

## ANNEX C

Parties' Responses to questions  
posed in the context of the second substantive meeting of the Panel

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## ANNEX C-1

### RESPONSES OF THE UNITED STATES

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

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

#### Answer:

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

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

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

- (a) Could Mexico explain this apparent contradiction between the process as explained in its answer to question 2(b) in which it stated that it is the IA which analyses and decides whether the POI is appropriate and its answer to question 5 ( *i.e.* petitioners suggest a POI which is accepted unless the other interested parties come up with convincing arguments supported by pertinent evidence that this POI is inappropriate)?
- (b) Could Mexico explain how this process of changing the POI after initiation works in practice (e.g. will new questionnaires have to be sent to interested parties in light of the changed POI)? Has this ever happened in Mexican practice?

Answer:

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

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

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

**3. The United States argues on various occasions that the purpose of an anti-dumping investigation is to determine whether a domestic industry is presently injured by dumping that is presently occurring (see e.g. United States answer to question 1 of the Panel's questions), and refers in support of this argument to the use of the present tense in *inter alia* Article 2 and 3.4, 3.5, and 5.8 Anti-Dumping Agreement (the "AD Agreement"). What would be the United States view on the argument that it is the definitional nature of these provisions which explains the use of the present tense and that this use of the present tense in such definitional provisions is thus uninformative of the alleged requirement of the closeness in time between the application of a measure and the conditions for application of the measure?**

Answer:

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

7. Similarly, Article VI:1 of the GATT 1994 states that dumping is to be condemned if it “causes or threatens” material injury to a domestic industry. The term “causes” indicates that the dumping and injury is occurring in the present, and the term “threatens” indicates that the injury may

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<sup>1</sup> See US Response to First Panel Question 2.

<sup>2</sup> New Shorter Oxford English Dictionary, 1985 (1993) (emphasis in original).

<sup>3</sup> New Shorter Oxford English Dictionary, 2348 (1993).

occur in the future. If the drafters had intended instead to permit the imposition of anti-dumping measures when the conditions for doing so only existed in the past, they could have used the terms “caused or threatened” material injury. They did not.

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

9. In the rice investigation, there was a nine month gap between the end of the petitioners’ suggested POI and the date the petition was filed. The gap stretched to 15 months by the time Economía initiated its investigation. By the time of the final determination, the injury information that Economía was using for its determination was three to five years old. Economía’s failure to collect or examine recent data, and its failure to update its injury information over the course of its investigation, left it with no basis for an objective evaluation of present dumping and injury.

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

Answer:

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

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

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

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<sup>4</sup> Mexico’s Second Written Submission, para. 21.

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

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

Answer:

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

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

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

Answer:

15. At the second Panel meeting, Mexico stated that it would not initiate an investigation if the petitioners identified no known exporters, because the AD Agreement requires petitioners to identify the known exporters. Mexico's answer does not explain, however, what it would do if the petitioners claimed not to know the identity of any of the exporters, or if Economía would take any steps to verify such an assertion. For example, there is no evidence in the record of the rice investigation suggesting that Economía took any steps at all to verify the petitioners' identification of only two "known" exporters in the petition (or to question their failure to identify the Rice Company as a known exporter). The record does, however, show that Economía is perfectly willing to apply the facts available in setting dumping margins for exporters and producers that the petitioners do not identify, and that are never sent the questionnaire. Mexico has not satisfactorily explained why it is willing to take this approach when the petitioners identify only two exporters, but would not do the same if the petitioners identified none.

**7. The United States on various occasions mentions the fact that apart from the two exporters listed as "known exporters" by the petitioner in the application, the application also contained information and referred for example in Annex H to another exporter, the Rice Corporation, which later appeared and took part in the investigation out of its own initiative.**

**(See e.g. para. 13 United States first submission.) According to the United States, did the application contain any other names of United States exporters, in addition to these three?**

Answer:

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

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

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

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

Answer:

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

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

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<sup>5</sup> Petition Annex M at 4 (Exhibit US-17).

<sup>6</sup> Petition Annex M at 2 (Exhibit US-17); Petition at 10 (Exhibit US-8).

<sup>7</sup> See Exhibits US-18&19 (excerpts from *Rice Journal*).

<sup>8</sup> See Petition at 17 (Exhibit US-8).

<sup>9</sup> See, e.g., Petition at 21 (final sentence), 23, 44 (referencing Annex F) (Exhibit US-8).

<sup>10</sup> Mexico's Second Written Submission, para. 57.

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

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

Answer:

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

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

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

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

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

Answer:

24. The United States noted in response to question 17(b) in the first set of Panel questions that the petitioners in the *Crystal Polystyrene* case used *pedimentos* that they obtained from the Mexican Government to separate out imports of the subject product from other, non-subject merchandise

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<sup>11</sup> See US Second Written Submission, para. 58 and n.43.

<sup>12</sup> See US First Written Submission, paras. 12, 18.

imported under the same tariff heading.<sup>13</sup> The reason for the US comment was to illustrate that the *pedimentos* could in fact be used to obtain accurate volume and value data that Economía could have used in its investigation.

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

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

27. As the United States has previously stated, we are noting Mexico's use of *pedimentos* that it supplied to its petitioners as a way of illustrating Mexico's willingness to use them in a way that favours the interests of its domestic industries. The United States does not mean to suggest, however, that releasing the *pedimentos* to private industry is appropriate.

#### **Questions concerning the non-shipping exporter**

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

Answer:

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

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<sup>13</sup> See US Reply to First Panel Question 17(b), para. 52 and accompanying footnotes.

<sup>14</sup> The preliminary determination states in pertinent part:

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

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

<sup>15</sup> See *id.*



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

Answer:

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

- (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
- (ii) where the liability for payment of antidumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of the exporters or producers not individually examined.”

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

31. Article 9.5 of the AD Agreement provides a basis for an exporter or producer that did not export during the POI to obtain an individual margin. Nothing in Article 9.5 requires an exporter or producer to seek an individual margin, however. The producer or exporter may choose instead to accept the imposition of anti-dumping duties on its exports at the “all others” rate established in accordance with Article 9.4. Inasmuch as the neutral “all others” margin would apply to the exporter’s or producer’s exports in the absence of an expedited review, there is no logical basis to interpret Article 9.5 as allowing an authority to require guarantees during the expedited review at a level higher than the all other’s margin.

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

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

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

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

Answer:

35. Non-shipping exporters are “exporters or producers” of the product subject to investigation, even if they are not exporting the product during the investigation. Therefore, they are interested parties within the meaning of Article 6.11(i) of the AD Agreement. It is important to note, however, that an investigating authority may choose to limit its investigation in accordance with Article 6.10 of the AD Agreement, and not include a particular exporter or producer in its investigation. In that case, it may only apply a neutral “all others” rate, calculated in accordance with Article 9.4 of the AD Agreement, to the unexamined exporters and producers. As the panel stated in *Argentina – Definitive Anti-dumping Measures on Imports of Ceramic Floor Tiles from Italy*, “an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit.”<sup>16</sup>

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

Answer:

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

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<sup>16</sup> Report of the Panel, WT/DS189/R, adopted 5 November 2001, para. 6.54 (“*Argentina – Ceramic Tiles*”). The Panel also stated that “the inclusion, in an Annex relating specifically to the use of best information available under Article 6.8, of a requirement to specify in detail the information required, strongly implies that investigating authorities are *not* entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required.” *Id.*, para. 6.55.

**Questions concerning the law as such**

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

- (a) Could Mexico explain whether the administration has the discretion to apply the law in a manner which goes against the clear meaning of the law if it considers that this is what is required in order for Mexico to comply with the AD Agreement?**
- (b) In the view of Mexico, is it relevant for the application of Article 2 FTA that some of the amendments to the FTA challenged by the United States in the current proceedings were introduced after the end of the Uruguay Round and the entry into force of the Anti-Dumping Agreement?**
- (c) Is it the view of Mexico that the provisions of the FTA challenged by the United States in the present case are all consistent with the WTO Anti-Dumping Agreement?**

**Answer:**

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

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

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

**Answer:**

39. The panel in the *Argentina Poultry* dispute concluded that Argentina breached Article 6.1.1 of the AD Agreement when it provided only 20 days for a group of respondents to respond to questionnaires that it sent for the first time approximately eight months after initiation.<sup>17</sup> The same panel stressed that the 30-day period provided for in the first sentence of Article 6.1.1 "is an absolute minimum that must be granted to exporters from the outset," and that the extensions provided for in the second sentence of that provision are in addition to, not in lieu of, the 30-day period provided for

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

in the first sentence.<sup>18</sup> Article 53 of the FTA, however, when applied to companies not identified as “known” exporters in the petition (and thus not sent the questionnaire immediately following initiation), legally forecloses both the 30-day response period and an opportunity for an extension of that period. Therefore, Article 53 is inconsistent as such with Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement.

**14. In its answer to question 31 of the Panel's questions, Mexico replies in the first sentence that "representativeness" is not a requirement for initiating a review. In the second sentence, Mexico adds that the interested party will be required in the course of the review to demonstrate such representativeness so that it can be assigned a margin of dumping. Is it the argument of Mexico that it is not a requirement for *initiating* a review, but it is a requirement in order to be *successful in obtaining* a review? Could Mexico explain to what extent it considers this distinction to be relevant?**

Answer:

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

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

Answer:

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

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

43. Therefore, it would not normally be permissible for an authority to apply a margin based on the facts available to an unknown exporter. Rather, that firm would be entitled to the neutral all

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<sup>18</sup> *Argentina Poultry*, para. 7.140.

other's margin calculated in accordance with Article 9.4 of the AD Agreement. If the domestic industry would prefer instead that the exporter receive an individual margin, it could simply do a better job of identifying the known exporters in the first place.

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

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

## ANNEX C-2

### RESPONSES OF MEXICO

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

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

#### Answer:

With regard to the first question, in examining the POI suggested by the petitioner, the investigating authority checks that: (a) the period suggested by the domestic producers is at least six months; (b) together with their application the petitioners submit information and evidence pertaining to the period they suggest; (c) the petitioner's information and evidence concerning normal value and export price correspond to the suggested POI.

With regard to the second question, a POI would be deemed inappropriate in the event of failure to meet all the conditions set out above.

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

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

#### Answer:

In our view there is no contradiction. When the investigating authority receives an application for initiation of an anti-dumping investigation, it checks compliance with the requirements listed in the answer to question 1. If the information submitted by the petitioners is adequate, then – as stated in the answer to question 5 of the Panel's questions in relation to the first substantive meeting – the POI proposed by the petitioners is deemed adequate for initiation of an investigation. However, in the course of the investigation importers and exporters may propose changing the period of investigation provided they submit relevant arguments and supporting evidence. In other words, Mexico's point is that an assertion alone without any evidence (as was submitted by the exporters in the investigation concerning long-grain white rice) will not suffice for the POI to be changed.

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

Answer:

In Mexican administrative practice there have been no cases of importers and exporters showing a need for a change of POI.

3. The United States argues on various occasions that the purpose of an anti-dumping investigation is to determine whether a domestic industry is presently injured by dumping that is presently occurring (see e.g. United States answer to question 1 of the Panel's questions), and refers in support of this argument to the use of the present tense in *inter alia* Article 2 and 3.4, 3.5, and 5.8 Anti-Dumping Agreement (the "AD Agreement"). What would be the United States view on the argument that it is the definitional nature of these provisions which explains the use of the present tense and that this use of the present tense in such definitional provisions is thus uninformative of the alleged requirement of the closeness in time between the application of a measure and the conditions for application of the measure?

Answer:

It is important to bear in mind that so far the United States has made only bald assertions and has not explained how it is possible in an anti-dumping investigation to determine whether a domestic industry is being presently injured by dumping that is presently occurring.

Mexico further observes that Articles 2, 3.4, 3.5 and 5.8 of the AD Agreement make use of the present tense because of the nature of the concepts they set forth. The same Articles also make use of the future, without this necessarily implying that the tense of the verb is to be read in the narrow and literal sense, as the following examples illustrate:

(a) The Spanish and French versions of Article 2.2.1 of the AD Agreement state:

"... Si los precios inferiores a los costos unitarios ... son superiores ... se considerará [English version: "shall be considered"] que esos precios permiten recuperar los costos dentro de un plazo razonable." (Emphasis added.)

"... Si les prix qui sont inférieurs aux coûts unitaires ... sont supérieurs ... il sera considéré que ces prix permettent de couvrir les frais dans un délai raisonnable." (Emphasis added.)

(b) The Spanish and French versions of 3.4 of the AD Agreement read as follows:

"El examen de la repercusión de las importaciones objeto de dumping sobre la rama de producción nacional de que se trate incluirá [English version: "shall include"] una evaluación de todos los factores e índices económicos ... Esta enumeración no es exhaustiva, y ninguno de estos factores aisladamente ni varios de ellos juntos bastarán [English version: "can ... necessarily give"] necesariamente para obtener una orientación decisiva..". (Emphasis added.)

"L'examen de l'incidence des importations faisant l'objet d'un dumping sur la branche de production nationale concernée comportera une évaluation de tous les facteurs et indices économiques ... Cette liste n'est pas exhaustive, et un seul ni même plusieurs de ces facteurs ne constitueront pas nécessairement une base de jugement déterminante." (Emphasis added.)

- (c) The Spanish and French versions of Article 3.5 of the AD Agreement state:

"Habrá de demostrarse [English version: "It must be demonstrated"] que, por los efectos del dumping ... Estas examinarán también cualesquiera otros factores de que tengan conocimiento, distintos de las importaciones objeto de dumping ... y los daños causados por esos otros factores no se habrán de atribuir [English: "must not be attributed] a las importaciones objeto de dumping." (Emphasis added.)

"Il devra être démontré que les importations faisant l'objet d'un dumping ... Celles-ci examineront aussi tous les facteurs connus autres que les importations faisant l'objet d'un dumping ... et les dommages causés par ces autres facteurs ne devront pas être imputés aux importations faisant l'objet d'un dumping." (Emphasis added.)

- (d) The Spanish and French versions of Article 5.8 of the AD Agreement read:

"La autoridad competente rechazará [English version: "shall be rejected"] la solicitud presentada con arreglo al párrafo 1 y pondrá fin [English version: "shall be terminated"] a la investigación sin demora ... " (Emphasis added.)

"Une demande présentée au titre du paragraphe 1 sera rejetée et une enquête sera close dans les moindres délais ... ". (Emphasis added.)

Consequently, the United States' arguments based on the use of the present tense in the above Articles are without merit since, as shown above, the same Articles also use verbs in the future tense which are not necessarily to be construed in a narrow and literal sense.

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

Answer:

First, it should be made clear that in paragraph 18 of its second oral statement, Mexico did not assert that the purpose of an anti-dumping investigation is to offset dumping that caused or threatened to cause injury in the past. What Mexico said is that the purpose of such investigations is to offset or prevent dumping – which does not necessarily have to occur in the present – that causes or threatens to cause injury to the domestic industry.

Secondly, in Mexico's view the very nature of investigations precludes any finding of present dumping because the period set for investigation is bound to be a period that has already elapsed and that precedes the initiation of the investigation. For example, no investigating authority in fact asks importers and exporters to provide information on transactions they carry out between the initiation of the investigation and the date of the final determination with a view to basing the latter on the present. In other words, it is impossible to set a POI to be updated over time so that at the end of the investigation the authority is in a position to determine the existence of present dumping. Indeed, recognizing this to be the case, the AD Agreement provides for the possibility of yearly reviews of anti-dumping duties which determine the new margin of dumping to be applied to a period subsequent to the one considered in the investigation.



Thus, for injury to be determined it must be found that dumping causes or threatens to cause injury to the domestic industry in the period in which it occurs and not necessarily afterwards. In the case of threat of injury, it must be found that a threat exists at the time when the dumping occurs. On this basis the authority in the investigation concerning long-grain white rice found dumping to be the cause of the injury to the domestic industry. In other words, it was determined that dumping caused injury in the period in which the United States exporters carried out their transactions and that the injury was caused by the dumped exports.

It is desirable for the POI to be as close as practicable to the initiation of the investigation because that period having already elapsed, the closer it is to the date of initiation the greater the likelihood that the circumstances prevailing during the POI will still obtain. But Mexico maintains that this is not mandatory, since no rule in the AD Agreement so provides.

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

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

Answer:

It must first be pointed out that in its reply to question 17(b) of the Panel, Mexico did not state that it was under no obligation to obtain the pedimentos to identify all of the exporters. What Mexico said is that it was not required under the AD Agreement to identify all the exporters or to obtain the pedimentos; in other words, the Agreement lays down no such obligation. Consequently, the United States cannot plead breach of the Agreement on the basis of a non-existent obligation. And there is no point in taking up the United States' arguments as to whether Mexico planned to consult them and decided in the end not to because of the delay it would cause, since the AD Agreement does not require Mexico to do so.

As to consulting a small number of pedimentos without unnecessarily delaying the investigation, the time it takes to obtain the pedimentos is what largely causes the delay. As occurs with many WTO Members, import declarations are in the hands of the customs authority, not the investigating authority. In Mexico, they therefore have to be obtained through the Ministry of Finance and Public Credit, which can take several weeks or perhaps months, even if only a sample is requested, in addition to the time needed to examine them. As explained in the reply to question 17(b), it would have taken more than 40 days to obtain the pedimentos, for the sake of complying with the United States' wishes and not out of any obligation under the AD Agreement.

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

Answer:

It must first be pointed out that a petition that does not specify the identity of the exporters has never been submitted to the Mexican authority. In the 200 or more cases dealt with by the

Ministry there has never been such a petition; and this holds good for the investigations concerning long-grain white rice and beef.

Failure to mention any exporters in a petition would be treated as inconsistent with Article 5.2(ii) of the AD Agreement and Article 75(X) of the Regulations of the Foreign Trade Act, and the investigating authority would advise the petitioner under Article 78 of the Regulations that it had 20 days within which to notify known exporters. The question is purely hypothetical and we confirm that the Mexican authority has never been faced with such a situation, including in investigations concerning exports from the United States. It is our view, generally speaking, that it is virtually impossible for a domestic producer not to know its foreign competitors.

As to the question whether the authority verifies the existence of exporters mentioned by the petitioner, Mexico is of the view that this is not part of the requirement laid down in Article 5.3 of the AD Agreement. That provision requires the examination of the accuracy and adequacy of the evidence to ascertain whether it is sufficient to justify initiation, and covers not the identity of exporters known to the petitioner but the information and evidence on dumping, injury and causal link submitted to justify initiation of an investigation.

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

Answer:

Apart from the exporters listed as known exporters and the company mentioned in "Annex H" of the application for initiation of an investigation, the application mentions no other United States companies that can be deemed to be exporters.

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

Answer:

Mexico confirms that exhibit MEX-5 is a questionnaire like the one sent to the known exporters and the United States Embassy in Mexico. It should also be noted that when unknown exporters request the questionnaire for exporters from the Mexican authority, it is sent to them with no prior formalities and they are allowed to participate in the investigation with no restrictions.

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

Answer:

We confirm that the listings of pedimentos contain information on the value and volume of the imports. They also contain data on the tariff heading, country of origin, country of consignment, freight, gross weight, exchange rate, identity of the importers (name and federal taxpayers' registration), *inter alia*.

In Mexico, both the listings of pedimentos and the pedimentos themselves are treated as confidential information under Mexican law.

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

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

Answer:

Mexico confirms that the 40 days referred to in its reply to question 17(b) of the Panel correspond to the time it would have taken just to obtain the pedimentos from the Ministry of Finance and Public Credit.

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

Answer:

The only relevant documents are the pedimentos and the listings of pedimentos. The investigating authority has electronic access to the latter. There is no electronic version of the pedimentos, which Customs handles only in paper form.

Questions concerning the non-shipping exporter

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

Answer:

It is our understanding that under Article 9.5 of the AD Agreement, during the new shipper procedure petitioners are not bound to pay anti-dumping duties and may instead provide guarantees. Thus, the term "guarantees" implies that the authorities of the importing Member may ask the

exporter to provide for the duration of the above-mentioned procedure guarantees sufficient to cover any anti-dumping duties the new shipper may have to pay as a result of the review.

We further observe that the term "guarantees" is not limited to the cash deposits or bonds referred to in Articles 7.2, 10.3, 10.4 and 10.5 of the AD Agreement, but allows that there may be other forms of guaranteeing the payment of anti-dumping duties.

It should nonetheless be noted that although the English version of the AD Agreement makes a distinction between "security" (Article 7.2) and "guarantees" (Article 9.5), in the Spanish and French versions there is no such difference. The Spanish version uses "garantías" and the French version, "garantie", in both those Articles (7.2 and 9.5) and in Articles 10.3, 10.4 and 10.5 as well. Thus, for the purpose of the grant of guarantees under Article 9.5 of the Agreement, cash deposits and bonds will be allowed.

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

Answer:

Mexico is of the view that the AD Agreement sets no guidelines for determining the amount of the guarantee that may be requested of a new shipper and that this will be dealt with on case-by-case basis.

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

Answer:

In Mexico's view, a non-shipping exporter is an interested party in the sense of Article 6.11(i) of the AD Agreement, since in establishing that interested parties are to include exporters or foreign producers, this provision does not exclude or limit participation by any exporter in the investigation.

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

Answer:

Mexico believes that, from a purely conceptual standpoint, a non-shipping exporter is not the same thing as a new shipper. A non-shipping exporter is an exporter that did not export during the POI to the WTO Member conducting the anti-dumping investigation. A new shipper is an exporter that did not export during the POI but has exported since the POI, which may be before the end of the investigation or once the anti-dumping duties have been imposed. Thus, a non-shipping exporter may become a new shipper if it exports after the POI.

Under Article 6.11(i) of the AD Agreement, both are interested parties in that both are exporters of the product subject to investigation and therefore have the same rights under the Agreement. However, for the purposes of levying anti-dumping duties the Agreement does not require the investigating authority to afford them different treatment. Mexico accordingly takes the view that if a non-shipping exporter and a new shipper fail to provide adequate information for the

determination of their individual margins of dumping, the investigating authority will base its preliminary or final determination on Article 6.8 of the Agreement.

Questions concerning the law as such

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

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

Answer:

In Mexico federal laws are general in nature and mandatory, being acts of parliament. Federal laws – including the FTA – accordingly apply nationwide. If Mexico has undertaken through an international treaty to fulfil certain obligations, the provisions of the FTA must obviously apply to the country with which the treaty was signed, in accordance with what is stipulated in that treaty. Consequently, for WTO Members the FTA must be applied – as its Article 2 provides – consistently with the provisions of the Marrakesh Agreement and the Agreements it encompasses. In other words it must not go against them, which on no account means that the investigating authority may breach the FTA at its discretion.

Accordingly, Mexico emphasises that in the case of the FTA, Article 2 of the latter serves as the guide for interpreting all other articles of the Act. Consequently, since the FTA establishes that all its articles must be applied in accordance with international treaties to which Mexico is a party, there is no possibility whatever of the authority going against the meaning of the FTA at its discretion.

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

Answer:

No. This has no relevance for the application of Article 2 of the FTA.

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

Answer:

Yes. Mexico considers that the provisions of the FTA impugned by the United States are consistent with the WTO Agreements as demonstrated by the claims and arguments, both oral and written, that Mexico has submitted to the Panel.

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

Answer:

Article 53 of the FTA must be read in conjunction with the last paragraph of Article 3 of the FTA, which states: "Where this Act refers to time-limits in days, these shall be understood to mean

working days and where it refers to months or years, these shall be understood to mean calendar months or years".

Thus, calculated in calendar days the period of 28 working days is longer than the period of 30 days prescribed in Article 6.1.1 of the AD Agreement, even including the week specified in footnote 15 of the Agreement. Mexican practice thus allows all exporters, known and unknown alike, a period of 28 working days after the initiation of the investigation in which to submit a duly completed exporters' questionnaire. This does not impair their right to apply for an extension of the deadline.<sup>1</sup>

Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement, on the other hand, are very emphatic: "Exporters or foreign producers (or interested Members) receiving questionnaires used in an ... investigation shall be given at least 30 days for reply ...". (Emphasis added).

Consequently, according to the rules of interpretation of international treaties and agreements described by Mexico in earlier submissions, there is no requirement to grant the 30 days to exporters that are not sent a questionnaire.

This is borne out by the report of the Appellate Body in *Argentina – Poultry Anti-Dumping Duties*, which said:

"7.145 ... We read the first sentence of Article 6.1.1 to mean that if questionnaires are sent to exporters or foreign producers, they shall be given at least 30 days for reply."

Besides, it would be illogical to grant this period to every newly arrived exporter or foreign producer of which the investigating authority was unaware. To do so would undoubtedly hold up the investigation and the ensuing delay would entail failure to observe the time-limits set in Article 5.10 of the AD Agreement and Article 11.11 of the SCM Agreement.

Along the same lines, the Appellate Body in *United States – Hot-Rolled Steel* said in its report:

"73. Indeed, in the absence of time-limits, authorities would effectively cede control of investigations to the interested parties, and could find themselves unable to complete their investigations within the time-limits mandated under the *Anti-Dumping Agreement*."

14. In its answer to question 31 of the Panel's questions, Mexico replies in the first sentence that "representativeness" is not a requirement for initiating a review. In the second sentence, Mexico adds that the interested party will be required in the course of the review to demonstrate such representativeness so that it can be assigned a margin of dumping. Is it the argument of Mexico that it *is not* a requirement for *initiating* a review, but it *is* a requirement in order to be *successful in obtaining* a review? Could Mexico explain to what extent it considers this distinction to be relevant?

Answer:

What Mexico wishes to emphasize is that representativeness is a requirement not for initiating a new shipper review or a review of anti-dumping duties, but for determining, at the end of the

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<sup>1</sup> In addition, Article 164 of the FTA Regulations allows unknown exporters that appear after initiation of the investigation to submit their replies to the questionnaire even after the preliminary determination, at which stage they are given a new period of thirty working days. Exporters' information, arguments and evidence will be taken into account for the final determination.

procedure, an individual dumping margin or subsidy for the company applying for the review. It is natural and logical that an applicant's export volume during the period under review should be representative. In other words, it is not enough to export one unit of the product under investigation for the purpose of obtaining a lower or zero margin. Otherwise, the investigating authority would not conduct a proper price comparison and would therefore fail in its obligation to determine a fair individual margin of dumping.

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

Answer:

Mexico believes that the following should be borne in mind:

First, Article 6.11(i) of the AD Agreement says that exporters of products subject to investigation must be treated as "interested parties", but does not determine whether only known exporters are to be regarded as interested parties. Since it makes no such distinction, the AD Agreement considers both known exporters and unknown exporters to be interested parties. Accordingly, all exporters of the product under investigation are subject to the relevant provisions of the AD Agreement.

Article 6.8 of the AD Agreement states: "In cases in which any interested party refuses access to, or otherwise does not provide, necessary information ... or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available." (Emphasis added).

On the basis of the foregoing, we observe that according to the AD Agreement, the provisions of Article 6.8 of the Agreement (facts available) may apply both to known and to unknown exporters, since both are interested parties.

Secondly, we note that in this dispute arguments have been adduced about the use of Articles 9.4 or 6.8 of the AD Agreement for the purpose of calculating the margin of dumping for unknown exporters.

Article 9.4 of the Agreement applies only to known exporters, as can be seen from the following:

- (a) Article 6.10 of the Anti-Dumping Agreement states: "The Authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned ... In cases where the number of exporters ... is so large as to make such a determination impracticable, the authorities may limit their examination ... by using samples which are statistically valid ... " (Emphasis added).

Thus, according to Article 6.10 of the AD Agreement, investigating authorities must as a rule calculate the individual margin of dumping for each known exporter except where the number of known exporters is so large as to make such a determination impracticable, in which case they may limit their examination using statistical samples. In other words, Article 6.10 of the AD Agreement allows statistically valid sampling only among the exporters known to the authority. This is perfectly logical since it is impossible to select a sample from among a set of unknown elements.

Furthermore, Article 9.4 of the AD Agreement provides that the calculation method it sets out shall apply only "[w]hen the authorities have limited their examination in accordance with ... paragraph 10 of Article 6 ... ", in other words, where the investigating authority has limited its examination by using statistically valid samples.

Since – as already stated – statistical samples may be used only for known exporters, the calculation method set forth in Article 9.4 of the Agreement may be used only for known exporters and provided a sample has been selected.

Accordingly, because Article 6.8 of the AD Agreement can be applied both to known and to unknown exporters and because Article 9.4 of the Agreement cannot be applied to unknown exporters, we conclude that it is consistent with the Agreement to calculate the residual margin of dumping on the basis of Article 6.8 (facts available). Likewise, since it does not apply to unknown exporters the calculation method described in Article 9.4 of the AD Agreement cannot properly be used to calculate a "residual" margin of dumping.

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