thereby contravened the AD Agreement.

4.74 An investigating authority complies with the standard laid down in Article 3.1 of the AD Agreement when: (a) It bases itself on affirmative, objective, verifiable and credible evidence; and (b) it gathers and evaluates that evidence in good faith and fundamental fairness. Economía fulfilled those conditions by carrying out an objective examination, based on positive evidence, of the volume of imports, their effect on prices for like products and the impact on the domestic industry.

4.75 The AD Agreement does not require any particular methodology for making price comparisons and evaluating effects on prices, but the analysis must be objective and based on positive evidence. In the absence of specific guidelines, an investigating authority may conduct its analysis in the manner it deems appropriate provided that it bases itself on positive evidence and makes an objective examination.

4.76 The United States argues that Economía based its analysis on information sources selected by the petitioner in the investigation, in breach of the AD Agreement. As the Appellate Body determined in *US – Wool Shirts and Blouses*, the United States failed to discharge its burden of proof in not putting forward a clear and detailed allegation or any supporting evidence. Notwithstanding the foregoing, Mexico submits that it did not infringe the AD Agreement.

4.77 As regards the fact that no questionnaires were sent to the purchasers, the AD Agreement contains no provision requiring such steps to be taken in an investigation, so that it is wrong to maintain that Mexico failed to act in compliance with the AD Agreement.

4.78 As to the *pedimentos*, these are not available to the investigating authority nor were they supplied by the petitioner. The investigating authority has "lists of *pedimentos*", which provide a variety of information but do not show the names or domiciles of the exporting firms.

4.79 The United States further argues that Economía's collection of information for the purposes of considering absolute and relative volumes of production and consumption was not objective and that Economía failed to conduct an objective evaluation of volume in using neither the *pedimentos* nor accurate information on the importers' import volumes. Mexico repeats that although the AD Agreement does not lay down any particular methodology for analysing the volume of imports and does not require the investigating authority to obtain more information than that supplied by the parties, the analysis must be carried out objectively, on the basis of positive evidence. Moreover, Economía requested information

from the exporters and importers but did not obtain an adequate response. Mexico holds that it carried out an objective examination based on positive evidence, in accordance with the AD Agreement.

4.80 Mexico did not use the information supplied by *The Rice Company* because, despite being asked to do so, the firm failed to provide data for 1997 and 1998. Therefore, the information it supplied for 1999 was disregarded for reasons of procedural fairness, since other appearing parties did submit data for the entire period of analysis.

4.81 The United States indicates that Economía used the methodology proposed by the petitioners, 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, in breach of Article 3.2. of the AD Agreement. Mexico repeats that Article 3.2 contains no guideline whatsoever as to whether use of the methodology proposed by the petitioner constitutes a violation of the AD Agreement. This methodology was used from the outset, in the preliminary determination, and no objection or better proposal was made. Consequently, the investigating authority requested further information from the exporters and the latter either did not respond or failed to supply the relevant information.

4.82 The United States asserts that Economía violated Article 6.8 and paragraphs 1 and 7 of Annex II of the AD Agreement by basing its injury analysis on the best information available, arguing that the reason for this is that Economía lacked accurate information on import volumes and value because it did not send questionnaires to all exporters, importers and purchasers and failed to consult the *pedimentos*. In the opinion of the United States, the investigating authority did not make the necessary effort to obtain information from the interested parties, nor did it notify them pursuant to paragraph 1 of Annex II relating to the use of the best information available. The United States accordingly concludes that none of the requirements of Article 6.8 of the AD Agreement was met for the purposes of applying the "adverse facts available".

4.83 There is no obligation to send questionnaires to all exporters, importers and purchasers, nor does the AD Agreement contain any provision requiring the investigating authority actively to seek information in an anti-dumping investigation, so that the above-mentioned argument is unfounded.

4.84 According to Article 6.1.1 of the AD Agreement, an investigating authority has the option to send questionnaires to producers and foreign exporters but is under no obligation to do so, much less in respect of all of them. In the case of purchasers, the possibility is not even contemplated in the AD Agreement, and so there is no obligation to send questionnaires to them. Mexico complied with its obligations, moreover, by transmitting to the United States authorities the public notice of initiation, the text of the application for initiation of an investigation and the annexes thereto, and the questionnaire for exporters and foreign producers.

4.85 In compliance with paragraph 1 of Annex II to the AD Agreement, the third paragraph of the introduction on the questionnaire provided to *Producers Rice* and *Riceland*, as well as to the United States' Embassy in Mexico, specified that if the required information was not supplied, Economía's determination would be based on the facts available. Accordingly, the United States' allegation that these points were not notified to the exporters is without foundation.

4.86 The United States argues that Economía violated Article 3.1 and 3.2 of the AD Agreement by failing to objectively consider whether there had been a significant increase in the volume (in absolute or relative terms) of dumped imports or significant effects on prices. Mexico rejects this argument.

4.87 According to the Panel's finding in *Thailand – H-Beams*, Mexico is under no obligation to make an explicit finding as to whether the increase in dumped imports is "significant". Mexico contends that the examination relating to the increase in total imports and dumped imports and the analysis of significant effects on prices is dealt with, albeit not explicitly, in the final determination.

4.88 The United States submits that Economía violated Article 3.1 and 3.4 of the AD Agreement in failing to conduct an objective analysis of the relevant economic factors. It also argues that the investigating authority did not properly evaluate inventories or market share, nor did it evaluate factors affecting domestic prices. For the purposes of its injury analysis, Economía carried out an objective examination in accordance with Article 3.4 of the AD Agreement. As detailed in the final determination, the analysis was properly conducted and covered the inventories, the objective assessment of market share, the factors affecting domestic prices and their impact on the domestic industry. All the factors listed in Article 3.4 were reviewed in the anti-dumping investigation and, as a result of this overall evaluation, Economía arrived at the conclusion set forth in the final determination.

4.89 The United States argues that Economía violated Article 3.1, 3.2 and 3.5 of the AD Agreement by including non-dumped imports in its evaluation of volume, effects on prices and the impact of dumped imports on the domestic industry.

4.90 The final determination shows that both the "volume of imports" and the "volume of dumped imports" were analysed and that the latter were the cause of the injury suffered by the domestic industry.

4.91 The United States also submits that Economía contravened Article 12.2 of the AD Agreement by failing to include in sufficient detail in its final determination the findings and conclusions reached on issues of law.

4.92 Economía considers that the final determination sets out in ample and sufficient detail the findings and conclusions reached on issues of fact and law relating to dumping, injury and causal relationship which it deemed relevant, as well as the reasons which led the investigating authority to impose definitive measures.

(d) Article 5.8 of the AD Agreement is not applicable to firms with dumping margins of zero per cent

4.93 The United States argues that Economía failed to exclude firms with dumping margins equivalent to zero per cent from the measures imposed in the final determination, contending that the investigation should have been terminated immediately. Furthermore, it submits that, inasmuch as these firms were not excluded from the anti-dumping measures, they remain subject to future administrative review and the possible imposition of anti-dumping duties, which is inconsistent with Article 5.8 of the AD Agreement.

4.94 Mexico contends that Article 5.8 of the AD Agreement does not apply because the investigation resulted in a determination of dumping, injury and causal link between the two. This led Economía to impose definitive anti-dumping measures by issuing a public notice of termination, whereby the anti-dumping investigation was concluded. Furthermore, a zero per cent duty does not de facto constitute an anti-dumping duty as it causes no prejudice to the exporter. As no anti-dumping duty is being charged, it cannot be considered that a *de minimis* margin exists or that an anti-dumping duty in excess of the dumping margin is being charged.

4.95 As to the claim that US exporters will be subject to review and the possible application of a definitive measure, Mexico would point out that, if those exporters do not engage in dumping, such reviews will not lead to the application of any measure. The AD Agreement does not prohibit a review of exporters for which a zero per cent dumping margin has been calculated. If the negotiators of the Agreement had determined that such exporters should not be subject to review, they would have done so explicitly.

4.96 Consequently, Mexico reiterates that it did not violate Article 5.8 of the AD Agreement and that this provision does not apply in this specific instance, given that the anti-dumping investigation ended with the publication in the Official Journal (DOF) of the official notice of termination and a zero per cent duty cannot actually be regarded as an anti-dumping duty.

(e) Mexico applied the facts available to *Producers Rice* and to the US producers and exporters that were not investigated in a manner consistent with the AD Agreement

4.97 The United States is wrong in claiming that Economía applied the "adverse facts available" to *Producers Rice* and to the producers and exporters which it did not examine, and that this is inconsistent with the WTO Agreements.

4.98 This argument is entirely unfounded. The United States is seeking to impose on Mexico obligations that are not derived from the AD Agreement or, contrary to Article 17.6 of the AD Agreement, it rejects *a priori* Mexico's permissible interpretation of the provisions of the Agreement.

4.99 Mexico is not obliged to determine an individual dumping margin for all exporters or producers inasmuch as Article 6.10 of the AD Agreement establishes the obligation to do so solely in respect of known exporters, which is what Economía did. Mexico complied with the AD Agreement by issuing the public notice of initiation and by notifying the known exporters and the United States' Embassy in Mexico.

4.100 Moreover, Mexico did not limit its examination to a reasonable number of exporters and was therefore under no obligation to calculate a margin of dumping in conformity with Article 9.4 of the AD Agreement for exporters or producers that were not included in the examination.

4.101 In the case of US exporters that were not investigated individually and were not included in the investigation and/or did not provide the information needed to calculate a margin of dumping, Economía was obliged to apply the facts available, in accordance with Article 6.8 of the AD Agreement. Mexico complied with its obligations in providing the United States' authorities with the public notice of initiation of the investigation, the text of the application for initiation and the annexes thereto and the questionnaire for exporters and foreign producers, and in convening all natural or legal persons that had an interest in the investigation, through the publication of the public notice of initiation.

4.102 Likewise, Economía acted consistently with Article 6.8 of the AD Agreement in applying to *Producers Rice* the facts available, because if an interested party does not participate in the investigation or has no exports during the period of investigation, it must be considered that it did not provide the information needed to calculate a dumping margin.

4.103 Regarding the United States' claim that Mexico acted in a manner inconsistent with Annex II to the AD Agreement, Mexico would make the following comments:

(a) Mexico acted consistently with paragraph 3 of Annex II to the AD Agreement by applying Article 6.8 of the Agreement to the exporting firm *Producers Rice*, as this firm did not provide the information needed and there was thus no information to be taken into account.

(b) The investigating authority acted consistently with paragraph 5 of Annex II to the AD Agreement, as the exporting firm *Producers Rice* did not provide information that was ideal in any respect for the purposes of calculating a dumping margin. Economía therefore was under no obligation to take this information into account.

(c) In addition, Mexico acted consistently with paragraph 6 of Annex II to the AD Agreement because Economía did not reject any evidence or information provided by *Producers Rice.* but accepted that information and acted in accordance with the provisions of the AD Agreement in calculating the dumping margin applicable.

4.104 Contrary to the United States' claim, the determinations of Economía amply and sufficiently reflect the findings and conclusions reached by the investigating authority on the questions of dumping,

injury and their causal relationship, and include all the issues of fact and law considered relevant by Economía. Consequently, there was no violation of the AD Agreement in that respect.

4.105 Mexico did not levy anti-dumping duties in excess of the dumping margins. The margins were correctly calculated by Economía and the duties levied are consistent with those margins. Mexico thus acted consistently with the GATT 1994.

(f) Complaints by the United States regarding the Foreign Trade Act

4.106 The United States challenges, as such, a number of provisions of the Foreign Trade Act and of other legal instruments as well. Its complaints are without merit for the following reasons:

- There is no *prima facie* case of violation of these provisions, as such;
- the United States bases itself on misinterpretations of the Foreign Trade Act and disregards the meaning and scope of the provisions challenged; and
- it relies on the rice investigation, which ended before the challenged provisions came into effect, to support its claims.

4.107 According to the report of the Appellate Body in *US– Carbon Steel*, where the consistency of a Member's law as such with a WTO Agreement is being challenged, the country's legislation is presumed to be consistent until proven otherwise. Thus, the burden of establishing *prima facie* that there has been a violation as such of the WTO Agreements rests with the complaining party. The United States consequently bears the burden of proving *prima facie* that Mexican legislation infringes the WTO Agreements, but has not done so.

4.108 The United States also claims that the Mexican law is "mandatory", without analysing the relationship between this legislation and international agreements. According to the Appellate Body report in *US – Corrosion-Resistant Steel Sunset Review*, in the event of claims brought against legislation "as such" the distinction between mandatory and discretionary legislation should be analysed on a case-specific basis and should not be applied in a "mechanistic" fashion.

4.109 **Article 53 of the Foreign Trade Act** is consistent as such with Articles 6.1.1 of the AD Agreement and 12.1.1 of the SCM Agreement, which specify that "[e]xporters or foreign producers receiving questionnaires ... shall be given at least 30 days for reply ...". Mexico is therefore not required to grant this time-limit to exporters that were not sent a questionnaire. This is confirmed in the final report of the Panel in *Argentina – Poultry Anti-dumping Duties*.

4.110 If the 30-day period were granted to any interested party that presented itself after the initiation of the investigation, the ensuing delay would lead to infringement of the time-limits laid down in Articles 5.10 of the AD Agreement and 11.11 of the SCM Agreement.

4.111 On the subject of extensions, Mexico rejects the United States' argument on the grounds that Article 53 of the Foreign Trade Act does not in any way prohibit the granting of extensions, and even in administrative procedures extensions have been granted on request. The United States has thus failed to make a *prima facie* case that this Foreign Trade Act provision is inconsistent as such with the AD and SCM Agreements.

4.112 **Article 64 of the Foreign Trade Act** is consistent with Articles 6.8 of the AD Agreement and 12.7 of the SCM Agreement inasmuch as, if an interested party does not participate in the investigation or had no exports during the period of investigation and consequently the exporter in question does not provide the necessary information, the investigating authority may calculate its margin of dumping or

subsidization on the basis of the facts available, pursuant to Articles 6.8 of the AD Agreement and 12.7 of the SCM Agreement.

4.113 The United States mistakenly alleges that Article 64 of the Foreign Trade Act is inconsistent with the AD Agreement because it mandates the investigating authority to impose on exporters that had no exports during the period of investigation, or did not participate in the investigation, a margin of dumping other than that determined in accordance with Article 9.4 of the AD Agreement, and that imposition of an anti-dumping duty in excess of the dumping margin therefore constitutes a violation of Article 9.3 of the AD Agreement.

4.114 It should be pointed out that Article 9.4 of the AD Agreement only applies where the investigating authority has limited its examination to a reasonable number of interested parties, in accordance with Article 6.10 of the AD Agreement. The calculation method set out in Article 9.4 does not apply to exporters or foreign producers which have not provided the necessary information or have not participated in the investigation. The dumping margin for such exporters and foreign producers must be calculated on the basis of the facts available, pursuant to Article 6.8 of the AD Agreement. Consequently, a violation of Article 9.3 cannot be alleged where Article 9.4 does not apply.

4.115 Article 64 of the Foreign Trade Act is consistent with paragraph 3 of Annex II to the AD Agreement because it requires the investigating authority to consider all verifiable information. If an exporter fails to provide the necessary information – normal value and export price in the case at hand – then there is no verifiable information to consider.

4.116 Paragraph 5 of Annex II to the AD Agreement stipulates that the investigating authority may not disregard the information provided by the exporter even if it is not ideal in all respects. In other words, if it is to be taken into consideration, the information must be ideal in at least one respect. Mexico repeats that if an exporter fails to provide the information – namely normal value and export price data – needed to determine its margin of dumping, then there is no minimum amount of information to be considered.

4.117 Mexico rejects the United States' argument concerning paragraphs 1 and 7 of Annex II to the AD Agreement, inasmuch as paragraph 1 specifies that if the interested party fails to provide the information required, the investigating authority will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of an investigation, and the last sentence of paragraph 7 of the Annex provides that if an interested party does not cooperate and fails to provide the investigating authority with relevant information, this situation may lead to a result which is less favourable to the interested party than if the party did cooperate.

4.118 **Article 68 of the Foreign Trade Act** is consistent "as such" with Articles 5.8, 9.3 and 11.2 of the AD Agreement and 11.9 and 21.1 of the SCM Agreement. Articles 5 of the AD Agreement and 11 of the SCM Agreement apply solely to investigations and not to reviews. If in the course of the investigation sufficient evidence of dumping or subsidization is found to exist, there is no obligation whatsoever under these Articles to refrain from conducting subsequent proceedings (such as administrative reviews), because once the definitive measure has been imposed, Articles 5.8 of the AD Agreement and 11.9 of the SCM Agreement cease to apply.

4.119 Moreover, the fact of subjecting to review exporters to which no positive margin of dumping or subsidization was assigned in the investigation does not cause them prejudice of any kind, since it does not entail any payment of duty. In any case, reviews carried out in respect of exporters with no positive dumping margin are similar to those provided for in Article 9.3.1 of the AD Agreement.

4.120 The United States' interpretation of Article 68 of the Foreign Trade Act is wrong inasmuch as this provision does not impose a "representativeness" requirement as a condition for the investigating authority to conduct reviews such as those provided for in Articles 21.2 of the SCM Agreement and 9.3

and 11.2 of the AD Agreement. The United States will therefore have to prove, *prima facie*, that the Foreign Trade Act is inconsistent with the WTO Agreements.

4.121 As has already been recognized in the submissions circulated in the course of the proceedings of the WTO Negotiating Group on Rules,[24] there are no clear provisions in the Agreements as to how to conduct administrative review and new shipper procedures, and the authorities of WTO Members therefore have discretion to establish the rules that they deem appropriate.

4.122 **Article 89D of the Foreign Trade Act** is consistent as such with Articles 9.5 of the AD Agreement and 19.3 of the SCM Agreement. The United States basically puts forward two arguments: This Article applies only to producers and not to exporters; and it requires producers to demonstrate that their exports were representative.

4.123 The first claim of the United States is without foundation because the provisions of the Foreign Trade Act – as stipulated in Article 2 of the Act – must be applied in a manner consistent with those of the international treaties to which Mexico is party. Mexico accordingly confines itself to applying anti-dumping and countervailing duties as provided for in Article VI of the GATT 1994 and in the AD and SCM Agreements.

4.124 The second claim of the United States is also without foundation because, although Articles 9.5 of the AD Agreement and 19.3 of the SCM Agreement do not expressly so provide, in view of their context, object and purpose, it is both natural and logical to request that a new shipper's volume of exports during the review period be representative. If such were not the case, it would be impossible for the investigating authority to make a proper price comparison, and it would be unable to meet its obligation to determine an individual margin of dumping if the new shipper were to export one single unit of the product under investigation.

4.125 The United States is wrong in claiming that **Article 93.V of the Foreign Trade Act** requires the Mexican investigating authority to impose fines on importers that import goods that are like or identical to goods subject to an anti-dumping or countervailing duty investigation and that this constitutes a non-permissible specific action against dumping or a subsidy, prompting it to contend that Article 93.V is inconsistent as such with Articles 18.1 of the AD Agreement and 32.1 of the SCM Agreement.

4.126 First, Mexico repeats that insofar as the United States has failed to prove that Article 93.V of the Foreign Trade Act is inconsistent with the AD Agreement or the SCM Agreement, Article 93.V should be deemed to be consistent with Mexico's WTO obligations, as determined by the Appellate Body in its report on *US – Carbon Steel*.

4.127 Second, even if the United States had produced the relevant evidence, Mexico will demonstrate that there is no inconsistency of any kind between Article 93.V of the Foreign Trade Act and the WTO Agreements inasmuch as Article 2 of the Foreign Trade Act stipulates that all provisions of the Foreign Trade Act must be applied in accordance with the provisions of international treaties to which Mexico is party.

4.128 Furthermore, Article 93.V of the Foreign Trade Act does not require the investigating authority to apply its provisions but gives it discretion to impose fines. This is proved by the fact that Mexico has never imposed such fines on WTO Members, even though this possibility has existed in the Foreign Trade Act since 1994.

[24] *Submission From Canada Respecting the Agreement On Implementation of Article VI of the GATT 1994 (The Anti-Dumping Agreement*), TN/RL/W/47, presented to the Negotiating Group on Rules on 27 January 2003 and circulated to Members the following day.

Article 366 of the Federal Code of Civil Procedure and Articles 68 and 97 of the Foreign Trade Act do not, as such, violate Articles 9.3, 9.5 and 11.2 of the AD Agreement or 19.3 and 21.2 of the SCM Agreement

4.129 The United States mistakenly argues that **Articles 68 and 97 of the Foreign Trade Act and 366 of the Federal Code of Civil Procedure** (FCCP) preclude the investigating authority from conducting reviews while a judicial review is under way, and that this violates Articles 9.3, 9.5 and 11.2 of the AD Agreement and 19.3 and 21.2 of the SCM Agreement.

4.130 With regard to Article 366 of the FCCP, the United States has failed to satisfy the burden of proof required of the claimant. This allegation should therefore not be considered further by the Panel. Indeed, the supporting evidence adduced by the United States (Exhibit US-20) contains no reference to this Article, and the United States has not put forward a clear and detailed allegation or produced any evidence of its assertion.

4.131 Moreover, Articles 68 and 97 of the Foreign Trade Act, by considering as definitive only anti-dumping or countervailing duties that have not been challenged under any procedure, provide legal certainty by ensuring that there are no contradictory rulings. Mexico considers that legal certainty affords a guarantee for exporters, who do not even have to pay any anti-dumping or countervailing duties while the challenge procedure is under way.

4.132 Articles 68 and 97 of the Foreign Trade Act do not infringe Article 9.3.2 of the AD Agreement inasmuch as they do not prohibit the reimbursement of duties paid in excess or state that such duties will not be refunded, and the refund is made promptly within the time-frame specified in the AD Agreement, once the proceedings in question have come to an end.

4.133 Moreover, Articles 68 and 97 of the Foreign Trade Act are not in breach of Articles 9.5 of the AD Agreement and 19.3 of the SCM Agreement. The provisions of the Foreign Trade Act neither preclude nor prohibit such a procedure. The United States is seeking to attribute to Mexico obligations that are not to be found in the WTO Agreements, given that the AD and SCM Agreements do not require a new shipper review to be initiated immediately after an application for such a review has been made, but specify that a new shipper review, once initiated, should be carried out promptly/expeditiously. The United States will have to prove its assertions by establishing a *prima facie* case in this respect.

C. FIRST ORAL STATEMENT OF THE UNITED STATES

4.134 The following summarizes the United States' arguments in its first oral opening and closing statements:

1. Opening statement

4.135 Authorities conducting AD investigations must conduct their examinations in an objective and unbiased manner. The authority must investigate the domestic industry, and the effects of dumped imports, in an unbiased manner, without favouring the interests of any party in the investigation. 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."

4.136 Mexico did not conduct its rice investigation in an objective and unbiased manner. It allowed the petitioner to decide which exporters and producers should be sent the anti-dumping questionnaire, and to choose which part of the year should be examined for dumping and injury. When the US firm Producers Rice demonstrated that it had no shipments of rice to Mexico during the POI, Mexico rejected its information and based its margin on adverse facts available. And Mexico failed even to collect, much less examine, more than a year's worth of data that preceded the initiation of the investigation. The

AD Agreement places obligations on Mexico, and Mexico has failed to rebut the United States' *prima facie* case that it has breached them.

(a) Mexico's use of a stale POI

4.137 With the exception of Mexico, all of the parties in this dispute agree that a Member's discretion in setting a POI is not boundless. The period investigated cannot be so remote in time that the information that the authority collects is incapable of providing a basis for an objective finding of dumping, injury, and causation. The fifteen month gap in the present case (and the three year gap between the end of the POI and the final determination) is inconsistent with numerous provisions of the AD Agreement and the GATT 1994.

4.138 Mexico argues that the AD Agreement creates no obligations with respect to the age of the data that a Member may use in reaching its determinations, and that it has complete freedom to do whatever it wants. This is not correct. The POI should end as close to the initiation date as practicable. Mexico has pointed to nothing justifying its decision to ignore 15 months worth of recent data, let alone the three years of data by the time of the final determination. The only rationale that Mexico provided in its notice was that it selected the POI the petitioner wanted.

(b) Mexico limited its injury analysis to only six months of 1997, 1998, and 1999

4.139 An authority conducting an analysis of injury and causation must conduct an objective examination, and it must base its determinations on positive evidence. Mexico's limitation of its investigation to only half of each of the years at issue failed to meet either of these requirements.

4.140 Mexico argues that the AD Agreement creates no obligations on this matter, that it is "entirely free" to do whatever it wants, and that therefore its approach was objective and based on positive evidence. Mexico is wrong. For example, the text of Article 3.5 of the AD Agreement plainly states that an authority must examine "all relevant evidence" that is before it. Mexico has failed to explain why the evidence for half of the POI was not "relevant."

4.141 Mexico's approach created distortion, because focusing an injury and causation analysis on the period when import presence is highest cannot but create a misleading picture of the state of the domestic industry. Mexico has no idea what the state of the industry was over the course of the entire POI, because Mexico did not examine the data for half of that period.

(c) Mexico's conduct of its injury analysis

4.142 Mexico's examination of the injury data was flawed in four ways. The first flaw arises from Mexico's failure to collect the evidence on price effects and volumes that it needed to conduct its analysis in an objective manner, and its improper use of the facts available. Mexico argues that the AD Agreement creates no relevant obligations. It fails, however, to explain why the approach that it chose was objective and based on positive evidence, as Article 3.1 requires.

4.143 For example, if Mexico had sought information from purchasers of long-grain white rice, it would have been able to directly compare the prices the purchasers paid for the domestic product and the prices they paid for the imported product. Similarly, Mexico could have obtained data from the *pedimentos.* Furthermore, Mexico rejected accurate data that The Rice Company submitted for the year 1999, in favour of using inaccurate data from the petitioner. In addition, Article 6.8 and Annex II do not permit an 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.

4.144 The second flaw arises from Mexico's failure to objectively consider whether there was a significant increase in the volume of dumped imports or significant price effects. Only four paragraphs of its determination were relevant to the examination of the dumped imports, and they show that the volume of the dumped imports declined during the three-year period of the injury analysis. And none of those paragraphs even mention significant price effects.

4.145 The third flaw arises from Mexico's failure to conduct an objective analysis of certain "relevant economic factors." Mexico's examination of inventories and market share was not objective, and it did not even examine "other factors affecting domestic prices." The final flaw in Mexico's analysis of the injury data is that it included non-dumped imports in its evaluation of volume, price effects, and the impact of the dumped imports on the domestic industry.

(d) Mexico's failure to exclude firms with AD margins of zero from the measure

4.146 Mexico ignores that the second and third sentences of Article 5.8 refer to the "margin" of dumping being *de minimis*. The term "margin" refers to the "individual margin of dumping determined for each of the investigated exporters and producers" of the investigated product. When Article 5.8 refers to terminating when the "margin" is *de minimis*, it is referring to termination for individual firms. The fourth sentence of Article 5.8 provides contextual support for this interpretation. That sentence demonstrates that the "volume" analysis may be done on a country-wide basis. There is no such language addressing the dumping analysis.

(e) Mexico's application of an adverse "facts available" margin to Producers Rice and to US producers and exporters that it did not examine

4.147 Mexico investigated only the two exporters that the petitioner named in the petition and two other firms that came forward on their own, and it applied an adverse, facts-available margin to Producers Rice and every other exporter and producer in the United States. Mexico argues that the AD Agreement contains no obligations with respect to this topic and that it has total freedom to apply the facts available to such firms, including "less favourable" facts available from the petition. Mexico's argument is illogical, inconsistent with the text of the AD Agreement, and contradictory to the findings of the Appellate Body on this topic.

4.148 Mexico's argument is inconsistent with the text of the AD Agreement because Mexico bases its entire argument on a flawed interpretive approach that relies on partial citations of Articles 6.8 and 6.10, viewed in isolation, and divorced from the broader context of the overall Agreement. Its argument is contrary to the findings of the Appellate Body because the Appellate Body found in *EC Bed Linen 21.5* that Article 6.10 of the AD Agreement "requires, 'as a rule', that individual dumping margins be established for *each* producer or exporter." Its interpretation is illogical because the drafters established a detailed set of rules that were meant to ensure that unexamined firms are not unfairly prejudiced if they are not included in an AD investigation. The idea that the drafters would have created detailed rules to protect "known" firms, and left "unknown" firms subject to the application of adverse facts available, is implausible at best.

4.149 The AD Agreement protects both known firms and unknown firms. It does this by requiring authorities to send their questionnaire to firms that are included "in the investigation," and by restricting the application of margins based on the facts available to cases where a firm is sent the questionnaire, is warned about the consequences of not responding, but nevertheless fails to provide the necessary information. If an authority does not take these steps, then it cannot claim to be including the firm "in the investigation," and the firm is entitled to a neutral all other's rate calculated in accordance with Article 9.4 of the AD Agreement.

4.150 Mexico argues that Article 9.4 only applies when the authority limits its investigation to a subset of exporters. But Mexico did limit its investigation by choosing not to send its questionnaire to

The Rice Company. It also did so by failing to consult the *pedimento* data held by Mexican Customs, when it chose not to reference public data that would have identified every producer of the subject product in the United States, and when it chose not to ask the petitioner whether the two firms listed as "known" exporters in the petition were truly the only exporters or producers that the petitioner knew of. Mexico's submission does not contest several of the United States' claims addressing its treatment of Producers Rice and the unexamined firms.

(f) Claims Regarding the Foreign Trade Act and Article 366 of the FCCP

4.151 Mexico argues that treaties are self-executing under Mexican law and that it must apply its laws in a way that is consistent with its treaties. This is beside the point if Mexico's laws mandate WTO-inconsistent action.

4.152 The first statutory provision at issue is Article 53 of the Foreign Trade Act, which sets a mandatory deadline of 28 working days for interested parties to respond to Mexico's AD questionnaire, and counts the 28 days from the date of publication of the initiation notice. Mexico argues that it would be "illogical" to provide the full 30 days to interested parties that are not initially sent the questionnaire. The issue for the Panel is quite clear: Is Mexico correct that Articles 6.1.1 and 12.1.1 only apply when an authority "sends" the questionnaire to an interested party? Or is the proper interpretation that both provisions count the 30 day deadline from the date of receipt?

4.153 The second statutory provision at issue in this dispute is Article 64 of the Foreign Trade Act. Article 64 requires Mexico to apply the highest level of facts available to firms that do not export during the POI or that do not "appear" in its investigation. Mexico argues that Article 6.8 of the AD Agreement permits a Member to apply the facts available to a party that fails to provide necessary information, and Mexico is therefore justified in applying the facts available to firms that have no shipments during the POI or that do not "appear" in the investigation. Mexico's argument is based on a partial citation of a portion of Article 6.8 without reference to any of the other provisions of the AD Agreement, including Article 6.1 and paragraph 1 of Annex II.

4.154 Mexico argues that Article 64 is not inconsistent with Article 9.4 of the AD Agreement because Article 9.4 requires Members to exclude margins that are based on the facts available. Mexico misses the point. Article 64 is inconsistent with Article 9.4 of the AD Agreement, because Article 64 requires Mexico to apply facts available-based margins to firms that should have received a neutral "all others" margin calculated in accordance with Article 9.4.

4.155 Mexico's argument with respect to paragraph 1 of Annex II ignores that an authority must "specify in detail the information required" and "ensure that the party is aware" of the consequences of not providing the information, before it may apply the facts available. Its argument that paragraph 7 of Annex II permits a "less favourable" result if a firm refuses to cooperate ignores that by requiring Mexico to always apply the highest level of facts available, Article 64 precludes taking cooperation into account. It does not contest that Article 64 of the Foreign Trade Act breaches Article 9.5 of the AD Agreement or Article 19.3 of the SCM Agreement.

4.156 The third provision at issue is Article 68 of the Foreign Trade Act, which mandates a breach of WTO rules for two reasons: first, it requires Mexico to review firms that were found not to be dumping or receiving subsidies; and second, it mandates that Mexico require firms seeking reviews to demonstrate that the volume of their exports was "representative."

4.157 Articles 5.8 of the AD Agreement and 11.9 of the SCM Agreement require authorities to exclude firms from AD and CVD measures if the authorities find that the firms are not dumping or receiving subsidies. If a firm is excluded from the measure, then there is no basis to subject the firm to a review. Yet Article 68 requires such reviews. Therefore, it breaches Articles 5.8 and 11.9. Moreover, a proper textual analysis of Articles 9.3 and 11.2 of the AD Agreement, and Article 21.2 of the SCM Agreement

demonstrates that a firm that meets the criteria in those provisions has a right to obtain a review. Since those conditions do not include showing that import volumes were "representative," Article 68 of the Foreign Trade Act – by imposing that condition – breaches Articles 9.3, 11.2, and 21.2.

4.158 The fourth provision at issue is Article 89D of the Foreign Trade Act, which mandates that firms seeking expedited reviews demonstrate that the volume of their exports was representative. The ordinary meaning of the text of the provisions demonstrates that a firm that meets the criteria in those provisions has a right to obtain an expedited review. Those conditions do not include showing that import volumes were "representative." And Article 89D breaches Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement because it only allows producers (and not non-producing exporters) to obtain reviews.

4.159 The fifth provision is Article 93V of the Foreign Trade Act, which requires Mexico to impose fines on importers that import certain goods subject to an AD or CVD investigation. Article 93V is inconsistent with Articles 18.1 of the AD Agreement and 32.1 of the SCM Agreement because it is a non-permissible specific action against dumping. Mexico has not contested that Article 93V is "specific" to dumping or subsidization; "against" dumping or subsidization; and not "in accordance with the provisions of GATT 1994," as interpreted by the AD and SCM Agreements. Mexico's only defence is to argue that it has discretion not to impose the fine. But, although Article 93V gives Mexico discretion to determine whether the factual predicates for applying a fine exist, it mandates the application of a fine if they do.

4.160 The final set of provisions at issue are Article 366 of the FCCP and Articles 68 and 97 of the Foreign Trade Act. They are inconsistent "as such" with the AD and SCM Agreements because they preclude the Mexican authorities from conducting reviews of AD and CVD measures during judicial proceedings. Article 366 states that a proceeding "shall be suspended" pending resolution of another matter. By precluding Mexico from conducting reviews in this manner, Article 366 is inconsistent with Articles 9.3, 9.5, and 11.2 of the AD Agreement, and Articles 19.3 and 21.2 of the SCM Agreement.

4.161 Mexico's submission does not even address the United States' claim that Articles 68 and 97 of the Foreign Trade Act breach Article 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement. As for the fact that Articles 68 and 97 breach Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement, Mexico asserts that those provisions allow a Member to wait as long as it likes before initiating an expedited review, if it conducts the review promptly once it initiates. Mexico's argument contradicts the text of Articles 9.5 and 19.3.

4.162 Mexico does not contest that Articles 68 and 97 of the Foreign Trade Act preclude Mexico from conducting reviews of measures under Article 9.3.2 of the AD Agreement while judicial reviews of the measures are underway. It argues instead that its approach is permissible because the duties are not "definitive" until the judicial review is complete. Mexico is wrong on the facts.

2. Closing statement

4.163 As the United States noted in its oral statement, Mexico's submission had failed to rebut the United States' *prima facie* case that Mexico has breached its WTO obligations in numerous ways. Mexico's oral statement yesterday was quite similar to its written submission, and also did not rebut the United States' *prima facie* case.

4.164 Because the United States' oral statement addressed the content of Mexico's written submission, and because Mexico's oral statement was quite similar to its written submission, it has only a few additional comments to make today.

4.165 The first point pertains to Mexico's request for a preliminary ruling. The United States addressed all of the points that Mexico raised yesterday, in the United States' written response. The United States filed that response on 7 May. The United States would like to make one additional point, however,

pertaining to Mexico's argument that it was prejudiced because it only received the Spanish-language version of the United States' written submission on 16 April, a week before its written submission was due. If there were merit to this claim, one might have expected that Mexico's oral statement would have set out the new arguments that Mexico did not have time to include in its written submission. Mexico has had the Spanish-language version of the submission of the United States for at least a month. The fact that Mexico's oral statement did not differ much from its written submission suggests that it was not prejudiced by the date it received the translation of the submission of the United States.

4.166 The second point pertains to Mexico's use of the facts available in assigning an anti-dumping margin to Producers Rice. Mexico argued yesterday that its application of the facts available was justified because Producers Rice had what Mexico described as an "obligation" to present the information that Mexico needed to conduct a margin. But Producers Rice demonstrated to Mexico that it had no shipments during the POI. There was nothing more that Producers Rice could have given to Mexico. It is not objective or unbiased for an authority to apply an adverse anti-dumping margin to a firm that was unable to provide information that does not exist.

4.167 The United States would also like to address Mexico's comment yesterday that Articles 68 and 89D of the Foreign Trade Act do not require firms seeking reviews to demonstrate that the volume of their sales was representative. The United States is confused by Mexico's argument. Article 68 reads: "[t]he Party requesting a review shall satisfy Economía that the volume of exports to Mexico during the review period is representative." Article 89D contains virtually identical text. The provisions speak for themselves.

4.168 On the issue of Article 93V of the Foreign Trade Act, Mexico argued that the application of fines is discretionary, and that proof of this fact is that it has never, in fact, applied such a fine. This proves nothing, because Mexico has not pointed to any case where it found that the conditions for imposing a fine were met, and yet it decided not to impose one. The text of the provision itself is mandatory.

4.169 Finally, the United States will comment further on the Panel's questions about the mandatory/discretionary issue, and the relevance of that issue to Mexico's laws, in its response to the Panel's questions and in the United States' second written submission.

D. FIRST ORAL STATEMENT OF MEXICO

4.170 The following summarizes Mexico's arguments in its first oral statements:

1. Preliminary ruling

(a) Ambiguities of the United States

4.171 Firstly, the fact that Mexico did not, at the preliminary stage, contest certain claims by the United States does not mean that Mexico accepts that the United States met the formal requirements.

4.172 Mexico notes that the United States asserts that Mexico confuses what is a claim (*reclamación*) with what is an argument (*argumento*). This is not correct. The United States' claims were not set out clearly or simply refer to irrelevant provisions. Mexico did not suggest that the United States should have put forward arguments in its request for the establishment of a panel.

4.173 The United States' request is ambiguous in at least three instances. Firstly, the United States is highly ambiguous when it alleges a violation of Article VI of the GATT 1994 as it does not specifically indicate to which paragraphs it is referring and proposes unrealistic methods to make good the omission. Secondly, the United States refers to Article 4.1 of the AD Agreement, even though this is in no way

related to the rest of the claim. Thirdly, the "narrative description" given by the United States in sections 1(g) and 1(f) of the request for the establishment of a panel has no relevance to the legal bases claimed.

(b) Damage requirement in procedural violations

4.174 The United States wrongly argues that at the current stage of the proceedings (i.e. the panel stage), Mexico has not shown how the violations caused by ambiguity have affected it. Firstly, there is no provision laying down such a requirement. Secondly, *arguendo* that such a requirement existed, at the present procedural stage it is impossible to determine the effect. Thirdly, also *arguendo* that a requirement existed, the combination of factors including the ambiguities and the long delay in translating the first written submission of the United States, had an impact on Mexico's defence.

(c) Identification of the measure

4.175 Article 366 of the Federal Code of Civil Procedure may be considered a measure. Nevertheless, the United States does not understand the relationship among the Articles of various Mexican laws and endeavours to remedy this by citing statements by "Mexican officials". Article 366 is a measure that bears no relation to the anti-dumping proceedings and the United States tries to make good this error by using statements by "Mexican officials".

4.176 Alternatively, as Mexico indicated in its written submission, in the event that the Panel rejects its arguments the United States did not provide a brief summary of the legal bases of the complaint sufficient to present the problem clearly.

(d) Legal bases not included in the consultations

4.177 In its request for the establishment of a panel, the United States improperly added 13 new legal bases that were not included in its request for consultations. This is contrary to the provisions of Article 4.5 and 4.7 of the DSU and Article 17.4 and 17.5 of the AD Agreement. The United States argued that the wording of Article 4.4 of the DSU allowed it to omit almost anything. A proper reading of Articles 4.4 and 6.2 of the DSU, however, indicates that the legal bases of the complaint must be the same in the request for consultations and in the request for a panel; the only thing that changes is the level of specificity, not the legal basis. Following the United States' criterion would lead to absurd cases.

2. Legal arguments regarding the anti-dumping investigation into imports of United States' long-grain white rice

4.178 Mexico emphasizes that the United States' arguments are not substantiated by the AD Agreement and considers that the United States is trying to impose on Mexico obligations that are not covered by the Agreement, thus violating Article 17.6 of the AD Agreement by dismissing *a priori* the permissible interpretation of those provisions by Mexico.

(a) Economía complied with Article VI:2 of the GATT 1994 and with Articles 1, 3.1, 3.2, 3.4 and 3.5 of the AD Agreement with regard to the establishment of the Period of Investigation

4.179 Economía complied with Articles 1, 3.1, 3.2, 3.4 and 3.5 of the AD Agreement and Article VI:2 of the GATT in the anti-dumping investigation into imports of long-grain white rice from the United States by correctly establishing the periods of investigation (for dumping purposes) and analysis (for determination of injury), as a result of an objective examination based on positive evidence.

4.180 In the request for the establishment of a panel, the United States set out arguments on Articles 1 of the AD Agreement and VI:2 of the GATT 1994 that were not the subject of consultations, violating Articles 4.5 and 4.7 of the DSU and 17.4 of the AD Agreement; therefore, its claims should be dismissed.

4.181 With regard to determination of the period of investigation, the AD Agreement does not contain any provision establishing how remote that period should be. Since it is impossible to violate an obligation that does not exist, Mexico did not contravene Article 3.2 of the AD Agreement in fixing that period. Furthermore, in the course of the investigation, no exporter put forward objections or evidence sufficient to change it.

4.182 Economía complied with Article 3.1, 3.2 and 3.4 of the AD Agreement by conducting an objective examination, based on positive evidence of the volume of the imports, their effect on prices, and relevant economic factors and indices. Moreover, the final determination indicates that during the period analysed dumped imports caused injury to the domestic industry.

(b) Economía complied with Articles 1, 3.1, 3.5 and 6.2 of the AD Agreement with regard to the establishment of the period analysed

4.183 In the request for the establishment of a panel, the United States included arguments on Articles 1 of the AD Agreement and VI of the GATT 1994 that were not the subject of consultations, thus violating Articles 4.5 and 4.7 of the DSU and 17.4 of the AD Agreement.

4.184 The periods of investigation and analysis were established correctly and Economía carried out an objective examination based on positive evidence, making sure that the parties had an opportunity to defend their interests in accordance with Article 6.2 of the AD Agreement.

4.185 The AD Agreement does not indicate how the period of analysis should be included in an anti-dumping investigation, therefore Economía did not violate the AD Agreement, which does not prohibit the comparison of periods equivalent to the period of investigation in order to determine injury. In this particular case and in order to prevent distortion, the factors listed in Article 3.4 of the AD Agreement that related to the period of investigation were compared to similar periods in 1997 and 1998, and this is not inconsistent with the AD Agreement.

4.186 The United States indicates that the spring/summer (October-December) season yield of paddy rice is greater than the fall/winter (June – July) yield and, consequently, domestic production of long-grain white rice is greater in the former than in the latter.

4.187 Mexico set the period of analysis as March to August 1997, 1998 and 1999, in order to maintain the objectivity of the analysis. When there is a drop in domestic production of paddy rice, domestic producers of long-grain white rice rely on imported paddy rice, so the domestic production of the product investigated remained virtually constant in 1997, 1998 and 1999. The United States' argument is therefore without foundation inasmuch as domestic production of this product does not depend on domestic production of paddy rice.

4.188 In the analysis of injury and the causal relationship with dumping, all relevant evidence was examined and, therefore, there was no breach of Article 3.5 of the AD Agreement. Consequently, it cannot be argued that, as a result of this violation, Article 6.2 of the AD Agreement was also violated. In compliance with Article 6.2 of the AD Agreement, a public hearing was held and interested parties were given the opportunity to meet with parties having adverse interests; moreover, the exporting companies subsequently presented their arguments in relation to what occurred during the hearing.

(c) Economía conducted its injury analysis in accordance with Articles 3.1, 3.2, 3.4, 3.5, 6.8 and 12.2 and Annex II of the AD Agreement

4.189 In its request for the establishment of a panel, the United States included arguments on paragraphs 1, 3, 5, 6 and 7 of Annex II to the AD Agreement that were not the subject of consultations, thus violating Articles 4.5 and 4.7 of the DSU and 17.4 of the AD Agreement.

4.190 Economía based its injury determination on positive evidence and on an objective examination of the effect on prices, the volume of imports, the impact on domestic prices and relevant economic factors, properly using the best information available and giving sufficient detail of its findings and conclusions on issues of fact and law. It thus complied with Articles 3.1, 3.2, 3.4, 3.5, 6.8 and 12.2 and Annex II of the AD Agreement.

4.191 The investigating authority of a WTO Member complies with Article 3.1 of the AD Agreement when: (a) It bases itself on affirmative, objective, verifiable and credible evidence; and (b) it gathers and evaluates that evidence in good faith and fundamental fairness. Economía fulfilled those conditions by carrying out an objective examination, based on positive evidence, of the volume of imports, their effect on prices for like products and the impact on the domestic industry.

4.192 The AD Agreement does not require any particular methodology for making price comparisons and evaluating effects on prices, and this was recognized by the United States in paragraph 90 of its first submission. An investigating authority may, therefore, conduct its analysis in the manner it deems appropriate provided that it bases itself on positive evidence and makes an objective examination, as Mexico did.

4.193 The United States does not put forward a clear and detailed allegation or any supporting evidence regarding the information sources used by Economía to carry out its analysis, thus failing to discharge its burden of proof, as determined by the Appellate Body in *US – Wool Shirts and Blouses*. Furthermore, it is sufficient to state that, in its analysis, Mexico did not violate the AD Agreement.

4.194 In addition, the AD Agreement does not establish an obligation to send questionnaires to purchasers, and the investigating authority did not consider it necessary to do so. It is therefore wrong to maintain that Mexico failed to act in compliance with the Agreement.

4.195 With regard to the import declarations (*pedimentos*), it should be emphasized that these are not available to the investigating authority. The investigating authority only has "list of *pedimentos*", which do not show the names or domiciles of exporters.

4.196 Mexico also reiterates that the AD Agreement does not lay down any particular methodology for analysing the volume of imports nor does it require the investigating authority to obtain more information than that supplied by the parties. In this connection, Economía did request information from exporters and importers on this particular point but did not obtain an adequate response[25], as can be seen in Exhibit MEX-4 to the first written submission.

4.197 Mexico repeats that Article 3.2 of the AD Agreement does not say that use of the methodology proposed by the petitioner constitutes a breach of the AD Agreement. This methodology was used from the outset and no objection was raised by the exporters. Once the preliminary determination had been issued, no objection or better or alternative proposal was made.

4.198 Furthermore, Mexico submits that there is no obligation to send questionnaires to all exporters, importers and purchasers. Pursuant to Article 6.1.1 of the AD Agreement, an investigating authority may send questionnaires to foreign producers and exporters, but is not obliged to send them to all. Mexico complied with its obligations by transmitting to the United States' authorities the public notice of initiation, the text of the application for initiation of an investigation and the annexes thereto, and the questionnaire for exporters and foreign producers.

4.199 Moreover, in compliance with paragraph 1 of Annex II to the AD Agreement, as indicated in the third paragraph of the introduction on the investigation questionnaire, Mexico did inform the interested

[25] Official communications UPCI.310.01.0623, UPCI.310.01.0631 and UPCI.310.01.0632 of 23 March 2001 (Exhibit MEX-4).

parties that, if the information required in the questionnaire was not provided, Economía's determination would be based on the facts available. Accordingly, the United States' allegation that these points were not notified to the exporters is without foundation.

4.200 Regarding an objective analysis of the relevant economic factors, Economía made an objective examination in accordance with Article 3.4 of the AD Agreement. The final determination contains an analysis of all these factors; consequently, the United States' allegation in this respect is without foundation.

4.201 Furthermore, it is wrong to assert that Mexico included non-dumped imports in its evaluation of volume, effect on prices and the impact of dumped imports on the domestic industry. The final determination shows that both the "total volume of imports" and the "volume of dumped imports" were analysed and that the latter were the cause of the injury suffered by the domestic industry.

4.202 Regarding the content of the final determination, Economía considers that it sets out in ample and sufficient detail the findings and conclusions reached on issues of fact and law relating to dumping, injury and the causal relationship which it deemed relevant, as well as the reasons which led the investigating authority to impose definitive measures; consequently, Mexico asserts that it did not violate any provision of the AD Agreement.

(d) Article 5.8 of the AD Agreement is not applicable to firms with dumping margins of zero per cent

4.203 Article 5.8 of the AD Agreement cannot be used in support of the argument that firms with dumping margins of zero per cent should be excluded from the measure because the investigation resulted in a determination of dumping, injury and their causal relationship, which led Economía to impose definitive anti-dumping measures. Furthermore, a zero per cent duty does not constitute a de facto anti-dumping duty as it causes no prejudice to the exporter. Since no anti-dumping duty is being charged, it cannot be considered that a *de minimis* margin exists or that an anti-dumping duty in excess of the dumping margin is being charged, as argued by the United States.

4.204 As to the claim that US exporters will be subject to review and the possible application of a definitive measure, if those exporters do not engage in dumping, such reviews will not lead to the application of any measure. The AD Agreement does not prohibit a review of exporters with a zero per cent dumping margin. If the negotiators of the Agreement had determined that such exporters should not be subject to review, they would have done so explicitly.

(e) Mexico applied the facts available to Producers Rice and to the US producers and exporters that were not investigated in a manner consistent with the AD Agreement

4.205 In the request for the establishment of a panel, the United States put forward arguments concerning Articles 1 and 9.3 and paragraphs 1, 3, 5, 6 and 7 of Annex II of the AD Agreement and Article VI:2 of the GATT 1994 that were not the subject of consultations, thus violating Articles 4.5 and 4.7 of the DSU and 17.4 of the AD Agreement.

4.206 The United States' argument concerning the application of a dumping margin to US exporters on the basis of the facts available is not substantiated by the AD Agreement. Mexico considers that the United States is trying to impose obligations on Mexico that are not to be found in the AD Agreement; or, contrary to Article 17.6 of the AD Agreement, it rejects *a priori* Mexico's permissible interpretation of the provisions of the Agreement.

4.207 Mexico is not obliged to determine an individual dumping margin for all exporters or producers inasmuch as Article 6.10 of the AD Agreement establishes the obligation to do so only in respect of known exporters, which is what Economía did.

4.208 Moreover, Article 9.4 of the AD Agreement only applies when the investigating authority limits its examination to a reasonable number of exporters or producers. Mexico did not limit its examination to a reasonable number of exporters or producers; therefore, this Article does not apply when a dumping margin is calculated for exporters that did not export or did not participate in the investigation.

4.209 In the case of US exporters that were not investigated individually and were never included in the investigation and/or did not provide the necessary information, Economía was obliged to apply the facts available, in accordance with Article 6.8 of the AD Agreement. Mexico acted consistently with the AD Agreement in applying the facts available to *Producers Rice*, because if an interested party does not participate in the investigation or has no exports during the period of investigation, it must be considered that it did not provide the information needed to calculate a dumping margin. Article 6.8 of the AD Agreement allows a dumping margin to be calculated on the basis of the facts available.

4.210 Mexico acted in a manner consistent with Annex II to the AD Agreement, as can be seen from the following considerations:

(a) Mexico acted consistently with paragraph 3 of Annex II to the Agreement by applying Article 6.8 of the AD Agreement to *Producers Rice* as the firm did not provide the information needed to calculate a dumping margin and there was thus no information from the exporter to be taken into account.

(b) Economía acted consistently with paragraph 5 of Annex II to the AD Agreement, as *Producers Rice* did not provide information that was ideal in at least one respect for the calculation of a dumping margin.

(c) In addition, Economía acted consistently with paragraph 6 of Annex II to the AD Agreement because it did not reject any of the information provided by *Producers Rice* but accepted it and acted in accordance with the provisions of the AD Agreement in calculating the dumping margin applicable.

4.211 Furthermore, contrary to the United States' claim, the determinations of Economía amply and sufficiently reflect the findings and conclusions reached on the dumping, injury and their causal relationship, and include all the issues of fact and law considered relevant by Economía. Consequently, there was no violation of the AD Agreement in that respect.

4.212 Mexico did not levy anti-dumping duties in excess of the dumping margins. The margins were correctly calculated by Economía and the duties levied are consistent with those margins. Mexico thus acted consistently with the GATT 1994 and the AD Agreement.

3. Complaints by the United States regarding the Foreign Trade Act

4.213 According to the report of the Appellate Body in *US – Carbon Steel*, it is presumed that a Member's legislation is consistent as such with the WTO Agreements until proven otherwise. Thus, the burden of establishing *prima facie* that there has been a violation in this respect rests with the complaining party. The United States bears the burden of proving *prima facie* that the Foreign Trade Act violates the WTO Agreements, but has not done so.

4.214 The United States asserts that the Foreign Trade Act is "mandatory", without taking into account the relationship between this legislation and international agreements. According to the Appellate Body report in *US – Corrosion-Resistant Steel Sunset Review*, in the event of claims brought against legislation "as such" the distinction between mandatory and discretionary legislation should be analysed on a case specific basis and should not be applied in a "mechanistic" fashion.

4.215 **Article 53 of the Foreign Trade Act** is consistent as such with Articles 6.1.1 of the AD Agreement and 12.1.1 of the SCM Agreement, which provide that "[e]xporters or foreign producers receiving questionnaires ... shall be given at least 30 days for reply ... ". Mexico is therefore not required to grant this time-limit to exporters that were not sent a questionnaire. This is confirmed in the final report of the Panel in *Argentina – Poultry Anti-Dumping Duties*. On the subject of extensions, Article 53 of the Foreign Trade Act does not in any way prohibit the granting of extensions, and in administrative procedures US exporters have been granted extensions when they so requested.

4.216 **Article 64 of the Foreign Trade Act** is consistent with Articles 6.8 of the AD Agreement and 12.7 of the SCM Agreement inasmuch as if a party does not participate in the investigation or had no exports during the period of investigation, and consequently does not provide the necessary normal value and export price information, the investigating authority may calculate the relevant margin on the basis of the facts available.

4.217 Likewise, Article 9.4 of the AD Agreement only applies where the investigating authority limits its examination to a reasonable number of interested parties, in accordance with Article 6.10 of the AD Agreement. The calculation method set out therein does not apply to exporters or foreign producers that have not provided the necessary information or have not participated in the investigation. It cannot therefore be claimed — as the United States does — that applying Article 64 of the Foreign Trade Act means imposing an anti-dumping duty in excess of the dumping margin, in violation of Article 9.3 of the AD Agreement.

4.218 Article 64 of the Foreign Trade Act is consistent with paragraph 3 of Annex II to the AD Agreement as it requires the investigating authority to consider all verifiable information. Thus, if an exporter fails to provide the necessary information on the normal value and export price, then there is no verifiable information to consider. Paragraph 5 of the Annex provides that the investigating authority should not disregard the information provided by the exporter even if it is not ideal in all respects. In other words, if it is to be taken into consideration, the information must be ideal in at least one respect; therefore, if no information on the normal value and export price is provided, it cannot be taken into account.

4.219 Mexico rejects the United States' argument concerning paragraphs 1 and 7 of Annex II to the AD Agreement inasmuch as paragraph 1 specifies that if the interested party fails to provide the information required, the investigating authority 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, and the last sentence of paragraph 7 of the Annex provides that if an interested party does not cooperate and fails to provide the investigating authority with relevant information, this could lead to a result which is less favourable to for the interested party than if the party did cooperate. This would occur after the said information had been compared with that available from independent sources.

4.220 **Article 68 of the Foreign Trade Act** is consistent "as such" with Articles 5.8, 9.3 and 11.2 of the AD Agreement and 11.9 and 21.1 of the SCM Agreement. Articles 5 of the AD Agreement and 11 of the SCM Agreement apply solely to investigations and not to reviews. Once the definitive measure has been imposed, Articles 5.8 of the AD Agreement and 11.9 of the SCM Agreement cease to apply. In any case, reviews carried out in respect of exporters with no positive dumping margin are similar to those provided in Article 9.3.1 of the AD Agreement.

4.221 The United States' interpretation of Article 68 of the Mexican Foreign Trade Act is wrong inasmuch as this provision does not impose a "representativeness" requirement as a condition for the investigating authority to conduct reviews such as those provided for in Articles 21.2 of the SCM Agreement and 9.3 and 11.2 of the AD Agreement.

4.222 **Article 89D of the Foreign Trade Act** is consistent as such with Articles 9.5 of the AD Agreement and 19.3 of the SCM Agreement. The United States basically puts forward two

arguments: this Article applies only to producers and not to exporters; and it requires foreign producers to demonstrate that their exports were representative.

4.223 Mexico reiterates that the provisions of the Foreign Trade Act must be applied in a manner consistent with those of the international treaties to which Mexico is party, as stipulated in Article 2 of the Foreign Trade Act. Thus, Mexico confines itself to applying anti-dumping and countervailing duties as provided for in Article VI of the GATT 1994 and in the AD and SCM Agreements.

4.224 Although Articles 9.5 of the AD Agreement and 19.3 of the SCM Agreement do not expressly so provide, in view of their context, object and purpose, it is both natural and logical to request that a new exporter's volume of exports during the review period be representative. If such were not the case, it would be impossible for the investigating authority to make a proper price comparison, and it would be unable to meet its obligation to determine an individual margin of dumping if the new exporter were to export one single unit of the product investigated.

4.225 **Article 93.V of the Foreign Trade Act** is consistent as such with Articles 18.1 of the AD Agreement and 32.1 of the SCM Agreement. The United States has failed to prove that Article 93.V of the Foreign Trade Act is inconsistent with the AD Agreement or the SCM Agreement. Even if the United States had produced the relevant evidence, Mexico holds that there is no inconsistency of any kind between Article 93.V of the Mexican law and the WTO Agreements inasmuch as Article 2 of the Foreign Trade Act stipulates that all of the provisions of the Foreign Trade Act must be applied in accordance with the provisions of international treaties to which Mexico is party. Furthermore, Article 93.V of the Foreign Trade Act does not require the investigating authority to apply its provisions but gives Economía discretion to impose fines. This is proved by the fact that Mexico has never imposed such fines on Members of the WTO, even though this possibility has existed in the Foreign Trade Act since 1994.

4.226 **Articles 68 and 97 of the Foreign Trade Act and 366 of the Federal Code of Civil Procedure** (FCCP) do not violate Articles 9.3, 9.5 and 11.2 of the AD Agreement and 19.3 and 21.2 of the SCM Agreement.

4.227 With regard to Article 366 of the FCCP, the United States has failed to make a *prima facie* case of violation as such of this Article; therefore, its allegation should not be considered further by the Panel. Even in its Exhibit US-20 there is no proof that Article 366 of the FCCP was applied.

4.228 Articles 68 and 97 of the Foreign Trade Act, by considering as definitive only anti-dumping or countervailing duties that have not been challenged under any procedure, give interested parties legal certainty. On the one hand, the Foreign Trade Act allows them to guarantee the amount of the anti-dumping duties fixed in the final determination that is subject to challenge; and on the other, it ensures that there are no contradictory rulings by the authorities. Such legal certainty affords a guarantee for exporters, who are not required to pay any duties while the challenge procedure is under way. Where the ruling is in their favour, the security is annulled or the amounts already paid are refunded with interest.

4.229 Articles 68 and 97 of the Foreign Trade Act are not inconsistent with Article 9.3.2 of the AD Agreement inasmuch as they do not prohibit the reimbursement of duties paid in excess. The refund is made promptly within the time-frame specified in the AD Agreement, once the proceedings in question have come to an end.

4.230 Moreover, Articles 68 and 97 of the Foreign Trade Act are not in breach of Articles 9.5 of the AD Agreement and 19.3 of the SCM Agreement on the new exporter procedure inasmuch as none of the provisions of the Foreign Trade Act precludes or expressly prohibits such a procedure. The requirement in the AD Agreement is that a new exporter procedure, once initiated, should be carried out promptly (or expeditiously in the words of the SCM Agreement). There is no requirement to initiate the new exporter procedure immediately after an application for such a procedure has been made.

E. SECOND WRITTEN SUBMISSION OF THE UNITED STATES

4.231 The following are the United States' arguments in its second written submission:

1. Introduction

4.232 Mexico's imposition of an anti-dumping measure on long-grain white rice from the United States breached numerous provisions of the AD Agreement and the GATT 1994. Several provisions of Mexico's Foreign Trade Act and its Federal Code of Civil Procedure ("FCCP") are inconsistent with provisions of the AD Agreement and the SCM Agreement.

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

2. Economía's use of a stale Period of Investigation

(a) Mexico is unable to justify Economía's use of a stale POI

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

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

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

4.237 Mexico's sole defence on this issue is that it interprets the AD Agreement as placing no limits on the age of the information that an authority may use in reaching its determinations of dumping and injury, and that Economía is under no obligation to obtain the most recent information available when it conducts its investigations. Mexico is wrong.

(b) An investigating authority must base its injury investigations on a period that includes the most recent available information

4.238 Numerous provisions in the AD Agreement and the GATT 1994 illustrate the need for authorities to base their injury investigations on a period that includes the most recent available information. For example, Article 3.7 of the AD Agreement requires an authority to base a threat determination:

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

4.239 If an authority fails to evaluate data that includes the most recent available data, it will not be in a position to make judgments about situations that are imminent; at most, it will be able to make predictions about situations that might have been imminent at some time in the past.[26] Thus, Article 3.7 of the AD Agreement presumes that the authority is making its determination based on data that include the most recent available information.

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

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

4.242 The necessity for an authority to consider events that happened in the past does not give an authority free rein to choose which part of the past to consider. In the rice investigation, Economía made no effort to collect information for the period between the end of the POI and the initiation of the anti-dumping investigation or to update its data thereafter. The 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 (1) 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; (2) 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 (3) Economía's determination that the dumped imports were "causing" injury to the domestic industry was not objective or based on positive evidence as required by Articles 3.1 and 3.5 of the AD Agreement.

3. Economía's limitation of its examination of injury

4.243 Economía's decision to allow the petitioners to set the POI for its dumping analysis as March - August 1999 and its 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.

4.244 First, the sole reason for Economía's decision to base its dumping analysis on the March to August time period was that the petitioner requested it to examine that period. Moreover, instead of using a neutral approach, Economía always assumes that the POI that the petitioner suggests is appropriate; if the foreign respondents disagree, it places the evidentiary burden on them to demonstrate that it should use another period instead. Moreover, when the respondents in the rice investigation did come forward and object to the POI, Economía summarily rejected their concerns.[27] Contrary to Mexico's assertion, footnote 4 of the AD Agreement is not relevant, because it merely addresses the determination of whether sales have been made below cost over an extended period of time.

4.245 Second, the sole reason for Economía's decision to base its injury analysis on the March to August time period was that the petitioner requested it to examine that period. Mexico's statement that Economía conducted its injury analysis on the basis of the "period selected by the petitioners" speaks

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

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

volumes. The petitioner requested Economía to examine the March to August time period specifically because the petitioner believed imports were concentrated in that period, and Economía initiated the case on that basis. An objective and unbiased authority would not have done so.

4.246 Third, Mexico has rejected the idea that Economía took "seasonality" into account in making this decision. Therefore, there are absolutely no grounds to conclude that concerns about seasonality justified the approach that Economía took.

4.247 Fourth, Economía did collect data for every month in the three-year injury POI; it simply chose not to examine half of that information. By contrast, a proper injury analysis looks at the evidence for the entire POI. The fact that the non-examined half of each of the three years reflects a large portion of domestic production makes it vital for an authority to examine evidence for the entire POI.

4.248 The Appellate Body made a similar point in *US – Hot-Rolled Steel*, when it found that an 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.

4.249 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*."

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

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

4. Economía's conduct of its injury analysis

4.252 Economía's injury analysis breached Articles 3.1, 3.2, 3.4, 3.5, 6.8, 12.2, and Annex II of the AD Agreement on at least four different grounds.

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

4.254 To be specific, Mexico has confirmed that numerous types of non-subject rice entered during the POI under tariff heading 1006.30.01 of Mexico's tariff schedule, and its answers demonstrate that Economía failed properly to separate the subject imports from the non-subject imports before it conducted its injury analysis.

4.255 Mexico argues that Economía did separate the subject imports from the non-subject imports, and that it used several methodologies to do so. In actuality, however, the only methodology that Economía used was the flawed procedure supplied by the petitioner. The petitioner's methodology was based on a flawed statistical procedure that focused on isolating imports of short-grain and medium-grain rice using monthly average prices for those products in the US market, that arbitrarily assumed that any rice that entered Mexico above a certain price had to be short-grain or medium grain and could not be long-grain white rice, and that did not even address the question of how to separate imports of glazed rice and parboiled rice, which were also not part of the subject product.[28] Moreover, even that analysis is applied only to 1999. Economía simply guessed at import levels for 1997 and 1998.[29] Furthermore, Mexico is mistaken in claiming that Economía also sought to base its injury determination on information obtained from the exporters. In actuality, Economía only sought volume and value information from Farmers Rice, Riceland, The Rice Company, and Producers Rice.

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

4.257 Finally, Mexico has confirmed that Economía ignored one reliable and neutral method that would have allowed it to collect the information that it needed to conduct an objective examination of the injury factors, and to base its determination on positive evidence – namely, consulting the *pedimentos*.

4.258 Mexico confirms that the *pedimentos* identify the volume and value of each import. Thus, it is indisputable that Economía could have used the *pedimentos* to obtain volume and value data that would have been specific to the subject merchandise, and substantially more accurate than the information on which it relied.

4.259 Mexico argues that the description field in the *pedimentos* does not necessarily describe in sufficient detail the product being imported, and that Economía would have needed to consult the invoices in cases where the description was not sufficiently precise. The invoices, however, are attached to the *pedimentos*. Moreover, even if Economía had only used the *pedimentos* that specifically identified the imports as long-grain white rice, it still would have had a substantial amount of precise data on volumes and values that it could have used in its determinations.

4.260 Mexico also argues that it would have been "impractical" to consult each and every *pedimento*. Even if Economía had only consulted a representative sample, however, it still would have had better data that it could have used in performing its analyses.

4.261 In addition, Mexico confirmed that the *pedimentos* identified the exporter and importer for each shipment. Thus, if Economía had consulted the *pedimentos* and encountered questions about the content of a particular shipment, it could have consulted either party, confirmed the nature of the merchandise, and ensured that it had accurate information on volumes and values. Alternatively, since the *pedimentos* listed the names and addresses of the exporters and importers, Economía could have simply sent them its questionnaire, and asked them to provide the necessary information. Economía failed to do so.

4.262 Finally, the Panel may wish to keep in mind the evidence that the United States submitted in response to question 17 from the Panel, which demonstrates that Mexico has been willing to use the *pedimentos* to benefit domestic industries seeking the imposition of anti-dumping measures. Mexico has gone so far as to release actual *pedimentos* to its domestic industry, and has allowed them to use the *pedimentos* to support their allegations of dumping and injury.

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

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

5. Economía's failure to exclude Farmers Rice and Riceland from the measure

4.263 Article 5.8 of the AD Agreement requires Members to exclude from anti-dumping measures firms that are individually examined in an anti-dumping investigation and found not to be dumping. Mexico's failure to exclude Farmers Rice and Riceland from the anti-dumping measure on long-grain white rice breached Article 5.8.

4.264 Mexico will impose an anti-dumping measure on every producer and exporter in the investigated country as long as it finds at least one exporter to be dumping at more than *de minimis* levels. This includes applying the measure to producers that are investigated and found not to be dumping. Economía will not examine whether the weighted average margin of all exporters is greater than *de minimis* when it decides to impose an anti-dumping measure.

4.265 The outcome of the rice investigation illustrates the consequences of Mexico's approach. By "deeming" every exporter and producer in the investigated country as being included in the investigation and applying an adverse, facts available-based margin to the unexamined exporters and producers, Economía will almost certainly find at least one firm to be dumping in every anti-dumping investigation, and thus it will never find a basis to terminate an investigation due to "*de minimis*" dumping margins. Mexico's interpretation of Article 5.8 reads the *de minimis* dumping language out of the AD Agreement.

4.266 Mexico's interpretation of Article 5.8 fails to take into account that the second and third sentences of Article 5.8 refer to the "margin" of dumping being *de minimis*. The Appellate Body has interpreted the term "margin" in Article 9.4 of the AD Agreement as referring to the "individual margin of dumping determined for each of the investigated exporters and producers" of the investigated product. Nothing in the text of Article 5.8 of the AD Agreement suggests that the term "margin" should be interpreted differently in Article 5.8 than in Article 9.4.

4.267 The fourth sentence of Article 5.8 of the AD Agreement provides contextual support for the view of the United States. That sentence states that the "volume" analysis is normally done on a country-wide basis. The absence of similar language suggesting that the dumping analysis is to be done on a country-wide basis supports the conclusion that the *de minimis* standard is to be applied on a company-specific basis.

4.268 The EC claims that the term "country" is used in various places in the AD Agreement and the GATT 1994, and that the concept of dumping involves a "strong connotation of a country-wide assessment." In actuality, however, the concept of dumping involves a strong connotation of firm-specific assessment. Several provisions of the AD Agreement support this view.

4.269 Moreover, there is no "internal inconsistency" involved in terminating an anti-dumping investigation on a firm-specific basis, and no risk that doing so will lead to "parallel" investigations. Nor will interpreting Article 5.8 to require the exclusion of firms with zero margins of dumping require or lead to "several company specific cases or investigations." On the contrary, an authority can conduct a single investigation of multiple firms, and then terminate its investigation with respect to specific firms by excluding firms that were investigated and found not to be dumping from the measure.

6. Economía's application of an adverse "Facts Available" dumping margin

(a) Economía should have taken steps to investigate additional exporters

4.270 Mexico has confirmed that the *pedimentos* identify the exporters of the subject merchandise, and that Mexico therefore knew the identity of every exporter of the subject merchandise to Mexico during the POI. Economía's failure to review the *pedimentos* to obtain the contact information for the exporters or to take any other steps to investigate more than just the two exporters that the petitioner designated in the petition was neither objective nor unbiased.

4.271 First, Mexico's argument that examining the *pedimentos* would have caused a "significant delay" in the initiation of the investigation is not credible. Economía only investigated dumping for March to August 1999, so even under Mexico's theory, reviewing the *pedimentos* would have taken approximately two weeks at most. It took Economía six months to initiate the investigation; the need to spend two weeks to gather the information it needed to contact the "known" exporters would not have dissuaded an objective and unbiased authority.

4.272 Second, Economía could have chosen instead to take other steps to identify additional exporters. For example, if Economía had consulted the *Rice Journal*, it would have obtained the names, addresses, and phone numbers for every rice miller in the United States.

4.273 Third, Mexico mischaracterizes the arguments of the United States on this issue when it claims that it was under no obligation to identify all of the exporters of long-grain white rice in the United States. The United States agrees that there is no such obligation. On the contrary, the second sentence of Article 6.10 explicitly permits an authority to limit its investigation. Therefore, Economía only needed to identify enough exporters to allow it to take either approach. An objective and unbiased administering authority would have done so.

4.274 Fourth, Economía's failure to conduct a proper investigation of the known exporters was particularly biased and non-objective because of the consequences for the firms that it did not individually investigate. Economía treated every exporter or producer in the United States as being included in the investigation. It then applied an adverse, facts available-based margin taken from the petition to any firm that did not learn of the investigation on its own and appear at the clerk's office in Mexico City to obtain a copy of the questionnaire. Given the negligible consequences for the petitioner of a slight delay in initiation, an objective and unbiased authority would have taken the necessary time to ensure that the due process rights of the foreign respondents were adequately protected.

4.275 Finally, Economía did not satisfy itself as to the accuracy of the petitioner's listing of only two exporters, as Articles 5.3 and 6.6 of the AD Agreement require. Although Economía used the *listado* data to check the volume and value data that the petitioner submitted, it was not able to use that source to confirm the identity of the exporters, and it did not check the *pedimentos*.

(b) Mexico is misinterpreting the relevant requirements of the AD Agreement

4.276 Economía also breached the AD Agreement and the GATT 1994 by applying an adverse, facts available-based margin taken from the petition to Producers Rice and the unexamined exporters and producers. Mexico's only response to the claims of the United States has been to argue that the AD Agreement creates no obligations with respect to "unknown" exporters and producers, or exporters that had no shipments during the POI, and that Article 6.8 of the AD Agreement authorized it to apply adverse facts available to such firms. Mexico even claims that an authority only needs to consider the exporters that are "known" to the petitioner, and not those known to itself. Mexico's interpretation is incorrect.

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

4.278 Thus, taken to its logical conclusion, the EC's and Mexico's interpretation of Articles 6.10 and 9.4 and the facts available provisions would permit an authority to initiate an investigation on the basis of a petition that did not identify any "known" exporters, publish a notice of the initiation of an anti-

dumping investigation in its official journal, and then send its questionnaire to nobody. Then, unless a firm learned of the investigation on its own, entered an appearance, and obtained a copy of the questionnaire, the authorities could apply the petition margin to the entire country without having to examine anyone. While this outcome might be expedient for the authority (and beneficial for the petitioner), it is not consistent with the terms of the AD Agreement.

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

4.280 Mexico must also explain how its interpretation is consistent with Article 9.5 of the AD Agreement, which permits certain exporters to receive an expedited review if they can demonstrate, among other conditions, that they are "not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product." (Emphasis added.) This provision applies specifically to exporters and producers who did not export the subject merchandise to the importing Member during the POI. Mexico includes every exporter or producer of the product in its investigations, and it applies the anti-dumping duties on the product to all of them (either because they receive an individual calculated rate or because they are assigned the adverse, facts available rate taken from the petition). Therefore, because Producers Rice and the unexamined exporters and producers are all "subject to the anti-dumping duties on the product," they do not qualify for an expedited review under Article 9.5 of the AD Agreement. Mexico's interpretation reads Article 9.5 out of the AD Agreement.

(c) An investigating authority may not apply a facts available margin to an exporter that was never even sent the questionnaire

4.281 The AD Agreement prohibits an authority from applying a margin based on the facts available to an exporter or producer that was never even sent the questionnaire. Article 6 and Annex II of the AD Agreement are the provisions most relevant to this point. The Appellate Body has described Article 6 as an article that:

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

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

4.283 Paragraph 1 of Annex II of the AD Agreement then reiterates this obligation by requiring investigating authorities to ensure that respondents receive proper notice of the rights of the investigating authorities to use the facts available. 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."

4.284 Given these requirements, Economía cannot simply publish a general notice in its *Diario Oficial* announcing the initiation of an anti-dumping investigation, purport to be investigating every producer and

exporter in the subject country, and apply a facts available-based margin to any firms that do not come forward on their own and enter an appearance in the proceeding. Rather, it must observe the procedural and due process obligations that are contained in Article 6 and that it owes to interested parties throughout the investigation. This means that if Economía is including a particular exporter "in an anti-dumping investigation," it must give notice to that individual exporter by sending the exporter a copy of the questionnaire, asking it to respond, and ensuring that the exporter understands that a failure to respond may result in the application of a margin based on the facts available. If it fails to take these steps, then it cannot apply a facts available-based margin to that exporter.

4.285 Alternatively, an authority may choose to limit its investigation in accordance with Article 6.10 of the AD Agreement. In that case, however, it may only apply a neutral "all others" rate, calculated in accordance with Article 9.4 of the AD Agreement, to the unexamined exporters and producers. Regardless of the approach it chooses, an authority cannot apply a facts available-based margin to an exporter or producer that is never sent the questionnaire.

(d) Economía breached paragraph 7 of Annex II

4.286 Mexico concedes that it did not observe the requirements of paragraph 7 of Annex II when it applied the facts available to Producers Rice. Mexico claims that it was under no obligation to do so. It also failed to observe paragraph 7 with respect to the unexamined exporters and producers. Similarly, there is no evidence on the record of the rice investigation to suggest that Economía failed to take steps to check the presumptions embodied in the petition against independent data available during the investigation, or to exercise "special circumspection" in its application of the petition margin to Producers Rice and the unexamined producers and exporters.

7. Mexico's Foreign Trade Act and its Federal Code of Civil Procedure

4.287 Mexico has largely agreed with the United States' interpretation of the operation of the various articles of the Foreign Trade Act and the FCCP at issue in this dispute; it has focused its defence instead on the United States' interpretation of the relevant WTO obligations. For the most part, this defence has been composed of broad assertions that the AD and SCM Agreements create no obligations with respect to the matters addressed by the challenged provisions. Mexico's arguments are wrong.

4.288 Mexico has also argued that the United States' arguments on this issue have failed to take into account the interrelationship between the AD and SCM Agreements and Mexico's domestic law. The United States has previously explained why this argument is incorrect as well.

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

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

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

4.292 In reply to the Panel's question 31, Mexico asserts that Article 68 of the Foreign Trade Act does not require an exporter to demonstrate that its volume of exports was "representative" as a sine qua non for the initiation of a review. It states that the exporter "should" make this demonstration during the course of the proceeding itself, however. As the United States demonstrated in its response to this same question, Economía does in fact require exporters seeking reviews to make such a demonstration; Economía addresses the issue in the initiation notice itself.

4.293 In any event, Mexico's argument seeks to elevate form over substance. Rejecting a review request in the course of a proceeding for a failure to demonstrate a "representative" volume of sales is tantamount to rejecting the review at the outset. In either event, Article 68 precludes firms from obtaining a review; therefore, it is inconsistent as such with Articles 9.3 and 11.2 of the AD Agreement, and with Article 21.2 of the SCM Agreement.[30]

4.294 Mexico's response to the Panel's question 33 attempts to defend Article 89D of the Foreign Trade Act by pointing to Article 47 of its regulations. The cited provision does nothing to rebut the United States' *prima facie* case that Article 89D is inconsistent "as such" with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement. Article 47 establishes rules for determining the costs of production for trading companies. It appears in the section of Mexico's anti-dumping regulations that sets out the methodologies that Economía is to apply in calculating anti-dumping margins. It has nothing to do with the question of who is entitled to obtain an expedited review, however. And even if it did, the hierarchy of laws in Mexico is such that the regulations are subordinate to the Foreign Trade Act; the decree that implemented Article 89D makes clear that the regulations continue in effect only insofar as they are not inconsistent with the provisions of the decree.

4.295 Finally, Mexico seeks to convince the Panel that no issue arises from the fact that Article 366 of Mexico's FCCP and Articles 68 and 97 of Mexico's Foreign Trade Act preclude Mexican authorities from conducting reviews of anti-dumping and countervailing duties while a judicial review of the underlying anti-dumping or countervailing duty measure is ongoing, because the interested parties may post a bond in lieu of paying the duties themselves while the litigation is underway. The ability to post a bond does not ameliorate the negative effects of the preclusion of reviews, or to remedy the WTO breaches that result therefrom.

4.296 The United States previously submitted to the Panel a letter from Economía to Sun Land, a US beef exporter that is subject to Mexico's anti-dumping measure on certain US beef products. That measure, imposed in July 2000, is being reviewed by a "binational panel" established under Chapter Nineteen of the North American Free Trade Agreement. Economía denied Sun Land's request for a review on the grounds that Articles 68 and 97 of the Foreign Trade Act preclude it from conducting the review while the NAFTA litigation is underway. Although the binational panel recently remanded the beef determination to Economía for further proceedings, the litigation continues today.

4.297 Anti-dumping duties are assessed against the importers, not the exporters or producers. Thus, it is the importer, and not the exporter or producer, that has to decide whether it is willing to post a bond as security against potential anti-dumping duties. After Mexico refused to conduct a review of Sun Land

[30] Mexico makes the same assertion with respect to Article 89D of the FTA in its response to the Panel's Question 32. As the United States demonstrated in its response to Panel Question 32, Mexico's arguments about Article 89D are similarly without merit, and the Panel should reject them as well.

while the NAFTA litigation was ongoing, Sun Land's importer informed Sun Land that it was not willing to post a bond with respect to any of Sun Land's beef products that are subject to the Mexican anti-dumping measure. In addition, Sun Land was unable to find another importer willing to post a bond. As a consequence of its inability to obtain a review and post a bond, Sun Land has been effectively locked out of the Mexican market for the products subject to the anti-dumping measure.

4.298 Thus, the preclusion of reviews causes real and substantial commercial harm to exporters that are subject to Mexican anti-dumping measures. It also presents exporters that are subject to Economía's adverse, facts available-based petition margins with two mutually exclusive choices: they can seek judicial review of the order itself, knowing that doing so will preclude them from obtaining an administrative review that might reduce their margin, thus guaranteeing their exclusion from the market for a period of years; or they can seek an administrative review in an effort to reduce their margin, and thus forfeit any chance to challenge the legitimacy of the order in court.[31] Neither the AD Agreement nor the SCM Agreement permits a Member to impose such a choice under its domestic law.

8. Mexico has failed to contest numerous US claims

4.299 Finally, Mexico has failed to date to contest – let alone rebut – numerous claims of the United States.

F. SECOND WRITTEN SUBMISSION OF MEXICO

4.300 The following are Mexico's arguments in its second written submission:

1. Complaints relating to the anti-dumping investigation on imports of long-grain white rice originating in the United States of America regardless of the country of provenance

(a) Introduction

4.301 Mexico hereby refutes the assertions made by the United States at the first substantive meeting of the Panel and reaffirms the arguments put forward by Mexico in its first written submission and its oral statement at that substantive meeting.

4.302 Mexico emphasizes that its first written submission, oral statement, replies to the questions posed by the Panel at the first substantive meeting and rebuttal submission should be considered as a whole. It also requests the Panel that, in view of their significance, the preliminary objections raised in its first written submission be treated on a par with the investigation itself. In this connection, the United States once again introduces a number of arguments based on Articles that were not the subject of consultations or included in its request for the establishment of a panel or its first submission. Mexico accordingly requests that these arguments be dismissed.

4.303 The United States puts a tendentious interpretation on Mexico's arguments and misrepresents them, while making claims based on *a priori* premises with no grounding in the AD Agreement and seeking to impose on Mexico its own administrative practice and its own interpretation of the AD Agreement, in breach of Article 17.6 of the Agreement.

[31] In addition, if they forfeit their chance to seek judicial review and wait to seek an administrative review instead, they run the risk that a different firm will request judicial review in the meantime. In that case, they will find themselves with no remedy at all, because Mexico refuses to conduct administrative reviews of any firm if any other firm is seeking judicial review.

4.304 The aforementioned points are clearly visible in the affirmations made by the United States in its *Opening Statement* at the first substantive meeting and in the document entitled *Answers of the United States to Questions of the Panel in Connection with its First Substantive Meeting* ("*Answers*").

4.305 In this document, Mexico responds to the assertions of the United States in its *Opening Statement* of 17 May 2004 and to a number of the replies contained in its *Answers*. Since many of the United States' arguments are a repetition of those set forth in its first submission, Mexico reiterates its position and makes cross-references to its own first written submission, indicating the paragraphs in which it has already responded to the questions raised by the United States.

4.306 The United States' arguments concerning the alleged inconsistency of the Foreign Trade Act with the WTO Agreements are based on a single premise, which is the supposedly mandatory nature of the Articles of the Foreign Trade Act at issue. *A contrario sensu*, this means that if the Articles in question are not mandatory, then they are not in any way inconsistent with the WTO Agreements.

4.307 The United States has not established a *prima facie* case of violation of the WTO Agreements. Mexico stresses that the provisions of the Foreign Trade Act are consistent with these Agreements, as its own arguments have demonstrated.

(b) Mexico complied with Articles 1, 3.1, 3.2, 3.4 and 3.5 of the AD Agreement and Articles VI:2 and VI:6(a) of the GATT 1994 with regard to the establishment of the period of investigation

4.308 Article VI:6(a) of the GATT 1994 was not cited in the request for consultations, the request for the establishment of a panel or the first submission of the United States. The United States' arguments in this respect should therefore be dismissed.

4.309 Mexico believes that a clear reading of the Article is important, because no violation of the GATT attributable to the Mexican investigating authority can be deduced from its wording since the authority applied an anti-dumping duty after it had determined that dumped exports from the United States were causing injury to Mexico's domestic industry, as explained in paragraph 398 of the final determination.

4.310 Mexico (as indeed any other WTO Member) does <u>not</u> have complete freedom to do whatever it wants and has never made any such claim. On the other hand, it <u>does</u> have discretion to establish the period of investigation that it deems most appropriate. As concerns the remoteness of the period investigated, the circumstances of each case will determine what timeframe is appropriate for the investigation.

4.311 Mexico takes the view that it is desirable for the period of investigation to be as close as practicable to the date of initiation of an anti-dumping investigation but observes that there is no provision establishing any obligation in that regard. If the period under investigation is remote and yet adequate for the anti-dumping investigation, it should not be rejected but should be evaluated and, as appropriate, used for the purposes of the relevant analysis.

4.312 Mexico stresses the biased emphasis, in footnote 4 in the United States' *Answers*, on the fact that it set as the period of investigation the months from March to August 1999 for two reasons: (a) because the petitioner so requested; and (b) because the imports of long-grain white rice were concentrated in that period. The United States attempts to make it appear as though Mexico acted in an arbitrary and non-objective manner.

4.313 The first part of the United States' claim reiterates the statement made in the United States' first submission, without referring to the arguments Mexico adduced in paragraphs 55, 56 and 67 of its first written submission to show that Mexico did not breach the AD Agreement in setting the period of investigation in the way that it did.

4.314 As regards the second part of the claim, although imports of long-grain white rice were indeed negligibly higher over the periods March to August of 1999 and 1998 than during the rest of each year, this was not the case in 1997, when imports from the United States were lower in that period than during the rest of the year. Thus, imports of white rice from the United States increased and the comparable periods differed slightly from the rest of each year in terms of imports. The United States' argument is therefore without substance.

4.315 Mexico observes that in paragraph 9 of its *Answers* the United States misrepresents Mexico's arguments and then directs the Panel to them as it sees fit.

4.316 As can be noted in paragraph 55 of its first written submission, Mexico did not establish the period of investigation in order to eliminate distortions but used, as the period of injury analysis, previous periods comparable to the period investigated. The period of investigation was not "selected" by the investigating authority but was suggested by the petitioner and, since no one demonstrated that it was inappropriate, the investigating authority had no objections.

4.317 The United States' assertion in paragraph 11 of its *Answers* should be dismissed because there is no line of reasoning to be derived therefrom. In any event, Mexico has already stated its reasons for setting the period of investigation in the way that it did. The United States has failed to establish *prima facie* that Mexico committed a violation in this regard.

4.318 In addition, as Mexico demonstrated in its first written submission and its response to question 13 posed by the Panel, there is no seasonality with respect to domestic production or the imports.

4.319 Furthermore, the United States did not respond to the Panel's first question regarding the use of events that happened in the past, nor did it offer any opinion as to whether a period of investigation covering 12-month-old data would be inconsistent with the AD Agreement. On the other hand, the United States emphasized that it was "not arguing that there is a specific length of time beyond which the POI becomes *per se* inconsistent with the AD Agreement", in contradiction to the argument developed in its first submission in respect of the remoteness of the period of investigation. The United States having changed its mind, it must be assumed that it is abandoning the argument set forth in its first submission. Mexico also refers to its response to question 2 posed by the Panel. The United States' reply to this question is that there is no consistent approach in Mexican practice with respect to the establishment of a period of investigation. Mexico stresses that, on average, there are about 10 months between periods of investigation and the initiation of its investigations.

4.320 In the investigations on partially hydrogenated fatty acid and triple-pressed stearic acid, the periods investigated used data that were 10 months old, which demonstrates the consistency with which Economía determines periods of investigation. On the other hand, the period did not necessarily have to be the same in both cases, since periods of investigation should be consistent with the circumstances of each case. When a petitioner suggests a period of investigation, the investigating authority therefore determines whether or not it is appropriate.

(c) Economía complied with Articles 1, 3.1, 3.5 and 6.2 of the AD Agreement regarding the establishment of the period of analysis

4.321 With regard to the comparable periods within the period of analysis, Mexico's comparison, for the purposes of injury analysis, between the periods March-August of 1997, 1998 and 1999 was carried out in an objective manner and on the basis of positive evidence. Mexico reiterates that (as any other WTO Member) it does not have complete freedom to do whatever it wants, but it does have discretion to establish the period of analysis that it deems most appropriate, provided that it does so in a manner consistent with the AD Agreement.

4.322 The United States held that Mexico breached Article 3.5 of the AD Agreement because Mexico failed to consider half of the period of investigation and to explain why it was not relevant. Mexico finds no link between the period of investigation and Article 3.5 of the AD Agreement, given that this provision relates to the period of injury analysis. Moreover, Mexico did consider all the information relevant to the dumping analysis within the period of investigation.

4.323 Mexico submits that the use of comparable periods eliminated any distortions that might have occurred in the injury analysis.

4.324 Mexico fails to understand why the United States considers that Mexico had no idea what the state of the industry was over the course of the period of investigation, even though it examined all the information for the period investigated and compared it in its entirety with the data for previous comparable periods within the period of analysis. Now, if the United States is referring to the fact that Mexico had no knowledge of the state of the domestic industry because its injury analysis did not encompass all three years in question, Mexico directs the Panel to its replies to questions 3 and 4 of the Panel relating to the first substantive meeting.

4.325 Mexico repeats that it complied with Article 6.2 del AD Agreement, since it gave the parties every opportunity to defend their interests. The United States is seeking to place on Mexico the obligation to analyse information that was not part of the anti-dumping investigation.

(d) Economía conducted its injury analysis in a manner consistent with Articles 3.1, 3.2, 3.4, 3.5, 6.8 and 12.2 and Annex II of the AD Agreement

4.326 As regards the alleged breaches of Articles 3.1, 3.2, 3.4, 3.5, 6.8 and 12.2 and Annex II of the AD Agreement, Mexico examined the data for the entire period of investigation and not only half of the data, since the period investigated covered the period March to August 1999.

4.327 Turning to the United States' argument concerning the failure to collect evidence on price effects and volumes, Mexico refers to its reply on the subject in its first written submission and maintains that it did conduct its injury analysis in an objective manner, on the basis of positive evidence. So far, the United States has failed to prove the contrary.

4.328 Economía does not have physical possession of the *pedimentos*, which are brought to the knowledge of the investigating authority when petitioners produce them as evidence. The fact of requesting and awaiting the reception of such documents would delay the initiation of an investigation even further. Hence, the investigating authority relies on the list of *pedimentos*.

4.329 In respect of the claim in paragraph 51 of the United States' *Answers*, there are cases in which the *pedimentos* are produced by the petitioners, since there are agreements to that effect between certain chambers or associations and the Ministry of Finance and Public Credit, as provided for in Article 144, paragraph XXVI,[32] of Mexico's Customs Law. This does not mean that the Mexican Rice Council (CMA) concluded any such agreement or that it was under the obligation to do so.

[32] "Article 144. The Ministry [SHCP] shall, in addition to the powers conferred on it under the Tax Code of the Federation and other laws, have discretion to:

...

XXVI.- Release the information contained in the pedimentos to Industrial Chambers and Industry Associations grouped in Confederations, as provided in the Law of Business Chambers and Confederations thereof, that participate with the Tax Administration Service in the Program on Customs and Tax Control by Industrial Sector. Similarly, it may release to taxpayers information in the pedimentos pertaining to any operations performed by them.

... ."

4.330 The United States has not demonstrated why it contends that Economía's failure to seek information from the purchasers of the merchandise under investigation constitutes a breach of the AD Agreement. Moreover, it points out that it did not suggest that the questionnaire be sent to all purchasers; the opposite emerges from its first submission, however. The United States thus appears to be seeking to partly modify its argument, which should therefore be dismissed.

4.331 The United States argues in its *Opening Statement* that Article 6.1.1 of the AD Agreement refers only to the time frame for exporters to respond to questionnaires, and fails to mention that this time frame applies solely to exporters that have received the questionnaire. On this matter, Mexico directs the Panel to its first written submission.

4.332 The United States puts a tendentious interpretation on the AD Agreement, making only partial reference to it and establishing non-existent linkages between its provisions. Mexico did not say that its interpretation of AD Agreement Article 6.1.1 nullified the obligation laid down in AD Agreement Article 3.1. It established the regulatory scope of Article 6.1.1 and concluded that neither this provision nor Article 3.1 had been breached.

4.333 Concerning the analysis of the significant increase in the volume of dumped imports and significant price effects, Mexico refers the Panel to paragraphs 114 to 117 of its first written submission.

4.334 The United States alleges that Mexico did not conduct an objective analysis of certain factors listed in Article 3.4 of the AD Agreement. Mexico refers the Panel to its arguments in paragraphs 118 to 122 of its first submission. The United States also places on Mexico the non-existent obligation to collect data for the period subsequent to the period of investigation. In so doing, it makes yet another baseless allegation of violation of the AD Agreement.

4.335 As regards paragraph 37 of the United States' *Opening Statement*, Mexico refers the Panel to paragraph 124 of its first written submission.

4.336 In response to paragraph 10 of the United States' *Answers*, Mexico refers to its written replies to questions 3 and 4 of the Panel relating to the first substantive meeting, and repeats that Economía gathered data for each month between January 1997 and December 1999.

4.337 The United States asserts that Mexico gathered no additional injury data after initiating its investigation. According to Mexico, this is not inconsistent with the AD Agreement. In addition, this is an argument that was not raised in the consultations or included in the panel request or the first written submission of the United States, in violation of Articles 4.5 and 4.7 of the DSU and Article 17.4 of the AD Agreement. It should therefore be dismissed.

4.338 In paragraph 12 of its *Answers*, the United States contends that Economía did not act in an objective and impartial manner, because at least half of domestic production occurred during the September-February time frame, and yet Economía set the months of March to August as the period of investigation.

4.339 Firstly, the fact that at least half of domestic production occurred during the September to February period does not affect the impartiality and objectiveness of the injury analysis, since the analysis covered the same periods of each year. In other words, the comparison was not between half of domestic production and all imports for an entire year. Secondly, the domestic producers argued that the imports were concentrated over the months of March to August, but this occurred, to a negligible extent, only in the years 1998 and 1999 and consequently, Economía accepted that period. In addition, no one raised any objections or proposed any other time frame. Mexico refers the Panel to its first written submission, which explains in detail why use of the months of March to August of each year does not contravene the AD Agreement. The United States' argument is therefore entirely without basis.

4.340 The United States claims in its *Answers* that the problems arising from an examination of only partial year data "are particularly acute when the domestic industry has production during all 12 months of a year" and that in order to comply with Articles 3.1, 3.4 and 4.1 of the AD Agreement, the investigating authority must examine the impact of the dumping on the domestic industry over a full-year period. The United States bases its claim on Article 4.1 of the AD Agreement, which was not the subject of consultations or included in its panel request or its first submission, in breach of Articles 4.5 and 4.7 of the DSU and Article 17.4 of the AD Agreement. Mexico accordingly requests that the claim be dismissed.

4.341 Moreover, seasonality being irrelevant, one segment of a given year is identical in structure to any other segment of that same year. The selection of the period has no implications in terms of comparability. Even if seasonality were an issue, the structure would be the same for a comparison of the same periods of each year. Thus, Mexico holds that the claim set out in paragraph 13 of the United States' *Answers* is entirely without merit.

4.342 Furthermore, Mexico does not bear the burden of proving that Articles 3.2 and 3.4 of the AD Agreement explicitly permit it to take the action it did. It is for the United States to demonstrate that Mexico acted in a manner inconsistent with the AD Agreement. Since the United States has provided no evidence in support of its arguments nor has it made a *prima facie* case, Mexico requests that its claims in this regard be dismissed.

4.343 In paragraph 19 of its *Answers*, the United States says that Article 4.1 of the AD Agreement requires an investigating authority to examine the domestic industry "as a whole" or those producers that constitute a "major proportion of total domestic production", and that because Economía examined production for half of each year, there was no way for it to be certain that it was complying with Article 4.1. The United States once again introduces a claim that was not the subject of consultations or mentioned in any subsequent document, in violation of Articles 4.5 and 4.7 of the DSU and Article 17.4 of the AD Agreement. This claim should therefore be dismissed.

4.344 Firstly, Article 4.1 of the AD Agreement does not provide grounds for the United States' assertions. Article 4.1 specifies that the investigation should include every domestic producer but not that it should encompass production for all months of the year. Secondly, the United States loses sight of where the burden lies in asserting that there was no way for Economía to be certain that it was complying with Article 4.1. The United States ought to produce evidence of its assertion, rather than expect Mexico to prove that its argument is without merit. In addition to the United States' argument not being sufficient to establish a *prima facie* case that Mexico violated the AD Agreement, the fact that it was not raised in the consultations or included in any subsequent document gives Mexico cause to request that it be dismissed.

4.345 As to the United States' argument in paragraph 20 of its *Answers*, Mexico refers the Panel to its reasoning in paragraphs 84 to 88 of its first written submission.

4.346 Concerning paragraphs 21 to 23 of the United States' *Answers*, it should first be pointed out that the United States once again introduces new arguments based on Article 4.1 of the AD Agreement, which was not the subject of consultations or included in any subsequent document, in breach of Articles 4.5 and 4.7 of the DSU and Article 17.4 of the AD Agreement. Secondly, the United States makes bald assertions with no underlying reasons. Its complaint should therefore be dismissed. Thirdly, Mexico emphasizes that its injury analysis of economic factors and indices relating to the domestic industry involved a major proportion of the industry at all times. The reasons for not considering the same subset of producers in the analysis of each injury factor were that there were producers that failed to provide the appropriate data or verifiable information, or they were no longer in operation. This is not a violation of Article 4.1 or Article 3.1 of the AD Agreement and, as Mexico stated earlier, the United States does not adduce evidence in support of its claim.

4.347 With respect to the United States' claim in paragraph 27 of its *Answers* regarding the modification of tariff heading 1006.30.01, Mexico emphasizes that the United States yet again puts forward arguments that were included neither in its request for consultations nor in any subsequent document, which is contrary to Articles 4.5 and 4.7 of the DSU and Article 17.4 of the AD Agreement. They should therefore be dismissed.

4.348 Moreover, the modification introduced on 18 May 2001 applied as of that date and was not applicable to the earlier data. Since the information considered in the investigation on long-grain white rice pre-dated 18 May 2001, the modification had no impact on the data considered in the investigation.

4.349 Regarding paragraph 32 of the United States' *Answers*, Mexico refers the Panel to paragraphs 93 and 94 of its first written submission, in which it explains why it was unable to use the *pedimentos* and demonstrates that such action is not inconsistent with the WTO Agreements. In addition, it was impracticable to separate out the imports of long-grain white rice on the basis of the *pedimentos*.

4.350 It is odd that the United States should argue that, for the purpose of determining the volume of imports of long-grain white rice, it is necessary to separate out all types of rice other than long-grain white rice that come under the same tariff heading in order to ascertain, by process of elimination, the volume corresponding to the imports at issue. This is impractical, and Economía therefore considered that the best method of identifying the volumes corresponding to long-grain white rice was to do so directly and not by process of elimination, as stated in paragraph 231 of the determination. In view of the foregoing, Mexico holds that the United States' arguments are no more than idle speculation.

4.351 The United States contends that the table and arguments in paragraphs 60 to 62 of Mexico's first written submission were prepared for the purposes of this dispute. It is not true that the table does not appear in the administrative record. The data listed in the table were provided by the CMA in its application for the investigation, the responses to the notice issued by Economía and the replies to requests for information. Since that information was not challenged, Economía regarded it as valid. Consequently, Mexico repeats that the United States' assertions regarding the inclusion of the table in the administrative record are irrelevant.

4.352 As to the United States' argument regarding *Covadonga*'s prices and the fact that Economía failed to explain the causal relationship between the dumped imports from the United States and those prices, Mexico observes that the United States once again makes claims that were not part of the consultations or included in subsequent documents, which is contrary to Articles 4.5 and 4.7 of the DSU and Article 17.4 of the AD Agreement. Mexico accordingly requests the Panel to dismiss these claims. The above notwithstanding, Mexico emphasizes that *Covadonga* was the only enterprise in the entire domestic industry that apparently displayed "different" behaviour. As detailed in paragraph 286 of the final determination, however, the extent of the difference was practically negligible and the industry as a whole nevertheless recorded adverse performance.

4.353 Concerning paragraph 36 of the United States' *Answers*, Mexico responded that "... it is not said that even if all the *pedimentos* had been available it would have been possible to determine with certainty the total amount of imports of the subject product ... " and went on to develop a series of arguments in that respect. The United States' claim is therefore totally unfounded. In this connection, Mexico refers to its written reply to question 15 of the Panel in relation to the first substantive meeting.

4.354 The United States loses sight of certain aspects in its response to question 18 of the Panel asking it to provide more information on the *USA Rice Federation* and to indicate the number of producers it represents. The United States replied to both queries but in so doing added a further argument against Mexico that was not included in the request for consultations or in any subsequent document and should therefore be dismissed. The United States contends that Economía could have contacted the *USA Rice Federation* to obtain information on the US firms. Had Mexico taken such a course of action, it

would have violated Article 5.5. of the AD Agreement. The United States' argument is therefore without merit.

4.355 The United States submits that Economía looked at all imports from the United States and not just the dumped imports in evaluating whether import levels had increased during the period of investigation, and that it based its conclusions only on data from the exporter *Farmers Rice*. Paragraph 217 of the final determination contains merely descriptive information, and it is therefore not valid to infer therefrom that the dumped imports were not taken into account. With regard to its having considered only data from *Farmers Rice*, Mexico refers the Panel to paragraphs 205, 228, 229 and 230 of the preliminary ruling and paragraph 270 of the final determination.

4.356 As to Economía having compared the fall in domestic prices to the fall in prices of all imports and not just of the dumped imports, including the prices of *Farmers Rice* and *Riceland*, Mexico refers the Panel to paragraph 269 of the final determination and paragraph 248 of the preliminary ruling.

4.357 While it is true that the share of the dumped imports did not increase in relative terms, this is not decisive evidence for concluding that there was no injury to the domestic industry, since the injury analysis should be comprehensive. Furthermore, although the dumped imports did not rise in terms of relative share, they did show an increase in absolute terms, as stated in paragraph 244 of the final determination.

(e) Article 5.8 of the AD Agreement is not applicable to firms with margins of dumping of zero per cent

4.358 With respect to the argument relating to Article 5.8 of the AD Agreement, Mexico refers the Panel to the considerations set out in paragraphs 131 to 137 of its first written submission.

4.359 In paragraph 41 of its *Opening Statement*, the United States observes that, as the WTO Appellate Body held in paragraph 118 of its report in *US – Hot-Rolled Steel*, the term "margin" refers to the "individual margin of dumping determined for each of the investigated exporters and producers". Thus, the United States argues that Article 5.8 of the AD Agreement refers to termination of the investigation for individual firms. The United States is mistaken in its interpretation. In *EC – Bed Linen*, which constitutes the basis for the Appellate Body's reasoning in paragraph 118 cited above, the Appellate Body refers to the fact that the term "margins" should reflect a comparison that is based upon examination of all of the relevant home market and export market transactions, and that it should be calculated for each individual firm. The Appellate Body thus describes only what the calculation of a margin of dumping should include, without referring to the scope of the term "margin" as it appears in Article 5.8 of the AD Agreement. On the other hand, Article 3.3 of the AD Agreement specifies that the basis for calculating margins of dumping in accordance with AD Agreement Article 5.8 applies to each country as a whole. Hence Article 5.8 does not establish that firms with *de minimis* margins of dumping should be excluded from the measure but that the investigation is to be terminated where the investigating authority concludes that the margin of dumping is *de minimis* – a determination that must be made for each country as a whole and not on a firm-specific basis.

4.360 In view of the foregoing, there are no grounds for the United States to assert that certain firms should not be subject to the measure and should be exempt from subsequent review.

(f) Mexico applied the facts available to US producers and exporters in a manner consistent with the AD Agreement

4.361 Turning to the claim in paragraph 44 of the United States' *Opening Statement*, Mexico emphasizes that it has never made the assertions attributed to it by the United States.

4.362 The statement in paragraph 46 of the United States' *Opening Statement* is an *a priori* premise without substance. Mexico refers the Panel to the response it gave in its first written submission concerning the Articles mentioned by the United States.

4.363 Mexico's first written submission already responds to the claim made by the United States in paragraph 47 of its *Opening Statement.*

4.364 The claim in paragraph 48 of the United States' *Opening Statement* relies on a partial citation of Article 6.10 of the AD Agreement. On this matter, Mexico refers the Panel to paragraph 141 of its first written submission.

4.365 The United States specifies what steps an investigating authority should supposedly take in order to calculate a dumping margin based on the facts available and submits that if these steps are not taken the margin should be calculated in accordance with Article 9.4 of the AD Agreement. Mexico is under no obligation to conduct its investigations in the manner indicated by the United States. On this matter, Mexico refers the Panel to paragraphs 138 to 181 of its first written submission.

4.366 The United States also alleges that Mexico did limit its examination to a reasonable number of interested parties and ought therefore to have applied an "all others" dumping margin calculated in accordance with Article 9.4 of the AD Agreement. The United States thus accepts by implication that Article 9.4 of the AD Agreement applies only where the examination is limited. Consequently, if the United States fails to demonstrate that Mexico limited its examination in accordance with Article 6.10 of the AD Agreement, its argument should be dismissed.

4.367 The United States advances a number of reasons in support of the foregoing. On this matter, Mexico refers the Panel to paragraphs 138 to 181 of its first written submission and emphasizes that none of these "reasons" affords valid grounds for the United States' claim. Thus, since it did not limit its examination, Mexico was under no obligation to calculate "all others" margins in conformity with Article 9.4 of the AD Agreement.

4.368 As to the claim in paragraph 53 of the United States' *Opening Statement*, Mexico refers the Panel to paragraphs 163, 164, 171 and 172 of its first written submission.

4.369 Lastly, in paragraph 54 of its *Opening Statement*, the United States submits that Mexico failed to respond to the following complaints:

(a) That Mexico's treatment of *Producers Rice* was inconsistent with paragraph 7 of Annex II of the AD Agreement. On this point, Mexico refers the Panel to paragraph 164 of its first written submission.

(b) That Mexico breached Article 6.6 of the AD Agreement by failing to satisfy itself that the list of known exporters was accurate and complete. On this point, Mexico refers the Panel to paragraph 152 of its first written submission.

(c) That Mexico breached Articles 6.2 and 6.4 of the AD Agreement by failing to provide the US exporters with the *pedimentos* that it gave to the Mexican industry. Mexico insists that its first written submission must be read as a whole. In addition, paragraphs 41 and 42 of the final determination show that information was sought from the petitioners, which sent a copy of *pedimento de importación* 3035 8000812 with the corresponding invoice. Thus, the United States' claim is unfounded since the documents

it refers to are in the investigation file[33] and were available to the parties. This matter was dealt with in paragraphs 93 and 94 of Mexico's first written submission.

(d) That Mexico has not denied that the margin contained in the petition was "adverse". On this point, Mexico refers to its written answer to question 25 of the Panel in relation to the first substantive meeting, in which Mexico stated that whether or not *Producers Rice.* cooperated bears no relationship to the fact that a facts-available dumping margin was calculated for that firm, since Article 6.8 of the AD Agreement stipulates that its provisions apply when a party does not provide the necessary information. Economía therefore applied paragraph 1 of the Annex.

(e) That Mexico has not denied that it breached Article 12.1 of the AD Agreement by failing to give notice to the parties. On this point, Mexico refers the Panel to paragraphs 155 to 157 of its first written submission.

(f) That Mexico's determination is inconsistent with Article 12.2 of the AD Agreement. Mexico answered this claim in paragraph 177 of its first written submission. Mexico insists that it is for the United States to submit proof of its assertion in order to make a *prima facie* case, rather than expect Mexico to do so in its capacity as defendant.

4.370 In its *Answers*, the United States raised a number of arguments that have a bearing on the issues discussed here. Mexico responds to these arguments in the paragraphs below.

4.371 Concerning paragraphs 28 to 31 of the United States' *Answers*, it cannot be inferred from the petition that the prices taken by the petitioners to calculate the normal value correspond to rice with a higher price than that used in reckoning the export price. It is therefore incorrect to say that Economía's intent was to increase the margin of dumping. Moreover, Economía took the appropriate action since there were no objections to the calculations proposed by the petitioner.

4.372 With respect to paragraphs 38 to 41 of the United States' *Answers*, Mexico refers to its written answer to question 16(a) posed by the Panel in relation to the first substantive meeting.

4.373 In paragraph 39 of its *Answers*, the United States claims that there is no basis for limiting the obligation to send a copy of the petition only to those exporters known to the petitioner if the investigating authority knows of other exporters. Mexico submits that the investigating authority relies on exporters identified by the petitioners and, if it knows no others, must send the petition to those exporters alone.

4.374 In paragraph 41 of its *Answers*, the United States contends that China's interpretation (as indeed Mexico's interpretation of Article 6.10 of the AD Agreement) is illogical because it would create an incentive for petitioners to under-report the range of known exporters. In this connection, Article 6.1.3 of the AD Agreement seeks to avert such a situation in laying down an obligation for the investigating authority to send the petition to the authorities of the exporting country. For the above reasons, Mexico holds that the United States' interpretation is entirely unfounded.

4.375 According to paragraph 42 of the United States' *Answers*, the issue before the Panel is whether Mexico was bound under the AD Agreement to take certain steps in conducting its investigation and whether it failed to take them. The United States evades the Panel's question without explaining the practical effect of its assertions. The issue before the Panel is not that indicated by the United States. The issue to be addressed is whether the AD Agreement sets rules on the subject, whether or not the United States is right in its interpretation regarding the obligations of an investigating authority, whether

[33] Administrative file of the anti-dumping investigation concerning long-grain white rice 07/00, confidential version, Volume 20, Folio 0103882.

its interpretation is the only permissible one and whether Mexico acted in a manner that cannot be treated as a permissible interpretation. Since the AD Agreement does not establish clear rules, its provisions have to be interpreted. The United States fails to explain why Mexico's practice "is unreasonable" and when the Panel draws its attention to the matter it merely skirts the question.

4.376 In response to the United States' arguments in paragraphs 43 to 49 of its *Answers*, Mexico stresses that the United States is seeking to impose on Mexico its administrative practice and its interpretation of various provisions of the AD Agreement, in breach of Article 17.6 of the AD Agreement.

4.377 The questionnaires can be obtained from Economía's web site, so the United States' claim in paragraph 45 of its *Answers* is unfounded. Mexico emphasizes that in various investigations US exporters have known of the investigation and have appeared before the Mexican authority. It is common practice for officials of the United States' Embassy to forward notices of initiation of an investigation to their exporters, which are not barred from participating in the investigation. The anti-dumping investigation concerning United States' exports of bovine meat and edible offal provided evidence of this.

4.378 As to paragraph 49 of the United States' *Answers*, Mexico refers the Panel to paragraph 112 of its first written submission, in which it explains why the United States' claim is unfounded.

2. Complaints relating to the Foreign Trade Act and Article 366 of the Federal Code of Civil Procedure

(a) Article 53

4.379 As demonstrated in paragraphs 218 to 221 of Mexico's first written submission, the time-limit set in Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement applies only to foreign producers and/or exporters who have been sent the questionnaire, that is, those that are known.

4.380 Both the AD Agreement and the SCM Agreement establish a period of 37 days for exporters or foreign producers to reply to the questionnaires. Thus, the period allowed by the Foreign Trade Act is longer (28 working days) than that provided by the Agreements, meaning that the Foreign Trade Act affords greater opportunities for defence. This was demonstrated in paragraph 228 of Mexico's first written submission.

4.381 If the period of 37 days were granted to any interested party that presented itself after the initiation of the investigation, the ensuing delay would entail non-observance of the time-limits prescribed in Article 5.10 of the AD Agreement and Article 11.11 of the SCM Agreement. The above is in line with paragraph 33 of the report of the Appellate Body in *US – Hot-Rolled Steel*.

(b) Article 64

4.382 Most of the United States' arguments challenging the provision of the Foreign Trade Act in question are based on the allegation that Mexico has misconstrued the WTO provisions. That only goes to show that the United States has based its argument on mere suppositions that are devoid of substance.

4.383 The United States submits that Mexico cites only part of Article 6.8 of the AD Agreement without referring to Article 6.1 and paragraph 1 of Annex II of the AD Agreement. Mexico cited Article 6.8 of the AD Agreement properly and showed in paragraph 240 of its first written submission that Article 64 of the Foreign Trade Act is consistent with the AD Agreement for the following reasons (which apply equally to Article 12.7 of the SCM Agreement):

(a) It allows the investigating authority to calculate margins of dumping for parties that do not provide the necessary information, as upheld by the Appellate Body in paragraph 119 of its report on *US – Hot-Rolled Steel*.

(b) If an interested party does not appear in the investigation or had no exports during the period of investigation, then that exporter will not provide the necessary normal value and export price data.

(c) In such cases, the investigating authority may calculate the margin of dumping on the basis of the facts available.

(d) Article 64 of the Foreign Trade Act thus stipulates that margins of dumping are to be calculated on the basis of the facts available for parties that do not appear in the investigation or have no exports during the period of investigation.

4.384 Article 6.1 of the AD Agreement was not the subject of consultations, and Mexico therefore requests the Panel to disregard it. Furthermore, the United States has not explained why it deems Article 64 of the Foreign Trade Act to be inconsistent with Article 6.1 of the AD Agreement.

4.385 Article 64 of the Foreign Trade Act is not inconsistent with Annex II of the AD Agreement, as has already been demonstrated in paragraphs 246 to 252 of Mexico's first written submission.

4.386 The United States contends in paragraph 70 of its *Opening Statement* that Article 64 of the Foreign Trade Act is inconsistent with Article 9.4 of the AD Agreement because it requires Mexico to apply a margin calculated on the basis of the facts available to firms that should have received an "all others" margin. Mexico refers the Panel in this connection to paragraphs 241 to 245 of its first written submission.

4.387 As to the allegation that Article 64 is inconsistent with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement, the United States asserts that the investigating authority is required to apply the highest margin of dumping to firms with no shipments and that where such firms are "deemed to have been investigated", they are "subject to anti-dumping duties" and are not eligible for new shipper review. The interpretation the United States puts on the above-mentioned Articles of the AD Agreement and the SCM Agreement is absurd and contradicts its own administrative practice. If one were to accept the United States' assertion, an "all others" margin calculated in accordance with Article 9.4 of the AD Agreement would likewise prevent firms with no shipments from applying for a new shipper review.

4.388 Article 64 of the Foreign Trade Act does not prevent foreign producers or exporters that made no shipments during the period of investigation from seeking a new shipper review, provided that they fulfil the requirements of Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement. Indeed, on the request of a US exporter, after the revision of the Foreign Trade Act had taken effect, Mexico initiated a new shipper review.[34]

(c) Article 68 of the Foreign Trade Act

4.389 In paragraph 76 of its *Opening Statement*, the United States cites Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement in alleging the inconsistency of Article 68 of the Foreign Trade Act with the WTO Agreements. With regard to the United States' interpretation of Article 5.8 of the AD Agreement – particularly the scope of the word "margin" – Mexico has the following comments. Article 5.8 of the AD Agreement does not establish that firms that are not dumping must be excluded from the measure. The Article says that the investigation must be terminated where the investigating authority determines that the margin of dumping is *de minimis*, and the margin is to be

[34] Resolution accepting the application of the interested party and declaring initiation of the new shipper procedure, pertaining to the final determination on imports of dessert apples of the varieties Red Delicious and its mutations and Golden Delicious, currently classified under heading 0808.10.01 of the Tariff established under the General Import and Export Duty Law, originating in the United States, regardless of the country of provenance. Published in the Official Journal of the Federation (DOF) of 21 October 2003 (Exhibit MEX-12).

determined for the country as a whole and not firm by firm, pursuant to Article 3.3 of the AD Agreement and Article 15.3 of the SCM Agreement. There are thus no grounds for alleging that some firms should not be subject to the measure and are hence exempt from subsequent review.

4.390 As to the representative volumes required by Article 68 of the Foreign Trade Act, and in response to paragraphs 76 to 81 of the United States' *Answers*, Mexico affirms once again that representative export volumes are not a requirement for the initiation of a review, and refers the Panel to paragraphs 262 to 266 of its first written submission.

4.391 Mexico emphasizes that the United States interprets to suit its own ends the resolution that it offers as evidence, since nowhere does the text of the resolution[35] mention the representativeness of import volumes as a requirement for initiation of the review. What the resolution does contain is an analysis of import volumes derived from the fact that the review applicants supplied such information. The dumping analysis is to be found in paragraphs 46 and 47 of the resolution.

4.392 Moreover, there is no evidence in the resolution that the application for review was rejected because it did not fulfil the representativeness requirement. It was rejected for other reasons, which are detailed in paragraph 95 of the resolution.

(d) Article 89D of the Foreign Trade Act

4.393 According to paragraph 79 of the United States' *Opening Statement*, Mexico alleged that the WTO Agreements establish no obligation in respect of the requirement to show representativeness prescribed in Article 89D of the Foreign Trade Act – an argument that Mexico did not adduce. Furthermore, the United States repeats that Article 89D of the Foreign Trade Act applies only to foreign producers and not to exporters, and that producers are required to demonstrate that the exports were representative.

4.394 With regard to the first of those claims, in its *Opening Statement* the United States overlooks the argument in paragraphs 268 and 269 of Mexico's first written submission, which refers to Article 2 of the Foreign Trade Act and the fact that the Act must be considered as a whole and not in isolation when determining whether or not its provisions are inconsistent with the WTO Agreements. Mexico also indicates that in the case of unfair international trade practices by WTO Members, it applies anti-dumping and countervailing duties as provided for in Article VI of the GATT 1994 and in the AD and SCM Agreements.

4.395 In order to disprove the United States' allegation, Mexico refers the Panel to Article 47 of the Foreign Trade Act Regulations, which establishes how the buying cost is to be determined for exporters, i.e. trading enterprises.

4.396 Mexico has conducted new shipper reviews both for foreign producers and for exporters on the basis of Article 47 of the Foreign Trade Act Regulations, proof of which is the resolution initiating the new shipper procedure concerning imports of apples from the United States,[36] paragraph 19 of which establishes that the provisions of the Foreign Trade Act Regulations that govern ordinary procedures – which include Article 47 mentioned above – apply to the new shipper procedure. Thus, the provisions of the Foreign Trade Act Regulations that apply to new shipper reviews are those set forth in Titles IV and

[35] Resolution declaring initiation of the review of the definitive anti-dumping duties imposed on imports of dessert apples of the varieties Red Delicious and its mutations and Golden Delicious, currently classified under heading 0808.10.01 of the Tariff established under the General Import and Export Duty Law, originating in the United States, regardless of the country of provenance. Published on 21 October 2003 in the Official Journal of the Federation (DOF) (first section), page 16 (Exhibit MEX-13).

[36] *Ibid*. Supra footnote 21.

VI thereof. Furthermore, paragraphs 3 and 32 of the resolution show that a new shipper review was initiated at the request of an exporting firm, which invalidates the United States' claim.

4.397 With regard to the second claim, Mexico stresses that representativeness is a requirement not for initiating a new shipper review but for the determination of an individual margin of dumping or subsidy, this being for economic reasons. Thus, although Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement do not expressly so provide, given the context and the object and purpose of the Agreements it is natural and logical to request that a new shipper's volume of exports during the review period be representative.

4.398 Concerning paragraphs 82 to 84 of the United States' *Answers*, Mexico explains that paragraph 16 of the resolution initiating the above-mentioned new shipper procedure states that " … a review shall be carried out promptly to determine the individual margin of price discrimination for the exporters or producers … provided that the said exporters or producers demonstrate that they have carried out export operations in representative volumes … " (emphasis added). Consequently, the representative volume requirement is for determining the individual margin of dumping and not for initiating of a new shipper review.

(e) Article 93.V of the Foreign Trade Act

4.399 The United States argues in paragraphs 82 and 83 of its *Opening Statement* that Article 93.V of the Foreign Trade Act is inconsistent with the WTO Agreements because it requires the investigating authority to apply the fines established therein. In rebuttal, Mexico refers the Panel to paragraphs 274 to 282 of its first written submission, which specifies that in interpreting the context of Article 93.V of the Foreign Trade Act account should be taken of Article 2 of the Foreign Trade Act, which stipulates that the Foreign Trade Act must be applied in a manner consistent with the international treaties to which Mexico is party.

4.400 In paragraph 84 of its *Opening Statement*, the United States asserts that the language of Article 93.V is enough to show that Mexico lacks the discretionary authority to impose the fines. Mexico refers the Panel in this connection to paragraphs 283 to 286 of its first written submission. It should likewise be pointed out that Article 93.V of the Foreign Trade Act establishes that the fines are to apply "when ... it is deemed probable that [the imports] undermine the remedial effect of the countervailing duty … ". Thus, Economía has discretion as to whether or not the fines are to be applied.

(f) Article 366 of the FCCP and Articles 68 and 97 of the Foreign Trade Act

4.401 With regard to the United States' claim that Article 366 of the FCCP is inconsistent as such with the WTO Agreements, Mexico repeats what it said in paragraph 297 of its first written submission, i.e. that the Article does not apply directly to the subject-matter or the procedures regulated by the Foreign Trade Act. The United States notes in this context that the very fact of attaching the text of Article 366 of the FCCP to its first written submission is enough to demonstrate the scope and meaning of its provisions. On this point, Mexico refers the Panel to paragraphs 293 to 299 of Mexico's first written submission, and note in addition that the United States must prove its claim *prima facie*.

4.402 In paragraph 87 of its *Opening Statement*, the United States observes that Mexico did not contest the allegation that Articles 68 and 97 of the Foreign Trade Act breach Article 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement. Mexico wishes to clarify that its rebuttal of this claim is to be found in paragraphs 300 to 303 of its first written submission. The United States misinterprets Mexico's arguments. Indeed, by waiting for the duties to be confirmed in order to carry out a review of them, Mexico is securing and safeguarding the interests of the parties, sparing them any possible injury. This is borne out by the fact that applicants that challenge the final determination are not required to pay any duties pending the resolution of their case, and are asked only for a surety to cover the duties, pursuant to Article 98.III of the Foreign Trade Act.

4.403 As to the United States' argument in paragraph 92 of its *Opening Statement*, Mexico emphasizes that although in its Semi-Annual Report Mexico reported the conclusion of an anti-dumping investigation concerning beef with the application of "definitive duties", this does not imply that the duties were confirmed. The US exporters brought challenge proceedings and accordingly provided sureties in respect of the imports they have effected in recent years, pursuant to Article 98 of the Foreign Trade Act.

4.404 Concerning the alleged inconsistency of Articles 68 and 97 of the Foreign Trade Act with Article 9.3.2 of the AD Agreement, Mexico reiterates what it said in paragraph 304 of its first written submission.

4.405 With respect to the alleged inconsistency of Articles 68 and 97 of the Foreign Trade Act with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement, Mexico is unaware of the grounds for the United States' claim, since none of the provisions of the Foreign Trade Act precludes or expressly prohibits a new shipper review from being carried out.

4.406 It should also be noted that the WTO Agreements require new shipper reviews to be carried out promptly (AD Agreement) and expeditiously (SCM Agreement). The United States is thus attempting to assign to Mexico obligations that are not to be found in the Agreements, since neither the AD Agreement nor the SCM Agreement lays down an obligation to initiate a new shipper review as soon as it has been applied for; what the Agreements do require is that, once initiated, the review must be carried out promptly and/or expeditiously.

4.407 As to paragraph 93 of the United States' *Opening Statement*, Articles 68 and 97 of the Foreign Trade Act provide certainty in law and preclude conflicting court rulings by treating as definitive only such anti-dumping or countervailing duties as have not been challenged in some procedure. Thus, once the dispute is settled the sureties posted by the exporters will be collected, or else it may determined that the original duty was unlawful, in which case the sureties will be returned.

G. SECOND ORAL STATEMENT OF THE UNITED STATES

4.408 The following summarizes the United States' arguments in its second oral opening and closing statements:

1. Opening statement

(a) Mexico's use of a stale POI

4.409 Numerous provisions in the AD Agreement and the GATT 1994 illustrate the need for authorities to base their injury investigations on a period that includes the most recent available information. The panel report in *US – Softwood Lumber VI* also supports this conclusion.

4.410 The *US – Softwood Lumber VI* panel stated that it must be clear from an authority's determination of threat of material injury that the authority has evaluated "how the future will be different from the immediate past, such that the situation of no present material injury will change in the imminent future to a situation of material injury . . . .". An authority that fails to examine data that includes the most recent available information will not be in a position to make judgments about the immediate past. The same can be said about findings of present injury. An authority can only make objective determinations about the present, or the imminent future, if it is examining a period that includes the most recent available information.

4.411 In its second submission, Mexico says it would be "preposterous" for a Member to base its findings on information that is ten years old. Thus, Mexico apparently now concedes that an authority's discretion in setting a POI is not without limit. According to Mexico, the appropriateness of a particular POI will depend on the facts of a particular case. The United States and Mexico apparently agree.

However, Mexico has pointed to nothing to justify its decision to ignore 15 months worth of recent data, or its decision not to collect any additional injury data after the initiation of the investigation. Although Mexico baldly asserts in its second submission that the POI in the rice investigation yielded objective information on dumping and injury, it has provided no evidence in support of its claim.

(b) Economía limited its injury examination to six months of 1997, 1998, and 1999

4.412 Mexico claims not to understand the argument of the United States that Economía breached WTO rules by only examining injury information for half of the POI. To clarify, Mexico breached WTO rules by only examining half of the injury POI.

4.413 Mexico also seeks to rebut the United States' claims by introducing another new table. This new table allegedly contains information on imports from the United States to Mexico on a monthly basis from 1997 through 1999. The Panel should disregard Mexico's table.

4.414 First, the new table does not appear to be record evidence. Mexico has provided no citation to the record for this table, or a photocopy of the page in the record where it is contained. Second, Mexico has failed to identify the source of the data in the table. Economía lacked accurate data on imports of long-grain white rice from the United States. The petitioners' import data included unknown quantities of glazed and parboiled rice, as well as short-grain rice and medium-grain rice. Thus, if the information in the table is from the petitioners' data, there is no basis to conclude that it accurately reflects the true level of imports of long-grain white rice during the three-year injury POI. Third, the table directly contradicts Economía's findings that imports were concentrated in the March to August time period. Mexico's complete reversal of its own position demonstrates that there was no justification for Economía's decision to examine only half of the injury POI.

4.415 In any event, the United States is objecting *per se* to Economía's decision to limit its injury analysis to only half of the injury POI. Mexico has conceded that seasonality was not relevant, and it is indisputable that Economía failed to examine at least half of the domestic industry's production over the course of the entire injury POI. Thus, Economía's injury analysis would have been inconsistent with WTO rules even if imports had not been concentrated in the March to August time period.

4.416 Mexico's argument that it was acceptable to look at a "representative sample" of the data is unfounded. Nothing in Economía's published determinations indicates that it focused on the March to August time period because it believed that period was a "representative sample." Nor are there any findings or evidence demonstrating that the period was, in fact, representative of the year as a whole.

(c) Mexico's conduct of its injury analysis

4.417 Mexico argues that Economía does not have access to the *pedimentos*. In actuality, although Economía may not have possession of the *pedimentos*, it does have access to them. It simply does not request such access, because Economía believes the AD Agreement does not require it to do so, and because it would take too much time.

4.418 Second, Mexico notes that Economía collected information through December 1999. But even if this is so, the fact remains that it did not consider information for any period after August 1999.

4.419 Third, Economía failed to conduct an objective examination of the domestic industry as defined by Article 4.1 of the AD Agreement because it did not examine a consistent set of producers when it conducted its injury analysis. Mexico justifies Economía's approach on the grounds that not all of the domestic producers provided the requested information. This was the case with respect to production volumes, sales, installed capacity, employment data, wages, and financial performance.

4.420 These reporting failures were not minor. The missing data pertained to many of the most critical factors necessary for Economía's injury analysis. Economía's published determinations do not adequately explain why the domestic industry was unable to provide the requested data. Nor is there any indication that Economía took steps to ensure the objectivity of its injury analysis by making further efforts to obtain it. Economía seems to have simply used the data its industry was willing to provide. Economía's willingness to conduct its injury analysis in this way undermined the objectivity of its injury determination. An objective investigating authority would not permit its domestic producers to control the injury analysis by allowing them to self-select which information they are willing to provide. For in doing so, the authority makes it possible for the domestic industry to influence the outcome of its investigation, by having each individual producer only provide its data for factors that are indicative of injury. In this way, the industry can ensure that the aggregate data for the "industry" will reflect injury.

4.421 Mexico tries to cast doubt on Economía's findings about Covadonga by stating that Covadonga "apparently" exhibited different behaviour. But Economía made these factual findings. The alleged fall in the domestic industry's prices was one of the primary findings underlying Mexico's injury determination, but the evidence demonstrates that Covadonga's prices actually rose during the injury POI.

4.422 Mexico states that it would have breached Article 5.5 of the AD Agreement if it had contacted the Rice Federation to obtain information on the "known" exporters. Nothing in Article 5.5 prevented Economía from contacting the Rice Federation after it initiated the investigation.

4.423 Mexico argues that the dumped imports increased in absolute terms. But as paragraph 244 of the final determination makes clear, the dumped imports actually fell over the course of the entire injury POI. Thus, one of the primary factors underlying Economía's injury determination was wrong.

(d) Mexico's failure to exclude firms with AD margins of zero per cent

4.424 Mexico argues that Article 3.3 of the AD Agreement demonstrates that the Article 5.8 *de minimis* calculation applies to the country as a whole. Article 3.3 has nothing to do with the dumping determination. Article 3.3 is an injury provision that uses the definition of *de minimis* in Article 5.8 as a means to establish a threshold for determining which countries may be cumulated for injury purposes. The cumulation analysis is country-wide by its very nature.

4.425 Article 5.8 itself states that the margin of dumping is to be considered *de minimis* if the margin is less than two per cent, "expressed as a percentage of the export price." Export prices are inherently firm-specific. If the drafters had intended to require termination only if the weighted average margin of dumping for all of the investigated firms was *de minimis*, they could have said so. This is what they did in Article 9.4 of the AD Agreement, which requires authorities to calculate the all other's rate on the basis of the "weighted average margin of dumping" calculated for the selected exporters and producers.

4.426 Finally, if a company is investigated and found not to be dumping, there is simply no basis under Article 1 of the AD Agreement to apply the measure to that firm.

(e) Mexico's application of an adverse "facts available" dumping margin

4.427 Mexico's arguments on this issue ignore that Articles 6.1 and 6.8 of the AD Agreement, and paragraph 1 of Annex II, prohibit an authority from applying a margin based on the facts available to an exporter or producer that was never sent the questionnaire and asked to respond.

4.428 Mexico argues that a Member is only required to apply a neutral margin under Article 9.4 of the AD Agreement when it has investigated a sample of exporters and producers. In Mexico's view, Economía did not sample, so it is under no obligation to apply a neutral margin to the unexamined firms. But Articles 6.1 and 6.8, and paragraph 1 of Annex II, contain an independent set of obligations that a Member must always observe when it bases margins on the facts available. One of the key obligations is

that an authority that includes a particular exporter "in an anti-dumping investigation" must give notice to that individual exporter, by sending the exporter a copy of the questionnaire, asking it to respond, and ensuring that the exporter understands that a failure to respond may result in the application of a margin based on the facts available. If an authority fails to take these steps with respect to an individual exporter or producer, then it cannot apply a margin based on the facts available.

4.429 Mexico also argues that it met the notice requirements of paragraph 1 of Annex II by sending its questionnaire to Producers Rice and Riceland, as well as to the Embassy of the United States. But the AD Agreement does not permit an authority to shift the burden for providing the requisite notice to the foreign respondents, or the foreign government. Economía did not send its questionnaire to the uninvestigated exporters and producers; therefore, it cannot apply facts available-based margins to them.

4.430 Mexico argues that it did not "limit" its investigation by only sending its questionnaire to the exporters and producers that the petitioners identified as such in the petition, and by not sending the questionnaire to the Rice Company, or to the exporters and producers identified in the *pedimentos*, or to the exporters or producers identified in public sources, such as the *Rice Journal*, because Article 6.10 only provides a single basis for limiting an investigation. But Mexico is only half right. The only permissible basis for limiting an investigation is where the number of exporters and producers is so large that calculating individual margins would be impracticable. Economía limited its investigation in an impermissible way, by remaining passive and taking no steps to conduct a proper examination of all of the known exporters and producers, or an examination of a representative sample, or the largest percentage of the exporters who could reasonably be investigated.

4.431 Mexico responds to the United States' demonstration that the petition margin was adverse by arguing that the petitioners did not inform it that the petition overstated the normal value, and thus overstated the dumping margin. But the petitioners' silence does not excuse Economía from its obligation to examine the accuracy of the information, as Articles 5.3 and 6.6 of the AD Agreement require, or its obligation to check the information in the petition against other independent sources, as paragraph 7 of Annex II of the AD Agreement requires. Nor does it change the fact that the petition margin was adverse.

4.432 Finally, with respect to the claim that Economía breached Articles 6.2 and 6.4, it has become apparent to the United States that it misunderstood the nature of the data taken from the *listados*. The United States had assumed that it was public information, because Mexico shared it with its domestic industry. But the United States now believes it must be confidential information. Articles 6.2 and 6.4 of the AD Agreement do not require a Member to disclose confidential information to interested parties. On the other hand, if the data is confidential, the United States does not understand how Mexico justifies sharing it with its domestic industry in the first place.

(f) Claims regarding the Foreign Trade Act and Article 366 of the FCCP

4.433 Article 53: Mexico has confirmed that Article 53 precludes Economía from providing exporters and producers who are not initially sent the questionnaire the full 30 day response time that Article 6.1.1 of the AD Agreement and 12.1.1 of the SCM Agreement require it to provide. The proper interpretation of the relevant WTO provisions is that any producer or exporter who receives the questionnaire is entitled to have 30 days to reply, and that the 30 days are counted from the date of receipt, not from the date the questionnaire is sent. Therefore, Article 53 of the Foreign Trade Act breaches WTO rules.

4.434 Article 64: Mexico argues in its second submission that the United States has not explained why Article 64 is inconsistent with Article 6.1 of the AD Agreement. Mexico is mistaken. Article 64 is inconsistent with Article 6.1 of the AD Agreement because it requires Economía to apply the highest facts available to firms that do not "appear" in the investigation, even when Economía has not complied with Article 6.1. Mexico also argues that Article 9.4 only applies when an authority investigates a sample of exporters or producers. But by its plain terms, Article 64 always requires Economía to apply the highest level of facts available to exporters and producers that have no exports during the POI or that do not

"appear" in its investigations. Therefore, even if Economía were to overtly limit its investigation in accordance with Article 6.10, Article 64 would still require it to apply the highest facts available to those producers and exporters. But Article 9.4 requires an authority that has limited its investigation to apply the neutral margin to all of the exporters or producers that are not included in the examination.

4.435 Articles 68 and 89D: Mexico argues that it is both "natural and logical" to require an exporter seeking a review to have a representative amount of sales, because the authority would not otherwise be able to make a proper price comparison. But a small number of export sales, even the sale of a single unit, as long as it is a bona fide sale, is not an obstacle to calculating a margin. Moreover, Mexico concedes that a party must demonstrate a representative volume of sales to obtain an individual margin of dumping or subsidization under Article 89D. In addition, the United States supplied evidence in response to the Panel's question 31 which confirmed that Mexico requires firms seeking reviews under Article 68 to demonstrate a representative volume of sales. Whether one characterizes it as a requirement to initiate or conduct a review of the margin, or a requirement to obtain a new margin, Articles 68 and 89D require exporters and producers to demonstrate a representative volume of sales.

4.436 Article 93: Mexico has not contested the United States' demonstration that Article 93V is (1) "specific" to dumping or subsidization; (2) "against" dumping or subsidization; and (3) not "in accordance with the provisions of GATT 1994," as interpreted by the AD and SCM Agreements. Moreover, Mexico argues in its second submission that Article 93V is discretionary, because Economía allegedly has discretion to decide in a particular case whether the conditions for imposing a fine are met. But if Economía finds the conditions are met, it must impose a fine. Mexico also argues that Article 93V is discretionary because it merely states that it "shall be the responsibility" of Economía to punish the infringing activity. This is equivalent to saying that the law is discretionary because Economía may simply choose not to enforce it. As the panel stated in *United States – Measures Affecting Alcoholic and Malt Beverages*, the non-enforcement of a provision that mandates WTO-inconsistent action does not make the provision itself discretionary.

4.437 Article 366 of the FCCP and Articles 68 and 97 of the Foreign Trade Act: Mexico has argued that Article 366 of the FCCP does not directly apply to the subject matter or procedures of the Foreign Trade Act. Mexico seems to be implying that the provision is indirectly applicable. It is also telling that Mexico has made no effort to explain why Article 366 does not apply, directly or indirectly, to the Foreign Trade Act.

4.438 Turning next to Articles 68 and 97 of the Foreign Trade Act, Mexico appears to be distinguishing between duties that are "definitive" and duties that are "binding," and it seems to accept that a Member imposes "definitive duties" at the time that it issues the final determination. But Articles 11.2 of the AD Agreement and 21.2 of the SCM Agreement state that Members "shall" review the need for the continued imposition of the duty, "upon request," if a reasonable period of time has elapsed since the "imposition" of the "definitive duty." The term "imposition of the definitive duty" refers to the imposition of the AD or CVD measure itself. This can be seen, for example, in Article 11.1 of the AD Agreement. Neither Article 11.2 of the AD Agreement nor Article 21.2 of the SCM Agreement permits an authority to refuse a review on the grounds that the measure is not "binding" until the end of judicial review.

4.439 Mexico appears to argue that Articles 68 and 97 do not preclude expedited reviews under AD Agreement Article 9.5 and SCM Article 19.3. But Mexico stated during consultations that those Articles did preclude such reviews. Moreover, Article 89D of the Foreign Trade Act only permits an exporter to request a review if the good is subject to a "final" duty. But under Article 97, only determinations issued at the end of a judicial proceeding can be considered "final." Therefore, Article 97 does preclude expedited reviews.

(g) Conclusion

4.440 The United States has two final points. First, Mexico argues that the Panel should disregard any claims or arguments that do not appear in the United States' first written submission. But nothing in the DSU suggests that a Party's first written submission defines the scope of permissible claims and arguments that a Party may raise over the course of a dispute. On the contrary, as the Appellate Body found in *EC – Bananas III*:

> There is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel. It is the panel's terms of reference, governed by Article 7 of the DSU, which set out the claims of the complaining parties relating to the matter referred to the DSB.

4.441 All of the claims that the United States has raised in this dispute were in the panel request. So Mexico's claim that the United States did not set forth certain claims in its request is wrong.

4.442 Second, the United States feels compelled to comment on language that Mexico unfortunately chose to employ in its second written submission and the allegations of bad faith that Mexico made today. Its allegations are inaccurate, as even a cursory review of the United States' presentations demonstrates. But, that is not why the United States is raising this matter today. Rather, the United States' concern is with the use by one sovereign nation of derogatory language towards another sovereign nation. Language like this is completely inappropriate and has no place in WTO dispute settlement proceedings, as has been recognized in the past by panels and members of the Appellate Body.

2. Closing statement

4.443 The United States has presented a *prima facie* case with respect to its claims. Mexico has not rebutted that case. And all of the United States' claims are in the panel request, contrary to Mexico's assertions. For example, Mexico argued that the United States did not make a claim under Article 4.1 of the AD Agreement, but the claim is in the panel request, as part of the first set of claims. As is a claim under Article 1 of the AD Agreement. The United States urges the Panel to look to the papers filed in this dispute, and what they actually say, and not just to Mexico's arguments about them.

4.444 There was a long discussion today about the POIs that Mexico uses in its dumping cases. What seemed clear from the discussion is that Mexico normally lets the petitioners pick the POI and then puts the burden on the respondents to show why the suggested POI should not be used. The United States had some of the same questions as the Panel about Mexico's approach, so the United States did some research. The United States included information about eight or ten Mexican investigations in the previous responses to Panel questions. In all of those cases, in 2003, the United States found that Mexico accepted the petitioners' proposed POI. Moreover, the length of the POIs varied quite a bit – from six to eighteen months. The only reason the United States was able to find for this was that those were the lengths that the petitioners requested.

4.445 Regarding the *listados*, the United States believes Mexico could have done, and should have done, what the Panel put its finger on: *i.e.*, Mexico had the information before it on the importers' names and the *pedimento* numbers, and it should have looked at the information and used it to gather what it needed to be sure it had conducted a full, vigorous investigation with all of the facts. The authorities have an interest in a full investigation. They also could have sent injury questionnaires to the importers listed in the *listados* and obtained – and then used – better volume and value data than they did.

4.446 Regarding the Foreign Trade Act provisions, the United States is challenging these provisions of Mexico's law as such, not as applied, so the text is the relevant evidence. There is no need for the

United States to provide examples of the application of the provisions, as Mexico suggested in its closing statement. If Mexico wishes to provide examples of the application of the provisions to disprove the United States' reading of the text, it can provide them, but there is no obligation on the part of the United States to do so to meet its *prima facie* case in this dispute.

4.447 Finally, regarding Mexico's continued arguments that the challenged legal provisions are discretionary, Mexico is using an odd formulation of the mandatory/discretionary principle. For example, Mexico is not claiming that, while its laws are WTO-inconsistent, Article 2 of the Foreign Trade Act provides it the discretion to apply the laws in a WTO-consistent manner. Rather, Mexico holds steadfast to its argument that its laws on their face are WTO-consistent. Thus, there is no conflict, in its view, between what its laws require and what its WTO obligations require. Therefore, there is no issue of discretion here.

4.448 In that respect, the Appellate Body's dicta that the mandatory/discretionary principle cannot be mechanistically applied in every dispute is relevant, because this principle is not relevant in this dispute. Mexico's so-called "discretionary" argument, if taken to its logical end, would mean that any WTO Member with a domestic law that says that it shall apply its laws in a WTO-consistent manner is essentially shielded from any and all claims that its laws are "as such" inconsistent with WTO rules, regardless of what the laws say. This conclusion is untenable.

H. SECOND ORAL STATEMENT OF MEXICO

4.449 The following summarizes Mexico's arguments in its second oral statements:

4.450 Mexico observes that the United States continues to act in bad faith, distorting Mexico's arguments and interpreting them with bias, and attempting to influence the Panel's view. It likewise persists in attempting to impose on Mexico its own administrative practice and interpretation of the AD Agreement, and to lay down and impose obligations not derived from that Agreement. Furthermore, it disregards Article 17.6 of the AD Agreement which allows that there may be more than one permissible interpretation of some of its provisions.

4.451 The United States is required to act in good faith, according to Article 3.10 of the DSU and the ruling set forth in the final report of the WTO Appellate Body in *US – Offset Act (Byrd Amendment)*, and as prescribed by the Panel that heard the case *Argentina – Poultry Anti-Dumping Duties*.

4.452 The United States' breaches go beyond the WTO Agreements: on numerous occasions the United States has acted inconsistently with Articles 4.5 and 4.7 of the DSU as well as Article 17.4 of the AD Agreement by introducing new arguments, attempting to influence the Panel through bias, capitalizing on its own disregard of the rules and leaving Mexico with no basis for defence. At the same time it has attributed to Mexico assertions the latter never made and has demonstrated that it can argue either way, depending on the end pursued – witness its proposal JOB(04)60 to the Negotiating Group on Rules. In that document it submits that a new shipper review should be denied to exporters failing to show that they have exported "in commercial quantity", which is precisely the objection it raises to Mexico's Foreign Trade Act although the latter makes no such provision. The Panel should accordingly dismiss the United States' claims and, above all, find that the United States has acted in breach of the principle of good faith embodied in Article 3.10 of the DSU.

1. Anti-dumping investigation on imports of long-grain white rice originating in the United States regardless of the country of provenance

(a) Mexico Complied with Articles 1, 3.1, 3.2, 3.4 and 3.5 of the AD Agreement and Articles VI:2 and VI:6(a) of the GATT 1994 with Regard to the Establishment of the Period of Investigation

4.453 In its first written submission the United States argues that the POI is inconsistent *per se* because of its remoteness. Then, in its "Answers", it denies making any such assertion only to reiterate it in its second written submission. This lack of inconsistency in the United States' position makes its claim unclear and leaves Mexico with no basis on which to mount a defence. Mexico therefore request the Panel to disregard these assertions.

4.454 With regard to the assertion that an anti-dumping investigation must determine whether or not a domestic industry is injured by dumping that is occurring presently, Mexico refers the Panel to its arguments in paragraphs 43 to 46 of its first written submission.

4.455 Mexico wishes to point out that the exporters and importers disagreed with the POI set by the investigating authority, but produced no convincing reasons for adopting some other POI. Nor did they propose a more suitable alternative period or submit any evidence warranting the selection of a different period by the investigating authority.

4.456 The United States continues to introduce claims that were not brought up in consultations or in its request for the establishment of a Panel. A case in point is Article 3.7 of the AD Agreement, relied on by the United States to "illustrate" the fact that the AD Agreement requires a more recent period for the investigation than the one used by Mexico. Nothing in that Article warrants such an assumption.

4.457 Mexico emphasizes that Article VI:6(a) was neither addressed in consultations nor included in the Panel request or the United States' first written submission. The United States' assertions in this connection must therefore be disregarded.

4.458 Contrary to the United States' assertion, an investigating authority is not bound to gather information between the end of the POI and the initiation of the anti-dumping investigation, or to update the information in the course of the investigation.

4.459 It is plain from the report of the Appellate Body in *EC – Bed linen (21.5 – India)*, cited as a precedent by the United States, that that case is immaterial to the present dispute since it concerns the selection of a method for determining injury and not the selection of a POI. The United States thus concludes its pleadings with unfounded assertions based on *a priori* premises all of which ought, in Mexico's opinion, to be dismissed by the Panel.

(b) Mexico Complied with Articles 1, 3.1, 3.5 and 6.2 of the AD Agreement with Regard to the Establishment of the Period of Investigation

4.460 In response to section III of the United States' second written submission, Mexico wishes to make the following points. First, in determining the POI, the investigating authority examined the petitioner's proposal and since none of the parties submitted any evidence of the need to set a different period, accepted it. This is not the same thing as allowing the petitioner to set the POI. Secondly, seasonality was not the element that prompted the authority to set the period examined in the way it did. Thirdly, for the injury analysis, in the interests of a fair comparison earlier periods comparable to the POI were set within the period examined (period considered for injury purposes, which covers three full years), so the petitioner did not select the period examined.

4.461 The United States cites the report of the Appellate Body in *US – Hot-Rolled Steel*, in which the Appellate Body found that the investigating authority cannot objectively examine a domestic industry by

focusing on one part of that industry. The above-mentioned report refers to a case in which the authority based its injury analysis on a segment of the industry, which is not the case here. The rice investigation examined the entire domestic industry during comparable periods in each year of the period examined. Mexico accordingly deems that the United States' reasoning is unsound and that the United States fails to make a *prima facie* case of breach of the Agreement.

4.462 As to the United States' arguments concerning the use of comparable periods within the period examined, Mexico points out that for the injury analysis it compared the periods from March to August of 1997, 1998 and 1999 in an objective manner and on the basis of positive evidence. In Mexico's view, the use of comparable periods for injury analysis eliminates any distortions that might have occurred during the period examined.

4.463 For the foregoing reasons, Mexico is of the view that the United States' pleas of breach of Articles 1, 3.1, 3.5 and 6.2 of the AD Agreement should be rejected.

(c) Economía Conducted its Injury Analysis in a Manner Consistent with Articles 3.1, 3.2, 3.4, 3.5, 6.8, 12.2 and Annex II of the AD Agreement

4.464 With regard to the failure to collect evidence regarding price effect and volume, Mexico refers the Panel to its first written submission and underlines that it did carry out its injury analysis objectively and on the basis of positive evidence. The United States has failed to prove *prima facie* that Mexico's injury analysis lacked objectivity and was not based on positive evidence.

4.465 As to the United States contention that the investigating authority took into account non- dumped imports in evaluating volume, price effects and the impact of dumped imports on the domestic industry, and that the injury analysis included all imports, Mexico believes that a distinction must be drawn between "volume of imports" and "volume of dumped imports". The former comprises all imports into Mexico and the latter is the volume of dumped imports. In the final determination the entire section on injury analysis, particularly paragraphs 206 to 221, analyses this matter.

4.466 The United States alleges that the investigating authority's findings lacked sufficient detail. But the final determination gives the arguments of fact and of law that Economía took as a basis. The final determination thus meets the requirements of Article 12.2 of the AD Agreement.

4.467 Furthermore, it cannot be confirmed from Mexico's answers to questions 10, 12 and 15 of the Panel that different types of rice entered under the same tariff heading or that the authority did not separate the dumped imports from the others. The information analysed by Economía predates that modification of tariff heading 1006.30.99 (18 May 2001), and the modification applies as from the date of into entry into force, it does not apply to the information used in the rice investigation. It thus has no repercussions for the historical data considered in the rice investigation and there is no reason to believe that the changes of 18 May 2001 would make the rice investigation data any more precise.

4.468 According to the United States, Mexico stated that it used only one method and that Mexico's assertion that it used several methods is wrong. Paragraph 239 of the final determination indicates that several methods were used but the best was the petitioner's, and not that the petitioner's was the only method used. Mexico also points out that it did not guess the volume of imports but estimated it using the method indicated in paragraphs 229 and 230 of the final determination. It also wishes to clarify that in its reply to question 12 of the Panel, it stated not that it based its determination on information from exporters but that it took the method proposed by the latter into account in estimating the volume of imports of the subject product.

4.469 As required by the AD Agreement Economía sent questionnaires to known exporters and producers, and sent notice of the initiation of an investigation together with the questionnaire and the petition to the United States Embassy in Mexico.

4.470 The information supplied by two of the importers was disregarded because no public version of it was submitted and because it was not shown to be "confidential or restricted commercial information" as required, in breach of several provisions of the relevant law.

4.471 In its answer to question 17 of the Panel the United States gave incorrect information. Sometimes, petitioners submit *pedimentos* given that, under Article 144 section XXVI of the Customs Law, agreements on access to information may exist between Chambers or Associations of domestic producers and the Ministry of Finance and Public Credit. However, that does not mean that the individual domestic producers or every Chamber or Association have indeed concluded an agreement of that kind, nor that it is mandatory to conclude such agreements for those Chambers or Associations or for the Ministry of Finance and Public Credit.

4.472 As to the allegation that Economía could have identified imports of long-grain white rice by consulting the *pedimentos*, and its assertion concerning the way in which imports of different types of rice were separated out, Mexico refers the Panel to paragraphs 93 and 94 of its first written submission. Furthermore, contrary to what the United States asserts, it is not possible to identify imports of long-grain white rice separately from the *pedimentos*.

4.473 The conclusion the investigating authority reached on the injury analysis was the result of an overall evaluation of all the relevant economic factors referred to in Article 3.4 of the AD Agreement. The United States places on Mexico a non-existent obligation to gather information subsequent to the POI. Mexico finds it odd that the United States should suggest that in order to determine the volume of imports of long-grain white rice it is necessary to separate all the different types of long-grain white rice, which would be impracticable. The investigating authority took the view that the best method of separating the volumes of long-grain white rice was directly and not by elimination.

4.474 The United States also alleges that to determine whether there was any increase in import volumes during the POI, Economía took into account total imports from the United States and not only dumped imports and that, moreover, it based its conclusions on the information of a single exporter.

4.475 As to the allegation that Mexico looked at the information of only one exporter, paragraph 205 of the preliminary determination indicates that Economía requested information from all US exporters that appeared and that the only exporter to submit full information was *Farmers Rice*. Moreover, the others had thirty working days in which to enter any objections and supporting evidence but chose not to take up the opportunity. Economía accordingly decided to maintain its finding. Mexico therefore considers that the United States' argument is without merit.

(d) Article 5.8 of the AD Agreement Is Not Applicable to Firms with Margins of Dumping of Zero Per Cent

4.476 With regard to the United States' assertion concerning Article 5.8 of the AD Agreement, Mexico refers the Panel to paragraphs 131 to 137 of its first written submission and enlarges below on its answer to question 20 of the Panel.

4.477 In that answer Mexico explained that all exporters would be subject to the measure, meaning the final determination and not the application of positive anti-dumping duties. Thus, to impose duties Mexico must ascertain in its final determination the position of each individual exporter. This does not mean that anti-dumping duties will be imposed on every producer and exporter investigated where at least one has exports with a margin of dumping above *de minimis*. In the same answer Mexico noted: "*Each enterprise will be assigned the anti-dumping duty corresponding to its individual margin, provided that the total volume of imports from the country in question is above the de minimis level*", since it is logical to determine an individual margin of dumping for each enterprise that has supplied the requisite information during the investigation. An exporter that submits all the requisite information on normal value and export prices will not be subject to the application of facts available. The answer ends: "*Any*

exporter for which the IA finds a more than zero and below de minimis margin of dumping would receive a zero per cent duty", which does not imply the imposition of an anti-dumping duty, and Mexico therefore takes the view that it cannot be regarded as such, strictly speaking, let alone as a breach of the AD Agreement.

4.478 The United States submits that in its reply to question 20 Mexico asserted that in deciding to impose an anti-dumping measure, Economía will not examine whether the weighted average margin of all exporters is greater than *de minimis*, so Mexico is obviously using a firm by firm approach. The United States is mistaken. Mexico never made such an assertion.

4.479 Furthermore, according to Article 3.3 of the AD Agreement, paragraph 118 of the report of the Appellate Body in *US – Hot-Rolled Steel* and paragraph 149 of the report of the Appellate Body in *US – Carbon Steel*, the determination of *de minimis* margins of dumping under Article 5.8 of the AD Agreement must be based on each country taken as a whole.

4.480 The United States relies on paragraph 118 of the report of the Appellate Body in *US – Hot-Rolled Steel* (which in turn refers to the report of the Appellate Body in *EC – Bed Linen*) to argue that the word "margin" in Article 9.4 of the AD Agreement refers to the individual margins of dumping for each exporter or producer. As a reading of that paragraph shows, the United States' interpretation is wrong. In *EC – Bed Linen*, the Appellate Body ruled that the term "margins" must reflect a comparison that is based upon an examination of all the relevant home market and export market transactions, and must be calculated for each individual firm. The Appellate Body states only what the calculation of a dumping margin is to include, but says nothing of the scope of the word "margin" as it appears in Article 5.8 of the AD Agreement.

4.481 Mexico points out that the provision in Article 5.8 of the AD Agreement that volume should be assessed on the basis of the country as a whole on no account implies that this is an exception to the rule or that the rule is a firm-by-firm approach.

4.482 It must be clearly understood that the anti-dumping investigation ends upon issuance of the final determination, a measure from which exporters not subjected to an anti-dumping duty cannot be excluded. The United States lacks clarity, in Mexico's view, in holding that Mexico should end the investigation in respect of exporters whose exports were found not to have been dumped, since Mexico decides in the final determination the anti-dumping duties that are to be imposed, and that determination likewise decrees the end of the investigation for all exporters. Any action taken after the final determination does not form part of the investigation, so Article 5.8 of the AD Agreement does not apply to any examination carried out after the final determination has been issued.

4.483 For the foregoing reasons, Mexico deems the United States' assertions to be unfounded.

(e) Mexico applied the facts available to *Producers Rice* and to the US Producers and Exporters That Were Not Investigated in a Manner Consistent with the AD Agreement

4.484 The United States puts forward the following new arguments:

(i) On the strength of Mexico's assertion that it would have taken 40 days to examine all the *pedimentos* from 1997 to 1999, the United States submits that it would have taken Mexico only two weeks to examine the *pedimentos* of 1999.

4.485 The United States' assertion is wrong. What Mexico said was that it would have taken about 40 days to obtain the *pedimentos* – not "examine" them. The time needed by Economía to examine them would have to be added to the 40 days.

(ii) The United States alleges that Mexico has not explained how its interpretation regarding the application of facts available is consistent with Article 9.5 of the AD Agreement, since if all firms are subjected to anti-dumping duties, there are no exporters able to apply for an expedited review.

4.486 The United states is mistaken. What Article 9.5 of the AD Agreement says is that there must be no relation with other exporters or producers which are subject to anti-dumping duties, which means that there must be no relation with exporters or producers examined individually and which are assigned a positive anti-dumping duty. Besides, if the United States' reading were correct, even if Mexico were to calculate an "all others" margin of dumping in accordance with Article 9.4 of the AD Agreement – as the United States claims it should have done – exporters not investigated individually would not qualify for an expedited review under Article 9.5. The United States' interpretation is at odds with its own argument and would prevent the holding of an expedited review.

(iii) The United States submits that Mexico's answer to question 17(c) of the Panel shows that Economía failed to satisfy itself as to the accuracy of the petitioner's list of exporters, as Articles 5.3 and 6.6 of the AD Agreement require.

4.487 What Article 5.3 of the AD Agreement requires is an examination of the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence of dumping, injury and a causal relationship. It lays down no obligation to identify all existing exporters. Since Mexico used the best available information in respect of exporters that did not appear, Article 6.6 of the AD Agreement is immaterial.

(iv) The United States contends that by not sending a questionnaire to all exporters, Mexico limited its investigation to a reasonable number of exporters, and that it had a duty to identify a reasonable number or the largest percentage of them that could reasonably be investigated.

4.488 Mexico did not limit its examination to a reasonable number of exporters, but sent a questionnaire to known exporters and the United States Government. Furthermore, it published a notice summoning all exporters and interested persons. Nothing in the AD Agreement requires Mexico to act in the manner prescribed by the United States.

(v) According to the United States, Mexico claims that it need consider only exporters known to the petitioner and not those known to the investigating authority.

4.489 The United States is mistaken. Mexico never made such an assertion.

(vi) The United States says that " ... *the EC's and Mexico's interpretation of ... would permit an authority to initiate an investigation on the basis of a petition that did not identify any "known" exporters, publish a notice of the initiation ... in its Official Journal, and ... send its questionnaire to nobody.*"

4.490 Since an investigating authority cannot know all exporters and producers of all products marketed in the world, to attempt to assign it such a task is illogical. By the same token it is logical that the investigating authority should notify and send questionnaires to the authorities of the exporting country and to known exporters and producers when it is able to draw on the information in the petition. It is likewise logical to assume that the authorities would forward those documents to their exporters and producers that were not notified individually. The role of the authority in the exporting country as set out in Article 6.1.3 of the AD Agreement supports Mexico's interpretation. The United States' assertions are therefore without merit.

(vii) The United States submits that nothing in the negotiating history of the AD Agreement suggests that the intent was to allow Members to ignore the requirements of Article 9.4 with respect to unexamined firms.

4.491 The United States bases that argument on a false assumption that Mexico limited its examination to a reasonable number of exporters. Regardless of the negotiating history, Article 9.4 applies only when the authority limits its examination. Since Mexico did not do so, Article 9.4 does not apply here.

4.492 The United States further submits that Mexico calculated margins of dumping for two exporters that came forward on their own. That assertion is wrong: the investigating authority calculated individual dumping margins for exporters that were sent the questionnaire and to one exporter that came forward spontaneously.

4.493 Economía was not bound to send the questionnaire to all United States producers and exporters, but only to those known to the investigating authority. Mexico would stress in this context that it is frequently the case that officials of the United States Diplomatic Representation in Mexico await notices of initiation of an investigation and forward them to their exporters, which are not barred from participating in the investigation.

4.494 Furthermore, the third paragraph of the introduction to the questionnaire sent to *Producers Rice* and *Riceland.* and to the US Embassy in Mexico shows that they were made aware, in accordance with paragraph 1 of Annex II of the AD Agreement, that if the requisite information was not provided, Economía would base its determination on facts available. The United States' claim is therefore unfounded.

4.495 Besides, the questionnaires for the investigation can be obtained from Economía's website, so the United States' contention that exporters had to go to the authority's offices in Mexico City is unfounded.

4.496 Mexico denies breaching Article 12.1 of the AD Agreement: it notified both the United States authorities and the exporters known to Economía individually.

4.497 Mexico complied with Article 6.8 and Annex II of the AD Agreement in calculating the margins of dumping on the basis of facts available.

4.498 Mexico has interpreted the AD Agreement as a whole, taking account of the full text of every material Article. The United States insists, citing the report of the Appellate Body in *US – Wheat Gluten*, that an investigating authority must not remain "passive". In that case the Appellate Body was ruling on the evaluation of factors to determine the existence of material injury in an investigation concerning safeguards, which is quite different from identifying all exporters or producers in an anti-dumping investigation. The argument is therefore without merit.

4.499 The United States' interpretations of the scope of rights of due process in fact go further even than the provisions of Article 6 of the AD Agreement, which is unacceptable.

4.500 The United States contends that the investigating authority acted inconsistently with paragraph 7 of Annex II of the AD Agreement. Whether or not *Producers Rice* cooperated bears no relation to the fact that the investigating authority calculated its margin of dumping on the basis of facts available, since Article 6.8 of the AD Agreement allows it to do so. The investigating authority applied not paragraph 7 but paragraph 1 of Annex II. The United States' allegation is therefore devoid of merit.

2. Complaints relating to the Foreign Trade Act and article 366 of the Federal Code of Civil Procedure

4.501 The United States' arguments concerning the alleged inconsistency, as such, of the Foreign Trade Act with the WTO Agreements are based on a single premise: the supposedly mandatory nature of the articles of the Foreign Trade Act at issue. This means, *contrario sensu*, that if the articles at issue are not mandatory – as Mexico has already demonstrated – then neither are they inconsistent with the WTO Agreements.

4.502 Furthermore, it is necessary to take into account Article 2 of the Foreign Trade Act and the fact that the Act must be considered as a whole and not in isolation when determining whether or not its provisions are inconsistent with the WTO Agreements.

4.503 The United States has failed to prove that Mexican legislation is inconsistent with WTO rules. In other words, it has not made a *prima facie* case of breach of those rules by Mexico. Accordingly, the Foreign Trade Act must be deemed consistent with the WTO Agreements.

4.504 As to the allegations concerning **Article 53 of the Foreign Trade Act**, the time-limit set in Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement applies only to foreign producers and/or exporters that were sent the questionnaire, i.e. known producers or exporters. In this respect the Foreign Trade Act allows a longer period (38 days) than the Agreements, thus affording more opportunity for defence.

4.505 With regard to **Article 64 of the Foreign Trade Act**, it is consistent with the AD Agreement and the SCM Agreement, because if an interested party does not appear in the investigation and had no exports during the POI, then that exporter will not provide the requisite information on normal value and export price, and in that case the investigating authority may calculate its margin of dumping on the basis of facts available.

4.506 The United States further contends that Article 64 of the Foreign Trade Act is inconsistent with Article 9.4 of the AD Agreement because it requires Mexico to apply a margin based on facts available to firms that should have received an "all others" margin. Clearly, Article 9.4 should apply only where the investigating authority has limited its examination to a reasonable number of interested parties in accordance with Article 6.10 of the AD Agreement, which Economía did not do.

4.507 The United States submits that under Article 64 of the Foreign Trade Act, the investigating authority is required to apply the highest margin of dumping to firms with no shipments and that where such firms are "deemed to have been investigated" they are "subject to anti-dumping duties" and are therefore not eligible for new shipper review.

4.508 That interpretation contradicts even the United States' own practice. Were one to accept its assertion, an "all others" margin calculated in accordance with Article 9.4 of the AD Agreement would likewise prevent firms with no shipments from applying for a new shipper review. Mexico repeats that Article 64 of the Foreign Trade Act is not a bar to applying for a new shipper review. In fact, at the request of a United States exporter and after the revision of the Foreign Trade Act had taken effect, Mexico initiated a new shipper review, as can be seen from Exhibit MEX-12, submitted by Mexico as evidence.

4.509 With regard as to **Article 68 of the Foreign Trade Act**, the United States alleges that it is inconsistent with the WTO Agreements, citing Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement. Article 5.8 of the AD Agreement does not require firms that are not dumping to be excluded from the measure. There are thus no grounds for alleging that some firms must not be subjected to the measure and are hence exempt from subsequent review.

4.510 As to the representative volumes required by Article 68 of the Foreign Trade Act, Mexico maintains that representative export volumes are not a requirement for initiation of a review.

4.511 Furthermore, nowhere does the resolution cited by the United States mention representative import volumes as a requirement for initiation of the review. Nor does it contain any evidence that the application for review was rejected because it did not fulfil the representativeness requirement. It was rejected in the case of some of the applicant firms for other reasons, which are detailed in paragraph 95 of the resolution.

4.512 The United States maintains its argument that **Article 89D** applies only to foreign producers and not to exporters, and that producers are required to demonstrate that their exports were representative.

4.513 As to the first of those assertions, Article 47 of the Foreign Trade Act Regulations expressly provides that "for trading companies, the buying cost shall be taken as the cost of production ... ", which includes exporters.

4.514 As to the second assertion, Mexico stresses that representativeness is a requirement not for initiating a new shipper review but for determining an individual margin of dumping or subsidy. Thus, although Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement do not expressly so provide, it is natural and logical to demand of a new exporter that it make shipments in order for the latter to be reviewed. The United States' interpretation perhaps derives from the fact that the United States proposed making representativeness a requirement for initiation of a new shipper review in the Negotiating Group on Rules[37] at its meeting of 12 and 13 July 2004.

4.515 With regard to the United States argument concerning the hierarchy of laws in the Mexican legal system, Mexico points out that this subject is not among the issues covered by the Panel's terms of reference. Only Mexican courts have the authority to interpret the manner in which Mexico's local laws interact. Mexico accordingly deems that the United States' assertions must be dismissed.

4.516 The United States has failed to show that Article 89D of the Foreign Trade Act is inconsistent with the WTO provisions. Mexico, on the other hand, has conducted new shipper reviews for foreign producers and for exporters on the basis of Article 47 of the Foreign Trade Act Regulations, as shown in Exhibit MEX-12.

4.517 The United States further asserts that **Article 93.V of the Foreign Trade Act** is inconsistent with the WTO Agreements because it requires the investigating authority to apply the fines established therein. Mexico reiterates that account must be taken of Article 2 of the Foreign Trade Act, which stipulates that the Foreign Trade Act must be applied in a manner consistent with the international treaties to which Mexico is a party.

4.518 As is plain from Article 93.V, Economía has discretion to determine whether or not the fines must be applied. Further proof of this is that although this article has been in force since 1993, its provisions have never been applied to any Member of the WTO.

4.519 In response to the United States' claim that **Article 366 of the Federal Code of Civil Procedure (FCCP)** is inconsistent as such with the WTO Agreements, Mexico wishes to point out that US-20 – to which the United States alludes in its reply – does not refer to Article 366 of the FCCP. As already stated, Article 366 of the FCCP does not apply to the subject-matter or the procedures governed by the Foreign Trade Act. Mexico maintains that the United States fails to make a *prima facie* case and that its claim must be dismissed.

[37] New Shipper Reviews (ADA Article 9.5), informal paper JOB(04)/60 circulated on 25 May 2004/Formal document TN/RL/GEN/1 – TN/RL/W/156/Rev.1 circulated on 14 July 2004.

4.520 The United States asserts that Mexico failed to respond to the allegation that **Articles 68 and 97 of the Foreign Trade Act** offend against Article 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement. Mexico's arguments on the matter are to be found in paragraphs 300 to 303 of its first submission. By waiting for the duties to be binding in order to carry out a review of them, Mexico is securing and safeguarding the interests of the parties, sparing them any possible injury.

4.521 As to the allegation that Articles 68 and 97 of the Foreign Trade Act are inconsistent with Article 9.3.2 of the AD Agreement, Mexico maintains what it said in paragraph 304 of its first written submission, in which it already established that the investigating authority will return any duties paid in excess upon conclusion of the relevant procedure. In no instance does Mexico breach the provisions of the AD Agreement.

4.522 As to the allegation that Article 68 and 97 of the Foreign Trade Act are inconsistent with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement, the United States lacks any basis for its claim since no provision of the Foreign Trade Act precludes or prohibits the holding of a new shipper review. Furthermore, the WTO Agreements require new shipper reviews, once initiated, to be carried out promptly, according to the AD Agreement and expeditiously, according to the SCM Agreement, but do not require a review to be initiated as soon as it is applied for.

4.523 Mexico wishes to point out to the Panel that the United States' allegation that Articles 68 and 97 of the Foreign Trade Act constitute a quantitative restriction to trade is quite mistaken, since never has there been any restriction, either *de jure* or *de facto*, on the normal conduct of the commercial transactions of *Sun Land Beef Company, Inc.* or any other foreign company.

V. ARGUMENTS OF THE THIRD PARTIES[38]

5.1 The arguments of the third parties are set forth in their written and oral submissions to the Panel, which are summarized below. The third parties' written answers to questions posed by the Panel are set forth in the Annexes to this report (*see* list of annexes at page xi).[39]

A. THIRD PARTY WRITTEN SUBMISSION OF CHINA

5.2 In its third party written submission, China made the following arguments:

1. Issue 1: The closeness of the Period of Investigation to the Date of Initiation

5.3 In the alleged anti-dumping investigation, Mexico's investigating authorities established a period of investigation ("POI") the ending of which was fifteen months earlier than the initiation of the investigation.

5.4 Although the AD Agreement itself does not establish any specific guidelines for determining an appropriate POI, the Anti-Dumping Committee has issued a recommendation to the effect that, as a general rule, POI shall be "ending as close to the date of initiation as is practicable". China does not consider that the time lag of fifteen months between the ending of POI and the date of initiation is in compliance with the spirit and substance of the recommendation of the Anti-Dumping Committee.

5.5 China believes that the evaluation of the closeness of the POI to the date of initiation should be considered in the context of its purpose and function under the AD Agreement.

[38] All the footnotes in sections V:A - V:F are original footnotes of the third parties.

[39] The Panel posed questions only to the European Communities. No other third party responded or commented on the questions.

5.6 The closeness of the POI is important for the investigation and the determination of the existence of injury and dumping margin. The data collected in a remote, non-proximate POI cannot prove that the dumped imports continue to exist at the present time, and that the level of such dumped imports "causes or threatens to cause material injury" to a domestic industry in the importing country. In order to ensure a fair and equitable investigation, the data collected within the POI shall meet the requirement of "objectivity" and "positive evidence", as such terms are defined in Article 3.1 of the AD Agreement. China agrees with the United States' assertion that the discretion of the investigating authorities to set the POI "is not boundless". As a general rule, the investigating authorities shall select the POI that is as close to the date of initiation of the investigation as practicable.

2. Issue 2: The seasonality of the Period of Investigation

5.7 The United States alleges that Mexico's investigating authorities examined only the March to August time period in each year of the POI for injury analysis. Such six-month period reflected the main import activity of the product under investigation when domestic production is at a seasonal low. Mexico's investigating authorities did not investigate the data in the September to February time period when domestic production is at a seasonal high and the import of the product under investigation is, conversely, relatively low. For the purpose of injury analysis, Mexico's investigating authorities did not compare the data of the seasonal high period with those of the seasonal low period. Instead, it only compared the data of the same season, on a year-to-year basis.

5.8 China takes no position as to whether or not the methodology adopted by Mexico in this dispute, which is to examine only an annual portion/season of the POI, as being inconsistent with its WTO obligations. Instead, China deems it appropriate to highlight the issue of the seasonal characteristic that is implicit in the POI stipulated for this investigation.

5.9 China believes that the investigating authorities have the discretion to consider seasonality when establishing the POI of a specific investigation. The Anti-Dumping Committee in its recommendation, did recognize the discretion of investigating authorities to "take account of the particular circumstances of a given investigation, to ensure that periods of data collection are appropriate in each case". Moreover, the Anti-Dumping Committee further recommended that "in establishing the specific periods of data collection in a particular investigation, investigating authorities may, if possible, consider the characteristics of the product in question, including seasonality and cyclicality" (emphasis added).

5.10 China also believes that the examination of a domestic industry by the investigating authorities from a seasonal perspective shall be conducted in an "objective" manner as required by Article 3.1 of the AD Agreement. The requirements of objectivity means that, where investigating authorities undertake an examination of a domestic industry in one season, they should, in principle, examine, in like manner, the same industry in all other seasons, as well as examine the industry for the whole year. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine certain seasons that have been excluded from examination.

3. Issue 3: Investigating authorities' obligations as to evidence collection

5.11 The United States alleged in the first written submission, that Mexico's "failure to investigate or attempt to gather data from readily available sources" breached Articles 3.1 and 3.2 of the AD Agreement because Mexico failed to "identify exporters and importers other than the handful of those mentioned in the petition"; failed to "send its anti-dumping questionnaire to exporters and importers other than the few designated as such in the petition, or to purchasers"; failed to "consult the customs declarations"; and failed to "seek to obtain accurate import volume information from importers".

5.12 The United States interpreted that the requirements of "objectivity" and "positive evidence" make it obligatory for the investigating authorities to "actively seek out information pertinent to" the investigation, and to "investigate or attempt to gather data from readily available sources". In other

words, the United States asserts that the investigating authorities are obligated to actively collect evidence in order to fulfil the requirements of "objectivity" and "positive evidence". China offers a different interpretation than that of the United States with regard to the approach in order to meet the standard of "objectivity" and "positive evidence" as set forth in Articles 3.1 and 3.2 of the AD Agreement.

5.13 China believes that the obligations of the investigating authorities with regard to evidence collection are to give notice of information required to all interested parties and to provide ample opportunity to present in writing all evidence, rather than to actively collect evidence as asserted by the United States. Article 6.1 of the AD Agreement clearly described the obligations of the investigating authorities as the following: "[a]ll 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."

5.14 The scope of the obligations of the investigating authorities as to the verification of the accuracy of the information provided by interested parties as defined in Article 6.6. of the AD Agreement is to "satisfy themselves as to the accuracy of the information … upon which their findings are based."

5.15 The requirement that the investigating authorities shall "satisfy themselves as to the accuracy of the information provided by interested parties" was clearly described by the panel in *US – DRAMS*. The panel here stated that if the investigating authorities are obligated to actively seek evidence from all sources available, it is also likely that "anti-dumping investigations would, as a consequence, become totally unmanageable". China concurs with the panel's findings.

5.16 Only when the investigating authorities have to operate under "best information available" as described in Paragraph 7 of Annex II of the AD Agreement that the obligations to verify the accuracy of the information through independent sources arise "where practicable".

5.17 In sum, China does not find in the AD Agreement a solid legal basis to support the assertion of the United States that investigating authorities are obligated to actively seek evidence through independent sources except under very specific circumstances.

4. Issue 4: Known exporters

5.18 The United States alleged in this dispute, that Mexico's investigating authorities "improperly sent its anti-dumping questionnaire to only two companies that were listed in the petition" and "made no effort to identify exporters and importers other than the handful of those mentioned in the petition". The allegation raises the issue of the obligations of investigating authorities with respect to "known" exporters for the United States has asserted that Articles 5 and 6 of the AD Agreement "require an investigating authority to actively determine the universe of potential respondents" and to "actively seek to identify individual exporters and producers". China does not agree with such assertion and interpretation.

5.19 China believes that Article 5.2 of the AD Agreement expressly places the burden of identifying "known" exporters on the petitioners by stating that a petition shall include "the identity of each known exporter or foreign producer" of the product in question. In Article 6.1.3, the use of the definite article "the" before "known exporters" shows that the phrase "known exporters" has been used in the previous text of the AD Agreement. Given that both Article 5.2 and Article 6.1.3 use the same wording "known exporter", the "known exporters" under Article 6.1.3 refer to "each known exporter" under Article 5.2. Therefore, the AD Agreement suggests that investigating authorities shall rely on the petitioners to identify "known" exporters in their petition(s).

5.20 China would submit that at the outset of the investigation, the investigating authorities shall rely on the information in the petition to identify "known" exporters. The authorities are obligated to check the "accuracy and adequacy" of such information and if the authorities believe that such information is not accurate or adequate, it shall give reasonable time to the petitioners to provide further information or

satisfactory explanation. There is no legal basis in the AD Agreement for the interpretation that the investigating authorities are obligated to actively seek to identify "known" exporters by themselves from available sources.

5. Issue 5: Exporters that had no export during the POI

5.21 The United States alleged that Mexico' investigating authorities improperly calculated dumping margin on the basis of adverse facts available for an exporter that had made no export sale during the POI but that had fully cooperated with the investigating authorities in the investigation. The United States asserts that a neutral "all other rate" shall be applied to such exporter because its full cooperation left no warrant to apply adverse facts available that are strictly confined in Article 6.8 of the AD Agreement. Furthermore, the United States stated that such exporter shall be entitled to the "new shipper" review as provided in Article 9.5 of the AD Agreement. China believes that the United States' interpretation that an exporter that made no export sales during the POI should have certain dumping margin applied to it (whether this is the neutral "all other rate", or the dumping margin based upon facts available) is in error.

5.22 China would base its position on the following: firstly, an exporter that made no export sales during the POI shall not be considered as having been dumping the products under investigation because no dumping margin can be calculated for such exporter due to the non-existence of an applicable export price. Article 2.1 of the AD Agreement provides that "a product is to be considered as being dumped, 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 product when destined for consumption in the exporting country" (emphasis added). An exporter that made no export sales during the POI had no export price that can be used to compare with the normal value to calculate dumping margin, therefore, the product under investigation of such exporter cannot "be considered as being dumped".

5.23 Secondly, Article 9.5 of the AD Agreement expressly requires that "no anti-dumping duties shall be levied on imports from such exporters or producers" "who have not exported the product to the importing Member during the period of investigation".

5.24 China believes that it is erroneous to impose any dumping margin on an exporter that made no export sales during the POI, whether this be the neutral "all other rate" or that based upon facts available.

B. THIRD PARTY WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

5.25 In its third party written submission, the EC made the following arguments:

1. Stale period of investigation

5.26 Although the AD Agreement contains no express rule in the text concerning the selection of the period of investigation, an investigating authority's discretion in that respect is not boundless. Having regard to the context and purpose of the relevant provisions, particularly the use of the present tense, there is a limit on how long the period between the end of the period of investigation and the initiation of the original investigation can be. An excessive gap would not be representative and would not be consistent with the obligation contained in Article 3.1 AD Agreement to conduct an objective examination based on positive evidence.

2. Use of March to August 1997, 1998 and 1999 for injury analysis

5.27 Article 3.1 AD Agreement begins with the words "A determination of injury …" (singular). From the wording of this provision it is clear that the AD Agreement requires an investigating authority to make one injury determination. An investigating authority cannot, without further reasonable explanation, make several discrete injury determinations relating, for example, to different companies forming part of the domestic industry, or relating to different time periods. Mexico defined the period at

issue in its anti-dumping investigation as beginning on 1 March 1997 and ending on 30 August 1999. Thus, of its own accord, Mexico clearly identified that period as the relevant period for making its (one) injury determination. Having defined the period as it did, Mexico was bound to treat that period consistently thereafter in accordance with that definition. Thus, it follows, with respect to Article 3, including Articles 3.1 and 3.5, that Mexico had to make "a determination of injury" for that period – and not for the various segments of that period selected by Mexico. There is nothing in the AD Agreement that provides for an investigating authority to make more than one injury determination; to the contrary, all references to the making of an injury determination are references to a determination of injury. Having defined the period at issue as it did, Mexico could not subsequently take the position that some segments of that period were no longer relevant for the purposes of comparison or assessment. Mexico was not permitted to see the temporal characteristics of its injury investigation in one way for one purpose, and in another way for another. Mexico had become bound by its own logic.

3. Injury analysis including non-dumped imports

5.28 Even where the AD Agreement does not require any particular methodology for the determination of injury, the analysis conducted by an investigating authority must be objective and based on positive evidence. Imports from companies found not to have dumped cannot be included in the evaluation of volume, price effects and the impact of dumped imports on the domestic industry.

4. *De minimis* dumping margin

5.29 The wording of Article 5.8 AD Agreement contemplates the termination of the "investigation" in respect of the exporting country as a whole, not with respect to individual exporters. This interpretation is in line with the first sentence of Article 5.8 AD Agreement which requires that a complaint be rejected and the investigation be terminated promptly in case of lack of sufficient evidence to proceed with the case. Where the investigating authority determines a *de minimis* dumping margin for a specific exporter, Article 5.8 AD Agreement requires that no duty be imposed and collected from that exporter. It does not require the termination of the entire investigation (provided that the country-wide margin is above *de minimis*). In the opinion of the European Communities, both the method used by Mexico and the method suggested by the United States constitute permissible interpretations of the AD Agreement.

5. All others rate, facts available

(a) Irrelevance of Articles 9.4 and 10.6 of the AD Agreement

5.30 The provisions of Articles 6.10 (other than the first sentence) and 9.4 AD Agreement relate to the situation in which exporters are known and sampling techniques are used. Absent sampling, these provisions are irrelevant for the determination of an anti-dumping duty.

(b) An all others rate is permissible for unknown exporters

5.31 The AD Agreement does not contain any specific rule concerning the rate or amount of duty to be imposed on unknown exporters in the investigated country. An "all others" rate may be imposed on such exporters - a residual country specific rate. Article 6.10 AD Agreement, first sentence, refers to "known" exporters, and in any event contains the words "as a rule". Contextual support for such an interpretation may also be found in Article 2.1 AD Agreement, which defines dumping, and which refers to the product exported from "one country to another". Article 9.2 AD Agreement refers to the imposition of duties on imports "from all sources", and permits the authorities to name the supplying country if it is impractical to name the suppliers, as it would be if they are unknown. Furthermore, Article 9.3 AD Agreement contains rules concerning refunds. If an exporter did not appear during the original investigation, there is nothing on the face of Article 9.3 that would prevent such exporter from requesting a periodic review or a refund

pursuant to those provisions. In any event, there being no dispute between the parties on this point, there is no need for the Panel to make any findings in this respect.

5.32 Unknown exporters, like known exporters, are interested parties within the meaning of Article 6.8 AD Agreement. If unknown exporters do not provide necessary information within a reasonable period, then, as in the case of known exporters, determinations may be made on the basis of the facts available. Unknown exporters choose, following the notice of initiation, not to appear and not to complete a questionnaire response. It necessarily follows that the "all others" rate may lawfully be based on the highest rate found in respect of a known exporter, whether or not on the basis of the facts available.

(c) Meaning of known and unknown exporters

5.33 Absent any contrary indication in the written record, the European Communities considers that exporters mentioned in the complaint or which respond to the notice of initiation may be considered to be known. That is a reasonable basis on which to proceed, which corresponds to a permissible interpretation of the AD Agreement. An investigating authority is not required by the AD Agreement to make further unilateral and autonomous enquiry.

(d) Application of an all others rate to unknown producers

5.34 The same analysis, mutatis mutandis, in respect of unknown (non-exporting) producers in the investigated country, would also be based on a permissible interpretation of the AD Agreement. Article 9.5 AD Agreement contains special rules in respect of so-called "newcomer" or "new shipper" reviews.

(e) Application of an all others rate to known producers

5.35 The AD Agreement also does not contain any specific rule concerning the rate or amount of duty to be imposed on (non-exporting) producers who are known. Producers Rice was a known producer which did not export during the investigation period. The imposition on Producers Rice of an "all others" rate based on the facts available was consistent with the AD Agreement, for all the reasons set out above. As explained above Articles 6.10 (other than the first sentence) and 9.4 AD Agreement relate to sampling and are irrelevant for this specific case. Producers Rice was not excluded from a sample. It simply had no exports. The absence of an export price precludes the calculation of a company specific dumping margin, but does not preclude the application of an "all others" rate. Article 9.5 AD Agreement contains special rules in respect of so-called "newcomer" or "new shipper" reviews in order to address the situation in which a producer without any exports and thus subject to the all others rate does have exports subsequent to the period of investigation. In all the circumstances, the imposition on Producers Rice of the same "all others" rate as that applicable to other unknown exporters and known producers, as the case may be based on the facts available, was a reasonable basis on which to proceed.

6. As such

5.36 Further to the Report of the Appellate Body in *US–Corrosion-Resistant Steel Sunset Review*, it is unnecessary for a measure to be "mandatory" as opposed to "discretionary" in order for such measure to be reviewed by a Panel for consistency with the AD Agreement.

C. THIRD PARTY WRITTEN SUBMISSION OF TURKEY

5.37 In its third party written submission, Turkey made the following arguments:

1. Selection of an investigation period that ended more than fifteen months prior to the date of initiation of the investigation

5.38 The United States submits that Mexico acted inconsistently with Article VI:2 of GATT 1994 and Articles 1, 3.1, 3.2, 3.4, and 3.5 of the AD Agreement by selecting a period for its dumping investigation that ended more than fifteen months prior to the date of initiation of the investigation. The United States, further contends that, those 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 or a determination based on positive evidence.

5.39 Turkey submits that although the AD Agreement does not establish any specific period of investigation, the wording of both the AD Agreement and Article VI of GATT 1994 leads authorities to investigate the presence of dumping, injury and causation at the most recent time period. Thus, authorities should not be allowed to initiate a dumping investigation and examine any time period that they believe dumping was exercised for the sake of imposing anti-dumping duties.

5.40 In this respect, Article VI:1 of GATT 1994 states that dumping is to be condemned if it causes or threatens material injury to an established industry or materially retards the establishment of a domestic industry. The paragraph continues by the definition of dumping which is also in present tense. Likewise, Article VI:2 of GATT 1994 states that a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping to offset or prevent dumping. The other paragraphs of Article VI of GATT 1994 also follow the same trend and presents remedies for situations that took place in the near past.

5.41 Furthermore, Article 3.4 of the AD Agreement lists the relevant economic factors and indices having a bearing on the state of the industry that should be examined. Here one can easily notice that the required examination should be done as to the actual and potential position of the listed factors. Also in Article 3.5 it is clearly stated that the authorities should demonstrate that dumped imports are causing injury to the domestic industry.

5.42 In this respect, in light of the above cited clear obligations to examine actual and potential positions rather than past experiences, Turkey believes that even if the AD Agreement does not establish a certain time period, an unbiased and objective authority would not establish dumping margin on the basis of the past information that is not valid anymore.

5.43 In Turkey's view, the period of data collection for dumping investigations should end as close to the date of initiation as is practicable. This is also important for purposes of predictability and transparency of the investigations and credibility of the authority's actions.

2. Limitation of inquiry

5.44 The United States submits that Mexico'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. The United States further contends that Economía's investigation of injury was not based on positive evidence for simple reason that it failed even to examine the evidence pertaining to half of the period of injury analysis. United States continued that Economía by taking this approach, made it more likely to determine that the domestic industry was injured."

5.45 In accordance with Article 17 of the AD Agreement, the panels are entitled to determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. In this respect, the Panel may consider here if selection of those particular periods resulted in a solution different from what it would be if the whole one-year period were taken, in other words what an objective and unbiased authority would do in any given investigation. In addition,

Turkey believes that seasonality is an important aspect of this investigation. The Panel may also focus on the seasonality of the subject product and its conformity with the practice of limiting the inquiry to certain parts of the year.

5.46 Turkey being a third party is not in a position to comment on if the results would be different if the whole one-year period was evaluated. Yet, what Turkey would like to emphasize is that in any such case if the authority is deviating from its normal practice it should provide the reasons for such deviation and invite the interested parties to submit rebuttal arguments if they would consider such practice not appropriate.

5.47 Turkey reckons that such arbitrary implementations should not be allowed as they would certainly place question marks as regards the objectivity of the authority and the outcomes of the investigation. In other words, authorities should not be allowed to manipulate the investigations as necessary.

3. Application of "adverse facts available" to certain companies

5.48 The United States considers that Economía's application of an adverse "facts available" dumping margin to Producers Rice and to US 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. The United States continues that an investigating authority is not permitted to examine individually just a few exporters and then assign an adverse facts available based margin to everyone else.

5.49 As regards the use of facts available, Article 6.8 clearly identifies the circumstances under which an investigating authority may resort to the "facts available". In accordance with this Article, only if an interested party "refuses access to" necessary information within a reasonable period, "otherwise does not provide" necessary information within a reasonable period, or "significantly impedes the investigation", the investigating authority may make determinations on the basis of the facts available.

5.50 Thus, the investigating authorities shall avoid the arbitrary implementation of "facts available" and for those companies who were not individually examined for reasons other than listed in Article 6.8 and the authority shall not calculate a margin based on facts available.

5.51 However, under certain circumstances the case may not be so straightforward. Assume a case where the investigating authority has acted to the best of its ability in reaching all the interested parties, that is to say he sent questionnaires to all the known exporters/producers, published a notice of initiation and notified the government of the exporting Member and requested assistance to reach unknown exporters/producers in the exporting Member. Some may here still argue that the authority did not notify all interested parties individually and those parties should not receive facts available based margins.

5.52 Assume that in the above scenario only one exporter/producer cooperated with the authority and responded to the questionnaire while all the other exporter/producers avoided cooperation. The only cooperating company received *de minimis* dumping margin. Here, would it be still rational to argue that those non-cooperating companies should receive the margin of the cooperating company or a neutral "all others rate" but not a dumping margin based on facts available?

5.53 In Turkey's view, application of facts available should be considered on a case by case basis. In any case the investigating authorities and interested parties should fulfil their respective requirements and bear the results of their relevant actions.

5.54 As regards the treatment of "new shippers", the only Article that is relevant with potential exporters of the product concerned in the AD Agreement is Article 9.5. The purpose of this Article is to eliminate the unfairness of punishing the newcomers with the residual duty of the original investigation for reasons beyond their control. The Article clearly states that to request a review those exporters or

producers must 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. This provision clarifies that the original investigation has already finished and the duties are in place, thus it does not recognize that new shippers can request an individual treatment during the investigation. Then the same Article continues that the review for those companies should be initiated and carried out on an accelerated basis and no anti-dumping duties shall be levied on imports of such exporters or producers while the review is being carried out. That is to say, regardless of the duty placed on the company they will not be subjected to that in the course of the investigation but may only be required to place guarantees or to withhold appraisement. In this respect, investigating authorities are not required by the AD Agreement to carry out individual investigations for those companies who did not export during the investigation period.

5.55 The United States further alleges that Economía failed to disclose to the exporters the export price information, which established the basis for the determination of the adverse facts available dumping margin. This information involved pedimento information obtained by the CMA from the Mexican Secretariat of Treasury. According to the United States, Economía did not include this information and the relevant documents in the public file of the investigation. Thus, the United States asserts that Economía, having acted as such, breached Article 6.2 and 6.4 of the AD Agreement.

5.56 Article 6.2 of the AD Agreement states that all interested parties shall have the right to defend their interests in the course of the investigation. Article 6.4 requires the authorities to provide "timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential (…), and that is used by the authorities in an anti-dumping investigation, (…)".

5.57 In view of the above requirements, Turkey believes that the authorities shall provide all interested parties access to non-confidential information that is relevant for the parties in making their cases so that the interested parties can use the opportunity to defend their rights, as stipulated under Article 6.2. The authorities' acting so will also render the investigation process more transparent and benefit all interested parties.

4. Consistency of domestic legislation

5.58 The United States alleges that various provisions of Mexico's Foreign Trade Act and its FCCP are inconsistent with Mexico's WTO obligations. The United States contends that particularly the provisions regarding time limit for responding questionnaires, facts available, reviews, new shipper reviews and application of fines are inconsistent with Articles 5.8, 6.1.1, 9.3, 9.5, 11.2, 12.1.1 and 18.1 of the AD Agreement and Articles 11.9, 19.3, 21.2 and 32.1 of the SCM Agreement.

5.59 Turkey submits that the Members being signatory to the Final Act of the Uruguay Round and the Agreement Establishing the WTO, commit themselves to be abide by the rules and procedures of the WTO Agreements. The presence of such commitment provides security and predictability to the multilateral trading system. Members should avoid impairing or nullifying benefits accruing to other Members by taking measures not allowed under the WTO Agreements.

5.60 In this respect, domestic Legislations of the Members designed to implement the WTO Agreements shall be compatible with the requirements of the relevant Agreements. Otherwise, the WTO Agreements and the multilateral system would prove unnecessary since Members might adopt Legislations with completely different obligations. This would inevitably result in chaos and unpredictability of the international environment.

5.61 As a matter of fact, Members are not precluded of having domestic Legislations. On the contrary, the WTO Agreements put forward general principles of application and they do not generally describe the procedures to be followed to act consistently with those principles. Thus, domestic Legislations are especially important in those instances where they help to describe procedures and rules that should be

followed in order to be compatible with the Agreements. However, the balance should be set. The provisions of the domestic legislations should not create unnecessary burden for the respondents and they should not contradict or annul the provisions of the WTO Agreements.

5. Conclusion

5.62 Turkey has serious concerns in WTO Members' interpretation of the fulfilment of their obligations under the AD Agreement.

5.63 To this end, Turkey believes that among others, it is very essential for sake of transparency, fairness and appropriate functioning of this Agreement that the interested parties should not be deprived of their rights as specified in detail in the Agreement, the authorities should abide by the provisions of the Agreements in conducting an anti-dumping investigation in an unbiased and objective manner. Lastly, Turkey believes that the domestic Legislation of Members should be in compliance with the relevant WTO Agreements to preserve the implementation standards of measures in such areas as the area of anti-dumping and subsidies.

D. THIRD PARTY ORAL STATEMENT OF CHINA

5.64 China, in its oral statement, made the following arguments:

1. Issue 1: The closeness of the Period of Investigation to the Date of Initiation

5.65 In the alleged anti-dumping investigation, Mexico's investigating authorities established a period of investigation ("POI") the ending of which was fifteen months earlier than the initiation of the investigation.

5.66 Although the AD Agreement itself does not establish any specific guidelines for determining an appropriate POI, the Anti-Dumping Committee has issued a recommendation to the effect that, as a general rule, POI shall be "ending as close to the date of initiation as is practicable". China does not consider that the time lag of fifteen months between the ending of POI and the date of initiation is in compliance with the spirit and substance of the recommendation of the Anti-Dumping Committee.

5.67 China believes that the evaluation of the closeness of the POI to the date of initiation should be considered in the context of its purpose and function under the AD Agreement.

5.68 The closeness of the POI is important for the investigation and the determination of the existence of injury and dumping margin. The data collected in a remote, non-proximate POI cannot prove that the dumped imports continue to exist at the present time, and that the level of such dumped imports "causes or threatens to cause material injury" to a domestic industry in the importing country. In order to ensure a fair and equitable investigation, the data collected within the POI shall meet the requirement of "objectivity" and "positive evidence", as such terms are defined in Article 3.1 of the AD Agreement. China agrees with the United States' assertion that the discretion of the investigating authorities to set the POI "is not boundless". As a general rule, the investigating authorities shall select the POI that is as close to the date of initiation of the investigation as practicable.

2. Issue 2: The seasonality of the Period of Investigation

5.69 The United States alleges that Mexico's investigating authorities examined only the March to August time period in each year of the POI for injury analysis. Such six-month period reflected the main import activity of the product under investigation when domestic production is at a seasonal low. Mexico's investigating authorities did not investigate the data in the September to February time period when domestic production is at a seasonal high and the import of the product under investigation is, conversely, relatively low. For the purpose of injury analysis, Mexico's investigating authorities did not

compare the data of the seasonal high period with those of the seasonal low period. Instead, it only compared the data of the same season, on a year-to-year basis.

5.70 China takes no position as to whether or not the methodology adopted by Mexico in this dispute, which is to examine only an annual portion/season of the POI, as being inconsistent with its WTO obligations. Instead, China deems it appropriate to highlight the issue of the seasonal characteristic that is implicit in the POI stipulated for this investigation.

5.71 China believes that the investigating authorities have the discretion to consider seasonality when establishing the POI of a specific investigation. The Anti-Dumping Committee in its recommendation did recognize the discretion of investigating authorities to "take account of the particular circumstances of a given investigation, to ensure that periods of data collection are appropriate in each case". Moreover, the Anti-Dumping Committee further recommended that "in establishing the specific periods of data collection in a particular investigation, investigating authorities may, if possible, consider the characteristics of the product in question, including seasonality and cyclicality" (emphasis added).

5.72 China also believes that the examination of a domestic industry by the investigating authorities from a seasonal perspective shall be conducted in an "objective" manner as required by Article 3.1 of the AD Agreement. The requirements of objectivity means that, where investigating authorities undertake an examination of a domestic industry in one season, they should, in principle, examine, in like manner, the same industry in all other seasons, as well as examine the industry for the whole year. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine certain seasons that have been excluded from examination.

3. Issue 3: Investigating authorities' obligations as to evidence collection

5.73 The United States alleged in the first written submission, that Mexico's "failure to investigate or attempt to gather data from readily available sources" breached Articles 3.1 and 3.2 of the AD Agreement because Mexico failed to "identify exporters and importers other than the handful of those mentioned in the petition"; failed to "send its anti-dumping questionnaire to exporters and importers other than the few designated as such in the petition, or to purchasers"; failed to "consult the customs declarations"; and failed to "seek to obtain accurate import volume information from importers".

5.74 The United States interpreted that the requirements of "objectivity" and "positive evidence" make it obligatory for the investigating authorities to "actively seek out information pertinent to" the investigation, and to "investigate or attempt to gather data from readily available sources". In other words, the United States asserts that the investigating authorities are obligated to actively collect evidence in order to fulfil the requirements of "objectivity" and "positive evidence". China offers a different interpretation than that of the United States with regard to the approach in order to meet the standard of "objectivity" and "positive evidence" as set forth in Articles 3.1 and 3.2 of the AD Agreement.

5.75 China believes that the obligations of the investigating authorities with regard to evidence collection are to give notice of information required to all interested parties and to provide ample opportunity to present in writing all evidence, rather than to actively collect evidence as asserted by the United States. Article 6.1 of the AD Agreement clearly described the obligations of the investigating authorities as the following: "[a]ll 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."

5.76 The scope of the obligations of the investigating authorities as to the verification of the accuracy of the information provided by interested parties as defined in Article 6.6. of the AD Agreement is to "satisfy themselves as to the accuracy of the information … upon which their findings are based."

5.77 The requirement that the investigating authorities shall "satisfy themselves as to the accuracy of the information provided by interested parties" was clearly described by the panel in *US – DRAMS*. The panel here stated that if the investigating authorities are obligated to actively seek evidence from all sources available, it is also likely that "anti-dumping investigations would, as a consequence, become totally unmanageable". China concurs with the panel's findings.

5.78 Only when the investigating authorities have to operate under "best information available" as described in Paragraph 7 of Annex II of the AD Agreement that the obligations to verify the accuracy of the information through independent sources arise "where practicable".

5.79 In sum, China does not find in the AD Agreement a solid legal basis to support the assertion of the United States that investigating authorities are obligated to actively seek evidence through independent sources except under very specific circumstances.

4. Issue 4: Known exporters

5.80 The United States alleged in this dispute, that Mexico's investigating authorities "improperly sent its anti-dumping questionnaire to only two companies that were listed in the petition" and "made no effort to identify exporters and importers other than the handful of those mentioned in the petition". The allegation raises the issue of the obligations of investigating authorities with respect to "known" exporters for the United States has asserted that Articles 5 and 6 of the AD Agreement "require an investigating authority to actively determine the universe of potential respondents" and to "actively seek to identify individual exporters and producers". China does not agree with such assertion and interpretation.

5.81 China believes that Article 5.2 of the AD Agreement expressly places the burden of identifying "known" exporters on the petitioners by stating that a petition shall include "the identity of each known exporter or foreign producer" of the product in question. In Article 6.1.3, the use of the definite article "the" before "known exporters" shows that the phrase "known exporters" has been used in the previous text of the AD Agreement. Given that both Article 5.2 and Article 6.1.3 use the same wording "known exporter", the "known exporters" under Article 6.1.3 refer to "each known exporter" under Article 5.2. Therefore, the AD Agreement suggests that investigating authorities shall rely on the petitioners to identify "known" exporters in their petition(s).

5.82 China would submit that at the outset of the investigation, the investigating authorities shall rely on the information in the petition to identify "known" exporters. The authorities are obligated to check the "accuracy and adequacy" of such information and if the authorities believe that such information is not accurate or adequate, it shall give reasonable time to the petitioners to provide further information or satisfactory explanation. There is no legal basis in the AD Agreement for the interpretation that the investigating authorities are obligated to actively seek to identify "known" exporters by themselves from available sources.

5. Issue 5: Exporters that had no export during the POI

5.83 The United States alleged that Mexico' investigating authorities improperly calculated dumping margin on the basis of adverse facts available for a exporter that had made no export sale during the POI but that had fully cooperated with the investigating authorities in the investigation. The United States asserts that a neutral "all other rate" shall be applied to such exporter because its full cooperation left no warrant to apply adverse facts available that are strictly confined in Article 6.8 of the AD Agreement. Furthermore, the United States stated that such exporter shall be entitled to the "new shipper" review as provided in Article 9.5 of the AD Agreement. China believes that the United States' interpretation that an exporter that made no export sales during the POI should have certain dumping margin applied to it (whether this is the neutral "all other rate", or the dumping margin based upon facts available) is in error.

5.84 China would base its position on the following: firstly, an exporter that made no export sales during the POI shall not be considered as having been dumping the products under investigation because no dumping margin can be calculated for such exporter due to the non-existence of an applicable export price. Article 2.1 of the AD Agreement provides that "a product is to be considered as being dumped, 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 product when destined for consumption in the exporting country" (emphasis added). An exporter that made no export sales during the POI had no export price that can be used to compare with the normal value to calculate dumping margin, therefore, the product under investigation of such exporter cannot "be considered as being dumped".

5.85 Secondly, Article 9.5 of the AD Agreement expressly requires that "no anti-dumping duties shall be levied on imports from such exporters or producers" "who have not exported the product to the importing Member during the period of investigation".

5.86 China believes that it is erroneous to impose any dumping margin on an exporter that made no export sales during the POI, whether this be the neutral "all other rate" or that based upon facts available.

E. THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

5.87 EC, in its oral statement, made the following arguments:

1. Introduction

5.88 The European Communities makes this third party oral submission because of its systemic interest in the correct interpretation of the AD Agreement.

5.89 In this oral submission the European Communities, reacting to certain statements made by Mexico in its first written submission and by the other third parties, will comment on the following points:

(a) the use by Mexico of a stale period of investigation, ending more than 15 months before initiation of the investigation;

(b) the use by Mexico of three select segmented six month periods for its injury determination;

(c) the application of an "all others" rate based on the facts available to unknown and known exporters or producers; and

(d) Article 93V of the Mexican Foreign Trade Act.

2. Stale period of investigation

5.90 The European Communities would respectfully draw the Panel's attention to what is essentially consensus among the United States and all of the third parties: China; the European Communities; and Turkey. All agree that the AD Agreement is silent on the period of time that may elapse between the end of the investigation period and the initiation of the proceeding. There is no express rule in the text. Despite this, all agree, remarkably, that it is not a permissible interpretation of the AD Agreement to conclude that there is no limit to the period of time that may elapse. That proposition is based on context and purpose, rather than text.

5.91 It is a proposition derived from the fact that numerous provisions of GATT 1994, Article VI and the AD Agreement are in the present tense, or express a requirement of temporal proximity between the regulated behaviour (dumping causing injury) and its consequences (the measures that may be adopted

under the AD Agreement); and from the numerous provisions of the AD Agreement that require an investigating authority to proceed in an objective manner, based on positive evidence.

5.92 The European Communities welcomes such an approach, it being one that validates in a balanced manner all the relevant rules of interpretation, giving fair weight to the overall logic of the Agreement, and the role of WTO dispute settlement. EC invites the Panel to embrace it.

3. Use of March to August 1997, 1998 and 1999 for injury analysis

5.93 On the question of the periods analysed for the purposes of the injury investigation, the European Communities also draws the attention of the Panel to the substantial degree of consensus between the United States and the third parties, both as to interpretative technique, and the conclusion to be drawn on this point.

5.94 The European Communities considers that the Panel need not consider whether or not there may be an issue of seasonality in this case, because that issue was not raised by or relied on by the investigating authority.

5.95 Rather, the European Communities considers that the Panel may and should make findings based on the general obligation of an investigating authority to adhere in its determinations to a coherent internal logic. This also results from the various provisions of the AD Agreement which require an investigating authority to proceed in an objective manner and base its findings on positive evidence. A determination that is internally contradictory cannot be, in all respects, objective and based on positive evidence. Some part of it must be non-objective and/or not based on positive evidence. The Appellate Body recently reiterated this basic requirement in the *EC–Bed Linen* case. It applies to an injury determination with just as much force as it applies to a dumping determination.

5.96 In this case, the Panel need do no more than find that Mexico determined it to be appropriate to assess injury over the three year period 1997, 1998 and 1999; that in principle Mexico was thus bound by its own logic to make its injury determinations on a consistent and objective basis in relation to that period; and that Mexico departed from the logic it had itself established by ignoring certain events relevant to injury assessment that took place during that three year period, without any explanation. Mexico thus acted inconsistently with the AD Agreement.

5.97 On the question of seasonality, the European Communities would not rule out the possibility that it may have a role to play when fixing the parameters of a single homogenous injury investigation period; or even that it should be taken into consideration within a period of injury investigation that extends over more than one season. That would not mean, however, that an investigating authority would be free to simply ignore certain events during the relevant period, without explanation.

5.98 For example, in determining whether or not the margin of dumping would be *de minimis* or the volume of imports negligible for the purposes of Article 3.3 of the AD Agreement, it is highly doubtful that an investigating authority could entirely ignore low season imports.

5.99 The same is true of the factors listed in Article 3.4 of the AD Agreement in relation to the examination of the impact of the dumped imports on the domestic industry, many of which by definition have a temporal aspect, and the measurement of which could therefore be severely distorted if arbitrarily restricted to certain sub-periods within the injury investigation period.

5.100 The same observation may be made in relation to the factors listed in Article 3.5 of the AD Agreement, those being factors causing injury other than dumped imports. Events relevant to the assessment of these factors cannot be simply ignored just because they happen to fall outside the particular sub-period or sub-periods arbitrarily selected by the investigating authority.

5.101 These observations are confirmed if it is recalled that seasonality may affect all Members to a greater or lesser extent. There may even be cases in which, in one season of the calendar year, Member A exports to Member B, whilst in another season of the calendar year, Member B exports the same product to Member A. In such a case, to look at only half the picture, could well result in a particularly distorted view of the situation.

4. All others rate, facts available

5.102 The European Communities recalls that there is no dispute between the parties as to whether a residual duty can be imposed on imports from unknown exporters or known non-exporting producers. Both parties agree that a residual duty can be imposed in both circumstances. Thus, contrary to what China suggests in its third party submission[40], the Panel is not asked to make any findings on this particular point. The parties disagree only on the question of how the residual duty should be established, that is, on whether or not such a duty can be based on facts available. This is therefore the specific issue on which the Panel is called upon to make findings in this case. The European Communities has pointed out that nothing in the AD Agreement precludes the residual duty from being based on facts available. In particular, Article 9.4 of the AD Agreement is irrelevant to this question, being limited to the specific circumstances in which sampling is used.

5. Fines imposed pursuant to Article 93V of the Foreign Trade Act

5.103 In so far as Article 93V of the Mexican Foreign Trade Act effectively requires the imposition of fines for dumped or subsidised imports from WTO Members, the European Communities would support the United States' claim that this is an impermissible specific action against dumping or subsidisation in violation of Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement. The European Communities would also take this opportunity to recall that the United States has yet has to bring its own legislation into conformity with these specific obligations of the AD Agreement and the SCM Agreement by complying with the rulings in the *US–1916 Act* case and the *US–Offset Act (Byrd Amendment)* case.

F. THIRD PARTY ORAL STATEMENT OF TURKEY

5.104 Turkey, in its oral statement, made the following arguments:

5.105 Turkey has not made submissions with respect to all matters raised before this Panel. However, Turkey would like to remind that this should not be understood to imply that Turkey either agrees with or objects to such interpretations of the Agreement by the parties to the dispute.

5.106 Turkey presents the four issues that it had raised in its written submission:

(a) Selection of an investigation period that ended more than fifteen months prior to the date of initiation of the investigation;

(b) Limitation of inquiry to only certain months where imports were at their highest and domestic production was lowest;

(c) Application of "adverse facts available" to certain companies;

(d) Consistency of domestic Legislations with provisions of the AD Agreement and the Agreement on Subsidies and Countervailing Measures and obligations of Members.

[40] Third party written submission of China, paras. 32 to 35.

5.107 As for the first issue, that is, Economía's selection of an investigation period that ended more than fifteen months prior to the date of initiation of the investigation, Turkey acknowledges that the AD Agreement does not establish any specific period of investigation. However, in Turkey's view, the wording of both the Agreement and Article VI of GATT 1994 leads the authorities to investigate the presence of dumping, injury and causation in the most recent time period. It is Turkey's opinion that the period of data collection for dumping investigations should end as close to the date of initiation as is practicable to display fair results. This is also important for purposes of predictability and transparency of the investigations and credibility of the authority's actions.

5.108 As for the second issue on the limitation of inquiry to only certain months where imports were at their highest and domestic production was lowest, Turkey would like to refer to Article 17 of the Agreement. In accordance with the said Article, the panels are entitled to determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. In this respect, the Panel may consider here if selection of those particular periods resulted in a solution different from what it would be if the whole one-year period were taken, in other words what an objective and unbiased authority would do in any given investigation. In addition, Turkey thinks that seasonality is an important aspect of this investigation. The Panel may also focus on the seasonality of the subject product and its conformity with the practice of limiting the inquiry to certain parts of the year.

5.109 Turkey would also like to emphasize that in case the authority is deviating from its normal practice, it should provide the reasons for such deviation for purposes of transparency and predictability and invite the interested parties to submit rebuttal arguments if they would consider such practice inappropriate.

5.110 The third issue that Turkey would like to bring up is the application by Mexico of "adverse facts available" to certain US producer/exporters. As regards the use of facts available, Article 6.8 clearly identifies the circumstances under which an investigating authority may resort to the "facts available". In accordance with this Article, only if an interested party "refuses access to" necessary information within a reasonable period, or "otherwise does not provide" necessary information within a reasonable period, or "significantly impedes the investigation", the investigating authority may make determinations on the basis of the facts available.

5.111 However, under certain circumstances the case may not be so straightforward. Assume a case where the investigating authority has acted to the best of its ability in reaching all the interested parties, that is to say it sent questionnaires to all the known exporters/producers, published a notice of initiation and notified the government of the exporting Member and requested assistance to reach unknown exporters/producers in the exporting Member.

5.112 Assume that in the above scenario only one exporter/producer cooperated with the authority and responded to the questionnaire while all the other exporter/producers avoided cooperation. The only cooperating company received *de minimis* dumping margin. Here, Turkey does not think that those non-cooperating companies should receive the margin of the cooperating company or a neutral "all others rate". In such case, calculation of the dumping margin for the non-cooperating parties should be based on facts available.

5.113 In Turkey's view, application of facts available should be considered on a case by case basis. In any case the investigating authorities and interested parties should fulfil their respective requirements and bear the results of their relevant actions.

5.114 As regards the treatment of "new shippers", the only Article that is relevant with potential exporters of the product concerned in the Agreement is Article 9.5. The purpose of this Article is to eliminate the unfairness of punishing the newcomers with the residual duty of the original investigation for reasons beyond their control. The Article clearly states that to request a review those exporters or producers must show that they are not related to any of the exporters or producers in the exporting

country which are subject to the anti-dumping duties on the product. This provision clarifies that the original investigation has already finished and the duties are in place, thus it does not recognize that new shippers can request an individual treatment during the investigation. Then the same Article continues that the review for those companies should be initiated and carried out on an accelerated basis and no anti-dumping duties shall be levied on imports of such exporters or producers while the review is being carried out. That is to say, regardless of the duty placed on the company they will not be subjected to that in the course of the investigation but may only be required to place guarantees or to withhold appraisement. In this respect, investigating authorities are not required by the Agreement to carry out individual investigations for those companies who did not export during the investigation period.

5.115 The last issue Turkey would like to raise is the consistency of domestic Legislations with the WTO Agreements and the WTO obligations of the Members. Turkey would like to remind that its written submission on this issue had been made before Turkey had the opportunity to examine Mexico's submission. Therefore, concerning this last issue, Turkey's submission did not include the views and approach that it would like to present after having examined Mexico's submission as well.

5.116 In this case, the United States refers to some provisions of the Mexican Foreign Trade Act that it considers to be inconsistent with the AD Agreement and the SCM Agreement. However, Mexico stated in its submission that the challenged Legislation entered into force several months after the termination of the investigation on imports of long-grain white rice originating in the United States. In other words, the reformed legislation subject to challenge by the United States was not in force during the time when the investigation was ongoing. Thus, Turkey believes that, even though the Mexican Foreign Trade Act involves some provisions allegedly inconsistent with the aforementioned Agreements, these were introduced after the termination of the subject investigation and should therefore be excluded from the scope of this panel and examined independently from this proceeding.

VI. INTERIM REVIEW

6.1 On 11 March 2005, the Panel issued its Interim Report to the parties. On 29 March 2005, the United States and Mexico requested the Panel to review precise aspects of the Interim Report, in accordance with Article 15.2 of the DSU. Mexico also requested the Panel to hold a further meeting with the parties pursuant to Article 15 of the DSU and paragraph 8 of the Panel's Working Procedures. The meeting was held on 25 April 2005.

6.2 We have briefly outlined our treatment of the parties' requests below. Where necessary, we have also made certain technical revisions to our Report.

A. COMMENTS BY THE UNITED STATES

6.3 In its comments on the Interim Report, the United States requests the Panel to make a number of technical and typographical corrections. Where appropriate, we made such corrections to our Report.

6.4 The United States requests the Panel to amend paragraph 7.62 of the Report relating to the Recommendation of the Committee on Anti-Dumping Practices in order to reflect that this Recommendation supports the interpretation of the Panel rather than providing "useful context" for the correct interpretation of the obligations. According to the United States, the Recommendation cannot be considered as "context" in the very particular sense in which that word has meaning under the Vienna Convention on the Law of Treaties, and this term should, therefore, be avoided. In its comment on the request of the United States, Mexico stated that the Recommendation is not binding and does not create new obligations for WTO Members. We note that the United States pointed out that this is also the reason why it would prefer to avoid the use of the term "context" in this paragraph. In order to avoid any misunderstanding, we amended our Report to state that this Recommendation provides "useful support" for our interpretation.

6.5 With respect to paragraph 7.223 of our Report, the United States requests the Panel to amend the Report to make sure that it is clear that the Panel findings address the consistency of Article 53 of the Act with both Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement. We accept the request of the United States and have amended our Report accordingly.

6.6 The United States requests the Panel to reconsider its position set out in paragraph 7.299 that the United States failed to provide sufficient evidence that Article 97 of the Act deals with the expedited reviews that are provided for in Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement. According to the United States, under Article 97 of the Act, only determinations issued at the end of a judicial proceeding can be considered "final". Since Article 89D of the Act only permits an exporter to request a review if the good in question is subject to a final duty, Article 97 of the Act, when read together with Article 89D of the Act does preclude expedited reviews and is, therefore, inconsistent with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement.

6.7 We consider that we sufficiently explain our position with regard to Article 97 of the Act in our Report. As the United States acknowledges, Article 89D of the Act is the relevant provision of the Act addressing expedited reviews. Article 97 of the Act does not, as such, deal with expedited reviews. Article 97 of the Act only becomes relevant due to the particular language used in Article 89D of the Act referring to a "final duty". In our view, the United States thus failed to adduce sufficient evidence that Article 97 of the Act, as such, is inconsistent with the obligations concerning expedited reviews set forth in Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement. We do not consider that the US comments are of such nature as to require us to reconsider our position and to amend our report. We, therefore, reject the request of the United States in this respect.

6.8 The United States requests the Panel to amend footnote 202 of the Report dealing with Mexico's argument that the United States should have adduced evidence of the application of the challenged provisions of the Act. The United States requests the Panel to restate its rejection of this argument by Mexico. According to the United States, the question of Mexican law does not implicate WTO or general public international legal issues, but is a question of fact from the standpoint of WTO proceedings. In its comment on the request of the United States, Mexico states that it does not consider this to be a matter of fact and repeats its argument that the United States failed to make a *prima facie* case.

6.9 While we agree with the United States that the question of the meaning a WTO Member's law is a question of fact, we note that in this footnote we are responding to an argument made by Mexico that WTO jurisprudence required the complaining party to adduce particular evidence to prove this fact. As we explain in footnote 202, we do not agree with Mexico that this fact is necessarily to be demonstrated in a particular way. Neither has Mexico demonstrated that rules of general public international law provide for such a particular evidentiary requirement. In light of the comments received, and in order to clarify our position, we have slightly reworded this footnote.

B. COMMENTS BY MEXICO

1. Observations concerning the section on the anti-dumping measure imposed on imports of long-grain white rice from the United States

6.10 Mexico requests the Panel to amend paragraph 7.52 and footnote 66 of the Report to reflect more fully Mexico's arguments as set forth in paragraphs 44 and 45 of Mexico's First Written Submission. We consider that for the purposes of our findings, paragraph 7.52 already accurately reflected Mexico's position. However, in order to avoid any misunderstanding, we changed the grammar of the paragraph's sentence relating to Mexico's view of the purpose of an anti-dumping measure so as to track Mexico's own wording as much as possible.

6.11 Mexico requests the Panel to clarify and complete the last part of paragraph 7.52 as Mexico considers that the last sentence of this paragraph is not clear and overlooks what was said in paragraph 67

of Mexico's First Written Submission. The United States considers that the Panel accurately reflected Mexico's statement in this respect and refers to footnote 71 of our Report. We note that the last part of paragraph 7.52 is taken almost verbatim from paragraph 35 of Mexico's Second Written Submission. In addition, we consider that the relevant part of the paragraph of Mexico's First Written Submission that Mexico wants the Panel to incorporate in the Final Report is already reflected in the penultimate sentence of paragraph 7.52 of our Report. We, therefore, reject Mexico's request to amend our Report.

6.12 Mexico requests the Panel to include a number of paragraphs of Mexico's Second Written Submission into paragraph 7.57 of the Report, which it considers to be incomplete and inaccurate. In addition, according to Mexico, what the Panel refers to as a position held by Mexico is not a submission of Mexico's but a comment on what was said by the United States in its Opening Statement at the first substantive meeting. We note that paragraph 7.57 is part of our analysis of the arguments of the parties which, as such, have been set forth in more detail in our Report, in "Section IV: Arguments of the Parties" and in the relevant part of "Section VII: Findings" dealing with the arguments of the parties. In paragraph 7.57, we highlight a particularly relevant statement by Mexico. We do not consider it necessary to include in this paragraph of our analysis a more elaborate explanation of Mexico's arguments which are fully reflected elsewhere in the Report. We, therefore, reject Mexico's request to amend our Report.

6.13 Mexico requests the Panel to amend paragraph 7.82 of the Report to reflect that it did not argue that taking a six month period was the *only* way of avoiding distortions. Mexico also requests the Panel to further amend paragraph 7.82 of the Report to reflect that Mexico did not state or give any indication that by "distortions" it was referring to "certain developments which occur in the remaining six months which perhaps undo part of the effect of the imports that entered the country during the six months that were examined", as Mexico considers is suggested in the Report. The United States considers that the Panel never claimed that Mexico made such a statement, but that the Panel was rather providing its own assessment of the facts in question.

6.14 We accept Mexico's comment that it did not say that applying a six month period was the *only* way of avoiding distortions, and we have amended our Report accordingly. We do not consider that we need to make the additional amendment to paragraph 7.82 of our Report as requested by Mexico. We note that paragraph 7.82 contains *our* analysis of Mexico's arguments in defence of the time period chosen, which has to be read in light of the fact that Mexico itself clearly indicated that seasonality was not an issue in adopting this six month period of investigation. This statement is thus our reflection of Mexico's explanations and not a summary of Mexico's argument, as Mexico seems to be suggesting. We consider that we sufficiently explained in our Report our position with respect to the failure to examine six months of each of the years of the period of investigation. We therefore reject Mexico's request to amend our Report.

6.15 Mexico requests the Panel to include the necessary details in footnote 78 of the Report to show that Mexico did not submit that "... its practise ... shows delays of sometimes six months, on other occasions 20 months between the end of the period of investigation and the date of initiation of the investigation, depending on the period of investigation the applicant is proposing". Mexico refers to a more complete description of its arguments in paragraphs 43 and 44 of its Second Written Submission. We acknowledge that, answering a question from the Panel, it was the United States, rather than Mexico, which presented an overview of the relevant practice of Mexico with respect to the choice of the period of investigations.[41] Mexico, in its Second Written Submission, however, did not contest the accuracy of these data, but rather confirmed that its practice reveals that on average there are about 10 months between the end of the period of investigation and the initiation of the investigation. In light of Mexico's request, we have slightly amended footnote 78 of our Report in order to clarify this point.

[41] US First Answers to Questions, para. 5 (question 2). This was confirmed by the United States in its comments on the Mexican request for interim review.

6.16 Mexico requests the Panel to amend paragraph 7.95 of the Report to more accurately reflect Mexico's position that it considers that an investigating authority is not required to send questionnaires to *all* the foreign producers and exporters. We accept Mexico's request and have amended our Report accordingly.

6.17 Mexico comments that on four occasions in the Report, the Panel refers to a "reasonable" investigating authority. Mexico requests the Panel to include an explanation of the term "reasonable". While we consider that a reasonable investigating authority is in the first place an authority which conducts an objective evaluation of the matter before it, in the sense given to the term "objective" by the Appellate Body in *inter alia* the case of *US – Hot-Rolled Steel*,[42] we decided that such a reference to a "reasonable" investigating authority in the paragraphs identified by Mexico was not necessary and we have amended our Report accordingly.

6.18 Mexico considers that paragraph 7.134 of the Report regarding Mexico's argument that it suffices for one exporter to be found to have been dumping above the *de minimis* level for all exporters to be included in the application of the measure, does not fully reflect Mexico's position. Mexico requests the Panel to include a reference to Mexico's argument set forth in its First Written Submission that if exporters do not engage in dumping, a review will not lead to the application of any measure - in the sense of the imposition of a duty - and such exporters will be able to continue enjoying their right to export without a dumping margin. The United States considers that the argument referred to by Mexico has nothing to do with the point the Panel is making in paragraph 7.134 of the Report. We are of the view that, in any case, such a reference as requested by Mexico is already contained in footnote 138 of our Report. We therefore reject Mexico's request to further amend our Report.

6.19 Mexico requests the Panel to clarify footnote 142 which provides that Mexico did *not* argue that an investigation has to be terminated if the country-wide dumping margin is below *de minimis*. Mexico fails to understand in what way the fact that Mexico did not make this argument may affect the analysis contained in the Panel's findings, given that it is not an issue in dispute. We note that footnote 142 implicitly refers to an argument made by the European Communities as a Third Party that the investigation is only to be terminated if the country-wide dumping margin is below *de minimis*. We consider it relevant, in light of this argument made by one of the Third Parties concerning the interpretation of Article 5.8 of the AD Agreement, to indicate that this possible argument was not one made by Mexico before us. While this fact does not alter our analysis, it completes our discussion of the arguments of the parties concerning the correct interpretation of Article 5.8 of the AD Agreement. We, therefore, reject Mexico's request to amend our Report.

6.20 Mexico considers that paragraph 7.143 of the Report which states that Mexico argues that termination of the investigation is only required when all of the margins of dumping for all exporters or producers are below *de minimis*, does not accurately reflect its position. Mexico requests the Panel to reflect the fact that Mexico asserted in its Answers to Questions from the Panel relating to the first

[42] Appellate Body report, *US - Hot-Rolled Steel*, para. 193:
"193. The term "objective examination" aims at a different aspect of the investigating authorities' determination. While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, 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 the 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 favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process."

substantive meeting that any exporter for which the authority finds a more than zero and below *de minimis* margin of dumping would receive a zero per cent duty. In addition, Mexico asserts that in its Second Written Submission it argued that the investigation is to be terminated where the investigating authority concludes that the margin of dumping is *de minimis* – a determination that must be made for each country as a whole and not on a firm-specific basis.

6.21 We note that paragraph 7.143 of the Report contains our analysis of the various arguments of the parties which are set forth in more detail elsewhere in the Report. We consider that the above statement that Mexico wants us to amend or delete is based on Mexico's argument, which it repeated in its comments on the Interim Report, that "it does suffice for one exporter to have been found to be dumping above the *de minimis* level for all exporters to be included in the application of the measure".[43] We, therefore, do not agree with Mexico that its position is not accurately reflected in paragraph 7.143 of the Report. We explain in this paragraph, and other relevant paragraphs, our interpretation of Article 5.8 of the AD Agreement. We conclude that Article 5.8 of the AD Agreement refers to exporter-specific margins of dumping. We wish to add that in paragraph 7.144 we address and reject Mexico's argument that the application of a zero per cent duty to an exporter does not constitute the application of a measure. We therefore see no reason to amend our Report as suggested by Mexico and reject Mexico's request in this respect.

6.22 Mexico considers that its position is not properly reflected in footnote 144 of the Report dealing with the alleged practical problem of an interpretation of Article 5.8 of the AD Agreement that could lead to parallel investigations against the same products from the same country. Mexico requests that part of the footnote referring to Mexico's position be deleted. In light of the fact that the argument of practicality was mainly one made by the European Communities in its Third Party Submission, we accept Mexico's request and have amended footnote 144 accordingly.

6.23 Mexico considers incorrect the statement of the Panel in paragraph 7.197 of the Report that "throughout the application the name of a third US exporter, the 'Rice Corporation' is referred to". Mexico points out that the only reference to that exporter in the application for initiation of an investigation is to be found in Annex H of the application. Mexico requests the Panel to amend the Report accordingly. In commenting on the Mexican request, the United States argues that the Panel is correct in stating that the name of this US exporter appeared throughout the application. We note that, as rightly pointed out by the United States, pages 23, 24 and 44 of the application and page 42 of part II of the application clearly refer to this US exporter. We therefore reject Mexico's request to amend our Report.

6.24 Mexico is of the view that paragraph 7.199 of the Report does not adequately reflect its position. According to Mexico, it did not acknowledge that it would have been possible to identify all US exporters by examining the so-called pedimentos. Mexico states that, while the pedimentos contain information on the names of the exporters, this does not necessarily mean that all the exporters of long-grain white rice can be identified. Mexico argues that the pedimentos would allow identification only of exporters of white rice, without any indication as to whether they exported short-grain, pre-cooked, etc. white rice, because the product description in the pedimentos serves only to ensure that the imported product corresponds to the tariff heading description, which covers many types of white rice. Mexico therefore requests the Panel to amend this paragraph to more accurately reflect its position. The United States considers that the Panel made a correct statement of fact concerning the information contained in the pedimentos.

6.25 We note that Mexico clearly stated that the pedimentos contain information not only on the volume and value of the imports, but also on the identity of the exporters.[44] We acknowledge Mexico's point that the pedimentos do not always distinguish between exporters of various types of white rice. This does not alter our view, which we have further clarified by adding a sentence to footnote 193. Mexico's

[43] Mexico First Answers to Questions, question 20.
[44] Mexico First Answers to Questions, question 15.

statement that the pedimentos included imports of *all* white rice, which is clearly inclusive of the subject *long grain* white rice, only confirms our view. We therefore reject to make the amendment requested by Mexico.

2. Observations concerning the section concerning the Foreign Trade Act ("the Act")

6.26 Mexico considers that footnote 202 of the Report does not accurately reflect Mexico's position. Mexico notes that the Panel concludes in this footnote that there is no basis for a requirement to adduce evidence in each of a party's "as such" claims of the application of the law, while Mexico had pointed to an Appellate Body report which came to the opposite conclusion. We note that Mexico's comments do not concern the presentation of Mexico's position, but rather that Mexico is commenting on the fact that we did not follow it in its argumentation. As becomes clear from the conclusion in this footnote, we do not consider that the Appellate Body report in *US – Carbon Steel* that Mexico has referred to actually supports Mexico's argument. The Appellate Body stated that such evidence of inconsistent legislation will typically be produced in the form of the text of the relevant legislation or legal instruments, "**which may be supported, as appropriate**, by evidence of consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars" (emphasis added). In our view, the Appellate Body was thus clearly not requiring that for an "as such" claim to be successful, evidence is to be adduced of the application of the law by the executive authorities and the domestic courts, in each case. We consider that our Report sufficiently explains the basis for our findings of inconsistency of several parts of the Act. We therefore reject Mexico's request to amend our Report.

6.27 Mexico considers that footnote 204 of the Report concerning the impact of the direct effect of WTO Agreements in Mexican law does not accurately reflect its position. In particular Mexico considers that reference should be made to its argument expressed in paragraph 206 of its First Written Submission that the Act has to be implemented as established in Article 2 of the Act in a manner congruent with the provisions of the Marrakesh Agreement and the Agreements it encompasses. Mexico requests the Panel to modify its findings so that they faithfully reflect the position held by Mexico in this dispute. We note that in footnote 204, which Mexico is referring to, as well as in paragraphs 7.224 and 7.225, we explain in detail why we do not follow Mexico's argument with regard to the impact for our review of Mexican law of the direct effect of the WTO Agreements in Mexican law. We consider that Mexico's position is accurately reflected both in paragraph 7.215 as well as in the above mentioned paragraphs. We, therefore, reject Mexico's request to amend our Report.

6.28 Mexico considers that its argument that the AD Agreement does not require the questionnaires to be sent to all exporters and foreign producers is not properly reflected in paragraph 7.232 of the Report as this paragraph refers to all *interested parties*. Mexico requests the Panel to amend its Report to reflect that Mexico's statement was not about all interested parties, but only about all exporters and foreign producers. We accept Mexico's request and have amended our Report accordingly.

6.29 Mexico requests the Panel to clarify the meaning of the term "to obtain" an administrative review in paragraph 7.253 of the Report. As became clear during the interim review meeting, Mexico's comment seems to be that the Panel should make a distinction between the right to obtain the initiation of a review and the right to have the duties reviewed. We consider that in paragraph 7.253 of our Report we explain that we do not consider this to be a meaningful distinction and we reject Mexico's argument in clear terms. We are of the view that our Report is sufficiently clear on what is meant by the terms "to obtain a review". We, therefore, reject Mexico's request to amend our Report.

6.30 Mexico requests the Panel to amend paragraph 7.262 of the Report which discusses the scope of Article 89D of the Act, and refers to a recent case in which a new-shipper review was initiated for a trading house, "rather than a producer". Mexico considers that this last part of paragraph 7.262 gives the impression that the firm in question was involved both in exporting and in producing, and that exporting

was its main activity, which is not the case. Mexico requests the Panel to delete from paragraph 7.262 the phrase "rather than a producer". We accept Mexico' s request and have amended our Report accordingly.

6.31 Mexico further considers that paragraphs 7.262 and 7.263 of the Report should reflect the fact that Mexico argued in its Second Written Submission that Article 47 of the Act's Regulations provides for new-shipper reviews for non-producing enterprises, i.e. enterprises devoted solely to exportation. We note that in these two paragraphs we describe Mexico's argument. Since it is correct that Mexico made this argument based on Article 47 of the Act's Regulations, we accept Mexico's request and have amended our Report accordingly. We note that in light of our findings on another aspect of Article 89D of the Act, we do not rule on the aspects of the claim that Mexico's comments relate to.

6.32 Mexico requests the Panel to specify in paragraph 7.67 of the Report that the argument of the United States which is reflected in that paragraph is based on data for paddy rice rather than long-grain white rice. We note that in paragraph 7.83 of the Report we explicitly state that these data concern imports of paddy rice and explain the importance we attach to these data. We therefore see no need to amend this paragraph 7.67 dealing with the arguments of the United States in respect of its claim.

6.33 Finally, Mexico requests the Panel to make certain clerical changes to the English and Spanish texts of the Report. We accept Mexico's request and have amended our Report accordingly.

VII. FINDINGS

7.1 This case concerns two sets of claims made by the United States regarding, on the one hand, the definitive anti-dumping measures imposed on imports of long-grain white rice from the United States, and on the other hand, a number of provisions of Mexico’s Foreign Trade Act and its Federal Code of Civil Procedure.

A. GENERAL ISSUES

1. Standard of Review

7.2 In light of the claims and arguments made by the parties in the course of these Panel proceedings, we recall, at the outset of our examination, the standard of review we must apply to the matter before us.

7.3 Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("the DSU")[45], in isolation, sets forth the appropriate standard of review for panels for all covered agreements except the Anti-Dumping Agreement ("AD Agreement"). Article 11 imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.

7.4 Article 17.6 of the AD Agreement sets forth the special standard of review applicable to anti-dumping disputes. It provides:

> “(i) in its assessment of the facts of the 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. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;”

[45] Article 11 of the DSU states: "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements…"

> "(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

7.5 Thus, together, Article 11 of the DSU and Article 17.6 of the AD Agreement set out the standard of review we must apply with respect to both the factual and legal aspects of our examination of the claims and arguments raised by the parties.[46]

7.6 In light of this standard of review, in examining the claims under the AD Agreement in the matter referred to us, we must evaluate whether Mexico's measures at issue are consistent with relevant provisions of the AD Agreement. If we find that the Mexican investigating authorities have properly established the facts and evaluated them in an unbiased and objective manner, and that the determinations rest upon a permissible interpretation of the relevant provisions, we will consider this measure to be consistent with the relevant provisions of the AD Agreement. Our task is not to perform a *de novo* review of the information and evidence on the record, nor to substitute our judgment for that of the Mexican authorities, even though we might have arrived at a different determination were we examining the record ourselves.

2. Burden of Proof

7.7 We recall that the general principles applicable to burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim.[47] In these Panel proceedings, the United States, which has challenged the consistency of the Mexican anti-dumping measure and of certain provisions of Mexico's law, thus bears the burden of demonstrating an inconsistency with the relevant provisions of the Agreement. We also note that it is generally for each party asserting a fact to provide proof thereof.[48] We also recall that a *prima facie* case is one which, in the absence of effective refutation by the other party, requires a panel, as a matter of law, to rule in favour of the party presenting the *prima facie* case.

B. MEXICO'S REQUEST FOR PRELIMINARY RULINGS

7.8 In its first submission to the Panel of 26 April 2004, Mexico requested the Panel to issue a preliminary ruling that a number of claims made by the United States were outside the Panel's terms of reference. At the request of the Panel, the United States submitted its comments on Mexico's request on 7 May 2004.

7.9 We first summarize the arguments of the parties before making our findings with respect to Mexico's request for a preliminary ruling.

1. Arguments of the Parties

(a) Mexico

7.10 Mexico requests the Panel to issue a preliminary ruling concerning alleged deficiencies in the United States' request for establishment of a panel[49] (the "US request for establishment") and to abstain from entertaining those claims that are not consistent with Article 6.2 of the DSU or were not subject to prior

[46] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 54-62.
[47] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 337.
[48] *Ibid*.
[49] WT/DS295/2

consultations. In addition, Mexico considers that the US request for establishment is inconsistent with Article 17.5 (i) of the AD Agreement.

7.11 First, Mexico submits that the US request for establishment fails to comply with Article 6.2 of the DSU as it fails to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In addition, Mexico argues that one of the measures challenged by the United States was not properly identified in the request for establishment.

7.12 In particular, Mexico argues that the following claims set forth in the request for establishment are overly vague and unclear:

- the claim of violation of Article VI of the GATT 1994 which fails to specify which of the paragraphs of Article VI of the GATT 1994 are alleged to have been violated;

- the claim relating to Article 4.1 of the AD Agreement concerning the definition of the domestic industry as the United States merely refers to violations of Article 3 of the AD Agreement and fails to explain why it considers that Article 4.1 of the AD Agreement would have been violated;

- the claim relating to the use of facts available to a non-shipping exporter set forth in section 1(f) of the request for establishment, which refers to a large number of provisions of the AD Agreement which concern the acceptance and processing of information, and are unrelated to whether or not an exporter has effected any exports during a specific period and the legal consequences thereof;

- the claim relating to the use of facts available to non-appearing exporters set forth in section 1 (g) of the request for establishment as the United States again refers to a number of provisions of the AD Agreement which are unrelated to the situation of such exporters as well as the United States' failure to explain why it considers that certain decisions of the Mexican Authority in this regard were taken in an "improper manner".

7.13 In addition, in Mexico's view, the US request for establishment fails to identify Article 366 of the Federal Code of Civil Procedure ("FCCP") as one of the challenged measures. According to Mexico, the US request for establishment does not refer to Article 366 of the Code of Civil Procedure itself, but rather only to statements of Mexican officials concerning Article 366 of the FCCP and Articles 68 and 97 of the Foreign Trade Act ("the Act"). According to Mexico, the statements of certain officials, which are included in the request for establishment, are clearly not "measures" that may be challenged before the WTO.

7.14 Furthermore, Mexico asserts that the request for establishment contains a number of claims which were not part of the consultations in violation of Article 4.5 and 4.7 of the DSU. Mexico argues that these provisions as well as Article 17.4 of the AD Agreement require that the consultations form the basis for the request for establishment of a panel. Therefore, Mexico submits, those provisions on which no consultations were held should be discarded by the Panel.[50]

7.15 In addition, Mexico argues that the claim concerning the alleged failure to examine all relevant factors in the injury analysis was only discussed in the consultations concerning the anti-dumping measures imposed on imports of beef, and was not discussed in the consultations relating to the imposition of anti-dumping duties on rice, the subject of the current dispute settlement proceedings. As no consultations were held on this claim, Mexico requests the Panel to discard it.

7.16 Finally, according to Mexico, as a consequence of the previously identified inconsistencies of the request for establishment with the DSU, the United States also failed to comply with the requirement of

[50] Mexico lists these provisions in para. 34 of its First Submission.

Article 17.5 of the AD Agreement to indicate how a benefit accruing to it has been nullified or impaired. The request for establishment is therefore in Mexico's view, also inconsistent with Article 17.5 of the AD Agreement.

7.17 Mexico claims that the prejudice it suffered from the lack of clarity in the US request for establishment was exacerbated by the fact that, as the US submission was made in English, additional time for the preparation of Mexico's defence was lost due to translation of the submission.

(b) United States

7.18 The United States considers that the US request for establishment of the Panel is fully consistent with the relevant provisions of the DSU and the AD Agreement, and submits that Mexico's request should therefore be rejected.

7.19 First, the United States argues that there is no requirement in Article 6.2 of the DSU that the request for establishment provide a summary of the specific legal arguments which will be developed in the submissions. Article 6.2 of the DSU requires that the claims must be included in the panel request, but not the arguments in support of these claims. The United States submits that its request lists the specific provision of the AD Agreement and the GATT 1994 alleged to be violated and provides, in addition, a brief textual explanation of the basis of the complaint. In particular,

- with regard to Article VI of the GATT 1994, the United States is of the view that the narrative description which accompanies the allegation leaves no doubt as to which of the paragraphs of Article VI of the GATT 1994 it considers to have been violated, as it focuses on the only two paragraphs that are relevant to this dispute, paragraphs 2 and 6(a);

- with regard to Article 4.1 of the AD Agreement, the United States is of the view that Mexico does not argue that the claim should be more specific, but that it is unable to understand which of the statements in the narrative description result in a breach of the Article invoked. The United States is of the view that Mexico's request should be rejected because Article 6.2 of the DSU does not require that the request contains the arguments to support the claim;

- with regard to the sections 1 (f) and (g) of the request, the United States considers that Mexico concedes that the United States request challenged the application of facts available to the non-shipping exporter, Producers Rice (subsection 1(f)) and to all other exporters that were not individually examined (subsection 1(g)), but that Mexico is of the view that the United States has not adequately explained how Mexico's use of facts available violated these provisions. The United States argues that Article 6.2 of the DSU requires that the claims must be made in the request for establishment, but that there is no similar requirement that the request set forth all the arguments in support of the claims.

7.20 In any case, the United States submits, Mexico failed to demonstrate that it was somehow prejudiced by this alleged failure to satisfy the requirements of Article 6.2 of the DSU. The United States submits that Mexico's assertion of prejudice is contradicted by the facts since Mexico's first written submission contains a lengthy response to each of the challenged US claims.

7.21 In addition, the United States argues that its request for establishment clearly indicates that Article 366 of the FCCP is the measure challenged, and not the statements of Mexican officials concerning the application of this provision. This, the United States submits, is clear from the second sentence of section 3 of the US request for establishment. There is, therefore, no basis for the Mexican argument that the United States failed to identify Article 366 of the FCCP as the "specific measure at issue".

7.22 Furthermore, the United States considers that Mexico's arguments pertaining to the alleged inadequacy of the consultations lack merit. The United States argues that there is no requirement in the DSU that a Member cannot include a claim in its request for establishment unless the particular claim was discussed during consultations. The United States is of the view that consultations are not "dress rehearsals" for the panel process requiring Members to have worked out all of their claims and positions in advance and presenting them in consultations for the other side to practice its prepared responses.

7.23 The United States further asserts that consultations were held in respect of the US claims concerning the examination of the injury factors by the investigating authority also in respect of the anti-dumping measures imposed on imports of rice, and not just in respect of the beef investigation. More importantly, however, the United States considers that the DSU does not contain a requirement as to the adequacy of the consultations. The United States notes that the United States and Mexico spent two days consulting at length on each of the specific measures at issue in this dispute, and there is therefore, no basis for Mexico's assertion that the United States acted inconsistently with Articles 4.5 and 4.7 of the DSU with respect to consultations over the disputed measures. The United States also rejects Mexico's argument of violation of Article 17.4 of the AD Agreement which in the United States' view only requires that the Member requesting the establishment of a panel "consider" that the consultations have failed to achieve a mutually agreed solution. Such was the case in this dispute, and the United States submits that Mexico's Article 17.4 of the AD Agreement claim is thus groundless.

7.24 Finally, the United States rejects Mexico's arguments of violation of Article 17.5 of the AD Agreement, as the United States is of the view that Article 17.5 of the AD Agreement does not impose an additional obligation on the complaining party.

2. Analysis

7.25 We consider that Mexico's request for a preliminary ruling raises three main issues concerning (i) Article 6.2 of the DSU and the extent of the obligation to provide a "brief summary of the legal basis of the complaint" in the request for establishment of a panel and to identify "the specific measure at issue"; (ii) the relationship between the request for establishment and the scope of the consultations; and (iii) the need to demonstrate nullification or impairment of interests in the request for establishment under Article 17.5 of the AD Agreement. We will address each of these issues in this order.

(a) Conformity of the Request for Establishment with Article 6.2 of the DSU

7.26 Article 6.2 of the DSU concerning the request for establishment of a panel provides as follows:

> "The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case the applicant requests the establishment of a panel with other than standard terms of reference, the written request shall include the proposed text of special terms of reference".

7.27 According to Article 6.2 of the DSU, therefore, the request for establishment must identify *the specific measures at issue and must provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly*. Mexico's request concerning Article 6.2 of the DSU relates to the absence of a sufficient summary of the legal basis of the complaint with regard to alleged violations of Article VI of the GATT 1994, Article 4.1 of the AD Agreement and the use of facts available in the case of non-shipping exporters and exporters not individually investigated. In addition, Mexico argues that the request for establishment relating to Article 366 of the FCCP failed to properly identify the specific measure at issue.

7.28 The first question before us is thus whether the US request for establishment provided a brief summary of the claim sufficient to present the problem clearly. In other words, the question is whether the

"brief summary" was such that Mexico knew what case it had to answer, enabling it to begin preparing its defence.[51] This in our view does not mean that the complainant is required, in its request for establishment, to set out the arguments in support of this claim. We consider that there is a significant difference between the claims identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the arguments supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.[52] We recall that the purpose of the terms of reference, apart from defining the scope of the dispute, is to serve the due process objective of notifying the parties of the nature of the complainant's case.[53]

7.29 First, with respect to Mexico's arguments concerning the lack of specificity of the request with regard to the alleged violation of Article VI of the GATT 1994, we recall that the US request for establishment provides in relevant part as follows:

> "(1) On 5 June 2002, Mexico published in the *Diario Oficial* its definitive anti-dumping measure on long-grain white rice. This measure appears to be inconsistent with the following provisions of the AD Agreement and the GATT 1994:
>
> > (a) Article VI of the GATT 1994 and Articles 1, 3.1, 3.2, 3.4, 3.5, and 4.1 of the AD Agreement because Mexico based its injury and causation analyses on only six months of data for each of the years examined; failed to collect or examine recent data; failed to properly evaluate the relevant economic factors; failed to base its determination on a demonstration that the dumped imports are, through the effects of dumping, causing injury within the meaning of the AD Agreement; and failed to base its injury determinations on positive evidence or to conduct objective examinations of the volume of dumped imports, the effect of those imports on prices in the domestic market of like products, and the impact of the imports on domestic producers of those products;" (footnote omitted).

7.30 Mexico considers that it is not sufficiently clear from the request which of the many subparagraphs of Article VI of the GATT 1994 the United States is alleging to have been violated. We recall that, while it is so that sometimes even a mere listing of the provisions allegedly violated may suffice to comply with the requirement of Article 6.2 of the DSU to provide a brief summary of the legal basis of the complaint,[54] this is not always the case, and especially in case the provision alleged to have been violated, consist of various paragraphs and subparagraphs, further specification may be required to inform the parties of the scope of the claims in a sufficiently clear manner. In the end, what matters is whether the request provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly. In case a complainant chooses to comply with this requirement by merely listing treaty provisions without any further narrative explanation of the problem, it is of course all important to know which of the paragraphs or subparagraphs the complainant is referring to in case the treaty provision consist of several of such paragraphs each dealing

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[51] For a recent application of this approach, see Panel Report, *Canada – Wheat Exports and Grain Imports*, para. 6.10 (para. 30 of the Panel's preliminary ruling).

[52] We note that this was also the view held by the Appellate Body in the *EC – Bananas* case. See Appellate Body Report, *EC – Bananas*, para. 141.

[53] Appellate Body Report, *United States – Carbon Steel*, para. 126.

[54] Appellate Body Report, *Korea – Dairy*, para. 124:

"There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of clarity in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.".

with slightly different issues. A general reference to such a multilayered treaty provision may in such circumstances not be enough to present the problem clearly. The facts before us are somewhat different, as the US request for establishment does more than simply listing the treaty provisions alleged to have been violated. The United States also provides a narrative in which it briefly explains the problem the United States has with the challenged measure. In our view, the question before us is thus whether, the reference to the provisions of the Agreement, *together with the narrative* which accompanied the listing of these provisions, were sufficient to present the problem clearly so that the defendant was able to understand the case against it.

7.31 While we consider that the US request for establishment could have been clearer in identifying precisely which of the paragraphs of Article VI of the GATT 1994 the United States claims to have been violated, we do not agree with Mexico that the request for establishment in this respect did not provide a brief summary of the legal basis of the claim sufficient to present the problem clearly. We consider that it is important when examining the consistency of part of the request for establishment with Article 6.2 of the DSU, not to examine parts of this request in isolation. Rather, in our view, the request must be considered as a whole, and the different claims in the request for establishment must be read in their context.[55] In our view, the accompanying narrative and the provisions of the AD Agreement also alleged to have been violated make it clear that the US claims in this respect concern the determination of injury caused by dumped imports. We agree with the United States that only a very limited number of paragraphs of Article VI of the GATT 1994, such as paragraphs 2 and 6 (a) are in fact relevant to this matter. We therefore reject Mexico's request in respect of Article VI of the GATT 1994.

7.32 Second, with respect to Mexico's arguments concerning Article 4.1 of the AD Agreement in section 1 (a) of the request for establishment, we note that Mexico stated that in its view the United States focuses its arguments on violations of various provisions of Article 3 of the AD Agreement and that Mexico is thus unable to determine specifically which of these facts may be considered a violation of any of the obligations provided for in Article 4.1 of the AD Agreement. We are of the view that the request for establishment clearly specifies the particular provision allegedly violated and explains in sufficient detail the legal basis of its claim. While Mexico may disagree with the United States and may well argue that Article 4.1 of the AD Agreement which sets forth a definition of the domestic industry is not applicable or is irrelevant in this case, this, we find, is a matter of substance and one which is to be addressed in the submissions to the Panel. We consider that the request for establishment provides a brief summary of the legal basis of the claim sufficient to present the problem clearly by, in addition to listing the legal basis of its claim, providing a narrative setting forth the US allegations concerning the failure to properly identify injury to the domestic industry. In our view, Mexico is really arguing that the United States should have provided more ample argument as to why it considered that the Mexican investigating authority acted inconsistently with Article 4.1 of the AD Agreement. As we stated earlier, the request for establishment is to set forth a brief summary of the legal basis of the claim, not to set out the arguments in support of this claim. We wish to emphasise that our views concerning the consistency of the request for establishment with Article 6.2 of the DSU in no way prejudge our findings as to the merits of the US claims, nor to the relevance or lack thereof of certain of the provisions invoked by the complainant.

7.33 Third, with regard to Mexico's arguments concerning sections 1 (f) and (g) of the US request and the use of facts available to a non-shipping exporter, and the exporters which were not individually investigated, we note that the US request for establishment provides as follows:

> "(f) Articles 6.6, 6.8, 6.10, 9.3, 9.4, and 9.5 of the AD Agreement, and paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement, by applying the facts available to a US

[55] We find support for this view in statement of the Appellate Body in the *US – Carbon Steel* case: "Moreover, compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances." Appellate Body Report, *US – Carbon Steel*, para. 127.

> respondent rice exporter that was investigated and found to have no shipments during the period of investigation;
>
> (g) Articles 1, 6.1, 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, by applying the facts available in establishing the anti-dumping margins that it assigned to US exporters that were not individually investigated, and by doing so in an improper manner;"

7.34 Mexico argues that it fails to see how such provisions relating to the acceptance and processing of information are relevant to the situation of these two categories of exporters. In our view, the United States request of establishment provides a sufficient summary of the legal basis of the US claims that facts available were applied to determine a margin of dumping for certain categories of exporters in a manner inconsistent with those provisions of the AD Agreement dealing with the use of best information available. Again, we consider that the United States is not required in its request for establishment to set forth the arguments in support of this claim. Whether the provisions alleged to have been violated are relevant and applicable is a question we do not need to decide when reviewing the consistency of the request for establishment with Article 6.2 of the DSU.

7.35 Finally, Mexico considers that section 3 of the request for establishment fails to identify Article 366 of the FCCP as the measure at issue. This section of the request for establishment reads as follows:

> "3. Mexican officials have asserted that Article 366 of Mexico's Federal Code of Civil Procedure and Articles 68 and 97 of the Act prevent Mexico from conducting reviews of anti-dumping or countervailing duty orders while a judicial review of the order is ongoing, including a "binational panel" review pursuant to Chapter Nineteen of the *North American Free Trade Agreement*. **These provisions appear to be inconsistent** with Articles 9.3, 9.5, and 11.2 of the AD Agreement, and Articles 19.3 and 21.2 of the SCM Agreement." (emphasis added)

7.36 In our view, the request for establishment clearly refers to Article 366 of the FCCP rather than to the statements of Mexican officials concerning its application, as the challenged measure in question. We consider the statements to have been referred to merely in support of the claim of inconsistency. We therefore find that section 3 of the request for establishment specifies clearly the specific measure at issue, and these measures are Article 366 of the FCCP and Article 68 and 97 of the Act.

7.37 In sum, we find that the request for establishment provides a summary of the legal basis of the complaint sufficient to present the problem clearly as required by Article 6.2 of the DSU with regard to the claims set forth in sections 1 (f) and (g) of the request, as well as with regard to the claim concerning Article VI of the GATT 1994 and Article 4.1 of the AD Agreement set forth in section 1 (a) of the request. Finally, we find that the request for establishment specifies clearly that Article 366 of the FCCP and Articles 68 and 97 of the Act are the specific measures at issue, and we thus reject Mexico's request in this respect.

(b) Lack of Identity between the Request for Consultations and the Request for Establishment

7.38 Mexico asserts that the request for establishment contains a number of violations of Agreement provisions which were not mentioned in the request for consultations and on which, it argues, no consultations were held. This aspect of Mexico's request for a preliminary ruling concerns the extent to which Articles 4.5 and 4.7 of the DSU as well as Article 17.4 of the AD Agreement provide that the permissible scope of the request for establishment is limited by the scope of the request for consultations.

7.39 Articles 4.5 and 4.7 of the DSU provide as follows:

> *Article 4*
>
> *Consultations*
>
> 5. In the course of consultations in accordance with the provisions of a covered agreement, before resorting to further action under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter.
>
> [...]
>
> 7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

7.40 Article 17.4 of the AD Agreement provides:

> 17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.

7.41 In our view, these provisions do not in any way require a complete identity between the scope of the request for consultations and the request for establishment, nor do they, in our view, limit the scope of the request for establishment to the exact scope of the request for consultations. While we read these provisions to require that Members should attempt to find a mutually agreed solution on the "matter" in dispute through consultations, this, in our view, only requires that request for consultations relate to the same subject matter as the request for establishment of a panel.[56] In sum, and provided the request for establishment concerns a dispute on which consultations have been requested, there is no need for the matter (i.e. the specific measures at issue and the legal basis of the complaint) as identified in the request for establishment to be identical to the matter on which consultations were requested.

7.42 Mexico argues that for certain of the measures challenged no consultations were held on a number of the provisions alleged to have been violated by these measures. In particular, Mexico argued that the

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[56] We note that, in the past, both panels and the Appellate Body reached a similar conclusion that the scope of the request for establishment need not be identical to the scope of the request for consultations. See e.g. Panel Report, *Japan – Agricultural Products II*, para. 8.4 (i); Panel report, *Brazil – Aircraft*, para. 7.9. Appellate Body Report, *Brazil – Aircraft*, para. 132*:*

> "132. We do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the SCM Agreement, require a precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel. As stated by the Panel, "[o]ne purpose of consultations, as set forth in Article 4.3 of the SCM Agreement, is to 'clarify the facts of the situation', and it can be expected that information obtained during the course of consultations may enable the complainant to focus the scope of the matter with respect to which it seeks establishment of a panel.[...]" (footnote omitted).

following provisions were not covered by the consultations but were included in the request for establishment:

Provision invoked	Paragraph in the request for establishment of a Panel
AD Article 1	Paragraphs 1(a), 1(g)
AD Article 4.1	Paragraph 1(a)
AD Article 11.2	Paragraph 2(c)
AD Article 18.1	Paragraph 2(e)
Paragraph 1 of Annex II	Paragraph 2(b)
Paragraph 3 of Annex II	Paragraph 2(b)
Paragraph 5 of Annex II	Paragraph 2(b)
Paragraph 6 of Annex II	Paragraph 2(b)
Paragraph 7 of Annex II	Paragraph 2(b)
SCM Article 12.5	Paragraph 2(b)
SCM Article 21.2	Paragraph 2(c)
SCM Article 32.1	Paragraph 2(e)
Article VI:2 of the GATT 1994	Paragraph 1(i)

7.43 In light of our finding that there is no need for a complete identity between the request for establishment and the request for consultations, we do not consider that we would not be able to rule on the alleged violations of the provisions mentioned by Mexico in the above table simply because they were not mentioned in the request for consultations. In our view, the fact that certain provisions were added to the list of alleged violations in the request for establishment compared to the request for consultations is a consequence of the consultation process which serves the purpose of clarifying the facts of the situation enabling the complainant to focus the scope of the matter with respect to which it seeks the establishment of a panel. It does not mean that no consultations were held on the matter, as the only difference between the request for consultations and the request for establishment consists of the fact that a number of closely related legal provisions alleged to have been violated were added. The measures remained the same and so did the legal basis for the complaint, as is evident from the narrative provided in the request for establishment. In our view, consultations were thus held on the matter on which the establishment of a Panel was requested. We therefore reject Mexico's request in this respect.

7.44 Mexico also argues that one claim concerning the failure to examine all relevant factors affecting the domestic industry was part of the consultations concerning the investigation on imported beef, but was not part of the consultations that took place relating to the measures imposed on imports of rice, the matter before the panel in this case.

7.45 As a factual matter, Mexico is correct that the request for consultations limits the claim concerning the failure to evaluate all relevant factors of Article 3.4 to the beef investigation.[57] However, in our view, and for the same reasons as mentioned above, as long as the request for establishment concerns a matter on which consultations were requested, there is no requirement that all the specific

[57] The Request for Consultations (DS 295/1) reads in pertinent part as follows:
"In particular, the United States believes that the anti-dumping measures on beef and rice are inconsistent with at least the following provisions:
Article 3 of the AD Agreement, because Mexico, *inter alia*, based its injury (or threat) and causation analyses on only six months of data for each of the years examined; failed to collect or examine recent data; **failed in the beef investigation to evaluate all relevant economic factors and indices having a bearing on the state of the industry**; and failed to base its injury determinations on positive evidence or to conduct objective examinations of the volume of dumped imports, the effect of those imports on prices in the domestic market of like products, and the impact of the imports on domestic producers of those products;" (emphasis added).

provisions alleged to have been violated in the request for establishment were also part of the consultations. Since consultations took place in respect of the alleged inconsistency of the injury determination in the rice investigation with Article 3 of the AD Agreement, it seems that the United States was entitled to formulate its request for establishment on the basis of any combination or subset of the legal provisions and claims relevant to the rice investigation on which consultations were held. Moreover, we note that the request for establishment refers to the "failure to *properly* evaluate the relevant economic factors" which is slightly different from the "failure to evaluate all relevant economic factors" mentioned in the request for consultations for the beef investigation. The failure to properly evaluate all factors effectively relates to the failure "to base its injury determinations on positive evidence or to conduct objective examinations of [....] the impact of the imports on domestic producers of those products" which was explicitly part of the request for consultation both with regard to the rice and the beef investigation. We therefore reject Mexico's request in this respect.

(c) Nullification or Impairment of Benefits under Article 17.5 of the AD Agreement

7.46 Mexico argues that the US request for establishment was inconsistent with Article 17.5 (i) of the AD Agreement as it failed to indicate in which way the US interests were nullified or impaired by the alleged violations.

7.47 Article 17.5 (i) of the AD Agreement provides as follows:

> "17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:
>
> (i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and ..."

7.48 We consider that the US request for establishment contains allegations of violation of the AD Agreement which, if demonstrated, will constitute a *prima facie* case of nullification or impairment under Article 3.8 of the DSU. In our view, since the US request for establishment describes the factual and legal circumstances alleged to constitute the asserted violations of the cited provisions of the AD Agreement in some detail, such statements suffice to "indicate how" benefits accruing to the United States under the AD Agreement have been nullified or impaired, as required by Article 17.5(i) of the AD Agreement.[58] In any case, we understand Mexico to be arguing that, *as a consequence of* the alleged inconsistencies of the US request for establishment with Article 6.2 of the DSU and Articles 4.5 and 4.7 of the DSU, the request for establishment is also inconsistent with Article 17.5 (i) of the AD Agreement. In light of our findings rejecting Mexico's allegations of inconsistency, we also reject Mexico's consequential claim of violation of Article 17.5 (i) of the AD Agreement.

3. Conclusion

7.49 For the reasons set forth above, we reject Mexico's request for a preliminary ruling that the US request for establishment was inconsistent with Article 6.2 of the DSU, Articles 4.5 and 4.7 of the DSU, and Articles 17.4 and 17.5 of the AD Agreement.

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[58] We find support for our view in the report of the Panel in the *Mexico – Corn Syrup* case: "In our view, a request for establishment that alleges violations of the AD Agreement which, if demonstrated, will constitute a prima facie case of nullification or impairment under Article 3.8 of the DSU, contains a sufficient allegation of nullification or impairment for purposes of Article 17.5(i). In addition, as noted above, the request must indicate how benefits accruing to the complaining Member are being nullified or impaired."
Panel Report, *Mexico – Corn Syrup*, para. 7.28.

C. CLAIMS RELATING TO THE ANTI-DUMPING MEASURE ON RICE

1. Claims relating to the Injury determination

(a) Claim 1: Economía[59]'s use of a period of investigation that ended more than fifteen months prior to the initiation of the anti-dumping 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

(i) Arguments of the Parties

United States

7.50 The United States submits that the Mexican investigating authority failed to satisfy the legal requirements for imposing an anti-dumping measure as the period of investigation used was so remote in time that the information collected by the investigating authority (Economía) was incapable of providing a basis for an objective finding based on positive evidence of injury and the causal link between dumped imports and the injury to the domestic industry. In particular, the United States claims that the more than fifteen-month gap between the end of the period of investigation and the initiation of the investigation implied that the investigating authority's examination of volume and price effects, its examination of all relevant economic factors having a bearing on the state of the industry and Economía's determination that the dumped imports were causing injury to the domestic industry was not objective nor based on positive evidence as required by Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement respectively.[60] By imposing AD duties in violation of the provisions of the AD Agreement, the United States submits that Economía has also violated Article 1 of the AD Agreement.

7.51 According to the United States, the purpose of an anti-dumping measure is to offset or prevent dumping that is presently causing or threatening to cause material injury to a domestic industry.[61] Therefore, the United States argues, an investigating authority is to base its determinations of dumping and injury on a period that includes the most recent available information. The United States argues that Article VI of the GATT 1994, as well as the AD Agreement require that the period of investigation should end as closely as possible to the initiation of the investigation if it is to meaningfully inform the investigating authority of dumping currently causing injury. The United States is of the view that the use of the present tense in a number of provisions of the AD Agreement, such as Articles 2, 3.4, 3.5, 3.7, and 5.8 of the AD Agreement, as well as in Articles VI.1 and VI.6 (a) of the GATT 1994 support its claim that an investigating authority must examine a period of time that is as close to the date of initiation as practicable.[62] Therefore, the United States is of the view that a period of investigation which ends more than 15 months prior to the initiation of the investigation does not allow the investigating authority to make an objective determination based on positive evidence of dumping which is causing injury.[63] The United States asserts that the Mexican investigating authority did not provide any justification based on record evidence as to the choice of the particular period of investigation apart from the fact that this was the period of investigation suggested by the applicants, nor did it explain why it was not possible to use more recent data or to update the injury data during the course of the investigation.[64] The United States

[59] Economía is the Mexican investigating authority.

[60] US First Submission, para. 61.

[61] US First Submission, para. 57. US Second Submission, para. 9.

[62] US First Submission, para. 56. The United States considers there is support for this view in the Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, G/ADP/6, adopted 5 May 2000 of the WTO Committee on Anti-Dumping Practices.

[63] The period of investigation ended in August 1999, while the investigation was initiated only in December of the following year, 11 December 2000. The application had been filed in June 2000.

[64] US Answers to Questions from the Panel following the First Substantive Meeting with the Parties, ("First Answers to Questions"), paras. 3 and 7. The United States considers that the necessity for an investigating authority

therefore requests the Panel to find that Economía's use of a stale period of investigation in its anti-dumping investigation of US long-grain white rice breached Articles 1, 3.1, 3.2, 3.4, 3.5 of the AD Agreement and Articles VI.2 and VI.6 (a) of the GATT 1994.[65]

Mexico

7.52 Mexico asserts that Economía complied with all the requirements of Articles 3.1, 3.2, 3.4, 3.5 of the AD Agreement and made an objective determination based on positive evidence of the volume and price effects of dumped imports, their overall impact on the domestic industry, and the causal relationship between the dumped imports and the injury to the domestic industry. Mexico considers that the AD Agreement does not impose any guidelines on the period of data collection to be used for the determination of dumping and injury. Mexico is of the view that the aim of an anti-dumping measure is to offset or prevent dumping - which does not necessarily have to occur in the present – that causes or threatens to cause injury to the domestic industry.[66] Mexico considers that the AD Agreement does not impose any limits on the remoteness of the period of investigation.[67] It is of the view that is desirable but not mandatory for the period of investigation to be as close as practicable to the date of initiation of an anti-dumping investigation.[68] According to Mexico, only the circumstances of the case can determine what period is appropriate for the investigation and in this particular instance, Mexico considers that the period used was suitable since it yielded objective data on dumping, injury and the causal link between the two.[69] Mexico emphasises that the period of investigation was not "selected" by the investigating authority, but rather that it was a period suggested by the applicant which complied with a number of criteria,[70] and that no one demonstrated that it would be incorrect to maintain this period. In Mexico's view, it was therefore not for the investigating authority to raise any such objections either.[71]

(ii) Analysis

7.53 We start our analysis by recalling the undisputed facts on the record. The Mexican investigating authority examined data for a period of investigation covering March to August 1999 for purposes of its dumping determination, and March to August 1997, 1998, and 1999 for purposes of its injury analysis. The investigation was initiated on 11 December 2000, 15 months after the end of the period of investigation. Final anti-dumping measures were imposed on 5 June 2002, a little less than three years after the end of the period of investigation. The United States claims that the use of a period of investigation by the Mexican investigating authority in this case ending 15 months prior to initiation is not consistent with the AD Agreement. The United States argues that such a "stale" period of investigation did not provide the investigating authority with positive evidence and did not allow the authority to make an objective determination of injury, as required by Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement, as such outdated data are uninformative of the current state of the domestic industry. According to the United States, Mexico therefore also acted in a manner inconsistent with Article 1 of the AD Agreement and Article VI of the GATT 1994.

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to consider events that happened in the past does not give an authority free rein to choose which past to consider. US First Answers to Questions, para. 4.

[65] US Second Submission, para. 18.

[66] Mexico First Submission, para. 44. Mexico's Answers to Questions from the Panel following the Second Substantive Meeting with the Parties ("Second Answers to Questions"), question 4.

[67] Mexico First Answers to Questions, question 2.

[68] Mexico Second Submission, para. 23.

[69] Mexico Second Submission, para. 22.

[70] In its Second Answers to Questions, Mexico clarified that the investigating authority examines whether the period suggested by the applicant a) covers at least 6 months; b) is accompanied by information and proof; c) is the same as the period for which information with regard to normal value and export price is provided by the applicant. Mexico Second Answers to Questions, Question 1.

[71] Mexico Second Submission, para. 35.

7.54 We start our analysis with Article 3.1 of the AD Agreement which sets forth the general requirement for making an injury determination. It provides as follows:

> 3.1 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.

7.55 Articles 3.1 of the AD Agreement thus requires that the injury determination be based on positive evidence and that it involve an objective examination. In our view, positive evidence is in the first place evidence which is material to the case at hand, in other words it is to be relevant and pertinent with respect to the issue to be decided. It is positive which make it "evidence" as opposed to unrelated facts. In addition, it must have the characteristics of being inherently reliable and creditworthy.[72] An objective examination, in turn, requires in our view that the investigative process establishing the facts be objective and unbiased. We agree with what the Appellate Body stated in this respect in the *US – Hot-Rolled Steel* case:

> "The term "objective examination" aims at a different aspect of the investigating authorities' determination. While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, 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 the basic principles of good faith and fundamental fairness."[73]

7.56 The choice of the period of investigation is obviously crucial in this investigative process as it determines the data that will form the basis for the assessment of dumping, injury and the causal relationship between dumped imports and the injury to the domestic industry.

7.57 It is clear that the AD Agreement does not contain any specific and express rules concerning the period to be used for data collection in an anti-dumping investigation. As acknowledged by Mexico, this does not mean that the authorities' discretion in using a certain period of investigation is boundless. Mexico considers that it would be preposterous to suggest that measures may be imposed after an investigation which was based on data relating to a period of investigation which ended ten years ago, and accepts that it would be desirable that the period of investigation end as closely as practicable to the date of initiation of the investigation. While we do not need to decide in the abstract whether the period of investigation always has to end as close as practicable to the date of initiation of the investigation, we are of the view that there is necessarily an inherent real-time link between the investigation leading to the imposition of measures and the data on which the investigation is based. We find strong textual support for this view in Article VI of the GATT 1994, as well as a number of provisions of the AD Agreement:

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[72] We note that in the *US – Hot-Rolled Steel* case, the Appellate Body stated that:
"The word 'positive' means, to us, that the evidence must be of an *affirmative*, *objective* and *verifiable* character, and that it must be *credible*." Appellate Body Report, *US – Hot-rolled Steel*, para.192. (emphasis added).

[73] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

Article VI.2 of the GATT 1994 provides that:

> "In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product".

Article 11 of the AD Agreement similarly provides that:

> "An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury".

In addition, Article 3.5 of the AD Agreement states that:

> "It must be demonstrated that the dumped imports *are*, through the effects of dumping, as set forth in paragraphs 2 and 4, *causing injury* within the meaning of this Agreement. [...]". (emphasis added)

7.58 We are of the view that these provisions are clear textual evidence that measures may be imposed to offset dumping presently causing injury. The terms "offset" and "counteract" connote the concept of a current reaction against a prevailing (i.e. existing and present) force. Thus, if an anti-dumping duty may be imposed only to "offset" dumping, and only for "as long as necessary" to "counteract" dumping, it is clear that this is an entitlement to act that is itself strictly conditioned on the active presence of its reciprocal -- in this case, injurious dumping that is taking place at that time. There is therefore an inherent real-time link between the imposition of the measure and the conditions for application of the measure, dumping causing injury. The use of the present tense in Article 3.5 of the AD Agreement is clear evidence of this temporal connection between what is investigated and what needs to be demonstrated in order to allow the imposition of measures, i.e. that dumped imports *are causing* injury. Of course, it is well established that the data on the basis of which this determination is made may be based on a past period, known as the period of investigation. Nevertheless, because this "historical" data is being used to draw conclusions about the current situation, it follows that the more recent data is likely to be inherently more relevant and thus especially important to the investigation. This, as a consequence, implies that the data considered concerning dumping, injury and the causal link should include, to the extent possible, the most recent information, taking into account the inevitable delay caused by the need for an investigation, as well as any practical problems of data collection in any particular case.

7.59 We find contextual support for this proposition in other provisions of the AD Agreement, such as Article 14 dealing with anti-dumping actions on behalf of a third country. Article 14.2 of the AD Agreement provides as follows:

> "14.2 Such an application [for an anti-dumping action on behalf of a third country] shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping *is causing injury* to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require." (emphasis added)

7.60 In other words, Article 14.2 of the AD Agreement provides that the evidence in an application to start an anti-dumping action on behalf of a third country is offered to show that dumping is *presently causing injury* to the domestic industry of the requesting country. If such is the case in respect of applications for third country anti-dumping actions, it seems reasonable to conclude that a similar

temporal requirement exists when the anti-dumping proceedings relate to injury being caused to a Member's own domestic industry.[74]

7.61 The AD Agreement allows Members to re-balance the injurious situation that is created by dumping. This implies that on the one side of the balance, there is injurious dumping, which is counter-balanced by the anti-dumping duty. It is therefore necessary to base a determination of dumping causing injury on data that is pertinent or relevant with regard to the current situation, taking into account the inevitable delay caused by the practical need to conduct an investigation. To impose anti-dumping duties without objectively examining relevant evidence on the dumping causing injury which is on one side of the balance would thus clearly run counter to the AD Agreement.

7.62 Finally, we note that the Committee on Anti-Dumping Practices adopted a Recommendation concerning the Periods of Data Collection for Anti-Dumping Investigations (G/ADP/6, adopted 5 May 2000) which sets forth guidelines for determining what period or periods of data collection may be appropriate for the examination of dumping and of injury. The Recommendation stipulates *inter alia* that the period of data collection should end as close to the initiation of the investigation as possible.[75] While we note that this Recommendation is a non-binding guide to the common understanding of Members on appropriate implementation of the AD Agreement, and does not add new obligations, nor detract from the existing obligations of Members under the Agreement[76], we do consider that this Recommendation

[74] We consider that further contextual support can be found in the Agreement on Safeguards, and Article 2.1 of the Agreement on Safeguards in particular. This provision allows for the imposition of safeguard measures if it has been determined that a product is being imported into the country's territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. As the Appellate Body noted in the *Argentina – Footwear (EC)* case (para. 130):

> "[...] In our view, the use of the present tense of the verb phrase "is being imported" in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 indicates that it is necessary for the competent authorities to examine recent imports, and not simply trends in imports during the past five years – or, for that matter, during any other period of several years.[130] In our view, the phrase "is being imported" implies that the increase in imports must have been sudden and recent.
>
> [130] The Panel, in footnote 530 to para. 8.166 of the Panel Report, recognizes that the present tense is being used, which it states "would seem to indicate that, whatever the starting-point of an investigation period, it has to *end* no later than the very recent past." (emphasis added) Here, we disagree with the Panel. We believe that the relevant investigation period should not only end in the very recent past, the investigation period should be the recent past."

We are of the view that while there are clear differences in the conditions for imposing measures under the AD Agreement and the Agreement on Safeguards, both anti-dumping and safeguard measures are based on an *investigation* which is to determine the existence of the conditions for application by using a certain period of investigation for which data will be collected. In our view, where Article 2.1 of the Safeguards Agreement explicitly provides that no measure may be imposed unless it has been demonstrated that a product is being imported in such quantities, Article VI:2 of the GATT 1994, read in conjunction with Article 2.1 and 3.5 of the AD Agreement similarly provides that no measure may be imposed unless it has been demonstrated that a product is being dumped and that these dumped imports *are causing injury* to the domestic industry.

[75] The Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations (G/ADP/6, adopted 5 May 2000) provides in relevant part that:

> " the Committee recommends that with respect to original investigations to determine the existence of dumping and consequent injury -
>
> 1. As a general rule:
>
> (a) the period of data collection for dumping investigations normally should be twelve months, and in any case no less than six months, ending as close to the date of initiation as is practicable;" (footnote omitted).

[76] G/ADP/M/7 at para 40, G/ADP/AHG/R/7, para. 2

provides useful support for the correct interpretation of the obligations found in the text of the AD Agreement.[77]

7.63 In sum, data of ten years old may well be reliable and creditworthy as to past dumping then causing injury but such data obviously are of much less relevance to the question whether that dumping is presently causing injury. Certainly, more recent data are more relevant to this question. As we discussed earlier, the AD Agreement requires that the conditions for imposing anti-dumping measures, that dumped imports are causing injury, have to be present at the time of imposition of the measure, to the extent practically possible. The requirement of a time-consuming and sometimes complicated investigation to demonstrate the existence of dumping and the ensuing injury poses a practical impediment to a complete identity in time between the imposition of the measure and the conditions for such imposition, i.e. dumping causing injury. Although this practical problem may lead to the situation in which any determination of dumping causing injury has by the time of the imposition of the measure become more of a proxy than a real time assessment of the current situation, it would, in our view, not be correct to be led by the practical necessity to examine the past to assess the present to accept that an investigating authority could justifiably base itself on old data to the exclusion of more recent data which was available and usable. To the contrary, the fact that an investigation of up to 12 months may have to be conducted to determine dumping, injury and the causal link magnifies the importance of having a period of data collection which ends as closely as possible to the date of initiation, as by the time of the possible imposition of the measure another 12 months may have passed. We established above the textual and contextual support in the GATT 1994 and the AD Agreement for this basic proposition.

7.64 In the investigation concerning imports of long-grain white rice from the United States, the period of investigation used by Mexico ended in August 1999. The application suggesting this particular period of investigation March – August 1999 was submitted by the domestic industry on 2 June 2000. The investigation was initiated only six months later, on 11 December 2000. The investigating authority accepted the period of investigation suggested by the applicants, even though at the time of initiation that period had ended more than 15 months earlier. During the investigation, no attempt was made to update any of the information obtained from the interested parties to reflect what had occurred in the 15 months between the end of the period of investigation in August 1999 and the start of the investigation in December 2000. Definitive anti-dumping measures were imposed on 5 June 2002, almost three years after the end of the period of investigation. We note that Mexico has not argued that practical problems necessitated this particular period of investigation, nor has Mexico ever argued that it was not possible for practical or other reasons to update the information to cover the 15 months or part thereof from the end of the period of investigation to the date of initiation of the investigation. As Mexico clearly stated, the applicants proposed this particular period of investigation, and it is Mexico's general practice to accept the proposed period of investigation.[78] Neither the investigating authority at the time of the investigation, nor Mexico in its arguments before us provided any other reason why more recent information was not sought. This fifteen month gap between the end of the period of investigation and the initiation of the investigation amounts to a relatively lengthy hiatus. A great deal could have happened – or changed – over a fifteen month period, and there is simply no evidence on record in respect of it. A hiatus of such a duration is, in our view, sufficiently long as to impugn the reliability of the period of investigation to deliver, for the purposes of a determination, evidence that has the requisite pertinence or relevance (see para. 7.55 *supra*). In other words, given the passage of time and the uncertainty about the factual situation

[77] We note that panels in the past have also referred to this Recommendation in their reasoning. See e.g. Panel report, *Guatemala – Cement II*, para. 8.266; Panel report, *US – Hot-Rolled Steel*, footnote 152; Panel report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.287.

[78] In response to the submission of data by the United States concerning Mexico's practice in this regard, Mexico explains that its practice shows delays of sometimes 6 months, on other occasions 20 months between the end of the period of investigation and the date of initiation of the investigation, depending on the period of investigation the applicant is proposing. The data submitted by the United States, which were not contested by Mexico, show that, on average, the period of investigation ends 10 months before the date of initiation, which is also 8 months less than was the case in the rice investigation.

in that relevant interim, the information lacks credibility and reliability, thereby failing to meet the criterion of "positive evidence" pursuant to Article 3.1 of the AD Agreement.

7.65 In light of all these considerations, we find that by choosing to base its determination of injury on a period of investigation which ended more than fifteen months before the initiation of the investigation, Mexico failed to comply with the obligation set forth in Article 3.1 of the AD Agreement to make a determination of injury which is based on positive evidence and which involves an objective examination of the volume and price effects of the alleged dumped imports or of the consequent impact of these imports on domestic producers of the like product at the time measures were imposed. We therefore find that Mexico acted in a manner which is inconsistent with Article 3.1 of the AD Agreement. As a consequence, and in light of our finding of violation of Article 3.1 of the AD Agreement which is an overarching provision that sets forth a Member's fundamental obligation with respect to injury determinations,[79] we find that Mexico acted in breach of Articles 3.2, 3.4 and 3.5 of the AD Agreement when considering the volume and price effects of the dumped imports, all relevant factors affecting the state of the industry and the causal relationship between dumped imports and the alleged injury to the domestic industry, respectively. In light of these findings, we do not consider it necessary in order to resolve this aspect of the dispute to examine the US claims of violation of Article 1of the AD Agreement and Article VI of the GATT 1994.

(b) Claim 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

(i) Arguments of the Parties

United States

7.66 The United States argues that the selective use of data from only part of the year covering the peak period of import activity does not allow an investigating authority to make an objective determination based on positive evidence of injury caused by dumped imports, as required by Article 3.1 of the AD Agreement. According to the United States, if an authority only considers the evidence for half of the period of investigation for the injury analysis, there is simply no way for the authority to determine the true state of the domestic industry over the course of the entire period of investigation, and thus no way to conclude that the authority's examination is consistent with Article 3.1 of the AD Agreement.[80]

7.67 The United States submits that the information on which the determination is based which ignores half of each of the three years of the period of investigation does not constitute positive evidence. In addition, the United States submits, by ignoring the period September – February of each year, Economía disregarded the portion of the year when domestic production of milled rice was at its seasonal high, and import penetration at its seasonal low.[81] The United States submits that Economía agreed with the applicants that imports were concentrated during the period March to August and consequently limited its injury analysis to the data for March – August of each of the years at issue in the investigation.[82] In any case, and even if imports had not been concentrated in the March to August time period, the United States

[79] See Appellate Body Report, *Thailand – H-Beams*, para. 106.

[80] US First Answers to Questions, para. 20.

[81] The United States asserts that Economía's findings with respect to at least two economic factors, market share and capacity utilization, serve to illustrate the inevitable and obvious distortions that resulted from this focussed approach. US First Submission, para. 71 – 72. The United States points to various paragraphs in Economía's published determinations in which the authority confirms that imports were concentrated in the March – August period. US First Answers to Questions, para. 15.

[82] US First Submission, para. 67. According to the United States, this narrowed focus is evident throughout the preliminary and the final determinations. See US First Submission, footnote 68.

is of the view that by limiting its injury analysis to only half of the period of investigation, Economía's injury analysis is inconsistent with WTO rules.[83]

7.68 According to the United States, the determination cannot be objective because the period chosen covers only a very specific period of the year during which imports are at a high, and thus ignores the fact that the industry might fare better during the other period of the year. The United States argues that the requirement of making an "objective analysis" implies that "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 industry is injured".[84] According to the United States, to examine only those parts of the year when import 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, in breach of Article 3.1 of the AD Agreement.[85] The United States is of the view that the period of investigation for injury should include all months of the year in which there is domestic production, assuming the data is reasonably available.[86]

7.69 The United States further argues that Economía's disregard of six months worth of data for each of the three years of the period of investigation is inconsistent with the requirement of Article 3.5 of the AD Agreement to make a determination of causation based on "all relevant evidence" before the authorities. The United States submits that in the absence of an objective examination of all relevant evidence, and not just of a part of the evidence relating to the March - August period, the analysis of the causal link between the dumped imports and injury to the industry is inevitably flawed.

7.70 The United States further submits that Economía's dismissal of the concerns of exporters and importers that participated in the investigation concerning the flawed period of investigation, prevented them from pointing to evidence from the missing months that might have supported their views. This, the United States argues, is inconsistent with Article 6.2 of the AD Agreement. Finally, the United States argues that as a consequence of the breaches of Articles 3.1 and 3.5, Article 1 of the AD Agreement is also violated.

Mexico

7.71 Mexico argues that the AD Agreement does not provide for any rules on how the period of investigation for the injury analysis should be integrated in the anti-dumping investigation. Mexico asserts that Economía gathered all the information available over a period of three years ("the period analysed"), including the year covered by the "period of investigation" for dumping purposes, March – August 1999. It then limited its comparison to strictly comparable periods, i.e. the periods in the preceding two years that covered exactly the same months as those of the "period of investigation",

[83] The United States thus emphasises that it is objecting *per se* to Economía's decision to limit the injury analysis to only half of the period of investigation, and not only to the fact that Economía limited its analysis to the period when imports were concentrated. US First Answers to Questions, para. 16 and US Oral Statement at the Second Substantive meeting of the Panel with the parties (the "Second Oral Statement"), para. 15.

[84] US First Submission, para 76 quoting from Appellate Body Report, *US – Hot-Rolled Steel*, para. 196. The United States points to the analysis of capacity utilization and performance of the industry in terms of sales revenue as two examples of a flawed analysis. In the United States' view, the period not examined would likely have led to higher sales revenue, since the September – February period was the time in which import volumes were low and domestic sales volumes at their seasonal high. By ignoring these data, Economía 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 June- July production and reflected in the March – August data. US First Submission, para. 80.

[85] The United States finds support for its argument in the Appellate Body Report in the *US – Hot-Rolled Steel* case in which the Appellate Body found that "an examination of only 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 'objective[ity]' in Article 3.1 of the Anti-Dumping Agreement". Appellate Body Report, *US – Hot-Rolled Steel*, para. 206, quoted in US First Submission, para. 82.

[86] US First Answers to Questions, para. 13.

thereby eliminating any possible distortions in the market under analysis.[87] In any case, Mexico argues that the AD Agreement does not stipulate anything on the choice of the period of investigation for injury, leaving the investigating authority with unfettered discretion to determine itself the appropriate period of investigation for the injury analysis.[88]

7.72 Mexico rejects the United States' assertion that the period March – August is the period of highest import penetration. According to Mexico, the production of long-grain white rice is more or less constant throughout the year, as it is independent of the production cycles of paddy rice. This is so because the long-grain white rice producers will simply import the paddy rice during certain parts of the year, but this does not affect their production levels.[89] The US argument that production is much higher, and imports much lower, during the second part of the year which was not examined by Economía is, therefore, in Mexico's view, baseless.[90]

7.73 In addition, in Mexico's view, since the period of investigation was not inconsistent with any provision of the AD Agreement, there is no basis for the US argument that the injury analysis failed to examine all relevant evidence as required by Article 3.5 of the AD Agreement or that the interested parties were not given an opportunity to defend their interests. Mexico points out that the interested parties were given an opportunity to meet with parties with an opposing interest[91] and they were all given every opportunity to present their views, in accordance with Article 6.2 of the AD Agreement. In the absence of a violation of any provision of the AD Agreement, there is also no basis for the US claim of a consequential violation of Article 1 of the AD Agreement.

(ii) Analysis

7.74 The claim of the United States concerns the choice of the period of investigation for the injury analysis and the data used by the investigating authority when examining injury. The United States argues that by ignoring part of these data, Mexico failed to base its injury analysis on positive evidence and did not conduct an objective examination of the state of the domestic industry, as required by Article 3.1 of the AD Agreement. Moreover, the United States submits, Mexico violated Article 3.5 of the AD Agreement, as its determination of the existence of a causal link between the dumped imports and the alleged injury to the domestic industry was not based on all relevant evidence as half of the relevant information was ignored. Mexico on the other hand submits that the AD Agreement does not contain any obligations with regard to the period of investigation for the determination of injury and asserts that it was necessary to examine these particular six months of every year instead of the full year in order to ensure that the period of the injury analysis paralleled the six month period chosen for the analysis of dumping, so as to avoid any distortions.

7.75 We note that in its Preliminary Determination the Mexican investigating authority stated that "the investigated period is March – August 1999 and, therefore, the period for injury analysis is the one between March 1997 and August 1999".[92] In response to a question from the Panel, Mexico confirmed that "the investigating authority gathered all the information available over a period of three years, including the year covered by the 'period of investigation'; however, it limited its comparison to strictly

[87] Mexico, First Answers to Questions, answer to question 3. Mexico First Submission, para. 55. In its First Submission, Mexico argued that these differences could arise from the seasonal character of the product. In its First Answers to Questions, and its Second Submission, it clarified that seasonality was not an issue in the decision to base the determination on the March – August period of each of the three years of the injury analysis only. See Mexico First Answers to Questions, question 3; Mexico Second Submission, para. 39.

[88] Mexico First Submission, para. 57.

[89] Mexico includes a table which demonstrates that throughout each of the years examined the domestic production levels remained stable. Mexico First Submission, para. 60.

[90] Mexico adds that none of the participating exporters presented convincing reasons why the period of investigation was to be changed.

[91] Mexico asserts that a hearing took place on 18 January 2002.

[92] Preliminary Determination, para. 69. Exhibits US-14 and US-15.

comparable periods, i.e. the periods in the preceding two years that covered exactly the same months as those of the 'period of investigation¨' [for dumping]."[93] In other words, for injury purposes, the investigating authority analysed data for the months of March – August of three consecutive years, 1997, 1998 and 1999, and data from the period September – February of each of these years were disregarded.

7.76 The United States asserts that by doing so, Mexico breached its obligations under Article 3.1 of the AD Agreement and 3.5 of the AD Agreement, which provide as follows:

> 3.1 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.
>
> 3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, 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. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

7.77 We note, as we have done with regard to the previous claim, that the AD Agreement does not set forth any express requirement regarding the choice of the period of investigation for the purpose of conducting an injury analysis. We are of the view, however, that the requirement to base a determination of injury on positive evidence and pursuant to an objective examination nevertheless imposed certain obligations on the Mexican investigating authorities with regard to the completeness of the data used as the basis for its determination. In this respect, we recall that in any case under the Panel's standard of review set forth in Article 17.6 of the AD Agreement, we are to assess whether the authority's establishment of the facts was proper, and its evaluation unbiased and objective.[94] The question before us is thus whether it was proper of the Mexican investigating authority in this particular case to base its injury determination on data covering only half of the three-year period (for which, as it happens, data were actually gathered), and whether such a limited data set enabled the authority to make an objective examination of injury.

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[93] Mexico, First Answers to Questions, question 3.

[94] We note that the Appellate Body in the *EC – Bed Linen (Article 21.5 – India)* case also linked the objective examination requirement with the panel's standard of review that requires it to examine whether the authority's establishment of the facts was proper. The Appellate Body explained in a footnote:

> "These requirements of paragraphs 1 and 2 of Article 3, as well as the requirements of Article 17.6(i), that investigating authorities establish the facts of the matter *properly* and evaluate those facts in an *unbiased and objective* manner, are mutually supportive and reinforcing. In *US – Hot-Rolled Steel*, we explained in respect of Article 17.6(i) that:
> … panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts by those authorities was *unbiased* and *objective*. (original italics)"
> Appellate Body report, *EC – Bed Linen (Article 21.5 – India)*, footnote 141

7.78 We consider that an objective examination of the facts starts with an objective and unbiased investigative process. We agree with the following statement of the Appellate Body in the *US - Hot-Rolled Steel* case summing up the requirement to conduct an "objective examination":

> "In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process". (footnote omitted).[95]

7.79 As we stated earlier, the choice of the period of investigation is crucial in this process as it determines the data that will form the basis for the assessment of the impact of dumping. An examination or investigation can only be "objective" if it is based on data which provide an accurate and unbiased picture of what it is that one is examining.

7.80 In our view, an objective examination of the effects of dumping on the state of the domestic industry which enables the authority to conclude that dumped imports caused injury to the domestic industry involves an analysis of trends over time of the volume and price of imports and of the state of the domestic industry. It is only such an analysis which will enable the authority to objectively gauge the effects of the dumped imports on the domestic industry as required by Article 3.1 of the AD Agreement, and to assess whether the injury found to exist is caused by the dumped imports as required by Article 3.5 of the AD Agreement.

7.81 For the purposes of examining the injury to the domestic industry, the Mexican investigating authority collected data for three years, 1997, 1998, and 1999. There does not appear to have been any problems in obtaining such data for this continuous period of three years. However, in its examination of that data, it decided not to use half of the information gathered. The authority thus based its determination on data relating to six months of each of the three years of the period of investigation, the months of March to August. In our view, and absent any proper justification for doing so, such an examination on the basis of an incomplete set of data cannot be objective, nor does the selective use of certain data for the injury analysis constitute a proper establishment of the facts on which to base the determination.[96]

7.82 We wish to note in this respect that our ruling should not be read as to imply that there could never be any convincing and valid reasons for examining only parts of years. Mexico has not however presented any convincing arguments to this effect, whether in its investigation or in its arguments before us. Mexico's only argument is that it was necessary to examine only data relating to the six months from March to August because this was also the six month period chosen for the analysis of the existence of dumping.[97] We see no *a priori* reason why a period of investigation on the injury analysis should be chosen to fit the period of investigation for the dumping analysis in case the latter period of investigation covers a period of less than 12 months. In our view, there is nothing in the AD Agreement that would require such an approach, quite to the contrary. Mexico submits that in order to avoid distortions due to the differences in volume of imports, sales or production during the other six months, it used for its injury analysis a similar six month period. We do not find this to constitute a proper justification for ignoring half of the data concerning the domestic industry. In fact, it seems that what Mexico refers to as distortions are certain developments which occur in the remaining six months which perhaps undo part of

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[95] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

[96] Our finding in this respect is made independent of the question as to the biased nature of the choice for these specific six months chosen.

[97] In its First Submission, Mexico suggested that its choice of period of investigation was justified for reasons relating to the seasonality of the product concerned. Mexico has not, however further developed this argument and has subsequently clarified that seasonality was not an issue in this case. See Mexico First Answers to Questions, question 3; Mexico Second Submission, para. 39.

the effect of the imports that entered the country during the six months that were examined. This is precisely the kind of information we consider it is necessary to examine in order for the determination to be that of an objective and unbiased investigating authority.

7.83 In fact, we recall that the applicants suggested this particular six month period of March – August 1999 as it reflected the period of highest import penetration.[98] The Mexican investigating authority itself confirms this in the Preliminary Determination, stating that, in accordance with the information provided by the applicant, "imports tend to be concentrated during the period from March to August every year, which corresponds to the investigated period proposed by the petitioner".[99] While we acknowledge that the authority was in this quote discussing the imports of paddy rice, the raw material for the production of the subject long-grain white rice, it clearly accepted the link made between production of paddy rice and the imports of the final product which the applicant points out is mainly imported in the period March – August. As the applicant claimed, during this period paddy rice is not harvested and for that reason this period adequately reflects the import activity.[100]

7.84 In our view, there are some similarities between the failure to examine part of the year for which data were collected, and the situation discussed by the Appellate Body in the *US – Hot-Rolled Steel* case involving an analysis of only a segment of the domestic industry, rather than the domestic industry as a whole. The Appellate Body found that 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.[101] We consider that the following reasoning of the Appellate Body leading to this conclusion is equally applicable to the situation before us in which an important part of the year in which the domestic industry was fully operational was disregarded in the injury analysis:

> "204. We have already stated that it may be highly pertinent for investigating authorities to examine a domestic industry by part, sector or segment. However, as with all other aspects of the evaluation of the domestic industry, Article 3.1 of the *Anti-Dumping Agreement* requires that such a sectoral examination be conducted in an "objective" manner. In our view, this requirement means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry. Different parts of an industry may exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry, even if coupled with an examination of the whole industry, may give a misleading impression of the data relating to the industry as a whole, and may overlook positive developments in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry. We note that the reverse may also be true – to examine only the parts of an industry which are performing well may lead to overlooking the significance of deteriorating performance in other parts of the industry."[102]

[98] Application for initiation of an anti-dumping investigation regarding imports of long-grain white rice from the United States, page 34. Exhibit US–8.
[99] Preliminary Determination, para. 65. Exhibits US -14 and US-15
[100] Preliminary Determination, para. 64. Exhibits US-14 and US-15.
[101] Appellate Body Report, *US – Hot-Rolled Steel*, para. 206.
[102] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.

7.85 We find that the acceptance of a period of investigation proposed by the applicants because it allegedly represented the period of highest import penetration and would thus show the most negative side of the state of the domestic industry is not what can be expected of an objective and unbiased investigating authority. The question whether production was in fact lower during these months or not and whether the situation of the domestic industry was, in fact, worse during these six months or not is, in our view, irrelevant in this respect.

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

7.87 As a consequence, we also find that Mexico acted inconsistently with Article 3.5 of the AD Agreement as it failed to base its determination of the existence of a causal relationship between the dumped imports and the alleged injury to the domestic industry on *all relevant evidence* before the authorities, as required by Article 3.5 of the AD Agreement.

7.88 In light of our findings on Article 3.1 and 3.5 of the AD Agreement, we do not find it necessary to address in this context the US claim under Article 1 of the AD Agreement and Article 6.2 of the AD Agreement. That is, having determined that the measure at issue is inconsistent with the cited Articles, and exercising the discretion implicit in the principle of judicial economy, we do not deem it necessary to examine whether the investigation which led to the inconsistent measure was consistent with the procedural rules on providing for all interested parties a full opportunity for the defence of their interests set forth in Article 6.2 of the AD Agreement. We do not consider that this would add anything to our findings or would be useful in the implementation of our ruling.

(c) Claim 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, 6.8 and Annex II of the AD Agreement

(i) Arguments of the Parties

United States

7.89 The United States submits that the injury determination in as far as it concerned the volume and price effects of the dumped imports on the domestic industry was not conducted in an objective manner, nor based on positive evidence, as required by Articles 3.1 and 3.2 of the AD Agreement. With regard to the volume of dumped imports, the United States argues that Economía failed to collect the data it needed to examine in an objective manner whether there had been a significant increase in dumped imports, as required by Article 3.2 of the AD Agreement. In particular, Economía did not use the customs declarations (the "pedimentos") or seek to obtain accurate import volume information from importers. In addition, Economía rejected information from the only company found to have been dumping (the Rice Company)[103], and drew inferences about volumes and prices of dumped imports from the data provided by another company for non-dumped imports.[104] Its determination of the volume of dumped

[103] According to the United States, the reasons given by Economía for rejecting the information was that such information covered only the year 1999 and not also 1997 and 1998. The United States points out that Economía did accept however less accurate estimates preferred by the applicants even though those estimates also pertained only to the 1999 period of analysis. US First Submission, para. 98.

[104] US First Submission, para. 97.

imports was therefore not objective nor based on positive evidence, in violation of Article 3.1 and 3.2 of the AD Agreement.

7.90 With regard to the examination of the price effects of the alleged dumped imports on the domestic industry, the United States submits that Economía failed to even attempt to collect information it needed to conduct a proper price analysis as required by Article 3.2 of the AD Agreement. The United States argues that the analysis under Article 3.2 of the AD Agreement of the price effects of the dumped imports entails a comparison of data concerning prices for the dumped imports on the one hand, and data concerning prices for the domestic like product on the other hand. While the AD Agreement does not require any particular methodology for making price comparisons and evaluating price effects, the United States submits that Article 3.1 of the AD Agreement requires that this analysis consist of an objective examination based on positive evidence. According to the United States, Economía chose to rely instead on biased information sources that the applicants had selected, and thus compared the actual sales values reported by the domestic producers to fictitious unit values for the dumped imports that it derived using a methodology proposed by the applicant.[105]

7.91 Finally, the United States submits that Economía used facts available to determine volume and price effects of the dumped imports and relied on secondary source information, without first having made an effort to obtain the data from the interested parties. In addition, it used such data without first seeking to corroborate them against independent sources, in breach of Article 6.8 and paragraphs 1 and 7 Annex II of the AD Agreement.

Mexico

7.92 Mexico submits that Economía made an objective determination based on positive evidence of the volume of dumped imports and the effect of the dumped imports on prices, in accordance with Articles 3.1 and 3.2 of the AD Agreement. Mexico fails to see on what basis the United States is arguing that because Economía based its analysis partly on information provided by the applicant, Economía violated the Agreement.

7.93 According to Mexico, the AD Agreement does not impose a particular methodology for conducting a volume or price analysis, nor does it impose an obligation on Economía to obtain more information than such as provided by the parties, as long as it makes an objective determination based on positive evidence.[106] Mexico rejects the United States' suggestion that Economía should have take the initiative to obtain and examine the pedimentos in which it could have found more ample information on prices and sales volumes. In any case, Mexico asserts that such pedimentos are kept by the Customs Office, and were therefore not at the disposal of Economía. As such documents were not provided by the applicant either, Economía could not rely on these documents for any price and volume information. Moreover, such pedimentos would not have enabled Economía to distinguish the subject imports from other imports coming in under the same tariff heading.

7.94 Mexico is of the view that the mere fact that Economía accepted the methodology proposed by the applicant for estimating import volumes is not inconsistent with Article 3.2 of the AD Agreement, especially since the exporters concerned failed to provide the information or did not respond at all.[107]

[105] According to the United States, Economía did not request data from a broad range of importers of the products, did not request sales information on the prices at which the importers made sales to their customers, nor did it seek information from purchasers to compare the prices paid for the dumped product with the prices paid for the domestic product. By not doing so, the United States asserts that Economía did not have accurate unit value data on the dumped imports.

[106] Mexico First Submission, para. 97.

[107] Mexico takes issue with the United States' suggestion that Economía accepted from the applicant information it rejected from the exporter. Mexico argues that Economía used the applicant information and methodology as the starting point but conducted further research.

Mexico submits that the information provided by the Rice Company was not accepted for reasons of procedural equality as it only related to one of the three years of the period of investigation, while others did provide information for all three years and similar information was requested from the Rice Company without success. Mexico thus asserts that the determination of the volume of dumped imports and their price effect was not inconsistent with Articles 3.1 and 3.2 of the AD Agreement.

7.95 With regard to the United States' assertion that Economía was not allowed to apply facts available as it did not send questionnaires to all exporters and did not consult the pedimentos, Mexico submits that it was not required to do so by the AD Agreement. Mexico argues that there is no provision in the AD Agreement which requires an investigating authority to actively go out and seek information as part of an anti-dumping investigation. Mexico argues that under Article 6.1 of the AD Agreement the investigating authority can, but is not obliged to send questionnaires to all the foreign producers and exporters. Mexico complied with its obligations under Article 6.1.3 of the AD Agreement by sending the notice of initiation and the forms for producers and exporters to the known exporters and to the US authorities, and published the notice of initiation. Mexico argues that the only customs document that the investigating authority had in its possession were the excerpts of the customs declarations, also known as the "listados". As these listados did not contain the names of exporters, no other exporters than those mentioned in the application were known to Economía. The forms sent to the known exporters and the US authorities clearly indicated that facts available could be used in case the required information was not provided. In Mexico's view, Economía thus complied with Article 6.8 of the AD Agreement.

(ii) Analysis

7.96 The United States claims that Mexico failed to base the part of its injury determination relating to the trends in the volume of dumped imports and the price effects of the dumped imports on positive evidence as it failed to collect the information required to make an objective examination of injury based on positive evidence, as required by Articles 3.1 and 3.2 of the AD Agreement. In addition the United States argues that the use of secondary source information without having sought to obtain the information from the interested parties is inconsistent with Article 6.8 of the AD Agreement and Annex II thereto.

7.97 Articles 3.1 and 3.2 of the AD Agreement provide as follows:

> 3.1 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.
>
> 3.2 With regard to the volume of the dumped imports, the investigating authorities shall 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. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price 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. No one or several of these factors can necessarily give decisive guidance.

7.98 Article 3.1 of the AD Agreement thus requires in relevant part that an injury determination is to be based on positive evidence and involve an objective examination of the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products. Article 3.2 of the AD Agreement elaborates on these requirements by requiring the authority to consider whether there has been a significant increase in dumped imports and whether there has been a significant price undercutting

by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect has been to depress prices or prevent price increases. It is clear from reading these two provisions in combination that the basis for any evaluation as to the volume of dumped imports or the price effects of such imports has to be positive evidence. We concur with the views expressed by the Appellate Body in the *US – Hot-Rolled Steel* case, that the word "positive" means that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.[108] We wish to emphasise that our task is not to perform a *de novo* review of the information and evidence on the record, nor to substitute our judgment for that of the Mexican authorities. Rather we examine what the evidence was on which the authorities based its examination and whether the determination made was the result of an objective examination based on positive evidence. In this respect, we consider it important to recall our standard of review under the AD Agreement as set forth in Article 17.6 (i) of the AD Agreement:

> "(i) in its assessment of the facts of the 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. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;"

7.99 In other words, if we find that the Mexican investigating authorities have properly established the facts and evaluated them in an unbiased and objective manner, and that the determinations rest upon a permissible interpretation of the relevant provisions, we will consider this measure to be consistent with the relevant provisions of the AD Agreement.

7.100 The authority explains how it established the volume of dumped imports of the subject product into Mexico in its final determination.[109] The final determination shows that the authorities were confronted with the problem of distinguishing first the subject rice imports (i.e. "long-grain white rice") from imports of all types of rice, and second the imports of the subject product that were dumped into Mexico from those imports that entered Mexico at undumped prices. The first problem arose from the fact that the tariff line under which subject imports of long-grain white rice were imported, 1006.30.01, at the time of the investigation also covered other types of rice such as medium and short grain rice, as well as glazed or parboiled rice which were not part of the investigation.[110]

7.101 The investigating authority examined various methods of extracting from the total imports that entered the country under this tariff line, those imports relating to the subject product, long-grain white rice. The authority first examined the "method using the exporters' verifiable information". The authority had requested information about long-grain white rice exports from each of the four companies that participated in the investigation. One firm replied that it had not exported and it did not provide any information. Two other companies, the Rice Company and Riceland were found to have submitted proper information for the period of investigation for the dumping analysis (1999). However, for the rest of the period of investigation (years 1997 – 1998) the authority found that only information on exports to other countries were submitted (the case of the Rice Company), or only a copy of a worksheet in which the exports of the investigated product were not clearly itemized was submitted (the case of Riceland). In sum, the authority considered that the only company to provide correct information for the whole period

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[108] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

[109] Final Determination, (Exhibits US-6 and US-7) paragraphs 206 – 261.

[110] As becomes clear from, for example, para. 7 of the Notice of Initiation (Exhibit US-2):
"The petitioner also indicated that other types of white rice enter the country under tariff code 1006.30.01 of the Schedule in the General Import Tax Law and that these types have different characteristics from those of the product under investigation and are classified commercially in two groups: short grain rice and medium grain rice. However, the tariff description in the Schedule under the General Import Tax law is general and makes no reference to this type of classification. Thus, the customs declarations do not differentiate the type of rice that is entering the United Mexican States."

of investigation was Farmers Rice, whose exports increased by 303.7 per cent in the 1998 March – August period compared to the previous corresponding period and by 12.3 per cent during the investigated period in 1999 in relation to the previous comparable period.[111] The authority considered that two of the three participating companies did not provide accurate information for the whole investigated period, and decided for that reason not to use the information submitted by these two companies. Instead, it established that the variation observed in the case of Farmers Rice was an acceptable indicator of the behaviour of the exports by the two other participating firms, Riceland and the Rice Company.

7.102 We consider it important to note at this juncture that the authority found no dumping margin for Farmers Rice, allegedly the only company that provided full information and of which the imports were used as an indicator of the volume of dumped imports. No dumping margin was found with respect to imports from Riceland either, a company whose exports the authority states represented an important proportion of imports from the United States into Mexico under tariff line 1006.30.01.[112]

7.103 For determining the volume of imports from companies other than the four participating firms, the authority decided to use the methodology proposed by the applicant:

> "229. ... [T]he Ministry found that the petitioner submitted a method that intends to differentiate some products from others for the purpose of calculating the dumping margin. This method is based on the confidence interval analysis. For this, the behavior of long grain rice prices on the one hand and of the prices of short grain and medium grain rice on the other were observed in the United States of America during the investigated period. Thus, the medium grain and short grain rice group had a minimum price of $0.458 U.S. dollars per kilogram and a maximum price of $0.509 dollars per kilogram. Finally, the CMA indicated that, based on the above, presumably any importation made at a price above 0.458 dollars per kilogram would be of rices different from the investigated one, while those imports made at prices below such amount would correspond to long grain rice.
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> 230. With this information as a starting point, and as was established at paragraph 221 of the preliminary determination, unquestioned by any of the interested parties, the Ministry calculated the volume of imports that would correspond to these price levels, and it subtracted the result from the total volume of imports from the United States of America that entered into the Mexican territory under tariff section 1006.30.01 of what was then the *Tarifa de la Ley del Impuesto General de Importación* during the investigated period. The above was carried out taking the *listado de pedimentos de importación* of the SIC-M, from which they eliminated those transactions with a price above $0.458 US dollars per kilogram. In this way, the Ministry considered that the rest of the imports could correspond to long grain white rice, which was not disproved during the investigation."[113]

7.104 In sum, the methodology proposed by the applicant was that rice imported below a certain price level was to be treated as the subject product, long-grain white rice, while rice imported above that price was not. The authority explained that it decided to use this methodology, even though it presented the important shortcoming that it failed to provide accurate information on the periods prior to the period of investigation used for dumping purposes, i.e. for the years 1997-1998.[114] While in the case of the

[111] Final Determination (Exhibits US-6 and US-7), paras. 226 – 227.
[112] Final Determination (Exhibits US-6 and US-7), para. 228.
[113] Final Determination (Exhibits US-6 and US-7), paras. 229 – 230.
[114] The authority made the following statement in para. 232 of the Final Determination:
"We have to point out that, when analyzing the information from which the above concepts are inferred, the Ministry found that the price of the long grain rice in the United States of America

exporting firms that participated in the investigation, this failure to provide accurate information for the years 1997-1998 implied that they were assumed to all have behaved in the same manner as the one exporter that provided full and accurate data (Farmers Rice), in applying the applicant's method the authority overcame this problem of lack of accurate data for the years 1997 – 1998 by simply assuming that the level of imports of the subject product in the total imports of all types of rice during the years of 1997 and 1998 was the same as in the year 1999:

> "239. [T]he Ministry decided that the best methodology in order to make this estimate [on the volume of imports from the United States] was the one presented by the CMA [the petitioner]; however, such methodology, as noted in paragraph 232 of this determination, could only identify long grain white rice imports corresponding to the investigated period [of 1999] and cannot be extrapolated to previous similar periods. Therefore, the Ministry decided it was appropriate to consider that the investigated imports, as they were estimated in paragraph 230 of this determination, maintained the same participation in the total imports coming from the United States of America.[…]." (emphasis added)

7.105 On this basis the authority established that the investigated imports increased 8.6 per cent in the period March-August 1998 in relation to the same period in the previous year, and increased 3.4 per cent during the dumping investigation period in relation to the previous comparable period. We recall that with regard to the level of imports from the examined exporters, the authority found, on the basis of the assumption that all exporters behaved in a manner similar to Farmers Rice, that the exports to Mexico from the companies that appeared in the investigation increased 303.7 per cent and 12.3 per cent in the analyzed periods.[115]

7.106 The authority then addressed the second problem of separating the volume of dumped subject imports from non-dumped subject imports, and found as follows:

> "243. Article 3.2 of the Anti-dumping Agreement states that it shall be considered whether there has been a significant increase in dumped imports. In order to comply with this article the Ministry made two groups of imports:
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> a) The imports that will be subject to a residual dumping margin, that is the group obtained from subtracting, from the investigated imports, which correspond solely to long grain white rice, the volume of exports made by the exporting companies that participated in the investigation, and
>
> b) The exports made by The Rice Corporation, for which a dumping margin of 3.93 per cent was established. *The sum of these two data groups corresponds to the dumped imports.*
>
> 244. Based on what is set forth in the above paragraph, the Ministry observed that these imports decreased 3.2 per cent in the period March-August 1998 in relation to the previous comparable period and increased 1.2 per cent in the investigated period in relation to the same period of the previous year. Thus, the Ministry concluded that the dumped imports increased in the investigated period, in terms of articles 64(I) of the

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was not always below the price of the other types of rice, as is stated in paragraph 224 of the preliminary determination. Therefore the Ministry considers that this estimation method cannot be used consistently during the periods previous to the investigated one". Final Determination (Exhibits US-6 and US-7), para. 232.

[115] Final Determination (Exhibits US-6 and US-7) para. 241.

> Regulations of the Foreign Trade Act, and 3.2 of the Anti-dumping Agreement." [116] (emphasis added)

7.107 In other words, the authority took the total volume of imports of the subject product and subtracted from that amount the imports from the exporters that participated in the investigation and for which no dumping margin was found.

7.108 With regard to the analysis of the evolution of prices of the subject imports and their effects on domestic prices, the investigating authority first concluded that the prices of dumped imports were decreasing in the following manner:

> "[A]s the price of all kinds of rice decreased during the investigated period and as the export price of Farmers Rice Milling also decreased, it is reasonable to conclude that the prices of the remaining imports, including the dumped imports, decreased. This argument was not refuted by any of the parties during the proceeding."[117]

7.109 In examining the effects on domestic prices, the authority reasoned as follows:

> "285. The Ministry found that during the investigated period, dumped imports were 17.8 per cent below the domestic price of the previous comparable period, and 24.2 per cent below that which existed in the period March-August 1997.
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> [...]
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> 294. Based on the aforementioned, the Ministry observed a decline in the prices of the domestic products that coincided with a decrease in the prices of the imports from the United States of America, dumped or not – although the prices of the dumped imports were 6.5 per cent below the price of non-dumped imports -, as well as with the presence of the product from Argentina.
>
> 295. Consequently, the Ministry observed that the information that was available during the final stage of the investigation shows that the imports of the investigated product were priced below the domestic product, except for the exports from Riceland Foods, Inc., which did not have a dumping margin.
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> 296. Therefore, the Ministry determined that, during the investigated period, the dumped products were priced below the domestic product. It was also observed that the price of the dumped imports was lower than the prices of the domestic products in periods previous to the investigated period. Due to this, the Ministry determined that this situation provoked the decline in the prices of the domestic producers. Also, the Ministry considers that the entry during the investigated period of imports at reduced prices from Argentina and the decline, in the same period, of the price of non-dumped imports from the United States of America contributed to the decline in prices of the merchandise produced domestically. Thus, the Ministry determined that the dumped imports from the United States of America contributed to pressure the domestic producers to lower their prices in the investigated period."[118]

7.110 The question before us is thus whether the investigating authority based its determination on information which is affirmative, objective, verifiable and credible.[119] We are of the view that the way in

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[116] Paras. 243 and 244 of the Final Determination (Exhibits US-6 and US-7).
[117] Final Determination (Exhibits US-6 and US-7), para. 270.
[118] Final Determination (Exhibits US-6 and US-7), paras. 285 and 294 - 296.
[119] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192:

which the investigating authority established the facts on the basis of which it was going to consider the trends in volume of dumped imports was not a proper establishment of the facts, for the following reasons.

7.111 As is clear from the authority's final determination, the volume analysis is not based on facts, but on assumption after assumption. The methodology of the applicant which the authority decided to use is based on the unsubstantiated assumption that rice sold below a certain price level must be long-grain white rice. Although the authority itself concludes that this was a flawed assumption[120], it decided to use this methodology. However, because the assumption apparently held true only for the investigated period of the year 1999, the authority had to make another unsubstantiated assumption, which was that in fact during the previous years the subject imports kept the same share in the total amount of imports of all types of rice from the United States. We recall that these assumptions were used in order to establish the trends in the volume of the imports of the subject product, long-grain white rice from the United States, without any distinction between the dumped and the non-dumped imports.

7.112 In parallel with the applicant's methodology for the determination of the volume trends of subject imports, the authority determined the trends in the volume of imports from the examined exporters. The authority first rejected the information provided by two of the three exporters examined, among which the Rice Company, the only company of these three for which a positive margin of dumping was established, and again based its conclusion as to their volume of subject imports on an unsubstantiated assumption, i.e. the assumption that all examined firms' export volumes showed a similar trend to that of the exporter which provided full three year volume information, Farmers Rice. We note that no margin of dumping was established with regard of exports from this company, Farmers Rice. On the basis of all these assumptions, the authority then determined the volume of dumped imports by subtracting all imports from the three examined exporters from the total amount of assumed subject imports, and adding the imports from the one examined company for which a margin for dumping was found, the Rice Company. It is clear that the authority did not base itself on positive evidence, but on, in our view unjustified, assumptions, and the authority has therefore failed to properly establish the facts. We do not wish to imply by this that an authority is never allowed to complete its analysis by drawing certain inferences, provided it offers a well reasoned explanation. However, we are of the view that the investigating authority did not do this in this case. Actually, it appears that in making its assumptions, the investigating authority consistently chose to make assumptions which negatively affected the exporters' interests. In our view, the authority could just as readily have concluded the exact opposite from the facts on which it based its assumptions. For that reason as well, we consider that the Mexican authority failed to conduct an objective examination of the volume of the dumped imports.

7.113 With regard to the basis for the authority's finding on the price decrease of the dumped imports, we come to much the same conclusions. We consider that an investigating authority conducting an objective and unbiased investigation could not have reached the conclusion that prices of dumped imports were decreasing on the basis of the flawed analysis based on unsubstantiated assumptions made by the Mexican investigating authority. In the statement on price decreases quoted above, the authority compares three types of prices: (a) export price of all types of rice (both subject rice and non-subject rice), (b) export price of Farmers Rice, and (c) the export price of the "remaining imports, including the dumped imports". We recall that Farmers Rice is "the only exporter to present information related to the entire investigated period, although this company did not have a margin of dumping"[121]. Thus, the logic of Economía is that because the price of a broader category of rice – i.e. category (a) -- declined, and because the prices of one participating exporter of the subject product, who was not found to have been

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"The term 'positive evidence' relates, in our view, to the *quality* of the evidence that authorities may rely upon in making a determination. The word "positive" means, to us, that the evidence must be of an *affirmative, objective* and *verifiable* character, and that it must be *credible*." (emphasis added)

[120] Final Determination (Exhibits US-6 and US-7), para. 232.

[121] Final Determination (Exhibits US-6 and US-7) para. 268.

dumping, decreased, the third category of rice – (c) or "dumped imports" -- is a sub-set of the first category of rice, and this third category of rice must have declined also.[122] We do not consider this to be a warranted assumption on the basis of the evidence in this case. Let us assume, for arguments sake, that import of category (a) (or "all kinds of rice") represented 100 tons, and its price declined by 7 per cent. Let us also assume that of that 100 tons, 10 tons represented "dumped imports". If the price of the latter increased 2 per cent while the price of the rest (i.e. 90 tons) decreased by 8 per cent, the price of "all kinds of rice" would still decrease by 7 per cent.[123] In our view, such flawed assumptions are clearly not "positive evidence" on which an examination of the price effects of dumped imports is to be based.

7.114 We are not convinced either that an objective and unbiased investigating authority had no choice but to base itself on the above unsubstantiated assumptions for lack of better information. The determination of dumping and injury are the result of an investigation to be conducted in an objective and unbiased manner. In our view, the Mexican investigating authority failed to comply with its obligation to determine the volume of dumped imports on the basis of positive evidence and to make an objective examination by failing to conduct a proper investigation. We consider that to conduct an "investigation" requires a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study – to use the treaty language, an "investigation" – must actively seek out pertinent information.[124] As we will discuss later in respect of the use of facts available to unexamined exporters, we are of the view that the investigating authority failed to ensure that all interested parties were informed of the information required of them, as the authority sent questionnaires only to those exporters listed in the application and those that appeared subsequent to the initiation of the investigation. It is clear that had the authorities properly informed all interested parties the authority could reasonably be considered to have knowledge of and if it had sent questionnaires to a larger number of exporters, more, and more accurate information could have been gathered on the volume of the subject imports.

7.115 Moreover, it appears that very useful and valuable information which could have provided a more accurate basis for any assessment of the volume of the subject imports existed in the form of the pedimentos which contained all information on volume and value of the imports, the exporting enterprise, the importing enterprise, the duties and other taxes paid, the date of the transaction, the customs point of entry of the goods, the tariff line under which the transaction was conducted and so forth.[125] Even though it appears the field for entering the product description does not necessarily contain all the details of the product covered by the pedimento, and even accepting that even if all the pedimentos had been available it might not have been possible to determine with certainty the total amount of imports of the subject product, such data would in any case have constituted a more objective basis of evidence for making a reasonable estimate of the amount of dumped imports. In any case, from Mexico's answers to our questions with regard to the pedimentos, we conclude that in cases where the pedimento would have simply referred to white rice without distinguishing whether the product imported was long-grain or other white rice, it would still be possible to find the precise product description by referring to additional documents such as the invoices issued by the exporter, bills of lading, and so forth. While we acknowledge that this would have required some additional work for the investigating authority we are of the view that the authority cannot have its cake and eat it at the same time. If an authority does not send out questionnaires to all exporters it could reasonably be expected to have knowledge of, and does not ensure that as many exporters as possible are otherwise informed of the information required by, for example, requesting the assistance of the authorities of the exporting country or known industry

[122] It goes without saying that one cannot *assume* that the price of dumped imports are *cheaper* than non-dumped imports (e.g. price of Farmers Rice). Thus, we fail to see, from the explanation given in the Final Determination (Exhibits US-6 and US-7), how the price of Farmers Rice (i.e .category (b)) fit into Economía's logic here.

[123] 10x(0.02)+90x(-0.08) = 100x(-0.07)

[124] We thus concur with the view expressed by the Appellate Body in the *US – Wheat Gluten* case. Appellate Body Report, *US – Wheat Gluten*, para. 53.

[125] Mexico First Answers to Questions, question 15.

associations in the exporting country, then it cannot complain about the fact that it will have to become more active itself in gathering sufficient positive evidence on which to base its injury determination.

7.116 In sum, we find that the investigating authority's injury analysis with regard to the volume and price effects of dumped imports was inconsistent with the requirements of Articles 3.1 and 3.2 of the AD Agreement to conduct an objective examination based on positive evidence of the volume and price effects of the dumped imports.

7.117 In light of our findings on Articles 3.1 and 3.2 of the AD Agreement, we do not consider it necessary to continue our analysis of the US claim with regard to Article 6.8 and Annex II of the AD Agreement alleged to have been violated by the Mexican investigating authority's failure to base its determination of the volume and price effects of dumped imports on positive evidence, and make no findings in this respect.

(d) Claim 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

(i) Arguments of the Parties

United States

7.118 According to the United States, while Economía's injury analysis included a lot of discussion of the volume of imports, much of the discussion did not address the relevant dumped imports. Moreover, the United States submits, the data that reflect the calculated volumes of dumped imports show that those imports actually declined, both in absolute and relative terms during the selected three year period.[126] The United States submits that an objective and unbiased investigating authority would not, in light of these facts have found that there was a significant increase in dumped imports, and Economía's findings in this case thus breached Article 3.2 of the AD Agreement.

7.119 The United States further argues that Economía evaluated the effect of imports on prices, but failed to consider whether their effect was "significant" as required by Article 3.2 of the AD Agreement. For that reason as well, the United States submits, Economía 's determination is inconsistent with Article 3.2 of the AD Agreement.

7.120 For these reasons, according to the United States, Economía's determination was not objective nor based on positive evidence and thus also inconsistent with Article 3.1 of the AD Agreement.

Mexico

7.121 Mexico rejects the United States' assertion that Economía failed to make an objective determination of a significant increase in the volume of imports and of the price effects of the dumped

[126] US First Submission, para. 104. The United States refers to paras. 244, 248, 254, and 259 of the Final Determination (Exhibits US-6 and US-7) which deal with dumped imports. According to the United States, these data show that the volume of dumped imports declined (para. 244), as did their share of apparent domestic consumption (para. 248) and internal consumption (para. 254). The volume of dumped imports in relation to domestic production remained flat (10.2–10.7–10.1) (para. 259). See US First Submission, paras. 105 – 109.

imports. Mexico argues that the significance of the increase is addressed in paragraphs 209-261 of the Final Determination, albeit in an implicit manner.[127]

[127] Mexico First Submission, para. 116. By way of example, Mexico refers to para. 212 in which it was determined that total imports rose and para. 217 that showed that imports from the United States increased during the period.

(ii) Analysis

7.122 In the light of our earlier findings in respect of the authority's injury determination which we find not to have been based on positive evidence and not to have involved an objective examination, we do not find it necessary to address the US claim described above concerning the specific conclusions of the authority based on such flawed premises. That is, having determined that the authority's determination in respect of injury is inconsistent with the cited provision, and exercising the discretion implicit in the principle of judicial economy, we do not deem it necessary to examine whether certain of the conclusions of the authority gave rise to further inconsistencies in respect of that determination.

(e) Claim 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

(i) Arguments of the Parties

United States

7.123 The United States submits that Economía failed to examine "all" relevant economic factors affecting the industry, as required by Article 3.4 of the AD Agreement. The United States refers in particular to the failure to examine the "factors affecting domestic prices", such as the quality differences or other factors affecting domestic prices such as brand reputation.

7.124 In addition, the United States submits that Economía's conclusions concerning some of the injury factors examined did not correspond with the facts on the record. In particular, Economía's conclusion that inventories increased, and market share declined are not supported by the facts on the record as found in the final determination. The United States submits that Economía's determination is therefore inconsistent with Article 3.4 of the AD Agreement, as well as Article 3.1, as it was neither objective nor based on positive evidence.

Mexico

7.125 Mexico submits that all relevant factors having a bearing on the industry were objectively examined in accordance with Articles 3.1 and 3.4 of the AD Agreement. Mexico emphasises that not one factor is determinative. With regard to the factor raised by the United States, inventories, Mexico submits that the Final Determination shows that there was a 7.3 per cent increase, even if this was preceded by a decrease.[128]

(ii) Analysis

7.126 In the light of our earlier findings in respect of the authority's injury determination which we find not to have been based on positive evidence and not to have involved an objective examination, we do not find it necessary to address the US claim described above concerning the specific aspects of this injury determination based on such flawed premises. That is, having determined that the authority's determination in respect of injury is inconsistent with the cited provision, and exercising the discretion implicit in the principle of judicial economy, we do not deem it necessary to examine whether certain aspects of the determination gave rise to further inconsistencies in respect of that determination.

[128] Final determination (Exhibits US-6 and US-7), para. 318. Similarly, Mexico asserts, market participation was discussed in paras. 313 – 315 of the Final Determination, and the effects of imports on prices of the like product in paras. 271 -296. Mexico First Submission, para. 121.

(f) Claim 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

(i) Arguments of the Parties

United States

7.127 The United States argues that Economía's injury and causation analysis examined the effects of all imports from the United States, both those that Economía acknowledged were not dumped and those that it alleged were dumped. The United States submits that Articles 3.1, 3.2 and 3.5 of the AD Agreement which govern the analysis of injury to the domestic industry caused by dumped imports, require an objective examination of the volume and effect of imports that are dumped to the exclusion of the volume and effect of imports that are not dumped.[129] Although Economía noted the data computed for the dumped imports alone, the United States argues that its examination and the final affirmative determination show that in reaching the determination, Economía considered the volume and price effects of all imports from the United States of long-grain white rice.[130] Therefore, the United States submits that Economía's failure to conduct an objective examination of the effect of the dumped imports alone is inconsistent with Articles 3.1, 3.2 and 3.5 of the AD Agreement.

Mexico

7.128 With regard to the United States' assertion that non-dumped imports were included in the assessment of the volume and price effects of imports, Mexico argues that a separate analysis is present throughout the determination of imports from the United States in general and dumped imports from the United States in particular.[131] Mexico recalls that Economía reached the conclusion that almost 75 per cent of all imports from the United States were dumped and that this was the percentage of imports that was causing injury.[132]

(ii) Analysis

7.129 In the light of our earlier findings in respect of the authority's injury determination which we find not to have been based on positive evidence and not to have involved an objective examination, we do not find it necessary to address the US claim described above concerning the specific aspects of this injury determination based on such flawed premises. That is, having determined that the authority's determination in respect of injury is inconsistent with the cited provision, and exercising the discretion implicit in the principle of judicial economy, we do not deem it necessary to examine whether certain aspects of the determination gave rise to further inconsistencies in respect of that determination.

[129] The United States finds support for its argument in Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 111 – 112.

[130] The United States considers that Economía's focus on all investigated imports, and not just the dumped imports, is most apparent in its discussion of the price effects. See US First Submission, para .120-123.

[131] Mexico refers to paragraphs 206 – 221 of the Final Determination (Exhibits US-6 and US-7).

[132] Mexico First Submission, para. 124.

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

(i) Arguments of the Parties

United States

7.130 The United States submits that 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 of the AD Agreement requires.[133]

Mexico

7.131 Mexico argues that the Final Determination sets forth in a detailed manner all considerations and findings on fact and law concerning dumping, injury and the causal link, in accordance with Article 12.2 of the AD Agreement.

(ii) Analysis

7.132 In light of our earlier findings pursuant to Article 3 of the AD Agreement, we do not find it necessary to address in this context the US claim under Article 12.2 of the AD Agreement. That is, having determined that the measure at issue is inconsistent with the cited Article, and exercising the discretion implicit in the principle of judicial economy, we do not deem it necessary to examine whether the investigation which led to the inconsistent measure was consistent with the procedural rules concerning notification in Article 12.2 of the AD Agreement. We do not consider that this would add anything to our findings or would be useful in the implementation of our ruling.

2. Claims relating to the margin of dumping and the application of the measure

(a) Claim 8: Economía's failure to exclude firms with anti-dumping margins of zero per cent from the anti-dumping measure is inconsistent with Mexico's obligations under Article 5.8 of the AD Agreement

(i) Arguments of the Parties

United States

7.133 The United States submits that Article 5.8 of the AD Agreement requires the termination of the investigation in case of a margin of dumping which is below *de minimis*. According to the United States, the term "margin" refers to the individual margin of dumping determined for each of the investigated exporters or producers.[134] The United States therefore argues that Article 5.8 of the AD Agreement requires that an investigation against an exporter is to be terminated in case the conclusion is that the exporter in question was not dumping. Economía found that two exporters, Farmers Rice and Riceland, had not been dumping during the period of investigation, but still included them in the anti-dumping measure. While a zero per cent anti-dumping duty was imposed with regard to these exporters, the United States emphasises that both exporters remain subject to subsequent reviews, and the possible application of duties in the future. The United States submits that the failure of Economía to terminate its

[133] The United States mentions four examples to illustrate its point. It refers by way of example *inter alia* to the failure to explain the effects of low-priced imports from Argentina which increased significantly during the period of investigation. US First Submission, para. 125.

[134] The United States finds support for this definition in the Appellate Body report, *US – Hot –Rolled Steel*, para 118.

investigation with respect to Farmers Rice and Riceland which it found not to have been dumping violates Article 5.8 of the AD Agreement.[135]

Mexico

7.134 Mexico is of the view that Article 5.8 of the AD Agreement has not been violated as the investigation demonstrated that imports from the United States had been dumped into Mexico above *de minimis* levels, and that injury was caused by such dumping. According to Mexico, Article 5.8 of the AD Agreement does not refer to the individual investigation of each exporter but to the investigation against imports from a particular country in general. Mexico considers that it suffices for one exporter to be found to have been dumping above *de minimis* level for all exporters to be included in the application of the measure, and each enterprise will be assigned the anti-dumping duty corresponding to its individual margin provided that the total volume of imports from a particular country is above the negligible level.[136] According to Mexico, Article 3.3 of the AD Agreement specifies that the basis for calculating margins of dumping in accordance with Article 5.8 applies to each country as a whole, and that Article 5.8 thus does not in any way establish that firms with *de minimis* margins of dumping should be excluded from the measure.[137] Moreover, Mexico is of the view that a zero per cent duty level does not *de facto* constitute an anti-dumping duty, as it cannot cause any disadvantage to the exporter concerned. Further, Mexico argues that there is nothing in the AD Agreement which prohibits that exporters be submitted to a review even if the exporters did not dump during the original period of investigation.[138] If the drafters had wanted to prohibit such reviews, they would have done so explicitly. Mexico therefore asserts that to include Riceland and Farmers Rice in the anti-dumping measure in respect of long-grain white rice from the United States was not inconsistent with Article 5.8 of the AD Agreement.

(ii) Analysis

7.135 The United States claims that by not excluding from the definitive anti-dumping measure two US exporters which were found to have exported at undumped prices, Mexico violated Article 5.8 of the AD Agreement, which provides as follows:

> 5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member. [139]

[135] The United States further notes that the investigating authority took no steps to examine whether the weighted average margin of all exporters was greater than *de minimis* when it decided to impose the anti-dumping measure. US First Answers to Questions, para. 62.

[136] Mexico First Answers to Questions, question 20.

[137] Mexico Second Submission, para. 138.

[138] Mexico asserts that in case a review demonstrates that there is no dumping, the exporter will continue to enjoy a 0 per cent duty level.

[139] In French, Article 5.8 provides in relevant part as follows:

7.136 The first sentence of Article 5.8 of the AD Agreement requires an authority to reject an application and terminate an investigation promptly as soon as the authorities are satisfied that there is not sufficient evidence of either dumping or injury. The second sentence requires the immediate termination (of the investigation) in cases where the authorities determine that the margin of dumping is *de minimis* or that the volume of dumped imports, actual or potential, or the injury is negligible. The third sentence then continues by explaining that the margin of dumping is *de minimis* if it is less than 2 per cent, expressed as a percentage of the export price. The fourth sentence provides that the volume of dumped imports is negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member.

7.137 In our view, in the AD Agreement the term "margin of dumping" refers to the individual margin of dumping of an exporter or producer rather than to a country-wide margin of dumping. This is evidenced by Article 6.10 of the AD Agreement which provides that "the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation".[140] As the text of Article 6.10 of the AD Agreement makes clear, this provision provides for the general rule of calculating an individual margin of dumping for each known exporter or producer. The exception to this rule is the case in which there are too many foreign producers or exporters so that an individual margin of dumping will only be calculated for a representative sample, while for the other non-sampled producers or exporters, Article 9.4 of the AD Agreement determines what the maximum amount of the duty is that can be applied to them. In sum, both the general rule and the exception to the rule provide for the calculation of individual margins of dumping, and do not envisage the calculation of a country-wide margin.

7.138 We examined the rest of the AD Agreement to see whether there is anything in the Agreement that contradicts this conclusion that the term margin of dumping in the AD Agreement is company-specific rather than country-wide. Article 8.1 of the AD Agreement concerning price undertakings as an alternative to the imposition of an anti-dumping duty provides that proceedings may be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices, and stipulates that the price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is clear that in this provision as well, the term margin of dumping referred to is exporter-specific, and does not refer to the average margin of dumping for all exports from all producers or exporters of a country.

7.139 Article 9.3 of the AD Agreement provides that the amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2. Article 2 of the AD Agreement provides a definition of dumping and sets forth the manner in which a margin of dumping is to be established under the AD Agreement. A number of references to the "exporter or producer under investigation" in Article 2, for example in Article 2.2.1.1, 2.2.2, and 2.3 of the AD Agreement, make explicit the generally accepted

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> "Une demande présentée au titre du paragraphe 1 sera rejetée et une enquête sera close dans les moindres délais dès que les autorités concernées seront convaincues que les éléments de preuve relatifs soit au dumping soit au dommage ne sont pas suffisants pour justifier la poursuite de la procédure. La clôture de l'enquête sera immédiate dans les cas où les autorités détermineront que la marge de dumping est *de minimis* ou que le volume des importations, effectives ou potentielles, faisant l'objet d'un dumping, ou le dommage, est négligeable.[...]"

In Spanish, Article 5.8 reads in relevant part:

> "La autoridad competente rechazará la solicitud presentada con arreglo al párrafo 1 y pondrá fin a la investigación sin demora en cuanto se haya cerciorado de que no existen pruebas suficientes del dumping o del daño que justifiquen la continuación del procedimiento relativo al caso. Cuando la autoridad determine que el margen de dumping es *de minimis*, o que el volumen de las importaciones reales o potenciales objeto de dumping o el daño son insignificantes, se pondrá inmediatamente fin a la investigación. [...]."

[140] If an individual margin cannot be determined for each known exporter for practical reasons, the Agreement allows the authorities to sample and calculate an individual margin for the sampled exporters.

understanding that Article 2 of the AD Agreement prescribes the manner in which an individual margin of dumping for an exporter or producer under investigation is to be determined.[141]

7.140 Article 9.5 of the AD Agreement requires the authorities to promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country who have not exported the product to the importing Member during the period of investigation. This Article as well clearly refers to individual margins of dumping. Article 12.2.1 of the AD Agreement requires that the public notice of a preliminary or final determination include, *inter alia*, the "margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2". The term margins of dumping is in this context clearly used to refer to the margins of dumping calculated for each individual exporter, as required by Article 6.10 of the AD Agreement. In other words, whenever the Agreement refers to the determination of a margin of dumping, it refers to the margin of dumping determined for the individual exporter. In fact we note that Mexico does not appear to disagree with our understanding as it calculates individual margins of dumping for all exporters participating in the investigation, including even those that did not export during the period of investigation. Therefore, we are of the view that the investigation which is to be immediately terminated under the second sentence of Article 5.8 of the AD Agreement is the investigation in respect of the individual exporter for which a zero or *de minimis* margin was established.

7.141 We also consider relevant in this respect the fact the second sentence requires the immediate termination of the investigation in case the margin of dumping is *de minimis* or the *volume of dumped imports is negligible.* According to Article 5.8 of the AD Agreement, negligibility is to be determined in respect of the volume of dumped imports "*from a particular country"*. In short, in Article 5.8 of the AD Agreement, the margin of dumping is juxtaposed to the volume of dumped imports. While it is expressly stipulated that the latter is to be examined on a country-wide basis, no such stipulation is made with regard to the margin of dumping. This further confirms our view that the reference to the margin of dumping in Article 5.8 of the AD Agreement is, as is the case in the other provisions of the AD Agreement referred to above, a reference to the individual margin of dumping which is to be determined on an exporter-specific basis.[142]

7.142 We further find support for our reading that Article 5.8 of the AD Agreement in relevant part requires the termination of the investigation in respect of an individual exporter in the Panel report in the *US – DRAMs* case which also reached the conclusion that the *de minimis* rule in Article 5.8 of the AD Agreement concerns the question whether an individual exporter will be subject to an anti-dumping order. The panel in that case concluded that the *de minimis* rule of Article 5.8 did not apply in the context of the duty assessment procedure of Article 9.3 as had been argued by Korea in that case, and found that:

> "6.90 [...]As explained above, we consider that the text of Article 5.8, when read in its context, does not require that a Member apply the Article 5.8 *de minimis* test in an Article 9.3 duty assessment procedure. In any event, there are possible logical explanations for applying different *de minimis* standards in investigations and Article 9.3 duty assessment procedures. Article 5.8 requires the termination of investigations in cases where the margin of dumping is *de minimis*. Thus, in the context of Article 5.8, the function of the *de minimis* test is to determine whether or not an exporter is subject to an anti-dumping order. In the context of Article 9.3 duty assessment procedures, however, the function of any *de minimis* test applied by Members is to determine whether or not an exporter should pay a duty. A *de minimis* test in the context of an Article 9.3 duty

[141] We note that it is indeed the general practice among WTO Members, including Mexico, to calculate an individual margin of dumping, rather than country-wide margins of dumping.

[142] We note that in any case Mexico did not argue that an investigation has to be terminated if the country-wide dumping margin is below *de minimis*, but rather that such an investigation does not need to be terminated as soon as there is one exporter or producer found to have been dumping.

> assessment procedure will not remove an exporter from the scope of the order. Thus, the implications of the *de minimis* test required by Article 5.8, and any *de minimis* test that Members choose to apply in Article 9.3 duty assessment procedures, differ significantly. Accordingly, we are not convinced that Korea's policy argument requires us to abandon our conclusion that the text of Article 5.8, when read in its context, does not require that a Member apply the Article 5.8 *de minimis* test in an Article 9.3 duty assessment procedure." (underlining added)[143]

7.143 Mexico argues that termination of the investigation is only required when all of the margins of dumping for all exporters or producers are below *de minimis*. We do not find this argument convincing. If this had been the intention of the drafters of the Agreement, they would certainly have used the plural and would have required the immediate termination of the investigation in cases where the authorities determine that the margins of dumping **are** *de minimis*. They did not do so. It is clear, however, that if all of the margins of dumping are below *de minimis*, the overall investigation would have to be terminated and no measures could be imposed at all. But we do not consider it justified to deduce from that the conclusion that as long as there is *one* exporter found to have been dumping above *de minimis* levels, the investigation can continue against *all* exporters or producers concerned.

7.144 Mexico submits that, even if the panel were to agree with the United States on the interpretation of Article 5.8, Mexico's application of the AD order to the two exporters found not to have been dumping at a zero per cent duty rates, did not really constitute the application of a measure and was fully consistent with Article 9.3 of the AD Agreement. We understand Mexico to argue that as long as Economía respects the requirement of Article 9.3 that no duty in excess of the margin of dumping be imposed, there is nothing in the Agreement which prohibits the inclusion of non-dumping exporters in the Anti-dumping measure. We do not find these arguments convincing. Article 5 of the AD Agreement is entitled "Initiation and subsequent investigation" and concerns the investigation to determine whether or not an exporter or producer of the subject product may be subject to an anti-dumping order. We are of the view that in this context Article 5.8 of the AD Agreement requires the termination of the investigation, and thus the exclusion from the anti-dumping order of any exporter or producer with a below *de minimis* margin of dumping. This, in our opinion, is the essential difference between Article 5.8 of the AD Agreement and Article 9.3 of the AD Agreement which deals with the amount of the duty to be imposed and collected, after it has been established that a duty may be applied to the exporter or producer in question. To accept Mexico's argument that the application of a zero per cent duty does not really constitute the imposition of a measure as it complies with Article 9.3 of the AD Agreement would moreover render Article 5.8 of the AD Agreement meaningless. Indeed, it would not be a violation of Article 9.3 of the AD Agreement to impose a duty at 0.5 per cent if that was the margin of dumping for the exporter concerned, but doing so would clearly be inconsistent with the requirement of Article 5.8 of the AD Agreement to terminate the investigation in case of a *de minimis* dumping margin. As convincingly explained by the Panel in the *US – DRAMs* case, both provisions serve a different purpose and compliance with Article 9.3 of the AD Agreement does not equal compliance with Article 5.8 of the AD Agreement.[144]

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[143] Panel Report, *US – DRAMs*, para. 6.90.

[144] The EC, as a third party, argued that requiring an authority to terminate an investigation against those exporters found not to be dumping above *de minimis* levels and excluding them from the measure could lead to the need to have a parallel investigation against the same product from the same country soon after the application of the measure, as the excluded exporters could use the imposition of the duty to start dumping into the market if the investigating country. This would be so because no administrative or changed circumstances reviews would apply to such exporters, once they had been excluded from the application of the measure. We do not find this scenario to be very likely. If the exporters were able to compete in the market during the period of investigation without dumping, and this while others were engaging in dumping practices, we do not consider that it would be necessarily so that such exporters would start dumping their products, once an anti-dumping duty is in place, as this anti-dumping duty has indirectly also increased their competitive position. It thus seems that it could be argued that there is actually even less reason for them to engage in dumping than before the duty was in place. Be all that as it may, scoping out concerns about practical consequences – whether plausible or otherwise – does not in any event constitute a basis to

7.145 In sum, we find that by not terminating the investigation against two US exporters which the authority found to have exported at undumped prices and by not excluding these two exporters from the application of the definitive anti-dumping measure, Mexico acted in a manner which is inconsistent with Article 5.8 of the AD Agreement.

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

(i) Arguments of the Parties

United States

7.146 According to the United States, Economía 's decision to apply an adverse facts available margin to the US firm Producers Rice is inconsistent with Article 6.8 and Annex II of the AD Agreement since Economía acknowledged that this US firm, which did not export the subject product to Mexico during the period of investigation, fully cooperated with the authorities. As Producers Rice did not refuse access to, and did not otherwise fail to provide necessary information, nor significantly impeded the investigation, the application of a facts available margin was inconsistent with Article 6.8 of the AD Agreement. In addition, the United States considers that Economía failed to comply with a number of the requirements laid down in Annex II of the AD Agreement. In particular, the United States submits that, in breach of paragraph 3 of Annex II, Economía failed to take into account when making its determination that Producers Rice was a fully cooperative respondent. Moreover, the United States argues, it is clear from Annex II of the AD Agreement that Economía has to play an active role in informing the parties of the kind of information required, as well as of the consequences of not providing the information or of not cooperating. In the United States' view, Economía failed to inform Producers Rice of the fact that its questionnaire response or the explanations and evidence provided therein were in any way unacceptable, nor did Economía solicit any further explanations or evidence from this firm. In the absence of compliance by Economía with this duty to inform, the determination of a dumping margin based on facts available is inconsistent with Article 6.8 and paragraph 6 of Annex II. In addition, there was no evidence that this producer failed to act to the best of its ability and the application of facts available was thus also in violation of paragraph 5 of Annex II. Finally, and in the absence of any basis to conclude that the exporter in question failed to cooperate with Economía, the use of adverse facts available was clearly inconsistent with paragraph 7 of Annex II.[145] In addition, the United States claims that Economía breached paragraph 7 of Annex II also for another reason. According to the United States, because Economía failed to check the presumptions embodied in the application against independent data available during the investigation, much less to exercise "special circumspection" in its application of the information and presumptions therein, the Mexican investigating authority breached paragraph 7 of Annex II.[146]

7.147 In addition, the United States argues that by imposing a residual duty rate on this cooperative exporter which was completely based on adverse facts available, Economía acted in a manner which is

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go against the plain meaning of the text. An exporter whose dumping margin is found to be de minimis is, under the Agreement, effectively returned to precisely the same position as an exporter which is not dumping. The Agreement – otherwise drafted – could have provided for some differentiation of treatment as between these cases. But it does not in fact do so. It is not our place to read into the text provisions which invent distinctions that are not in fact there.

[145] The United States argues that the margin of 10.18 per cent was adverse as it was almost triple the highest margin found for the three exporters examined and each component of the margin was based on flawed data and unsupported assumptions that served to increase the dumping margin. US First Submission, para. 159-164.

[146] According to the United States, Mexico conceded in its First Answers to Questions, answers to question 25, that it did not observe the requirements of paragraph 7 of Annex II, when it applied the facts available to Producers Rice, claiming that it was under no obligation to do so. US Second Submission, para. 83.

inconsistent with Article 9.4 of the AD Agreement which requires that the neutral residual duty rate for non-investigated exporters be determined on the basis of the weighted average of the dumping margins found to exist but with the exclusion, *inter alia*, of margins based on facts available. In light of the fact that the residual duty rate applied to Producers Rice was on the contrary exclusively based on adverse facts available, the United States is of the view that Economía acted in a manner which is inconsistent with Article 9.4 of the AD Agreement.

7.148 Furthermore, the United States submits that the application of an anti-dumping duty based on adverse facts available to an exporter which did not export during the period of investigation is inconsistent with Article 9.5 of the AD Agreement which requires Economía to conduct an expedited review in order to determine an individual margin of dumping for exporters which did not export during the period of investigation, and which would otherwise be covered by the neutral residual duty that applied to the product. The United States argues that the firms seeking review under Article 9.5 of the AD Agreement when entering the export market would have previously been subject to an all-others dumping margin calculated under Article 9.4, and not as a "facts available" margin calculated under Article 6.8 of the AD Agreement.[147] The United States considers that the placement of Article 9.5 of the AD Agreement immediately after Article 9.4 of the AD Agreement as well as the textual link between Article 9.5 of the AD Agreement and the requirement of determining an individual margin of dumping provided for in Article 6.10 of the AD Agreement confirm its view. Moreover, the United States submits that by considering Producers Rice to have been investigated, assigning it a facts available-based margin, and considering it thus as an exporter subject to AD duties, Economía has precluded this firm from receiving a review under Article 9.5 of the AD Agreement, and thus breached that provision.

7.149 Finally, the United States submits that Economía breached Article 6.2 and 6.4 of the AD Agreement by failing to disclose to this exporter, Producers Rice, the export price information that was used in the calculation of the adverse facts available margin. According to the United States, under Article 6.4 of the AD Agreement, Economía should have made the abstract of the customs declaration ("listado"), on which the export price was based, available to Producers Rice. The United States submits that this was information which was obviously relevant to the presentation of this firm's case, was used by the authorities, and was not confidential. Economía's failure to provide the exporter an opportunity to prepare presentations on the basis of this information breached Article 6.4 of the AD Agreement and as a consequence Economía also acted in a manner inconsistent with Article 6.2 of the AD Agreement.

Mexico

7.150 With regard to the application of facts available to Producers Rice, Mexico submits that Article 6.8 of the AD Agreement clearly provides that in case information necessary for the calculation of the margin is not provided, the determination may be based on the facts available. According to Mexico, Producers Rice did not provide export price information which is necessary for the calculation of a dumping margin, and the authority was thus entitled under Article 6.8 of the AD Agreement to resort to the facts available for the calculation of the margin of dumping. Since Producers Rice failed to provide necessary information, its general cooperation in the investigation becomes irrelevant for the purpose of applying Article 6.8 of the AD Agreement.

7.151 Mexico further considers that paragraph 3 of Annex II of the AD Agreement dealing with the use of best information available was not violated either as no verifiable information on the export price, which under paragraph 3 is to be taken into account, was provided by Producers Rice. Economía's application of facts available was not inconsistent with paragraph 5 of Annex II of the AD Agreement either, as no information was provided. With regard to the obligation of paragraph 6 of Annex II of the AD Agreement to inform the party concerned that its information was not accepted, Mexico submits that no violation occurred as Economía did accept all the information, but the information submitted simply

[147] US First Submission, para. 172.

did not allow for the calculation of a margin.[148] Neither does Mexico consider Economía's use of facts available to have been inconsistent with paragraph 7 of Annex II as all it did was to calculate a duty based on the facts available including those contained in the application for initiation, in accordance with paragraph 1 of Annex II of the AD Agreement.

7.152 In addition, Mexico argues that there is no requirement to apply the neutral rate of Article 9.4 of the AD Agreement to the non-shipping exporter as Article 9.4 of the AD Agreement only applies in case the authorities have limited their investigation and have sampled certain exporters. That was not the case in the rice investigation. According to Mexico, the AD Agreement does not regulate how the anti-dumping duty should be calculated for exporters that have no exports during the period of the investigation.[149] Mexico rejects the US argument that a general obligation exists to calculate a neutral all others rate to the non-shipping exporters which could be deduced from Article 9.5 of the AD Agreement relating to new shipper reviews. The fact that Article 9.5 of the AD Agreement comes immediately after Article 9.4 of the AD Agreement cannot be read to imply that before a new shipper review under Article 9.5 of the AD Agreement is undertaken, the margin to be applied is to be calculated in accordance with the methodology set forth in Article 9.4 of the AD Agreement.

7.153 With regard to the US claims under Article 6.2 and 6.4 of the AD Agreement, Mexico argues that the information from the "listado" documents referred to by the United States was part of the investigation file and thus available to the parties.[150]

(ii) Analysis

7.154 The United States claims that the investigating authority's calculation of a margin of dumping based on the facts available for a US firm which did not export the subject product during the period of investigation was inconsistent with the AD Agreement, as this firm responded to the questionnaire and fully cooperated with the authority. According to the United States a "neutral" all others rate under Article 9.4 of the AD Agreement should have been calculated for this non-shipping exporter. Mexico submits that Article 9.4 of the AD Agreement is simply not relevant to this situation which did not involve the use of a sample by the investigating authority. Mexico argues that in case the authorities are not provided with the necessary information to calculate a dumping margin, facts available under Article 6.8 of the AD Agreement may be used. In the Final Determination itself, the Mexican authorities explicitly relied on Article 6.8 of the AD Agreement, and cited to this provision as the basis for their determination of a margin for Producers Rice.

7.155 We first deal with the United States claim that the residual duty for Producers Rice should have been determined on the basis of the methodology described in Article 9.4 of the AD Agreement.

7.156 Article 9.4 of the AD Agreement provides that:

> 9.4 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:
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> > (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

[148] Mexico considers that Economía took account of the company's assertion that it had no exports of the subject product during the investigation, and thus did not reject any information from this company. According to Mexico, paragraph 6 of Annex II of the AD Agreement applies only in case the information provided is rejected by the authority, which was not the case in the rice investigation, as no information was provided in the first place.

[149] Mexico First Answers to Questions, question 24.

[150] Mexico, Second Submission, para. 165.

> (ii) where the liability for payment of anti-dumping 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,
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> 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. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

7.157 We consider that Article 9.4 of the AD Agreement deals with the very specific and defined situation of the use of a sample by the investigating authority. As the first sentence sets forth, the limits imposed by the methodology provided for by Article 9.4 (i) and (ii) of the AD Agreement apply in case the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6.[151] The second sentence of Article 6.10 provides that:

> "[I]n 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 on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated".

7.158 For this particular situation, Article 9.4 of the AD Agreement provides a specific methodology with regard to the calculation of the duty for those interested parties that did not form part of the sample. We see no requirement to apply that methodology in a case which does not involve sampling. In our view, Article 9.4 of the AD Agreement simply does not apply to any other situation.

7.159 The US argument that the placement of this provision immediately preceding Article 9.5 of the AD Agreement dealing with new shipper reviews implies that its rules also apply to non-shipping exporters is not convincing, as we do not find that anything can be deduced in and of itself from the sequence of provisions in the Agreement, particularly when the provision in question relates to an exceptional situation, while the subsequent provision does not. The United States also argues that the

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[151] Article 6.10 of the AD Agreement reads as follows:

6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer 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 on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.

6.10.2 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 to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

non-sampled interested parties and the new shippers dealt with by Article 9.5 are in a similar position and that by analogy the same Article 9.4 methodology for the calculation of a residual duty rate should apply.[152] We are not convinced that the text of the Agreement supports this view. In this respect, we find particularly relevant, the absence of any cross-referencing in Article 9.5 of the AD Agreement dealing with new shippers to the calculation methodology of Article 9.4 of the AD Agreement. This absence of cross-referencing is particularly conspicuous if one were to accept, *arguendo*, the analogous situation of non-sampled and non-shipping exporters. Indeed, especially in such a situation, one would expect the drafters to have explicitly referred to Article 9.4 of the AD Agreement. As on other occasions, where the drafters intended to see obligations apply in similar circumstances, they explicitly provided for such cross-referencing.[153] We recall in this respect that the Appellate Body also found that the absence of such cross-referencing to obligations contained in other provisions is revealing of the absence of such an obligation.[154] We find that Article 9.4 of the AD Agreement does not refer to non-shipping exporters outside a sampling situation, and that there was therefore no obligation for the Mexican authorities to calculate a residual duty margin for Producers Rice based on the "neutral" methodology set forth in Article 9.4 of the AD Agreement. We therefore reject the US claim in this respect.

7.160 The United States further claims that the Mexican investigating authority acted in breach of Article 6.8 of the AD Agreement when resorting to the use of facts available to calculate a duty rate for the non-shipping exporter, Producers Rice. The United States points in particular to the full co-operation offered by Producers Rice in responding to the questionnaire. Mexico asserts that the authority was entitled to base the calculation of a dumping margin for Producers Rice on the facts available provided by the applicant and that it complied with all the requirements concerning the use of the facts available under Article 6.8 of the AD Agreement when calculating a margin of dumping for Producers Rice.[155]

7.161 The Final Determination explains the treatment accorded to Producers Rice in the following manner:

> "Producers Rice Mill Inc. stated that it did not make any exports of the investigated product during the investigated period, due to which the Ministry qualified it according to the facts of which it had knowledge, which are described in paragraphs 138 to 157 of this determination"[156]

7.162 The Final Determination further provides the following explanation for the particular method used for the calculation of the dumping margin:

> "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 Anti-dumping Agreement and 54 of the Foreign Trade Statute, the ministry calculated the dumping margin applicable to long grain white rice based on the information submitted by the petitioner, and in accordance

[152] The United States argues that both are in a similar position because the non-shipping exporter is in a way in the same situation as the non-sampled producers in the sense that it could not provide the information necessary to calculate a dumping margin, not because it was never asked to submit such information, as is the case with non-sampled exporters, but because it did not export. Such non-shipping exporters should thus similarly not be "punished" for the fact that it was not possible for the authority to establish an individual margin. Therefore, and rather than applying a facts available rate, a neutral residual rate should apply to them, one which as Article 9.4 requires, excludes all margins established on the basis of facts available.

[153] Examples of such cross-referencing of obligations in the AD Agreement can be found in Article 7.5 on provisional measures stating that the relevant provisions of Article 9 shall be followed; Article 11.4 dealing with reviews and cross-referencing to the provisions of Article 6 regarding evidence and procedure.

[154] See Appellate Body Report, *US – Carbon Steel*, para. 69.

[155] We note that both parties agree that Producers Rice is an interested party in the investigation even if it has not exported during the period of investigation.

[156] Final Determination, para. 62. Exhibits US -6 and US-7.

> with the methodology that is described in the following paragraphs, and that corresponds to paragraphs 36 to 54 of the Initial determination of the anti-dumping investigation published in the Federation Official Gazette dated December 11 2000."[157]

7.163 It is clear therefore that the investigating authority considered that it was entitled under Article 6.8 of the AD Agreement to calculate a margin of dumping for Producers Rice on the basis of the facts available. We will therefore examine whether the investigating authority complied with the obligations set forth in Article 6.8 of the AD Agreement in this case.[158]

7.164 Article 6.8 of the AD Agreement provides as follows:

> 6.8 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, 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.

7.165 Paragraph 7 of Annex II provides as follows:

> ANNEX II
>
> BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6
>
> 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.

7.166 Article 6.8 of the AD Agreement thus allows for determinations to be made on the basis of facts available, but only in case an interested party "refuses access" to necessary information within a reasonable period, or "otherwise does not provide" such information within a reasonable period, or when it "significantly impedes" the investigation. Article 6.8 of the AD Agreement further stipulates that when resorting to the use of facts available, the provisions of Annex II shall be observed. Annex II, entitled "Best Information Available in Terms of Paragraph 8 of Article 6" contains a number of obligations the investigating authority has to comply with in order for the use of facts available in a given case to be in accordance with Article 6.8 of the AD Agreement.[159] The use of the term "*best* information" means that

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[157] Final determination, para. 138. Exhibits US-6 and US-7.

[158] We are mindful of the fact that the AD Agreement does not expressly provide specific guidelines as to the way in which to deal with the calculation of the rate for new shippers, and that it could be argued that Article 6.8 of the AD Agreement actually does not govern the situation of the non-exporting party. However, in light of Mexico's position both at the time of the investigation, and in the proceedings before us that Article 6.8 of the AD Agreement does apply, and that the authority was complying with Article 6.8 of the AD Agreement when determining a margin of dumping for Producers Rice, we will examine the United States' claim on the assumption that Article 6.8 of the AD Agreement applies to this situation.

[159] Article 6.8 of the AD Agreement requires that the provisions of Annex II of the AD Agreement be observed in the use of facts available, and the use of facts available in a manner which is inconsistent with Annex II is thus also inconsistent with Article 6.8 of the AD Agreement.

information has to be not simply correct or useful *per se*, but the most fitting or "most appropriate"[160] information available in the case at hand. Determining that something is "best" inevitably requires, in our view, an evaluative, comparative assessment as the term "best" can only be properly applied where an unambiguously superlative status obtains. It means that, for the conditions of Article 6.8 of the AD Agreement and Annex II to be complied with, there can be no better information available to be used in the particular circumstances. Clearly, an investigating authority can only be in a position to make that judgement correctly if it has made an inherently comparative evaluation of the "evidence available". This is reinforced, in our view, by the requirement in paragraph 3 of Annex II that all information which is verifiable, which is appropriately submitted and supplied in a timely fashion is to be taken into account when determinations are made. In similar vein, paragraph 5 of Annex II does not allow an authority to disregard information, even though that information is not ideal in all respects, provided the interested party has acted to the best of its ability. Finally, and perhaps most importantly, such a conclusion is evident from the requirement set forth in paragraph 7 of Annex II that, in case the authorities have to base their findings on information from a secondary source they should do so with special circumspection, and check, where practicable, 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.

7.167 We recall that the non-shipping exporter, Producers Rice was identified by the applicant as a "known exporter" in the application. The investigating authority sent a questionnaire to Producers Rice requesting it to provide necessary information on normal value and export price which would enable the authority to calculate a margin of dumping for this company. Producers Rice responded to the questionnaire, stating that during the period of investigation it had not exported the subject product to Mexico. Producers Rice did provide comments on the question of injury to the domestic industry. The investigating authority determined that a margin based on the facts available was to be calculated for Producers Rice due to the fact that it did not make any exports during the investigated period.[161] Assuming, *arguendo*, that an authority would be entitled to apply the facts available in the calculation of a margin of dumping in such a situation as this, we consider that the manner in which the facts available were used in this investigation with regard to Producers Rice was not in accordance with Article 6.8 and Annex II of the AD Agreement. The Final Determination demonstrates that the facts available margin was arrived at on the basis of the information contained in the application. In effect, the explanation provided for in the Final Determination as to the use of the applicant's information as the basis for calculating the 10.18 per cent facts available margin is exactly the same as that given in the Notice of Initiation.[162][163] We note that this margin is much higher than any margin calculated for the exporters that were individually examined.[164] In examining the record, we find no basis to consider that the authority made any attempt to check the applicant's information against information obtained from other interested parties or undertook the evaluative, comparative assessment that would have enabled the authority to assess whether the information provided by the applicant was indeed the *best* information available. Nor for that matter can it be said that it used the applicant's information with "special circumspection" as required by paragraph 7 of Annex II. From the record we conclude that the authority relied on data provided by the applicant in the application concerning normal value and export price, and that the record shows no attempt to examine the applicant's information to assess whether this information was the most fitting or appropriate for making determinations with regard to Producers Rice. In sum, it is clear from the record that the authority did not check the information obtained from other interested parties during

[160] New Shorter Oxford Dictionary, p. 218.

[161] Final Determination, para. 62. Exhibits US-6 and US-7.

[162] Compare paragraphs 139 – 157 of the Final Determination (Exhibits US-6 and US-7) with paragraphs 36-54 of the Notice of Initiation (Exhibits US-1 and US-2). Paragraph 157 of the Final Determination explicitly acknowledges as much, by referring back to the above quoted paragraph 138 of the Final Determination.

[163] The authority discusses how it reached the facts available margin of 10.18 % in paras. 138-156 of the Final Determination (Exhibits US-6 and US-7).

[164] We note that for two exporters no dumping margin was found, while for a third exporter a margin of 3.93 per cent was calculated.

the investigation, or used the information provided by the applicant with special circumspection, as required by paragraph 7 of Annex II.

7.168 For all these reasons, we find that the Mexican investigating authority calculated a margin of dumping on the basis of the facts available for Producers Rice in a manner which is not consistent with Article 6.8 of the AD Agreement, read in light of paragraph 7 of Annex II of the AD Agreement. In light of this finding we do not consider it necessary to consider the US claims under paragraphs 3, 5, and 6 of Annex II, and Article 9.5 of the AD Agreement. Nor do we consider it necessary for the resolution of the dispute to examine the US claims concerning Articles 6.2 and 6.4 of the AD Agreement. That is, having determined that the measure at issue is inconsistent with the cited provision, and exercising the discretion implicit in the principle of judicial economy, we do not deem it necessary to examine whether the investigation which led to the inconsistent measure was consistent with the procedural rules of Articles 6.2 and 6.4 of the AD Agreement.

(c) Claim 10: Economía's application of an adverse facts available-based dumping margin to the US 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

(i) Arguments of the Parties

United States

7.169 The United States considers that Mexico breached numerous provisions of the AD Agreement by individually examining only three exporters and applying an adverse facts available margin to all other non-investigated exporters. In particular, the United States argues that (a) Mexico failed to individually examine all known exporters and to determine an individual duty rate for all or to apply a neutral all-others rate in case it wished to limit the number of exporters examined; and (b) Mexico wrongly applied adverse facts available to non-examined American producers and exporters.

7.170 According to the United States, Article 6.10 of the AD Agreement requires "as a rule" that an investigating authority establish an individual margin of dumping for each known producer or exporter, unless 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 a case, an investigating authority may limit its examination, and, under Article 9.4, apply a "neutral" all others rate to producers or exporters that were not individually examined. According to the United States, Economía never even made an effort to calculate an individual margin for each exporter or producer of the subject merchandise as required by Article 6.10 of the AD Agreement. Economía simply sent a questionnaire to only two exporters mentioned in the application and examined those two as well as two other exporters who voluntarily appeared, assuming a lack of co-operation from all other exporters. This, the United States submits, is a violation of Article 6.10 of the AD Agreement, as no objective and unbiased investigating authority would have concluded that there were only two exporters or producers of long-grain white rice in the United States. The United States submits that Article 6.10 of the AD Agreement does not permit investigating authorities to take a passive approach to their investigations, but 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 or exporters.[165]

7.171 Moreover, the United States considers that Economía failed to comply with Article 6.6 of the AD Agreement which requires Economía to satisfy itself as to the accuracy of the information supplied by the interested party upon which the determination is based. In the United States' view, Economía simply accepted at face value the information in the application which indicated that there were only two exporters of the product to Mexico, even though the application itself mentioned data relating to a third

[165] US First Submission, para. 140 – 141.

exporter. According to the United States, it would have sufficed for Economía to consult the customs declarations ("pedimentos") that the Mexican customs authorities collects from importers to have been able to identify every exporter from the United States.

7.172 In any case, the United States argues, where an investigating authority limits its investigation in accordance with Article 6.10 of the AD Agreement, the rate applicable to the producers and exporters which were not individually examined should be calculated in accordance with Article 9.4 of the AD Agreement, which does not allow the use of margins based on facts available. The United States considers that *de facto* the Mexican investigating authority limited its investigation by not sending questionnaires to an exporter mentioned in an annex to the application, not consulting the pedimentos and not using public data to identify all US exporters. As Economía applied a margin entirely based on facts available to the non-examined producers and exporters, it breached Article 9.4 of the AD Agreement. Finally, according to the United States, the assumption applied by Economía that all producers and exporters are considered to have been investigated implies that no exporter or producer will be eligible for an expedited review under Article 9.5 as this applies only to non-investigated producers and exporters. The United States submits that by acting in this manner, Economía has breached Article 9.5 of the AD Agreement by rendering it a nullity.

7.173 In addition, the United States submits that by applying facts available to the unexamined firms when it never sent them a copy of the anti-dumping 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. The United States asserts that Mexico failed to provide the exporters and producers notice of the information which Economía required, as required by Article 6.1 of the AD Agreement. According to the United States, Article 6.1 of the AD Agreement establishes that an investigating authority that has decided to include a particular exporter or producer in the anti-dumping investigation cannot simply announce that it has initiated the investigation and place the burden on the producer or exporter to come forward and appear.[166] The United States further argues that Economía did not give all exporters and producers a "full opportunity" to defend their interests as required by Article 6.2 of the AD Agreement. Moreover, Mexico's application of facts available without having specified the information which was required and without providing proper notice to the interested parties of the rights of Economía to use facts available is a breach of Article 6.8 and paragraph 1 of Annex II of the AD Agreement.[167]

7.174 Furthermore, the United States considers that the use of adverse facts available for the unexamined firms in the absence of any evidence of uncooperative behaviour by any of such firms, is a breach of Article 6.8 and paragraph 7 of Annex II of the AD Agreement. Moreover, Economía failed to apply the information contained in the application with "special circumspection" as required by paragraph 7 Annex II.

7.175 Finally, the United States argues that Economía failed to ensure that all interested parties known to have an interest in the investigation were notified as required by Article 12.1 of the AD Agreement. The United States submits that the Mexican investigating authority failed to notify a third exporter mentioned in an Annex to the application, and did not notify other US exporters or producers which could have been identified by the authority on the basis of the customs record.

Mexico

[166] US First Submission, para. 145.

[167] The United States argues that 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 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 other margin that is not based on the facts available to everyone else. US First Submission, para. 151.

7.176 Mexico argues that there is no obligation under Article 6.10 of the AD Agreement to calculate an individual margin for all exporters or producers, but only for those that are known to the authorities. According to Mexico, the known exporters are those that are made known to the authorities in the application, or that appear subsequent to the initiation of the investigation.[168] Mexico complied with this obligation. Mexico argues that it did not limit its examination to a reasonable number of exporters, but assigned individual margins to all the exporters and producers that participated in the investigation and that therefore the methodology for the calculation of a neutral all others rate under Article 9.4 of the AD Agreement is not applicable. It emphasises in this respect that it never refused to accept the participation of any US exporter that wanted to participate in the investigation.[169] Mexico submits that inasmuch as it complied with the obligation to send questionnaires to the known exporters and to calculate an individual dumping margin for all the exporters that submitted the necessary information to the investigating authority, it was entitled to make final determinations for the remaining exporters on the basis of the facts available, in accordance with Article 6.8 and Annex II of the AD Agreement.[170] Mexico argues that it applied paragraph 1 of Annex II which establishes clearly that if a party does not provide the information requested, the latter will be free to make the determinations on the basis of the facts available, including those contained in the application for initiation.[171]

7.177 Mexico argues that it complied with all its obligations under Article 6 of the AD Agreement by providing the United States authorities in Mexico[172] and the two known exporters, Producers Rice[173] and Riceland[174], with the public notice of initiation of the investigation, the text of the application for initiation and the annexes thereto and the form for exporters and foreign producers. In addition, it convened hearings for all natural or legal persons interested in the investigation through the publication of the official notice of initiation published in the Official Journal (DOF) on 11 December 2000.[175] Mexico does not consider Article 6.6 of the AD Agreement to be applicable to the situation in which the margin was based on facts available. Neither does it consider that Article 5.3 of the AD Agreement required it to verify whether the names of the exporters mentioned in the application included all existing US exporters but simply whether the application mentions the names of the exporters known to the applicant and whether the firms mentioned were exporters of the subject product.[176]

7.178 With regard to the United States' assertion that it would have sufficed for the investigating authority to consult the customs declarations (pedimentos) in order to have found the names of every exporter, Mexico argues that such pedimentos were not in the hands of the investigating authority but rather of the Ministry of Finance and Public Credit and that to request and receive such documents would have seriously delayed the proceedings (by approximately 40 days).[177] More importantly, Mexico considers that the AD Agreement does not require the authority to obtain such pedimentos and identify all exporters and the authority therefore did not attempt to obtain them.[178]

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[168] Mexico First Answers to Questions, question 16.

[169] Mexico Second Oral Statement, para. 70.

[170] Mexico First Submission, para. 159.

[171] Mexico asserts that the third paragraph of the introduction to the questionnaires clearly stated that such would be the case, thus complying with paragraph 1 of Annex II.

[172] Official communication UPCI.310.00.3082 of 8 November 2000 (Exhibit MEX-8). and official communication UPCI.310.00.3089 of 11 December 2000 (Exhibit MEX-9).

[173] Official communication UPCI.310.00.3296 of 11 December 2000 (Exhibit MEX-6).

[174] Official communication UPCI.310.00.3297 of 11 December 2000 (Exhibit MEX-7).

[175] Resolution accepting the interested party's application and initiating the anti-dumping investigation on imports of long-grain white rice, a product classified under heading 1006.30.01 of the Tariff established by the General Import and Export Duties Law, originating in the United States of America, regardless of the country of provenance, published in the Official Journal (DOF) of 11 December 2000 (Exhibit MEX-10).

[176] Mexico Second Oral Statement, para. 68-69.

[177] Mexico First Answers to Questions, question 17. Mexico Second Answers to Questions, questions 5 and 10.

[178] Mexico First Answers to Questions, question 17.

(ii) Analysis

7.179 We recall that the application filed by the Mexican domestic industry mentioned two US exporters, Producers Rice and Riceland. The Mexican investigating authority initiated the investigation and sent a notice of initiation as well as a questionnaire to the two exporters listed in the application as the exporters known to the applicant, and to the US embassy in Mexico City. The Notice of Initiation stated that a period of 30 days was given to any interested party to appear before the investigating authority to submit the official investigation form which could be obtained at the clerk's office of the International Trade Practices Unit in Mexico City.[179] Two US exporters, the Rice Company and Farmers Rice, as well as an industry association, the USA Rice Federation, came forward out of their own initiative, and received questionnaires. Individual margins of dumping were assigned to all four US exporters that "participated" in the investigation. For all other US exporters which did not come forward themselves, and did not provide information, a residual margin of dumping was calculated based on the facts available.

7.180 The United States claims that the investigating authority failed to abide by its obligation under Article 6.10 of the AD Agreement to determine an individual margin of dumping for each known exporter or producer as no efforts were undertaken by the authority to obtain knowledge of US exporters other than those two named in the application, and the two that came forward of their own initiative. The US submits that the authority failed to actively identify and inform interested parties of the investigation as required by Articles 6.1 and 12.1 of the AD Agreement. As a consequence, the US submits that the application of facts available to calculate a margin of dumping for these uninvestigated firms is therefore also inconsistent with Article 6.8 of the AD Agreement. Mexico on the other hand is of the view that Article 6.10 of the AD Agreement requires the calculation of an individual margin of dumping only with regard to the exporters that were known to the investigating authority. As the authority provided the required notification to, and calculated an individual margin of dumping for, the exporters made known to the authority by the applicants, as well as for those exporters that made themselves known to the authority, Mexico considers that it fully complied with Articles 6.1, 12.1 and 6.10 of the AD Agreement, and its use of facts available for the non-appearing firms is thus justified under Article 6.8 of the AD Agreement.

7.181 Article 6.10 of the AD Agreement provides as follows:

> 6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer 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 on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.
>
> 6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.
>
> 6.10.2 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

[179] Notice of initiation, paras. 152 – 153. Exhibits US-1 and US-2.

> would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

7.182 Article 6.10 of the AD Agreement thus set forth the general rule that the authorities shall determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. The disagreement between the parties centres around the extent of active involvement required from the authorities in identifying the foreign exporters and producers for which it is to calculate an individual margin of dumping. In line with general rules of interpretation of customary international law, we will examine the terms of Article 6.10 of the AD Agreement in their ordinary meaning and in light of their context and taking into account the object and purpose of the Agreement.

7.183 The ordinary meaning of the term "known" is "learned, apprehended mentally; familiar, esp. familiar to all, generally known or recognized. Also, identified as such"[180]. In other words, "known" exporters or producers are those which the investigating authority has learned about or has knowledge of. As such, the ordinary meaning of the term does not tell us whether the authority is required to take any active steps to become aware of any foreign exporter or producer or whether, on the other hand, it suffices for an authority to rely on the applicant to identify the exporters and to expect the interested foreign exporters and producers to make themselves known to the authority. In order to answer this question we examine the obligations set forth in the AD Agreement which provide the necessary context in light of which the requirement to calculate an individual margin of dumping for each known exporter and producer has to be read.

7.184 This context is formed by the overarching obligation to conduct *an investigation* and by the specific obligations on the authority to ensure that all interested parties are informed of the information required of them and are given the opportunity to present all evidence to support their case.

7.185 The first important obligation is the requirement expressed in Article 1 of the AD Agreement that an anti-dumping measure shall only be applied pursuant to *investigations* initiated and conducted in accordance with the provisions of the AD Agreement. Among others, Article 5 of the AD Agreement entitled "Initiation and Subsequent Investigation" and Article 6 of the AD Agreement further elaborate on the specific requirements that an investigating authority has to comply with when conducting this investigation. The term "to investigate" means "to search or inquire into; examine a matter systematically or in detail; make an (official) inquiry into"[181] and an "investigator" is not surprisingly defined as "a researcher"[182]. In our view, an investigating authority required to conduct an investigation in an objective and unbiased manner has to play an active role in the search of the information it requires in order to make its determination. We thus concur with the view expressed by the Appellate Body, albeit in a different context, in the *US - Wheat Gluten* case that:

> "[T]he ordinary meaning of the word "investigation" suggests that the competent authorities should carry out a "systematic inquiry" or a "careful study" into the matter before them. The word, therefore, suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study – to use the treaty language, an "investigation" – must actively seek out pertinent information".[183]

7.186 While it is clear that the interested parties, including the applicants, play a very important role in the fact gathering process, the obligation of conducting an investigation and making a determination remains that of the investigating authority, and not that of the interested parties. This is evidenced, for example, by the requirement of Article 6.6 of the AD Agreement that the investigating authorities "during

[180] New Shorter Oxford Dictionary, p. 1504.
[181] New Shorter Oxford Dictionary, p. 1410.
[182] New Shorter Oxford Dictionary, p. 1410.
[183] Appellate Body Report, *US – Wheat Gluten*, para. 53.

the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which its findings are based".[184]

7.187 In sum, we are of the view that the term "known exporter or producer" in Article 6.10 of the AD Agreement refers to the exporters or producers that an unbiased and objective investigating authority properly establishing the facts would be reasonably expected to have become conversant with. Article 6.10 of the AD Agreement is a general requirement that the authority has to comply with, at the latest, at the end of the investigation when making the determinations. This implies that the exporters that are known to the authorities at that point are those that an objective and unbiased investigating authority properly establishing the facts and conducting an active investigation could have and should have reasonably been considered to have knowledge of.[185]

7.188 Clearly, the exporters that would be "known" to an investigating authority which makes little or no effort to inform itself will be far less than those "known" to an authority that has been reasonably active. Interpreted in its context, the term "known" cannot be construed in such an artificially contrived and solipsistic manner as to become a warrant for a passive investigative approach. To do so would be to effectively read out of the AD Agreement an important aspect of the obligation of an investigating authority regarding the conduct of an investigation.

7.189 We wish to emphasise that this does not imply that we are of the view that an investigating authority is required to go to the other extreme and actively identify each and every foreign exporter or producer of the subject product. In our view, such a reading would read the term "known" out of the Agreement's requirement to calculate an individual margin only for each "known" exporter or producer of the subject product.[186] What is reasonable to expect of the investigating authority as far as the identification of foreign exporters or producers goes will depend on the circumstances of each case and the information provided by the interested parties that could assist the authority in identifying such foreign exporters or producers.[187]

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[184] Paragraph 7 of Annex II similarly requires in case secondary source information is to be used that such be done with "special circumspection" and that "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".

[185] In this respect, there is an important difference with the context in which the term "known exporters" is used in Article 5.2 of the AD Agreement. In Article 5.2 (ii) of the AD Agreement, it is provided that the application shall contain such information as is reasonably available to the applicant on *inter alia* "the identity of each known exporter or foreign producer". This provision deals with the content requirements of an application and the "known" exporters are clearly those that *according to the information reasonably available to the applicant* are those exporters that are *known to the applicant*. In our view, as is the case for all the other information that under Article 5.2 of the AD Agreement the applicants should inform the authorities of, such as prices at which the product in question is sold or the volume of the allegedly dumped imports and the effects on prices, the investigating authority cannot simply accept this information as a basis for making its determinations, but is required through conducting an unbiased and objective investigation to establish and evaluate the facts. This is the whole purpose of the investigation, which as becomes clear from a number of provisions in the Agreement is the responsibility of the investigating authority. Especially in light of the important consequences that flow from the determination of the known exporters, it would render the requirement to conduct an "investigation" meaningless to leave this identification in the hands of one of the interested parties, the applicants.

[186] We recall that it is a generally accepted rule of treaty interpretation that an interpreter is to give full meaning to all the terms of the Agreement and not to adopt such an interpretation that reads certain terms out of the Agreement. See, e.g, Appellate Body Report, *US – Gasoline*, p. 23:

> "...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 the 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."

[187] We note that the Panel in the *Argentina – Poultry Anti-Dumping Duties* case also rejected a similarly restrictive reading of the Agreement's requirement to notify all interested parties known to have an interest in the

7.190 In addition, the AD Agreement contains a number of express obligations on the investigating authorities to inform all interested parties of the initiation of the investigation and of the information that is required of them. Article 6.1 of the AD Agreement provides as follows:

> 6.1 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.
>
> 6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply. 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.
>
> 6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.
>
> 6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5. (footnotes omitted)

7.191 Article 6.1 of the AD Agreement thus requires that all interested parties be given notice of the information required, which under Article 6.1.3 AD Agreement includes at least that the full text of the application is to be provided to the known exporters. Article 12.1 AD Agreement similarly provides for a notification requirement with regard to all interested parties known to have an interest in the investigation:

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investigation under Article 12.1 of the AD Agreement. The slightly different yet similar situation before the panel in that case concerned certain exporters which were mentioned in an annex to the petition but without an address. The Argentine authorities were arguing that the address was not known to them and that they had asked the authorities of the country of export for assistance which was all that was required of them under the notification requirement of Article 12.1 of the AD Agreement. The Panel rejected this restrictive reading of the obligations incumbent on the investigating authorities to notify all known interested parties:

> "7.132 [...] We accept that there may be circumstances in which an investigating authority may not have sufficient information to allow it to notify all interested parties known to have an interest in an investigation. In this sense, the fact that an exporter is 'known' by the investigating authority to have an interest in an investigation does not necessarily mean that sufficient details concerning the exporter are 'known' to the investigating authority such that it may make the Article 12.1 notification. In other words, knowledge of an exporter's interest in an investigation does not necessarily imply knowledge of contact details regarding that exporter. In such circumstances, however, we consider that the nature of the Article 12.1 notification obligation is such that the investigating authority should make all reasonable efforts to obtain the requisite contact details. Sending a letter 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"

Panel report, *Argentina – Poultry Anti-Dumping Duties*, para.7.132. The panel in that case also found that there was *prima facie* evidence that exporters mentioned in an annex to the petition are "known" to the authorities and should thus be notified. See Panel report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.131.

> 12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other *interested parties known to the investigating authorities to have an interest therein* shall be notified and a public notice shall be given.

7.192 Thus, the AD Agreement makes clear that the investigation concerns not just the exporters and producers made known to the authorities by the applicant, or that make themselves known, but relates to all interested parties. In our view, in order to comply with *inter alia* the requirement to ensure that all interested parties be given notice of the information required of them, the investigating authority when conducting an investigation cannot remain entirely passive in the identification of the interested parties. We consider highly relevant the fact that Article 6.1.3 of the AD Agreement and Article 12.1 of the AD Agreement require the authorities to provide the full text of the application to all known exporters as well as notify all interested parties known to have an interest in the investigation of the initiation of the investigation. In our view, an investigating authority complies with these obligations by informing those interested parties it can reasonably obtain knowledge of. It clearly does not suffice for the authority to inform only those exporters identified by the applicant, as the notification requirement applies to interested parties known to the authority, and not simply those known to the applicant, as in Article 5.2 of the AD Agreement. Nor would the authority in our view be complying with this crucial obligation by expecting the interested parties to make themselves known to the authorities. It seems that the latter approach is inherently problematic since it leaves unanswered the question how such exporters become aware of the investigation such that they would come forward and make themselves known to the authority and participate in the investigation if the authority does not first contact the interested parties and does not first inform all interested parties known to have an interest in the investigation of the initiation of the investigation.

7.193 We are of the view that the requirement of Article 6.1 of the AD Agreement is more than a matter of mere procedural rectitude, but is fundamental to a correct application of *inter alia* Article 6.8 of the AD Agreement which provides as follows:

> 6.8 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, 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.

7.194 We consider that in case an interested party has not been properly notified and informed of the information it is required to submit under Article 6.1 of the AD Agreement, it cannot be argued to have refused access to or to otherwise have withheld necessary information or to have significantly impeded the investigation. This is evidenced also by the requirement in paragraph 1 of Annex II of the AD Agreement which provides that:

> 1. 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.

7.195 We note that Article 6.8 of the AD Agreement makes clear that the provisions of Annex II such as the above quoted paragraph 1 have to be observed by the authority when applying facts available to make its determinations.[188]

7.196 We will therefore now turn to the facts of this case in order to determine whether the Mexican investigating authority complied with the requirements of Articles 6.1, 6.8, 6.10 and 12.1 of the AD Agreement.

7.197 We recall that the application referred to two US exporters, Producers Rice, and Riceland. The Mexican authorities, upon initiation of the investigation, sent a copy of the application, together with the notice of initiation, to these two exporters as well as to the US authorities in Mexico City. Questionnaires were sent to the two US exporters mentioned in the application. The notice to the US authorities included a form by which interested parties could make themselves known. We note that throughout the application the name of a third US exporter, the "Rice Corporation"[189], is referred to as one of the largest US exporters. In spite of the fact that this important exporter's name appeared from time to time, no effort was made by the authorities to obtain more information on this exporter either from the applicants or from the US authorities.[190] However, this exporter, as well as fourth exporter not mentioned in the application, the Farmers Rice, came forward itself and an individual margin of dumping was calculated for these two exporters, as well as for the two exporters explicitly listed in the application.

7.198 The absence of these two exporters that came forward themselves, one of which actually appeared on several places in the application, revealed to the authority that the list of foreign exporters or producers was incomplete.[191] The incomplete listing in the application of the foreign exporters or producers was also evidenced by the fact that the application stated that the subject product is produced in six states of the United States,[192] while both exporters explicitly listed as exporters known to the applicants, come from one and the same state, Arkansas.

7.199 In addition, Annex M to the application refers to, and includes contact details for, two industry associations in the United States, the USA Rice Council and the Rice Millers Association, stating that the latter's members represent 97 per cent of all US milled production. As it is explicitly stated in Annex M, while these organizations are not themselves producers of rice, they can provide general and specific information about the rice industry in the United States. Mexico further acknowledges that it would have been possible to identify all US exporters by examining the so-called pedimentos,[193] but considers that it was under no obligation to consult these pedimentos which were being held by the Ministry of Finance and Public Credit. Mexico does not argue that it was impossible to obtain the pedimentos, but rather that requesting the pedimentos would have caused a delay of about 40 days.[194] Information on US exporters seems to have been available from a number of public sources as well such as a US magazine for the rice industry, the Rice Journal, a source mentioned in Annex S to the application.[195] This Rice Journal

[188] Apart from setting forth independent obligations, we consider that the above quoted provisions also provide further context in which to read the requirement of Article 6.10 of the AD Agreement to calculate an individual margin of dumping for "each known exporter or producer" of the subject product.

[189] The Final Determination (Exhibits US-6 and US-7) refers to the Rice Company by this name.

[190] For example, Annex H to the Petition concerned information on "The Rice Company" – Exhibit US -8, p. 44.

[191] This does not necessarily mean that the information contained in the application was not sufficient to justify the initiation of the investigation, a question we are in any case not asked to rule on.

[192] These six States are Arkansas, California, Louisiana, Mississippi, Missouri, and Texas. See Petition, page 10 (Exhibit US-8); Annex M to petition, Exhibit US-17.

[193] This is clear from Mexico's statement that the pedimentos included imports of *all* white rice which is clearly inclusive of the subject merchandise, long grain white rice. For an example of a pedimento and the kind of information contained therein, see Exhibit US-12.

[194] Mexico First Answers to Questions, question 17.

[195] Annex S to petition, Rice Outlook 1999, p. 6, Exhibit US-9.

contains all the names and contact details of US producers.[196] While the investigating authority notified the US authorities of the initiation of the investigation as required by Article 6.1.3 and 12.1 of the AD Agreement, it did not request the assistance of the authorities in identifying US exporters or producers. We do not consider that an investigating authority is complying with its investigatory task by assuming that the authorities of the exporting country will inform the foreign producers and exporters of the initiation such that they can come forward and present their data. The government of the exporting Member is to be notified because, according to Article 6.11 (ii) of the AD Agreement, it is an interested party in its own right, not because that government should do the work for the investigating authority. For all of these reasons we consider that an objective and unbiased investigating authority conducting an investigation in a reasonable manner should have made more of an effort to obtain knowledge of other US exporters. The authority knew that the listing in the application was far from complete, and it had sufficient information before it that would have enabled the authority to identify other US producers and exporters. It is, in our view, the task of the investigating authority and not of the interested parties to inform all interested parties of the information that is required and to conduct a proper investigation. We are of the view that the investigating authority is not allowed to rely on the initiative of the interested parties for the fulfilment of obligations which are really its own.

7.200 For the reason set out above, we find that the investigating authority failed to comply with Articles 6.1 and 12.1 of the AD Agreement as it failed to notify all interested parties known to have an interest in the investigation of the initiation of the investigation and of the information required of them. We are of the view that these violations are not to be viewed as some kind of minor or inconsequential procedural infringement as they have important implication(s) with regard to the use of facts available under Article 6.8 of the AD Agreement. As we stated earlier, in case the authorities do not properly notify and inform the interested parties, it is not permitted to apply the facts available to make determinations with regard to these interested parties. We thus conclude that by applying the facts available in the calculation of a margin of dumping for the US exporters or producers that were known or could reasonably have been known to the authority, Mexico acted in a manner which is inconsistent with Article 6.8 and paragraph 1 of Annex II of the AD Agreement. In light of this finding, we do not find it necessary to examine the US argument concerning the inconsistency of the Mexican measure with paragraph 7 of Annex II, and do not make any ruling with regard to this aspect of the US claim.

7.201 In addition, we find that Mexico acted in breach of Article 6.10 of the AD Agreement by remaining entirely passive in the identification of exporters or producers interested in the investigation, and by not calculating an individual margin for dumping for each exporter or producer that was known or should reasonably have been known to the investigating authority.

7.202 In light of our findings under Articles 6.1, 6.8, 6.10 and 12.1 of the AD Agreement, we do not consider it necessary for the resolution of the dispute to also examine the US claims concerning Articles 6.6, 9.4, and 9.5 of the AD Agreement, and do not make any findings in this respect.

[196] Exhibit US -18.

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

(i) Arguments of the Parties

United States

7.203 The United States submits that Economía provided only the most summary rationale for its decision to base the margin of Producers Rice and the unexamined exporters and producers on adverse facts available. Economía thus failed to provide sufficiently detailed information on all issues of fact and law as required by Article 12.2 of the AD Agreement.

Mexico

7.204 Mexico submits that the Final Determination sets forth the findings on all issues of fact and law in a sufficiently detailed manner.

(ii) Analysis

7.205 In light of our findings on Articles 6.1, 6.8, 6.10 and 12.1 of the AD Agreement, we do not find it necessary to address in this context the US claim under Article 12.2 of the AD Agreement. That is, having determined that the measure at issue is inconsistent with the cited Articles, and exercising the discretion implicit in the principle of judicial economy, we do not deem it necessary to examine whether the investigation which led to the inconsistent measure was consistent with the procedural rules concerning notification in Article 12.2 of the AD Agreement. We do not consider that this would add anything to our findings or would be useful in the implementation of our ruling.

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

(i) Arguments of the Parties

United States

7.206 The United States states that by failing to calculate the residual margin of dumping for the non-examined exporters and Producers Rice on the basis of the neutral formula set forth in Article 9.4, the amount of the margin assigned to those producers inevitable exceeded the margin of dumping established under Article 2, and thus breached Article 9.3 which provides that the amount of the duty shall not exceed the margin of dumping as established under Article 2.

7.207 In addition, by imposing duties in a manner inconsistent with the provisions of the Agreement, the United States argues, Economía also violated Article 1 which requires that measures be applied only after an investigation conducted in accordance with the provisions of the Agreement.

Mexico

7.208 Mexico argues that Article 9.4 of the AD Agreement is not applicable and that Article 9.3 of the AD Agreement has therefore not been violated either.

(ii) Analysis

7.209 In light of the finding made above concerning the inconsistency with Articles 6.1, 6.8, 6.10 and 12.1 of the AD Agreement, we do not find it necessary for the resolution of the dispute to address the US claims concerning the inconsistency of the use of facts available with Articles 9.3 and 1 of the AD Agreement. We therefore do not make any rulings in this respect.

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

(i) Arguments of the Parties

United States

7.210 The United States submits that, because the duties that Mexico levied on the "all others" companies was greater in amount than the appropriate margin of dumping, Mexico also violated Article VI:2 of the GATT 1994 which provides that a duty may be imposed which is not greater in amount than the margin of dumping in respect of such product.

Mexico

7.211 In Mexico's view, since the measures taken are consistent with the AD Agreement, there can be no consequent violation of Article VI: 2 of the GATT 1994.

(ii) Analysis

7.212 In light of the finding made above concerning the inconsistency of the dumping margin calculation with Articles 6.1, 6.8, 6.10 and 12.1 of the AD Agreement, we do not find it necessary for the resolution of the dispute to address this US claim concerning the inconsistency with Article VI:2 of the GATT 1994. We therefore do not make any rulings in this respect.

D. CLAIMS CONCERNING MEXICO'S FOREIGN TRADE ACT AND SECTION 366 OF MEXICO'S FCCP AS SUCH

1. Claim 14: Article 53 of Mexico's Foreign Trade Act is inconsistent "as such" with Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement

(a) Arguments of the Parties

(i) United States

7.213 The United States asserts that Article 53 of the Act requires interested parties to present arguments, information, and evidence to Economía within 28 days after publication of the initiation notice. The United States submits that Article 6.1.1 of the AD Agreement, and its SCM counterpart, Article 12.1.1 of the SCM Agreement, provide that interested parties are to be given at least 30 days to reply to questionnaires counting from the date of receipt of the questionnaire, and not counting from the date of publication of the notice of initiation. In addition, these provisions state that an authority should, after due consideration, grant extensions of this time period, upon cause shown, "whenever practicable". The United States asserts that Mexico only sends questionnaires to the producers or exporters named in the application, and listed in the notice of initiation. This implies, in the United States' view, that Article 53 of the Act will preclude Economía from providing other exporters or foreign producers which come forward following the initiation to ask for copies of the questionnaires 30 days to respond, since the time has started counting from the date of publication of the initiation notice and not from the time the questionnaires were sent to these interested parties that appeared after initiation. In addition, the United

States submits that Article 53 of the Act prevents Economía from giving due consideration to extension requests, let alone granting such requests. The United States is thus of the view that Article 53 of the Act is inconsistent as such with Articles 6.1.1 of the AD Agreement and 12.1.1 of the SCM Agreement.

(ii) Mexico

7.214 Mexico submits that Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement do not oblige Economía to provide for 30 days to respond to questionnaires with respect to exporters that were not sent a questionnaire. Mexico is of the view that if the 30-day period were granted to any interested party that presented itself after the initiation of the investigation, the ensuing delay would entail failure to observe the time-limits laid down in, and hence a violation of, Article 5.10 of the AD Agreement and 11.11 of the SCM Agreement. Second, Mexico asserts that according to Article 3 of the Act[197], the term 28 "days" in Article 53 of the Act has to be read as "working days". Given the fact that it is common practice in Mexico to send out the questionnaires the day following publication of the initiation, Mexico argues that Article 53 of the Act thus actually provides for at least 38 calendar days, which is more than Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement require.[198] Finally, Mexico submits that nothing in Article 53 of the Act prohibits Economía from authorizing extensions of the deadline, and several exporters have successfully requested such extensions.[199] In any case, and in the event the panel should consider that the United States has provided evidence of such an alleged prohibition based on the text of the Act, Mexico argues that Article 6.1.1 of the AD Agreement and 12.1.1 of the SCM Agreement apply congruently to Mexican anti-dumping and countervailing duty investigations, and the investigating authority may grant extensions on the basis of these Articles.

7.215 Finally, Mexico submits that, in any case, by virtue of Article 133 of its Constitution, treaties such as the WTO Agreements are self-executing and automatically applicable in Mexican law, and as Article 2 of the Act makes clear, the Act will be implemented in a manner which is congruent with the provisions of the WTO Agreements. According to Mexico, the Act thus does not mandate any WTO inconsistent action.

(b) Analysis

7.216 The United States claim concerns Article 53 of the Act which provides as follows:

> 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.

7.217 According to the United States, by not starting to count the 28 days for replies to questionnaires from the date of receipt of such questionnaires but rather from the date of initiation, Article 53 of the Act fails to provide all interested parties an equal right to have 30 days to respond to questionnaires, as required by Article 6.1.1 of the AD Agreement, and its SCM counterpart, Article 12.1.1 of the SCM Agreement. Article 6.1.1 of the AD Agreement provides that[200]:

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[197] Article 3 of the Act provides as follows: "...where this Act refers to time-limits in days these shall be understood to mean working days and where it refers to months or years these shall be understood to mean calendar months or years".

[198] Mexico First Submission, para. 227.

[199] Mexico First Submission, para. 229. Mexico does not provide specific examples.

[200] Article 12.1.1 of the SCM Agreement similarly provides that:

> 12.1.1 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.

> 6.1.1 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.
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> [15] As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

7.218 We are of the view that the wording of Article 6.1.1 of the AD Agreement makes it very clear that any exporter or foreign producer which receives a questionnaire is to be given at least 30 days for reply. As footnote 15 adds, this time limit shall as a general rule be counted from the date of receipt of the questionnaire, which shall be deemed to have been received one week from the date on which it was sent. We do not understand the United States to consider inconsistent the fact that Article 53 of the Act provides for 28 days only, instead of the 30 days required by Article 6.1.1 of the AD Agreement as it seems to acknowledge that, by virtue of Article 3 of the Act, the days referred to in the Act refer to working days.[201] As Mexico's administrative practice is to send the questionnaires out the day following the publication of the initiation, the parties seem to be in agreement that exporters listed in the application and to which questionnaires are sent at the time of initiation would in fact have at least 30 calendar days to respond, as required by Article 6.1.1 of the AD Agreement.

7.219 The United States does challenge, however, the consistency of Article 53 of the Act with Article 6.1.1 of the AD Agreement with regard to exporters or foreign producers which were not listed in the application as being known to the applicant and which for that reason were not sent a questionnaire at initiation. Mexico is of the view that the 30-day period of Article 6.1.1 of the AD Agreement only applies to exporters or foreign producers to which a questionnaire was sent at initiation and not to those exporters or producers that appear later in the course of the investigation. According to Mexico Article 6.1.1 of the AD Agreement does not oblige Economía to provide for 30 days to respond to questionnaires with respect to exporters which received questionnaires only after such exporters had come forward and requested such questionnaires.

7.220 We consider that Article 6.1.1 of the AD Agreement clearly provides that any exporter or foreign producer receiving a questionnaire shall be given 30 days for reply. This 30-day rule does not make a distinction between those exporters that received a questionnaire at the time of initiation because they happened to be known to the applicant and were thus informed of the initiation, and those that make themselves known or the existence of which becomes known to the authorities and to which questionnaires are sent following initiation. In our view, by using the date of publication of the initiation notice as the starting point for the time period for questionnaire responses, Article 53 of the Act effectively prevents Mexico from giving each exporter or foreign producer receiving a questionnaire 30 days to respond. For that reason we consider Article 53 of the Act to be inconsistent with the unequivocal requirement in Article 6.1.1 of the AD Agreement to provide for 30 days to respond to questionnaires.[202]

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[40] As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representatives of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

[201] Article 3 of the Mexican Foreign Trade Act (LCE) speaks of "días habiles". See Mexico's First Submission, para. 225.

[202] We note that Mexico has argued that the United States should have adduced evidence, in each of its claims concerning the law as such, of the application of the law by the executive authorities and its interpretation by the domestic courts. We find no basis for such a requirement in this case. These sources may become important in

7.221 The United States also argues that Article 53 of the Act is inconsistent with the second sentence of Article 6.1.1 of the AD Agreement because it prevents Economía from giving due consideration to extension requests, let alone granting such requests. Mexico submits that Article 53 of the Act does not have this effect.

7.222 Even assuming *arguendo* that we were to agree with Mexico that nothing in Article 53 of the Act prevents the authorities from granting extensions, when requested, this, in our view would not be able to cure the original failure to provide for 30 days to respond to questionnaires for all exporters or foreign producers. The first sentence of Article 6.1.1 of the AD Agreement is categorical in requiring that 30 days be given to respond to questionnaires. The second sentence of Article 6.1.1 of the AD Agreement dealing with extension requests, thus refers to requests to obtain more than the 30 days required. Exporters or foreign producers receiving questionnaires should not be forced to use the possibility of requesting extensions to obtain the time period of 30 days they are entitled to, without any showing of good cause. Article 6.1.1 of the AD Agreement requires Members, with regard to extension requests, to give "due consideration" to such request, and to grant them, "whenever practicable". The language of the first sentence of Article 6.1.1 of the AD Agreement relating to the 30 days rule does not contain such caveats and does not allow for any exceptions, and exporters or foreign producers should not be forced to hope to obtain by requesting extensions a time period for responding to questionnaires they are in any case entitled to.

7.223 In sum, we find that Article 53 of the Act is as such inconsistent with Article 6.1.1 of the AD Agreement. In addition, we consider that the requirement contained in Article 6.1.1 of the AD Agreement to provide for 30 days to respond to questionnaires is identical to that of Article 12.1.1 of the SCM Agreement. For the same reasons as set forth above, we therefore find that Article 53 of the Act is as such also inconsistent with Article 12.1.1 of the SCM Agreement.

7.224 We finally note that Mexico argues that in Mexican law, international agreements such as the WTO agreements are "self-executing" and automatically applicable in Mexico, and that any domestic law has to be applied in a manner which is compatible with Mexico's international obligations.[203] While we understand the important role given to Mexico's international commitments by providing for the direct effect of international agreements such as the WTO Agreements in Mexican law, we do not consider that for this reason, Mexico's laws would be shielded from any review of the consistency of these laws with the WTO Agreements or that such laws can never be found to be inconsistent with the WTO Agreements. The fact that provision is made for the direct effect of the WTO Agreements does not automatically and inevitably ensure a correct interpretation of the WTO Agreements, at least not in a situation where there is also a distinct domestic legal provision which manifestly conflicts with the terms of the Agreements. In our view, the direct effect of the WTO Agreements in Mexican law may prove important in case the domestic law leaves the authority with discretion to apply the law in a WTO consistent manner. However, in case the domestic law which implements Mexico's international commitments with regard to for example the AD Agreement and SCM Agreement, as does the Act, is clear and manifestly conflicts with and effectively impairs the enjoyment of the rights which the affected party is unconditionally

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WTO jurisprudence or general public international law as the adjudicator may in certain circumstances need to consider the interpretation of the law by domestic courts and the application by the executive authority in order to determine the real scope and meaning of the text of the domestic law. In this case, where the United States as the complainant has made a *prima facie* case that the language of the domestic law in question is on its face manifestly WTO inconsistent, we do not consider that – absent anything more substantive and concrete than the counter-assertion by Mexico of its consistency – we would have to wait until a domestic law is applied and interpreted by the domestic courts before this law could be dealt with by a WTO panel.

[203] Mexico First Submission, paras. 202 - 206. Mexico asserts that this is set forth in Article 2 of the Act which provides as follows: "The provisions of this Act are public policy provisions that apply throughout the Republic, without prejudice to the provisions of the international treaties or agreements to which Mexico is party".

entitled to under the WTO Agreement, as is the case here, then the direct effect of the WTO Agreements cannot shield the domestic law from such scrutiny by WTO panels.[204]

7.225 This is especially so in case the challenged provisions do not leave any room for interpretation but are clearly inconsistent with the WTO Agreement. Absent any contrary indication that the law does not mean what the text of the law indicates it means, the challenged provision of the law is inconsistent with the Agreement. In this case, Mexico has not provided any such evidence, quite to the contrary, it has vigorously defended its law as being consistent as such with the WTO Agreement, and has argued that the law does not provide for 30 days to respond to questionnaires in case such questionnaires are sent to exporters that appear after the initiation because this is not required by the AD Agreement. Since we find that the AD Agreement does provide for such a right to have 30 days to respond to questionnaires for all exporters receiving such questionnaires, we find this provision of the Act to be inconsistent as such with Articles 6.1.1 of the AD Agreement and 12.1.1 of the SCM Agreement.

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

(a) Arguments of the Parties

(i) United States

7.226 The United States submits that Article 64 of the Act breaches Article 9.4 of the AD Agreement as it does not provide for the application of a neutral "all others " rate for unexamined exporters and producers. According to the United States, Article 64 of the Act requires the application of the highest margin obtained from the facts available to, *inter alia*, (a) firms which "failed to appear" at the investigation because they were not properly informed and never received a questionnaire; and (b) firms which cooperate but demonstrate that they did not export during the period of investigation. Therefore, the United States argues, at least with regard to these two categories of firms Article 64 of the Act is inconsistent as such with Article 9.4 of the AD Agreement.

7.227 In addition, the United States argues, Article 64 of the Act violates Articles 6.8 of the AD Agreement, and paras. 1, 3, 5 and 7 of Annex II of the AD Agreement, which limit the applicability of facts available to situations where information that was requested from individually examined firms was not provided within a reasonable period of time or in case of significant impediment of the investigation. Under Article 64 of the Act, the investigating authority is required to blindly apply the highest margin to firms even if such firms were never informed of the information that was required of them in violation of para. 1 of Annex II. Article 64 of the Act also applies in cases in which the firms acted to the best of their abilities as is the case for cooperative producers who did not export during the period of investigation, thereby violating paras. 3, 5 and 7 of Annex II. Finally by requiring the imposition of the highest margin, the Act precludes the investigating authority from using the secondary source information "with special circumspection" as required by paragraph 7 of Annex II, and this with regard to all categories of situations to which Article 64 of the Act applies.

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

7.228 For the same reasons, and because it deprives the investigating authority of all discretion to evaluate the appropriateness of using facts available for parties which were cooperative or not individually examined, the United States submits that Article 64 also violates Article 12.7 of the SCM Agreement. The United States submits that the Act also violates Article 19.3 of the SCM Agreement requiring that duties be levied "in appropriate amounts" in each case, as nothing in the SCM Agreement justifies a determination that the appropriate amounts of duties for parties that did not export or were not even sent a questionnaire is necessarily the highest margin suggested by the applicant.

7.229 Finally, the United States submits that Article 64 of the Act breaches the Articles 19.3 of the SCM Agreement and 9.5 of the AD Agreement concerning expedited reviews. Article 19.3 of the SCM Agreement provides for expedited reviews for exporters who were not actually investigated for reasons other than a refusal to cooperate. As uninformed producers and producers who simply did not export during the period of investigation are deemed to have been investigated, no producer will ever be able to claim the benefits of an expedited review and Article 64 of the Act thus renders Article 19.3 of the SCM Agreement a nullity. Similarly, Article 9.5 of the AD Agreement provides for expedited reviews if the producers which did not export during the period of investigation are not related to exporters subject to the duties on the product. The United States asserts that since under Article 64 of the Act, firms that did not export are deemed to have been investigated, such firms will never be able to request the benefit of an expedited review under Article 9.5 of the AD Agreement, as they are not just related to exporters subject to the duties, they are themselves subject to the duties. Article 64 of the Act thus breaches Article 9.5 of the AD Agreement as well.

7.230 Finally, the United States argues that, in light of the fact that Article 64 of the Act requires the application of the highest margin rather than the neutral all others rate, the Act also inevitably violates Article 9.3 of the AD Agreement as it will lead to the imposition of duties in excess of the margin of dumping established under Article 2 of the AD Agreement.

(ii) Mexico

7.231 Mexico asserts that Article 64 of the Act which stipulates that the margin of dumping or subsidization is to be calculated on the basis of the facts available for interested parties that do not appear in the investigation or have no exports during the period of investigation and have therefore not provided the necessary information is consistent with the provisions of the AD Agreement and the SCM Agreement. Mexico is of the view that Articles 6.8 of the AD Agreement and 12.7 of the SCM Agreement provide for the application of facts available in case information necessary for the determination of a margin is not provided. This is the case when exporters do not appear in the investigation or do not export during the period of investigation, as this implies that the exporters will not provide the normal value or export price information necessary for the calculation of a margin of dumping or subsidization.

7.232 In Mexico's view, Article 64 of the Act does not violate paragraphs 3 and 5 of Annex II of the AD Agreement either as these provisions contain obligations in case information was provided, while in the cases covered by Article 64 of the Act no information whatsoever has been received on one or more essential elements of a margin determination. In addition, Mexico is of the view that there is no obligation on the investigating authority to send questionnaires to all exporters and foreign producers and it is therefore justified to base a determination with regard to non-participating or non-exporting interested parties that do not provide the necessary information on the facts available, including the information contained in the application. For this reason, Article 64 of the Act is thus also consistent with paragraphs 1 and 7 of Annex II of the AD Agreement.

7.233 According to Mexico, Article 9.4 of the AD Agreement is only applicable in case the investigating authority has limited the number of exporters investigated to a sample and there does not exist any obligation in the AD Agreement to calculate a neutral all others rate for non-appearing or non-shipping exporters. Article 64 of the Act is thus not inconsistent with Article 9.4 of the AD Agreement either.

7.234 Furthermore, Mexico submits that Article 64 of the Act on no grounds prevents foreign producers or exporters that have made no shipments during the period of investigation from seeking a new shipper review, if they comply with the requirements of Article 9.5 of the AD Agreement and 19.3 of the SCM Agreement. Mexico refers to a request for a new shipper review granted by the authority after the revision of the Act had taken effect in support of its argument that Article 64 of the Act does not prohibit such reviews.[205]

7.235 Finally, Mexico submits that, in any case, by virtue of Article 133 of its Constitution, treaties such as the WTO Agreements are self-executing and automatically applicable in Mexican law, and as Article 2 of the Act makes clear, the Act will be implemented in a manner which is congruent with the provisions of the WTO Agreements. According to Mexico, the Act thus does not mandate any WTO inconsistent action.

(b) Analysis

7.236 The US claim concerns Article 64 of the Act which 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:
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> 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."[206]

7.237 We first examine the US claim concerning the inconsistency of Article 64 of the Act with Article 6.8 and Annex II of the AD Agreement, and Article 12.7 of the SCM Agreement. We recall that Article 6.8 of the AD Agreement provides as follows:

> 6.8 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, 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.[207]

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[205] Mexico's Second Submission, para 213, footnote 12 –Exhibit MEX -12.

[206] We note that the term "countervailing duty" referred to throughout the Act is used to refer to both anti-dumping duties and countervailing duties.

[207] Article 12.7 of the SCM Agreement similarly provides as follows:

> "In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

Article 6.8 of the AD Agreement thus allows for the use of facts available in case an interested party (i) refuses access to, or (ii) otherwise does not provide, necessary information within a reasonable period or (iii) significantly impedes the investigation. Article 64 of the Act on the other hand provides for the use of the highest margin based on the facts available with regard to producers that (i) fail to appear (Article 64.I of the Act); or (ii) fail to provide the information in a proper and timely fashion; or (iii) significantly impede the investigation; or (iv) supply information or evidence that is incomplete, incorrect or does not derive from their accounts (Article 64.II of the Act); or (v) that did not export the subject product during the period of investigation (Article 64.III of the Act). It is clear that the first and fifth category of situations covered by Article 64 of the Act are not expressly provided for in Article 6.8 of the AD Agreement which disciplines and restricts the use of facts available. We will therefore first consider the US arguments concerning Article 64.II of the Act and the use of the highest facts available margin to producers which 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.

7.238 We recall that Article 6.8 of the AD Agreement provides that in certain situations in which access to necessary information is refused, such information is otherwise not provided within a reasonable period, or the investigation is significantly impeded, the authorities may make their determinations on the basis of the facts available. The fact gathering and evidentiary context in which Article 6.8 of the AD Agreement provides for this possibility clearly shows that Article 6.8 of the AD Agreement is there to allow authorities to continue with the investigation and make a determination, positive or negative, on the basis of the facts that are available. The Agreement expresses a clear preference for first-hand information, but does not allow any party to hold the authority hostage by not providing the necessary information, and thus provides that second-best information from secondary sources may be used in certain well-defined circumstances. The use of facts available under Article 6.8 of the AD Agreement is not however intended to operate as a punishment for those parties that do not provide such information. In fact, as paragraphs 1, 3, 5 and 7 of Annex II of the AD Agreement entitled "Best Information Available in Terms of Paragraph 8 of Article 6" clearly show, all the information provided by the parties, even if not ideal in all respects, should to the extent possible be used by the authorities, and in case secondary source information is to be used, the authorities should do so with special circumspection.[208] The final sentence of paragraph 7 of Annex II, in our view, only states the

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In light of the almost identical wording of Article 12.7 of the SCM Agreement, our analysis under Article 6.8 of the AD Agreement applies to Article 12.7 SCM of the Agreement as well.

[208] These paragraphs 1,3, 5 and 7 of Annex II provide as follows:

> 1. 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.
>
> 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, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.
>
> 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.
>
> 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

obvious that in case of non-co-operation, the result of such use of secondary source information could be less favourable to the party than if the party did cooperate. By making it a requirement to always use the highest margin based on the facts available Article 64 of the Act prohibits the authority from taking into account the specific circumstances of each individual case of non-provision of information. This effectively prevents the authority from being able to undertake the inherently comparative evaluation of this evidence available in a case at hand that is needed to meet the requirement that the facts available to be used are the "best" information that is available.[209] This, in our view, requires the authority to use those data which are most appropriate and best suited to replace the missing data. Since Article 64 of the Act effectively prevents the authorities from using the best information to replace the missing data, we find that Article 64 of the Act is inconsistent with Article 6.8 and paragraphs 1, 3, 5 and 7 of Annex II of the AD Agreement.[210]

7.239 We will now address the US claim with regard to Article 64.I of the Act concerning the use of the highest facts available margin for producers which fail to appear. In similar vein, we consider that the use of facts available to make determinations with regard to exporters or producers that fail to appear could as such be permitted by Article 6.8 of the AD Agreement. We wish to emphasise that this will at least be the case if the investigating authority has first made a reasonable effort to ensure that all interested parties are informed of the information required, and if a copy of the application and a notice of the initiation has been sent to all exporters that an objective investigating authority can reasonably be considered to have knowledge of, as required by Article 6.1.3 and 12.1 of the AD Agreement.[211] Indeed, in case a party is informed of the initiation, is requested to provide information or is sent a questionnaire, but does not respond and does not take part in the investigation, we consider that Article 6.8 of the AD Agreement would clearly allow the authority to use the facts available. However, and for the same reasons as set forth above, we are of the view that a rule which provides for the use of the highest margin based on the facts available in each case of a failure to appear is not consistent with the requirement that the facts used to replace the missing data should be the best and most appropriate information available. To indiscriminately require the use of the highest margin even if completely unrelated to the exporter which failed to appear, does, in our view, not comply with this requirement. We thus find that Article 64.I of the Act is inconsistent with Article 6.8 and paragraphs 1, 3, 5 and 7 of Annex II of the AD Agreement.

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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.

[209] See para. 7.166 above.

[210] This is not, in our view, inconsistent with any view that it is conceivable that in a particular case, the "best information available" leads to use of the highest margin. What is however inconceivable is that this can be predetermined to be *always* the "best information available".

[211] We note that, in Mexico, the situation covered by the "failure to appear" in Article 64.I of the Act would seem to cover also that of any interested party which, even when not requested to provide information, fails to make itself known to the investigating authority so that it can be examined individually. We are mindful of the fact that Article 64 of the Act was revised following the conclusion of the rice investigation and that this investigation can thus not be considered as evidence of the application of Article 64 of the Act. Nevertheless, Mexico does not contest that the category of "producers that fail to appear" in Article 64.I of the Act is to be understood to cover all foreign producers or exporters that do not provide information, irrespective of the fact that no effort was undertaken by the authority to contact such exporters and to inform them of the information required for the determination. According to Mexico, the investigating authority is not required to take an active approach, and complies with all the obligations under the AD Agreement by providing questionnaires to the exporters or foreign producers listed in the application and to those that come forward out of their own initiative because they have learned about the initiation. As we stated earlier, we are of the view, that an investigating authority which fails to ensure that all interested parties are given notice of the information that is required of them and ample opportunity to present all evidence they consider relevant to their case, is not entitled to make determinations on the basis of the facts available. In our view, such exporters cannot be considered to have failed to provide necessary information, since they were never properly informed of the information they were requested to provide.

7.240 Finally, Article 64.III of the Act requires the application of the highest margin based on the facts available to producers which did not export during the period of investigation.

7.241 Once again, and assuming *arguendo* that a margin of dumping for non-shipping exporters is governed by the terms of Article 6.8 of the AD Agreement [212]we are of the view that the problem with Article 64.III of the Act consists of the indiscriminate requirement to use the highest margin based on the facts available rather than the margin that results from the use of the best information available. In effect, Article 64 of the Act does not simply provide for the use of facts available in order to calculate a margin of dumping for the non-shipping exporter. It rather requires that for all non-shipping exporters, regardless of the circumstances of the case, the highest margin found on the basis of the facts available is to be applied to such non-shipping exporters. For the reasons set forth above, we are of the view that such a rule that requires the authority to always apply the highest margin is inconsistent with Article 6.8 and paragraphs 1, 3, 5 and 7 of Annex II of the AD Agreement.

7.242 In sum, and for the reasons set forth above, we find that Article 64 of the Act which requires the authority to determine "a countervailing duty on the basis of the highest margin of price discrimination or subsidization" obtained from the facts available in the three situations described in Article 64 of the Act to be inconsistent with Article 6.8 of the AD Agreement and paragraphs 1, 3, 5 and 7 of Annex II of the AD Agreement, and Article 12.7 of the SCM Agreement.[213] In light of our findings, we do not consider it necessary for the resolution of this dispute to make any rulings on the US claims with regard to violations of Article 9.3, 9.4, 9.5 of the AD Agreement, and Article 19.3 of the SCM Agreement.

3. Claim 16: Article 68 of Mexico's Foreign Trade Act is inconsistent "as such" with Articles 5.8, 9.3, and 11.2 of the AD Agreement and Articles 11.9 and 21.2 of the SCM Agreement

(a) Arguments of the Parties

(i) United States

7.243 The United States argues that Article 68 of the Act requires the investigating authority to conduct reviews of final anti-dumping and countervailing measures with respect to companies that were found not to have been dumping or not to have received countervailable subsidies during the original period of investigation. The United States submits that this is clearly inconsistent with the explicit requirement of Article 5.8 of the AD Agreement and 11.9 of the SCM Agreement to terminate the investigation immediately in case no margin of dumping or countervailable subsidy was found to exist.

7.244 In addition, the United States argues that Article 68 of the Act is inconsistent with the AD and SCM Agreement as it requires exporters or producers requesting a review to demonstrate that the sales during the review period were "representative", while no such additional requirement for obtaining a review exists in Articles 9.3 and 11.2 of the AD Agreement and 21.2 of the SCM Agreement. In the view of the United States, these provisions do not permit the introduction of such an additional requirement. The United States therefore submits that by requiring the authority to deny a review unless a party demonstrates that its exports were "representative", Article 68 of the Act is inconsistent as such with the AD Agreement and the SCM Agreement.

(ii) Mexico

7.245 Mexico rejects the US allegations of inconsistency of Article 68 of the Act with Articles 5.8, 9.3 and 11.2 of the AD Agreement and Articles 11.9 and 21.2 of the SCM Agreement. First, Mexico argues

[212] See footnote 158.

[213] For the reasons given in paras. 7.224 and 7.225, we reject the Mexican defence on the basis of the direct effect of international agreements in Mexican law.

that Article 5.8 of the AD Agreement and 11.9 of the SCM Agreement do not apply to reviews but only to original investigations. Mexico therefore considers that the US argument that Article 68 of the Act violates Articles 5.8 of the AD Agreement and 11.9 of the SCM Agreement in subjecting to administrative reviews exporters for whom no margin of dumping or subsidization was determined is without merit since the allegedly infringed Articles do not even apply in the case of reviews. Furthermore, Mexico is of the view that Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement do not require the exclusion of an exporter from the measure and therefore from being subjected to reviews simply because no margin of dumping was established in the original investigation. According to Mexico, Article 3.3 of the AD Agreement and 15.3 of the SCM Agreement clearly show that an investigation is only to be terminated in case the margin of dumping calculated on a country-wide basis rather than a firm-specific basis is below *de minimis*. In any case, Mexico is of the view that a review does not imply the imposition of a duty and thus does not negatively affect the exporters concerned. Such reviews are thus similar to those provided in Article 9.3.1 of the AD Agreement concerning the determination of final liability for payment of anti-dumping duties.

7.246 Mexico further submits that Article 68 of the Act does not impose a "representativeness" requirement as a condition for the investigating authority to conduct reviews such as those provided for in Article 21.2 of the SCM Agreement and Articles 9.3 and 11.2 of the AD Agreement. According to Mexico, there are no clear provisions in the AD Agreement or SCM Agreement as to the procedures for conducting administrative reviews and new exporter reviews, and the "representativeness" requirement of Article 68 of the Act is merely a means of ascertaining that the export volumes reported in administrative review or new shipper reviews reflect normal volumes that are representative of the sales policies of exporters seeking such reviews. Mexico asserts that an exporter is not required to show "representative volume of sales" in order to obtain the initiation of a review, but that an interested party will need to demonstrate such representativeness in order to be able to determine a margin of dumping for that party.[214] In any case, according to Mexico, the United States fails to demonstrate that such a requirement is a sine qua non requirement for the initiation of such reviews.[215]

7.247 Finally, Mexico submits that, in any case, by virtue of Article 133 of its Constitution, treaties such as the WTO Agreements are self-executing and automatically applicable in Mexican law, and as Article 2 of the Act makes clear, the Act will be implemented in a manner which is congruent with the provisions of the WTO Agreements. According to Mexico, the Act thus does not mandate any WTO inconsistent action.

(b) Analysis

7.248 The United States makes two claims concerning Article 68 of the Act. First, the United States argues that by subjecting exporters for which the original investigation showed a margin of dumping or subsidization below *de minimis* to administrative reviews, Article 68 of the Act is inconsistent with Article 5.8 of the AD Agreement and 11.9 of the SCM Agreement. Second, the United States submits that by requiring exporters requesting a review to show that their volume of sales during the review period was representative, Article 68 of the Act is in breach of Articles 9.3 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement.

[214] Mexico First Answers to Questions, question 31.

[215] Mexico asserts that this is clear from a recent review on imports of dessert apples from the United States (Exhibit MEX-13).

7.249 We will first examine the US claim of violation of Article 5.8 of the AD Agreement and Article 11.9 of the SCM Agreement. Article 5.8 of the AD Agreement provides as follows[216]:

> 5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

7.250 In turn, Article 68 of the Act in pertinent part provides 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. . .

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

7.252 The second claim of the United States with regard to Article 68 of the Act concerns the consistency with Article 9.3 and 11.2 of the AD Agreement and 21.2 of the SCM Agreement of the

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[216] Article 11.9 of the SCM Agreement provides as follows:

> 11.9 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*, or where the volume of subsidized imports, actual or potential, or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be *de minimis* if the subsidy is less than 1 per cent *ad valorem.*

"representativeness" requirement which, according to the United States, is imposed by Article 68 of the Act. Article 68 of the Act in pertinent part reads as follows:

> The party requesting a review shall satisfy the Ministry that the volume of exports to Mexico during the review period is representative.[217]

7.253 We consider that Article 68 of the Act clearly imposes as a requirement to obtain an administrative, i.e. duty assessment review, or a changed circumstances review a showing by the party requesting such reviews that its volume of exports to Mexico during the review period was representative. Article 68 of the Act, by using such mandatory wording that the party requesting such reviews "shall satisfy" the Ministry leaves little to be desired in terms of clarity of what is required of a party requesting reviews. In fact, Mexico confirmed as much in its answer to a question from the panel, when it stated that an exporter is not required to show a representative volume of sales in order to obtain the initiation of a review, but that "in the course of a review, an interested party will need to demonstrate such representativeness in order to be able to determine a margin of dumping for that party".[218] In other words, we understand Mexico to confirm that while a review may be initiated without a showing of representativeness, the duties will not be reviewed for any party that fails to satisfy the authority that the volume of exports during the review period was representative. We do not consider meaningful the distinction drawn by Mexico between the right to obtain the initiation of a review and the right to have the duties reviewed, as an initiation of review without chance of success because of a failure to demonstrate representative volume of exports is meaningless.

7.254 The question before us is thus whether such a requirement to show representative volume of exports is consistent with Article 9.3 and 11.2 of the AD Agreement and 21.2 of the SCM Agreement.

7.255 Article 9.3 of the AD Agreement provides as follows:

> 9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.
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> 9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made.[20] Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.
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> 9.3.2 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.
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> 9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2,

[217] *See Mexico's 2003 WTO Notification* (G/ADP/N/1/MEX/1/Suppl.2), at page 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 page 10.

[218] Mexico First Answers to Questions, question 31.

authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.

[20] It is understood that the observance of the time-limits mentioned in this subparagraph and in subparagraph 3.2 may not be possible where the product in question is subject to judicial review proceedings.

7.256 Article 11.2 of the AD Agreement provides that:

11.2 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.[21] 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.[219]

[21] A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

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

[219] Article 21.2 of the SCM Agreement similarly provides as follows:
21.2 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.

requirement can be imposed on the exporter when it is requesting the refund of the duties paid in excess of the margin of dumping through an administrative review.

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

7.259 Article 68 of the Act requires *as a rule* that *each time* an interested party is unable to show that volume of exports during the review period was representative, such a review is to be denied. This in our view is inconsistent with the Agreement. Under a changed circumstances review of Article 11.2 of the AD Agreement, the authority examines whether there is continued need for the measure and whether the duty is to be varied or removed. A situation could be envisaged where the positive information substantiating the need for a review that the interested party is to adduce in support of its request relates only to its domestic sales and the normal value side of the dumping margin. A possible example could be a case where an exporter requests a review based on an important and dramatic drop in the normal value for the product due to a change in the cost structure of the company for example. This will have an obvious effect on the dumping margin and may thus warrant a review that leads to the duty being removed or varied. The change in circumstances is unrelated to export side of the equation. An interested party is entitled to a changed circumstances review under Article 11.2 of the AD Agreement and 21.2 of the SCM Agreement, if it submits positive information substantiating the need for a review. What such positive information relates to will depend from case to case, and such positive information does not, in our view, necessarily include that a representative number of exports sales were made. We consider that by requiring the authority to reject a review each time the volume of export sales was not representative, even in cases where the change in circumstances is unrelated to the export price, Article 68 of the Act requires the authority to reject reviews in a manner which is inconsistent with Article 11.2 of the AD Agreement.[220]

7.260 We therefore find that by imposing this additional requirement that interested parties requesting a review are required to always satisfy the authority that the volume of the export sales was representative, Article 68 of the Act is as such inconsistent with Articles 9.3 and 11.2 of the AD Agreement and, *mutatis mutandis*, Article 21.2 of the SCM Agreement.[221]

[220] We acknowledge that the representativeness of the export sales can in certain situations be a relevant factor in determining whether it is appropriate to remove or vary the duty. A showing of such representativeness may thus be requested as part of the "positive information substantiating the need for a review" which is to be submitted by the interested party requesting the review. Whether that is so will depend on the circumstances of each case. In our view, the rule of Article 68 of the Act fails to take these specific circumstances into account.

[221] For the reasons set forth in paras. 7.224 and 7.225, we reject Mexico's defence based on the direct effect of international treaties in Mexican law.

4. Claim 17: Article 89D of Mexico's Foreign Trade Act is inconsistent "as such" with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement

(a) Arguments of the Parties

(i) United States

7.261 The United States asserts that Article 89 D of the Act restricts the ability of interested parties to obtain expedited reviews in a manner which is inconsistent with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement. According to the United States, Article 89D of the Act requires a producer to demonstrate that the volume of exports during the review period was "representative", while no such requirement exists in Articles 9.5 of the AD Agreement and 19.3 of the SCM Agreement. In addition, under the Act such expedited reviews are available to producers only, while the AD Agreement and the SCM Agreement provide for such reviews for both producing and non-producing exporters.

(ii) Mexico

7.262 Mexico argues that Article 89D of the Act is not inconsistent with Article 9.5 of the AD Agreement or Article 19.3 of the SCM Agreement. First, Mexico is of the view that even if Articles 9.5 of the AD Agreement and 19.3 of the SCM Agreement do not do so expressly, it is in light of the context and purpose of these provisions only logical that the authorities require that the review be based on a representative amount of exports, as only this will enable the authorities to conduct an adequate price comparison. Second, Mexico asserts that although Article 89D of the Act mentions only "producers", the text of Article 89D of the Act has to be read in combination with the WTO Agreements themselves. Mexico asserts that Article 89D of the Act confers a right to a new shipper review under certain circumstances to both producers and exporters as is evidenced by the resolution initiating the new shipper procedure concerning imports of apples from the United States, paragraphs 3 and 32 of which show that the new shipper review was initiated at the request of an exporting firm which was a trading enterprise.[222] Moreover, Mexico argues, Article 47 of the Act's Regulations also allows new shipper reviews for non-producing enterprises, i.e. enterprises devoted solely to exportation.

7.263 Finally, Mexico submits that, in any case, by virtue of Article 133 of its Constitution, treaties such as the WTO Agreements are self-executing and automatically applicable in Mexican law, and as Article 2 of the Act makes clear, the Act will be implemented in a manner which is congruent with the provisions of the WTO Agreements. According to Mexico, the Act thus does not mandate any WTO inconsistent action.

(b) Analysis

7.264 The US claim concerns Article 89D of the Act which provides 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

[222] Mexico Second Submission, para. 230. Exhibit MEX – 12.

> 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. (emphasis added)

7.265 According to the United States Article 89D of the Act provides for a requirement of "representativeness" that is not provided for by Article 9.5 of the AD Agreement or 19.3 of the SCM Agreement. Article 9.5 of the AD Agreement provides 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. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

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

7.267 Article 19.3 of the SCM Agreement provides as follows:

> 19.3 When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted. 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.

7.268 Article 19.3 of the SCM Agreement thus similarly provides for the right to an expedited review of an exporter whose exports are subject to a definitive duty but who was not actually investigated for reasons other than a refusal to cooperate. Article 19.3 of the SCM Agreement does not subject this right

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

7.269 We therefore find that Article 89D of the Act is as such inconsistent with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement.[223] In light of our findings, we do not consider it necessary for the resolution of this dispute to consider the US arguments based on the fact that Article 89 D of the Act only talks about producers, while Article 9.5 of the AD Agreement entitles both exporters and producers to an expedited review. In any case, we note that Mexico clarified that it is of the view that the use of the term producers does not imply that exporters are not similarly entitled to such reviews.[224] [225]

5. Claim 18: Article 93V of Mexico's Foreign Trade Act is inconsistent "as such" with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement

(a) Arguments of the Parties

(i) United States

7.270 The United States argues that Article 93V of the Act provides for the imposition of fines for importers which enter products subject to anti-dumping or countervailing duty investigations while such investigations are underway. This, according to the United States, is a specific action against dumping or against subsidies which is not provided for by the AD or SCM Agreement and is therefore inconsistent with Articles 18.1 of the AD Agreement and 32.1 of the SCM Agreement. The United States submits that 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 of the Act. In the view of the United States, it is therefore a "specific action" relating to dumping or subsidization, which is "against" dumping/subsidization since it has an adverse bearing on dumping or subsidization and creates an incentive to terminate such practices. As the fines envisaged under Article 93 V of the Act constitute a "specific action against dumping/subsidization" which is not contemplated in the AD and SCM Agreement, as it does not take the form of a definitive anti-dumping duty, a provisional measure or price undertaking, Article 93V of the Act is inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement.[226]

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[223] For the reasons set forth in paras. 7.224 and 7.225, we reject Mexico's defence based on the direct effect of international treaties in Mexican law.

[224] In support of its statement, Mexico submitted a resolution initiating the new shipper procedure concerning imports of apples from the United States, paragraph 3 and 32 of which show that the new shipper review was initiated at the request of an exporting firm which was a trading enterprise rather than a producer of the subject product. Mexico Second Submission, para. 230. Exhibit MEX – 12.

[225] Mexico First Answers to Questions, question 33.

[226] The United States refers to a detailed discussion of the meaning of a "specific action against dumping/subsidization" in the report of the Appellate Body in the *US – Offset Act (Byrd Amendment)* case, paras. 224 -269.

(ii) Mexico

7.271 Mexico submits that the United States failed to establish any violation with the AD Agreement or the SCM Agreement of this provision of the Mexican law which has to be read in light of Mexico's international obligations under the WTO Agreements. In addition, the United States failed to adduce evidence of the interpretation of this provision by the domestic courts and the doctrine, or its application by the authorities. In the absence of such proof, the law has to be assumed to be consistent with Mexico's obligations under the WTO Agreements. In addition, Mexico asserts that Article 93V of the Act does not oblige Economía to impose fines but merely authorises it to do so. Article 93V of the Act is therefore not as such inconsistent with Articles 18.1 of the AD Agreement and 32.1 of the SCM Agreement.

7.272 Finally, Mexico submits that, in any case, by virtue of Article 133 of its Constitution, treaties such as the WTO Agreements are self-executing and automatically applicable in Mexican law, and as Article 2 of the Act makes clear, the Act will be implemented in a manner which is congruent with the provisions of the WTO Agreements. According to Mexico, the Act thus does not mandate any WTO inconsistent action.

(b) Analysis

7.273 The US claim concerns the consistency of Article 93 V of the Act with Articles 18.1 of the AD Agreement and 32.1 of the SCM Agreement. Article 93V of the Act 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 duties . . .

7.274 Article 18.1 of the AD Agreement in turn provides that:

> 18.1 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.[24]
>
> [24]This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.

7.275 Article 32.1 of the SCM Agreement similarly provides as follows:

> 32.1 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.[56]
>
> [56]This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

7.276 In our view, the only specific action against dumping that is in accordance with the provisions of the GATT 1994 as interpreted by the AD Agreement are those set forth in the AD Agreement and consist

of definitive anti-dumping duties, provisional measures and price undertakings.[227] The same holds true for specific action against a subsidy, for which the SCM Agreement provides as the only remedies the imposition of definitive countervailing duties, provisional measures or an undertaking. It is clear therefore that the imposition of a fine is not permitted in case it can be demonstrated that it is imposed as a specific action against dumping or subsidization.

7.277 The important question for us to answer remains whether Article 93V of the Act is a specific action against dumping or subsidization such that the imposition of fines would be inconsistent with Article 18.1 of the AD Agreement and 32.1 of the SCM Agreement. We concur with the following view expressed by the Appellate Body in the *US – CDSOA 2000* case:

> "Accordingly, 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 of the *Anti-Dumping Agreement* or a "specific action" in response to subsidization within the meaning of Article 32.1 of the *SCM Agreement*. 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, as in the 1916 Act, be derived from the text of the measure itself."[228]

7.278 In our view, the imposition of fines under Article 93V of the Act is inextricably linked to, and strongly correlated with, a determination of dumping, as defined in Article VI:1 of the GATT 1994 and in the Anti-Dumping Agreement, or a determination of a subsidy, as defined in the SCM Agreement. Article 93V of the Act provides for the possibility to impose fines in case (i) a product identical or similar to the subject product is being imported; (ii) after the investigation has been initiated; (iii) in significant quantities within a relatively short period of time; and (iv) such imports are likely to undermine the remedial effect of the countervailing duty. The level of the fine is determined by the amount of the final duty. Such fines may only be imposed following a final determination and may be applied to imports that entered the country for up to five months following the date of initiation of the investigation. As the text of Article 93V of the Act clearly shows, importers may be fined only once anti-dumping duties or countervailing duties have been imposed, and the fines may be collected only pursuant to an anti-dumping duty order or countervailing duty order. In addition, and as an anti-dumping duty order or a countervailing duty order can be imposed only following a determination of dumping or subsidization respectively, we consider that there is a clear, direct and unavoidable connection between the determination of dumping and subsidization and the imposition of fines under Article 93 V of the Act. In sum, we consider that Article 93V of the Act fines may be imposed only following a determination that the constituent elements of dumping or subsidization are present, and such fines therefore constitute a "specific action" related to dumping or a subsidy within the meaning of Article 18.1 of the AD Agreement

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[227] We find support for this view in the Appellate Body Report in the *US – 1916 Act* case in which the Appellate Body found that Article VI of the GATT 1994, in particular Article VI:2, read in conjunction with the AD Agreement, limits the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings:

> "137. As we have concluded above, Article VI of the GATT 1994 and the Anti-Dumping Agreement apply to "specific action against dumping". Article VI, and, in particular, Article VI:2, read in conjunction with the Anti-Dumping Agreement, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings. Therefore, the 1916 Act is inconsistent with Article VI:2 and the Anti-Dumping Agreement to the extent that it provides for "specific action against dumping" in the form of civil and criminal proceedings and penalties.
> 138. With the caveat that Article VI:2 must be read together with the relevant provisions of the Anti-Dumping Agreement, we, therefore, agree with the conclusion of the Panel that:
> … by providing for the imposition of fines or imprisonment or for the recovery of treble damages, the 1916 Act violates Article VI:2 of the GATT 1994. "
> Appellate Body Report, *US – 1916 Act*, paras. 137 – 138, footnote omitted.

[228] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 239.

and of Article 32.1 of the SCM Agreement. In addition, we find that by threatening to impose fines on anyone importing the product subject to an anti-dumping investigation, Article 93V of the Act clearly provides for a specific action against dumping or subsidization which is not provided for in the AD or SCM Agreement.

7.279 In fact we note that Mexico does not appear to argue the contrary but submits that Article 93V of the Act does not require the authority to impose such fines but merely authorises it do so. We do not consider this argument to be convincing. When a law like the Act provides that it "shall be the responsibility of the Ministry to punish the following infringements",[229] it does more than just dividing competences among the government, but rather stipulates that fines are to be imposed in case the conditions of Article 93V of the Act are met and that it is up to the Ministry of Economy responsible also for the conduct of anti-dumping and countervailing duty investigations to impose such fines.

7.280 For the reasons set forth above, we conclude that Article 93V of the Act is inconsistent with Article 18.1 of the AD Agreement and 32.1 of the SCM Agreement.[230] [231]

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

(a) Arguments of the Parties

(i) United States

7.281 The United States submits that Articles 68 and 97 of the Act, and Section 366 of Mexico's FCCP preclude the authorities from conducting a review of anti-dumping or countervailing duties while a judicial review, either national or bi-national before a NAFTA panel is ongoing. This, the United States submits, is in clear violation of the entitlement to such reviews of the duties as set forth in Articles 9.3 of the AD Agreement on administrative reviews, 9.5 of the AD Agreement and 19.3 of the SCM Agreement on expedited reviews and 11.2 of the AD Agreement and 21.2 of the SCM Agreement on changed circumstances reviews.[232]

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[229] The Spanish original of the law reads: "*Corresponde a la Secretaría* sancionar las siguientes infracciones: ...".

[230] For the reasons set forth in paras. 7.224 and 7.225, we reject Mexico's defence based on the direct effect of international treaties in Mexican law.

[231] In fact we note that Article 93 V of the Act appears to be aiming to remedy a situation of injury which is difficult to repair caused by massive imports entering the country in a relatively short period of time following the initiation of the investigation but prior to the imposition of any measures. A very similar situation is addressed in Article 10.6 of the AD Agreement and Article 20.6 of the SCM Agreement which allow, under certain strict conditions, for the retroactive application of duties even prior to the application of provisional measures in such cases as an exception to the general rule of non-retroactive effect of duties. The retroactive application of duties is clearly a specific action against dumping as explicitly provided for in the AD Agreement and the SCM Agreement. In light of the fact that the fines of Article 93V of the Act operate in the same manner and its amount is limited to the amount of the duty, such fines are obviously also a specific action against dumping or subsidization, but one not provided for in the AD Agreement or the SCM Agreement, and therefore inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement. In any case, and even assuming *arguendo* that there really is no practical difference between the retroactive application of anti-dumping or countervailing duties and the imposition of fines in an equal amount, it is clear that Article 93 V of the Act allows for the imposition of such fines without imposing the same requirements and conditions as are set forth in Article 10.6 of the AD Agreement and Article 20.6 of the SCM Agreement. However, as no claims were made before us with regard to Article 10.6 of the AD Agreement and Article 20.6 of the SCM Agreement, we do not need to make any rulings in this respect.

[232] The United States submits as evidence of the operation of the challenged provisions of the Act a letter of the investigating authority to a US Beef exporter in which the authority rejects this exporter's request for a review of

7.282 The United States asserts that the harm is being exacerbated by the fact that Article 64 of the Act requires Economía to impose the highest facts available margin on all exporters that did not receive an individual margin of dumping. This implies that exporters which requested that an individual margin of dumping be determined through an expedited review will not only have to wait until any possible judicial review has been finalized, but will in the meantime be confronted with duties determined on the basis of the highest facts available margin of dumping.

(ii) Mexico

7.283 Mexico considers that the United States failed to discharge its burden of proof by not adducing evidence on the alleged applicability of Section 366 of the FCCP to reviews of anti-dumping or countervailing duties.[233] Furthermore, Mexico considers that Articles 68 and 97 of the Act which provide that the duties only become definitive if no review is ongoing seek to ensure legal certainty. The rule that no reviews will be undertaken until all legal challenges are over thus provides a guarantee for exporters which are not obliged to pay any definitive duties until after such challenges are finalized, but may provide a guarantee of payment until such time as the duty becomes definitive.[234] With regard to the alleged inconsistency with Article 9.3.2 of the AD Agreement, Mexico asserts that the authority will refund any duties paid in excess once the relevant proceedings have been completed and the duties imposed in the investigation are regarded as being definitive, and nothing in the challenged provisions states otherwise.

7.284 As far as new shippers are concerned, Mexico is of the view that the challenged provisions do not preclude or expressly prohibit such new shipper reviews. In addition, Mexico considers that there is no obligation under the AD/SCM Agreement that prohibits a Member from not initiating such a procedure while challenge proceedings are under way. According to Mexico there is no obligation to immediately initiate such a procedure once an application has been made, but rather only to carry out such review promptly (in the AD Agreement) or expeditiously (in the SCM Agreement), once initiated. Therefore the provision that no review for new shippers will be initiated until after a legal challenge is over, is not inconsistent with the AD Agreement or the SCM Agreement.

7.285 Finally, Mexico submits that, in any case, by virtue of Article 133 of its Constitution, treaties such as the WTO Agreements are self-executing and automatically applicable in Mexican law, and as Article 2 of the Act makes clear, the Act will be implemented in a manner which is congruent with the provisions of the WTO Agreements. According to Mexico, the Act thus does not mandate any WTO inconsistent action.

(b) Analysis

7.286 The US claim concerns a challenge of Article 366 of the FCCP and Articles 68 and 97 of the Act. Article 366 of the FCCP provide 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.

7.287 We recall that Article 68 of the Act reads in pertinent part:

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the duties on the basis of the fact that such duties were not considered definitive as the duties had been challenged before a bi-national NAFTA panel. Exhibit US-20.

[233] Mexico considers relevant the fact that the evidence introduced by the United States in support of its interpretation of the operation of the challenged provisions (Exhibit US-20) does not even mention Article 366 of the FCCP.

[234] Mexico First Submission, para. 302.

> 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. . . .

7.288 Article 97 of the Act reads:

> Any interested party may, in respect of the resolutions and actions referred to in Article 94, paragraph (V), 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;

7.289 The United States argues that, in case a judicial review of the measure is requested, before a domestic or bi-national body, the challenged provisions require the authority to suspend all administrative, expedited and changed circumstances reviews. In essence Mexico confirms that the provisions operate in this manner, but argues that this does not constitute a violation of any of the provisions alleged to have been violated. Mexico mainly argues that as long as judicial review proceedings are ongoing, the duty has not become "definitive" and hence no reviews have to be undertaken, as such reviews all relate to products subject to "definitive" anti-dumping or countervailing duties. The fact that this is the way the Mexican system works is further evidenced by the letter of the investigating authority to a US exporter of beef which was requesting a review of the anti-dumping duties, in which the authority rejected such request and stated the following:

> "in conformity with Articles 68 of the FTA and 99, 100 and 101 of the Regulation, in order to be able to request a review it is required that the determination subject of the review be definitive, ...
>
> In this particular case, the final determination on bovine meat and edible offals, published in the Official Journal of 28 April 2000, is not of a definitive nature, as will be considered as final only the determination of the Secretaria which results from the decision taken by the mechanisms of alternative dispute resolution, in conformity with Article 97 II of the FTA".[235]

7.290 The question before us is thus whether a Member is permitted to reject request for reviews because of the fact that judicial review proceedings have been initiated and for as long as such proceedings have not been finalized. Article 68 of the Act deals with administrative as well as changed circumstances reviews. The obligations for Members with regard to such reviews are set forth in Articles 9.3 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement.

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

> 9.3 The amount of anti-dumping duty shall not exceed the margin of dumping as established under Article 2.
>
> > 9.3.2 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

[235] We note that this translation is ours. Exhibit US-20.

> subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.

7.292 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.

7.293 Article 21.2 of the SCM Agreement provides that:

> 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.

7.294 In sum, these provisions all require the authorities, in case a product is subject to a duty, to review the amount of and/or need for continued imposition of such duties. Article 9.3.2 of the AD Agreement states that provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping, and that 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. Article 11.2 of the AD Agreement in turn states in equally unequivocal terms that 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. 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.

7.295 We are of the view that a product is subject to a duty as soon as an investigation has been concluded and a final determination has been made deciding to impose anti-dumping or countervailing duties. The term "duty" in the context of Articles 9.3 and 11.2 of the AD Agreement and 21.2 of the SCM Agreement is a clear reference to the duty that Members may impose at the end of an investigation which has led to an affirmative determination of dumping /subsidization, injury and a causal link between the two. Article 9 of the AD Agreement, and Article 19 of the SCM Agreement make a clear distinction between the imposition of the duty on the one hand and collection of the duty on the other. As Article 9.1 of the AD Agreement states, the decision whether to impose anti-dumping duties and the decision whether the amount of the duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. Article 9.2 of the AD Agreement then deals with the next step following imposition of the duty, as it concerns the collection of the duty. Article 9.2 of the AD Agreement provides that when an anti-dumping duty is imposed in respect of any product, such anti-dumping duties shall be collected in the appropriate amounts in each case. Article 9.3 of the AD Agreement then follows up on what Article 9.2 of the AD Agreement had said about collection of the

duty in the appropriate amounts, by stating that the amount of the anti-dumping duty shall not exceed the margin of dumping. Articles 9.3.1 and 9.3.2 then further specify how this requirement is to be met in a retrospective and a prospective system respectively. Such provisions thus deal with collection of the duty. We thus conclude that a product is subject to a duty once the decision under Article 9.1 of the AD Agreement to impose such a duty has been taken. Once this decision has been taken, the duty is necessarily a definitive duty in the sense of the AD Agreement. A similar analysis applies, *mutatis mutandis*, to Article 19 of the SCM Agreement.

7.296 We recall in this respect that the AD and SCM Agreement only provide for three permissible specific actions against dumping or subsidization, price undertakings, provisional measures, which may take the form of a provisional duty and which are taken for a limited period of time following a preliminary affirmative determination, and definitive duties. The duties imposed by an authority following an investigation which resulted in an affirmative final determination are final or definitive anti-dumping or countervailing duties, even if the authorities decides to collect such duties only provisionally, and conditional upon the results of the judicial review proceedings. We therefore do not agree with Mexico that as long as a judicial review is ongoing with regard to the final determination, the duties imposed are not really definitive duties but only guarantees and the product is thus not subject to a duty during this often lengthy judicial review period. It is not because the definitive duties are only provisionally collected that they are no longer definitive duties. [236]

7.297 We find that Articles 9.3.2 and 11.2 of the AD Agreement leave little to be desired for in terms of clarity and require the review of duties and their refund or the application of such duties in an amended amount when requested to do so, and in case certain well-defined conditions are met. In case the conditions are met, the authority is not allowed to reject such requests for reason that the judicial review of the measures in question is still ongoing. We therefore find that Article 68 of the Act in combination with Article 97 of the Act are inconsistent as such with Articles 9.3.2 and 11.2 of the AD Agreement and 21.2 of the SCM Agreement by requiring the authority to reject requests for reviews until after the conclusion of the judicial review proceedings.[237]

7.298 With regard to Article 366 of the FCCP, the provision of the Mexican Federal Code of Civil Procedure also challenged by the United States, we consider that the United States has failed to establish a *prima facie* case concerning the meaning and role of the provision in anti-dumping and countervailing duty investigations. We find that the United States has not sufficiently explained which "proceedings" this provision refers to and failed to provide sufficient arguments concerning the context of this provision the meaning and scope of which is not immediately clear to us. In our view, it does not suffice for a party to discharge itself of the burden of proof by simply stating that a provision of another Member's law has a certain effect without providing the proper context in which to read and understand this provision. While the United States may consider it telling that Mexico has made no effort to explain why Article 366 does not apply, directly or indirectly, to the Act[238], we consider that the United States, as the complaining party, is the first to have failed to provide sufficient evidence of the applicability to and role played by this provision in AD and CVD proceedings and reviews in Mexico.

[236] In fact, no duties would then ever be definitive as Article 9.3 of the AD Agreement provides for refunds in case duties have been paid in excess of the margin of dumping, which implies that the collection of the duty due is not definitive until after such a duty assessment review period. In the case of a retrospective system final liability is only determined through a duty assessment review covering a period following the date of the final determination and the imposition of the duty. Although the final liability remains open during that period of time, the duties are definitive from the date of imposition, and the product is subject to a duty as of the final determination of the authority and its decision to impose duties.

[237] For the reasons set forth in paras. 7.224 and 7.225, we reject Mexico's defence based on the direct effect of international treaties in Mexican law.

[238] US Second Oral Statement, para. 58.

7.299 We note that the United States has also challenged the consistency of these provisions of the Act with the requirement to perform expedited reviews set forth in Article 9.5 of the AD Agreement and 19.3 of the SCM Agreement. In our view, however, the United States has provided insufficient evidence that Article 68 of the Act,[239] or Articles 97 of the Act or 366 of the FCCP deal with such reviews. We therefore find that the United States has failed to establish a *prima facie* case of violation by these challenged provisions of the obligations with regard to expedited reviews set forth in Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 In the light of our findings above concerning the determination of injury by Economía in the investigation on imports of long-grain white rice from the United States, we conclude:

(a) that Mexico acted inconsistently with Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement by choosing to base its injury determination on a period of investigation which ended more than fifteen months before the initiation of the investigation. We apply judicial economy and do not make any findings on the US claim of violation of Article VI:2 of GATT 1994 and Article 1 of the AD Agreement;

(b) that Mexico acted inconsistently with Articles 3.1 and 3.5 of the AD Agreement by limiting its injury analysis to only six months of the years 1997, 1998, and 1999. We apply judicial economy and do not make any findings on the US claims of violation of Articles 1 and 6.2 of the AD Agreement;

(c) that Mexico acted inconsistently with Article 3.1 and 3.2 of the AD Agreement by failing to conduct an objective examination based on positive evidence of the price effects and volume of dumped imports as part of its injury analysis. We apply judicial economy and do not make any findings on the US claims of violation of Article 6.8 and Annex II of the AD Agreement.

8.2 Having reached the conclusions set forth above that the injury determination is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement, we apply judicial economy and do not rule on the US claims that:

(a) 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;

(b) 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;

(c) 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;

(d) 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.

[239] We note that from the discussions concerning other claims in this case, it seems that it is Article 89D of the Act that actually deals with such expedited reviews.

8.3 In the light of the above findings concerning the dumping margin determination by Economía in the investigation on imports of long-grain white rice from the United States, we conclude:

(a) that Mexico acted inconsistently with Article 5.8 of the AD Agreement by not terminating the investigation on two US exporters which the authority found to have exported at undumped prices and by not excluding these two exporters from the application of the definitive anti-dumping measure;

(b) that Mexico acted inconsistently with Article 6.8 and paragraph 7 of Annex II of the AD Agreement in its application of a facts available-based dumping margin to the non-shipping exporter Producers Rice. We apply judicial economy and do not make any findings on the US claims of violation of Articles 6.2, 6.4, and 9.5 of the AD Agreement, and paragraphs 3, 5 and 6 of Annex II;

(c) that Mexico acted inconsistently with Articles 6.1, 6.8, paragraph 1 of Annex II, and Articles 6.10 and 12.1 of the AD Agreement in its application of a facts available-based dumping margin to the US producers and exporters that it did not investigate. We apply judicial economy and do not make any findings on the US claims of violation of Articles 6.6, 9.4, 9.5 and paragraph 7 of Annex II of the AD Agreement.

8.4 Having reached the conclusions set forth above that Economía's dumping margin determination is inconsistent with Articles 5.8, 6.1, 6.8, 6.10 and 12.1 of the AD Agreement, we apply judicial economy and do not rule on the US claims that:

(a) 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 US exporters and producers is inconsistent with Mexico's obligations under Article 12.2 of the AD Agreement;

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

(c) Economía's levying of an anti-dumping duty greater than the margin of dumping is inconsistent with Mexico's obligations under Article VI:2 of GATT 1994.

8.5 In light of our findings above on the US challenges against Mexico's law as such, we conclude:

(a) that Article 53 of Mexico's Foreign Trade Act is inconsistent as such with Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement;

(b) that Article 64 of Mexico's Foreign Trade Act is inconsistent as such with Articles 6.8 and paragraphs 1, 3, 5 and 7 of Annex II of the AD Agreement, and 12.7 of the SCM Agreement. We apply judicial economy and do not make any findings on the US claims of violation of Articles 9.3, 9.4, and 9.5 of the AD Agreement, and Article 19.3 of the SCM Agreement;

(c) that Article 68 of Mexico's Foreign Trade Act is inconsistent as such with Articles 5.8, 9.3, and 11.2 of the AD Agreement and Articles 11.9 and 21.2 of the SCM Agreement;

(d) that Article 89D of Mexico's Foreign Trade Act is inconsistent as such with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement;

(e) that Article 93V of Mexico's Foreign Trade Act is inconsistent as such with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement; and

(f) that Articles 68 and 97 of Mexico's Foreign Trade Act are inconsistent as such with Articles 9.3, and 11.2 of the AD Agreement, and Article 21.2 of the SCM Agreement, but that the United States failed to make a *prima facie* case that Article 366 of the FCCP is inconsistent with Articles 9.3, 9.5 and 11.2 of the AD Agreement and 19.3 and 21.2 of the SCM Agreement, and also that the United States failed to make a *prima facie* case of violation by the challenged provisions of the Act of Articles 9.5 of the AD Agreement and 19.3 of the SCM Agreement.

8.6 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent Mexico has acted inconsistently with the provisions of the AD Agreement and the SCM Agreement, it has nullified or impaired benefits accruing to the United States under those Agreements.

8.7 We therefore recommend that the Dispute Settlement Body request Mexico to bring its measures into conformity with its obligations under the AD Agreement and the SCM Agreement.

ANNEX A

Responses of the United States to Mexico's request for a preliminary ruling

ANNEX A-1

RESPONSES OF THE UNITED STATES

7 May 2004

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I. INTRODUCTION

1. Mexico offers no legitimate basis for its request for a preliminary ruling ("Mexico's Request") that the US panel request in this dispute fails to meet the requirements of Article 6.2 of the *Understanding on the Rules and Procedures Governing the Settlement of Disputes* ("DSU"). To the contrary, as required by Article 6.2, the US panel request properly "identif[ies] the specific measures at issue and provide[s] a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

2. Mexico is seeking to have this Panel read into Article 6.2 a requirement that is not there and that the Appellate Body has specifically rejected: namely, that the United States summarize the specific legal arguments to be presented in the first US submission. The Appellate Body in *EC Bananas*[1] has already rejected the suggestion that a complaining party must summarize its legal arguments in the panel request, and this Panel should do so as well.

3. Mexico is also seeking to have this Panel find that the US panel request does not "identify the specific measure" with respect to one of the measures at issue in this dispute, Article 366 of Mexico's Federal Code of Civil Procedure ("FCCP"). Inasmuch as Article 366 is specifically identified in the panel request, there is no basis for such a finding.

4. Mexico has also failed to provide any legitimate basis for its argument that the US panel request is inconsistent with Articles 4.5 and 4.7 of the DSU, or Articles 17.4 and 17.5 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"). The gist of Mexico's argument is that the US panel request contains legal claims that were not the subject of consultations. Mexico fails to recognize that it is the panel request, and not the consultation request, that establishes the scope for this Panel's work.

II. STATEMENT OF FACTS

5. The United States requested formal dispute settlement consultations with Mexico on the definitive anti-dumping measures on beef and rice, and on various provisions of Mexico's Foreign Trade Act and Article 366 of the FCCP, on 16 June 2003.[2] The United States and Mexico held two days of consultations with respect to the measures in Mexico City, on 31 July and 1 August 2003, but failed to resolve the dispute.

6. Consequently, on 19 September 2003, the United States requested the establishment of a panel, specifically identifying the definitive anti-dumping measure on rice, Articles 53, 64, 68, 89D, 93V, and 97 of the Foreign Trade Act, and Article 366 of the FCCP as the specific measures at issue, and providing a brief summary of the legal basis of the complaint.[3] The Panel was established on 7 November 2003.[4]

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[1] Appellate Body Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, para. 141 ("*EC Bananas AB*").

[2] *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Request for Consultations by the United States*, WT/DS295/1, G/L/631, G/ADP/D50/1, G/SCM/D54/1, circulated 23 June 2003 ("US Consultation Request").

[3] *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Request for the Establishment of a Panel by the United States*, WT/DS295/2, circulated 22 September 2003 ("US Panel Request").

[4] *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Constitution of the Panel Established at the Request of the United States, Note by the Secretariat*, WT/DS295/3 (19 February 2004).

III. THE REQUIREMENTS OF DSU ARTICLE 6.2

7. Article 6.2 of the DSU requires, in relevant part, that a request for the establishment of a panel "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

8. Mexico's Request contains a number of quotations from Appellate Body reports that explain this provision and emphasize its role and importance in dispute settlement. It has entirely missed, however, one aspect of these reports that is critical to the issue now before this Panel: **the key distinction between *claims* – which must be included in the panel request – and the *arguments* in support of those claims – which need not be included. As the Appellate Body explained in *EC Bananas*:**

> **In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.[5]**

9. Furthermore, the Appellate Body in *EC Bananas* made clear that a panel request may in some cases adequately state a claim if the request simply cites the pertinent provision of the WTO agreement:

> We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements.[6]

10. Mexico also fails to note that – according to the Appellate Body – even in cases where simply citing the pertinent provisions would *not* satisfy the requirements of Article 6.2, the Panel is not automatically deprived of jurisdiction over the matter. Rather, the Appellate Body has found that a panel must examine, based on the "particular circumstances of the case", whether the defect has prejudiced the ability of the responding party to defend itself given the actual course of the panel proceedings. As the Appellate Body explained in *Korea Dairy*:

> In assessing whether the European Communities' request met the requirements of Article 6.2 of the DSU, we consider that, in view of the particular circumstances of this case and in line with the letter and spirit of Article 6.2, the European Communities' request should have been more detailed. However, Korea failed to demonstrate to us that the mere listing of the articles asserted to have been violated has prejudiced its ability to defend itself in the course of the Panel proceedings. Korea did assert that it had sustained prejudice, but offered no supporting particulars in its appellant's submission nor at the oral hearing. We, therefore, deny Korea's appeal relating to the consistency of the European Communities' request for the establishment of a panel with Article 6.2 of the DSU.[7]

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[5] *EC Bananas AB*, para. 141.

[6] *Id.* (emphasis added).

[7] *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, para 131 ("*Korea Dairy*") (emphasis added). The Appellate Body concluded in

11. Therefore, in evaluating claims that a panel request fails to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, as required by DSU Article 6.2, the Panel may consider the particular circumstances of the dispute, including whether the responding party has been prejudiced.

12. Mexico asserts that the US panel request (1) does not provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly; and (2) does not identify the "specific measure at issue" with respect to Article 366 of the FCCP, and that Mexico has thereby been prejudiced. As detailed in the sections that follow, Mexico's objections are wrong on both counts.

IV. CONTRARY TO MEXICO'S ALLEGATIONS, THE US PANEL REQUEST PROVIDES A BRIEF SUMMARY OF THE LEGAL BASIS OF THE COMPLAINT SUFFICIENT TO PRESENT THE PROBLEM CLEARLY

13. The first of Mexico's complaints about the US panel request is that the request is too vague, and that it allegedly does not provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, as Article 6.2 requires. Mexico's complaint is groundless.

14. It is important to note at the outset that Mexico only challenges the sufficiency of the US panel request with respect to a few of the US claims.[8] Accordingly, the United States is proceeding under the assumption that Mexico considers the other claims that it did not challenge in its preliminary ruling request as being sufficient for purposes of Article 6.2.[9]

15. With respect to the claims that Mexico does challenge, the US panel request does provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, as required by Article 6.2. It both lists the specific provisions of the AD Agreement and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") alleged to be violated, and provides, in addition, a brief textual explanation of the basis of the complaint.

16. Turning first to subsections 1(f) and (g) of the US panel request, the United States lists 15 specific provisions of the AD Agreement (including five specific paragraphs of Annex II of the AD Agreement). Mexico has failed to provide any reason as to why citing these specific provisions was insufficient under DSU Article 6.2. For example, Mexico has made no effort to explain why it was unclear from the US citation of Article 6.8 and Annex II (the "facts available" provisions) of the AD Agreement that the United States was challenging Mexico's use of the facts available in assigning anti-dumping margins to Producers Rice (in subsection 1(f)) and all of the rest of the exporters and producers in the United States that Mexico did not individually examine (in subsection 1(g)).

17. On the contrary, Mexico *concedes* that the US request in fact asserts that Mexico's application of the facts available to those entities breached the listed provisions. What it objects to is that it believes the United States has not adequately explained <u>how</u> Mexico's application of the facts available breached each of the provisions (in other words, the United States did not in its panel request provide arguments to support its claims).[10] As noted above, previous panels and the Appellate Body have been very careful to distinguish between the claims that must be made in a panel request under Article 6.2 – *i.e.*, the brief summary of the legal *basis* for the complaint sufficient to present the

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Korea Dairy that simply listing the articles of the agreement involved may not be sufficient if, for example, the articles listed established multiple obligations. *Id*., para. 124.

[8] Specifically, Mexico questions the listing of Article VI of GATT 1994 and Article 4.1 of the AD Agreement in subsection 1(a) of the panel request, and it questions the articles listed in subsections 1(f) and (g) of the panel request. *See* Mexico's Request, paras. 14-19.

[9] Specifically, Mexico does not question five of the seven articles listed in subsection 1(a), any of the articles listed in subsections 1(b)-(e), (h), or (i), or any portion of subsections 2 or 3.

[10] *Id*., paras. 17-18.

problem clearly – and the *arguments* supporting those claims. The claims must be set forth in the panel request. The arguments need not be.[11]

18. Mexico's challenge to the US claim that the injury and causation analyses breached Article 4.1 of the AD Agreement suffers from a similar flaw.[12] Mexico does not argue that the claim should have been more specific; the request cites clearly to the first paragraph of Article 4. Mexico even concedes that the United States included a narrative description that provided further information with respect to the claim. It objects, however, that it is unable to understand which of the statements in the narrative description results in a breach of Article 4.1. Thus, its concern is with the US *arguments*, and not with the specificity of the claim itself.

19. Turning next to Mexico's objection to the US claim under Article VI of GATT 1994, it is true that Article VI has several paragraphs.[13] However, Mexico cannot argue that it was unable to understand which paragraphs were relevant to the matters in dispute. In the US panel request, the Article VI claim is accompanied by a lengthy narrative description that provides more than sufficient detail about the nature of the US claims and demonstrates that the majority of Article VI is simply not relevant. The plain facts underlie this conclusion. For example, the narrative description does not address the imposition of countervailing duties (which is the topic of paragraphs 3 and 5 of Article VI), because there is no Mexican countervailing duty measure on US rice. Similarly, the description does not mention either of the scenarios that are the subject of paragraphs 4 or 7 of Article VI, because the anti-dumping measure does not involve either issue. Rather, the narrative focuses on issues that are addressed by the only paragraphs of Article VI that are relevant to this dispute: paragraphs 2 and 6(a). As such, through the narrative description in the US panel request, the United States provided Mexico a brief summary of the legal basis of the complaint with respect to Article VI that is sufficient to present the problem clearly.

20. Furthermore, it is worth noting that in Mexico's panel request in *United States – Anti-Dumping Measures On Oil Country Tubular Goods From Mexico*, Mexico includes a claim under Article VI of GATT 1994, but fails to specify which paragraphs of Article VI are relevant.[14] Thus, it is apparent that Mexico itself believes a citation to Article VI as a whole is not inconsistent with Article 6.2 of the DSU.

21. In sum, Mexico has not presented any reasons why subsections 1(a), (f), and (g) of the US panel request should be found inconsistent with the requirements of Article 6.2 of the DSU.

V. THE US PANEL REQUEST DOES NOT PREJUDICE THE ABILITY OF MEXICO TO DEFEND ITSELF

22. Even if Mexico had succeeded in demonstrating that the US panel request does not meet the requirements of DSU Article 6.2, which it has not, Mexico has offered nothing to suggest that it has been prejudiced.

23. In *Korea Dairy*, the Appellate Body denied Korea's claim that the panel request had failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly,

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[11] *See, e.g.*, *EC Bananas AB*, para. 141; Appellate Body Report on *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, at para. 88, n.36 (noting that there is a "significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference . . . and the *arguments* supporting those claims," and that the arguments are clarified in the first written submission and in subsequent documents.) While Mexico cited paragraph 88 of the *Thai Steel AB* report, it omitted reference to footnote 36, which is appended to that paragraph. *See* Mexico's Request, para. 11.

[12] *Id*., paras. 15-16.

[13] Mexico's Request, para. 14.

[14] *See United States – Anti-Dumping Measures On Oil Country Tubular Goods From Mexico, Request for the Establishment of a Panel by Mexico*, WT/DS282/2, circulated 29 July 2003.

for the following reason: although Korea had asserted prejudice, it offered no supporting particulars and failed to demonstrate that the panel request had prejudiced its ability to defend itself during the panel proceedings.[15] Mexico categorically asserts that it is prejudiced by the US panel request, but only in the vaguest and most conclusory manner.

24. Mexico's only explanation of how it has been prejudiced is its assertion that the alleged deficiencies in the panel request are impeding its ability to prepare a defence.[16] It has failed completely, however, to provide any supporting particulars as to why this is so. Moreover, its assertion is contradicted by the facts, since Mexico's first written submission contains a lengthy response to each of the challenged US claims.[17]

25. In light of the Appellate Body's reasoning in *Korea Dairy*, Mexico's mere assertion of prejudice is plainly insufficient to establish prejudice. As was the case for Korea in that dispute, Mexico has "offered no supporting particulars" and has "failed to demonstrate" that its ability to defend itself in the panel proceedings has been prejudiced.

VI. MEXICO'S ASSERTION THAT THE US PANEL REQUEST DOES NOT IDENTIFY ARTICLE 366 OF THE FEDERAL CODE OF CIVIL PROCEDURE AS A "SPECIFIC MEASURE AT ISSUE" IS INCORRECT

26. Mexico's second objection to the US panel request under Article 6.2 of the DSU is that the request allegedly failed to identify Article 366 of the FCCP as a "specific measure at issue". Mexico first made this assertion at the DSB meeting where the United States first requested the formation of a panel in this dispute. As the United States explained at that time, and as it further explained at the DSB meeting that established the panel, Mexico's assertion is groundless.

27. Section 3 of the US panel request states the following:

> Mexican officials have asserted that **Article 366 of Mexico's Federal Code of Civil Procedure and Articles 68 and 97 of the Foreign Trade Act** prevent Mexico from conducting reviews of anti-dumping or countervailing duty orders while a judicial review of the order is ongoing, including a "binational panel" review pursuant to Chapter Nineteen of the *North American Free Trade Agreement*. These provisions appear to be inconsistent with Articles 9.3, 9.5, and 11.2 of the AD Agreement, and Articles 19.3 and 21.2 of the SCM Agreement.[18]

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[15] *Korea – Dairy*, para 131.

[16] Mexico's Request, para. 38. Mexico's only other assertion of prejudice relates to the date on which it received an English-language translation of the US first written submission. Mexico's Request, para. 5. It is not clear to the United States how the date that Mexico received the first written submission is relevant to determining whether Mexico was prejudiced by the panel request. The United States notes, however, that Mexico received five weeks to prepare its first written submission – which is two weeks longer than the maximum period proposed in Appendix 3 of the DSU. In addition, if any Party has been prejudiced by the "translation" issue, it is the United States, which has had to prepare and file this response to Mexico's Request before receiving the English-language translation. Although we have done our best to respond to Mexico's complaints in a comprehensive manner, we may need to supplement our response after we receive the English translation.

[17] In *United States – Lamb Meat*, the Panel found that the United States had not provided adequate "supporting particulars" in support of its claim of prejudice. It based its finding in part on the fact that the US first written submission contained a detailed rebuttal to the challenged claims. *See* Panel Report on *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, adopted 16 May 2001, para. 5.51.

[18] US Panel Request, Section (3).

28. Mexico focuses solely on the first sentence, which refers to the assertions made by the Mexican officials. It ignores completely, however, the second sentence, which plainly states that it is the "provisions" themselves – including Article 366 of the FCCP – that the United States is challenging, and not the assertions of the Mexican officials. While it is barely credible that Mexico would take from the first sentence the understanding that the United States was challenging assertions rather than the provision, when the paragraph is viewed in its entirety, it is plain that Mexico's claims are groundless.[19]

29. Furthermore, the US representative specifically addressed this issue at the DSB meeting that established this Panel, after Mexico claimed not to understand which measure the United States was challenging:

> The United States wished to address briefly two erroneous statements that Mexico had made during [the first DSB meeting that considered the US panel request]. First, Mexico had mistakenly asserted that the United States had abandoned its claim addressing Article 366 of Mexico's Federal Code of Civil Procedure. In actuality, this claim appeared in section 3 of the panel request. Second, Mexico had asserted that the United States was claiming that certain statements of Mexican officials were "measures". As the request itself made clear, the United States was making no such claim. Rather, it had cited statements of Mexican officials with respect to certain provisions that *are* measures – namely, Article 366 of the Federal Code of Civil Procedure, and Articles 68 and 97 of the Foreign Trade Act.[20]

30. Accordingly, there is no doubt that Article 366 is a "specific measure at issue". Moreover, there is no need for the Panel to address Mexico's arguments that statements of Mexican officials cannot be considered "measures".[21] The United States has made no arguments to the contrary. It is Article 366 – and not statements about Article 366 – that is the measure at issue.

31. For the foregoing reasons, there are no grounds for Mexico's assertion that the United States failed to identify Article 366 of the FCCP as a "specific measure at issue" in this dispute, and therefore no grounds to conclude that the US panel request does not meet the requirements of DSU Article 6.2 with respect to this measure.

VII. MEXICO'S CHALLENGES TO THE ADEQUACY OF CONSULTATIONS LACK MERIT

32. Mexico's final challenge to the US panel request pertains to the adequacy of the consultations with respect to the claims at issue. Mexico argues that a Member cannot include a legal claim in a panel request unless that claim was discussed during consultations.[22] It also complains about the

[19] The notion that the United States would be challenging the statements of the Mexican officials about Article 366, rather than Article 366 itself, is even more difficult to credit given discussions on this topic at consultations. The United States provided Mexico with a list of questions during consultations that specifically addressed Article 366. As an introduction to the questions, the United States noted, as it did in the US panel request, that Mexican officials had claimed in meetings with US officials that Article 366 of the FCCP precluded Mexico from conducting reviews while judicial review proceedings were ongoing. The seven questions that followed, however, were addressed to Article 366 itself, and not to the assertions of the Mexican officials. Thus, it was abundantly clear to Mexico that the measure in question was Article 366, and not the statements by the Mexican officials *about* Article 366.

[20] *Minutes of Meeting, Held in the Centre William Rappard on 2 October 2003*, WT/DSB/M/156, 10 November 2003, para. 45.

[21] Mexico's Request, paras. 22-26.

[22] Mexico's Request, paras. 33-34.

adequacy of the consultations with respect to Mexico's evaluation of the injury factors in the rice investigation.[23] Neither objection has merit.

33. First, there is no basis for Mexico's contention that a Member cannot include a claim in its panel request unless the claim was discussed during consultations. A consultation request must provide an "identification of the measures at issue and an indication of the legal basis for the complaint".[24] However, nothing in the DSU requires that a Member must have ascertained all of the possible legal claims and relevant provisions of the WTO agreements before the Member can even request consultations. One of the purposes of consultations is to foster a better understanding of the relevant measures and concerns of the various Members in order to promote a satisfactory adjustment of the matter. Consultations are often the first time that the Member maintaining the measure provides a detailed description of the measure and relevant facts and legal documents. Consultations are not a "dress rehearsal" or "moot court" for the panel process requiring Members to have worked out all of their claims and positions in advance and presenting them in the consultations for the other side to practice its prepared responses.

34. The DSU reflects the difference between requests for panels and requests for consultations by using different terms for each. With respect to panels, the DSU requires that a request for the establishment of a panel provide a "brief summary of the legal basis of the complaint sufficient to present the problem clearly".[25] However, with respect to consultations, the DSU merely requires that requests for consultations give "an indication" of the legal basis for the complaint.[26] Moreover, previous panels have rejected the approach that Mexico is urging here – for example, the panel in *Japan – Agricultural Products* rejected Japan's argument that the US panel request could not include a claim under Article 7 of the *Agreement on the Application of Sanitary and Phytosanitary Measures* if the claim was not included in the consultation request and no consultations were held on it.[27]

35. Second, Mexico's complaint about the alleged inadequacy of the consultations with respect to Mexico's evaluation of the injury factors is equally without merit. Contrary to Mexico's assertion, the consultations did address Mexico's evaluation of the injury factors in the rice investigation. More fundamentally, precisely to avoid litigation over what the parties did or did not say during consultations, the DSU only requires that the consultation request identify the measure that is the subject of the consultations; there is no requirement as to the adequacy of the consultations themselves. As the panel noted in *Korea – Taxes on Alcoholic Beverages*:

> The only requirement under the DSU is that consultations were in fact held, or were at least requested, and that a period of sixty days has elapsed from the time consultations were requested to the time a request for a panel was made. What takes place in those consultations is not the concern of a panel.[28]

36. In addition, the panel in *Bananas III* specifically rejected the contention that consultations must lead to an adequate explanation of the complainants' case:

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[23] *Id.*, para. 35.
[24] DSU Art. 4.4.
[25] *Id.*, Art. 6.2.
[26] *Id.*, Art. 4.4.
[27] Panel Report on *Japan – Measures Affecting Agricultural Products*, WT/DS76/R, adopted 19 March 1999, para. 8.4(i).
[28] Panel Report on *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, adopted 17 February 1999, para. 10.19 (*citing* Panel Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by the United States*, WT/DS27/R/USA, adopted 25 September 1997, para. 7.19 ("*Bananas III*")).

> As to the EC argument that consultations must lead to an adequate explanation of the Complainants' case, we cannot agree. Consultations are the first step in the dispute settlement process. While one function of the consultations may be to clarify what the case is about, there is nothing in the DSU that provides that a complainant cannot request a panel unless its case is adequately explained in the consultations. The fulfilment of such a requirement would be difficult, if not impossible, for a complainant to demonstrate if a respondent chose to claim a lack of understanding of the case, a result which would undermine the automatic nature of panel establishment under the DSU. The only prerequisite for requesting a panel is that the consultations have "fail[ed] to settle a dispute within 60 days of receipt of the request for consultations ...". Ultimately, the function of providing notice to a respondent of a complainant's claims and arguments is served by the request for establishment of a panel and by the complainant's submissions to that panel.[29]

37. In the present case, the United States and Mexico spent two full days in Mexico City consulting at length on each of the specific measures at issue in this dispute. In addition, more than sixty days elapsed from the time the United States requested consultations to the time the request for the panel was made.[30] Therefore, there is no basis for Mexico's assertion that the United States has acted inconsistently with Articles 4.5 and 4.7 of the DSU with respect to consultations over the disputed measures.

38. Finally, Mexico also claims that the US panel request is inconsistent with Articles 17.4 and 17.5 of the AD Agreement. Neither claim has merit. First, to the extent that Article 17.4 creates any obligation with respect to consultations, it is that the requesting Member "consider" that the consultations have failed to achieve a mutually agreed solution. The United States so considered in this dispute. In the view of the United States, the consultations in this case have, in fact, failed to achieve a mutually satisfactory solution. Therefore, Mexico's Article 17.4 claim is groundless.

39. Second, Mexico's claim under Article 17.5 of the AD Agreement must fail because Article 17.5 imposes no obligation on the complaining party; rather, it establishes that the DSB shall, upon the request of the complaining party, establish a panel to examine the matter based on the panel request and the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

VIII. CONCLUSION

40. For the reasons stated above, Mexico's arguments in support of its request for a preliminary ruling that the US panel request does not meet the requirements of Articles 4.5, 4.7, and 6.2 of the DSU or Articles 17.4 or 17.5 of the AD Agreement are without merit. Accordingly, the Panel should reject that request.

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[29] *Bananas III*, para. 7.20 (footnote omitted).

[30] *Compare* US Consultation Request (demonstrating that the United States requested consultations on 16 June 2003) *to* US Panel Request (demonstrating that the United States requested the Panel on 19 September 2003).

ANNEX B

Parties' and Third Parties' Responses to questions
posed in the context of the first substantive meeting of the Panel

ANNEX B-1

RESPONSES OF THE UNITED STATES

Questions concerning the period of investigation

1. The United States points (for example, in paragraph 57 of its first submission) to the use of the present tense in various provisions of the Anti-Dumping Agreement (the "AD Agreement") to support its claim that the POI must be as close to the date of initiation as practicable.

(a) Could the US elaborate on this view in light of the fact that it is inevitable that an investigation has to consider events that happened in the past. Does the US argue that there is any specific length of time beyond which the POI becomes inconsistent with the AD Agreement?

(b) For example, in view of the US, would a POI that ended 12 months prior to the initiation be inconsistent with the AD Agreement?

Answer:

1. The United States agrees that an investigation of dumping and injury must necessarily consider events that happened in the past. For this reason, we are not arguing that there is a specific length of time beyond which the POI becomes *per se* inconsistent with the AD Agreement. However, the purpose of an anti-dumping investigation is to determine whether a domestic industry is presently injured (or threatened with injury) by dumping that is presently occurring.[1] Therefore, an investigating authority must seek to base its determinations of dumping and injury on the most recent available information. If an investigating authority chooses instead to base its analyses on information that is not the most recent available information, it must be able to justify its approach and explain why, despite its approach, its determinations are objective, unbiased, and based on positive evidence.

2. In the rice investigation, Economía provided no explanation for its decision to base its determinations on stale data, other than that the POI it selected was the one the petitioner asked for. For example, Economía provided no explanation of its decision to base its dumping analysis on data for March to August 1999, when it did not even initiate its investigation until December 2000.

3. Similarly, Economía provided no explanation for its decision to base its injury determination on data that was already fifteen months to three years old on the date of initiation, in lieu of collecting the most recent injury information that was available at that time. Economía also provided no explanation for its failure to update its injury data during the course of its investigation, with the consequence that the data was three to five years old at the time of the final determination. Economía also failed to explain how its injury analysis had any relevance to the situation of the domestic industry at the time of the final determination (or even at the time of initiation), given that the import volumes, price effects, and economic factors that it analyzed were for a period of time that was well before the initiation of the investigation, and years before the final injury determination.

4. The necessity for an investigating authority to consider events that happened in the past does not give an authority free rein to choose which part of the past to consider. Rather, the authority must

[1] As the Panel notes, the United States pointed to numerous provisions in the AD Agreement supporting this conclusion in its first written submission. *See* US First Written Submission, para. 57.

evaluate the most recent information that is available.[2] Economía made no effort to collect information for September 1999 to December 2000, and it made no effort to update its data thereafter. As a consequence of its failure to collect recent information, Economía had no idea whether dumped imports were causing injury to the domestic industry as of the date that it initiated its investigation, much less on the date that it published its final determination.

2. Mexico argues that "there is no provision in the AD Agreement which indicates how remote an anti-dumping period of analysis must be" (para 49 of its first submission).

(a) In Mexico's view, is there no limit in the AD Agreement on how "old" the data can be on which the dumping and injury analysis may be based ? If Mexico is of the view that there are certain limits, please explain what, in Mexico's views, are the criteria for determining whether a POI is consistent with the AD Agreement or not?

(b) What is the Mexican practice in respect of the POI?

Answer:

5. In evaluating Mexico's response to this question, the Panel may wish to consider the following information relating to the anti-dumping investigations that **Economía** initiated on US products in 2003-2004:[3]

Investigation	Initiation Date	Length of POI	Gap Between End of POI and Initiation Date
Epoxidized Soybean Oil	17 May 2004	10 months (January to October 2003)	6.5 months
Crystal Polystyerene	13 January 2004	12 months (July 2002 to June 2003)	6.5 months
Newsprint	25 November 2003	12 months (January to December 2002)	11 months
Carbon Steel Line Pipe	29 August 2003	12 months (January to December 2001)	20 months
Hydrogen Peroxide	17 July 2003	12 months (January to December 2002)	6.5 months
Triple-Pressed Stearic Acid	11 June 2003	12 months (August 2001 to July 2002)	10 months
Fatty Acid	6 June 2003	19 months (January 2001 to July 2002)	10 months
Certain Pork Products	7 January 2003	6 months (April to September 2002)	3 months

6. The POIs that **Economía** established in these investigations suggests that it has no consistent approach with respect to the length of the POI it uses, other than that it uses the POI that the petitioners suggest in their petitions (even when, as in the rice investigation, the exporters object). It also suggests that Mexico often bases its determinations on stale data. Evidence of **Economía's willingness to allow the petitioner** to craft the POI can be seen in particular in the investigations of

[2] *Compare* Appellate Body Report, *European Communities Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/R, adopted 24 April 2003, para. 113 ("*EC – Bed Linen 21.5 AB*") (stating that the absence of a specified methodology for calculating the volume of the "dumped imports" does not give an investigating authority unfettered discretion to "pick and choose whatever methodology they see fit . . . ". Rather, the methodology must ensure that the determination is made on the basis of "positive evidence" and involves an "objective examination".).

[3] The United States is attaching the relevant pages of each of the initiation notices as Exhibit US-21. The notices are in Spanish, as the United States does not have English-language translations.

Triple-Pressed Stearic Acid and *Fatty Acid*. Although the two investigations were filed by the same Mexican producer (Quimic S.A. de C.V.) on the same day, and initiated within a few days of each other, the POIs in the two investigations differ substantially.

(c) Are there particular reasons why more recent data were not used in this case? Is Mexico of the view that the POI used in this case was the one closest to the initiation as far as "practicability" is concerned? If so, please elaborate.

Answer:

7. The only rationale that Economía provided in its published determinations for its decision to use stale data in conducting its analyses of dumping and injury was that the petitioner requested the March to August 1999 time period, and that imports were concentrated during that period.[4] Economía's decision to conduct its investigation in accordance with the petitioner's wishes, over the objections of the foreign exporters[5], belies any suggestion that Economía's choice of POI was objective or unbiased.

8. Furthermore, it is not factually accurate that the POI that Economía used in its investigation was the closest practicable to the date of initiation. By December 2000, dumping and injury data would have been available for all of 1999 and most of 2000. By the time of the final determination, injury data would have existed for all of 2000 and 2001 and possibly for 2002 as well.

3. Could Mexico explain the reason why it considered that the March - August 6 month period was appropriate for the injury analysis, including whether "seasonality" was one of the reasons.

Answer:

9. As the Panel will recall, Mexico clarified during the first panel meeting that "seasonality" was not a reason for its decision to limit its analysis to the March to August period. Furthermore, although Mexico argued in paragraph 55 of its first written submission that its choice of POI was designed in part to eliminate distortions in production levels, it argued in paragraph 60 of that same submission that production levels were constant throughout the year. Mexico's shifting rationales further confirm that Economía's choice of POI in this investigation was neither objective nor unbiased.

4. Could Mexico clarify whether the Panel is correct to understand that the investigating authority had the data necessary to perform an injury analysis for the full three year period, but chose not to use this data as it considered that the period should correspond to the period on which the analysis for dumping was made? Please elaborate.

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[4] In particular, in paragraph 111 of the Notice of Initiation, Economía stated that, according to the petitioners:

> [T]he main importing activity of the finished product [milled rice] takes place in the period that goes from March thorough August in which there are no harvests of paddy rice and that for this reason such period adequately reflects importing activities.
>
> Rice Initiation Notice, Exhibits US-1&2, para. 111. Economía repeated this statement in paragraph 64 of the Preliminary Determination and reached the conclusion that, according to the information provided by the petitioners:
>
> [I]mports tend to concentrate in the period from March through August of each year, which corresponds to the period of investigation proposed by the petitioners.
>
> Exhibits US-14&15, para. 65.

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

Answer:

10. The United States understands that Economía did in fact collect data for each month between March 1997 and August 1999, even though it only examined the data for the March to August time periods. However, Economía did not attempt to collect any data for the time period between September 1999 and December 2000, and it did not attempt to collect any additional injury data after it initiated the investigation.

5. Could Mexico explain why it considered that this particular 6 month period was adequate in terms of a dumping analysis. Was the fact that that was the period which the petitioners cited the sole reason?

Answer:

11. The United States has been able to find only two places in **Economía's** published determinations where it addresses its use of a six month period for the dumping analysis (other than the discussion of the concentration of imports in the March to August time period). First, **Economía** stated at paragraph 2 of its initiation notice that "the petitioner stated that during the period that includes March through August 1999 imports of long-grain milled rice, originating from the United States, were made at discriminatory prices, which caused injury to the domestic industry producing like goods". Second, Economía stated in paragraph 150 of the initiation notice that it had resolved to accept the petition and initiate an anti-dumping investigation on long-grain milled rice imports from the United States, "setting as the period of investigation the period encompassed from 1 March through 31 August 1999".

6. Is the United States of the view that an investigating authority is always precluded from choosing a POI for the injury analysis other than a full-year (12 months) period? If not, please explain specifically why the case at issue is not permissible.

Answer:

12. In the rice investigation, Economía's focus on the March-August time period was neither objective nor unbiased because at least half of domestic production occurred during the September-February time frame, and yet Economía focused on the March to August period because the petitioner argued that imports were concentrated in that period.

13. The problems arising from an examination of only partial year data are particularly acute when the domestic industry has production during all 12 months of a year. In order to comply with the requirements of Articles 3.1, 3.4, and 4.1 of the AD Agreement, the investigating authority must examine the impact of the dumped imports on the domestic producers as a whole. Therefore, the POI for injury should include all months of the year in which there is domestic production (assuming the data is reasonably available).

14. If the product under investigation is truly "seasonal" in character, an investigating authority might be justified in focusing its analysis on certain seasonal segments, provided that it does not fail to consider the other segments in the year. During the first panel meeting, however, Mexico denied that the production of long-grain milled white rice is seasonal, or that seasonality is relevant to this dispute.

7. The petitioners appear to have suggested this particular POI (March- August 6 month period), for reasons relating to the alleged seasonal character of the product, and as this period was representative of the increased import penetration. Precisely that, it seems, is the reason why the US objects to this period of investigation as it represents only that part of the year during which imports are at a high. In the US view, what are the facts on the record which

demonstrate that imports of the subject product were concentrated in the March - August period, other than the petitioner's statement referred to in para. 65 of the preliminary determination? What other basis, if any, does the US have for its view that imports were at a high during this period?

Answer:

15. To be clear, the United States does not contest **Economía's** findings that imports were concentrated in the March to August time period. At least five paragraphs in **Economía's** published determinations, in addition to paragraph 65 of the preliminary determination, indicate that imports were in fact concentrated in this way:

- Paragraph 112 of the initiation notice states that "the petitioner indicated that major import activity in the finished product occurs in the period from March to August when there are no harvests of paddy rice and thus the period adequately reflects import activity."

- Paragraph 113 of the same notice states that "[f]or its part, the Secretariat noted that according to the information provided by the petitioner, the production of paddy rice is concentrated in early October and early February of each year and that imports tend to be concentrated in the period between March and August of each year, which corresponds to the period proposed for investigation by the petitioner."

- Paragraph 43(D) of the preliminary determination cites the petitioner's argument that "the main importing activity of white rice is carried out in the period in which there are not crops of "paddy" rice, therefore the period from March to August of each year reflects such activity . . . ."

- Paragraph 64 of the preliminary determination repeats the discussion contained in paragraph 112 of the initiation notice.

- Paragraph 67 of the preliminary determination cites the petitioner's argument that "the chosen period is the one in which the paddy rice harvests are not performed and therefore it is the one that reflects the import activity."

16. In any event, the United States is objecting *per se* to **Economía's** decision to limit its injury analysis to only half of the POI, and not only to the fact that **Economía** limited its analysis to the period when imports were concentrated. Mexico has conceded that seasonality was not relevant in this investigation, and it is indisputable that **Economía** failed to examine at least half of the domestic industry's production over the course of the entire POI. Thus, **Economía's** injury analysis would have been inconsistent with WTO rules even if imports had not been concentrated in the March to August time period.

17. First, Article 3.2 of the AD Agreement requires an investigating authority to consider whether there has been a significant increase in dumped imports or significant price effects. Nothing in Article 3.2 suggests that it is permissible for an investigating authority to conduct this analysis by considering evidence for only half of the three-year POI.

18. Second, Article 3.4 of the AD Agreement requires an investigating authority to evaluate all relevant economic factors and indices having a bearing on the state of the industry, and Article 3.5 of the AD Agreement requires an investigating authority to examine all relevant evidence before it. Neither provision permits an investigating authority to establish a three-year POI and then ignore the evidence for half of that period.

19. Third, Article 4.1 of the AD Agreement normally requires an investigating authority to examine the domestic producers "as a whole", or those producers whose collective output constitutes a "major proportion of total domestic production." In the rice investigation, domestic production of milled long-grain white rice spanned the entire year, yet **Economía** only examined the production for half of that period. If a Member only examines the evidence for half of the POI, there is no way to be certain that it is, in fact, meeting its obligations under Article 4.1.

20. Finally, Article 3.1 of the AD Agreement requires a determination of injury to be based on "positive evidence" and involve an "objective examination" of volume, price effects, and the impact of the dumped imports on the domestic producers of the like product. If an investigating authority only considers the evidence for half of the POI, there is simply no way for the authority to determine the true state of the domestic industry over the course of the entire POI, and thus no way to conclude that the authority's examination is consistent with Article 3.1.

Questions concerning the injury analysis

8. What, according to the parties, is the definition of the domestic industry allegedly injured by the dumped imports? Does the domestic industry considered in the injury analysis include producers of paddy rice or only of milled rice?

Answer:

21. The product under investigation was defined as long-grain milled rice. Therefore, the domestic industry should have been comprised of the "domestic producers as a whole" of long-grain milled rice (that is, the Mexican millers of paddy rice) or the domestic producers whose collective output of long-grain milled rice constituted a major proportion of the total domestic production of that product.[6]

22. In actuality, however, **Economía** failed to examine a consistent set of producers of long-grain milled rice when it conducted its injury analysis. To the contrary, **Economía** repeatedly shifted its analysis from one subset of producers to another, as it examined various factors. For example:

- **Economía** based its analysis of the effect of the imports on domestic prices on seven producers' data: IPACPA, Schettino, GEVSA, Mexicana de Arroz, Arrocera de Occidente, Arrocera del Bajio, and Covadonga.[7]

- **Economía** based its analysis of production volumes on eight producers' data: IPACPA, Schettino, GEVSA, Mexicana de Arroz, Arrocera de Occidente, Arrocera del Bajio, Industrias COREREPE, and Molino La Chontalpa.[8]

- **Economía** based its analysis of sales on eleven producers' data: IPACPA, Schettino, GEVSA, Mexicana de Arroz, Arrocera de Occidente, Arrocera del Bajio, Industrias COREREPE, Molino La Chontalpa, Champoton, Molino Trapiche de Labra, and Covadonga.[9]
- **Economía** based its analysis of inventories on six producers' data: IPACPA, Schettino, GEVSA, Mexicana de Arroz, Arrocera del Bajio, and Champoton.[10]

- **Economía** based its analysis of capacity utilization on three to five producers' data: IPACPA, Schettino, GEVSA, Champoton, and Industrias COREREPE.[11]

[6] AD Agreement, Art. 4.1.
[7] Final Determination, para. 278 (Exhibits US-6&7).
[8] *Id.*, para. 303.
[9] *Id.*, paras. 305, 307.
[10] *Id.*, para. 317.

- **Economía** based its analysis of employment on seven producers' data (but not the same seven used for the analysis of prices): IPACPA, Schettino, GEVSA, Mexicana de Arroz, Arrocera del Bajio, Champoton, and Covadonga.[12]

- **Economía** based its analysis of wages on three producers' data: IPACPA, Schettino, and GEVSA.[13]

- **Economía** based its analysis of financial performance (in terms of profitability, return on investment, cash flow, and capacity to raise capital) on seven producers' data: IPACPA, Schettino, GEVSA, Mexicana de Arroz, Arrocera de Occidente, Arrocera del Bajio, and Covadonga.[14]

23. Thus, **Economía's** injury analysis did not constitute an "objective examination" of the domestic industry as defined in Article 4.1 of the AD Agreement, and its conclusions were not supported by the positive evidence that Article 3.1 requires.

9. Could Mexico clarify whether the import data also include data relating to imports of paddy rice or is the "rice" referred to in the Final Determination always "milled" rice? Are the terms "rice", "white rice" and "long grain white rice" as they appear throughout the Final Determination used as synonyms?

Answer:

24. Depending upon the issues involved, the public notices of the investigation make reference to imports of paddy rice, imports of milled rice, and imports of long-grain milled rice (the product under investigation). Even references to imports of "long grain white rice" should more properly refer to "imports deemed to be long grain white rice", however, given the absence of record data distinguishing between subject and non-subject merchandise. The United States discusses this point further in response to question 10 below.

10. Could Mexico clarify whether paddy rice also enters the Mexican market under tariff heading 1006.30.01? More in general, which categories of rice fall under this tariff heading?

Answer:

25. Under the Harmonized System, imports of paddy rice and imports of milled rice are classified under different tariff headings. At the time of initiation of the rice investigation, imports of paddy rice were classified under heading 1006.10.01 of the Mexican Tariff Schedule while imports of semi-milled and milled rice were classified under heading 1006.30.01.

26. Heading 1006.10.01 applies (and applied at the time) only to imports of paddy rice. In contrast, heading 1006.30.01 included semi-milled and milled rice, irrespective of the grain length and irrespective of whether the rice had been polished ("*pulido*"), glazed ("*glaseado*"), or parboiled ("*precocido*").[15] Inasmuch as the Customs classifications did not indicate which white rice imports were imports of long-grain white rice, the data that **Economía** used for its determinations of dumping (prices) and injury (volumes and prices) were based on estimates.

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[11] *Id.*, paras. 326, 328.
[12] *Id.*, para. 333.
[13] *Id.*, para. 334.
[14] *Id.*, para. 338.
[15] *See, e.g.*, Notice of Initiation, para. 19 (Exhibits US-1&2); Preliminary Determination, paras. 9, 22 (Exhibits US-14&15).

27. On 18 May 2001, while the investigation was ongoing, heading 1006.30.01 was modified to apply only to imports of long-grain milled rice. Other imports previously classified under that heading were shifted to a new heading 1006.30.99.[16] This modification post-dated the August 1999 end of the POI, and the United States is not aware of any evidence suggesting that **Economía** took any steps to examine the new, more precise data.

11. Could the parties clarify whether the rice imported into Mexico under tariff heading 1006.30.01 covers rice in any or all of the 5 stages of processing mentioned in para.161 of the Final Determination and that, therefore, some of the rice imported under this tariff heading will need to undergo further processing in Mexico before entering the consumer market as a finished product?

Answer:

28. Paragraph 161 of the final determination references paddy rice, husked rice (rice with husk removed), milled rice, and broken rice. During the POI, paddy rice, husked rice, milled rice, and broken rice were classified, respectively, under headings 1006.10.01, 1006.20.01, 1006.30.01, and 1006.40.01 of the Mexican Tariff Schedule.

29. Broken rice is not rice at a particular "stage of processing", but rather a lower-value type of milled rice resulting from breakage of grains during the milling process. Product consisting entirely of broken rice entered under tariff heading 1006.40.01. The milled rice entered under tariff heading 1006.30.01, however, normally also contains some broken grains.[17] Milled rice containing higher percentages of broken grains corresponds to lower "grades" of milled rice, and sells for lower prices.[18]

30. The United States explained in its first written submission that the margin **Economía** took from the petition and applied to Producers Rice and the unexamined producers and exporters was adverse.[19] This "adverseness" was due in part to the fact that the petitioner compared an export price based on all imports designated as long grain white rice to a normal value based solely on prices for high grade rice with few broken grains, thus overstating the dumping margin.[20]

12. If it is correct that both subject and non-subject imports of rice from the United States entered the Mexican market under the above mentioned tariff heading, could Mexico explain the methodology that was used by the investigating authority to separate the subject imports of long grain white rice that came in under this heading from the non-subject imports of other types of rice (short grain, etc.)?

Answer:

31. As the United States explained in response to question 11, imports of paddy rice, husked rice, and broken rice were classified under headings other than 1006.30.01 (to be specific, headings 1006.10.01, 1006.20.01 and 1006.40.01, respectively). However, heading 1006.30.01 applied to both subject and non-subject imports (*i.e.*, semi-milled and milled rice, irrespective of the grain length and irrespective of whether the rice was polished, glazed or parboiled).[21] Therefore, for purposes of its

[16] Preliminary Determination, para. 23 (Exhibits US-14&15).
[17] *See* US First Written Submission, footnotes 167-68.
[18] *Id.*
[19] *Id.*, paras. 159-165.
[20] *See id.*, paras. 163-64 and footnotes 166-68.
[21] The petitioners specifically defined the subject product as "long-grain milled rice." Initiation Notice, para. 1 (Exhibits US-1&2). Economía did not modify this definition in any way and it initiated the investigation with respect to "long-grain milled rice." *Id.*, para. 150. Moreover, the petitioners explicitly excluded glazed

injury determination, **Economía** needed to separate imports of long-grain milled rice from imports of the other types of rice also classified under heading 1006.30.01.

32. The United States noted in its first written submission that **Economía** could have separately identified imports of long-grain milled rice on the basis of the information provided in the *pedimentos* for all the shipments that entered under heading 1006.30.01 during the POI. Instead, **Economía** relied on a flawed statistical procedure that focused on isolating imports of short-grain and medium-grain rice, and that did not even address the question of how to separate out imports of glazed rice and parboiled rice, which were also not part of the subject product. In fact, paragraphs 229-232 of the final determination, setting out **Economía's** methodology, make no reference to any attempt to separate out glazed rice and parboiled rice.[22]

13. Could Mexico clarify whether its statement that the domestic industry kept production of long grain white rice stable throughout the year by importing rice during the off-season, is a reference to the imports of paddy rice, or whether such imports are also of semi-processed rice?

Answer:

33. If the Panel is referring to paragraphs 60-62 of Mexico's first written submission, the United States notes again that Mexico has provided no citations to the administrative record of the rice investigation for the referenced table. To the contrary, Mexico's reference to "common knowledge" suggests that the table is a non-record document that Mexico prepared for purposes of this dispute.

34. Furthermore, it is also important to reiterate **Economía's** finding in the investigation that Covadonga, one of the major Mexican producers, lowered its prices by mixing low-priced imports of milled rice from Argentina with its own production. The Argentine imports were priced below the prices of the US imports. **Economía** failed to explain in its published determinations how it could have found any causal relationship between the allegedly dumped imports from the United States and Covadonga's sales prices, given that Covadonga's sales prices increased when its imports from Argentina were excluded from the calculation.[23]

14. In para. 265 of the Final Determination, the Investigating Authority discusses the ex-factory price difference between Argentinian rice and US rice when exported to Mexico. Could Mexico indicate how high the Mexican import duty for rice from non-NAFTA countries like Argentina is? Was all the rice referred to as "rice imported from Argentina" fully processed long grain white rice ready for domestic consumption?

15. Could Mexico clarify whether the information contained in the "pedimentos" would have allowed the investigating authority to determine with certainty the precise amount of imports of the subject product, long grain white rice, from the United States and from other countries, without any need to apply a methodology to distinguish subject from non-subject imports?

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rice, parboiled rice, short-grain rice, and medium-grain rice from the scope of the investigation, on the grounds that these types of rice did not compete with domestic long-grain milled rice. *Id.*, paras. 10-15.

[22] Paragraph 239 of the final determination indicates that Economía used the methodology described in paragraphs 229-232 for its analysis of 1999. For 1997 and 1998, Economía simply guessed that imports of long-grain white rice entered in proportions equal to all imports of white rice from the United States. *See id.*

[23] *See* Final Determination, paras. 286 and 290 (Exhibits US-6&7); US First Written Submission, para. 125.

Answer:

35. The United States explained in its first written submission that the *pedimentos* provide a wealth of information for each import shipment.[24] Moreover, Exhibit US-12 reproduces the format for the *pedimentos* that was applicable during 1999. As the instruction sheet for that document indicates (the instruction sheet is also set out in Exhibit US-12), there are 57 specific fields in the *pedimentos*, including fields for reporting a full description of the imported goods (field 32), the unit price of the goods (field 33), and the quantity of goods involved (field 53), as reported in the invoice. The instruction sheet also notes that field 32 should contain "the nature and the technical and commercial characteristics needed and sufficient for determining customs classification".

36. Therefore, if **Economía** had so chosen, it could have collected the *pedimentos* for the shipments of the subject product during the POI, and thus would have been in a position to separate the subject imports (imports of long-grain milled rice) from non-subject imports (imports of short-grain rice, medium-grain rice, glazed rice, and parboiled rice), and calculate precisely the price and the quantity of the subject imports.

37. The United States notes in its response to question 17 below that Mexico has shown a willingness to use the *pedimentos* where doing so will benefit domestic industries seeking the imposition of anti-dumping measures. It also explains that Mexican petitioners have used *pedimentos* released to them by the Mexican government to separate subject products from non-subject products imported under the same tariff heading.

16. (a) Could the parties comment on the following argument made by China in its oral statement (page 5):

> **"Given that both Article 5.2 and Article 6.1.3 use the same wording "known exporter", the "known exporters" under Article 6.1.3 refer to "each known exporter" under Article 5.2. Therefore, the AD Agreement suggests that investigating authorities shall rely on the petitioners to identify "known" exporters in their petition(s)".**

Answer:

38. The United States does not agree with China's interpretation of Article 6.1.3 of the AD Agreement. Article 6.1.3 places obligations on the investigating authority, not on the petitioner. There is no textual link to Article 5.2 or any other language in the text of Article 6.1.3 suggesting that the authority is only required to send a copy of the petition to the exporters known to the petitioner, and not to the exporters known to itself. If the drafters of the AD Agreement had intended to limit the obligation in Article 6.1.3 in such a manner, they presumably would have said so.

39. The broader context of Article 6.1 supports the conclusion that the reference to "known" exporters in Article 6.1.3 is to those exporters known to the investigating authority. The first sentence of Article 6.1 states that "[a]ll 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. . . ." Given the requirement to notify "all" interested parties, there is no logical basis for limiting the obligation to send the petition to only those exporters known to the petitioner if the investigating authority knows of other exporters.

40. In addition, Article 6.2 of the AD Agreement states that "all" interested parties shall have a full opportunity for the defence of their interests, and Article 6.4 states that authorities shall provide opportunities for "all" interested parties to see relevant information. These provisions illustrate the

[24] US First Written Submission, n. 25 and accompanying text.

emphasis that Article 6 places on ensuring that the interests of all interested parties involved in an anti-dumping investigation are protected, and militate against an interpretation of Article 6.1.3 that would lead to fewer parties receiving the information they need to defend themselves.

41. Finally, China's interpretation (like Mexico's interpretation of Article 6.10 and its overall approach to assigning margins to uninvestigated firms) is illogical, because it would create an incentive for petitioners to under-report the range of exporters known to them, because doing so would allow them to manipulate the investigation to the detriment of the investigated parties.

(b) Is it Mexico's view that the term "known" exporters in Article 6.1.3 AD Agreement, only relates to the exporters that are "made known" to it by the petitioner ?

(c) Could the US explain why it considers that it was so unreasonable of the authority to assume, given the nature of the industry, that by making its public initiation notification, by sending the questionnaires to the two known exporters and by notifying the US authorities in Mexico, all exporters would be informed of the initiation of the investigation and of the need to provide information? Is this not confirmed by the behaviour of the USA Rice Federation (see also question 18 below)?

Answer:

42. The issue before the Panel is whether **Economía** was under an obligation with respect to the AD Agreement to take certain steps in the conduct of its investigation, and whether it failed to take those steps.

43. In order to act consistently with Mexico's WTO obligations, **Economía** could have, on one hand, investigated and made an effort to calculate an individual margin of dumping for each known exporter or producer. Taking this approach would have required **Economía** to send a copy of the anti-dumping questionnaire to each firm that was included in the investigation and to ensure that each firm understood the consequences of not replying before **Economía** could apply a facts available-based margin to it.[25] On the other hand, **Economía** could have limited its investigation to a subset of exporters and producers.[26] Taking this other approach would have required **Economía** to apply a neutral margin, calculated in accordance with Article 9.4 of the AD Agreement, to the unexamined firms.

44. However, **Economía** chose instead to take a third approach that is not consistent with the AD Agreement: it limited its investigation by only sending its anti-dumping questionnaire to the two firms that the petitioner designated as "known" exporters in the petition. Then, having made this decision, it applied an adverse, facts-available based margin, instead of a neutral margin, to the unexamined firms. **Economía's** approach served both to minimize the investigative burden on itself and to maximize the anti-dumping margins applied to the foreign exporters and producers. But under the AD Agreement, **Economía** cannot have it both ways.

45. First, **Economía** limited its investigation by choosing to only send its questionnaire to the two exporters specifically identified as "known" exporters in the petition, and by failing to send its

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

[26] Specifically, a reasonable number of interested parties using statistically valid samples, or the largest percentage of the volume of the exports which could reasonably be investigated. AD Agreement, Art. 6.10, second sentence.

questionnaire to The Rice Company, a known exporter mentioned repeatedly in the petition and described in Annex H of the petition as "one of the largest US exporters as regards paddy rice and white milled rice".[27] It also limited its investigation by choosing not to consult the *pedimentos*, which were in the possession of the Mexican government and identified every exporter of the subject merchandise to Mexico during the POI, thus making them known to Mexico. **Economía** also limited its investigation by taking no steps to review publicly available information that would have provided names and contact information for every US producer in the United States.[28] Then, **Economía** increased the difficulty for any firm not identified by the petitioner to participate in the investigation by requiring it to appear in Mexico City to obtain a copy of the questionnaire.[29]

46. Second, **Economía** did not apply a neutral margin calculated in accordance with Article 9.4 of the AD Agreement to the unexamined producers and exporters. Rather, it applied an adverse, facts available-based margin to them. There are numerous provisions of the AD Agreement, however, that place limitations on the ability of a Member to apply margins based on the facts available. The United States discussed these provisions at length in its first written submission and in its oral statement at the first panel meeting.[30] **Economía** failed to comply with any of them.

47. Third, Article 12.1 of the AD Agreement requires an investigating authority initiating an anti-dumping investigation to give public notice and notify the interested parties known to the investigating authorities. Therefore, it is not enough for a Member to simply publish a notice of initiation of an investigation and thereby meet its obligations under Article 12.1. The fact that the USA Rice Federation (the "Federation") came forward and asked to participate in the investigation proves only that the Federation subsequently learned of the investigation. It does not prove that any other firm knew that it had been "deemed" included in the investigation, or that the Federation or any other firm was aware of **Economía's** plan to breach its WTO obligations by applying an adverse, facts available-based margin to firms that were never even sent a questionnaire. The initiation notice says nothing of the sort.

48. The Panel's question suggests that **Economía** might have taken the approach that it did because of the "nature of the industry" that it was investigating. The United States is not aware of any evidence on the record of the rice investigation supporting this assumption. If anything, the record evidence suggests instead that **Economía's** approach reflected a conscious decision to favour the interests of the petitioner by ignoring readily available information, shifting the burden for providing the requisite notice from itself to the US exporters and producers, as well as to the US government, and ensuring that a prohibitive facts available-based anti-dumping margin would be applied to as many US exporters and producers as possible.

49. If **Economía** had not deemed every producer and exporter of the subject merchandise in the country to be "in the investigation" when it only sent its questionnaire to two of them, and if it had applied a neutral "all others" margin calculated in accordance with Article 9.4 to the uninvestigated exporters and producers, then **Economía's** failure to provide the unexamined exporters and producers the notice that Article 6.1 and paragraph 1 of Annex II require would not have been an issue. **Economía** did claim that it was investigating every US exporter and producer in the United States,

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[27] Petition Annex H, at 2. (Exhibit US-10). **Economía**'s failure to send the questionnaire to The Rice Company demonstrates that it is not accurate to state that **Economía** sent its questionnaire to the "known" exporters.

[28] *See* Exhibits US-18 and 19 (excerpts from the industry publication *Rice Journal* for 1999 and 2000, respectively, providing contact information).

[29] Initiation Notice, para. 153. (Exhibits US-1&2). The Panel should also recall Mexico's argument that it would be "illogical" to provide such firms the full 30 days to respond to the questionnaire that the AD Agreement requires. *See* Mexico's First Written Submission, para. 220-21.

[30] *See, e.g.*, US First Written Submission, paras. 142-148, 174-183, 192-195; US oral statement at the first panel meeting, paras. 45-51.

however, and it applied an adverse, facts available-based margin taken from the petition to all but three of them. As the United States demonstrated in its first written submission, **Economía's** approach breached numerous provisions of the AD Agreement and the GATT 1994.

17. The US argues that all the Mexican investigating authority had to do was to look into the "pedimentos" to find out who the other US exporters were.

(a) Could Mexico indicate whether this assertion is correct, do the "pedimentos" identify all the exporters?

Answer:

50. Exhibit US-12 reproduces the format for the *pedimentos* that was applicable during 1999. As the United States noted in its first written submission, field 19 in the *pedimentos* requests the name of the foreign supplier involved, together with its business address.[31]

(b) Could Mexico clarify whether the investigating authority attempted to obtain the "pedimentos"? If so, what was the reason why such information was not obtained, or could not be used?

Answer:

51. In evaluating Mexico's response to the Panel's questions on the *pedimentos*, the Panel may wish to also take into account Mexico's willingness to use the *pedimentos* to benefit domestic industries seeking the imposition of anti-dumping measures. For example, on 17 May 2004 (the day of the first panel meeting in this dispute), **Economía** published an initiation notice in its anti-dumping investigation of *Epoxidized Soybean Oil from the United States*.[32] The notice indicates that Mexico's Ministry of the Treasury released actual *pedimentos* to the petitioners in that case and that the petitioners used data taken from the *pedimentos* to support their allegations of dumping and injury.[33]

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[31] US First Written Submission, n. 25 (final sentence).

[32] *Resolucion por la que se acepta la solicitud de parte interesada y se declara el inicio de la investigación antidumping sobre las importaciones de aceite epoxidado de soya, mercancía actualmente clasificada en la fracción arancelaria 1518.00.02 de la Tarifa de la Ley de los Impuestos Generales de Importación y de Exportación, originarias de los Estados Unidos de América, independientemente del país de procedencia*, Diario Oficial de la Federacion (segunda seccion) 11 (17 May 2004) ("*Soybean Oil Initiation Notice*") (Exhibit US-22). The attached exhibit is the Spanish-language original, because the United States does not have an English-language translation of the notice.

[33] In paragraph 16 of the initiation notice, Economía takes stock of all of the information that the petitioners submitted in their petition. Economía notes in particular that the petitioners provided:

> Customs declarations [*pedimentos*] from 2002 through October 2003 accompanied by their [corresponding] invoices, certificates of analysis and the translation of the latter.
> Soybean Oil Initiation Notice, para. 16(C). Economía then notes in paragraph 24 that:
> To document the export price, the companies EIQSA and RYMSA [the two petitioners] provided customs declarations [*pedimentos*] which establish the price at which epoxidized soybean oil was exported from the United States of America to Mexico during the period of investigation. The petitioners obtained this information from the Ministry of the Treasury through ANIQ.
> *Id.*, para. 24 (ANIQ is the acronym for *Asociacion Nacional de la Industria Quimica* or the National Association of the Chemical Industry) (emphasis added). Finally, in assessing the petitioners' allegations of injury, the initiation notice states that:
> The petitioners obtained statistics of definitive imports corresponding to the tariff heading 1518.00.02 of Mexico's Import Tariff Schedule at the level of customs declarations provided by the General Customs Administration for the period of investigation.

52. Similarly, in **Economía's** anti-dumping investigation of *Crystal Polystyrene from the United States*, the petitioners obtained copies of *pedimentos* from the Mexican government and used them to support their allegations of dumping and injury.[34] Moreover, the petitioners in the *Crystal Polystyrene* investigation used the *pedimentos* to separate out the imports of the subject product from other, non-subject merchandise imported under the same tariff heading.[35]

53. In sum, Mexico's willingness to allow petitioners to use the *pedimentos* to support dumping and injury claims in other investigations illustrates (1) that the *pedimentos* can be used to obtain value and volume information for products subject to anti-dumping investigations; and (2) that Economía's failure to use them in the investigation at issue to identify "known" exporters or to use them in its injury analyses was neither objective nor unbiased.[36]

(c) Could Mexico explain whether the Mexican investigating authority in its normal practice verifies the information provided by the petitioners concerning the exporters mentioned in the petition? If so, how does the authority go about checking this information?

> . . . The petitioners stated that the customs declarations were obtained through ANIQ and that the totality of such declarations referred to epoxidized soybean oil.
> According to the foregoing, the petitioners presented an import database that refers exclusively to epoxidized soybean oil originating in the United States of America for the period under review.
> *Id*., paras. 64(A), 64(C), 64(D).

[34] *Resolucion por la que se acepta la solicitud de parte interesada y se declara el inicio de la investigación antidumping sobre las importaciones de poliestireno cristal, mercancía actualmente clasificada en la fraccionnes arancelarias 3903.19.02 y 3903.19.99 de la Tarifa de la Ley de los Impuestos Generales de Importación y de Exportación, originarias de los Estados Unidos de América, independientemente del país de procedencia*, Diario Oficial de la Federacion (primera seccion) 25 (13 January 2004) ("Crystal Polystyrene Initiation Notice") (Exhibit US-23). The attached exhibit is the Spanish-language original, because the United States does not have an English-language translation of the notice.

[35] Economía noted at paragraph 29A of the Initiation Notice that:

> [Petitioners] obtained a representative sample of copies of pedimentos from the General Administration of Customs for the period of investigation and identified the type of product that each importer buys, the terms of sale, the means of transportation, and the presentation of the product (in bags or in bulk), inter-alia. Subsequently, they eliminated the shipments that do not correspond to crystal polystyrene [the subject product]. The sample of pedimentos accounts for 73.6 per cent of the total volume imported under tariff headings 3903.19.02 and 3903.19.99 of the TIGIE [Schedule of the General Import Tax, which is the formal name for Mexico's Harmonized Tariff Schedule] during the period under investigation.

Id., para. 29A (emphasis added) (Exhibit US-23).

[36] In addition, paragraph XXVI of Article 144 of Mexico's Customs Law provides that Mexico's Ministry of the Treasury shall:

> [r]elease the information contained in the *pedimentos* to Industrial Chambers and Industry Associations grouped in Confederations, as provided in the Law of Business Chambers and Confederations thereof, that participate with the Tax Administration Service [Mexico's IRS] in the Program on Customs and Tax Control by Industrial Sector . . . .
>
> This is yet another example of Mexico's willingness to allow its domestic industries to use *pedimento* data to support their cases in anti-dumping proceedings.

Answer:

54. The United States has been unable to identify any evidence in **Economía's** initiation notice suggesting that **Economía** took any steps to verify the accuracy and adequacy of the information that the petitioner submitted with respect to the "known" exporters in the investigation at issue. For example, **Economía** did not question the petitioner's omission of The Rice Company as a known exporter, notwithstanding that the petitioner used information from The Rice Company's web site to support the petition.[37]

18. Could the United States provide more information on the "USA Rice Federation", which according to the Final Determination made itself known to the investigating authority. Which and how many producers does it represent?

Answer:

55. The Federation is a rice industry organization that serves as a national advocate for all segments of the US rice industry. It conducts activities to influence government programs, develops and initiates programmes to increase worldwide demand for US rice, and provides other services to increase industry profitability for all industry segments. The Federation has three charter members: the US Rice Producers' Group, the Rice Millers' Association, and the USA Rice Council. Each of those organizations has a distinct identity and serves its own segment of the US rice industry.

56. The Federation was in existence when the petitioner filed its petition, and it was one source among many that the petitioner and **Economía** could have contacted to obtain publicly available information on the names and contact information of US producers and exporters of long-grain white rice. However, neither the petitioner nor **Economía** contacted the Federation.[38] In the context of this dispute, the AD Agreement required **Economía** to calculate a margin for each known exporter and producer, to send a copy of the anti-dumping questionnaire to each firm that was included in the investigation, and to ensure that each such firm understood the consequences of not replying before **Economía** could apply a facts available-based margin to it.[39] Mexico therefore cannot cite the fact that the Federation subsequently came forward on its own and asked to participate in the anti-dumping investigation as a means of relieving Mexico of its WTO obligations or of "curing" its failure to meet those obligations.

19. Could the US explain why it considers that the Mexican authority failed to separate the dumped from the non-dumped imports while the Final Determination on numerous occasions refers to dumped imports separately and explicitly?

Answer:

57. As the Appellate Body stated in *EC Bed Linen 21.5 AB*, Article 3.1 of the AD Agreement requires investigating authorities to ensure that their injury determinations are:

[37] *See* Initiation Notice, para. 28(y) (Exhibits US-1&2).

[38] For example, Economía did not send the Federation a copy of the petition or its anti-dumping questionnaire or otherwise ask it for assistance in identifying members of the US rice industry. The Federation obtained the questionnaire by coming forward on its own and appearing at Economía's offices in Mexico City.

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

> 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*.[40]

Thus, an investigating authority must focus its analysis on the dumped imports. **Economía**, by contrast, made its determinations on the basis of an examination of the volume and effect of *all* imports, including both the dumped and the non-dumped imports. The US first written submission lists several examples of this point.[41]

58. For example, **Economía** looked at *all* imports from the United States, and not just dumped imports, in determining whether import levels had increased during the period of investigation.[42] **Economía** examined the import levels for Riceland and Farmers Rice – two companies that were found not to be dumping – and based its overall conclusions on data for the non-dumping Farmers Rice.[43]

59. Similarly, **Economía** compared the fall in domestic prices to the fall in prices of *all* imports (including third country imports), and not just the dumped imports.[44] **Economía** specifically included in its analysis the prices of Farmers Rice and Riceland, neither of which were dumped, imports of non-subject merchandise, and imports from Argentina (which were priced below the dumped imports).[45]

60. Moreover, **Economía** stated that the "dumped imports" did not register an increase in their share of domestic consumption, and that they maintained their share of internal consumption.[46] These statements are only accurate, however, if they were based on data for <u>all</u> of the investigated imports, and not just the dumped imports. The data for the <u>dumped</u> imports actually showed that:

- The dumped imports' share of apparent domestic consumption actually <u>fell</u> – from 5.7 per cent in March – August 1997 to 4.8 per cent in March–August 1999.[47]

- Similarly, the dumped imports' share of internal consumption <u>fell</u> – from 6.9 per cent in March–August 1997 to 6.5 per cent in March–August 1999.[48]

- Finally, the share of the dumped imports in comparison with domestic production <u>fell</u> – from 10.2 per cent in March–August 1997 to 10.1 per cent in March–August 1999.[49]

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[40] *EC – Bed Linen 21.5 AB*, para. 111.

[41] *See* US First Written Submission, paras. 120-124.

[42] *See, e.g.*, Final Determination, para. 217 (Exhibit US-6&7).

[43] *Id.*, para. 228.

[44] *Id.*, paras. 262-296.

[45] *Id.*, paras. 281-82, 291. As the United States noted in its first written submission, Mexico failed to explain how it could have found any causal relationship between the allegedly dumped imports from the United States and Covadonga's sales price, given that Covadonga's sales price <u>increased</u> when its sales of its imports from Argentina were excluded from the calculation. *See id.*, paras. 286 and 290; US First Written Submission, para. 125.

[46] Final Determination, para. 261 (Exhibit US-6&7).

[47] *Id.*, para. 248. By comparison, the investigated imports as a whole constituted 6.6 per cent of apparent consumption in March to August 1997, and 6.5 per cent in March to August 1999. *Id.*, para. 247.

[48] *Id.*, para. 254. By comparison, the investigated imports as a whole constituted 8.1 per cent of internal consumption in March to August 1997, and 8.7 per cent in March to August 1999. *Id.*, para. 247.

[49] *Id.*, para. 259. By comparison, the share of the investigated imports as a whole was 11.8 per cent in March to August 1997, and 13.5 per cent in March to August 1999. *Id.*, para. 258.

61. In sum, Articles 3.1., 3.2, and 3.5 of the AD Agreement required **Economía** to conduct an objective examination of the volume, price effects, and impact of the *dumped* imports, and **Economía** failed to do so.

Questions concerning Article 5.8 AD Agreement

20. In Mexico's view, does it suffice for one exporter to have been found to be dumping above *de minimis* levels for all other exporters to be included in the application of the measure under Article 5.8 AD Agreement or does Mexico consider that some sort of country-wide rate needs to be established and that, only if that country-wide rate is above *de minimis*, will all exporters from that country be covered by the measure? Could Mexico clarify whether an exporter for which a below *de minimis*, but more than zero margin of dumping was found, would receive a 0 per cent duty or would a duty be imposed on such an exporter equal to the *de minimis* margin?

Answer:

62. In the rice investigation, **Economía** did find only one company to be dumping. The other three exporters that **Economía** examined either had margins of zero (Farmers Rice and Riceland) or did not export to Mexico during the POI (Producers Rice).[50] Nevertheless, **Economía** applied the anti-dumping measure to every producer or exporter in the United States, including Farmers Rice and Riceland. **Economía** took no steps to examine whether the weighted average margin of all exporters was greater than *de minimis* when it decided to impose the anti-dumping measure.[51]

63. It is important to note that the consequence of (1) **Economía's** refusal to apply Article 5.8 on a firm-specific basis; (2) its practice of "deeming" every exporter and producer in the investigated country as being included in the investigation; and (3) its application of adverse, facts available-based margins to the unexamined exporters and producers, is that **Economía** will almost certainly find at least one firm to be dumping, and thus never find a basis to terminate an investigation due to "*de minimis*" dumping margins. The only case where the language will have meaning for Mexico is the exceedingly rare one where **Economía** individually investigates every exporter and producer of the subject product in the country under investigation and calculates a zero or *de minimis* margin of dumping for each of them. By effectively reading the *de minimis* dumping margins language out of the AD Agreement, Mexico's interpretation of Article 5.8 breaches the principle of effectiveness of treaty interpretation.

21. Could Mexico clarify whether this is a correct understanding of the way in which the Mexican system operates: if an exporter was not dumping during the POI, but a dumping margin was found for other exporters of the product, this non-dumping exporter will be included in the measure, but a 0% duty will be imposed. If later the review shows that the exporter had since engaged in dumping, a duty will be imposed on him equivalent to the new margin of dumping.

(a) Is this a correct understanding of the system?

(b) Will a new injury analysis be required before such duties may be imposed?

22. Could the US please react to the European Communities suggestion (in para. 8 in fine of its written submission) that the US interpretation of Article 5.8 AD Agreement raises the practical problem of the possibility of two parallel proceedings against imports from the same country?

[50] *See* Final Determination, para. 400 (Exhibits US-6&7).
[51] *Id*., paras. 398-404.

Answer:

64. It is not clear to the United States what the European Communities (EC) means when it suggests that the US interpretation of Article 5.8 may lead to "parallel" proceedings against imports from the same country, or how such an outcome would differ from the normal situation in an anti-dumping investigation. In a sense, the "dumping" side of an anti-dumping investigation is always a series of "parallel" investigations, because the investigating authority examines the export prices and normal values of each individual firm under investigation, and it determines an individual margin of dumping for each such firm. It is this very aspect of the dumping calculation that makes it possible for an investigating authority to exclude from the anti-dumping measure those individual firms that are investigated and found not to be dumping.

65. Furthermore, there is no reason to assume that a firm that is found not to be dumping in an investigation, and excluded from the measure, would subsequently begin to dump. Unlike a firm that is investigated and found to be dumping, a firm that is investigated and found not to be dumping has demonstrated that it is able to sell in the export market without engaging in such practices. If the firm is able to sell without dumping when there is no anti-dumping measure in place, it will presumably be able to continue doing so thereafter (particularly if its competitors are subject to the measure). Thus, there is no reason to assume that there would be any need for an investigating authority to conduct a new investigation.

66. Finally, the United States has excluded individual firms from anti-dumping measures in the past without encountering "practical problems" or "parallel proceedings".

67. In sum, if a firm is investigated during the investigation and found not to be dumping, there is no basis under the AD Agreement to apply the anti-dumping measure to that firm.

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

23. In para. 176 of its submission, and para. 61. (c) of its oral statement, Mexico argues that para. 6 of Annex II was complied with as the information of the non-shipping exporter, Producers Rice, was "accepted".

(a) Could Mexico clarify what information this company provided which was accepted by the authority?

(b) Is Mexico of the view that para. 6 does not apply to situations in which the information is not provided, or is not provided within a reasonable period of time, but only to situations in which information which was provided is rejected?

24. Article 68 of the Foreign Trade Act mentions three categories of exporters to which the highest margin shall be applied. One of these categories seems to cover the situation provided for in Article 6.8 AD Agreement.

(a) Does Mexico consider that the two other categories (non-appearing exporters and non-shipping exporters) are not covered by the situation described in Article 6.8 AD Agreement?

(b) What is the view of the US on the relevance, if any, of the fact that Article 68 of the Foreign Trade Act provides for these three separate categories?

Answer:

68. Subparagraph II of Article 64 appears to address the application of the facts available in the situation set out in Article 6.8 of the AD Agreement. The fact that subparagraphs I and III require **Economía** to apply the facts available in two additional situations is evidence that Article 64 requires **Economía** to apply the facts available when the necessary prerequisites for doing so in accordance with Article 6.8 and Annex II of the AD Agreement are absent.

69. Furthermore, subparagraph II of Article 64 is also inconsistent with WTO rules. The United States noted this point, for example, in paragraphs 237-329 of its first written submission.

(c) Is Mexico of the view that the AD Agreement does not provide any rules on how to calculate an all others rate for non-appearing parties and non-shipping exporters, or is Mexico arguing that the maximum duty that can be imposed on such exporters under the Agreement is a facts available margin?

Answer:

70. Even if one were to interpret the AD Agreement as not providing rules on how to calculate an all others rate for non-appearing parties and non-shipping exporters, the fact remains that Articles 6.1 and 6.8 and Annex II of the AD Agreement do provide rules that Members must follow when applying margins based on the facts available. For the reasons set out in our first written submission[52], **Economía's** application of the facts available to Producers Rice and the unexamined exporters and producers breached these rules.

25. In Mexico's view, does para. 7 of Annex II allow for unfavourable results only in case of non-cooperative parties or in all cases in which the necessary information is not provided?

Questions concerning the challenge of the law as such

26. According to the parties, to what extent is the distinction mandatory / discretionary legislation still applicable in WTO law after the Appellate Body statement in para. 93 of its decision in the US - Corrosion Resistant Steel case (DS 244)?
Answer:

71. In paragraph 93 of the relevant report, the Appellate Body stated that it had not, "as yet, been required to pronounce generally upon the continuing relevance or significance of the mandatory/discretionary distinction. Nor do we consider that this appeal calls for us to undertake a comprehensive examination of this distinction."[53] Therefore, the Appellate Body's statements do not provide grounds to conclude that the doctrine is no longer applicable in WTO law.

72. As the United States discusses in greater detail in responding to question 27, Mexico has alleged that there is no conflict between its WTO obligations and the challenged Mexican legal provisions. Indeed, Mexico's enactment of the challenged provisions is premised upon its view that no such conflict exists. Therefore, the issue of whether Mexico has "discretion" to ignore an FTA provision that conflicts with the AD Agreement does not arise.

[52] US First Written Submission, paras. 174-183, 192-195.

[53] Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, DS/244/AB/R, adopted January 9, 2004, para. 93 ("*United States – Japan Sunset AB*") (footnote omitted).

27. Could the US explain to what extent it considers the challenged Mexican legal provisions to be mandatory in nature in light of the argument by Mexico of the direct effect of the WTO Agreements in Mexican municipal law?

Answer:

73. The so-called "mandatory/discretionary" doctrine applies when a law is capable of being applied in both a WTO-consistent and a WTO-inconsistent manner. Each of the legal provisions at issue in this dispute, by contrast, requires **Economía** to act in a particular manner. For example, Article 64 of the FTA does not say that **Economía** may apply the highest facts available to firms that did not export to Mexico during the POI; it requires **Economía** to do so. Mexico has not alleged otherwise. Mexico's suggestion that it is required to apply its laws in a WTO-consistent manner cannot insulate those laws from challenge if the laws themselves grant **Economía** no discretion to apply them in a WTO-consistent manner.

74. Furthermore, **Economía** is the administrator of Mexico's anti-dumping laws, and **Economía** views each of the challenged provisions as in itself consistent with WTO rules, without any need to somehow override these laws through application of WTO rules under municipal law. Mexico has made this point repeatedly during this dispute. In other words, as a matter of Mexican municipal law, Mexico has been interpreting its WTO obligations as not precluding the challenged laws from requiring actions which are, in fact, WTO-inconsistent. Mexico has therefore not considered it necessary to test whether, under Mexican municipal law, the direct effect of the WTO Agreements could actually override a law which on its face mandates what is, in fact, WTO-inconsistent action. Moreover, given Mexico's view that, as a matter of Mexican municipal law, WTO rules do not preclude the challenged laws from operating as provided in the laws themselves, Mexico does not, as a matter of municipal law, have discretion to disregard their otherwise mandatory aspects.

75. Thus, the issue of "discretion" might only arise with respect to the challenged laws in the event that this Panel finds the laws to be inconsistent with Mexico's WTO obligations. At that point, it would fall to Mexico to explain in the implementation phase of the dispute what steps it would need to take to reconcile its WTO-inconsistent laws with its WTO obligations, just as it would for any other Member whose domestic law was found to be inconsistent on its face with WTO rules.

28. Could Mexico explain whether, in case the DSB were to adopt a panel report finding an inconsistency of a Mexican law with the WTO Agreements, it considers that it would be obliged to amend the law to bring the law into conformity with the WTO Agreement?

29. Could Mexico clarify whether private parties may be successful when they file a suit against the administration before the domestic courts of Mexico in case the administration failed to comply with a statutory obligation, even if this obligation is inconsistent with the WTO Agreement, requiring the administration to comply with such obligations?

30. Is it Mexico's view that if a certain provision is somehow found to be inconsistent with the WTO Agreements, that is, in case a conflict is found between the Foreign Trade Act and the WTO Agreements, then the WTO Agreements would prevail by virtue of Article 133 of the Political Constitution and Article 2 of the Foreign Trade Act?

31. In para. 263 - 266 of its submission, Mexico argues that the "representativeness" requirement in Article 68 of the Foreign Trade Act is only a tool, and that the US is wrong in suggesting that it is a condition *sine qua non* for the initiation of a review.

(a) Could Mexico clarify whether a review may be initiated if the party concerned cannot demonstrate that its sales volume for the period was representative?

(b) What in the Mexican practice is considered to be a "representative" volume?

Answer:

76. The United States has noted previously that the plain language of Article 68 imposes a condition for exporters seeking reviews to demonstrate that the volume of exports of the subject merchandise during the review period was representative. In the event that Mexico contests this fact, the Panel may wish to refer to the attached initiation notice for a Mexican "Article 68" review that is currently ongoing, which demonstrates that Mexico does in fact require exporters seeking reviews to make such a demonstration.[54]

77. The review in question involves several exporters. According to the initiation notice, each exporter stated that "the volume exported in the period under investigation [the review period] was representative, given that its shipments were made in commercial volumes and in a regular fashion throughout such period", and provided supporting data on export sales to **Economía**.[55]

78. Furthermore, paragraphs 38-42 of the attached initiation notice are entitled "Legal Requirements for the Review". Paragraph 38 states that, according to Article 68 of the FTA and Article 99 of the Regulation, reviews of definitive anti-dumping duties are subject to the substantive and procedural rules set forth in those articles. Therefore, inasmuch as the "representative exports" requirement is set forth in Article 68, reviews are subject to that requirement.

79. Paragraph 47 of the initiation notice states that **Economía** applied two tests to determine whether the exports of the various firms during the review period were representative. First, **Economía** compared the export volumes of the firms against the volumes of their domestic (US) sales. Second, **Economía** compared the export volumes of the firms against the average volume of exports for all of the companies that were involved in the original investigation. At paragraph 48 of the notice, **Economía** concludes that six of the firms passed both tests and, at paragraph 49, it concludes that the volume of exports during the review period by such firms was representative, "in conformity with Article 68 of the Foreign Trade Law" (emphasis added).[56]

80. Finally, paragraph 92A of the notice states that, "in conformity with Article 68 of the [FTA], the volume of exports made in the period that goes from January through July 2003 by [the companies qualifying for the review] was representative."

81. In sum, Mexico did require the exporters seeking the reviews to demonstrate that the volume of their exports of the subject merchandise during the review period was representative.

32. Is it the view of Mexico that, with regard to new shippers (Article 89 D of the Foreign Trade Act), the representativeness requirement is not inconsistent with the AD Agreement or the Subsidies and Countervailing Measures ("SCM") Agreement because it is the only logical and sensible way of ensuring that the Authority can make a proper price comparison for the establishment of an individual margin (as Mexico seems to be saying in para. 270 of its written submission) or is Mexico's arguments simply that it is not a condition *sine qua non*, and is this

[54] *Resolucion por la que se declara el inicio de la revision de la cuota compensatoria definitiva impuesta a las importaciones de manzanas de mesa de las variedades Red Delicious y sus mutaciones y Golden Delicious, mercancia clasificada actualmente en la fraccion arancelaria 0808.10.01 de la Tarifa de la Ley de los Impuestos Generales de Importacion y de Exportacion, originarias de los Estados Unidos de America, independientemente del pais de prodedencia*, Diario Oficial de la Federacion (primera seccion) 16 (21 October 2003). (Exhibit US-24).

[55] *Id.* at paras. 11C and 12A (Chelan), 15B and 16A (Dovex), 17C and 18A (Holtzinger), 19D and 20A (L&M), 21B and 22A (Manson), 23B and 24A (Northern Fruit), 25C and 26A (Nuchief), 27F and 28A (Oneonta), 29C and 30A (PAC), 31C and 32A (Rainer Fruit), 33D and 34A (Sage), and 35C and 36A (Stemilt) (Exhibit US-24).

[56] Mexico rejected the requests of the other exporters on unrelated grounds.

"requirement" for that reason not inconsistent with the AD and SCM Agreements (as paras. 263-266 of the written submission seem to suggest with regard to the similar requirement in Article 68 of the Foreign Trade Act)?

Answer:

82. The United States has noted previously that the plain language of Article 89D imposes a condition for exporters seeking reviews to demonstrate that the volume of exports of the subject merchandise during the review period was representative. In the event that Mexico contests this fact, the Panel may wish to refer to the attached initiation notice for a Mexican "new shipper" review that was initiated on the same date as the "Article 68" review discussed in response to question 31. Paragraph 16 of the initiation notice states as follows:

> In accordance with Article 89D of the FTL and Article 9.5 of the Anti-Dumping Agreement, an expedited review will be undertaken to determine an individual dumping margin for exporters or producers . . . , provided that such exporters demonstrate that they have made export sales to Mexico of the subject merchandise, in representative volumes, subsequent to the period of investigation in the proceeding that gave rise to the anti-dumping duty at issue . . . .[57]

83. The document also notes the exporter's assertion that it had exported a representative volume of the subject merchandise to Mexico after the imposition of the anti-dumping measure, and that the firm had provided evidence documenting its assertion.[58]

84. Thus, **Economía** did require the exporter seeking the review to demonstrate that the volume of its exports of the subject merchandise during the review period was representative.

33. In its submission and oral statement, Mexico does not directly reply to the US argument in para. 261 of the US submission that Article 89 D of the Foreign Trade Act only applies to producers, but clearly asserts that it will apply its laws in accordance with the Agreement. Could Mexico clarify whether Article 89 D of the Foreign Trade Act also applies to exporters?

34. Could Mexico clarify whether, pending a judicial review, no definitive duties will be imposed or collected as it seems to be arguing in paras. 301 - 302 of its written submission?

35. Could Mexico clarify whether the importation of "identical or like goods" on which fines may be imposed under certain circumstances in Article 93 V of the Foreign Trade Act also

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[57] *Resolucion por la que se acepta la solicitud de parte interesada y se declara el inicio del procedimiento de nuevo exportador, en relacion con la resolucion definitiva sobre las importaciones de manzanas de mesa de las variedades Red Delicious y sus mutaciones y Golden Delicious, mercancia clasificada actualmente en la fraccion arancelaria 0808.10.01 de la Tarifa de la Ley de los Impuestos Generales de Importacion y de Exportacion, originarias de los Estados Unidos de America, independientemente del pais de prodedencia*, Diario Oficial de la Federacion (primera seccion) 29, at para. 16 (21 October 2003) (emphasis added). (Exhibit US-25).

[58] *Id*., paras. 13(C), 14(G).

refers to imports of the products from third countries, i.e. from countries other than the one investigated in the anti-dumping investigation?

ANNEX B-2

RESPONSES OF MEXICO

Questions concerning the period of investigation

1. UNITED STATES

2. Mexico argues that "there is no provision in the AD Agreement which indicates how remote an anti-dumping period of analysis must be" (para. 49 of its first submission).

(a) In Mexico's view, is there no limit in the AD Agreement on how "old" the data can be on which the dumping and injury analysis may be based? If Mexico is of the view that there are certain limits, please explain what, in Mexico's views, are the criteria for determining whether a POI is consistent with the AD Agreement or not?

Answer:

The AD Agreement establishes no limit regarding the remoteness of the period of investigation (POI).

(b) What is the Mexican practice in respect of the POI?

Answer:

The petitioners in an investigation suggest a POI in their application for initiation; the investigating authority analyses the information and evidence contained in the application and decides what POI it will use, which is reflected in the determination concerning the initiation of the investigation.

(c) Are there particular reasons why more recent data were not used in this case? Is Mexico of the view that the POI used in this case was the one closest to the initiation as far as "practicability" is concerned? If so, please elaborate.

Answer:

Mexico considers that an investigating authority is not required under the AD Agreement to gather the data that are most recent in relation to the initiation of the investigation. As regards agricultural products, Mexico notes that in its practice there may be an interval of several months between the end of the period of investigation and the initiation of the investigation.

3. Could Mexico explain the reason why it considered that the March - August 6 month period was appropriate for the injury analysis, including whether "seasonality" was one of the reasons.

Answer:

The basic idea behind the periods of comparison used in the injury analysis in the rice case was the following:

The petitioner in the anti-dumping investigation provided information on the unfair dumping practice for the period March-August 1999. The investigating authority ("IA") conducted an analysis

to determine whether the unfair practice had had any effects during the period selected by the petitioners and hence whether it had had any impact on the economic and financial indicators for the domestic industry over the period in question. That six-month period was therefore defined as the "period of investigation".

In order to confirm the initial hypothesis, it was considered that the period in question should be distinct from previous periods in which the unfair practice either did not exist or had had no impact on industry indicators. The IA accordingly gathered all the information available over a period of three years ("period analysed"), including the year covered by the "period of investigation"; however, it limited its comparison to strictly comparable periods, i.e. the periods in the preceding two years that covered exactly the same months as those of the "period of investigation".

The "period of investigation" over which the adverse effects of the unfair practice were allegedly observed was thus compared with "comparable" periods in which the practice did not occur. The hypothetical expectation was that the domestic industry would be found to be healthy in the preceding comparable periods whereas unfavourable indicators would be observed in the "period of investigation".

The above approach was adopted to ensure strict comparability of the periods analysed; even if it had been necessary in the long-grain white rice investigation to consider the seasonality factor – which was not the case – comparing the "period of investigation" with previous comparable periods would eliminate any possible distortions in the market under analysis.

The March-August period in this case is not more appropriate in the strict sense than any other period that might have been selected. On the other hand, as has already been pointed out, it is the period for which the petitioners had information on the unfair practice and hence that which must be compared against similar periods.

4. Could Mexico clarify whether the Panel is correct to understand that the investigating authority had the data necessary to perform an injury analysis for the full three year period, but chose not to use this data as it considered that the period should correspond to the period on which the analysis for dumping was made? Please elaborate.

Answer:

Indeed, the IA had before it information covering the period January 1997 to December 1999 and, for the reasons explained in the preceding reply, the comparison was made between the "period of investigation" and similar periods over the preceding two years.

5. Could Mexico explain why it considered that this particular 6 month period was adequate in terms of a dumping analysis. Was the fact that that was the period which the petitioners cited the sole reason?

Answer:

Generally speaking, the IA considers that in principle the "period of investigation" proposed by a petitioner is adequate in terms of performing the dumping analysis and that it can serve as a basis for the injury analysis. However, the IA has authority to modify the initial "period of investigation" provided that it receives relevant arguments, accompanied by pertinent evidence, which lead it to consider that the period is not adequate. This is why a simple, unsubstantiated allegation cannot serve as a basis for modifying the period of investigation.

It is important to note that the AD Agreement stipulates in footnote 4 that "[t]he extended period of time should normally be one year but shall in no case be less than six months". The IA

considered that the period of investigation suggested by the petitioner fulfilled that obligation, and hence accepted it for the purposes of initiating the investigation.

6. UNITED STATES

7. UNITED STATES

Questions concerning the injury analysis

8. What, according to the parties, is the definition of the domestic industry allegedly injured by the dumped imports? Does the domestic industry considered in the injury analysis include producers of paddy rice or only of milled rice?

Answer:

The domestic industry covers only producers of long-grain white rice. It does not include producers of paddy rice.

9. Could Mexico clarify whether the import data also include data relating to imports of paddy rice or is the "rice" referred to in the Final Determination always "milled" rice? Are the terms "rice", "white rice" and "long grain white rice" as they appear throughout the Final Determination used as synonyms?

Answer:

The entire injury analysis refers exclusively to long-grain white rice.

10. Could Mexico clarify whether paddy rice also enters the Mexican market under tariff heading 1006.30.01? More in general, which categories of rice fall under this tariff heading?

Answer:

No. Only polished white rice enters under tariff heading 1006.30.01. Paddy rice is imported under heading 1006.10.01 and husked rice under heading 1006.20.01. Over the period of investigation, several types of polished white rice in addition to long-grain white rice entered under the first tariff heading, i.e. glutinous short-grain rice, parboiled rice, etc.; however, all of these share the characteristics of white rice.

11. Could the parties clarify whether the rice imported into Mexico under tariff heading 1006.30.01 covers rice in any or all of the 5 stages of processing mentioned in para. 161 of the Final Determination and that, therefore, some of the rice imported under this tariff heading will need to undergo further processing in Mexico before entering the consumer market as a finished product?

Answer:

Rice is generally sold in large quantities and in bulk, and is transported by rail or ship over vast distances. It is therefore practically impossible to export semi-processed rice from the United States to Mexico – that is, in any of the five stages of processing – because in view of adverse climate conditions or possible pest contamination (weevils, insects, fungus, bacteria, etc.), the only forms in which rice can be imported are paddy rice, with its natural protective husk, and white or polished rice, which has already undergone all the stages of processing and from which the husk and bran (the part most susceptible to pests) have been removed.

12. If it is correct that both subject and non-subject imports of rice from the United States entered the Mexican market under the above mentioned tariff heading, could Mexico explain the methodology that was used by the investigating authority to separate the subject imports of long grain white rice that came in under this heading from the non-subject imports of other types of rice (short grain, etc.)?

Answer:

It was impossible to make an exact separation, and various methodologies (volume of imports from the United States, exporter/importer methodology, methodology based on verifiable exporter data and Mexican Rice Council (CMA) methodology) were therefore used to estimate the volume of imports of the product. The methodologies are explained in paragraphs 217 to 244 of the Final Determination.

13. Could Mexico clarify whether its statement that the domestic industry kept production of long grain white rice stable throughout the year by importing rice during the off-season, is a reference to the imports of paddy rice, or whether such imports are also of semi-processed rice?

Answer:

The domestic industry is able to keep up production throughout the year by importing paddy rice from the United States. As explained above, the importation of semi-processed rice is complicated.

14. In para. 265 of the Final Determination, the Investigating Authority discusses the ex-factory price difference between Argentinean rice and US rice when exported to Mexico. Could Mexico indicate how high the Mexican import duty for rice from non-NAFTA countries like Argentina is? Was all the rice referred to as "rice imported from Argentina" fully processed long grain white rice ready for domestic consumption?

Answer:

A 10 per cent duty is paid on white rice imported from Argentina and other countries with which Mexico has no trade treaty.

The reference in the Final Determination to imports from Argentina concerns long-grain white rice. As stated in paragraph 365 of the document, the product was purchased by a Mexican producer of white rice and mixed with its own production for marketing purposes.

15. Could Mexico clarify whether the information contained in the "pedimentos" would have allowed the investigating authority to determine with certainty the precise amount of imports of the subject product, long grain white rice, from the United States and from other countries, without any need to apply a methodology to distinguish subject from non-subject imports?

Answer:

The document known as the *pedimento de importación* (import declaration) includes various types of information such as the volume and value of the imports, the exporting enterprise, the importing enterprise, the duties and other taxes paid, the date of the transaction, the customs point of entry of the goods, the type of transport used to ship them to Mexico, the tariff heading under which the transaction was conducted, and so forth.

However, the field for entering the product description does not necessarily contain all the details of the product covered by the *pedimento*. Sometimes the imported product is simply described as "white rice", without any specification as to whether it is long grain, short grain or parboiled. Since the sole purpose of this field is to ensure that the product corresponds to its description in the tariff heading and the latter covers many types of white rice, any white rice will come under that heading.

The type of rice most extensively produced and sold in Mexico and the United States and common to both markets is long-grain white rice, so it may reasonably be assumed that the majority of imports concern this particular product. On the other hand, it is not said that even if all the *pedimentos* had been available it would have been possible to determine with certainty the total amount of imports of the subject product.

In addition, the rice trade involves a large number of operations. For example, 1,183 transactions were recorded in 1997, 1,088 in 1998 and 1,207 in 1999. It would have been impractical, therefore, to request access to every single *pedimento* under tariff heading 1006.30.01 for the three years covered by the "period analysed" and to single out the transactions that concerned long-grain white rice. Where a *pedimento* merely stated that white rice was being imported, without specifying whether it was long grain, short grain or of any other type, the investigation regarding that particular *pedimento* would have required referring to additional documents such as the invoices issued by the exporter, bills of lading, and so forth, in the hope that any of these would provide a precise description of the product.

This is why in such cases the IA relies on reasonable estimates of import volumes and prices of the subject product. It also asks the exporters themselves to provide specific data on their exports to Mexico. Replies from exporters are normally expected to cover the major share of estimated exports, thus ensuring the accuracy of the IA's calculations. In the long-grain white rice case, for instance, the data for the "period of investigation" received from the exporters cover 59.8 per cent of the estimated imports (as indicated in paragraph 207 of the Final Determination). Unfortunately, the exporters, despite having been requested to supply data covering the entire period analysed, failed to do so.

16. (a) Could the parties comment on the following argument made by China in its oral statement (page 5):

> **"Given that both Article 5.2 and Article 6.1.3 use the same wording "known exporter", the "known exporters" under Article 6.1.3 refer to "each known exporter" under Article 5.2. Therefore, the AD Agreement suggests that investigating authorities shall rely on the petitioners to identify "known" exporters in their petition(s)".**

Answer:

Mexico agrees with China's interpretation that the investigating authorities should rely on known exporters identified by the petitioners in an investigation.

(b) Is it Mexico's view that the term "known" exporters in Article 6.1.3 AD Agreement, only relates to the exporters that are "made known" to it by the petitioner?

Answer:

In the specific case of the notification under Article 6.1.3 of the AD Agreement, only exporters notified by the petitioner are deemed to be known exporters.

(c) UNITED STATES

17. The US argues that all the Mexican investigating authority had to do was to look into the "pedimentos" to find out who the other US exporters were.

(a) Could Mexico indicate whether this assertion is correct, do the "pedimentos" identify all the exporters ?

Answer*:*

The IA does not have the *pedimentos*, which are in the hands of the Ministry of Finance and Public Credit. To request and await reception of these documents would significantly delay the initiation of the investigation. Instead, the IA has an electronic list of the documents, which does not contain all the information set out in the *pedimentos*.

(b) Could Mexico clarify whether the investigating authority attempted to obtain the "pedimentos"? If so, what was the reason why such information was not obtained, or could not be used?

Answer:

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

(c) Could Mexico explain whether the Mexican investigating authority in its normal practice verifies the information provided by the petitioners concerning the exporters mentioned in the petition? If so, how does the authority go about checking this information ?

Answer:

The IA verifies the information provided in the petition using the list of *pedimentos* to check the value and volume of exports. It cannot, however, determine the number of exporters that performed the transactions.

18. UNITED STATES

19. UNITED STATES

Questions concerning Article 5.8 AD Agreement

20. In Mexico's view, does it suffice for one exporter to have been found to be dumping above *de minimis* levels for all other exporters to be included in the application of the measure under Article 5.8 AD Agreement or does Mexico consider that some sort of country-wide rate

needs to be established and that, only if that country-wide rate is above *de minimis*, will all exporters from that country be covered by the measure? Could Mexico clarify whether an exporter for which a below *de minimis*, but more than zero margin of dumping was found, would receive a 0 per cent duty or would a duty be imposed on such an exporter equal to the *de minimis* margin?

Answer:

Mexico considers that it does suffice for one exporter to have found to be dumping above the *de minimis* level for all exporters to be included in the application of the measure. Each enterprise will be assigned the anti-dumping duty corresponding to its individual margin, provided that the total volume of imports from the country in question is above the *de minimis* level.

Any exporter for which the IA finds a more than zero and below *de minimis* margin of dumping would receive a zero per cent duty.

21. Could Mexico clarify whether this is a correct understanding of the way in which the Mexican system operates: if an exporter was not dumping during the POI, but a dumping margin was found for other exporters of the product, this non-dumping exporter will be included in the measure, but a 0 per cent duty will be imposed. If later the review shows that the exporter had since engaged in dumping, a duty will be imposed on him equivalent to the new margin of dumping.

(a) Is this a correct understanding of the system?

Answer:

Yes. If the IA determines that an exporter has not been engaged in dumping, the exporter will be assigned a zero per cent duty, which de facto does not constitute an anti-dumping duty. If a later review shows that the exporter is engaged in dumping and its volume of exports exceeds the *de minimis* level, the exporter will indeed be imposed a duty equivalent to the new margin of dumping.

(b) Will a new injury analysis be required before such duties may be imposed?

Answer:

Mexico has not conducted any reviews of exporters with a zero per cent margin of dumping. Were it to do so, however, a new injury analysis would probably be carried out before an anti-dumping duty was imposed.

22. UNITED STATES

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

23. In para. 176 of its submission, and para. 61. (c) of its oral statement, Mexico argues that para. 6 of Annex II was complied with as the information of the non-shipping exporter, Producers Rice, was "accepted".

(a) Could Mexico clarify what information this company provided which was accepted by the authority?

Answer:

Paragraph 176 of Mexico's first written submission states that paragraph 6 of Annex II to the AD Agreement addresses the case where the IA does not accept information or evidence from an interested party. In the specific case of *Producers Rice Mill, Inc.*, the circumstances are different because the IA did accept the information submitted by that company. In its various submissions, *Producers Rice Mill, Inc.* explained that it had had no exports of the subject product during the period of investigation and presented arguments in respect of the injury alleged by the CMA.

As mentioned earlier, the IA thus took account in its investigation of the company's assertion that it had had no exports of the subject product during the period of investigation. Moreover, the IA examined the information and evidence submitted by *Producers Rice Mill, Inc.* in the light of the allegations of injury made by the petitioner, as stated in paragraphs 62, 138, 157 and 226 of the Final Determination.

(b) Is Mexico of the view that para. 6 does not apply to situations in which the information is not provided, or is not provided within a reasonable period of time, but only to situation in which information which *was* provided is rejected?

Answer:

Mexico considers that paragraph 6 of Annex II to the AD Agreement does not apply to situations in which information is not provided. On the other hand, it notes that the paragraph does apply where the information provided has been rejected.

24. Article 68 of the Foreign Trade Act mentions three categories of exporters to which the highest margin shall be applied. One of these categories seems to cover the situation provided for in Article 6.8 AD Agreement.

(a) Does Mexico consider that the two other categories (non-appearing exporters and non-shipping exporters) are not covered by the situation described in Article 6.8 AD Agreement?

Answer:

Mexico considers it necessary to clarify that Article 68 of the Foreign Trade Act (FTA) does not address the three situations referred to in the question. In any event, the relevant provision is Article 64 of the FTA.

The cases covered by Article 64 concern the situation where exporters or foreign producers fail to provide the information needed to determine margins of dumping, if any. This corresponds to the second situation described in Article 6.8 of the AD Agreement.

(b) What is the view of the US on the relevance, if any, of the fact that Article 68 of the Foreign Trade Act provides for these three separate categories?

(c) Is Mexico of the view that the AD Agreement does not provide any rules on how to calculate an all others rate for non-appearing parties and non-shipping exporters, or is Mexico arguing that the maximum duty that can be imposed on such exporters under the Agreement is a facts available margin?

Answer:

Indeed, Mexico considers that the AD Agreement does not regulate how the anti-dumping duty should be calculated for exporters that did not appear in the investigation and had no exports during the period of investigation.

25. In Mexico's view, does para. 7 of Annex II allow for unfavourable results only in case of non-cooperative parties or in all cases in which the necessary information is not provided?

Answer:

In the case of the long-grain white rice anti-dumping investigation, the fact that *Producers Rice Mill, Inc.* did or did not cooperate bears no relationship to the fact that the Mexican IA calculated a facts-available dumping margin for that company, since Article 6.8 of the AD Agreement stipulates – as mentioned earlier – that its provisions apply when an interested party does not provide the necessary information. The IA therefore did not apply paragraph 7 of Annex II to the AD Agreement. Instead, it applied paragraph 1 of the Annex, which clearly establishes that if a party does not provide the information requested by the IA, the authority will be free to make determinations on the basis of the facts available, including those contained in the application for initiation.

Questions concerning the challenge of the law as such

26. According to the parties, to what extent is the distinction mandatory/discretionary legislation still applicable in WTO law after the Appellate Body statement in para. 93 of its decision in the *US – Corrosion Resistant Steel* case (DS 244)?

Answer:

We note that in paragraph 93 of its report in *US – Corrosion-Resistant Steel Sunset Review* (WT/DS244/AB/R), the Appellate Body recognizes the importance of distinguishing between the mandatory and the discretionary nature of legislation. It emphasizes that the distinction varies from case to case and should not be applied in a mechanistic fashion. This is why we believe that when a petitioner and a respondent argue over the mandatory or discretionary nature of challenged provisions, it is crucial for the Panel to analyse and, if need be, distinguish between the mandatory and the discretionary nature of a law or of its various provisions in the light of the particular circumstances of each case.

Mexico notes that in this dispute all of the United States' complaints concerning the alleged inconsistency of a number of FTA Articles as such are premised on the fact that the provisions are mandatory. Hence, the United States tacitly recognizes that if those provisions were not mandatory there would be no inconsistency whatsoever. In view of the foregoing, Mexico considers it essential to determine the discretionary or mandatory nature of the FTA provisions challenged by the United States. This will have to be done in the light of the particular circumstances of the case, as explained in Mexico's first written submission and Mexico's oral statement to the Panel.

27. UNITED STATES

28. Could Mexico explain whether, in case the DSB were to adopt a panel report finding an inconsistency of a Mexican law with the WTO Agreements, it considers that it would be obliged to amend the law to bring the law into conformity with the WTO Agreement?

Answer:

If the DSB were to adopt a final Panel report finding inconsistencies between the FTA and the WTO Agreements, Mexico would be obliged to remedy those inconsistencies.

29. Could Mexico clarify whether private parties may be successful when they file a suit against the administration before the domestic courts of Mexico in case the administration failed to comply with a statutory obligation, even if this obligation is inconsistent with the WTO Agreement, requiring the administration to comply with such obligations?

Answer:

It is our understanding that this question of the Panel concerns a hypothetical case which in no way prejudges the consistency of the FTA provisions challenged by the United States. Mexico therefore requests that its reply be considered in that light.

No. In proceedings before the domestic courts, the Mexican administration would in its defence argue the application of Mexican law in a manner consistent with the country's international commitments, such as the WTO Agreement. Consequently the Mexican courts, basing their interpretation on the structure and characteristics of the Mexican legal system, would be under the obligation to rule in favour of the administration. This would be the case if the country investigated were a WTO Member; if not, domestic legislation prevails.

30. Is it Mexico's view that *if* a certain provision is somehow found to be inconsistent with the WTO Agreements, that is, in case a conflict is found between the Foreign Trade Act and the WTO Agreements, then the WTO Agreements would prevail by virtue of Article 133 of the Political Constitution and Article 2 of the Foreign Trade Act?

Answer:

Yes.

31. In para. 263 – 266 of its submission, Mexico argues that the "representativeness" requirement in Article 68 of the Foreign Trade Act is only a tool, and that the US is wrong in suggesting that it is a condition *sine qua non* for the initiation of a review.

(a) Could Mexico clarify whether a review may be initiated if the party concerned cannot demonstrate that its sales volume for the period was representative?

Answer:

As indicated on previous occasions, a demonstration that trade operations were made in representative volumes is not a *sine qua non* requirement for initiating a review. Nevertheless, the interested party will be required in the course of the review to demonstrate such representativeness so that it can be assigned a margin of dumping.

(b) What in the Mexican practice is considered to be a "representative" volume ?

Answer:

For the purposes of determining the representativeness of volumes of exports to Mexico, the Ministry does not use restrictive criteria but analyses information provided by the exporters which demonstrates that their volumes of exports are regular and representative of their sales policies.

It is important to emphasize that exporters are required to demonstrate that their export sales have not been intermittent during the period of analysis and that the volumes involved are consistent with their trade practices.

In order that the foregoing should not be not interpreted as the only means for enterprises to demonstrate the representativeness of their volumes of export sales, the following are cited as further examples:

- A comparison between the volumes of their export sales to Mexico during the period of investigation and during the period under review;

- a comparison between the volumes of their domestic sales and export sales to Mexico during the period under review;

- a comparison between the volumes of their export sales to Mexico and sales to other markets during the period under review.

32. Is it the view of Mexico that, with regard to new shippers (Article 89 D of the Foreign Trade Act), the representativeness requirement is not inconsistent with the AD Agreement or the Subsidies and Countervailing Measures ("SCM") Agreement because it is the only logical and sensible way of ensuring that the Authority can make a proper price comparison for the establishment of an individual margin (as Mexico seems to be saying in para. 270 of its written submission) or is Mexico's argument simply that it is not a condition *sine qua non*, and is this "requirement" for that reason not inconsistent with the AD and SCM Agreements (as paras. 263 – 266 of the written submission seem to suggest with regard to the similar requirement in Article 68 of the Foreign Trade Act)?

Answer:

Mexico supports both arguments cited by the Panel in its question regarding new shippers.

33. In its submission and oral statement, Mexico does not directly reply to the US argument in para. 261 of the US submission that Article 89 D of the Foreign Trade Act only applies to producers, but clearly asserts that it will apply its laws in accordance with the Agreement. Could Mexico clarify whether Article 89 D of the Foreign Trade Act also applies to exporters?

Answer:

In the case of new shippers, Mexico applies Article 89.D of the FTA concurrently with Article 47 of the FTA Regulations, as duly notified to the WTO and circulated to Members on 18 May 1995 in document G/ADP/N/1/MEX/1, for reviews of exporters or traders that so request.

34. Could Mexico clarify whether, pending a judicial review, no definitive duties will be imposed or collected as it seems to be arguing in paras. 301 - 302 of its written submission?

Answer:

As stated in paragraph 302 of Mexico's first written submission and pursuant to Article 98.III of the FTA, interested parties are not required to pay anti-dumping duties and may provide a guarantee of payment while the challenge procedure is under way.

35. Could Mexico clarify whether the importation of "identical or like goods" on which fines may be imposed under certain circumstances in Article 93 V of the Foreign Trade Act also

refers to imports of the products from third countries, i.e. from countries other than the one investigated in the anti-dumping investigation?

Answer:

The fine provided for in Article 93.V of the FTA would apply, where appropriate, to imports of identical or like goods from the country under investigation, regardless of the country of provenance. It would not apply to imports from third countries.

ANNEX B-3

RESPONSES OF THE EUROPEAN COMMUNITIES

2 June 2004

1. Question (a)

Could the EC provide a detailed reasoning on why it considers that the "investigation" in Article 5.8 AD Agreement unambiguously refers to a country-wide investigation?

1. A country-wide approach to an anti-dumping investigation can be deduced from a number of both substantial and procedural provisions of the *Anti-Dumping Agreement*.

2. Article 2 *Anti-Dumping Agreement* defines dumping. Article 2.1 *Anti-Dumping Agreement* refers to the word "country" three times – and specifically to the product exported "from one country to another". The word "country" is used a further five times in Article 2.2 and footnote 2 *Anti-Dumping Agreement*. These provisions reflect the language of Article VI GATT 1994, which also repeatedly refers to imports from one country to another. They indicate that the concept of dumping involves a strong connotation of a country-wide assessment, which will inevitably have an impact on the scope of the investigation. Thus, absent particular provisions requiring a company specific approach, a country-wide approach will reflect a permissible interpretation of the *Agreement*.

3. Article 5.2(ii) *Anti-Dumping Agreement* requires the provision of the "names of the country or countries of origin or export in question". This is the primary obligation, in the sense that it is mentioned first in this provision, and is not qualified in any way – a complainant cannot state that it does not know the country or countries of origin. There is a secondary obligation – to describe known exporters or producers and importers. This obligation is, however, subject to the important qualification of the word "known" – if the names of the exporters or producers are not known, they do not need to be indicated in the complaint. It would be a permissible interpretation of the *Anti-Dumping Agreement* to initiate an original investigation even in circumstances where only the country of origin would be known – even if there were no known exporters or producers. Thus, the country-wide nature of the investigation is also reflected in the complaint, right from the start, that being the very basis of a possible subsequent investigation.

4. Such an approach is confirmed by Article 12.1.1 *Anti-Dumping Agreement*, which requires that the public notice of the initiation of an original investigation states the name of the exporting country or countries. There is no obligation to state the names of known exporters or producers. Thus, what is clear from both Article 5.2 (ii) and Article 12.1.1. *Anti-Dumping Agreement* is that the investigating authority is not obliged to pick-out particular exporters from a given country of origin for the purposes of the initiation of an investigation. The initiation of an anti-dumping investigation may thus lawfully be country-specific.

5. In addition to these strong textual arguments, one may observe that the country-wide approach to the initiation of an original investigation is common sense. The primary objective of an anti-dumping proceeding is to address the economic problem (injury) caused by dumped imports from a particular source. The legal structures of exporters and producers in the exporting country are, in terms of the scope of the investigation, incidental and may be difficult or impossible to ascertain. If the investigation were initiated in the first place only in relation to known exporters and producers, then each time a further exporter or producer became known, it would presumably be necessary to extend the investigation. An investigating authority has no real means of ascertaining with complete certainty the full list of exporters or producers in the exporting country, and the *Anti-Dumping Agreement* imposes no obligation on an investigating authority to actively seek out that information.

6. The first part of the first sentence of Article 5.8 *Anti-Dumping Agreement* refers to the rejection of an application under paragraph 1, an application which, we have just observed, could lawfully be country-wide only – and indeed is likely to be so. In order for this sentence to be interpreted in an internally consistent manner, it necessarily follows that the ensuing obligation to terminate the investigation contained in the second part of the first sentence of Article 5.8 *Anti-Dumping Agreement* refers to the same types of investigation as those referred to in the first part of the sentence, that is, including an investigation with a country-wide scope. Members may go further, by considering such matters on a company specific basis, but they are not obliged to do so by the terms of Article 5.8 *Anti-Dumping Agreement*.

2. Question (b)

What, if any, is the significance of the wording used in the second sentence of Article 5.8 that there shall be immediate termination "in cases" where the authorities determine that the margin of dumping is *de minimis*? In the view of the EC, would one not expect the Agreement to have used the singular "in such a case" in the second sentence of Article 5.8 as well, if, as the EC argues, the investigation in the first sentence was a reference to a country-wide investigation?

7. The European Communities understands the final words "the case" in the first sentence of Article 5.8 *Anti-Dumping Agreement* to refer to the case as reflected in the application – which may lawfully be country-wide, as explained above. Furthermore, the European Communities understands the words "the cases" in the second sentence of Article 5.8 *Anti-Dumping Agreement* to have the same meaning (except that the plural is used) as the words "the case" in the first sentence of Article 5.8. The European Communities agrees that the text might have read : "in a case". However, the European Communities does not attach any significance to the use of the plural in the second sentence of Article 5.8. It is common when drafting an abstract and normative piece of legislation to have in mind its future application in concrete terms to many individual cases (plural), and that may often be reflected in the drafting.

8. The European Communities would find it unpersuasive to suggest that by using the plural "the cases" the drafters intended to refer to several company specific cases or investigations, as opposed to "the case" referred to in the first sentence of Article 5.8 *Anti-Dumping Agreement* – that being a country-wide case. It seems to the European Communities that had the drafters wished to write such a distinction into this provision, they would have done so more clearly – choosing, for example, a difference abstract noun, rather than relying on an over-subtle distinction between the singular and the plural.

9. The European Communities finds further support for this view in the fact that the French language version of the first sentence of Article 5.8 *Anti-Dumping Agreement* does not use the word "cas". That strongly militates in favour of rejecting the notion that the drafters intended to build on a distinction between the singular and the plural – had they so intended they would surely have ensured that the text had the same meaning in all the language versions.

10. Finally, the European Communities would observe that the second sentence of Article 5.8 *Anti-Dumping Agreement* refers both to *de minimis* dumping margins and to a negligible volume of imports. Both of these are linked to the words "in cases where". The import threshold factor is clearly country-wide, as reflected, for example, in the fourth sentence of Article 5.8. It follows that the words "in cases where" cannot, in themselves, lead to the conclusion that the investigating authority must conduct a company specific assessment.

Question (c)

Is the EC of the view that its interpretation requires an authority to calculate a country-wide margin to examine whether this country-wide margin is above *de minimis*? If not, why not?

11. The European Communities considers that Article 5.8 *Anti-Dumping Agreement* imposes an obligation on an investigating authority to calculate a country-wide dumping margin when the investigating authority has reasons to believe that such a margin could be *de minimis* and the case would thus have to be terminated (even though individual exporters might have dumping margins above *de minimis*). Where it is obvious from the company specific dumping margin calculations that the country-wide dumping margin is well above *de minimis*, no precise calculation is required.

Question (d)

Is it the EC practice to calculate such a country-wide margin?

12. The answer to question (c) reflects the practice of the European Communities.

ANNEX C

Parties' Responses to questions
posed in the context of the second substantive meeting of the Panel

ANNEX C-1

RESPONSES OF THE UNITED STATES

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

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

Answer:

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

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

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

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

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

Answer:

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

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

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

3. The United States argues on various occasions that the purpose of an anti-dumping investigation is to determine whether a domestic industry is presently injured by dumping that is presently occurring (see e.g. United States answer to question 1 of the Panel's questions), and refers in support of this argument to the use of the present tense in *inter alia* Article 2 and 3.4, 3.5, and 5.8 Anti-Dumping Agreement (the "AD Agreement"). What would be the United States view on the argument that it is the definitional nature of these provisions which explains the use of the present tense and that this use of the present tense in such definitional provisions is thus uninformative of the alleged requirement of the closeness in time between the application of a measure and the conditions for application of the measure?

Answer:

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

7. Similarly, Article VI:1 of the GATT 1994 states that dumping is to be condemned if it "causes or threatens" material injury to a domestic industry. The term "causes" indicates that the dumping and injury is occurring in the present, and the term "threatens" indicates that the injury may

[1] *See* US Response to First Panel Question 2.
[2] New Shorter Oxford English Dictionary, 1985 (1993) (emphasis in original).
[3] *New Shorter Oxford English Dictionary*, 2348 (1993).

occur in the future. If the drafters had intended instead to permit the imposition of anti-dumping measures when the conditions for doing so only existed in the past, they could have used the terms "caused or threatened" material injury. They did not.

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

9. In the rice investigation, there was a nine month gap between the end of the petitioners' suggested POI and the date the petition was filed. The gap stretched to 15 months by the time Economía initiated its investigation. By the time of the final determination, the injury information that Economía was using for its determination was three to five years old. Economía's failure to collect or examine recent data, and its failure to update its injury information over the course of its investigation, left it with no basis for an objective evaluation of present dumping and injury.

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

Answer:

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

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

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

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

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

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

Answer:

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

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

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

Answer:

15. At the second Panel meeting, Mexico stated that it would not initiate an investigation if the petitioners identified no known exporters, because the AD Agreement requires petitioners to identify the known exporters. Mexico's answer does not explain, however, what it would do if the petitioners claimed not to know the identity of any of the exporters, or if Economía would take any steps to verify such an assertion. For example, there is no evidence in the record of the rice investigation suggesting that Economía took any steps at all to verify the petitioners' identification of only two "known" exporters in the petition (or to question their failure to identify the Rice Company as a known exporter). The record does, however, show that Economía is perfectly willing to apply the facts available in setting dumping margins for exporters and producers that the petitioners do not identify, and that are never sent the questionnaire. Mexico has not satisfactorily explained why it is willing to take this approach when the petitioners identify only two exporters, but would not do the same if the petitioners identified none.

7. The United States on various occasions mentions the fact that apart from the two exporters listed as "known exporters" by the petitioner in the application, the application also contained information and referred for example in Annex H to another exporter, the Rice Corporation, which later appeared and took part in the investigation out of its own initiative.

(See e.g. para. 13 United States first submission.) According to the United States, did the application contain any other names of United States exporters, in addition to these three?

Answer:

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

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

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

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

Answer:

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

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

[5] Petition Annex M at 4 (Exhibit US-17).
[6] Petition Annex M at 2 (Exhibit US-17); Petition at 10 (Exhibit US-8).
[7] *See* Exhibits US-18&19 (excerpts from *Rice Journal*).
[8] *See* Petition at 17 (Exhibit US-8).
[9] *See, e.g.*, Petition at 21 (final sentence), 23, 44 (referencing Annex F) (Exhibit US-8).
[10] Mexico's Second Written Submission, para. 57.

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

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

Answer:

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

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

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

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

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

Answer:

24. The United States noted in response to question 17(b) in the first set of Panel questions that the petitioners in the *Crystal Polystyrene* case used *pedimentos* that they obtained from the Mexican Government to separate out imports of the subject product from other, non-subject merchandise

[11] *See* US Second Written Submission, para. 58 and n.43.
[12] *See* US First Written Submission, paras. 12, 18.

imported under the same tariff heading.[13] The reason for the US comment was to illustrate that the *pedimentos* could in fact be used to obtain accurate volume and value data that Economía could have used in its investigation.

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

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

27. As the United States has previously stated, we are noting Mexico's use of *pedimentos* that it supplied to its petitioners as a way of illustrating Mexico's willingness to use them in a way that favours the interests of its domestic industries. The United States does not mean to suggest, however, that releasing the *pedimentos* to private industry is appropriate.

Questions concerning the non-shipping exporter

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

Answer:

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

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

[14] The preliminary determination states in pertinent part:

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

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

[15] *See* id.

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

Answer:

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

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

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

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

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

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

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

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

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

Answer:

35. Non-shipping exporters are "exporters or producers" of the product subject to investigation, even if they are not exporting the product during the investigation. Therefore, they are interested parties within the meaning of Article 6.11(i) of the AD Agreement. It is important to note, however, that an investigating authority may choose to limit its investigation in accordance with Article 6.10 of the AD Agreement, and not include a particular exporter or producer in its investigation. In that case, it may only apply a neutral "all others" rate, calculated in accordance with Article 9.4 of the AD Agreement, to the unexamined exporters and producers. As the panel stated in *Argentina – Definitive Anti-dumping Measures on Imports of Ceramic Floor Tiles from Italy*, "an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit."[16]

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

Answer:

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

[16] Report of the Panel, WT/DS189/R, adopted 5 November 2001, para. 6.54 ("*Argentina – Ceramic Tiles*"). The Panel also stated that "the inclusion, in an Annex relating specifically to the use of best information available under Article 6.8, of a requirement to specify in detail the information required, strongly implies that investigating authorities are *not* entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required." *Id*., para. 6.55.

Questions concerning the law as such

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

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

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

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

Answer:

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

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

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

Answer:

39. The panel in the *Argentina Poultry* dispute concluded that Argentina breached Article 6.1.1 of the AD Agreement when it provided only 20 days for a group of respondents to respond to questionnaires that it sent for the first time approximately eight months after initiation.[17] The same panel stressed that the 30-day period provided for in the first sentence of Article 6.1.1 "is an absolute minimum that must be granted to exporters from the outset," and that the extensions provided for in the second sentence of that provision are in addition to, not in lieu of, the 30-day period provided for

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

in the first sentence.[18] Article 53 of the FTA, however, when applied to companies not identified as "known" exporters in the petition (and thus not sent the questionnaire immediately following initiation), legally forecloses both the 30-day response period and an opportunity for an extension of that period. Therefore, Article 53 is inconsistent as such with Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement.

14. In its answer to question 31 of the Panel's questions, Mexico replies in the first sentence that "representativeness" is not a requirement for initiating a review. In the second sentence, Mexico adds that the interested party will be required in the course of the review to demonstrate such representativeness so that it can be assigned a margin of dumping. Is it the argument of Mexico that it is not a requirement for *initiating* a review, but it is a requirement in order to be *successful in obtaining* a review? Could Mexico explain to what extent it considers this distinction to be relevant?

Answer:

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

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

Answer:

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

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

43. Therefore, it would not normally be permissible for an authority to apply a margin based on the facts available to an unknown exporter. Rather, that firm would be entitled to the neutral all

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

other's margin calculated in accordance with Article 9.4 of the AD Agreement. If the domestic industry would prefer instead that the exporter receive an individual margin, it could simply do a better job of identifying the known exporters in the first place.

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

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

ANNEX C-2

RESPONSES OF MEXICO

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

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

Answer:

With regard to the first question, in examining the POI suggested by the petitioner, the investigating authority checks that: (a) the period suggested by the domestic producers is at least six months; (b) together with their application the petitioners submit information and evidence pertaining to the period they suggest; (c) the petitioner's information and evidence concerning normal value and export price correspond to the suggested POI.

With regard to the second question, a POI would be deemed inappropriate in the event of failure to meet all the conditions set out above.

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

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

Answer:

In our view there is no contradiction. When the investigating authority receives an application for initiation of an anti-dumping investigation, it checks compliance with the requirements listed in the answer to question 1. If the information submitted by the petitioners is adequate, then – as stated in the answer to question 5 of the Panel's questions in relation to the first substantive meeting – the POI proposed by the petitioners is deemed adequate for initiation of an investigation. However, in the course of the investigation importers and exporters may propose changing the period of investigation provided they submit relevant arguments and supporting evidence. In other words, Mexico's point is that an assertion alone without any evidence (as was submitted by the exporters in the investigation concerning long-grain white rice) will not suffice for the POI to be changed.

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

Answer:

In Mexican administrative practice there have been no cases of importers and exporters showing a need for a change of POI.

3. The United States argues on various occasions that the purpose of an anti-dumping investigation is to determine whether a domestic industry is presently injured by dumping that is presently occurring (see e.g. United States answer to question 1 of the Panel's questions), and refers in support of this argument to the use of the present tense in *inter alia* Article 2 and 3.4, 3.5, and 5.8 Anti-Dumping Agreement (the "AD Agreement"). What would be the United States view on the argument that it is the definitional nature of these provisions which explains the use of the present tense and that this use of the present tense in such definitional provisions is thus uninformative of the alleged requirement of the closeness in time between the application of a measure and the conditions for application of the measure?

Answer:

It is important to bear in mind that so far the United States has made only bald assertions and has not explained how it is possible in an anti-dumping investigation to determine whether a domestic industry is being presently injured by dumping that is presently occurring.

Mexico further observes that Articles 2, 3.4, 3.5 and 5.8 of the AD Agreement make use of the present tense because of the nature of the concepts they set forth. The same Articles also make use of the future, without this necessarily implying that the tense of the verb is to be read in the narrow and literal sense, as the following examples illustrate:

(a) The Spanish and French versions of Article 2.2.1 of the AD Agreement state:

> " ... Si los precios inferiores a los costos unitarios ... son superiores ... se considerará [English version: "shall be considered"] que esos precios permiten recuperar los costos dentro de un plazo razonable." (Emphasis added.)
>
> " ... Si les prix qui sont inférieurs aux coûts unitaires ... sont supérieurs ... il sera considéré que ces prix permettent de couvrir les frais dans un délai raisonnable." (Emphasis added.)

(b) The Spanish and French versions of 3.4 of the AD Agreement read as follows:

> "El examen de la repercusión de las importaciones objeto de dumping sobre la rama de producción nacional de que se trate incluirá [English version: "shall include"] una evaluación de todos los factores e índices económicos ... Esta enumeración no es exhaustiva, y ninguno de estos factores aisladamente ni varios de ellos juntos bastarán [English version: "can … necessarily give"] necesariamente para obtener una orientación decisiva..". (Emphasis added.)
>
> "L'examen de l'incidence des importations faisant l'objet d'un dumping sur la branche de production nationale concernée comportera une évaluation de tous les facteurs et indices économiques ... Cette liste n'est pas exhaustive, et un seul ni même plusieurs de ces facteurs ne constitueront pas nécessairement une base de jugement déterminante." (Emphasis added.)

(c) The Spanish and French versions of Article 3.5 of the AD Agreement state:

> "Habrá de demostrarse [English version: "It must be demonstrated"] que, por los efectos del dumping ... Estas examinarán también cualesquiera otros factores de que tengan conocimiento, distintos de las importaciones objeto de dumping ... y los daños causados por esos otros factores no se habrán de atribuir [English: "must not be attributed] a las importaciones objeto de dumping." (Emphasis added.)
>
> "Il devra être démontré que les importations faisant l'objet d'un dumping ... Celles-ci examineront aussi tous les facteurs connus autres que les importations faisant l'objet d'un dumping ... et les dommages causés par ces autres facteurs ne devront pas être imputés aux importations faisant l'objet d'un dumping." (Emphasis added.)

(d) The Spanish and French versions of Article 5.8 of the AD Agreement read:

> "La autoridad competente rechazará [English version: "shall be rejected"] la solicitud presentada con arreglo al párrafo 1 y pondrá fin [English version: "shall be terminated"] a la investigación sin demora ... " (Emphasis added.)
>
> "Une demande présentée au titre du paragraphe 1 sera rejetée et une enquête sera close dans les moindres délais ... ". (Emphasis added.)

Consequently, the United States' arguments based on the use of the present tense in the above Articles are without merit since, as shown above, the same Articles also use verbs in the future tense which are not necessarily to be construed in a narrow and literal sense.

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

Answer:

First, it should be made clear that in paragraph 18 of its second oral statement, Mexico did not assert that the purpose of an anti-dumping investigation is to offset dumping that caused or threatened to cause injury in the past. What Mexico said is that the purpose of such investigations is to offset or prevent dumping – which does not necessarily have to occur in the present – that causes or threatens to cause injury to the domestic industry.

Secondly, in Mexico's view the very nature of investigations precludes any finding of present dumping because the period set for investigation is bound to be a period that has already elapsed and that precedes the initiation of the investigation. For example, no investigating authority in fact asks importers and exporters to provide information on transactions they carry out between the initiation of the investigation and the date of the final determination with a view to basing the latter on the present. In other words, it is impossible to set a POI to be updated over time so that at the end of the investigation the authority is in a position to determine the existence of present dumping. Indeed, recognizing this to be the case, the AD Agreement provides for the possibility of yearly reviews of anti-dumping duties which determine the new margin of dumping to be applied to a period subsequent to the one considered in the investigation.

Thus, for injury to be determined it must be found that dumping causes or threatens to cause injury to the domestic industry in the period in which it occurs and not necessarily afterwards. In the case of threat of injury, it must be found that a threat exists at the time when the dumping occurs. On this basis the authority in the investigation concerning long-grain white rice found dumping to be the cause of the injury to the domestic industry. In other words, it was determined that dumping caused injury in the period in which the United States exporters carried out their transactions and that the injury was caused by the dumped exports.

It is desirable for the POI to be as close as practicable to the initiation of the investigation because that period having already elapsed, the closer it is to the date of initiation the greater the likelihood that the circumstances prevailing during the POI will still obtain. But Mexico maintains that this is not mandatory, since no rule in the AD Agreement so provides.

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

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

Answer:

It must first be pointed out that in its reply to question 17(b) of the Panel, Mexico did not state that it was under no obligation to obtain the pedimentos to identify all of the exporters. What Mexico said is that it was not required under the AD Agreement to identify all the exporters or to obtain the pedimentos; in other words, the Agreement lays down no such obligation. Consequently, the United States cannot plead breach of the Agreement on the basis of a non-existent obligation. And there is no point in taking up the United States' arguments as to whether Mexico planned to consult them and decided in the end not to because of the delay it would cause, since the AD Agreement does not require Mexico to do so.

As to consulting a small number of pedimentos without unnecessarily delaying the investigation, the time it takes to obtain the pedimentos is what largely causes the delay. As occurs with many WTO Members, import declarations are in the hands of the customs authority, not the investigating authority. In Mexico, they therefore have to be obtained through the Ministry of Finance and Public Credit, which can take several weeks or perhaps months, even if only a sample is requested, in addition to the time needed to examine them. As explained in the reply to question 17(b), it would have taken more than 40 days to obtain the pedimentos, for the sake of complying with the United States' wishes and not out of any obligation under the AD Agreement.

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

Answer:

It must first be pointed out that a petition that does not specify the identity of the exporters has never been submitted to the Mexican authority. In the 200 or more cases dealt with by the

Ministry there has never been such a petition; and this holds good for the investigations concerning long-grain white rice and beef.

Failure to mention any exporters in a petition would be treated as inconsistent with Article 5.2(ii) of the AD Agreement and Article 75(X) of the Regulations of the Foreign Trade Act, and the investigating authority would advise the petitioner under Article 78 of the Regulations that it had 20 days within which to notify known exporters. The question is purely hypothetical and we confirm that the Mexican authority has never been faced with such a situation, including in investigations concerning exports from the United States. It is our view, generally speaking, that it is virtually impossible for a domestic producer not to know its foreign competitors.

As to the question whether the authority verifies the existence of exporters mentioned by the petitioner, Mexico is of the view that this is not part of the requirement laid down in Article 5.3 of the AD Agreement. That provision requires the examination of the accuracy and adequacy of the evidence to ascertain whether it is sufficient to justify initiation, and covers not the identity of exporters known to the petitioner but the information and evidence on dumping, injury and causal link submitted to justify initiation of an investigation.

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

Answer:

Apart from the exporters listed as known exporters and the company mentioned in "Annex H" of the application for initiation of an investigation, the application mentions no other United States companies that can be deemed to be exporters.

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

Answer:

Mexico confirms that exhibit MEX-5 is a questionnaire like the one sent to the known exporters and the United States Embassy in Mexico. It should also be noted that when unknown exporters request the questionnaire for exporters from the Mexican authority, it is sent to them with no prior formalities and they are allowed to participate in the investigation with no restrictions.

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

Answer:

We confirm that the listings of pedimentos contain information on the value and volume of the imports. They also contain data on the tariff heading, country of origin, country of consignment, freight, gross weight, exchange rate, identity of the importers (name and federal taxpayers' registration), *inter alia*.

In Mexico, both the listings of pedimentos and the pedimentos themselves are treated as confidential information under Mexican law.

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

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

Answer:

Mexico confirms that the 40 days referred to in its reply to question 17(b) of the Panel correspond to the time it would have taken just to obtain the pedimentos from the Ministry of Finance and Public Credit.

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

Answer:

The only relevant documents are the pedimentos and the listings of pedimentos. The investigating authority has electronic access to the latter. There is no electronic version of the pedimentos, which Customs handles only in paper form.

Questions concerning the non-shipping exporter

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

Answer:

It is our understanding that under Article 9.5 of the AD Agreement, during the new shipper procedure petitioners are not bound to pay anti-dumping duties and may instead provide guarantees. Thus, the term "guarantees" implies that the authorities of the importing Member may ask the

exporter to provide for the duration of the above-mentioned procedure guarantees sufficient to cover any anti-dumping duties the new shipper may have to pay as a result of the review.

We further observe that the term "guarantees" is not limited to the cash deposits or bonds referred to in Articles 7.2, 10.3, 10.4 and 10.5 of the AD Agreement, but allows that there may be other forms of guaranteeing the payment of anti-dumping duties.

It should nonetheless be noted that although the English version of the AD Agreement makes a distinction between "security" (Article 7.2) and "guarantees" (Article 9.5), in the Spanish and French versions there is no such difference. The Spanish version uses "garantías" and the French version, "garantie", in both those Articles (7.2 and 9.5) and in Articles 10.3, 10.4 and 10.5 as well. Thus, for the purpose of the grant of guarantees under Article 9.5 of the Agreement, cash deposits and bonds will be allowed.

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

Answer:

Mexico is of the view that the AD Agreement sets no guidelines for determining the amount of the guarantee that may be requested of a new shipper and that this will be dealt with on case-by-case basis.

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

Answer:

In Mexico's view, a non-shipping exporter is an interested party in the sense of Article 6.11(i) of the AD Agreement, since in establishing that interested parties are to include exporters or foreign producers, this provision does not exclude or limit participation by any exporter in the investigation.

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

Answer:

Mexico believes that, from a purely conceptual standpoint, a non-shipping exporter is not the same thing as a new shipper. A non-shipping exporter is an exporter that did not export during the POI to the WTO Member conducting the anti-dumping investigation. A new shipper is an exporter that did not export during the POI but has exported since the POI, which may be before the end of the investigation or once the anti-dumping duties have been imposed. Thus, a non-shipping exporter may become a new shipper if it exports after the POI.

Under Article 6.11(i) of the AD Agreement, both are interested parties in that both are exporters of the product subject to investigation and therefore have the same rights under the Agreement. However, for the purposes of levying anti-dumping duties the Agreement does not require the investigating authority to afford them different treatment. Mexico accordingly takes the view that if a non-shipping exporter and a new shipper fail to provide adequate information for the

determination of their individual margins of dumping, the investigating authority will base its preliminary or final determination on Article 6.8 of the Agreement.

Questions concerning the law as such

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

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

Answer:

In Mexico federal laws are general in nature and mandatory, being acts of parliament. Federal laws – including the FTA – accordingly apply nationwide. If Mexico has undertaken through an international treaty to fulfil certain obligations, the provisions of the FTA must obviously apply to the country with which the treaty was signed, in accordance with what is stipulated in that treaty. Consequently, for WTO Members the FTA must be applied – as its Article 2 provides – consistently with the provisions of the Marrakesh Agreement and the Agreements it encompasses. In other words it must not go against them, which on no account means that the investigating authority may breach the FTA at its discretion.

Accordingly, Mexico emphasises that in the case of the FTA, Article 2 of the latter serves as the guide for interpreting all other articles of the Act. Consequently, since the FTA establishes that all its articles must be applied in accordance with international treaties to which Mexico is a party, there is no possibility whatever of the authority going against the meaning of the FTA at its discretion.

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

Answer:

No. This has no relevance for the application of Article 2 of the FTA.

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

Answer:

Yes. Mexico considers that the provisions of the FTA impugned by the United States are consistent with the WTO Agreements as demonstrated by the claims and arguments, both oral and written, that Mexico has submitted to the Panel.

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

Answer:

Article 53 of the FTA must be read in conjunction with the last paragraph of Article 3 of the FTA, which states: "Where this Act refers to time-limits in days, these shall be understood to mean

working days and where it refers to months or years, these shall be understood to mean calendar months or years".

Thus, calculated in calendar days the period of 28 working days is longer than the period of 30 days prescribed in Article 6.1.1 of the AD Agreement, even including the week specified in footnote 15 of the Agreement. Mexican practice thus allows all exporters, known and unknown alike, a period of 28 working days after the initiation of the investigation in which to submit a duly completed exporters' questionnaire. This does not impair their right to apply for an extension of the deadline.[1]

Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement, on the other hand, are very emphatic: "Exporters or foreign producers (or interested Members) receiving questionnaires used in an … investigation shall be given at least 30 days for reply … ". (Emphasis added).

Consequently, according to the rules of interpretation of international treaties and agreements described by Mexico in earlier submissions, there is no requirement to grant the 30 days to exporters that are not sent a questionnaire.

This is borne out by the report of the Appellate Body in *Argentina – Poultry Anti-Dumping Duties*, which said:

> "7.145 … We read the first sentence of Article 6.1.1 to mean that if questionnaires are sent to exporters or foreign producers, they shall be given at least 30 days for reply."

Besides, it would be illogical to grant this period to every newly arrived exporter or foreign producer of which the investigating authority was unaware. To do so would undoubtedly hold up the investigation and the ensuing delay would entail failure to observe the time-limits set in Article 5.10 of the AD Agreement and Article 11.11 of the SCM Agreement.

Along the same lines, the Appellate Body in *United States – Hot-Rolled Steel* said in its report:

> "73. Indeed, in the absence of time-limits, authorities would effectively cede control of investigations to the interested parties, and could find themselves unable to complete their investigations within the time-limits mandated under the *Anti-Dumping Agreement*."

14. In its answer to question 31 of the Panel's questions, Mexico replies in the first sentence that "representativeness" is not a requirement for initiating a review. In the second sentence, Mexico adds that the interested party will be required in the course of the review to demonstrate such representativeness so that it can be assigned a margin of dumping. Is it the argument of Mexico that it *is not* a requirement for *initiating* a review, but it *is* a requirement in order to be *successful in obtaining* a review? Could Mexico explain to what extent it considers this distinction to be relevant?

Answer:

What Mexico wishes to emphasize is that representativeness is a requirement not for initiating a new shipper review or a review of anti-dumping duties, but for determining, at the end of the

[1] In addition, Article 164 of the FTA Regulations allows unknown exporters that appear after initiation of the investigation to submit their replies to the questionnaire even after the preliminary determination, at which stage they are given a new period of thirty working days. Exporters' information, arguments and evidence will be taken into account for the final determination.

procedure, an individual dumping margin or subsidy for the company applying for the review. It is natural and logical that an applicant's export volume during the period under review should be representative. In other words, it is not enough to export one unit of the product under investigation for the purpose of obtaining a lower or zero margin. Otherwise, the investigating authority would not conduct a proper price comparison and would therefore fail in its obligation to determine a fair individual margin of dumping.

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

Answer:

Mexico believes that the following should be borne in mind:

First, Article 6.11(i) of the AD Agreement says that exporters of products subject to investigation must be treated as "interested parties", but does not determine whether only known exporters are to be regarded as interested parties. Since it makes no such distinction, the AD Agreement considers both known exporters and unknown exporters to be interested parties. Accordingly, all exporters of the product under investigation are subject to the relevant provisions of the AD Agreement.

Article 6.8 of the AD Agreement states: "In cases in which any interested party refuses access to, or otherwise does not provide, necessary information … or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available." (Emphasis added).

On the basis of the foregoing, we observe that according to the AD Agreement, the provisions of Article 6.8 of the Agreement (facts available) may apply both to known and to unknown exporters, since both are interested parties.

Secondly, we note that in this dispute arguments have been adduced about the use of Articles 9.4 or 6.8 of the AD Agreement for the purpose of calculating the margin of dumping for unknown exporters.

Article 9.4 of the Agreement applies only to known exporters, as can be seen from the following:

(a) Article 6.10 of the Anti-Dumping Agreement states: "The Authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned … In cases where the number of exporters … is so large as to make such a determination impracticable, the authorities may limit their examination … by using samples which are statistically valid … " (Emphasis added).

Thus, according to Article 6.10 of the AD Agreement, investigating authorities must as a rule calculate the individual margin of dumping for each known exporter except where the number of known exporters is so large as to make such a determination impracticable, in which case they may limit their examination using statistical samples. In other words, Article 6.10 of the AD Agreement allows statistically valid sampling only among the exporters known to the authority. This is perfectly logical since it is impossible to select a sample from among a set of unknown elements.

Furthermore, Article 9.4 of the AD Agreement provides that the calculation method it sets out shall apply only "[w]hen the authorities have limited their examination in accordance with … paragraph 10 of Article 6 … ", in other words, where the investigating authority has limited its examination by using statistically valid samples.

Since – as already stated – statistical samples may be used only for known exporters, the calculation method set forth in Article 9.4 of the Agreement may be used only for known exporters and provided a sample has been selected.

Accordingly, because Article 6.8 of the AD Agreement can be applied both to known and to unknown exporters and because Article 9.4 of the Agreement cannot be applied to unknown exporters, we conclude that it is consistent with the Agreement to calculate the residual margin of dumping on the basis of Article 6.8 (facts available). Likewise, since it does not apply to unknown exporters the calculation method described in Article 9.4 of the AD Agreement cannot properly be used to calculate a "residual" margin of dumping.

ANNEX D

Request for Consultations and Request for the Establishment of a Panel

ANNEX D-1

REQUEST FOR CONSULTATIONS BY THE UNITED STATES

WORLD TRADE ORGANIZATION

WT/DS295/1
G/L/631
G/ADP/D50/1
G/SCM/D54/1
23 June 2003
(03-3349)

Original: English

MEXICO – DEFINITIVE ANTI-DUMPING MEASURES ON BEEF AND RICE

Request for Consultations by the United States

The following communication, dated 16 June 2003, from the Permanent Mission of the United States to the Permanent Mission of Mexico and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the Government of Mexico pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), and Article 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), with respect to Mexico's definitive anti-dumping measures on beef and long grain white rice, published in the *Diario Oficial* on 28 April 2000[1] and 5 June 2002[2] respectively, as well as any amendments thereto or extensions thereof[3] and any related measures[4] and also with respect to certain provisions of Mexico's Foreign Trade Act and its Federal Code of Civil

[1] *Resolución final de la investigación antidumping sobre las importaciones de carne y despojos comestibles de bovino, mercancía clasificada en las fracciones arancelarias 0201.10.01, 0202.10.01, 0201.20.99, 0202.20.99, 0201.30.01, 0202.30.01, 0206.21.01, 0206.22.01 y 0206.29.99 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia, Diario Oficial, Segunda Sección 8 (28 de Abril de 2000).*

[2] *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 de Exportación, originarias de los Estados Unidos de América, independientemente del país de procedencia, Diario Oficial, Segunda Sección 1 (5 de Junio de 2002).*

[3] Including any further determinations made pursuant to court order or remand.

[4] These include, for example, the *Resolución final de la investigación sobre elusión del pago de cuotas compensatorias impuestas a las importaciones de carne de bovino en cortes deshuesada y sin deshuesar, mercancía clasificada en las fracciones arancelarias 0201.20.99, 0202.20.99, 0201.30.01, 0202.30.01 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia, Diario Oficial, Primera Sección 1 (22 de Mayo 2001).*

Procedure. These measures appear to be inconsistent with Mexico's obligations under the provisions of GATT 1994, the AD Agreement, and the SCM Agreement.

In particular, the United States believes that the anti-dumping measures on beef and rice are inconsistent with at least the following provisions:

- Article 3 of the AD Agreement, because Mexico, *inter alia*, based its injury (or threat) and causation analyses on only six months of data for each of the years examined; failed to collect or examine recent data; failed in the beef investigation to evaluate all relevant economic factors and indices having a bearing on the state of the industry; and failed to base its injury determinations on positive evidence or to conduct objective examinations of the volume of dumped imports, the effect of those imports on prices in the domestic market of like products, and the impact of the imports on domestic producers of those products;

- Article 5.8 of the AD Agreement, because Mexico failed to terminate the rice investigation after a negative preliminary determination of injury, and Articles 5.8 and 11.1 of the AD Agreement because Mexico failed to exclude certain respondent US exporters from the beef and rice measures after negative final determinations of dumping;

- Article 6 of the AD Agreement, because Mexico, *inter alia*, failed to provide respondent US exporters with ample opportunity to present in writing all evidence which they considered relevant in respect of the anti-dumping investigations and failed to give all interested parties a full opportunity for the defense of their interests, and Article 6 and Annex II of the AD Agreement by improperly applying the facts available to a US respondent rice exporter that was investigated and found to have no shipments during the period of investigation;

- Article 9 of the AD Agreement, in conjunction with Article 6, because of the manner in which Mexico determined anti-dumping margins for US exporters that were not individually investigated;

- Article 6 and 9 of the AD Agreement and Article VI of GATT 1994, because Mexico, *inter alia*, limited the application of the respondent-specific margins that it calculated in the beef investigation to selected grades of meat imported within 30 days of slaughter (applying "facts available" margins to the respondents' other shipments) and limited the application of a particular US respondent exporter's margin after conducting an "anti-circumvention review" that found the respondent was not engaged in circumvention;

- Articles 9 and 11 of the AD Agreement, because Mexico rejected requests by certain US respondent exporters to conduct reviews of the beef anti-dumping order; and

- Article 12 of the AD Agreement, because Mexico failed in its final determinations in both investigations to set forth in sufficient detail the findings and conclusions reached on all issues of fact and law considered material or to provide all relevant information on the matters of fact and law and reasons which led to the imposition of final measures.

In addition, the following provisions of Mexico's Foreign Trade Act appear to be inconsistent with Mexico's obligations under the provisions of the AD Agreement and the SCM Agreement:

- Article 53, which 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 appears to be inconsistent with Articles 6.1.1 and 12.1.1 of the AD and SCM Agreements, respectively, which specify that exporters/foreign producers shall be given

at least 30 days to respond to questionnaires, and that, as a general rule, the 30 days are to be counted from the date of receipt of the questionnaire;

- Article 64, which codifies the "facts available" approach that Mexico applied in the rice and beef investigations, as described in the fourth bullet above. This provision appears to be inconsistent with Article 9 of the AD Agreement, in conjunction with Article 6; and with Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement to the extent that it requires the application of facts available rates to exporters with no shipments during the period of investigation;

- Article 68, which appears to require reviews of respondent exporters that were not assigned a positive margin in an investigation, and appears to require that respondent exporters seeking reviews demonstrate that their volume of exports during the period of review was "representative." This provision appears to be inconsistent with Articles 5.8 and 11.1 of the AD Agreement (as described in the second bullet above), with Article 9 of the AD Agreement, and with Articles 11.9 and 21.1 of the SCM Agreement;

- Article 89D, which appears to require that "new shippers" requesting expedited reviews demonstrate that their volume of exports during the period of review was "representative." This provision appears to be inconsistent with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement, which require authorities to conduct reviews without regard to such a condition; and

- Article 93V, which appears to provide for the application of definitive anti-dumping or countervailing duties on products entered prior to the date of application of provisional measures (1) for longer than allowed under the AD and SCM Agreements, and (2) even if not all AD or SCM Agreement requirements for applying such duties are met. This provision appears to be inconsistent with Articles 7 and 10.6 of the AD Agreement and Articles 17 and 20.6 of the SCM Agreement.

Finally, Article 366 of Mexico's Federal Code of Civil Procedure, in conjunction with Article 68 of the Foreign Trade Act, appears to be inconsistent with Articles 9 and 11 of the AD Agreement and Articles 19 and 21 of the SCM Agreement to the extent that the provisions prevent Mexico from conducting reviews of anti-dumping or countervailing duty orders while a judicial review of the order is ongoing, including a "binational panel" review pursuant to Chapter Nineteen of the *North American Free Trade Agreement*.

Mexico's measures also appear to nullify or impair benefits accruing to the United States directly or indirectly under the cited agreements.

We look forward to receiving your reply to the present request and to fixing a mutually convenient date for consultations.

ANNEX D-2

REQUEST FOR THE ESTABLISHMENT OF A PANEL BY THE UNITED STATES

WORLD TRADE ORGANIZATION

WT/DS295/2
22 September 2003

(03-5043)

Original: English

MEXICO – DEFINITIVE ANTI-DUMPING MEASURES ON BEEF AND RICE

Request for the Establishment of a Panel by the United States

The following communication, dated 19 September 2003, from the Permanent Mission of the United States to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

The United States considers that certain measures of the Government of Mexico are inconsistent with Mexico's commitments and obligations under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). In particular:

(1) On 5 June 2002, Mexico published in the *Diario Oficial* its definitive antidumping measure on long-grain white rice.[1] This measure appears to be inconsistent with the following provisions of the AD Agreement and the GATT 1994:

(a) Article VI of the GATT 1994 and Articles 1, 3.1, 3.2, 3.4, 3.5, and 4.1 of the AD Agreement because Mexico based its injury and causation analyses on only six months of data for each of the years examined; failed to collect or examine recent data; failed to properly evaluate the relevant economic factors; failed to base its determination on a demonstration that the dumped imports are, through the effects of dumping, causing injury within the meaning of the AD Agreement; and failed to base its injury determinations on positive evidence or to conduct objective examinations of the volume of dumped imports, the effect of those imports on prices in the domestic market of like products, and the impact of the imports on domestic producers of those products;

[1] 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 de Exportación, originarias de los Estados Unidos de América, independientemente del país de procedencia, Diario Oficial, Segunda Sección 1 (5 de Junio de 2002).

(b) Article 5.8 of the AD Agreement, because Mexico failed to terminate the antidumping investigation after a negative preliminary determination of injury, and Articles 5.8 and 11.1 of the AD Agreement because Mexico failed to exclude certain respondent US exporters from the measure after negative final determinations of dumping;

(c) Articles 6.1, 6.2, and 6.4 of the AD Agreement, because Mexico, *inter alia*, failed to give all of the interested parties in the investigation notice of the information that the authorities required or ample opportunity to present in writing all evidence which they considered relevant in respect of the antidumping investigation, failed to give all interested parties a full opportunity for the defense of their interests, and failed to provide timely opportunities for the respondent US exporters to see all information that was relevant to presentation of their cases, that was not confidential as defined in Article 6.5, and that the authorities used in their investigation;

(d) Article 6.8 of the AD Agreement, and paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement, by improperly rejecting information submitted by US exporters and applying the facts available in the evaluation of injury;

(e) Article 6.9 of the AD Agreement, because the investigating authorities, before the final determination was made, failed to inform the respondent US exporters of the essential facts under consideration which formed the basis for the decision to apply a definitive measure;

(f) Articles 6.6, 6.8, 6.10, 9.3, 9.4, and 9.5 of the AD Agreement, and paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement, by applying the facts available to a US respondent rice exporter that was investigated and found to have no shipments during the period of investigation;

(g) Articles 1, 6.1, 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, by applying the facts available in establishing the antidumping margins that it assigned to US exporters that were not individually investigated, and by doing so in an improper manner;

(h) Article 12.2 of the AD Agreement, because Mexico failed in its final determination in the rice investigation to set forth in sufficient detail the findings and conclusions reached on all issues of fact and law considered material or to provide all relevant information on the matters of fact and law and reasons which led to the imposition of final measures; and

(i) Article VI:2 of the GATT 1994, because Mexico levied an antidumping duty greater in amount than the margin of dumping.

(2) Certain provisions of Mexico's Foreign Trade Act also appear to be inconsistent with Mexico's obligations under various provisions of the AD Agreement and the SCM Agreement. Specifically:

(a) 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 does not appear to permit the investigating authorities to grant extensions of the 28-day deadline. Accordingly, the provision appears to be inconsistent with Articles 6.1.1 and 12.1.1 of the AD and SCM Agreements, respectively, which specify that due consideration should be

granted to extension requests and that such requests should, upon cause shown, be granted whenever practicable;

(b) Article 64 of the Foreign Trade Act codifies the "facts available" approach that Mexico applied in the rice investigation, as described in subparagraphs (f) and (g) of section (1) above. This provision appears to be inconsistent with Articles 6.1, 6.6, 6.8, 6.10, 9.3, 9.4, and 9.5 of the AD Agreement, and paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement; and with Articles 6.6, 6.8, 6.10, 9.3, 9.4, and 9.5 of the AD Agreement, paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement, and Articles 12.5, 12.7, and 19.3 of the SCM Agreement, to the extent that it requires the application of facts available rates to exporters with no shipments during the period of investigation;

(c) Article 68 of the Foreign Trade Act appears to require reviews of respondent exporters that were not assigned a positive margin in an investigation, and appears to require that respondent exporters seeking reviews demonstrate that their volume of exports during the period of review was "representative." This provision appears to be inconsistent with Articles 5.8 and 11.1 of the AD Agreement (as described in subparagraph (b) of section (1) above), with Articles 9.3 and 11.2 of the AD Agreement, and with Articles 11.9, 21.1, and 21.2 of the SCM Agreement;

(d) Article 89D of the Foreign Trade Act appears to require that "new shippers" requesting expedited reviews demonstrate that their exports were subsequent to the period of investigation and that the volume of exports during the period of review was "representative." This provision appears to be inconsistent with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement;

(e) Article 93V of the Foreign Trade Act appears to provide for the application of fines on importers that enter products subject to antidumping and countervailing duty investigations while such investigations are underway. This provision appears to be inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement.

(3) Mexican officials have asserted that Article 366 of Mexico's Federal Code of Civil Procedure and Articles 68 and 97 of the Foreign Trade Act prevent Mexico from conducting reviews of antidumping or countervailing duty orders while a judicial review of the order is ongoing, including a "binational panel" review pursuant to Chapter Nineteen of the *North American Free Trade Agreement*. These provisions appear to be inconsistent with Articles 9.3, 9.5, and 11.2 of the AD Agreement, and Articles 19.3 and 21.2 of the SCM Agreement.

On 16 June 2003, the United States Government requested consultations with the Government of Mexico pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the GATT 1994, Article 17.3 of the AD Agreement, and Article 30 of the SCM Agreement. The United States and Mexico held such consultations on 31 July and 1 August 2003. These consultations provided some helpful clarifications but unfortunately did not resolve the dispute.

Accordingly, the United States respectfully requests, pursuant to Article 6 of the DSU, Article 17.4 of the AD Agreement, and Article 30 of the SCM Agreement, that the Dispute Settlement Body establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU. The United States further asks that this request for a panel be placed on the agenda for the next meeting of the Dispute Settlement Body to be held on 2 October 2003.