

ANNEX B

Parties' and Third Parties' Responses to questions
posed in the context of the first substantive meeting of the Panel

Content		Page
Annex B-1	Responses of the United States	B-2
Annex B-2	Responses of Mexico	B-25
Annex B-3	Responses of the European Communities	B-37

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 Polystyrene	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 exporters⁵, 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.**

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, Arrocería de Occidente, Arrocería del Bajío, and Covadonga.⁷
- **Economía** based its analysis of production volumes on eight producers’ data: IPACPA, Schettino, GEVSA, Mexicana de Arroz, Arrocería de Occidente, Arrocería del Bajío, Industrias COREREPE, and Molino La Chontalpa.⁸
- **Economía** based its analysis of sales on eleven producers’ data: IPACPA, Schettino, GEVSA, Mexicana de Arroz, Arrocería de Occidente, Arrocería del Bajío, 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, Arrocería del Bajío, 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 Bajío, 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 Bajío, 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.

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?

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,

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

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 Federación (segunda sección) 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 EIQA 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 all of the investigated imports, and not just the dumped imports. The data for the dumped imports actually showed that:

- The dumped imports’ share of apparent domestic consumption actually fell – 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 fell – 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 fell – from 10.2 per cent in March–August 1997 to 10.1 per cent in March–August 1999.⁴⁹

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 increased 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 submission⁵², **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 procedencia*, 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

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 procedencia*, 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 prejudices 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.
