

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

Complaint with Respect to Rice

**AB-2005-6**

*Report of the Appellate Body*



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TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Poultry Anti-Dumping Duties</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, 3327
<i>Brazil – Aircraft</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
<i>Japan – Agricultural Products II</i>	Appellate Body Report, <i>Japan – Measures Affecting Agricultural Products</i> , WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003
<i>Mexico – Anti-Dumping Measures on Rice</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R, 6 June 2005
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
<i>US – Anti-Dumping Measures on Cement</i>	<i>United States – Anti-Dumping Measures on Cement from Mexico</i> , WT/DS281
<i>US – Anti-Dumping Measures on Oil Country Tubular Goods</i>	<i>United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico</i> , WT/DS282
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779

<i>US – Certain EC Products</i>	Appellate Body Report, <i>United States – Import Measures on Certain Products from the European Communities</i> , WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
<i>US – Countervailing Measures on Certain EC Products</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R, adopted 8 January 2003
<i>US – DRAMS</i>	Panel Report, <i>United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea</i> , WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US – Hot-Rolled Steel</i>	Panel Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/R, adopted 23 August 2001 as modified by Appellate Body Report, WT/DS184/AB/R, DSR 2001:X, 4769
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003
<i>US – Offset Act (Byrd Amendment)</i>	Panel Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/R, WT/DS234/R, adopted 27 January 2003, as modified by Appellate Body Report, WT/DS217/AB/R, WT/DS234/AB/R
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Application for Initiation	" <i>Solicitud de investigación antidumping contra las importaciones de arroz blanco originarias de los Estados Unidos de América</i> " ("Application for initiation of an anti-dumping investigation regarding imports of long-grain white rice from the United States"), 2 June 2000 (Exhibit US-8 submitted by the United States to the Panel)
<i>Anti-Dumping Agreement</i>	<i>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994</i>
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
Economía	Ministry of Economy of Mexico
Farmers Rice	Farmers Rice Milling Company
Final Determination	" <i>Resolución final de la investigación antidumping sobre las importaciones de arroz blanco grano largo, mercancía clasificada en la fracción arancelaria 1006.30.01 de la Tarifa de la Ley de los Impuestos Generales de Importación y Exportación, originarias de los Estados Unidos de América, independientemente del país de procedencia</i> ", <i>Diario Oficial</i> , 5 June 2002, Second Section, pp. 1-47 (Exhibit US-6 submitted by the United States to the Panel; Exhibit MEX-1 submitted by Mexico to the Panel)
FTA	Foreign Trade Act of Mexico
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
Panel Report	Panel Report, <i>Mexico – Anti-Dumping Measures on Rice</i>
Preliminary Determination	" <i>Resolución preliminar de la investigación antidumping sobre las importaciones de arroz blanco grano largo, mercancía clasificada en la fracción arancelaria 1006.30.01 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia</i> ", <i>Diario Oficial</i> , 18 July 2001, pp. 3-54 (Exhibit US-14 submitted by the United States to the Panel)
Producers Rice	Producers Rice Mill, Inc.
Riceland	Riceland Foods, Inc.
<i>SCM Agreement</i>	<i>Agreement on Subsidies and Countervailing Measures</i>
SECOFI	Ministry of Commerce and Industrial Development of Mexico
<i>Vienna Convention</i>	<i>Vienna Convention on the Law of Treaties</i> , done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization





WORLD TRADE ORGANIZATION  
APPELLATE BODY

**Mexico – Definitive Anti-Dumping  
Measures on Beef and Rice, Complaint  
with Respect to Rice**

Mexico, *Appellant*  
United States, *Appellee*

China, *Third Participant*  
European Communities, *Third Participant*  
Turkey, *Third Participant*

AB-2005-6

Present:

Lockhart, Presiding Member  
Abi-Saab, Member  
Taniguchi, Member

**I. Introduction**

1. Mexico appeals certain issues of law and legal interpretations developed in the Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice* (the "Panel Report").<sup>1</sup> The Panel was established to consider a complaint by the United States concerning the imposition of definitive anti-dumping duties by Mexico on imports of long-grain white rice from the United States<sup>2</sup>, as well as certain provisions of Mexican law relating to anti-dumping and countervailing duty proceedings.

2. The Mexican Rice Council filed an anti-dumping petition on 2 June 2000 with the Ministry of Commerce and Industrial Development ("SECOFI"), Mexico's investigating authority at that time.<sup>3</sup> The investigation was initiated in December 2000 by the Ministry of Economy ("Economía")<sup>4</sup>, which

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<sup>1</sup>WT/DS295/R, 6 June 2005.

<sup>2</sup>In its request for consultations (WT/DS295/1, G/L/631, G/ADP/D50/1, G/SCM/D54/1, 23 June 2003 (attached as Annex III to this Report)), the United States raised claims with respect to the anti-dumping measure on beef, the anti-dumping measure on long-grain white rice, certain provisions of the Foreign Trade Act of Mexico (the "FTA"), and one provision of the Federal Code of Civil Procedure. The claims with respect to the anti-dumping measure on beef, however, were not included in the request for the establishment of a panel (WT/DS295/2, 22 September 2003 (attached as Annex II to this Report)). The Panel Report, therefore, did not examine the anti-dumping measure on beef. (Panel Report, footnote 2 to para. 1.2)

<sup>3</sup>Panel Report, para. 2.2.

<sup>4</sup>*Ibid.*, para. 2.3. See also "Resolución por la que se acepta la solicitud de parte interesada y se declara el inicio de la investigación antidumping sobre las importaciones de arroz blanco grano largo, mercancía clasificada en la fracción arancelaria 1006.30.01 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia", *Diario Oficial*, 11 December 2000, First Section, pp. 4-26 (Exhibit US-1 submitted by the United States to the Panel).

succeeded SECOFI as Mexico's investigating authority.<sup>5</sup> The notice of initiation, a copy of the petition and attachments thereto, and the investigation questionnaire were sent to the Government of the United States and to the two exporters that were specifically identified in the petition as the "exporters", Producers Rice Mill, Inc. ("Producers Rice") and Riceland Foods, Inc. ("Riceland").<sup>6</sup> Two additional exporters, The Rice Company and Farmers Rice Milling Company ("Farmers Rice"), came forward following the initiation of the investigation and before the preliminary determination, and requested copies of the questionnaire.<sup>7</sup>

3. The period of investigation for the purpose of the dumping determination was 1 March to 31 August 1999. For the purpose of the injury determination, Economía collected data for the period March 1997 through August 1999, but based its analysis on the data for 1 March to 31 August for the years 1997, 1998, and 1999<sup>8</sup> and issued its final affirmative determination on 5 June 2002.<sup>9</sup> Economía found that Farmers Rice and Riceland had not been dumping during the period of investigation and consequently imposed a zero per cent duty on these exporters. With respect to The Rice Company, Economía determined a dumping margin of 3.93 per cent and imposed a duty in that amount. Economía also imposed on the remaining United States exporters of the subject merchandise, including Producers Rice, a duty of 10.18 per cent, calculated on the basis of the facts available.<sup>10</sup>

4. Before the Panel, the United States raised claims with respect to Economía's anti-dumping investigation on long-grain white rice, alleging that Economía's dumping determination was inconsistent with Article VI:2 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), as well as Articles 1, 5.8, 6.1, 6.2, 6.4, 6.6, 6.8, 6.10, 9.3, 9.4, 9.5, 12.1, and 12.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*

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<sup>5</sup>As the Panel noted, the name of Mexico's investigating authority was changed from SECOFI to Economía, which completed the investigation on long-grain white rice from the United States. (Panel Report, footnote 4 to para. 2.2)

<sup>6</sup>Panel Report, para. 2.4. See also Notice to Producers Rice Mills, Inc. of the initiation of the investigation, 11 December 2000 (Exhibit MEX-6 submitted by Mexico to the Panel); Notice to Riceland Foods, Inc. of the initiation of the anti-dumping investigation on imports of long-grain white rice, 11 December 2000 (Exhibit MEX-7 submitted by Mexico to the Panel); Notice of the initiation of the investigation communicated to the Government of the United States of America through its Embassy in Mexico City, 11 December 2000 (Exhibit MEX-9 submitted by Mexico to the Panel).

<sup>7</sup>Panel Report, para. 2.5.

<sup>8</sup>*Ibid.*, paras. 2.4 and 7.75.

<sup>9</sup>"*Resolución final de la investigación antidumping sobre las importaciones de arroz blanco grano largo, mercancía clasificada en la fracción arancelaria 1006.30.01 de la Tarifa de la Ley de los Impuestos Generales de Importación y de Exportación, originarias de los Estados Unidos de América, independientemente del país de procedencia*", *Diario Oficial*, 5 June 2002, Second Section, pp. 1-47 (Exhibit US-6 submitted by the United States to the Panel; Exhibit MEX-1 submitted by Mexico to the Panel).

<sup>10</sup>Panel Report, para. 2.7.

(the "*Anti-Dumping Agreement*") and Annex II thereto.<sup>11</sup> The United States also alleged that Economía's injury determination was inconsistent with Articles VI:2 and VI:6(a) of the GATT 1994, as well as Articles 1, 3.1, 3.2, 3.4, 3.5, 6.2, 6.8, and 12.2 of the *Anti-Dumping Agreement* and Annex II thereto.<sup>12</sup> In addition, the United States claimed that certain provisions of the Foreign Trade Act of Mexico (the "FTA") and one provision of the Federal Code of Civil Procedure are inconsistent, as such, with various provisions of the *Anti-Dumping Agreement* and the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*").<sup>13</sup>

5. In the Panel Report, circulated to Members of the World Trade Organization (the "WTO") on 6 June 2005, the Panel concluded that:

- (a) Economía's dumping determination is inconsistent with Articles 5.8, 6.1, 6.8, 6.10, and 12.1 of the *Anti-Dumping Agreement* and paragraphs 1 and 7 of Annex II thereto<sup>14</sup>;
- (b) Economía's injury determination is inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement*<sup>15</sup>;
- (c) Article 53 of the FTA is inconsistent, as such, with Article 6.1.1 of the *Anti-Dumping Agreement* and Article 12.1.1 of the *SCM Agreement*<sup>16</sup>;
- (d) Article 64 of the FTA is inconsistent, as such, with Article 6.8 of the *Anti-Dumping Agreement* and paragraphs 1, 3, 5, and 7 of Annex II thereto, and Article 12.7 of the *SCM Agreement*<sup>17</sup>;
- (e) Article 68 of the FTA is inconsistent, as such, with Articles 5.8, 9.3, and 11.2 of the *Anti-Dumping Agreement* and Articles 11.9 and 21.2 of the *SCM Agreement*<sup>18</sup>;

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<sup>11</sup>Panel Report, para. 3.1(h)-(m).

<sup>12</sup>*Ibid.*, para. 3.1(a)-(g) and footnote 8 to para. 3.1.

<sup>13</sup>The FTA provisions challenged by the United States are Articles 53, 64, 68, 89D, and 93V, as well as Articles 68 and 97 read together. The United States also challenged Section 366 of the Federal Code of Civil Procedure. (Panel Report, para. 3.1(n)-(s))

<sup>14</sup>*Ibid.*, para. 8.3.

<sup>15</sup>*Ibid.*, para. 8.1.

<sup>16</sup>*Ibid.*, para. 8.5(a).

<sup>17</sup>*Ibid.*, para. 8.5(b).

<sup>18</sup>*Ibid.*, para. 8.5(c).

- (f) Article 89D of the FTA is inconsistent, as such, with Article 9.5 of the *Anti-Dumping Agreement* and Article 19.3 of the *SCM Agreement*<sup>19</sup>;
- (g) Article 93V of the FTA is inconsistent, as such, with Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*<sup>20</sup>; and
- (h) Articles 68 and 97 of the FTA, read together, are inconsistent, as such, with Articles 9.3 and 11.2 of the *Anti-Dumping Agreement*, and Article 21.2 of the *SCM Agreement*.<sup>21</sup>

6. The Panel further concluded that the United States had failed to make a *prima facie* case in two respects: (i) that Article 366 of the Federal Code of Civil Procedure is inconsistent with Articles 9.3, 9.5, and 11.2 of the *Anti-Dumping Agreement* and Articles 19.3 and 21.2 of the *SCM Agreement*; and (ii) that Articles 68 and 97 of the FTA, read together, are inconsistent with Article 9.5 of the *Anti-Dumping Agreement* and Article 19.3 of the *SCM Agreement*.<sup>22</sup> With respect to the remaining claims of the United States, the Panel exercised "judicial economy".<sup>23</sup> The Panel therefore recommended that the Dispute Settlement Body (the "DSB") request Mexico to bring its measures into conformity with its obligations under the *Anti-Dumping Agreement* and the *SCM Agreement*.<sup>24</sup>

7. On 20 July 2005, Mexico notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Articles 16.4 and 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal<sup>25</sup> pursuant to Rule 20(1) of the *Working Procedures for Appellate Review* (the "*Working Procedures*").<sup>26</sup> At the outset of the appeal, the participants asked to have all written submissions made available to all participants in English and Spanish. Following consultations with the participants, the Appellate Body Division hearing the appeal issued a Working Schedule for the appeal, taking into account time periods for translation of

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<sup>19</sup>Panel Report, para. 8.5(d).

<sup>20</sup>*Ibid.*, para. 8.5(e).

<sup>21</sup>*Ibid.*, para. 8.5(f).

<sup>22</sup>*Ibid.*

<sup>23</sup>*Ibid.*, paras. 8.1, 8.2, 8.3(b) and (c), 8.4, and 8.5(b).

<sup>24</sup>*Ibid.*, para. 8.7.

<sup>25</sup>WT/DS295/6 (attached as Annex I to this Report).

<sup>26</sup>WT/AB/WP/5, 4 January 2005.

submissions estimated by the WTO Language Services and Documentation Division.<sup>27</sup> Given the time required for the translation of submissions, it was not possible to circulate this Report within 90 days from the date the Notice of Appeal was filed. The participants confirmed in writing their agreement to deem the Appellate Body Report in this proceeding, issued no later than 29 November 2005, to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU.<sup>28</sup>

8. On 27 July 2005, Mexico filed an appellant's submission.<sup>29</sup> On 6 September 2005, the United States filed an appellee's submission.<sup>30</sup> China and the European Communities each filed a third participant's submission on 29 August 2005.<sup>31</sup> On 5 October 2005, Turkey notified its intention to appear at the oral hearing as a third participant.<sup>32</sup>

9. On 4 August 2005, Mexico filed a letter with the Appellate Body Secretariat requesting that the Division modify the Working Schedule. Mexico stated that the Working Schedule provided for "five calendar days" between the date Mexico would receive the translated appellee's and third participant's submissions, and the first day of the oral hearing, whereas the *Working Procedures* provided normally for 10 to 15 days for that period.<sup>33</sup> Mexico submitted that the other time periods provided in the Working Schedule corresponded to the time periods in a typical appeal, with additional time provided where necessary for translation. Mexico therefore requested that it be given "as much time as possible" in the period preceding the oral hearing to ensure that both participants had "an equal opportunity to present their case".<sup>34</sup>

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<sup>27</sup>Letter from the Director of the Appellate Body Secretariat to the participants and third participants, dated 27 July 2005.

<sup>28</sup>Letter from the Ambassador and Permanent Representative of Mexico to the WTO to the Director of the Appellate Body Secretariat, dated 4 August 2005; letter from the Senior Legal Advisor of the Permanent Mission of the United States to the WTO to the Director of the Appellate Body Secretariat, dated 4 August 2005.

<sup>29</sup>Pursuant to Rule 21(1) of the *Working Procedures*. A courtesy English translation of Mexico's appellant's submission, prepared by the WTO Language Services and Documentation Division, was provided to the participants and third participants on 19 August 2005.

<sup>30</sup>Pursuant to Rules 22 and 23(4) of the *Working Procedures*. A courtesy Spanish translation of the United States' appellee's submission, prepared by the WTO Language Services and Documentation Division, was provided to the participants and third participants on 28 September 2005.

<sup>31</sup>Pursuant to Rule 24(1) of the *Working Procedures*. Courtesy Spanish translations of China's and the European Communities' third participant's submissions, prepared by the WTO Language Services and Documentation Division, were provided to the participants and third participants on 28 September 2005.

<sup>32</sup>Pursuant to Rule 24(4) of the *Working Procedures*.

<sup>33</sup>Letter from the Ambassador and Permanent Representative of Mexico to the WTO to the Director of the Appellate Body Secretariat, dated 4 August 2005. The Working Schedule provided for Mexico to receive the translated appellee's and third participant's submissions on 30 September 2005, and the oral hearing to commence on 6 October 2005.

<sup>34</sup>*Ibid.*

10. The Appellate Body Division invited the United States and the third participants to comment on Mexico's request, stating its understanding that the request had been made pursuant to Rule 16(2) of the *Working Procedures*.<sup>35</sup> The United States responded that, although it was not clear that the time period provided for in the Working Schedule was "manifestly unfair", it "recognize[d] Mexico's point of view" and therefore would not object to a "slight, further modification" of the Schedule.<sup>36</sup> In its reply, the Division noted that "[i]n the light of [Mexico's] request", the WTO Language Services and Documentation Division had informed the Appellate Body Secretariat that it would provide a translation of the United States' appellee's submission two days earlier than scheduled, that is, eight days before the oral hearing. The Division concluded that, in these circumstances, maintaining the original Working Schedule "would not prejudice the ability of Mexico to defend its interests" and therefore declined Mexico's request.<sup>37</sup>

11. The oral hearing in this appeal was held on 6 and 7 October 2005. The participants and third participants (with the exception of Turkey) presented oral arguments and responded to questions posed by the Members of the Division hearing the appeal.

## **II. Arguments of the Participants and the Third Participants**

### **A. *Claims of Error by Mexico – Appellant***

#### **1. Article 6.2 of the DSU**

12. Mexico appeals the Panel's finding that those claims set out in the United States' panel request, but not indicated in the request for consultations, do not fall outside the Panel's terms of reference.

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<sup>35</sup>Letter from the Acting Director of the Appellate Body Secretariat to the participants and third participants, dated 8 August 2005. Rule 16(2) of the *Working Procedures* provides:

In exceptional circumstances, where strict adherence to a time-period set out in these Rules would result in a manifest unfairness, a party to the dispute, a participant, a third party or a third participant may request that a division modify a time-period set out in these Rules for the filing of documents or the date set out in the working schedule for the oral hearing. Where such a request is granted by a division, any modification of time shall be notified to the parties to the dispute, participants, third parties and third participants in a revised working schedule.

<sup>36</sup>Letter from the Senior Legal Advisor for the Permanent Mission of the United States to the WTO to the Acting Director of the Appellate Body Secretariat, dated 10 August 2005. No third participant filed any comment on Mexico's request.

<sup>37</sup>Letter from the Acting Director of the Appellate Body Secretariat to the Ambassador and Permanent Representative of Mexico to the WTO, dated 11 August 2005.

13. Mexico argues that the inclusion in the United States' panel request of WTO legal provisions that did not form part of the request for consultations is inconsistent with Article 6.2 of the DSU. Pursuant to Article 4.4 of the DSU, the United States was required to indicate, in its request for consultations, the "legal basis" for its complaint, including the provisions with which a measure is alleged to be inconsistent. Pursuant to Article 6.2 of the DSU, the United States was required not only to *indicate* the "legal basis" of its complaint in its panel request, but to do so in a manner "sufficient to present the problem clearly". Thus, according to Mexico, the only difference between the request for consultations and the panel request is that the latter should contain a brief statement by the complaining party of the legal basis *already identified* in the former, in order to "present the problem clearly". The "legal basis" itself, however, remains unchanged from the request for consultations to the panel request.

14. Mexico submits that its interpretation of Articles 4.4 and 6.2 of the DSU is based on the customary rules of treaty interpretation codified in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").<sup>38</sup> Mexico points out that, in the light of Article 31 of the *Vienna Convention*, the "ordinary meaning"<sup>39</sup> of the term "legal basis" must be the same in both Article 4.4 and Article 6.2 of the DSU. Mexico argues that, on the basis of this "ordinary meaning", it is clear that an increase in the number of allegations of inconsistency with WTO provisions cited in the panel request, compared with the request for consultations, does not alter the "legal" nature of such allegations, but does alter the "basis" of the complaining party's claims. For example, Mexico explains that a panel request with claims resting on *two* articles of the GATT 1994 would not have the same "basis" as a request founded on *seven* articles of the GATT 1994. Moreover, supplementary means of interpretation, as provided for in Article 32 of the *Vienna Convention*, confirm the above interpretation. Mexico points, in particular, to the fact that the requirement of a "legal basis" in panel requests—existing at the time of the 1988 Montreal Ministerial Conference during the Uruguay Round—was subsequently included, after the 1990 Brussels Ministerial Conference, as a requirement of requests for consultations.

15. Mexico states that the Appellate Body has not yet considered the question whether the legal basis set out in the request for consultations can be expanded in the panel request. However, Mexico refers to the decision of the Appellate Body, in *US – Carbon Steel*, that the legal basis of a complaint cannot be established at a stage later than the panel request if that basis was not established in the panel request itself. Mexico opines that the same principle applies at an earlier procedural stage, as in

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<sup>38</sup>Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679.

<sup>39</sup>Mexico's appellant's submission, para. 14 ("*sentido corriente*") (quoting Article 31 of the *Vienna Convention*).

the present case, such that the legal basis of a complaint cannot be included in a panel request if it was not included first in the request for consultations.

16. Alternatively, if the Appellate Body upholds the finding of the Panel, Mexico alleges that the legal grounds posited by the United States in its panel request are not "sufficiently inter-related" to justify their inclusion in the panel request without having been included in the request for consultations.<sup>40</sup>

17. Consequently, Mexico requests the Appellate Body to reverse the Panel's finding that the legal provisions alleged in the panel request to have been violated need not be identical to those identified in the request for consultations. Mexico further requests the Appellate Body to find that those claims set out for the first time in the United States' panel request were not properly before the Panel and, accordingly, to reverse the Panel's findings on those claims.

## 2. Economía's Injury Determination

### (a) The Use of a Period of Investigation Ending in August 1999

18. Mexico appeals the Panel's finding that the use of a period of investigation ending in August 1999 for purposes of the injury analysis is inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement*.

19. Mexico submits that the Panel's finding regarding the remoteness of the period of investigation is beyond the terms of reference of this dispute. The scope of the dispute derives from the terms of reference and from the panel request submitted by the United States. The claim made by the United States in its panel request is that Mexico violated Article 5.1 of the *Anti-Dumping Agreement* by not examining recent data, because the purpose of an anti-dumping investigation is to determine whether dumping is occurring at the present time. Mexico alleges, however, that the Panel disregarded the United States' claim and "reconstructed" the argument differently.<sup>41</sup> Instead of considering whether Mexico had violated Article 5.1, the Panel decided, on the basis of other articles of the *Anti-Dumping Agreement*, that the purpose of an anti-dumping investigation is to determine whether dumping is occurring at the present time, and that Mexico had examined a period that was not relevant for this determination, thereby breaching Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement*.

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<sup>40</sup>Mexico's appellant's submission, para. 25 ("los preceptos jurídicos no tienen la relación suficiente entre sí como para poder ser insertados en la solicitud de grupo especial sin estar incluidos en la solicitud de consultas").

<sup>41</sup>*Ibid.*, para. 39 ("reconstruyó").



20. Mexico contends that, even if the Panel had acted consistently with the terms of reference applicable to the dispute, the Panel nevertheless erred because it required that the period of data collection and the investigation period be the same. Mexico agrees with the Panel that the *Anti-Dumping Agreement* contains no rule regarding the period to be used for an anti-dumping investigation, and that the data on which an investigation is based may relate to an earlier period. However, Mexico submits that these assertions contradict the Panel's conclusion that there must be a real-time connection between the period of investigation and the period of the collection of data. Indeed, if such a temporal connection existed, the investigation would have to proceed concurrently with the collection of related information, in which case there would be no point in collecting data from an earlier period.

21. Mexico also argues that the Panel mistakenly determined that the purpose of an anti-dumping investigation is to offset dumping causing injury at the present time. According to the Panel, the purpose of an anti-dumping investigation is established by the use of verbs in the present tense, as in the expression "causing injury" in Articles 3.5 and 11.1 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. In Mexico's opinion, the fact that these Articles contain verbs in the present tense is not determinative, as several articles of the *Anti-Dumping Agreement* refer to the future, without their having to be interpreted in the narrow and literal sense. Furthermore, according to Mexico, it is not possible to conduct an investigation without using data from a previous period. It follows, then, that the expression "causing injury" in Article 3.5 of the *Anti-Dumping Agreement* must be interpreted in such a manner that it refers to the situation where it can be assumed that, on the basis of data relating to a previous period, dumping is still causing injury. Lastly, Mexico observes that, if the purpose of Article 3.1 of the *Anti-Dumping Agreement* were to counteract dumping causing injury at the present time, the Article should provide so expressly, which clearly it does not.

22. Thus, Mexico contends that Economía correctly established the investigation period and acted in a manner consistent with Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement*. Consequently, Mexico requests the Appellate Body to reverse the Panel's findings to the contrary.

(b) The Use of Six-month Periods in the Injury Analysis

23. Mexico appeals the Panel's findings that Mexico acted inconsistently with Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* because Economía limited its injury analysis to only six months of the years 1997, 1998, and 1999.

24. Mexico alleges that the Panel's findings of inconsistency are based on presumptions that have not been demonstrated and, therefore, are unfounded. Mexico considers that comparing the periods March to August of 1997, 1998, and 1999 does not imply that the analysis was not objective and not

based on positive evidence. According to Mexico, the Panel erred because it assumed that, as a rule, information should be analyzed for full years; this implies that if any WTO Member conducts an injury analysis using parts of a year, and compares them, a presumption arises that its methodology is not objective, and the Member therefore bears the burden of proving that its analysis is objective. Mexico contends that this presumption is flawed, because it amounts to assuming that the *Anti-Dumping Agreement* contains obligations with regard to matters not mentioned in the Agreement. Finally, Mexico argues that, even though it did not have to prove that its methodology was objective, it submitted arguments to this effect, but the Panel "simply disregarded" them.<sup>42</sup>

25. Mexico recalls that Economía conducted the injury analysis by comparing the period March to August 1997 with the corresponding periods in 1998 and 1999. For Mexico, it is incorrect to assume, as did the Panel, that such comparison shows "the most negative side of the state of the domestic industry"<sup>43</sup>, because the indicators for March to August of a particular year are compared with the indicators for March to August of the other two years, and not with the indicators for September to February. Mexico submits that using comparable periods for the injury analysis was proper, because it eliminated any distortions that might have occurred had it examined two different time periods for the dumping and injury phases of the investigation. Mexico also alleges that the Panel's position that the period March to August shows "the most negative side of the state of the domestic industry" relies on an uncertain premise: for Mexico, the percentage by which imports of long-grain white rice in the March to August periods of 1998 and 1999 exceeded imports during the rest of the year was "practically negligible", whereas, in 1997, imports from the United States were lower between March and August than during the rest of the year.<sup>44</sup>

26. In its reasoning, the Panel expressed the view that there were some similarities between the situation before it and that discussed by the Appellate Body in *US – Hot-Rolled Steel*, where certain parts of the domestic industry were not examined by the investigating authority.<sup>45</sup> Mexico argues that the Appellate Body Report in *US – Hot-Rolled Steel* is inapplicable because, in the case at hand, Economía undertook a comparison of the periods March to August 1997, 1998, and 1999, and no information was disregarded in a comparison that involved "structurally equivalent periods".<sup>46</sup>

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<sup>42</sup>Mexico's appellant's submission, para. 77 ("*simplemente los desestimó*").

<sup>43</sup>Panel Report, para. 7.85.

<sup>44</sup>Mexico's appellant's submission, para. 83 ("*prácticamente desestimable*").

<sup>45</sup>Panel Report, para. 7.84.

<sup>46</sup>Mexico's appellant's submission, para. 88(c) ("*periodos estructuralmente iguales*").

27. Thus, Mexico contends that the use of a six-month period from 1997, 1998, and 1999 in the injury analysis was consistent with Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*, and accordingly requests the Appellate Body to reverse the Panel's findings to the contrary.

(c) The Examination of the Volume and Price Effects of Dumped Imports

28. Mexico appeals the Panel's finding that, in its injury analysis, Economía acted inconsistently with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* by failing to conduct an objective examination, based on positive evidence, of the volume and price effects of dumped imports.

29. Mexico alleges that, contrary to what was stated by the Panel, Economía properly established the facts relating to the trends in the volume of dumped imports. For Mexico, this is proved by the structure of the Final Determination issued by Economía, in which all the background, considerations, findings, and elements of the determination are set out consistent with Mexico's obligations under the *Anti-Dumping Agreement*.

30. According to Mexico, the Panel simply summarized the final determination made by Economía, without providing any reasons to substantiate its determination that Mexico had violated the *Anti-Dumping Agreement* in its examination of the volume of dumped imports. Mexico argues that the fact that Economía used the methodology described in the final determination implies no violation of the *Anti-Dumping Agreement* because that Agreement imposes no specific obligation with respect to the methodology to be used to determine the volume of dumped imports.

31. Mexico also submits that the Panel's statement that "the investigating authority consistently chose to make assumptions which negatively affected the exporters' interests"<sup>47</sup> is "biased"<sup>48</sup> and not supported by legal reasoning. According to Mexico, Economía conducted an injury analysis based on positive evidence because it considered all the available relevant information and did not have the possibility of collecting any further information than that used during the investigation.

32. Thus, Mexico requests the Appellate Body to reverse the Panel's finding that it did not act consistently with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* based on Economía's examination of the volume of dumped imports and their effect on prices for like products in the domestic market.

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<sup>47</sup>Panel Report, para. 7.112.

<sup>48</sup>Mexico's appellant's submission, para. 108 ("*de manera parcial*").

3. Economía's Dumping Determination

(a) The Application of the Anti-Dumping Order to Farmers Rice and Riceland

33. Mexico appeals the Panel's finding that Mexico acted inconsistently with Article 5.8 of the *Anti-Dumping Agreement* because Economía did not terminate the investigation in respect of the two exporters that were found not to have been dumping, and by not excluding them from the application of the anti-dumping duty order.

34. Mexico submits that the Panel's finding is based on an erroneous interpretation of Article 5.8. Mexico contends that, instead of analyzing the meaning of the term "investigation", the Panel focused on the term "margin of dumping" in the second sentence of Article 5.8. The Panel's analysis, Mexico argues, does not follow the interpretative approach required by the *Vienna Convention*. According to Mexico, had the Panel analyzed the term "investigation", it would not have inferred from its interpretation of the term "margin of dumping" that "Article 5.8 of the [*Anti-Dumping Agreement*] requires the termination of the investigation, and thus the exclusion from the anti-dumping order of any exporter or producer with a below *de minimis* margin of dumping."<sup>49</sup> In Mexico's submission, a measure may be applied to those exporters; what is not permitted is to apply a positive anti-dumping duty to them. To this end, Mexico emphasizes that a distinction must be made between the definitive anti-dumping duties and the particular act of the authority through which the duties are imposed. The definitive anti-dumping duties do not constitute in themselves a measure, the measure being the act of the authority through which the duties are imposed. Mexico contends that the *Anti-Dumping Agreement* does not prevent exporters for whom a *de minimis* margin was determined from being covered by such a measure.

35. According to Mexico, the main function of anti-dumping procedures is to conduct an examination with respect to products, not exporters. This suggests that the scope of the "investigation" referred to in Article 5.8 specifically concerns the product, and not the enterprise exporting the product. Mexico contends that Article 5.8 addresses whether there should be an anti-dumping procedure where there is not sufficient evidence to initiate an investigation. Accordingly, Mexico submits, Article 5.8 refers to the termination of the proceeding as a whole, not to the termination of the investigation in respect of individual exporters. Mexico also argues that the term "investigation", as used in Article 5.8, refers to a stage in any anti-dumping proceeding, and not to action concerning individual exporters.

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<sup>49</sup>Panel Report, para. 7.144.

36. Mexico contends that the Panel "ignore[d]"<sup>50</sup> the context of Article 5.8, in particular, Article 3.3 of the *Anti-Dumping Agreement*. According to Mexico, Article 3.3 confirms that the relevant margin of dumping under Article 5.8 is the margin established in relation to the imports from each Member. Mexico further argues that the Panel's interpretation of Article 5.8 leads "to a manifestly absurd and unreasonable result" that would make the application of anti-dumping measures unmanageable.<sup>51</sup>

37. Mexico also submits that, even if the *de minimis* margin of dumping had to be calculated for each individual exporter or producer, Mexico did not act inconsistently with the *Anti-Dumping Agreement* because Economía terminated its investigation when it was satisfied that the United States' exporters had a dumping margin of zero per cent. According to Mexico, Economía was unable to determine with certainty whether the dumping margin was *de minimis* until the final determination was made. Mexico argues that, because Economía terminated the investigation at that stage in respect of Farmers Rice and Riceland, it complied with Article 5.8.

38. Consequently, Mexico requests the Appellate Body to reverse the Panel's finding that Mexico acted inconsistently with Article 5.8 of the *Anti-Dumping Agreement* in its anti-dumping investigation.

(b) The Application of a Facts Available-based Dumping Margin to Producers Rice

39. Mexico appeals the Panel's finding that Mexico acted inconsistently with Article 6.8, read in the light of paragraph 7 of Annex II to the *Anti-Dumping Agreement*, because Economía calculated a margin of dumping on the basis of the facts available for Producers Rice, an exporter that did not export long-grain white rice to Mexico during the period of investigation.

40. Mexico alleges that the Panel did not act in accordance with the terms of reference applicable to the dispute, arguing that the United States did not make a claim on the basis of Article 6.8 and Annex II, but, rather, rested its claim on Article 9.4 of the *Anti-Dumping Agreement*. Mexico contends that, as the Panel rejected the United States' contention that the margin of dumping should have been calculated in accordance with Article 9.4, the Panel should have found that the United States' argument was without merit and that, as a result, Mexico did not act inconsistently with the *Anti-Dumping Agreement*. For Mexico, the Panel exceeded its terms of reference in moving on to

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<sup>50</sup>Mexico's appellant's submission, para. 126 ("*ignor[ó]*").

<sup>51</sup>*Ibid.*, para. 129 ("*un resultado manifiestamente absurdo e irrazonable*").

analyze whether Mexico calculated the margin of dumping for Producers Rice in conformity with Article 6.8 and Annex II.

41. Thus, Mexico requests the Appellate Body to reverse the Panel's finding that Mexico acted inconsistently with Article 6.8 of the *Anti-Dumping Agreement* in applying a margin of dumping to Producers Rice based on the facts available.

(c) The Requirement that Economía Identify Exporters or Producers Covered by the Investigation

42. Mexico challenges the Panel's findings that Economía's treatment of non-investigated exporters and producers was inconsistent with Articles 6.1, 6.8, 6.10, and 12.1 of the *Anti-Dumping Agreement*, and paragraph 1 of Annex II thereto. Mexico's appeal focuses on the Panel's assessment that, under these provisions, the "known" producers or exporters include those of whom an investigating authority should reasonably be considered to have had knowledge, and that an investigating authority should take steps to find out who are the exporters or producers covered by the investigation.

43. Mexico argues that, under Article 6.10, the investigating authority is obliged to determine individual margins of dumping for those exporters or producers whose existence has been notified, but is not obliged to determine individual margins for *all* firms. Mexico submits that Economía complied with Article 6.10 by calculating individual margins of dumping for all known exporters and producers that took part in the investigation. As regards the exporters that were not investigated individually, Mexico contends that Economía met its obligations under the *Anti-Dumping Agreement* by giving the United States' authorities public notification of initiation of the investigation, a copy of the request to initiate an investigation and the annexes thereto, as well as the questionnaire for exporters and foreign producers. Mexico argues that an investigating authority has no obligation to take steps to find out who are the exporters or foreign producers. For Mexico, the Panel's reasoning is flawed because the Panel made an *a priori* assumption that the diplomatic authorities of the exporting Member do not have any obligation to make their exporters or producers aware of the investigation, whereas such obligation is stated in footnote 15 to Article 6.1.1 of the *Anti-Dumping Agreement*. Mexico adds that it complied with Articles 6.1 and 12.1 of the *Anti-Dumping Agreement* because there is no provision in the *Anti-Dumping Agreement* that requires an investigating authority to take any action in order to identify each and every one of the foreign producers or exporters.

44. Mexico also contends that, under Article 6.8, Economía was entitled to calculate a margin of dumping based on the facts available for the exporters and producers that were not investigated, because it met its obligations under Articles 6.1 and 6.10, and the exporters and producers that were not investigated did not provide the necessary information.

45. Consequently, Mexico requests the Appellate Body to reverse the Panel's findings of inconsistency with Articles 6.1, 6.8, 6.10, and 12.1 of the *Anti-Dumping Agreement*, and paragraph 1 of Annex II thereto.

4. The Foreign Trade Act

(a) Preliminary Issues

46. Mexico submits that the Panel made two errors with respect to *each* of the United States' "as such" claims against the FTA: (i) in ruling on these claims notwithstanding the United States' failure to establish a *prima facie* case; and (ii) in concluding that each of the challenged FTA provisions was "mandatory", notwithstanding that Article 2 of the FTA gives Economía discretion to ensure that those provisions are interpreted consistently with the WTO agreements.

47. Mexico contends that the Panel ruled on the United States' challenges to provisions of the FTA where the United States had failed to make a *prima facie* case of inconsistency with respect to any of the challenged provisions. According to Mexico, the United States' submission of the texts of the relevant provisions was insufficient to make a *prima facie* case, because the United States was required, by virtue of the Appellate Body decision in *US – Carbon Steel*, to also submit evidence relating to the *operation* of the FTA provisions. Mexico submits that such evidence might have included application of the law by executive branch officials, interpretation by domestic courts, or opinions of legal experts. In the absence of such evidence, Mexico argues, the Panel made the case of WTO-inconsistency for the United States with respect to the challenged provisions of the FTA.

48. Mexico alleges that the United States' claims with regard to the contested provisions of the FTA rest on the assertion that those provisions *require* the investigating authority to act in a manner inconsistent with the provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*. Consequently, the Panel's task, according to Mexico, was to ascertain whether those provisions of the FTA are in fact mandatory, and, if so, whether this results in an inconsistency with Mexico's obligations under the WTO agreements. Mexico contends that, if the Panel had found that the provisions challenged by the United States are not mandatory, the Panel would necessarily have found the United States' claims to be without merit.

49. Mexico alleges that the Panel erred in its findings with regard to the FTA because it "disregarded"<sup>52</sup> Mexico's arguments concerning the relevance of Article 2 of the FTA, which establishes that provisions of the FTA may not be applied in a manner inconsistent with the provisions of international treaties or agreements entered into by Mexico. In the light of Article 2, Mexico submits that the provisions of the FTA do not *mandate* that the investigating authority act in a particular way, but, instead, give it discretion to act in a manner consistent with the WTO agreements. Had the Panel properly considered Mexico's arguments relating to Article 2, Mexico argues, the Panel would have concluded that the challenged FTA provisions are "discretionary" rather than "mandatory" and, consequently, that they are not inconsistent with the *Anti-Dumping Agreement* or the *SCM Agreement*.

50. In the light of the above, Mexico requests the Appellate Body to find that the Panel erred in making findings on claims in the absence of a *prima facie* case, and in "disregarding" Mexico's arguments relating to Article 2 of the FTA. Consequently, Mexico further requests the Appellate Body to reverse the Panel's findings with respect to the challenged provisions of the FTA.

(b) Article 53

51. Mexico contends that the Panel erred in finding that the 30-day period for responding to questionnaires—provided for in Article 6.1.1 of the *Anti-Dumping Agreement* and Article 12.1.1 of the *SCM Agreement*—is to be granted to *all* exporters without exception. According to Mexico, these provisions contain no such obligation; this time period applies only to those that have received the corresponding questionnaire from the investigating authority, that is, only to exporters to whom the questionnaire has been sent. In this respect, Mexico argues that it would be "illogical"<sup>53</sup> to grant the above-mentioned period whenever an exporter or foreign producer not previously known to the investigating authority comes forward, because doing so would undoubtedly cause delays in the investigation proceedings beyond the time-limits prescribed by Article 5.10 of the *Anti-Dumping Agreement* and Article 11.11 of the *SCM Agreement*.

52. Consequently, Mexico requests the Appellate Body to reverse the Panel's finding that Article 53 of the FTA is inconsistent, as such, with Article 6.1.1 of the *Anti-Dumping Agreement* and Article 12.1.1 of the *SCM Agreement*.

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<sup>52</sup>Mexico's appellant's submission, para. 195(d) ("*desestimó*").

<sup>53</sup>*Ibid.*, para. 230 ("*ilógico*").



(c) Article 64

53. Mexico appeals the Panel's finding that Article 64 of the FTA is inconsistent, as such, with Article 6.8 of the *Anti-Dumping Agreement*, paragraphs 1, 3, 5, and 7 of Annex II thereto, and Article 12.7 of the *SCM Agreement*.

54. Mexico argues that Article 6.8 of the *Anti-Dumping Agreement* and Article 12.7 of the *SCM Agreement* permit an investigating authority to calculate margins of dumping or subsidization for parties that do not supply the necessary information. According to Mexico, if an interested party did not appear in the investigation or did not export during the period of investigation, this means that the exporter in question did not provide the information necessary for determining whether there is a margin of dumping or subsidization. Viewed in this light, Mexico argues, Article 64 is not WTO-inconsistent because it provides for margins to be calculated on the basis of the facts available where interested parties do not provide the necessary information, including where interested parties do not appear in the investigation or do not export during the investigation period.

55. Mexico argues that Article 64 is consistent with paragraph 3 of Annex II to the *Anti-Dumping Agreement* inasmuch as that paragraph establishes the obligation to take into account all verifiable information. If an exporter does not provide the necessary information, however, there is no verifiable information to be taken into account, and, thus, recourse to facts available in the absence of such information is not inconsistent with the stated obligation.

56. Mexico argues that Article 64 is consistent with paragraph 5 of Annex II to the *Anti-Dumping Agreement* inasmuch as that paragraph provides that the investigating authority shall not disregard information provided by the exporter, even if that information is not ideal in all respects. According to Mexico, paragraph 5 indicates that, in order for such information to be considered, it must be ideal in at least one respect. Mexico contends that if an exporter does not provide the information needed to determine its dumping margin, the information cannot be said to be ideal in at least one respect, because the information is "totally lacking".<sup>54</sup>

57. Mexico further argues that Article 64 is consistent with paragraphs 1 and 7 of Annex II to the *Anti-Dumping Agreement*. Mexico submits that paragraph 1 provides that, if the interested party does not supply the information required, the investigating authority shall be free to make determinations on the basis of the facts available, including those contained in the petition. Moreover, Mexico argues, paragraph 7 explicitly provides that, if an interested party does not cooperate and fails to submit relevant information, this could lead to a result that is less favourable to the interested party

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<sup>54</sup>Mexico's appellant's submission, para. 243(b) ("*la inexistencia absoluta de información*").

than if it had cooperated. Mexico contends that, as paragraph 7 expressly provides that there may be such a less-favourable result, there is no basis to reject the option of applying the highest margin calculated, as in Article 64, because this result would fall under the category of less-favourable results that may be applied to an exporter or foreign producer that does not cooperate. Therefore, in Mexico's submission, paragraphs 1 and 7 of Annex II specifically contemplate the use of facts available as provided for in Article 64.

(d) Article 68

58. Mexico argues that the Panel erred in determining that, even though Article 5.8 of the *Anti-Dumping Agreement* does not apply to reviews, Article 68 of the FTA is inconsistent with it because the logical consequence of its exclusion is that foreign producers or exporters may not be subject to review. Mexico submits that the scope of Article 5.8 of the *Anti-Dumping Agreement* and Article 11.9 of the *SCM Agreement* is limited to the original investigation: once the investigation has ended, Article 5.8 ceases to apply. Because Article 68 applies solely to events subsequent to the investigation—that is, to reviews—the provision bears no relation to the above-mentioned Articles and thus cannot properly be found to be inconsistent with them.

59. Mexico also contends that Article 5.8 of the *Anti-Dumping Agreement* and Article 11.9 of the *SCM Agreement* make a clear reference to the moment at which an investigation should be terminated if the margin of dumping is *de minimis*, namely, the moment at which the investigating authority determines that the said margin of dumping is *de minimis*. In this respect, Mexico explains that Economía is unable to determine with certainty whether the margin of dumping is *de minimis* until the final determination of the investigation. According to Mexico, Article 68 does not prevent Economía from terminating the investigation when it is sure of the amount of the dumping margin, that is, when it makes a final determination in the investigation concerned. Thus, Mexico argues, in the case of exporters for whom a below-*de minimis* duty has been established in the final determination, the investigation is properly terminated at that time, consistent with the relevant provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*.

60. In addition, Mexico alleges that the Panel erred in finding that definitive measures may not be applied to exporters for whom a *de minimis* margin of dumping or subsidization has been determined. According to Mexico, duties are not a measure as such, the measure being the action by the authority through which the duties are applied. Investigating authorities may therefore apply definitive measures to those exporters provided that they do not impose a positive anti-dumping or countervailing duty on them. Indeed, this is consistent with the practice of Mexico, where exporters are included in the definitive measure—which establishes firms' dumping margins—but this does not

imply that, if their margins are *de minimis*, an anti-dumping or countervailing duty will, in fact, be imposed on them.

61. With regard to the element of "representativeness" provided for in Article 68, Mexico asserts that there are no treaty provisions prohibiting the showing of a "representative" volume of export sales as a prerequisite to the calculation of a margin in reviews. According to Mexico, the only obligation laid down by Articles 9.3 and 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement* is that the reviews be *initiated* by the investigating authority upon request of certain interested parties. The text contains no guidelines, however, on how the reviews are to be *conducted*. As Article 68 does not preclude the mandated *initiation* of reviews, Mexico submits, it is not inconsistent with the aforementioned treaty provisions.

62. Consequently, Mexico requests the Appellate Body to reverse the Panel's finding that Article 68 of the FTA is inconsistent, as such, with Articles 5.8, 9.3, and 11.2 of the *Anti-Dumping Agreement*, and Articles 11.9 and 21.2 of the *SCM Agreement*.

(e) Article 89D

63. In Mexico's view, the texts of Article 9.5 of the *Anti-Dumping Agreement* and Article 19.3 of the *SCM Agreement* contain no prohibition on an agency requiring that exporters demonstrate a "representative" volume of export sales in order to receive a calculated margin in a review. In the absence of such a prohibition, Mexico argues, it must be considered that the negotiators of those Agreements intended to permit agencies to impose such requirements. As a result, Mexico submits, Article 89D of the FTA is not inconsistent with Mexico's obligations under the *Anti-Dumping Agreement* and the *SCM Agreement*.

64. Consequently, Mexico requests the Appellate Body to reverse the Panel's finding that Article 89D of the FTA is inconsistent, as such, with Article 9.5 of the *Anti-Dumping Agreement* and Article 19.3 of the *SCM Agreement*.

(f) Article 93V

65. Mexico argues that the Panel failed to comply with its obligations under Article 11 of the DSU in finding that Article 93V of the FTA is inconsistent, as such, with Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*.

66. Mexico submits that the specific measure that is the subject of the United States' complaint is the *Spanish* text of the FTA, in this case, of Article 93V. The Panel, however, based its finding exclusively on an *English* translation of the contested measure, which does not reflect precisely the

meaning of the Spanish text of the article in question. Specifically, Mexico contends that the Panel's reliance on the English translation led it to conclude—incorrectly—that Article 93V *mandates* the imposition of fines in certain circumstances.

67. Mexico also alleges that the Panel failed to analyze those additional elements of Article 93V that indicate clearly that the provision is not mandatory. According to Mexico, Article 93V expressly provides that fines shall be imposed only when Economía itself considers that the remedial effect of anti-dumping or countervailing duties is being undermined; and, even if Economía considers this to be the case, it is required to hear the arguments of the alleged offender and it may then conclude that the impact of the anti-dumping or countervailing duties has not been affected, in which case no fine would be imposed. Thus, Mexico argues, it is "illogical"<sup>55</sup> to assume, as the Panel did, that Economía has no discretion to impose a fine.

68. Accordingly, Mexico requests the Appellate Body to find that the Panel failed to comply with its obligations under Article 11 of the DSU and to reverse the Panel's finding that Article 93V of the FTA is inconsistent, as such, with Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*.

(g) Articles 68 and 97

69. Mexico argues that nothing in Article 68 of the FTA bears any relation to the prohibition alleged by the United States against the conduct of reviews while judicial proceedings are ongoing. Similarly, with respect to Article 97 of the FTA, Mexico alleges that the provision does not prevent Economía from undertaking reviews as required by the *Anti-Dumping Agreement* and the *SCM Agreement*. According to Mexico, because neither of the challenged provisions contains the prohibition alleged by the United States, the Panel should have found that the United States had not made a *prima facie* case of inconsistency with respect to either Article 68 or Article 97.

70. Mexico further argues that Articles 68 and 97 of the FTA are consistent with Articles 9.3 and 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*, because those provisions require that reviews be granted upon request only once a duty becomes *definitive*. The Panel understood these provisions of the Agreements to require reviews once duties have been imposed by a final determination following an investigation. Mexico submits that this interpretation is in error, however, because duties become definitive only upon the conclusion of judicial proceedings. Mexico contends that this ensures legal certainty for exporters, who are not required to pay the duties until the exporter has had an opportunity to exhaust its appeals of the definitive

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<sup>55</sup>Mexico's appellant's submission, para. 283(c) ("ilógico").

measure and the final liability of the exporter is thereby established. Because duties are not definitive before that point, and Articles 68 and 97 do not prevent reviews once judicial proceedings have concluded, Articles 68 and 97 are not inconsistent with Mexico's obligations under the *Anti-Dumping Agreement* or the *SCM Agreement*.

71. Consequently, Mexico requests the Appellate Body to reverse the Panel's finding that Articles 68 and 97 of the FTA are inconsistent, as such, with Articles 9.3 and 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*.

B. *Arguments of the United States – Appellee*

1. Article 6.2 of the DSU

72. The United States alleges that Mexico "mischaracterizes" the Panel's finding under Article 6.2 of the DSU because the Panel made no findings on whether it was consistent with Article 6.2 of the DSU to include claims in a panel request that were not included in the request for consultations. According to the United States, Mexico never made such an allegation, but argued instead that it was inconsistent with Articles 4.5 and 4.7 of the DSU to include claims for the first time in the panel request. Nevertheless, the United States submits, even if Mexico had made that argument, the Panel would have rejected it based on the same reasoning the Panel applied in rejecting Mexico's arguments under Article 4 of the DSU.

73. The United States argues that it is well established that a panel's terms of reference are established by the panel request, not by the request for consultations. The United States opines that "it would make little sense" to limit the legal claims that may be included in a panel request to those included in the request for consultations, because one of the purposes of consultations is to foster a better understanding of the relevant measures and concerns of the various Members in order to promote a "satisfactory adjustment of the matter".<sup>56</sup> The United States further notes that the Appellate Body found, in *Brazil – Aircraft*, that there is no requirement to have a "precise and exact identity" between the *measures* included in the request for consultations and those in the panel request and, thus, the same logic would apply with respect to the *legal* basis of the complaint.<sup>57</sup>

74. The United States submits that the DSU reflects the difference between panel requests and requests for consultations by providing different requirements for each. According to the United States, although the DSU requires that a panel request provide "*a brief summary*" of the legal basis of

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<sup>56</sup>United States' appellee's submission, para. 28.

<sup>57</sup>*Ibid.*, para. 29 (referring to Appellate Body Report, *Brazil – Aircraft*, para. 132).

the complaint sufficient to present the problem clearly"<sup>58</sup>, it requires that requests for consultations provide only "*an indication* of the legal basis for the complaint".<sup>59</sup> Finally, the United States contends that Mexico's practice in WTO dispute settlement proceedings indicates that it does not believe its own arguments on this issue.

75. The United States requests the Appellate Body to uphold the Panel's finding that the United States' claims set out in the panel request, including those not initially raised in the request for consultations, were properly within its terms of reference.

## 2. Economía's Injury Determination

### (a) The Use of a Period of Investigation Ending in August 1999

76. The United States contends that Mexico's arguments on appeal regarding the use of a period of investigation ending in August 1999 provide "no basis" for reversing the Panel's finding on this issue.<sup>60</sup> According to the United States, Mexico's argument—that the United States' claim on this issue was premised on an inconsistency with Article 5.1 of the *Anti-Dumping Agreement*—is a "transparently incorrect assertion".<sup>61</sup> The United States argues that its panel request refutes this argument, because it contains no allegation of inconsistency with Article 5.1 of the *Anti-Dumping Agreement*.

77. In addition, the United States disagrees with Mexico's argument that, because the *Anti-Dumping Agreement* does not so state explicitly, it may not be concluded that the purpose of an anti-dumping investigation is to offset dumping that is causing injury at the time of the investigation. The United States submits that Mexico fails to account for the language in Article VI of the GATT 1994 providing that anti-dumping duties may be imposed "to offset or prevent" dumping. Mexico also "disregard[s]" other textual evidence referred to by the Panel in reaching its conclusions, including the use of the present tense in the relevant provisions.<sup>62</sup>

78. As regards Mexico's assertion that the Panel failed to analyze the "applicability"<sup>63</sup> of the data used by Economía, the United States argues that the Panel, in fact, did so and that Mexico ignores a series of the Panel's factual findings that support the Panel's conclusion that Economía failed to make

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<sup>58</sup>Article 6.2 of the DSU. (emphasis added)

<sup>59</sup>Article 4.4 of the DSU. (emphasis added)

<sup>60</sup>United States' appellee's submission, para. 44.

<sup>61</sup>*Ibid.*

<sup>62</sup>*Ibid.*, para. 47.

<sup>63</sup>*Ibid.*, para. 49 (quoting Mexico's appellant's submission, para. 61 ("*la aplicabilidad*")).

a determination of injury based on positive evidence and involving an objective examination. Finally, with respect to Mexico's argument that the Panel should have found that its interpretation was "permissible" under Article 17.6(ii) of the *Anti-Dumping Agreement*, the United States maintains that it is not clear how Mexico's interpretation differs from the Panel's interpretation of the anti-dumping provisions at issue.

79. Consequently, the United States requests the Appellate Body to uphold the Panel's finding that Mexico acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement* because Economía based its injury determination on a period of investigation that ended more than 15 months before the initiation of the investigation.

(b) The Use of Six-Month Periods in the Injury Analysis

80. The United States agrees with the Panel's finding that Economía's decision to "ignore" half the injury data for each of the years in the period of investigation was inconsistent with Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*.<sup>64</sup> According to the United States, Mexico's arguments on this issue "mischaracterize" the Panel's legal findings, "disregard" its factual findings, and provide "no basis" for reversing the Panel's conclusions.<sup>65</sup> The United States observes that, whereas Economía established a three-year period of investigation and collected data for the entirety of that period, it disregarded half the data it had collected. The United States submits that it established a *prima facie* case that Economía's approach was inconsistent with Articles 3.1 and 3.5 of the *Anti-Dumping Agreement*, and that Mexico failed to provide a convincing and valid reason explaining its approach and thereby rebutting the *prima facie* case.

81. The United States underscores that the Panel based its findings on Economía's own published determinations. It adds that, as factual findings, these points are not within the scope of appellate review. According to the United States, the Appellate Body should also reject the table submitted in paragraph 83 of Mexico's appellant's submission, because there is no uncontroverted basis to conclude that the data in Mexico's table accurately reflect the true level of imports of long-grain white rice during the three-year period of investigation regarding injury.

82. In the light of the above, the United States requests the Appellate Body to uphold the Panel's finding that Mexico acted inconsistently with Articles 3.1 and 3.5 of the *Anti-Dumping Agreement* by limiting its injury analysis to only six months of the years 1997, 1998, and 1999.

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<sup>64</sup>United States' appellee's submission, para. 53.

<sup>65</sup>*Ibid.*, para. 55.

(c) The Examination of the Volume and Price Effects of Dumped Imports

83. According to the United States, the Panel correctly concluded as a matter of fact that Economía based its determination of import volumes and price effects on assumptions instead of facts. The United States adds that the Panel explained at length why it so concluded and, therefore, why Economía's analysis was inconsistent with the requirements of Article 3 of the *Anti-Dumping Agreement*. The United States emphasizes that an investigating authority's ability to devise its own methodology for determining injury does not mean that the investigating authority is free to use a methodology that results in an investigation that is not objective and based on positive evidence.

84. As regards Mexico's claim that the Panel's analysis was "biased", the United States points out that Mexico has made no claims under Article 11 of the DSU and, therefore, this claim should be rejected.<sup>66</sup> Finally, the United States disagrees with Mexico's assertion that it was not possible for Economía to collect additional information. According to the United States, Economía could have gathered more accurate information if it had sent its anti-dumping questionnaire to a greater number of exporters and if it had referred to the *pedimentos* ("customs declarations").

85. The United States requests the Appellate Body to uphold the Panel's finding that Mexico acted inconsistently with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* by failing to conduct an objective examination based on positive evidence of the volume and price effects of dumped imports as part of its injury analysis.

3. Economía's Dumping Determination

(a) The Application of the Anti-Dumping Order to Farmers Rice and Riceland

86. The United States agrees with the Panel that the term "margin of dumping" in the second and third sentences of Article 5.8 refers to the *individual* margin of dumping of an exporter or producer, rather than a *country-wide* margin. According to the United States, further support for the Panel's finding can be found in the third sentence of Article 5.8, because the term "export price" mentioned therein is inherently firm-specific, not country-wide.

87. For the United States, none of Mexico's arguments provides a basis for reversing the Panel's finding that Mexico acted inconsistently with Article 5.8 of the *Anti-Dumping Agreement*. The United States argues that Mexico failed to explain why it believes the Panel would have reached a different conclusion had it examined the meaning of the term "investigation" and the phrase "shall be

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<sup>66</sup>United States' appellee's submission, para. 76.



terminated promptly". The United States also argues that Mexico's attempt to distinguish between the imposition of a measure and the levying of duties is incorrect, because such distinction would imply that an anti-dumping measure might be imposed in cases where all of the margins are below *de minimis*, or where the investigating authority reaches a negative determination of injury (as long as no duties are collected).

88. According to the United States, neither Article 5.8 nor Article 1 of the *Anti-Dumping Agreement* can be construed to permit Members to include in the scope of an anti-dumping measure an exporter or producer that is investigated and found not to be dumping, because in such circumstances the exported products cannot be found to be dumped imports that are causing injury to the domestic industry. Furthermore, the United States considers that Article 3.3 of the *Anti-Dumping Agreement*, to which Mexico refers, is an injury provision that has nothing to do with the dumping determination. In any event, the United States submits, Article 3.3 shows that when the drafters intended for a particular calculation to be done on a country-wide basis, they said so explicitly.

89. The United States contends that an investigating authority can conduct a single investigation of multiple firms, and then terminate its investigation with respect to specific firms, by stating in its final determination that it will exclude from the measure those firms that were investigated and found not to be dumping. Accordingly, the United States argues, Mexico is wrong in stating that the Panel's interpretation would lead to a manifestly absurd and unreasonable result. Finally, the United States submits that Mexico's argument—that Economía acted consistently with Article 5.8 because it terminated the investigation with respect to Farmers Rice and Riceland as soon as it had concluded they had zero margins—is not credible, because Economía applied the anti-dumping measure to both firms.

90. Accordingly, the United States requests the Appellate Body to uphold the Panel's finding that Mexico acted inconsistently with Article 5.8 of the *Anti-Dumping Agreement* by not terminating the investigation with respect to Farmers Rice and Riceland and by not excluding them from the application of the definitive anti-dumping measure, notwithstanding that Economía found that Farmers Rice and Riceland were not dumping.

(b) The Application of a Facts Available-based Dumping Margin to Producers Rice

91. The United States submits that Mexico makes the "perplexing" assertion that the United States never claimed that the facts available-based anti-dumping margin was inconsistent with Mexico's WTO obligations, and that the Panel, therefore, exceeded its terms of reference in so

deciding.<sup>67</sup> The United States underscores that it specifically cited paragraph 7 of Annex II to the *Anti-Dumping Agreement* in the panel request, and explained in its submissions to the Panel why it considered that the margin of dumping applied to Producers Rice was inconsistent with paragraph 7 of Annex II.

92. Accordingly, the United States requests the Appellate Body to uphold the Panel's finding that Mexico acted inconsistently with Article 6.8 of the *Anti-Dumping Agreement* and paragraph 7 of Annex II thereto in its application of a facts available-based dumping margin to Producers Rice.

(c) The Requirement that Economía Identify Exporters or Producers Covered by the Investigation

93. The United States agrees with the Panel's analysis of the scope of Article 6.10 of the *Anti-Dumping Agreement*. According to the United States, the Panel correctly found that Economía acted inconsistently with Article 6.10 "by 'remaining entirely passive in the identification of exporters or producers interested in the investigation, and by not calculating an individual margin of dumping for each exporter or producer that was known or should reasonably have been known' to it."<sup>68</sup> The United States adds that, contrary to what Mexico suggests, the Panel did not find that Article 6.10 requires an investigating authority to identify and calculate an individual margin of dumping for *every* exporter or producer of the subject merchandise.

94. The United States also agrees with the Panel's conclusion that an investigating authority cannot apply the facts available to a particular exporter or producer without first sending the exporter or producer a copy of its questionnaire and asking it to reply. For the United States, Mexico's approach is wrong, because it focuses solely on the text of Article 6.8 and does not take into account other provisions of the *Anti-Dumping Agreement*, such as Article 6.1 and paragraph 1 of Annex II thereto. The United States submits that Economía failed to provide to all of the interested parties in the investigation the notice required by Article 6.1 and, consequently, contrary to what Mexico suggests, Economía did not act consistently with Article 6.1.3. Accordingly, the United States argues, Economía could not apply a facts available-based margin to the exporters or producers for whom it did not meet its obligations under Article 6.1.

95. According to the United States, there is no textual basis for Mexico's argument that it was the United States Government, and not Economía, that had an obligation to identify and notify the exporters and producers that Economía was purporting to investigate. The United States adds that footnote 15 to Article 6.1.1 of the *Anti-Dumping Agreement* does not create an independent

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<sup>67</sup>United States' appellee's submission, para. 100.

<sup>68</sup>*Ibid.*, para. 108 (quoting Panel Report, para. 7.201).

obligation for the exporting government to identify exporters and producers covered by the investigation. Finally, the United States submits that the Panel properly found that Economía acted inconsistently with Article 12.1 of the *Anti-Dumping Agreement* by failing to provide notice that it had initiated an investigation to each of the interested parties known to have an interest in the investigation.

96. The United States, therefore, requests the Appellate Body to uphold the Panel's finding that Mexico acted inconsistently with Articles 6.1, 6.8, 6.10, and 12.1 of the *Anti-Dumping Agreement* and paragraph 1 of Annex II thereto in its application of a facts available-based dumping margin to the United States producers and exporters that it did not investigate.

#### 4. The Foreign Trade Act

##### (a) Preliminary Issues

97. The United States submits that, although Mexico argues that the Panel failed to address Mexico's arguments concerning Article 2 of the FTA, Mexico concedes in its appellant's submission that the Panel did, in fact, address them. Furthermore, according to the United States, Mexico emphasized before the Panel that each of the actions required by the challenged FTA provisions was consistent with Mexico's WTO obligations. In this respect, the United States argues, Mexico fails to explain how Article 2 could "override the clear requirements" of the challenged provisions, when Mexico sees no conflict between the provisions and its WTO obligations.<sup>69</sup>

98. The United States, therefore, requests the Appellate Body to uphold the Panel's finding that Article 2 of the FTA does not prevent the Panel from finding that other FTA provisions are inconsistent, "as such", with Mexico's WTO obligations.

##### (b) Article 53

99. According to the United States, the disagreement between the parties regarding Article 53 of the FTA centred not on the meaning of Article 53, but on the proper interpretation of Article 6.1.1 of the *Anti-Dumping Agreement* and Article 12.1.1 of the *SCM Agreement*. The United States agrees with the Panel that, pursuant to the plain language of these treaty provisions, an exporter is entitled to a 30-day response time regardless of when it receives the questionnaire. Mexico's interpretation—that these provisions require a 30-day response time *only* when an authority sends the questionnaire to an interested party at the *time of initiation* of the investigation—can be supported only by reading words into the provisions that are not there.

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<sup>69</sup>United States' appellee's submission, para. 123.

100. In addition, the United States contends that, contrary to Mexico's assertion, the panel report in *Argentina – Poultry Anti-Dumping Duties* does not support Mexico's interpretation of the treaty. According to the United States, Mexico is "taking the *Argentina – Poultry Anti-Dumping Duties* language out of context and ignoring other language in that report which undermines its own position and plainly supports" the Panel's findings.<sup>70</sup>

101. Consequently, the United States requests the Appellate Body to uphold the Panel's finding that Article 53 of the FTA is inconsistent, as such, with Article 6.1.1 of the *Anti-Dumping Agreement* and Article 12.1.1 of the *SCM Agreement*.

(c) Article 64

102. The United States contests Mexico's argument that the Panel should have found Article 64 of the FTA consistent with paragraph 3 of Annex II to the *Anti-Dumping Agreement* because that paragraph requires investigating authorities to take information into account only if it is "verifiable". The United States submits that Article 64 requires Economía to apply the highest facts available-based margin to firms that did not appear in the investigation or did not export the subject merchandise during the period of investigation. Thus, according to the United States, even if these firms submit "verifiable" information, Economía may not take it into account unless it results in the highest facts available-based margin. The United States argues that the failure to take such information into account, without regard to the effect it might have on the ultimate margin, renders Article 64 inconsistent with paragraph 3 of Annex II.

103. In addition, the United States disagrees with Mexico's argument that the Panel should have found Article 64 consistent with paragraph 5 of Annex II to the *Anti-Dumping Agreement* because that paragraph entitles an investigating authority to reject information that is not ideal in at least one respect. The United States submits that paragraph 5 does not authorize an investigating authority to disregard such information if the interested party that submitted it acted to the best of its ability. By requiring Economía to apply always the highest facts available-based margin, Article 64 prevents Economía from considering whether a party has acted to the best of its ability. Therefore, the United States argues that Article 64 is inconsistent with paragraph 5 of Annex II.

104. The United States further contends that the Panel correctly determined that Article 64 is inconsistent with paragraphs 1 and 7 of Annex II to the *Anti-Dumping Agreement*. The United States asserts that paragraph 1 requires the investigating authority to specify the information required and to

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<sup>70</sup>United States' appellee's submission, para. 127 (referring to Mexico's appellant's submission, paras. 229 and 233(b), in turn quoting Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.145).

ensure that the interested party is aware that the investigating authority may make a determination based on the facts available if the party fails to supply the requested data. Article 64, however, requires Economía to apply the highest fact available-based margin in *all* cases, even if the authority fails to provide the notice required by paragraph 1 of Annex II. Regarding paragraph 7 of Annex II, the United States argues that it permits an investigating authority to base its findings on secondary sources—such as the petition—provided that the investigating authority does so "with special circumspection", including by checking other, independent sources. According to the United States, Article 64 is inconsistent with paragraph 7 of Annex II because it requires Economía to apply the highest facts available-based margin in *all* cases, thereby preventing Economía from exercising special circumspection.

105. In view of the above, the United States requests the Appellate Body to uphold the Panel's finding that Article 64 of the FTA is inconsistent, as such, with Article 6.8 of the *Anti-Dumping Agreement* and paragraphs 1, 3, 5, and 7 of Annex II thereto, and Article 12.7 of the *SCM Agreement*.

(d) Article 68

106. The United States contends that the Panel correctly found that Article 68 of the FTA is inconsistent, as such, with Article 5.8 of the *Anti-Dumping Agreement* and Article 11.9 of the *SCM Agreement* because it requires Economía to conduct reviews of exporters and producers that were investigated and found not to be dumping or receiving countervailable subsidies. According to the United States, Mexico's arguments in response to the Panel's findings are similar to the arguments it raised above with respect to Farmers Rice and Riceland<sup>71</sup>, and are "similarly without merit".<sup>72</sup>

107. The United States argues that, contrary to Mexico's assertion, the Panel addressed—and rejected—Mexico's argument that Article 5.8 of the *Anti-Dumping Agreement* cannot be the basis for a finding of inconsistency with respect to Article 68 of the FTA because Article 5.8 applies only to investigations. As the Panel correctly found, if Article 5.8 requires an investigating authority to exclude a particular exporter from an anti-dumping measure imposed at the end of an investigation, it necessarily follows that the investigating authority cannot subsequently subject that exporter to a review under the very measure from which it should have been excluded in the first instance. The United States further argues that Article 17.4 of the *Anti-Dumping Agreement* is irrelevant to this issue, and that taking Mexico's argument on this provision to its "logical conclusion" would permit an investigating authority to impose an anti-dumping measure on exporters in cases where all of the

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<sup>71</sup>See *supra*, paras. 89-90.

<sup>72</sup>United States' appellee's submission, para. 144.

margins are below *de minimis*, or where the investigating authority reaches a negative determination of injury, so long as no duties are collected.<sup>73</sup>

108. With respect to Articles 9.3 and 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*, the United States submits that the Panel correctly found that none of these WTO provisions permits an investigating authority to require an exporter to demonstrate, as a condition for obtaining a review, that its sales during the review period were "representative". According to the United States, the "primary basis" of Mexico's appeal of the Panel's finding is a "mischaracterization" of the relevant provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*.<sup>74</sup> The United States submits that Mexico's argument—that the provisions at issue require the investigating authority to *initiate* reviews, but do not contain any obligation with respect to the *conduct* of those reviews—"elevate[s] form over substance", because refusing to complete a review of a firm that does not demonstrate a "representative" volume of sales is tantamount to refusing to initiate the review.<sup>75</sup> Furthermore, none of these provisions permits a Member to condition the conduct of a review on a showing of a "representative" volume of sales, and none limits the obligations contained therein to the *initiation* of a review. Therefore, the United States argues, an investigating authority cannot meet its obligation to "review" the need for the duty merely by initiating the review and then refusing to determine a re-calculated margin.

109. In addition, the United States contends that Mexico "misunderstands" the interaction between the customary rules of treaty interpretation and the requirements of Article 68.<sup>76</sup> Although Mexico correctly notes that the fact that a treaty provision is silent on a specific issue must have some meaning, Mexico fails to recognize that the WTO provisions at issue are not silent but, instead, "quite explicit" with respect to the limited requirements that an exporter or producer must meet in order to be entitled to reviews.<sup>77</sup>

110. Accordingly, the United States requests the Appellate Body to uphold the Panel's findings that Article 68 of the FTA is inconsistent, as such, with Articles 5.8, 9.3, and 11.2 of the *Anti-Dumping Agreement*, and Articles 11.9 and 21.2 of the *SCM Agreement*.

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<sup>73</sup>United States' appellee's submission, para. 147.

<sup>74</sup>*Ibid.*, para. 152.

<sup>75</sup>*Ibid.*

<sup>76</sup>*Ibid.*, para. 155.

<sup>77</sup>*Ibid.*

(e) Article 89D

111. According to the United States, the issue with respect to Article 89D of the FTA is virtually identical to that in relation to Article 68 of the FTA.<sup>78</sup> The United States submits that Mexico again "misunderstand[s]" the interaction between the customary rules of treaty interpretation and the FTA provision at issue.<sup>79</sup> According to the United States, and contrary to Mexico's assertion, Article 9.5 of the *Anti-Dumping Agreement* and Article 19.3 of the *SCM Agreement* are not silent with respect to the requirements that an exporter or producer must meet in order to be entitled to an expedited review. Therefore, the United States submits, the Panel correctly found that these provisions do not permit an investigating authority to deny expedited reviews to exporters and producers that do not demonstrate a "representative" volume of exports during the review period.<sup>80</sup>

112. The United States accordingly requests the Appellate Body to uphold the Panel's finding that Article 89D of the FTA is inconsistent, as such, with Article 9.5 of the *Anti-Dumping Agreement* and Article 19.3 of the *SCM Agreement*.

(f) Article 93V

113. The United States contends that, although Mexico does not contest directly the Panel's conclusion that Article 93V of the FTA is a specific action against dumping or subsidization, Mexico asserts that the Panel failed to comply with its obligations under Article 11 of the DSU because it analyzed neither the Spanish version of Article 93V nor those parts of the provision that allegedly show that it is discretionary. The United States submits that "[n]either assertion has merit".<sup>81</sup>

114. According to the United States, Mexico's argument that the Panel based its findings exclusively on the English version of Article 93V is "belied" by the fact that the English version of the Panel Report addresses both the Spanish text of Article 93V and its English translation.<sup>82</sup> The United States further argues that the United States submitted the English translation of Article 93V drawn from Mexico's WTO notifications and that Mexico did not contest the accuracy of the

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<sup>78</sup>See *supra*, paras. 109-110.

<sup>79</sup>United States' appellee's submission, para. 160.

<sup>80</sup>*Ibid.*, para. 159 (quoting Panel Report, para. 7.266).

<sup>81</sup>*Ibid.*, para. 164.

<sup>82</sup>*Ibid.* (referring to Panel Report (in English and Spanish), para. 7.279 and footnote 229 thereto).

translation before the Panel.<sup>83</sup> The United States submits that Mexico has not explained how it would be inconsistent with Article 11 of the DSU for the Panel to examine the English version of Mexico's own WTO notification when Mexico never contested it.

115. The United States contends that Mexico's allegation that the Panel failed to examine other parts of Article 93V also lacks merit because the Panel Report explicitly sets out the text in question. Thus, there is no basis for Mexico's assertion that the Panel overlooked it. Moreover, according to the United States, the language proffered by Mexico simply confirms that Economía *must* impose a fine if it finds that the conditions in Article 93V are met. Finally, the United States asserts that the fact that Economía has not, to date, imposed such a fine is not meaningful in the light of Mexico's failure before the Panel to point to any case where Economía found that the conditions for imposing a fine were met, and yet decided not to impose one. The United States therefore submits that the Panel correctly found that Article 93V provides for a specific action against dumping or subsidization that is not provided for in Article 18.1 of the *Anti-Dumping Agreement* or Article 32.1 of the *SCM Agreement*.

116. The United States therefore requests the Appellate Body to uphold the Panel's finding that Article 93V of the FTA is inconsistent, as such, with Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*.

(g) Articles 68 and 97

117. The United States contends that Mexico's assertion that Article 68 of the FTA bears no relation to the prohibition of reviews while judicial review proceedings are ongoing, and that there is nothing in Article 97 of the FTA preventing Economía from conducting reviews, is "remarkable"<sup>84</sup>, because the facts underlining the Panel's findings on this point were uncontested. Furthermore, even if Mexico does now contest this understanding of the challenged provisions, the Panel found, as a matter of fact, that Articles 68 and 97 work together to preclude reviews while judicial proceedings are ongoing. The United States submits that these factual findings are not properly a subject for appellate review as Mexico has not alleged that the Panel did not comply with Article 11 of the DSU in making those factual findings.

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<sup>83</sup>United States' appellee's submission, para. 165 (referring to "Notification of Laws and Regulations under Article 18.5 and 32.6 of the Relevant Agreements, Communication from Mexico", G/ADP/N/1/MEX/1/Suppl.2, G/SCM/N/1/Mex/1/Suppl.1, G/SG/N/1/MEX/1/Suppl.1, 24 April, 2003, p. 14; and "Notification of Laws and Regulations under Article 18.5 of the Agreement, Communication from Mexico", G/ADP/N/1/MEX/1, 18 May 1995, p. 12).

<sup>84</sup>*Ibid.*, para. 170.



118. Regarding Article 97, the United States agrees with the Panel that, contrary to Mexico's assertion, a product becomes subject to "definitive" duties at the time that an anti-dumping or countervailing measure is imposed, and not only when the final liability for the duties is subsequently determined. The United States argues that Article 11.2 of the *Anti-Dumping Agreement* further supports the Panel's finding because, when Article 11.2 is interpreted in the context of Article 11.1, it is clear that the term "imposition of the definitive duty" in Article 11.2 refers to the imposition of the anti-dumping or countervailing duty measure itself.

119. The United States requests the Appellate Body to uphold the Panel's finding that Articles 68 and 97 of the FTA are inconsistent, as such, with Articles 9.3 and 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*.

C. *Arguments of the Third Participants*

1. China

(a) Article 6.2 of the DSU

120. China submits that the Appellate Body has determined that, contrary to Mexico's argument, there is no requirement of identity between a request for consultations and a panel request. In the absence of such a requirement, the relevant question is whether the addition of certain WTO provisions in a panel request has "expanded the scope of the dispute".<sup>85</sup> In this respect, China refers to the decisions of the Appellate Body in *Brazil – Aircraft* and *US – Certain EC Products*, arguing that resolution of this issue requires the Appellate Body to examine whether new legal provisions added by the United States in the panel request have changed the "essence" of, and are "separate" and "legally distinct" from, the measures and the legal provisions expressed in the request for consultations.<sup>86</sup>

(b) Economía's Injury and Dumping Determinations

121. China submits that the alleged silence of the *Anti-Dumping Agreement* regarding the selection of the period of investigation for making an injury determination does not provide Mexico with "unfettered" discretion in selecting this period.<sup>87</sup> China agrees with the Panel that the

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<sup>85</sup>China's third participant's submission, para. 7.

<sup>86</sup>*Ibid.*, para. 8 (quoting Appellate Body Report, *Brazil – Aircraft*, paras. 127, 130, and 132; and Appellate Body Report, *US – Certain EC Products*, para. 75).

<sup>87</sup>*Ibid.*, para. 12.

investigating authority, conducting a "selective" examination, bears the obligation to justify its conduct.<sup>88</sup>

122. China further agrees with the Panel that investigating authorities cannot remain "entirely passive" during the investigation and that, therefore, "the term 'known' [in Article 6.10 of the *Anti-Dumping Agreement*] cannot be construed in such an artificially contrived and solipsistic manner as to become a warrant for a passive investigative approach".<sup>89</sup> China submits that the obligations for investigating authorities to identify known exporters and interested parties are not without limitation because, if investigating authorities are obligated to seek evidence actively from all sources available, it is likely that "anti-dumping investigations would, as a consequence, become totally unmanageable".<sup>90</sup>

123. China also agrees with the Panel that Mexico erred in applying a dumping margin, based on the facts available, to a United States producer that did not export to Mexico during the period of investigation. China submits, however, that this finding, based on Article 6.8 of the *Anti-Dumping Agreement* and Annex II thereto, should rest, rather, on Article 9.5 of the *Anti-Dumping Agreement*. According to China, Article 9.5 expressly requires that no anti-dumping duties shall be levied on imports from exporters that did not export the product to the importing Member during the period of investigation.

(c) The Foreign Trade Act

124. China disagrees with Mexico's contention that, merely because a Member's legal system renders treaties "self-executing", its domestic laws—"no matter how inconsistent with the WTO agreements"—may not be challenged as such.<sup>91</sup> China considers Mexico's reasoning "absurd"<sup>92</sup> because the same domestic law would face different consequences under the WTO agreements based solely on the fact that it was enacted in two different Members, with two different legal systems. China, therefore, submits that, notwithstanding Article 2 of the FTA, the Panel properly found that the "direct effect of the WTO [a]greements cannot shield" the domestic law from scrutiny by WTO panels.<sup>93</sup>

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<sup>88</sup>China's third participant's submission, para. 13. (emphasis omitted)

<sup>89</sup>*Ibid.*, para. 26 (quoting Panel Report, para. 7.188).

<sup>90</sup>*Ibid.*, para. 21 (quoting Panel Report, *US – DRAMS*, para. 6.78).

<sup>91</sup>*Ibid.*, para. 33.

<sup>92</sup>*Ibid.*

<sup>93</sup>*Ibid.*, para. 35 (referring to Panel Report, para. 7.224).

2. European Communities

(a) Economía's Injury and Dumping Determinations

125. The European Communities agrees with the Panel's finding that Mexico acted inconsistently with the *Anti-Dumping Agreement* by choosing to base its injury determination on a period of investigation that ended more than 15 months before the initiation. The European Communities endorses the Panel's interpretation of Article 3.1 of the *Anti-Dumping Agreement*, because it understands the Panel's characterization of Article 3.1 as "an overarching provision" to mean that the obligations in Article 3.1 inform all of the other obligations set out in Article 3. Moreover, the European Communities agrees with the Panel's understanding that there must be a temporal connection between the data collected and the injury alleged to exist at the time of the investigation.

126. The European Communities also agrees with the Panel's finding that Mexico acted inconsistently with the *Anti-Dumping Agreement* by limiting its injury analysis to only six months of the years 1997, 1998, and 1999. The European Communities argues that nothing in the text of Article 3.1 of the *Anti-Dumping Agreement* permits an investigating authority to disregard certain data in the injury investigation period; when the Members sought to permit investigating authorities to disregard certain matters, they did so explicitly. According to the European Communities, if a Member fails to explain properly why it disregards certain data, a panel must conclude that the investigating authority did not act in a fair and even-handed manner.

127. The European Communities furthermore agrees with the Panel's finding that Mexico acted inconsistently with the *Anti-Dumping Agreement* by failing to conduct an objective examination, based on positive evidence, of the volume and price effects of dumped imports. The European Communities endorses the Panel's view that, where an investigating authority consistently makes assumptions that negatively affect the exporter's interests, it does not behave in an objective, fair, and even-handed manner.

128. The European Communities disagrees with the Panel's finding regarding Article 5.8 of the *Anti-Dumping Agreement*. The European Communities argues that Article 5.8 imposes an obligation on an investigating authority to terminate a country-wide investigation only when the country-wide dumping margin is *de minimis*. In addition, it contends that the country-wide approach to the initiation of an original investigation is "common sense"<sup>94</sup>, because an investigating authority has no real means of establishing, with complete certainty, the full list of exporters or producers in the exporting Member. The *Anti-Dumping Agreement* imposes no obligation on an investigating

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<sup>94</sup>European Communities' third participant's submission, para. 22.

authority to seek out actively that information. Finally, the European Communities submits that the fact that the establishment of a country-wide margin of dumping is expressly associated in Article 3.3(a) with the *de minimis* rule in Article 5.8 demonstrates that interpreting the term "margin of dumping" in Article 5.8 as referring to the country-wide margin of dumping constitutes the correct interpretation of that latter provision.

129. The European Communities agrees with the Panel's finding that Article 9.4 of the *Anti-Dumping Agreement* does not apply to situations other than sampling. Also, the European Communities considers, as did the Panel, that an investigating authority would, in principle, be entitled to use the facts available in the calculation of a margin of dumping for a producer that did not export during the period of investigation.

130. The European Communities also agrees with the Panel's "implicit finding that a residual duty may be imposed on unknown exporters, where appropriate, based on the facts available."<sup>95</sup> Nevertheless, it disagrees with the Panel's conclusion that an investigating authority is required to seek out actively the identity of exporters, other than those mentioned in the application, or those that come forward following the publication of the notice of initiation.

(b) The Foreign Trade Act

131. The European Communities does not support Mexico's arguments as to the "discretionary" nature of the challenged provisions of the FTA and, accordingly, agrees with the Panel's findings of inconsistency with respect to those provisions. The European Communities submits that, although these provisions do not require the investigating authority in *all* cases to act in a WTO-inconsistent manner, or prevent the investigating authority in *all* cases from acting in a WTO-inconsistent manner, the Panel properly examined the consistency of these provisions with the covered agreements, without framing its analysis in terms of the "mandatory/discretionary" doctrine.<sup>96</sup> Even had it done so, the European Communities argues, "a mechanistic application of that doctrine could not have averted a finding of inconsistency" with respect to those provisions.<sup>97</sup>

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<sup>95</sup>European Communities' third participant's submission, para. 26.

<sup>96</sup>*Ibid.*, para. 29.

<sup>97</sup>*Ibid.*

### III. Issues Raised in This Appeal

132. The following issues are raised in this appeal:

- (a) whether the Panel erred, under Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), in finding that the claims in the United States' panel request which were not "indicat[ed]" in the consultations request did not fall outside the Panel's terms of reference;
- (b) with respect to the injury determination by the Ministry of Economy of Mexico ("Economía"):
  - (i) whether the Panel exceeded its terms of reference in concluding that Economía's use of a period of investigation ending in August 1999 was inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement");
  - (ii) whether the Panel erred in finding that Economía's use of a period of investigation ending in August 1999 resulted in a failure to make a determination of injury based on "positive evidence", as required by Article 3.1 of the *Anti-Dumping Agreement*, and that, as a consequence, Mexico acted inconsistently with Articles 3.2, 3.4, and 3.5 of that Agreement;
  - (iii) whether the Panel erred in finding that, in limiting the injury analysis to six months of the years 1997, 1998, and 1999, Economía failed to make a determination of injury that involved an "objective examination" as required by Article 3.1 of the *Anti-Dumping Agreement*, and that, as a consequence, Mexico acted inconsistently with Article 3.5 of that Agreement; and
  - (iv) whether the Panel erred in finding that Economía's injury analysis with respect to the volume and price effects of dumped imports was inconsistent with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement*;
- (c) with respect to Economía's dumping determination:
  - (i) whether the Panel erred in finding that Mexico did not terminate immediately the investigation in respect of Farmers Rice Milling Company ("Farmers Rice") and Riceland Foods, Inc. ("Riceland") because Economía did not

exclude them from the application of the definitive anti-dumping measure, as required by Article 5.8 of the *Anti-Dumping Agreement*;

- (ii) whether the Panel exceeded its terms of reference in concluding that Economía calculated a margin of dumping on the basis of facts available for Producers Rice, in a manner inconsistent with Article 6.8 of the *Anti-Dumping Agreement* read in the light of paragraph 7 of Annex II to that Agreement; and
  - (iii) whether the Panel erred in finding that, with respect to the exporters that Economía did not investigate, Mexico acted inconsistently with Articles 6.1, 6.8, 6.10, 12.1, and paragraph 1 of Annex II to the *Anti-Dumping Agreement*; and
- (d) with respect to the provisions of the Foreign Trade Act of Mexico (the "FTA"):
- (i) whether the Panel erred in considering that a *prima facie* case had been made out concerning the consistency of the challenged provisions of the FTA with Mexico's obligations under the *Anti-Dumping Agreement* and the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*");
  - (ii) whether the Panel erred by disregarding Article 2 of the FTA, or Mexico's argument in relation thereto, in concluding that the challenged provisions of the FTA are mandatory measures;
  - (iii) whether the Panel erred in finding that Article 53 of the FTA is inconsistent, as such, with Article 6.1.1 of the *Anti-Dumping Agreement* and Article 12.1.1 of the *SCM Agreement*;
  - (iv) whether the Panel erred in finding that Article 64 of the FTA is inconsistent, as such, with Article 6.8 of the *Anti-Dumping Agreement*, and paragraphs 1, 3, 5, and 7 of Annex II thereto, and Article 12.7 of the *SCM Agreement*;
  - (v) whether the Panel erred in finding that Article 68 of the FTA is inconsistent, as such, with Articles 5.8, 9.3, and 11.2 of the *Anti-Dumping Agreement*, and Articles 11.9 and 21.2 of the *SCM Agreement*;

- (vi) whether the Panel erred in finding that Article 89D of the FTA is inconsistent, as such, with Article 9.5 of the *Anti-Dumping Agreement* and Article 19.3 of the *SCM Agreement*;
- (vii) whether the Panel, in its interpretation of Article 93V of the FTA, failed to fulfil its obligations under Article 11 of the DSU; and
- (viii) whether the Panel erred in finding that Articles 68 and 97 of the FTA, read together, are inconsistent, as such, with Articles 9.3.2 and 11.2 of the *Anti-Dumping Agreement*, and Article 21.2 of the *SCM Agreement*.

#### IV. Article 6.2 of the DSU

133. We begin our examination of Mexico's appeal with its challenge under Article 6.2 of the DSU. Mexico requested a preliminary ruling from the Panel that certain claims advanced by the United States were outside the Panel's terms of reference because, *inter alia*, the provisions with which the challenged measures were alleged to be inconsistent in the request for the establishment of a panel differed from those identified in the request for consultations.<sup>98</sup> The Panel rejected this request, finding, *inter alia*, that there is no need for "complete identity between the scope of the request for consultations and the request for establishment [of a panel]"<sup>99</sup>; it is necessary only that consultations be held on the "matter" in dispute. The Panel concluded that, because the additional provisions in the panel request were "closely related" to those in the request for consultations, and the challenged measures remained unchanged, consultations had been held on the "matter" at issue in this dispute.<sup>100</sup>

134. On appeal, Mexico argues that, although Article 6.2 of the DSU requires that the "legal basis" of the complaint be more fully explained in the panel request than in the request for consultations, the "legal basis" in the panel request may not extend beyond that "indicat[ed]"<sup>101</sup> in the request for consultations.<sup>102</sup> In particular, Mexico submits that, where a measure is alleged in the *request for consultations* to be inconsistent with certain provisions of the covered agreements, additional provisions may not form the basis of allegations of inconsistency in the *panel request*. Mexico contends that the United States included in its panel request provisions not identified in the request for consultations and, therefore, that the claims based on those additional provisions were not within the

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<sup>98</sup>Panel Report, para. 7.38.

<sup>99</sup>*Ibid.*, para. 7.41.

<sup>100</sup>*Ibid.*, para. 7.43.

<sup>101</sup>Article 4.4 of the DSU.

<sup>102</sup>Mexico's appellant's submission, paras. 14 and 16.

Panel's terms of reference. Mexico further argues, in the alternative, that the legal bases set out in the panel request are not sufficiently related to those indicated in the request for consultations, so as to fall within the Panel's terms of reference.<sup>103</sup>

135. We look first to the text of the relevant provisions setting out the information that must be contained in requests for consultations and panel requests. Article 4.4 of the DSU, dealing with requests for consultations, provides:

... Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the *legal basis for the complaint*. (emphasis added)

Article 6.2 of the DSU, which deals with panel requests, provides:

The request for the establishment of a panel ... shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the *legal basis of the complaint* sufficient to present the problem clearly. (emphasis added)

136. The Appellate Body has previously explained that the term "legal basis", which appears in both Article 4.4 and Article 6.2, refers to the claims made by the complaining party.<sup>104</sup> It does not follow from the use of the same term in both provisions, however, that the claims made at the time of the panel request must be identical to those indicated in the request for consultations. Indeed, instead of such a rigid approach, we consider that the dispute settlement mechanism, which generally requires that a panel request be preceded by consultations<sup>105</sup>, allows for a measure of flexibility to Members in subsequently formulating complaints in panel requests.

137. The Appellate Body has observed that consultations serve a critical role in circumscribing the scope of a dispute:

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<sup>103</sup>Mexico's appellant's submission, para. 25.

<sup>104</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 162.

<sup>105</sup>We observe that, if the responding Member does not engage in consultations within 30 days of a request, the DSU permits a complaining Member to "proceed directly" to requesting the establishment of a panel to hear its complaint. (Article 4.3 of the DSU)



Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, *narrow the scope of the differences between them* and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to *define and delimit the scope of the dispute* between them.<sup>106</sup> (emphasis added)

The Appellate Body has also emphasized this objective of consultations in finding that, with respect to the *measures at issue*, Articles 4 and 6 of the DSU do not "require a *precise and exact identity*" between the request for consultations and the panel request, provided that the "essence" of the challenged measures had not changed.<sup>107</sup>

138. In our view, the same logic applies with respect to the *legal basis* of the complaint. A complaining party may learn of additional information during consultations—for example, a better understanding of the operation of a challenged measure—that could warrant revising the list of treaty provisions with which the measure is alleged to be inconsistent. Such a revision may lead to a narrowing of the complaint, or to a reformulation of the complaint that takes into account new information such that additional provisions of the covered agreements become relevant. The claims set out in a panel request may thus be expected to be shaped by, and thereby constitute a natural evolution of, the consultation process. Reading the DSU, as Mexico does, to limit the legal basis set out in the panel request to what was indicated in the request for consultations, would ignore an important rationale behind the requirement to hold consultations—namely, the exchange of information necessary to refine the contours of the dispute, which are subsequently set out in the panel request. In this light, we consider that it is not necessary that the provisions referred to in the request for consultations be identical to those set out in the panel request, provided that the "legal basis" in the panel request may reasonably be said to have evolved from the "legal basis" that formed the subject of consultations. In other words, the addition of provisions must not have the effect of changing the essence of the complaint.

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<sup>106</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54. See also Appellate Body Report, *India – Patents (US)*, para. 94:

All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning both as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly. Facts must be disclosed freely. This must be so in consultations as well as in the more formal setting of panel proceedings. In fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations. For the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings.

<sup>107</sup> Appellate Body Report, *Brazil – Aircraft*, para. 132. (original emphasis)

139. Based on this understanding, we turn now to consider whether the legal basis in the United States' panel request may reasonably be said to have evolved from the legal basis indicated in its request for consultations, and that the essence of the complaint has not changed. As an initial matter, we note that Mexico identifies 13 treaty provisions included by the United States in its panel request that Mexico says did not form part of the legal basis identified in the request for consultations.<sup>108</sup> Of these 13, the Panel exercised judicial economy in relation to claims under two provisions (Article 1 of the *Anti-Dumping Agreement* and Article VI:2 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"))<sup>109</sup> and made no findings relating to two other provisions (Article 4.1 of the *Anti-Dumping Agreement* and Article 12.5 of the *SCM Agreement*). In other words, the Panel made no findings of inconsistency—and indeed, undertook no analysis at all—with respect to four of the 13 claims that Mexico alleges on appeal were not properly identified by the United States in the request for consultations as part of the "legal basis" of the complaint.

140. In the absence of any findings of inconsistency by the Panel or an appeal by the United States on these four claims, we see no need to decide whether they were sufficiently identified as part of the "legal basis" for the complaint, because doing so "would not serve 'to secure a positive solution' to this dispute".<sup>110</sup> At the oral hearing, Mexico and the United States agreed with this approach.<sup>111</sup> We therefore decline to examine whether these four claims evolved out of the "legal basis" indicated in the request for consultations. The remaining provisions are considered in three categories of claims: (i) Article 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*; (ii) Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*; and (iii) paragraphs 1, 3, 5, 6, and 7 of Annex II to the *Anti-Dumping Agreement*.

141. The first category of claims relates to the United States' challenge to Articles 68 and 97 of the FTA. In both the request for consultations and the panel request, the United States based its challenge on the fact that Economía was prevented from conducting reviews other than sunset reviews whilst an anti-dumping order was the subject of judicial proceedings.<sup>112</sup> The United States alleged, in the request for consultations, that this was inconsistent with certain treaty provisions dealing generally

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<sup>108</sup>Mexico's appellant's submission, para. 1.

<sup>109</sup>See Panel Report, paras. 8.1(a)-(b) and 8.4(b)-(c).

<sup>110</sup>Appellate Body Report, *Japan – Apples*, para. 215 (quoting Article 3.7 of the DSU).

<sup>111</sup>Mexico's and the United States' responses to questioning at the oral hearing.

<sup>112</sup>See Request for Consultations by the United States (attached as Annex III to this Report), p. 3:

Article 366 of Mexico's Federal Code of Civil Procedure, in conjunction with Article 68 of the Foreign Trade Act, appears to be inconsistent with Articles 9 and 11 of the AD Agreement and Articles 19 and 21 of the SCM Agreement to the extent that the provisions prevent Mexico from conducting reviews of anti-dumping or countervailing duty orders while a judicial review of the order is ongoing[.] (emphasis added)

with the duration and extent of anti-dumping and countervailing duty orders, including Article 11 of the *Anti-Dumping Agreement* and Article 21 of the *SCM Agreement*.<sup>113</sup> The treaty provisions added by the United States in its panel request—Article 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*—are the principal provisions of those Agreements governing reviews (other than sunset reviews) of such orders. Given that the essence of the United States' complaint against Articles 68 and 97 of the FTA, when read together—in both the request for consultations and the panel request—relates to the conduct of reviews other than sunset reviews, it appears to us that the legal basis in the panel request naturally evolved from the legal basis indicated in the request for consultations.

142. The second category of provisions relates to the United States' challenge to Article 93V of the FTA. In its request for consultations, the United States alleged that Article 93V imposed duties on subject merchandise entered before the investigating authority's final determination, in a manner inconsistent with Articles 7 and 10.6 of the *Anti-Dumping Agreement* and Articles 17 and 20.6 of the *SCM Agreement*.<sup>114</sup> These treaty provisions govern the application of provisional measures as well as duties levied on products entered prior to the date of application of provisional measures. In its panel request, the United States contended that these duties are inconsistent with two other treaty provisions, namely, Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*.<sup>115</sup> These latter treaty provisions require that "specific action against" dumping or

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<sup>113</sup>The United States identified Article 11 (without specification of paragraph) of the *Anti-Dumping Agreement*, as well as Article 11.1 of that Agreement, and Article 21 (without specification of paragraph) of the *SCM Agreement*, as well as Article 21.1 of that Agreement. (Request for Consultations by the United States (attached as Annex III to this Report))

<sup>114</sup>See Request for Consultations by the United States (attached as Annex III to this Report), p. 3:

Article 93V ... appears to provide for the application of definitive anti-dumping or countervailing duties on products entered prior to the date of application of provisional measures (1) for longer than allowed under the AD and SCM Agreements, and (2) even if not all AD or SCM Agreement requirements for applying such duties are met.

<sup>115</sup>Request for the Establishment of a Panel by the United States (attached as Annex II to this Report), WT/DS295/2, para. 2(e).

subsidization be taken only in accordance with the GATT 1994 and the *Anti-Dumping Agreement* or the *SCM Agreement*.<sup>116</sup>

143. Duties *properly* imposed or levied on goods entered before a final determination—including provisional measures—are one type of "specific action against" dumping or subsidization that *is permitted* by the *Anti-Dumping Agreement* and the *SCM Agreement*. The consultations held in this dispute with respect to Article 93V focused on the allegedly *improper* imposition or levying of duties on goods entered before the final determination. A claim of WTO-inconsistent "specific action against" dumping or subsidization could reasonably have evolved from these consultations. Thus, we are of the view that the claim set out in the panel request represents a natural evolution of the claim indicated in the request for consultations.

144. The final category of claims that Mexico contends was outside the Panel's terms of reference relates to the United States' challenges under several paragraphs of Annex II to the *Anti-Dumping Agreement*, entitled "Best Information Available in Terms of Paragraph 8 of Article 6". All of the paragraphs in Annex II govern the proper application of facts available in an anti-dumping investigation. In its request for consultations, the United States did not refer explicitly to specific paragraphs of Annex II. However, it did refer to Article 6.8 of the *Anti-Dumping Agreement* and Annex II thereto generally; the use of "facts available" by Economía; and "the manner in which Mexico determined anti-dumping margins for US exporters that were not individually investigated", which included the use of facts available.<sup>117</sup> Mexico does not contend that these issues were not part of the consultations held by the parties. Thus, we consider that the legal basis of the complaint in the panel request—namely, specific paragraphs of Annex II to the *Anti-Dumping Agreement*—developed out of the legal basis indicated in the request for consultations.

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<sup>116</sup>In a previous case involving a challenge under Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*, the Appellate Body has stated:

[T]he CDSOA has an adverse bearing on the foreign producers/exporters in that the imports into the United States of the dumped or subsidized products (besides being subject to anti-dumping or countervailing duties) result in the financing of United States competitors—producers of like products—through the transfer to the latter of the duties collected on those exports. Thus, foreign producers/exporters have an incentive not to engage in the practice of exporting dumped or subsidized products or to terminate such practices. Because the CDSOA has an adverse bearing on, and, more specifically, is designed and structured so that it dissuades the practice of dumping or the practice of subsidization, and because it creates an incentive to terminate such practices, the CDSOA is undoubtedly an action "against" dumping or a subsidy, within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*.

(Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 256)

<sup>117</sup>Request for Consultations by the United States (attached as Annex III to this Report), pp. 2-3.

145. In the light of the above, we *uphold* the Panel's finding, in paragraph 7.43 of the Panel Report, that the claims in the United States' panel request that were not "indicat[ed]" in the request for consultations did not fall outside the Panel's terms of reference.

## V. Economía's Injury Determination

### A. *The Period of Investigation and the Terms of Reference*

146. We examine, first, Mexico's allegation that the Panel did not act in conformity with its terms of reference in finding that Economía's use of a period of investigation ending in August 1999 was inconsistent with the *Anti-Dumping Agreement*.

147. Economía examined data for a period of investigation covering March to August 1999 for purposes of its dumping determination, and March to August in 1997, 1998, and 1999 for purposes of its injury analysis. The investigation was initiated on 11 December 2000, 15 months after the end of the period of investigation. Final anti-dumping measures were imposed on 5 June 2002, just less than three years after the end of the period of investigation.

148. According to the Panel, although the *Anti-Dumping Agreement* does not contain any specific rules concerning the period to be used for data collection in an anti-dumping investigation, this does not mean that the investigating authority's discretion in using a certain period of investigation is boundless. The Panel was of the view that there is an "inherent real-time link" between the imposition of the measure and the conditions for application of the measure, namely, dumping causing injury.<sup>118</sup> For the Panel, "the [*Anti-Dumping Agreement*] requires that the conditions for imposing anti-dumping measures, that dumped imports are causing injury, have to be present at the time of imposition of the measure, to the extent practically possible."<sup>119</sup> The *Anti-Dumping Agreement* establishes a framework that allows Members to take actions in order to rebalance the injurious situation that is created by dumping. The Panel reasoned, accordingly, that injurious dumping should exist at the time of the imposition of the anti-dumping duty, because the function of the anti-dumping duty is to "counterbalance[]" injurious dumping, and that anti-dumping duties imposed in the absence of current injurious dumping would not achieve the rebalancing contemplated by the *Anti-Dumping Agreement*.<sup>120</sup> Thus, for the Panel, it is necessary to base a determination of dumping causing injury on data that is pertinent or relevant with regard to the current situation, taking into account the "inevitable delay" caused by the practical need to conduct an investigation.<sup>121</sup> The

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<sup>118</sup>Panel Report, para. 7.58.

<sup>119</sup>*Ibid.*, para. 7.63.

<sup>120</sup>*Ibid.*, para. 7.61.

<sup>121</sup>*Ibid.*

Panel emphasized that, although it is well established that the data on the basis of which the determination of dumping causing injury is made may be based on a past period (the period of investigation), "this 'historical' data is being used to draw conclusions about the current situation" and, therefore, "the more recent data is likely to be inherently more relevant and thus especially important to the investigation."<sup>122</sup> For the Panel, "the data considered concerning dumping, injury and the causal link should include, to the extent possible, the most recent information, taking into account the inevitable delay caused by the need for an investigation, as well as any practical problems of data collection in any particular case."<sup>123</sup>

149. The Panel went on to analyze Economía's use of a period of investigation ending in August 1999. The Panel noted that this period of investigation was suggested by the domestic industry in the application submitted on 2 June 2000, and that the investigation was initiated six months later (on 11 December 2000). The Panel also observed that Economía accepted the period of investigation suggested by the petitioner, even though, at the time of initiation, that period had ended more than 15 months earlier. The Panel underlined that: during the investigation, no attempt was made by Economía to update any of the information obtained from the interested parties to reflect what had occurred in the 15 months between the end of the period of investigation in August 1999 and the start of the investigation in December 2000; Mexico did not argue that practical problems necessitated this particular period of investigation or that updating the information was not possible; and Mexico did not provide any explanation as to why more recent information was not sought.

150. Article 3.1 of the *Anti-Dumping Agreement* requires, *inter alia*, that the injury determination be "based on positive evidence". In the Panel's view, evidence that is not relevant or pertinent with respect to the issue to be decided is not "positive evidence" within the meaning of Article 3.1.<sup>124</sup> The 15-month gap between the end of the period of investigation and the initiation of the investigation, according to the Panel, amounted to a "hiatus" sufficiently long as to impugn the reliability of the period of investigation to deliver, for the purposes of a determination, evidence that has the "requisite pertinence or relevance" to constitute "positive evidence" in Article 3.1.<sup>125</sup> Thus, according to the Panel, "given the passage of time and the uncertainty about the factual situation in that relevant interim, the information lacks credibility and reliability, thereby failing to meet the criterion of 'positive evidence' pursuant to Article 3.1 of the [*Anti-Dumping Agreement*]."<sup>126</sup> As a consequence of finding a violation of Article 3.1, the Panel found that Mexico acted in breach of Articles 3.2, 3.4,

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<sup>122</sup>Panel Report, para. 7.58.

<sup>123</sup>*Ibid.*

<sup>124</sup>*Ibid.*, para. 7.55.

<sup>125</sup>*Ibid.*, para. 7.64.

<sup>126</sup>*Ibid.*

and 3.5 of that Agreement when considering the volume and price effects of the dumped imports, all relevant factors affecting the state of the industry, and the causal relationship between dumped imports and the alleged injury to the domestic industry, respectively. In the light of these findings, the Panel did not consider it necessary to examine the United States' claims of violation of Article 1 of the *Anti-Dumping Agreement* and Article VI of the GATT 1994.

151. On appeal, Mexico contends that the Panel acted inconsistently with its terms of reference because the Panel's reasoning was different from the argument put forward by the United States. According to Mexico, the United States argued before the Panel that the purpose of an anti-dumping measure is to offset or prevent dumping that is currently causing or threatening to cause material injury, and that the legal basis for this contention was Article 5.1 of the *Anti-Dumping Agreement*. Mexico submits that the United States argued before the Panel that, by not examining recent data, Mexico acted in a manner inconsistent with Article 5.1 of the *Anti-Dumping Agreement* and that, as a result, Mexico violated Article VI of the GATT 1994 and Articles 1, 3.1, 3.2, and 3.5 of the *Anti-Dumping Agreement*.<sup>127</sup> Thus, Mexico argues, the Panel did not act in conformity with its terms of reference because it did not address the questions raised by the United States' argument—including whether Mexico violated Article 5.1 of the *Anti-Dumping Agreement*—but, rather, conducted an analysis that reconstructed in a manner different to the United States' reasoning.<sup>128</sup>

152. It is well settled that the terms of reference of a panel define the scope of the dispute<sup>129</sup> and that the claims identified in the request for the establishment of a panel establish the panel's terms of reference under Article 7 of the DSU.<sup>130</sup> Panels are not permitted to address legal claims falling outside their terms of reference.<sup>131</sup> In this case, the panel request does not mention Article 5.1 of the *Anti-Dumping Agreement*. In other words, the United States had not made a claim before the Panel that Mexico had violated Article 5.1 of the *Anti-Dumping Agreement*.<sup>132</sup> Accordingly, the issue whether Mexico violated Article 5.1 fell outside the scope of the dispute; had the Panel made a finding under that provision, it would have exceeded its terms of reference. By not addressing this issue, the Panel properly confined itself to the limits of its terms of reference. We fail to see why it should be faulted for having done so.

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<sup>127</sup>Mexico's appellant's submission, para. 36.

<sup>128</sup>*Ibid.*, paras. 37 and 39.

<sup>129</sup>Appellate Body Report, *US – Carbon Steel*, para. 126.

<sup>130</sup>Appellate Body Report, *EC – Bananas III*, para. 141.

<sup>131</sup>Appellate Body Report, *EC – Hormones*, para. 156.

<sup>132</sup>In response to questioning at the oral hearing, the United States confirmed that it did not make a claim under Article 5.1. The United States, rather, indicated that it did reference Article 5.1 as evidence for the need to base a determination on the most recent available data.

153. Mexico emphasizes paragraphs 55, 56, and 57 of the United States' first written submission to the Panel. It contends that the United States alleged in these paragraphs that Article 5.1 of the *Anti-Dumping Agreement* is the basis for maintaining that the purpose of an anti-dumping investigation is to determine whether dumping is taking place at the present time, and that, consequently, Article 5.1 obliged Mexico to consider a period that was as close as practicable to the date of initiation.<sup>133</sup> Mexico adds that the United States argued that not examining recent data automatically implied that Mexico was acting inconsistently with the obligations under Article 5.1 of the *Anti-Dumping Agreement*, and this consequently meant a violation of Article VI of the GATT 1994 and Articles 1, 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement*.<sup>134</sup>

154. Paragraphs 55, 56, and 57 of the United States' first written submission to the Panel read as follows:

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

A Member is not offsetting or preventing injurious dumping if the dumping or injury has completely ceased or never existed. Thus, in order to impose an antidumping measure, the investigating authority must examine, as part of its initial investigation pursuant to Article 5 of the AD Agreement, a period of time that is as close to the date of initiation as practicable.

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

- Article VI of GATT 1994, which defines dumping and injury in the present tense (*e.g.*, dumping "is" causing or threatening to cause injury).
- Article 2 of the AD Agreement, which defines "dumping" in the present tense (*e.g.*, "being" dumped and Export Price "is" lower than Normal Value).

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<sup>133</sup>Mexico's appellant's submission, paras. 35-36.

<sup>134</sup>*Ibid.*, para. 36(c).



- The whole point of the examination pursuant to Article 3.4 of the AD Agreement is to examine the present "state" of the domestic industry; not its condition during some remote time period.
- Similarly, Article 3.5 establishes a test for causation that seeks to determine whether the dumped imports "are" causing or threatening to cause injury.
- The "clearly foreseen" and "imminent" standards in Article 3.7 suggest a period of investigation that is as recent as practicable.
- The term "domestic industry" is defined in Article 4 and used in many provisions of the AD Agreement, most notably Articles 3.4 and 5.4. In Article 5.4, the term clearly refers to those producers in existence at the time the petition is filed. Absent some contrary indication in the agreement, it follows that the "domestic industry" examined in Article 3.4 is the same set of producers – not a different set of producers who may have produced the like product in the past.
- Article 5.8 of the AD Agreement describes the negligibility standard for both injury and the volume of imports in the present tense (*i.e.*, "is negligible"). (footnotes omitted)

155. In our view, contrary to what Mexico suggests, the United States did not argue in paragraphs 55, 56, and 57 that Mexico breached Article 5.1 of the *Anti-Dumping Agreement*. The proposition advanced by the United States was that the purpose of an anti-dumping investigation is to test whether dumping is occurring at the present time and that anti-dumping duties should respond to current dumping, not to dumping that occurred at some time in the past. This specific question—whether the purpose of an anti-dumping investigation is to determine whether dumping is occurring at the present time and whether the conditions for imposing anti-dumping measures have to be present at the time of imposition of the measure—was extensively discussed by the Panel, in particular, in paragraphs 7.57 to 7.63 of the Panel Report. The United States referred to Article VI of the GATT 1994 and provisions of the *Anti-Dumping Agreement*, including Article 5.1 thereof, as arguments—not claims—to support its position that the purpose of a dumping investigation is to determine whether dumping is occurring at the present time. However, the United States did not ask the Panel—in paragraphs 55, 56, and 57 or elsewhere—to determine whether Mexico violated Article 5.1 of the *Anti-Dumping Agreement*.

156. Thus, we do not consider that the Panel reconstructed or restructured the United States' argument regarding Economía's use of a period of investigation ending in August 1999, and that the Panel developed a legal reasoning different from the United States' approach. Indeed, even if it had done so, we would not necessarily find that the Panel thereby acted improperly. As the Appellate

Body indicated in *US – Certain EC Products*, a panel is not obliged to limit its legal reasoning to arguments presented by the parties.<sup>135</sup> The Appellate Body also stated, in *EC – Hormones*, that:

... nothing in the DSU limits the faculty of a panel freely to use arguments submitted by any of the parties—or to develop its own legal reasoning—to support its own findings and conclusions on the matter under its consideration.<sup>136</sup>

157. Accordingly, we *find* that the Panel *did not exceed* its terms of reference in concluding, in paragraphs 7.65 and 8.1(a) of the Panel Report, that Economía's use of a period of investigation ending in August 1999 was inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement*.

B. *The Use of a Period of Investigation Ending in August 1999 and the Criterion of Positive Evidence*

158. We turn now to the issue whether the Panel erred in finding that Economía's use of a period of investigation ending in August 1999 resulted in a failure to make a determination of injury based on positive evidence, as required by Article 3.1 of the *Anti-Dumping Agreement*.

159. The Panel found that, by choosing to base its determination of injury on a period of investigation that ended more than 15 months before the initiation of the investigation, Mexico failed to comply with the obligation to make a determination of injury based on positive evidence.<sup>137</sup> As a consequence, the Panel found that Mexico acted inconsistently with Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement*. We have already set out above, in paragraphs 148 to 150, the Panel's reasoning in this regard.

160. Mexico challenges the Panel's findings regarding Economía's use of a period of investigation ending in August 1999. This challenge is distinct from that relating to the Panel's terms of reference.<sup>138</sup> According to Mexico, the Panel erred in finding that there is an "inherent real-time link" between the investigation and the data on which it is based.<sup>139</sup> Mexico alleges that this "real-time link" requirement is inconsistent with the option of using a past period as the period of investigation.<sup>140</sup> Mexico also argues that the Panel contradicts itself because the Panel acknowledged that it is impossible that the period of investigation used for purposes of data collection coincide

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<sup>135</sup>Appellate Body Report, *US – Certain EC Products*, para. 123.

<sup>136</sup>Appellate Body Report, *EC – Hormones*, para. 156.

<sup>137</sup>Panel Report, para. 7.65.

<sup>138</sup>See *supra*, section V.A.

<sup>139</sup>Mexico's appellant's submission, para. 41 (referring to Panel Report, para. 7.57).

<sup>140</sup>*Ibid.*, para. 43.

exactly with the time period in which the investigating authority conducts its investigation.<sup>141</sup> For Mexico, the content of Article 3.1 of the *Anti-Dumping Agreement* does not focus on how remote the investigation period is, but on the applicability of the data used.<sup>142</sup>

161. Mexico also argues that the Panel erred because it considered that remoteness of the investigation period *per se* implied a violation of Article 3.1<sup>143</sup>, and that the Panel's finding of a violation of Article 3.1 was based exclusively on the remoteness of the investigation period. Mexico contends that, in the analysis under Article 3.1, the Panel should have examined the scope of the data used and their applicability<sup>144</sup>; it also should have assessed whether the information on which Economía's determination was based was adequate.<sup>145</sup> According to Mexico, because the United States did not establish that the data relating to the period of investigation were inappropriate, it did not make out a *prima facie* case of violation of Article 3.1 of the *Anti-Dumping Agreement*.<sup>146</sup>

162. The Panel considered that the recommendation adopted by the Committee on Anti-Dumping Practices—the Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations (the "Recommendation")<sup>147</sup>—provides useful support for the correct interpretation of the obligations found in the text of the *Anti-Dumping Agreement*.<sup>148</sup> According to Mexico, the Recommendation does not constitute a basis for finding that a given period of investigation is inconsistent with the *Anti-Dumping Agreement*; at best, it may provide some guidance.<sup>149</sup> Finally, Mexico submits that, because the Panel had no legal basis for finding that remoteness of the investigation period *per se* implies a violation of the *Anti-Dumping Agreement*, the Panel should have found that Mexico's interpretation concerning the integration of the data collection period was permissible pursuant to Article 17.6(ii) of the *Anti-Dumping Agreement*.<sup>150</sup>

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<sup>141</sup>Mexico's appellant's submission, para. 44.

<sup>142</sup>*Ibid.*, para. 49.

<sup>143</sup>*Ibid.*, para. 57.

<sup>144</sup>*Ibid.*, para. 58.

<sup>145</sup>*Ibid.*, para. 55.

<sup>146</sup>*Ibid.*, para. 60.

<sup>147</sup>G/ADP/6, adopted by the Committee on Anti-Dumping Practices on 5 May 2000.

<sup>148</sup>Panel Report, para. 7.62.

<sup>149</sup>Mexico's appellant's submission, paras. 63-64.

<sup>150</sup>*Ibid.*, paras. 66(d) and 67.

163. We begin our analysis with the text of Article 3.1 of the *Anti-Dumping Agreement*, which sets forth the general requirement for making an injury determination:

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

Article 3.1 thus requires, *inter alia*, that the injury determination be based on positive evidence.

164. The Panel described "positive evidence" as evidence that is relevant and pertinent with respect to the issue to be decided, and that has the characteristics of being inherently reliable and creditworthy.<sup>151</sup> The Panel was of the view that, under the positive evidence criterion of Article 3.1, the question whether the information at issue constituted "positive evidence"—that is to say, was relevant, pertinent, reliable, and creditworthy—had to be assessed with respect to the current situation.<sup>152</sup>

165. We agree with the Panel that evidence that is not relevant or pertinent to the issue to be decided is not "positive evidence". We also agree with the Panel that relevance or pertinence must be assessed with respect to the existence of injury caused by dumping at the time the investigation takes place. Under Article VI of the GATT 1994 and its "application" in the *Anti-Dumping Agreement*<sup>153</sup>, the conditions for imposing an anti-dumping duty—*injury caused by dumping*—should obtain at that time. Article VI:2 of the GATT 1994 provides that anti-dumping duties are imposed "to offset or prevent" dumping. The term "offset" suggests that the scheme established in Article VI of the GATT 1994, and applied through the provisions of the *Anti-Dumping Agreement*, fulfils a corrective function: Members are permitted to take corrective measures in order to counter the injurious situation created by dumping. Under the logic of this corrective scheme, the imposition of anti-dumping duties is justified to the extent that they respond to injury caused by dumping. To use the Panel's terminology, anti-dumping duties "counterbalance[]" injury caused by dumping.<sup>154</sup> Because the conditions to impose an anti-dumping duty are to be assessed with respect to the current situation,

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<sup>151</sup>Panel Report, para. 7.55.

<sup>152</sup>*Ibid.*, para. 7.61.

<sup>153</sup>Article 1 of the *Anti-Dumping Agreement* states that the provisions of that Agreement "govern the application of Article VI of GATT 1994".

<sup>154</sup>Panel Report, para. 7.61.

the determination of whether injury exists should be based on data that provide indications of the situation prevailing when the investigation takes place.<sup>155</sup>

166. This, of course, does not imply that investigating authorities are not allowed to establish a period of investigation that covers a past period. We note that, contrary to what Mexico suggests, the Panel did not state that the *Anti-Dumping Agreement* requires a coincidence in time between the investigation and the data used therein.<sup>156</sup> On the contrary, the Panel recognized that "it is well established that the data on the basis of which [the determination that dumped imports cause injury] is made may be based on a past period, known as the period of investigation."<sup>157</sup> In order to determine whether injury caused by dumping exists when the investigation takes place, "historical data" may be used. We agree with the Panel, however, that more recent data is likely to provide better indications about current injury.<sup>158</sup>

167. We agree with Mexico that using a remote investigation period is not *per se* a violation of Article 3.1.<sup>159</sup> In our view, however, the Panel did not set out such a principle, as its findings relate to the specific circumstances of this case. The Panel was satisfied that, in this specific case, a *prima facie* case was established that the information used by Economía did not provide reliable indications of current injury and, therefore, did not meet the criterion of positive evidence in Article 3.1 of the

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<sup>155</sup>We note that in response to questioning at the oral hearing, Mexico agreed that a determination of injury caused by dumping should be based on data that are pertinent or relevant with regard to the current situation.

<sup>156</sup>Mexico's appellant's submission, para. 51.

<sup>157</sup>Panel Report, para. 7.58. The Panel also added that "the inevitable delay caused by the need for an investigation, as well as any practical problems of data collection in any particular case" should be taken into account. (*Ibid.*)

<sup>158</sup>*Ibid.*

<sup>159</sup>Mexico's appellant's submission, para. 69.

*Anti-Dumping Agreement*.<sup>160</sup> The Panel arrived at this conclusion on the basis of several factors. The Panel attached importance to the existence of a 15-month gap between the end of the period of investigation and the initiation of the investigation, and a gap of almost three years between the end of the period of investigation and the imposition of final anti-dumping duties. However, these temporal gaps were not the only circumstances that the Panel took into account. The Panel, as trier of the facts, gave weight to other factors: (i) the period of investigation chosen by Economía was that proposed by the petitioner; (ii) Mexico did not establish that practical problems necessitated this particular period of investigation; (iii) it was not established that updating the information was not possible; (iv) no attempt was made to update the information; and (v) Mexico did not provide any reason—apart from the allegation that it is Mexico's general practice to accept the period of investigation submitted by the petitioner—why more recent information was not sought.<sup>161</sup> Thus, it is not only the remoteness of the period of investigation, but also these other circumstances that formed the basis for the Panel to conclude that a *prima facie* case was established. In the light of the general assessment of these other circumstances carried out by the Panel as trier of the facts, we accept that a gap of 15 months between the end of the period of investigation and the initiation of the investigation, and another gap of almost three years between the end of the period of investigation and the imposition of the final anti-dumping duties, may raise real doubts about the existence of a sufficiently relevant nexus between the data relating to the period of investigation and current injury. Therefore, we have no reason to disturb the Panel's assessment that a *prima facie* case of violation of Article 3.1 was made out.

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<sup>160</sup>We recall that a *prima facie* case is:

... one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.

(Appellate Body Report, *EC – Hormones*, para. 104)

We also note that, in *US – Gambling*, the Appellate Body stated:

The evidence and arguments underlying a *prima facie* case ... must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.

(Appellate Body Report, *US – Gambling*, para. 141)

As the Appellate Body stated in *US – Wool Shirts and Blouses*, the nature and scope of evidence required to establish a *prima facie* case "will necessarily vary from measure to measure, provision to provision, and case to case." (Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323, at 335) See also Appellate Body Report, *Japan – Apples*, para. 159.

<sup>161</sup>Panel Report, para. 7.64.

168. Mexico had the opportunity to rebut the *prima facie* case that the information on which Economía relied did not meet the criterion of positive evidence in Article 3.1 of the *Anti-Dumping Agreement*. Thus, Mexico could have sought to show that the information relating to the period of investigation conveyed indications as to current injury and constituted an appropriate basis for determining whether there was current injury, in spite of its remoteness. Mexico did not do so. In the absence of "an effective refutation", it appears to us that it was not unreasonable for the Panel to conclude that the criterion of positive evidence set out in Article 3.1 of the *Anti-Dumping Agreement* was not met.

169. Mexico also argues that the Panel erred because it based its finding that the period of investigation used by Economía was inconsistent with the *Anti-Dumping Agreement* on the Recommendation referred to above in paragraph 162, a non-binding document adopted by the Committee on Anti-Dumping Practices. The Recommendation stipulates, *inter alia*, that the period of data collection should end as close to the date of initiation of the investigation as is practicable.<sup>162</sup> We disagree with Mexico's argument. The Panel took care to recall that this Recommendation is a "non-binding guide" that "does not add new obligations, nor detract from the existing obligations of Members under the [*Anti-Dumping Agreement*]".<sup>163</sup> It appears to us that the Panel referred to the Recommendation, not as a legal basis for its findings, but simply to show that the Recommendation's content was not inconsistent with its own reasoning. Doing so does not constitute an error of law. In any event, we note that the Recommendation was not a decisive factor that led the Panel to conclude that the criterion of "positive evidence" in Article 3.1 was not met.

170. We turn now to Mexico's argument that the Panel should have found that Mexico's interpretation concerning the "integration" of the data collection period<sup>164</sup> was permissible pursuant to Article 17.6(ii) of the *Anti-Dumping Agreement*. This provision reads as follows:

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<sup>162</sup>The Recommendation provides, in relevant part:

The Committee recommends that with respect to original investigations to determine the existence of dumping and consequent injury –

1. As a general rule:

(a) the period of data collection for dumping investigations normally should be twelve months, and in any case no less than six months, *ending as close to the date of initiation as is practicable*[.]

(Panel Report, footnote 75 to para. 7.62) (footnote omitted; emphasis added)

<sup>163</sup>*Ibid.*, para. 7.62.

<sup>164</sup>Mexico's appellant's submission, para. 67 ("*la integración*").

[T]he panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

171. We have some difficulty with Mexico's argument. The Panel had to decide whether the information relating to a period of investigation ending in August 1999 constituted an appropriate basis for making a determination of injury. The issue before the Panel centred on the manner in which Economía conducted the injury analysis, not the interpretation of a specific provision of the *Anti-Dumping Agreement*. Furthermore, as we underlined above, the Panel expressed the view that the data on the basis of which a determination of injury caused by dumping is made may relate to a past period, to the extent this information is relevant with regard to the current situation.<sup>165</sup> It appears to us that the Panel's view is compatible with Mexico's own reading of the *Anti-Dumping Agreement*, according to which using data relating to a past period does not, *per se*, entail a violation of that Agreement. For these reasons, we are of the view that Mexico's argument regarding Article 17.6(ii) of the *Anti-Dumping Agreement* is without merit.

172. Accordingly, we *uphold* the Panel's finding, in paragraphs 7.65 and 8.1(a) of the Panel Report, that Economía's use of a period of investigation ending in August 1999 resulted in a failure to make a determination of injury based on "positive evidence" as required by Article 3.1 of the *Anti-Dumping Agreement*. As a result of this finding, we also *uphold* the Panel's finding, in paragraphs 7.65 and 8.1(a) of the Panel Report, that by choosing this period of investigation, Mexico acted inconsistently with Articles 3.2, 3.4, and 3.5 of that Agreement.

C. *The March–August Period*

173. We turn now to the issue whether the Panel erred in finding that, in limiting the injury analysis to the March–August period of 1997, 1998, and 1999, Economía failed to make a determination of injury that involves an "objective examination" as required by Article 3.1 of the *Anti-Dumping Agreement*.

174. For the purposes of examining the injury to the domestic industry, Economía collected data for a continuous period of three years covering 1997, 1998, and 1999. However, Economía limited its analysis to data for the months of March to August of these years; data from the period September to February of each of these years were disregarded. In the Panel's view, such an examination, made on

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<sup>165</sup>Panel Report, paras. 7.58 and 7.61.



the basis of an incomplete set of data and characterized by the selective use of certain data for the injury analysis, could not be "objective" within the meaning of Article 3.1 of the *Anti-Dumping Agreement*, unless a proper justification were provided.<sup>166</sup> In this respect, the Panel noted that Mexico's only argument was that it was necessary to examine data relating only to the six months from March to August because this was also the six-month period chosen for the analysis of the existence of dumping. The Panel considered that this did not constitute a proper justification for ignoring half of the data concerning the state of the domestic industry. For the Panel, the *Anti-Dumping Agreement* does not require that "a period of investigation [for] the injury analysis should be chosen to fit the period of investigation for the dumping analysis in case the latter ... covers a period of less than 12 months."<sup>167</sup>

175. The Panel also underscored that, in the petition submitted in June 2000, the domestic producers suggested that the six-month period of March to August should be used because it reflected the period of highest import penetration.<sup>168</sup> Thus, according to the Panel, this period would show the most negative side of the state of the domestic industry.<sup>169</sup> The Panel noted that, in its Preliminary Determination<sup>170</sup>, Economía stated that, in accordance with the information provided by the petitioner, "imports tend to be concentrated during the period from March to August every year, which corresponds to the investigated period proposed by the petitioner".<sup>171</sup> The Panel explained that, although Economía was discussing the imports of paddy rice—the raw material for the production of the subject long-grain white rice—Economía nevertheless "clearly accepted the link made between production of paddy rice and the imports of the final product which the applicant points out is mainly imported in the period March–August."<sup>172</sup> Thus, the Panel noted that the Preliminary Determination referred to the petitioner's claim that the main import activity of the final product takes place within

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<sup>166</sup>Panel Report, para. 7.81.

<sup>167</sup>*Ibid.*, para. 7.82.

<sup>168</sup>*Ibid.*, para. 7.83 (referring to the "*Solicitud de investigación antidumping contra las importaciones de arroz blanco originarias de los Estados Unidos de América*" ("Application for initiation of an anti-dumping investigation regarding imports of long-grain white rice from the United States"), 2 June 2000 (Exhibit US-8 submitted by the United States to the Panel (the "Application for Initiation"), p. 34).

<sup>169</sup>Panel Report, para. 7.85.

<sup>170</sup>"*Resolución preliminar de la investigación antidumping sobre las importaciones de arroz blanco grano largo, mercancía clasificada en la fracción arancelaria 1006.30.01 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia*", *Diario Oficial*, 18 July 2001, pp. 3-54 (Exhibit US-14 submitted by the United States to the Panel) (the "Preliminary Determination").

<sup>171</sup>*Ibid.*, para. 65.

<sup>172</sup>Panel Report, para. 7.83.

the period March to August, during which period "paddy rice is not harvested and for that reason this period adequately reflects the import activity."<sup>173</sup>

176. The Panel found that the injury analysis of Economía, which was based on data covering only six months of each of the three years examined, did not allow for an "objective examination", as required by Article 3.1 of the *Anti-Dumping Agreement*, for two reasons: first, whereas the injury analysis was selective and provided only a part of the picture, no proper justification was provided by Mexico in support of this approach; and secondly, Economía accepted the "period of investigation proposed by the applicants because it allegedly represented the period of highest import penetration and would thus show the most negative side of the state of the domestic industry".<sup>174</sup> For these two reasons, the Panel considered that the injury analysis was not based on data that provided an "accurate and unbiased picture"<sup>175</sup> and, therefore, was not "objective" within the meaning of Article 3.1. As a consequence of a violation of Article 3.1 of the *Anti-Dumping Agreement*, the Panel found that Mexico had acted inconsistently with Article 3.5 of the *Anti-Dumping Agreement*, which refers to the demonstration of a causal relationship between the dumped imports and the injury. The Panel exercised judicial economy with respect to the United States' claims under Articles 1 (principles) and 6.2 (opportunity for defence) of the *Anti-Dumping Agreement*.

177. Mexico challenges the Panel's finding that Economía's injury analysis was not "objective" because it was based on data covering only six months of each of the three years examined. Mexico argues that, in making its findings, the Panel did not rely on a legal basis, but only on assumptions.<sup>176</sup> Thus, according to Mexico, the assertions that March to August is the period of highest import penetration, and that this period shows the most negative side of the state of the domestic industry, are unsubstantiated assumptions that reflect a "mere opinion".<sup>177</sup> For Mexico, the Panel improperly assumed that there is a general rule according to which data relating to entire years have to be analyzed in an injury analysis. Mexico submits that the Panel thereby erred because such an assumption implies that, if an investigating authority were to use segments of years in its injury analysis, it would be presumed that the methodology was not objective, and the responding Member would bear the burden of justifying that the agency's analysis was objective.<sup>178</sup>

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<sup>173</sup>Panel Report, para. 7.83 (referring to Preliminary Determination, *supra*, footnote 170, para. 64).

<sup>174</sup>*Ibid.*, para. 7.85.

<sup>175</sup>*Ibid.*, para. 7.79.

<sup>176</sup>Mexico's appellant's submission, para. 71.

<sup>177</sup>*Ibid.*, paras. 73-74 ("*una mera opinión*").

<sup>178</sup>*Ibid.*, para. 76.

178. Mexico also argues that the Panel erred in assuming that the data relating to the March to August period for 1997, 1998, and 1999 showed the most negative side of the state of the domestic industry. For Mexico, the methodology used by Economía is not flawed because six-month periods with the same "structure" were compared.<sup>179</sup> Mexico further submits that the information used by Economía does not constitute an "incomplete set of data"<sup>180</sup> but, rather, is complete in that it allows a comparison of the relevant indicators for the domestic industry with prior comparable periods.<sup>181</sup> Mexico adds that using comparable periods in the injury analysis constituted a proper methodology because "distortions" were avoided; Economía was thus able to make a proper comparison between the data relating to the period of investigation and those pertaining to previous comparable periods.<sup>182</sup> Mexico reiterates that Economía used the March to August period in 1997, 1998, and 1999 in order to avoid distortions in the comparison between the period of investigation for purposes of the dumping determination and the period of investigation for purposes of the injury analysis.<sup>183</sup>

179. Mexico observes that, although in 1998 and 1999 long-grain white rice imports were higher in the March to August period than in the rest of the year, that was not the case in 1997, where long-grain white rice imports were lower in the March to August period than during the rest of the year. Mexico adds that the percentage by which imports in the March to August periods of 1998 and 1999 exceeded those during the rest of the year was practically negligible.<sup>184</sup> Accordingly, Mexico contends that the Panel's view that the March to August period shows the most negative side of the state of the domestic industry rests upon a questionable premise.<sup>185</sup> Mexico also contends that, contrary to what the Panel suggested, the domestic production of long-grain white rice is not dependent on the production cycles of paddy rice because, when there is a drop in domestic paddy rice production, the domestic producers of long-grain white rice rely on imported paddy rice. Consequently, Mexico submits, domestic production of long-grain white rice remains constant throughout the year.<sup>186</sup>

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<sup>179</sup>For Mexico, "the structure is by definition the same if exactly the same periods for each year are compared." (Mexico's appellant's submission, para. 81, "*la estructura es por definición la misma si se comparan entre sí exactamente los mismos periodos de cada año.*")

<sup>180</sup>Panel Report, para. 7.81.

<sup>181</sup>Mexico's appellant's submission, para. 81.

<sup>182</sup>*Ibid.*, para. 82.

<sup>183</sup>*Ibid.*

<sup>184</sup>*Ibid.*, para. 83.

<sup>185</sup>*Ibid.*, paras. 83-84.

<sup>186</sup>*Ibid.*, para. 89.

180. The Panel expressed the view that, under Article 3.1, an injury analysis can be "objective" only "if it is based on data which provide an accurate and unbiased picture of what it is that one is examining".<sup>187</sup> This view is consistent with the Appellate Body's statement in *US – Hot-Rolled Steel* regarding the requirement to conduct an "objective examination" under Article 3.1 of the *Anti-Dumping Agreement*:

[A]n "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.<sup>188</sup> (footnote omitted)

Therefore, the question to be decided is whether the Panel erred in finding that the data used by Economía in the injury analysis, which relate to the same six-month period in 1997, 1998, and 1999, did not provide an "accurate and unbiased picture" of the injury suffered by the domestic industry.

181. We note that the Panel's finding is based not only on Economía's selective use of the information gathered for the purpose of the injury analysis. Indeed, in reaching the conclusion that the data used by Economía did not provide an "accurate and unbiased picture", the Panel also relied on another factor: the acceptance by Economía of the period of investigation proposed by the petitioner, knowing that the petitioner proposed that period because it allegedly represented the period of highest import penetration. It appears to us that, in the specific circumstances of this case, these two factors, considered together, were sufficient to make out a *prima facie* case that the data used by Economía did not provide an "accurate and unbiased picture".

182. Mexico did not present an "effective refutation"<sup>189</sup> of that *prima facie* case by providing a proper justification for the use of the March to August period. The only explanation presented by Mexico, and reiterated on appeal, was that the period of investigation for purposes of the dumping determination was March to August 1999, and that, therefore, it should be used in the injury analysis in order to avoid "distortions" in the comparison between the period of investigation for purposes of the dumping determination and the period of investigation for purposes of the injury analysis.<sup>190</sup>

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<sup>187</sup>Panel Report, para. 7.79.

<sup>188</sup>Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

<sup>189</sup>Appellate Body Report, *EC – Hormones*, para. 104.

<sup>190</sup>Mexico's appellant's submission, para. 82. ("*las distorsiones*")

183. In *US – Hot-Rolled Steel*, the Appellate Body stated that, from the definition of injury provided in footnote 9 of the *Anti-Dumping Agreement*<sup>191</sup>, "[i]t emerges clearly ... that the focus of an injury determination is the state of the 'domestic industry'."<sup>192</sup> We fail to see how, in the present case, the use of data relating to the whole year, as opposed to the March to August period, would have introduced "distortions" of the assessment of the "state of the domestic industry". Rather, in our view, examining data relating to the whole year would result in a more accurate picture of the "state of the domestic industry" than an examination limited to a six-month period. Moreover, the explanation put forward by Mexico implies that the dumping determination and the injury determination are integrated. This is not the case; although injury and dumping must be linked by a causal relationship, these determinations are two separate operations relying on distinct data seeking to determine different things. Accordingly, we see no reason to disagree with the Panel that the explanation provided by Mexico with respect to Economía's choice of a limited period of investigation for purposes of the injury analysis was not a "proper justification"<sup>193</sup> sufficient to refute the *prima facie* case that the data used by Economía did not provide an "accurate and unbiased picture" of the state of the domestic industry. We therefore agree with the Panel that the data used by Economía in the injury analysis, relating to the March to August period of 1997, 1998, and 1999, did not provide an "accurate and unbiased picture" of the state of the domestic industry and, thus, did not result in an "objective examination" as required by Article 3.1 of the *Anti-Dumping Agreement*.

184. On appeal, Mexico's objections to the Panel's reasoning are not, in substance, different from the arguments it submitted before the Panel. Mexico argues that the proposition that the March to August period is the period of highest import penetration is an unsubstantiated assumption that reflects a "mere opinion".<sup>194</sup> We disagree. In its reasoning, the Panel referred to the petitioner's position that the main import activity of long-grain white rice takes place within the March to August period—during which paddy rice is not harvested in Mexico—and that, for this reason, this period adequately reflects the import activity.<sup>195</sup> Making such a reference is not, in our view, making an unsubstantiated assumption that reflects a "mere opinion".

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<sup>191</sup>Footnote 9 to Article 3 of the *Anti-Dumping Agreement* reads:

Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

<sup>192</sup>Appellate Body Report, *US – Hot-Rolled Steel*, para. 189.

<sup>193</sup>Panel Report, para. 7.81.

<sup>194</sup>Mexico's appellant's submission, paras. 73-74. ("*una mera opinión*")

<sup>195</sup>Panel Report, para. 7.83 (referring to Application for Initiation, *supra*, footnote 168, p. 34; and Preliminary Determination, *supra*, footnote 170, para. 64).

185. Nor can we accept Mexico's argument that the Panel created a presumption that an injury analysis based on data relating to only parts of years is not objective. We note, first, that the Panel underscored that its "ruling should not be read as to imply that there could never be any convincing and valid reasons for examining only parts of years."<sup>196</sup> Secondly, the Panel's finding is not based exclusively on the fact that Economía was selective as regards the data it used in the injury analysis. It is the combination of this factor with another—"the acceptance of a period of investigation proposed by the applicants because it allegedly represented the period of highest import penetration and would thus show the most negative side of the state of the domestic industry"<sup>197</sup>—that led the Panel to consider that a *prima facie* violation of Article 3.1 had been established. Mexico had an opportunity to refute the *prima facie* case by presenting a "proper justification" for the use of the March to August period; however, it failed to do so.

186. Mexico submits that the methodology used was not flawed because six-month periods with the same structure were compared.<sup>198</sup> We agree with Mexico that it was not improper for Economía to make comparisons with previous years. The Panel, however, did not find that Economía could not make comparisons with previous periods in the injury analysis. The Panel discussed a different question, namely, whether Economía's methodology was flawed because segments of years were compared instead of full years.

187. Mexico argues that, in 1997, long-grain white rice imports were lower in the March to August period than in the rest of the year, and that in 1998 and 1999, imports in the March to August period were higher than in the rest of the year by only a negligible amount. Mexico also contends that the domestic production of long-grain white rice is independent of the production cycles of paddy rice. On these bases, Mexico questions what it alleges are the premises on which the Panel based its assertion that the period March to August shows the most negative side of the state of the domestic industry.<sup>199</sup> Mexico's allegations refer to facts concerning import patterns of long-grain white rice and the relationship between the production of long-grain white rice and that of paddy rice. Contrary to what Mexico suggests, the Panel's reasoning was not centred on an assessment of the import patterns of long-grain white rice or the relationship between the production of long-grain white rice and that of paddy rice. On these questions of fact, the Panel did not make any finding, because it considered it

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<sup>196</sup>Panel Report, para. 7.82.

<sup>197</sup>*Ibid.*, para. 7.85.

<sup>198</sup>Mexico's appellant's submission, para. 81.

<sup>199</sup>*Ibid.*, para. 84.

was unnecessary to do so.<sup>200</sup> Rather, the Panel's position was based on the findings that Economía selected the same period of investigation as that put forward by the petitioner, and that the petitioner proposed this period because the months March to August allegedly represent the period of highest import penetration.<sup>201</sup> As we mentioned above, we are of the view that the Panel did not err by taking into account this factor in its analysis.<sup>202</sup>

188. For these reasons, we *uphold* the Panel's findings, in paragraphs 7.86 and 8.1(b) of the Panel Report, that, in limiting the injury analysis to the March to August period of 1997, 1998, and 1999, Mexico failed to make a determination of injury that involves an "objective examination", as required by Article 3.1 of the *Anti-Dumping Agreement*. Accordingly, we also *uphold* the Panel's findings, in paragraphs 7.87 and 8.1(b) of the Panel Report, that, in limiting the injury analysis to the March to August period of 1997, 1998, and 1999, Mexico acted inconsistently with Article 3.5 of that Agreement.

D. *The Volume and Price Effects of the Dumped Imports*

189. We move now to the issue whether the Panel erred in finding that Economía did not conduct an objective examination based on positive evidence in its analysis of the volume and price effects of the dumped imports. This issue concerns the methodology used by Economía to determine the volume of the dumped imports and that used to determine the price effects of the dumped imports. The Panel found that the use of these methodologies resulted in an injury analysis that was not consistent with the requirements under Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* to conduct an objective examination based on positive evidence of the volume and price effects of the dumped imports.

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<sup>200</sup>Panel Report, para. 7.85. Mexico's position that, in 1997, long-grain white rice imports were lower in the March to August period than in the rest of the year, and that, in 1998 and 1999, imports in this period were higher than in the rest of the year by only a negligible amount, is based on a table presented in paragraph 83 of Mexico's appellant's submission. In response to questioning at the oral hearing, Mexico indicated that this table was submitted to the Panel, whereas the United States said that, before the Panel, it contested the validity of the information set out in the table. The Panel did not make any finding with respect to this table.

<sup>201</sup>Panel Report, para. 7.85. The petitioner's position is set out in the Application for Initiation, *supra*, footnote 168, p. 34 and in the Preliminary Determination, *supra*, footnote 170, para. 64. Further to questioning at the oral hearing, Mexico recognized that, before Economía, the petitioner took the position that the main import activity of long-grain white rice in Mexico takes place within the March to August period, and that Economía accepted this position.

<sup>202</sup>*Supra*, para. 181.

1. Economía's Analysis

190. Economía explains in the Final Determination how it established the volume of dumped imports of the subject product into Mexico.<sup>203</sup> The Final Determination shows that Economía was confronted with the problem of distinguishing, first, the subject rice imports (that is, "long-grain white rice") from imports of all types of rice, and, secondly, the imports of the subject product that were dumped into Mexico from those imports that were not dumped. The first problem arose from the fact that the tariff line under which long-grain white rice was imported (1006.30.01) at the time of the investigation also covered other types of rice, such as medium-grain and short-grain rice, as well as glazed or parboiled rice, which were not part of the investigation.

191. Economía had requested information about long-grain white rice exports from each of the four companies that participated in the investigation. One firm replied that it had not exported during the period of investigation and, therefore, it did not provide any information. Economía considered that the only company that provided correct information for the whole period of investigation was Farmers Rice, whose exports increased by 303.7 per cent in the 1998 March to August period, compared to the previous corresponding period, and by 12.3 per cent during the investigated period in 1999, in relation to the previous corresponding period.<sup>204</sup> Economía considered that two other participating companies, The Rice Company and Riceland, did not provide accurate information for the whole period of investigation, and decided, for that reason, not to use the information submitted by these two companies. Instead, it established that the variation in volume of exports observed in the case of Farmers Rice was an acceptable indicator of the behaviour of the exports by Riceland and The Rice Company.

192. Economía did not find a dumping margin for Farmers Rice and Riceland.

193. For determining the volume of imports from companies other than the four participating firms, Economía decided to use the methodology proposed by the petitioner: rice imported below a certain price level was to be treated as the subject product, long-grain white rice, while rice imported above that price was not. Economía explained that it decided to use this methodology, even though the methodology failed to provide accurate information for the years 1997 and 1998. Economía sought to overcome this lack of accurate data for the years 1997 and 1998 by assuming that the share of imports of the subject product in the total imports of all types of rice during those years was the same as in the year 1999. On this basis, Economía established that, as regards the companies other than the four participating companies, the investigated imports increased 8.6 per cent in the period

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<sup>203</sup>Final Determination, *supra*, footnote 9, paras. 206-261.

<sup>204</sup>*Ibid.*, paras. 226-227.



March to August 1998, in relation to the same period in the previous year, and increased 3.4 per cent during the investigation period of March to August 1999, in relation to the previous comparable period.

194. Regarding the second problem of separating the volume of dumped subject imports from non-dumped subject imports, Economía took the total volume of imports of the subject product and subtracted from that amount the imports from the exporters that participated in the investigation and for which no dumping margin was found.

195. With respect to the analysis of the evolution of prices of the subject imports and their effects on domestic prices, Economía considered, first, that, as the price of all kinds of rice decreased during the investigation period, and as the export price of Farmers Rice also decreased, it was reasonable to conclude that the prices of the remaining imports, including the dumped imports, decreased.<sup>205</sup> Furthermore, Economía observed that, during the investigation period, the dumped products were priced below the domestic product and that the price of the dumped imports was lower than the prices of the domestic products in periods previous to the investigated period. As a result, Economía determined that this situation provoked the decline in the prices of the domestic producers. Also, Economía considered that the entry during the investigated period of imports at reduced prices from Argentina and the decline, in the same period, of the price of non-dumped imports from the United States, contributed to the decline in prices of the domestic products. Thus, Economía determined that the dumped imports from the United States contributed to pressure faced by the domestic producers to lower their prices during the investigated period.<sup>206</sup>

## 2. The Panel's Reasoning and Mexico's Appeal

196. From reading Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* together, the Panel concluded that the basis for any evaluation as to the volume of dumped imports or the price effects of such imports had to be positive evidence, and that "the word 'positive' means that the evidence must [have been] of an affirmative, objective and verifiable character, and that it must be credible."<sup>207</sup> Thus, for the Panel, the question before it was whether Economía had based its determination on information that is affirmative, objective, verifiable, and credible.

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<sup>205</sup>Final Determination, *supra*, footnote 9, para. 270.

<sup>206</sup>*Ibid.*, paras. 285 and 294-296.

<sup>207</sup>Panel Report, para. 7.98.

197. As regards the analysis of the volume of the dumped imports, the Panel was of the view that the methodology used by Economía was flawed and resulted in a determination that was not based on positive evidence. For the Panel, the determination of the volume of dumped imports was based not on facts, but on a series of unsubstantiated assumptions made by Economía<sup>208</sup>: (i) as regards companies other than the four participating firms, rice sold below a certain price level was assumed to be long-grain white rice<sup>209</sup>; (ii) during the years 1997 and 1998, the subject imports from companies other than the four participating firms were assumed to keep the same share in the total amount of imports of all types of rice from the United States as in the year 1999<sup>210</sup>; and (iii) it was assumed that all examined firms' export volumes show a similar trend to that of the exporter that provided full three-year volume information, namely, Farmers Rice.<sup>211</sup> The Panel was of the view that all these assumptions were unsubstantiated. The Panel added that Economía appeared to have consistently chosen to make assumptions that negatively affected exporters' interests.<sup>212</sup>

198. With regard to the analysis on the evolution of prices of the dumped imports and their effects on domestic prices, the Panel also found that Economía's determination that dumped imports resulted in a decline in domestic prices was based on unsubstantiated assumptions and, accordingly, was inconsistent with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement*. The Panel observed that Economía had compared three types of prices: (a) export price of all types of rice (both subject rice and non-subject rice); (b) export price of Farmers Rice, a producer with no margin of dumping; and (c) the export price of the remaining imports, including the dumped imports. According to the Panel, Economía had assumed that:

... because the price of a broader category of rice – i.e. category (a) -- declined, and because the prices of one participating exporter of the subject product, who was not found to have been dumping, decreased, the third category of rice – (c) or "dumped imports" -- is a sub-set of the first category of rice, and this third category of rice must have declined also.<sup>213</sup> (footnote omitted)

The Panel did not consider this to be a warranted assumption.

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<sup>208</sup>Panel Report, para. 7.111.

<sup>209</sup>*Ibid.*

<sup>210</sup>*Ibid.*

<sup>211</sup>*Ibid.*, para. 7.112.

<sup>212</sup>*Ibid.*

<sup>213</sup>*Ibid.*, para. 7.113.

199. For these reasons, the Panel found that Economía's injury analysis with regard to the volume and price effects of the dumped imports was inconsistent with the requirements of Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* to conduct an objective examination based on positive evidence. In the light of these findings, the Panel exercised judicial economy as regards the United States' claim based on Article 6.8 of the *Anti-Dumping Agreement* (determinations on facts available) and Annex II (best information available) thereto.

200. On appeal, Mexico challenges the Panel's finding that Economía did not conduct an objective examination based on positive evidence of the volume and price effects of the dumped imports, as required by Articles 3.1 and 3.2 of the *Anti-Dumping Agreement*. According to Mexico, Economía made an objective examination based on positive evidence because, in its injury analysis, it relied on the information available to it, including the relevant data, and it evaluated this information correctly.<sup>214</sup> Mexico adds that Economía's examination of the trends in the volume of dumped imports was based on facts properly established, as it appears from the structure of the Final Determination, in which all the background, considerations, findings, and elements of the determination consistent with Mexico's obligations under the *Anti-Dumping Agreement* were set out.<sup>215</sup> For Mexico, Article 3 of the *Anti-Dumping Agreement* does not impose any requirement on the methodology to be used and, therefore, the fact that Economía used the methodology described in the Final Determination does not imply any violation of the *Anti-Dumping Agreement*.<sup>216</sup> Mexico also submits that the Panel's statement that "the investigating authority consistently chose to make assumptions which negatively affected the exporters' interests"<sup>217</sup>, is not supported by legal reasoning.<sup>218</sup> According to Mexico, Economía conducted an injury analysis based on positive evidence because it considered all the available relevant information<sup>219</sup>, and it was not possible to collect any more information than that used during the investigation.<sup>220</sup>

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<sup>214</sup>Mexico's appellant's submission, para. 99.

<sup>215</sup>*Ibid.*, para. 100.

<sup>216</sup>*Ibid.*, para. 106.

<sup>217</sup>Panel Report, para. 7.112.

<sup>218</sup>Mexico's appellant's submission, paras. 108-109.

<sup>219</sup>*Ibid.*, para. 111.

<sup>220</sup>*Ibid.*, para. 110.

3. Analysis

201. We begin our analysis with the text of Articles 3.1 and 3.2 of the *Anti-Dumping Agreement*, which provide:

*Determination of Injury*

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

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance. (footnote omitted)

202. We agree with the Panel that it flows from reading these two provisions together that the basis of any evaluation as to the volume of dumped imports or the price effects of such imports has to be positive evidence.<sup>221</sup> In this respect, the Appellate Body stated, in *US – Hot-Rolled Steel*, that the term "positive evidence" in Article 3.1 relates "to the quality of the evidence that authorities may rely upon in making a determination" and that "[t]he word 'positive' means ... that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible."<sup>222</sup> We also observe that, in *Thailand – H-Beams*, the Appellate Body said that "Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the injury determination, and that this general obligation "informs the more detailed obligations" in the remainder of Article 3.<sup>223</sup> Therefore, it appears to us that the Panel correctly identified the question it had to address, namely, whether Economía based its determinations regarding the volume of dumped imports and the effect of

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<sup>221</sup>Panel Report, para. 7.98.

<sup>222</sup>Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

<sup>223</sup>Appellate Body Report, *Thailand – H-Beams*, para. 106.

the dumped imports on prices in the domestic market on information that has the quality of positive evidence.<sup>224</sup>

203. In the methodology used to determine the volume of dumped imports, Economía relied on three assumptions, which we set out above.<sup>225</sup> Its determination on the price effects of the dumped imports was also built upon the assumption that the export price of the dumped imports follows the same evolution as the export price of all types of rice (both subject rice and non-subject rice) and the export price of Farmers Rice, a firm that was found not to have a margin of dumping.<sup>226</sup> All these assumptions were critical to Economía's reasoning and its determinations on the volume and the price effects of the dumped imports.

204. Mexico is correct in asserting that Articles 3.1 and 3.2 do not prescribe a methodology that must be followed by an investigating authority in conducting an injury analysis. Consequently, an investigating authority enjoys a certain discretion in adopting a methodology to guide its injury analysis. Within the bounds of this discretion, it may be expected that an investigating authority might have to rely on reasonable assumptions or draw inferences. In doing so, however, the investigating authority must ensure that its determinations are based on "positive evidence". Thus, when, in an investigating authority's methodology, a determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified.

205. In this case, the Panel found violations of Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* because important assumptions on which Economía was relying in its methodology were "unsubstantiated".<sup>227</sup> An investigating authority that uses a methodology premised on unsubstantiated assumptions does not conduct an examination based on positive evidence. An assumption is not properly substantiated when the investigating authority does not explain why it would be appropriate to use it in the analysis. The assumptions on which Economía relied in its methodology played an important role in its reasoning. In the Final Determination, Economía did not explain why these assumptions were appropriate and credible in the analysis of the volume and price effects of the dumped imports, or how they would contribute to providing an accurate picture of the volume and

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<sup>224</sup>Panel Report, para. 7.110.

<sup>225</sup>See *supra*, para. 197.

<sup>226</sup>Final Determination, *supra*, footnote 9, para. 270.

<sup>227</sup>Panel Report, paras. 7.111-7.113.

price effects of the dumped imports.<sup>228</sup> We therefore agree with the Panel that the assumptions on which Economía was relying in its methodology were not properly substantiated.

206. Accordingly, we *uphold* the Panel's findings, in paragraphs 7.116 and 8.1(c) of the Panel Report, that Economía's injury analysis with respect to the volume and price effects of dumped imports was inconsistent with the requirements of Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* to conduct an objective examination based on positive evidence.

## **VI. Economía's Dumping Determination**

### *A. The Application of the Anti-Dumping Measure to Farmers Rice and Riceland*

207. We now turn to issues relating to Economía's dumping determination. The first issue we examine is whether the Panel erred in finding that, by not excluding Farmers Rice and Riceland from the application of the definitive anti-dumping measure, Mexico acted inconsistently with Article 5.8 of the *Anti-Dumping Agreement*. These two exporters were found by Economía not to have been dumping during the period of investigation, but were nevertheless covered by the anti-dumping measure.

208. The Panel found that, by not excluding Farmers Rice and Riceland from the application of the definitive anti-dumping measure, Mexico did not terminate immediately the anti-dumping investigation with respect to these non-dumping exporters and, therefore, acted inconsistently with Article 5.8 of the *Anti-Dumping Agreement*. For the Panel, the second sentence of Article 5.8 requires the immediate termination of the investigation in respect of an exporter for which an individual margin of dumping of zero or *de minimis* is found. This is a proper reading of Article 5.8 because, the Panel reasoned, the term "margin of dumping" in Article 5.8—as well as in the *Anti-Dumping Agreement* in general—refers to the individual margin of dumping of an exporter or producer, rather than to a country-wide margin of dumping.<sup>229</sup> The Panel based this view on the fact that Article 6.10 of the *Anti-Dumping Agreement* provides that the authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer of the product under investigation. The Panel examined the rest of the *Anti-Dumping Agreement* and found that there was nothing in that Agreement that contradicts the conclusion that the term "margin of dumping" is

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<sup>228</sup>Final Determination, *supra*, footnote 9, paras. 228-229, 239, and 270. The justification provided by Economía for resorting to assumptions was the lack of hard data. This is not a sufficient explanation because, by definition, assumptions are used in the absence of hard evidence, as surrogates for such data. Instead, we would expect an investigating authority to substantiate the reasonableness and credibility of particular assumptions.

<sup>229</sup>Panel Report, para. 7.137.

company-specific, rather than country-wide.<sup>230</sup> In particular, the Panel observed that "[a] number of references to the 'exporter or producer under investigation' in Article 2, for example in Article[s] 2.2.1.1, 2.2.2, and 2.3 of the [*Anti-Dumping Agreement*], make explicit the generally accepted understanding that Article 2 of the [*Anti-Dumping Agreement*] prescribes the manner in which an individual margin of dumping for an exporter or producer under investigation is to be determined."<sup>231</sup> According to the Panel, "whenever the [*Anti-Dumping Agreement*] refers to the determination of a margin of dumping, it refers to the margin of dumping determined for the individual exporter."<sup>232</sup>

209. The Panel considered that Economía's calculation of individual margins of dumping for all exporters participating in the investigation was consistent with the Panel's views. The Panel also underscored that, in Article 5.8 of the *Anti-Dumping Agreement*, the margin of dumping is juxtaposed with the volume of dumped imports and that, whereas it is expressly stipulated that the latter is to be examined on a country-wide basis, no such stipulation is made with regard to the margin of dumping. For the Panel, this confirmed its view that the reference to the margin of dumping in Article 5.8 is a reference to the individual margin of dumping to be determined on an exporter-specific basis.<sup>233</sup> Accordingly, the Panel found that the investigation that is to be immediately terminated under the second sentence of Article 5.8 is the investigation in respect of the individual exporter for which a zero or *de minimis* margin is established.<sup>234</sup>

210. The Panel then addressed Mexico's argument that the application of the anti-dumping order to Farmers Rice and Riceland was WTO-consistent because no duty in excess of the zero margin of dumping was imposed and that, as long as the requirement of Article 9.3 (amount of dumping duty) is respected, nothing in the Agreement prohibits the inclusion of non-dumping exporters in an anti-dumping measure. The Panel rejected this argument on the ground that Articles 5.8 and 9.3 serve different purposes and that, accordingly, compliance with Article 9.3 does not constitute compliance with Article 5.8. For the Panel, Article 5 of the *Anti-Dumping Agreement*, entitled "Initiation and Subsequent Investigation", concerns the investigation to determine whether or not an exporter or producer may be subject to an anti-dumping order. In this context, the Panel reasoned, Article 5.8 of the *Anti-Dumping Agreement* requires the termination of the investigation, and thus the exclusion from the anti-dumping order, of any exporter or producer with a margin of dumping below *de minimis*. The Panel contrasted this with Article 9.3, which deals with the amount of the duty to be

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<sup>230</sup>Panel Report, para. 7.138.

<sup>231</sup>*Ibid.*, para. 7.139. (footnote omitted)

<sup>232</sup>*Ibid.*, para. 7.140.

<sup>233</sup>*Ibid.*, para. 7.141.

<sup>234</sup>*Ibid.*, para. 7.140.

imposed and collected after it has been established that a duty may be applied to a given exporter or producer.<sup>235</sup> Accordingly, the Panel found that, by not excluding from the application of the definitive anti-dumping measure two exporters that were found by Economía not to have been dumping, Mexico did not terminate immediately the investigation in respect of them and, thus, acted inconsistently with Article 5.8 of the *Anti-Dumping Agreement*.

211. On appeal, Mexico challenges this finding on the ground that the Panel did not interpret Article 5.8 correctly. Mexico argues that, contrary to the Panel's view, Article 5.8 requires the termination of the investigation when, for a given country, the country-wide margin of dumping is *de minimis*. Mexico contends that the Panel came to the erroneous conclusion that the term "margin of dumping" in Article 5.8 refers to the individual margin of dumping of an exporter or producer, rather than to a country-wide margin of dumping; the Panel erred because it focused on the interpretation of the term "margin of dumping" instead of analyzing, first, the term "investigation" and the phrase "an investigation shall be terminated promptly". Mexico argues that the Panel's reasoning implies that, in anti-dumping procedures, the number of investigations should be equal to the number of exporters involved<sup>236</sup>, which would be inconsistent with the text of Article 5.8 referring to the termination of "an investigation". Mexico adds that the phrase "to justify proceeding with the case" in the first sentence of Article 5.8, as well as the phrase "[t]here shall be immediate termination" in the second sentence, confirms that the phrase "an investigation shall be terminated promptly" refers to the procedure as a whole, and not to actions in respect of one exporter.<sup>237</sup> For Mexico, the main purpose of anti-dumping procedures is to undertake a review with regard to products, not exporters.<sup>238</sup> Thus, the word "investigation", used in Article 5.8, refers to a stage in any anti-dumping procedure, and not to action with respect to an individual exporter.<sup>239</sup>

212. Mexico also argues that the Panel erred in finding that Article 5.8 requires "the exclusion from the anti-dumping order of any exporter or producer with a below *de minimis* margin of dumping"<sup>240</sup>, because such a finding is based on the assumption that definitive anti-dumping duties constitute a measure. For Mexico, this assumption is incorrect: definitive anti-dumping duties would not, in themselves, constitute a measure; the measure would consist, rather, of the act of the authority that imposes such duties.<sup>241</sup> Mexico goes on to argue that nowhere in the *Anti-Dumping Agreement*

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<sup>235</sup>Panel Report, para. 7.144.

<sup>236</sup>Mexico's appellant's submission, para. 124.

<sup>237</sup>*Ibid.*

<sup>238</sup>*Ibid.*

<sup>239</sup>*Ibid.*

<sup>240</sup>Panel Report, para. 7.144.

<sup>241</sup>Mexico's appellant's submission, para. 124.



is it stated that it is not possible to apply a measure to exporters for whom a *de minimis* margin has been determined.<sup>242</sup>

213. Mexico submits that Article 3.3 of the *Anti-Dumping Agreement* provides relevant context for interpreting Article 5.8, and that the Panel erred by ignoring this provision. Article 3.3 refers, *inter alia*, to the determination that "the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5". Mexico underscores that Article 3.3 refers to a country-wide margin of dumping, not to the individual margin of dumping of an exporter or producer. Mexico also emphasizes that Article 5.8 is specifically mentioned in Article 3.3. According to Mexico, Article 3.3 confirms that the relevant margin of dumping is the margin of dumping established in relation to the imports from each country.<sup>243</sup>

214. Finally, Mexico contends that, in any event, it acted consistently with Article 5.8 because Economía was satisfied that the margin of dumping for Riceland and Farmers Rice was zero per cent only at the stage of the final determination, and the investigation was terminated at that stage.<sup>244</sup> Mexico states that the second sentence of Article 5.8 provides that the termination of the investigation takes place when the authority determines that "the margin of dumping is *de minimis*". Mexico explains that, with respect to Mexico's anti-dumping regime, such a determination cannot be made before the final determination stage, because it is only at that moment that Economía is able to determine with certainty whether the margin of dumping is *de minimis*.<sup>245</sup> Mexico thus contends that, *vis-à-vis* Riceland and Farmers Rice, it complied with Article 5.8, because Economía was satisfied that their margin of dumping was zero per cent only when the final determination was made, and Economía terminated the investigation at that time.<sup>246</sup>

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<sup>242</sup>Mexico's appellant's submission, para. 124.

<sup>243</sup>*Ibid.*, para. 128.

<sup>244</sup>*Ibid.*, para. 139.

<sup>245</sup>*Ibid.*, para. 141.

<sup>246</sup>*Ibid.*, para. 142.

215. We begin our analysis with Article 5.8 of the *Anti-Dumping Agreement*, which reads:

An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

216. The Panel's position—that the term "margin of dumping" in Article 5.8 refers to the individual margin of dumping of an exporter or producer rather than to a country-wide margin of dumping—is consistent with the use of the term "margins of dumping" in Article 2.4.2 of the *Anti-Dumping Agreement*<sup>247</sup>, as stated by the Appellate Body in *US – Hot-Rolled Steel*:

"[M]argins" means the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product.<sup>248</sup> (footnote omitted)

217. We also agree with the reasons provided by the Panel in support of its position, which are set out in paragraphs 7.137 to 7.142 of the Panel Report, and summarized in paragraph 208 above. Accordingly, we share the Panel's view that the second sentence of Article 5.8 requires the immediate termination of the investigation in respect of exporters for which an *individual* margin of dumping of zero or *de minimis* is determined.

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<sup>247</sup>Article 2.4.2 of the *Anti-Dumping Agreement* provides:

Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

<sup>248</sup>Appellate Body Report, *US – Hot-Rolled Steel*, para. 118.

218. Having said that, we agree with Mexico that, for the purposes of Article 5.8, there is one investigation and not as many investigations as there are exporters or foreign producers. However, nothing in the Panel Report suggests to us that the Panel assumed differently. The Panel's position was, rather, that there is a single investigation, and that Article 5.8 requires the "immediate termination" of this investigation *in respect of* the individual exporter or producer for which a zero or *de minimis* margin is established.<sup>249</sup>

219. The second sentence of Article 5.8 provides that there shall be "immediate termination" of the investigation where the authorities determine that the margin of dumping is *de minimis*. The issuance of the order that establishes anti-dumping duties—or the decision not to issue an order—is the ultimate step of the "investigation" contemplated in Article 5.8; in most cases, an investigation is "terminated" with the issuance of an order or a decision not to issue an order. This ultimate step necessarily follows the final determination. In the present case, the order establishing anti-dumping duties came *after* the final determination of a margin of dumping of zero per cent was made for Farmers Rice and Riceland, but the order nevertheless covered these exporters. Given that the issuance of the order establishing anti-dumping duties necessarily occurs after the final determination is made, the only way to terminate *immediately* an investigation, in respect of producers or exporters for which a *de minimis* margin of dumping is determined, is to exclude them from the scope of the order. Economía failed to do so, and, therefore, it did not terminate *immediately* the investigation in respect of Farmers Rice and Riceland, as required by Article 5.8 of the *Anti-Dumping Agreement*.

220. Regarding Mexico's arguments about the relevant context in Article 3.3 for interpreting the term "margin of dumping" in Article 5.8, in our opinion, Article 3.3 does not add to the analysis of Article 5.8. First, Article 3.3 establishes conditions for cumulation of the effects of the imports from more than one country, which is unrelated to the termination of an investigation under Article 5.8. Secondly, although, as Mexico pointed out, Article 3.3 refers to Article 5.8, this reference concerns uniquely the definition of a *de minimis* margin of dumping (defined in the third sentence of Article 5.8 as a margin of less than two per cent, expressed as a percentage of the export price). Mexico's contention that the Panel erred in the interpretation of Article 5.8 does not relate to the definition of "*de minimis*". Accordingly, we are of the view that the reference to Article 5.8 in Article 3.3 is not relevant to Mexico's argument under Article 5.8. Thirdly, it is explicitly provided in Article 3.3 that "the margin of dumping [is] established in relation to the imports from each country". It could be argued that this specific language was incorporated into Article 3.3 to mark a departure from the general rule that the term "margin of dumping" refers to the individual margin of dumping of an exporter or producer. In other words, although Mexico contends that Article 3.3 provides context

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<sup>249</sup>Panel Report, para. 7.140.

to suggest that the Panel erred in its interpretation of Article 5.8, it could also be viewed as context that supports the Panel's interpretation of Article 5.8, as no language similar to that of Article 3.3 ("the margin of dumping [is] established in relation to imports from each country") can be found in Article 5.8. Accordingly, we are of the view that, contrary to what Mexico argues, Article 3.3 does not provide useful context for interpreting the term "margin of dumping" in Article 5.8.

221. For all these reasons, we *uphold* the Panel's findings, in paragraphs 7.145 and 8.3(a) of the Panel Report, that Mexico acted inconsistently with Article 5.8 of the *Anti-Dumping Agreement* when it did not terminate immediately the investigation in respect of Farmers Rice and Riceland because Economía did not exclude them from the application of the definitive anti-dumping measure, whereas these exporters were found by Economía not to have been dumping.

B. *The Margin of Dumping for Producers Rice and the Terms of Reference*

222. We move now to the issue whether the Panel acted in conformity with its terms of reference in finding that the margin of dumping was calculated in a manner inconsistent with Article 6.8 of the *Anti-Dumping Agreement*, read in the light of paragraph 7 of Annex II thereto.

223. This issue concerns Economía's calculation of a margin of dumping for Producers Rice based on the facts available. This firm did not export the subject product during the period of investigation. It also responded to the questionnaire and fully cooperated with Economía. Mexico contends that, under the terms of reference, the Panel did not have the authority to assess whether, in applying a facts available-based dumping margin to Producers Rice, Economía acted consistently with Article 6.8 of the *Anti-Dumping Agreement* and Annex II thereto, given that the Panel found that Mexico did not breach Article 9.4 of the *Anti-Dumping Agreement*.

224. The Panel addressed, first, the United States' claim that the anti-dumping duty for Producers Rice should have been determined on the basis of the methodology described in Article 9.4 of the *Anti-Dumping Agreement*. The Panel considered that Article 9.4 deals with "the very specific and defined situation of the use of a sample by the investigating authority" in cases where the number of exporters, producers, importers, or types of products involved is so large as to make impracticable the determination of an individual margin of dumping for each known exporter or producer.<sup>250</sup> For this particular situation, the Panel added, Article 9.4 provides a specific methodology with regard to the calculation of the anti-dumping duty for those interested parties that did not form part of the sample.<sup>251</sup> For the Panel, Article 9.4 does not apply to situations other than cases involving

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<sup>250</sup>Panel Report, para. 7.157.

<sup>251</sup>*Ibid.*, para. 7.158.

sampling.<sup>252</sup> In this case, Economía did not resort to sampling. The Panel therefore rejected the United States' claim relating to Article 9.4.<sup>253</sup>

225. The Panel went on to examine the United States' claim that Economía acted in breach of Article 6.8 of the *Anti-Dumping Agreement* when resorting to the use of facts available to calculate a duty rate for the non-shipping exporter, Producers Rice. The Panel noted that Article 6.8 permits determinations to be made on the basis of the best information available, but only if certain conditions are met.<sup>254</sup> Some of those conditions are set out in Annex II to the *Anti-Dumping Agreement*.<sup>255</sup> For the Panel, the use of the term "best information" in Annex II means that information has to be not simply correct or useful *per se*, rather, it must be the most fitting or most appropriate information available in the case at hand. The Panel added that "[d]etermining that something is 'best' inevitably requires ... an evaluative, comparative assessment as the term 'best' can only be properly applied where an unambiguously superlative status obtains."<sup>256</sup> The Panel also underscored that paragraph 7 of Annex II requires that, if the authorities have to base their findings on information from a secondary source, they should do so with "special circumspection".<sup>257</sup>

226. The Panel observed that Economía determined that a margin based on the facts available had to be calculated for Producers Rice because it did not make any exports during the investigated period. Assuming *arguendo* that Economía would be entitled to determine a margin based on the facts available, the Panel concluded that the manner in which the facts available were used with regard to Producers Rice was not in accordance with Article 6.8 or Annex II. On the basis of an examination of the record, the Panel found:

... no basis to consider that the authority made any attempt to check the applicant's information against information obtained from other interested parties or undertook the evaluative, comparative assessment that would have enabled the authority to assess whether the information provided by the applicant was indeed the *best* information available."<sup>258</sup> (original emphasis)

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<sup>252</sup>Panel Report, para. 7.158.

<sup>253</sup>*Ibid.*, para. 7.159.

<sup>254</sup>*Ibid.*, para. 7.166.

<sup>255</sup>Annex II is entitled "Best Information Available in Terms of Paragraph 8 of Article 6".

<sup>256</sup>Panel Report, para. 7.166.

<sup>257</sup>*Ibid.* (quoting para. 7 of Annex II).

<sup>258</sup>*Ibid.*, para. 7.167.

The Panel added that, in its view, Economía did not use the applicant's information with "special circumspection" as required by paragraph 7 of Annex II.<sup>259</sup> Accordingly, the Panel found that Economía calculated a margin of dumping on the basis of the facts available for Producers Rice in a manner inconsistent with Article 6.8 of the *Anti-Dumping Agreement*, read in the light of paragraph 7 to Annex II of the *Anti-Dumping Agreement*.<sup>260</sup>

227. Mexico does not challenge the substance of the Panel's reasoning. Rather, it contests the Panel's authority, under the terms of reference, to make a finding regarding Article 6.8 of the *Anti-Dumping Agreement* and Annex II thereto, given the Panel's finding on Article 9.4 of that Agreement. According to Mexico, the United States did not make two distinct claims—one on the basis of Article 9.4, and the other on the basis of Article 6.8 and Annex II—but a single claim centred on Article 9.4. This single United States claim, according to Mexico, is that Economía was under an obligation to comply with the provisions of Article 9.4, and that Mexico violated the *Anti-Dumping Agreement* in calculating a margin of dumping for Producers Rice on the basis of the facts available, instead of applying the provisions of Article 9.4.<sup>261</sup> Mexico contends that the Panel disposed of the issue raised by the United States' claim in deciding that Economía did not have to calculate the margin of dumping for Producers Rice according to the provisions of Article 9.4. For Mexico, this Panel finding resolved the issue, and the Panel exceeded its terms of reference in analyzing whether Mexico calculated the margin of dumping for Producers Rice in conformity with Article 6.8 and Annex II.<sup>262</sup>

228. We begin our analysis with the terms of reference of the Panel, which establish the scope of the dispute and the jurisdiction of the Panel:

To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS295/2, the matter referred to the DSB by the United States in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>263</sup>

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<sup>259</sup>Panel Report, para. 7.167.

<sup>260</sup>*Ibid.*, para. 7.168.

<sup>261</sup>Mexico's appellant's submission, paras. 151-152.

<sup>262</sup>*Ibid.*, para. 155.

<sup>263</sup>Panel Report, para. 1.2.

229. The Panel's standard terms of reference refer to document WT/DS295/2, the request for the establishment of a panel by the United States. Paragraph 1(f) of the panel request reads as follows:

On 5 June 2002, Mexico published in the *Diario Oficial* its definitive antidumping measure on long-grain white rice. This measure appears to be inconsistent with the following provisions of the AD Agreement and the GATT 1994:

...

- (f) Articles 6.6, 6.8, 6.10, 9.3, 9.4, and 9.5 of the AD Agreement, and paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement, by applying the facts available to a US respondent rice exporter that was investigated and found to have no shipments during the period of investigation ... .

230. The panel request refers to Article 6.8 and five paragraphs of Annex II to the *Anti-Dumping Agreement*, as well as to Article 9.4 of that Agreement. Thus, under its terms of reference, the Panel had jurisdiction to decide whether Mexico acted in a manner inconsistent with Articles 6.8 and 9.4 of the *Anti-Dumping Agreement*, and paragraphs 1, 3, 5, 6, and 7 of Annex II thereto, "by applying the facts available to a [United States] respondent rice exporter that was investigated and found to have no shipments during the period of investigation".

231. Furthermore, it appears from the United States' first written submission to the Panel that the United States made a distinct claim on the basis of Article 6.8 and Annex II, *in addition to* a claim based on Article 9.4. In paragraph 171 of that submission, the United States claimed that, "[f]irst, Economía's application of a facts available margin to Producers Rice breached Article 9.4."<sup>264</sup> Arguments in support of this claim were developed in paragraphs 171 to 173 of the United States' first written submission to the Panel. The United States put forward a distinct claim in paragraph 174, alleging that "Economía's treatment of Producers Rice *also breached* Article 6.8 of the [*Anti-Dumping Agreement*] and paragraphs 3, 5, 6 and 7 of Annex II." (emphasis added) Arguments in support of this claim were elaborated in paragraphs 174 to 183. These arguments are different from and independent of those developed in paragraphs 171 to 173—in support of the claim that "Economía's application of a facts available margin to Producers Rice breached Article 9.4."<sup>265</sup>

232. Neither the request for the establishment of a panel, nor the United States' first written submission to the Panel, supports Mexico's theory that the United States' case was limited to a single claim centred on Article 9.4. The terms of reference were broad enough to allow the Panel to examine whether the use of facts available to calculate the margin of dumping for Producers Rice

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<sup>264</sup>United States' first written submission to the Panel, para. 171.

<sup>265</sup>*Ibid.*

breached Article 9.4, as well as to consider whether the use of facts available was inconsistent with Article 6.8 (considered in combination with Annex II). In its submissions to the Panel, the United States elaborated arguments on two distinct claims, one based on Article 9.4, and the other on Article 6.8 and Annex II. Neither the terms of reference, nor the claims made by the United States before the Panel, prevented the Panel from analyzing arguments relating to Article 9.4 as well as those relating to Article 6.8 and Annex II. The Panel was entitled to examine claims under Article 9.4 as well as under Article 6.8 together with paragraph 7 of Annex II.

233. Accordingly, we *find* that the Panel *did not exceed* its terms of reference in concluding, in paragraphs 7.168 and 8.3(b) of the Panel Report, that Economía calculated a margin of dumping on the basis of the facts available for Producers Rice in a manner inconsistent with Article 6.8 of the *Anti-Dumping Agreement*, read in the light of paragraph 7 of Annex II to that Agreement.

C. *The Margin of Dumping for the Exporters Not Investigated*

234. We move now to Mexico's appeal against the Panel's findings in relation to Economía's calculation of a margin of dumping based on the facts available for the United States exporters that it did not investigate.

235. The application filed by the Mexican petitioner referred to two United States exporters, Producers Rice and Riceland. Economía initiated the investigation and sent a notice of initiation as well as a questionnaire to each of the two exporters listed in the application and to the United States Embassy in Mexico City. The notice of initiation stated that any interested party had a period of 30 days to appear before Economía. Two United States exporters, The Rice Company and Farmers Rice, as well as an industry association, the USA Rice Federation, came forward on their own initiative and each completed a questionnaire. Individual margins of dumping were assigned for all four United States exporters that participated in the investigation. For all other United States exporters that did not come forward themselves and did not provide information, a residual margin of dumping was calculated based on the facts available. These facts available consisted of the information submitted by the petitioner.<sup>266</sup> The margin of dumping assigned to the exporters not investigated was 10.18 per cent.<sup>267</sup>

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<sup>266</sup>Final Determination, *supra*, footnote 9, para. 138.

<sup>267</sup>In comparison, Economía determined a margin of dumping of 3.93 per cent for The Rice Company and zero per cent for Farmers Rice and Riceland. Economía calculated an individual margin of dumping based on the facts available for Producers Rice. The margin of dumping assigned for Producers Rice was also 10.18 per cent. (See Final Determination, *supra*, footnote 9, paras. 91, 113, 137, 138, and 157)



236. The Panel began its analysis with Article 6.10 of the *Anti-Dumping Agreement*, which sets forth the general rule that "[t]he authorities shall determine ... an individual margin of dumping for each known exporter or producer concerned of the product under investigation." The Panel's analysis focused on the interpretation of the term "known exporter or producer" in Article 6.10. The Panel examined the context of this provision and considered that it consisted of "the overarching obligation to conduct *an investigation* and ... the specific obligations on the authority to ensure that all interested parties are informed of the information required of them and are given the opportunity to present all evidence to support their case."<sup>268</sup> For the Panel, the notion of "investigation" implies that the investigating authority "has to play an active role in the search of the information it requires in order to make its determination."<sup>269</sup> In addition, the Panel stated that the term "known" in Article 6.10 cannot be construed in a manner that would transform it into "a warrant for a passive investigative approach", as such an interpretation would "effectively read out of the [*Anti-Dumping Agreement*] an important aspect of the obligation of an investigating authority regarding the conduct of an investigation."<sup>270</sup> On these bases, the Panel concluded that the term "known exporter or producer" in Article 6.10 refers to the exporters or producers of which "an objective and unbiased investigating authority properly establishing the facts and conducting an active investigation could have and should have reasonably been considered to have [obtained] knowledge."<sup>271</sup>

237. The Panel then moved on to Articles 6.1, 6.1.3, and 12.1 of the *Anti-Dumping Agreement*. Article 6.1 requires that all interested parties be given notice of the information required by the investigating authority, whereas Article 6.1.3 specifies that the full text of the application is to be provided to the known exporters. Article 12.1 similarly provides for a notification requirement with regard to all interested parties known to have an interest in the investigation. In analyzing these provisions, the Panel took an approach similar to that it adopted for its analysis of Article 6.10. The Panel opined that, in order to comply with the requirement to ensure that all interested parties be given notice of the information required of them, the investigating authority, when conducting an investigation, cannot remain "entirely passive" in the identification of the interested parties, and must inform those interested parties of which it can reasonably obtain knowledge.<sup>272</sup>

238. According to the Panel, the requirement in Article 6.1 is fundamental to a correct application of Article 6.8, which concerns the use of facts available by the investigating authority. Article 6.8 provides that, when an interested party refuses access, to or does not provide necessary information

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<sup>268</sup>Panel Report, para. 7.184. (original emphasis)

<sup>269</sup>*Ibid.*, para. 7.185.

<sup>270</sup>*Ibid.*, para. 7.188.

<sup>271</sup>*Ibid.*, para. 7.187. (footnote omitted)

<sup>272</sup>*Ibid.*, para. 7.192.

within, a reasonable period, or significantly impedes the investigation, a determination may be made on the basis of the facts available. The Panel reasoned that a determination cannot be made on the basis of the facts available if an interested party has not been properly notified and informed of the information it is required to submit under Article 6.1, because "it cannot be argued to have refused access to or to otherwise have withheld necessary information or to have significantly impeded the investigation."<sup>273</sup> The Panel added that this is "evidenced also by the requirement in paragraph 1 of Annex II of the [*Anti-Dumping Agreement*]"<sup>274</sup>

239. Turning to the facts of the case, the Panel stated that Economía could have deduced from the application that the listing in the application of exporters or foreign producers was incomplete.<sup>275</sup> The Panel expressed the view that Economía could have obtained information about the rice industry in the United States through two industry associations mentioned in the application, and that it would have been possible for Economía to identify all United States exporters by examining the so-called *pedimentos* (customs declarations).<sup>276</sup> The Panel added that information on United States exporters was also available from a number of public sources, such as a United States magazine about the rice industry, *Rice Journal*, a source mentioned in the application filed by the Mexican petitioner.<sup>277</sup> The Panel also noted that, "[w]hile the investigating authority notified the US authorities of the initiation of the investigation as required by Article[s] 6.1.3 and 12.1 of the [*Anti-Dumping Agreement*], it did not request the assistance of the authorities in identifying US exporters or producers."<sup>278</sup> For these reasons, the Panel concluded that "an objective and unbiased investigating authority conducting an investigation in a reasonable manner should have made more of an effort to obtain knowledge of other US exporters."<sup>279</sup>

240. Accordingly, the Panel found that Economía did not comply with Articles 6.1 and 12.1 of the *Anti-Dumping Agreement* "as it failed to notify all interested parties known to have an interest in the investigation of the initiation of the investigation and of the information required of them."<sup>280</sup> In addition, the Panel found that "by applying the facts available in the calculation of a margin of dumping for the [United States] exporters or producers that were known or could reasonably have been known to the authority, Mexico acted in a manner which is inconsistent with Article 6.8 and

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<sup>273</sup>Panel Report, para. 7.194.

<sup>274</sup>*Ibid.*

<sup>275</sup>*Ibid.*, paras. 7.197-7.198.

<sup>276</sup>*Ibid.*, para. 7.199.

<sup>277</sup>*Ibid.*

<sup>278</sup>*Ibid.*

<sup>279</sup>*Ibid.*

<sup>280</sup>*Ibid.*, para. 7.200.

paragraph 1 of Annex II of the [*Anti-Dumping Agreement*]."<sup>281</sup> As regards Article 6.10 of the *Anti-Dumping Agreement*, the Panel found that Mexico acted in breach of this provision "by remaining entirely passive in the identification of exporters or producers interested in the investigation, and by not calculating an individual margin for dumping for each exporter or producer that was known or should reasonably have been known to the investigating authority."<sup>282</sup> The Panel exercised judicial economy with respect to the United States' claims concerning Article 6.6 (accuracy of information), Article 9.4 (duty applied to exporters or producers not examined, and Article 9.5 (exporters or producers not exporting the product to the importing Member) of the *Anti-Dumping Agreement*.

241. Mexico challenges the Panel's findings that Economía's treatment of non-investigated exporters and producers was inconsistent with Articles 6.1, 6.8, 6.10, 12.1, and paragraph 1 of Annex II to the *Anti-Dumping Agreement*. Mexico's appeal focuses on the Panel's view that, under these provisions, the known producers or exporters include those of which an investigating authority should have reasonably been considered to have knowledge, and that an investigating authority should take steps to find out which are the exporters or producers covered by the investigation.

242. Mexico argues that, under Article 6.10, the investigating authority is obliged to determine individual margins of dumping for those exporters or producers whose existence has been notified, but the investigating authority does not have to determine individual margins for all producers and exporters. According to Mexico, there is no provision in the *Anti-Dumping Agreement* laying down such an obligation.<sup>283</sup> Mexico argues that it complied with Article 6.10 by calculating individual margins of dumping for all known exporters or foreign producers that took part in the investigation.<sup>284</sup> As regards the exporters that were not investigated individually, Mexico submits that it met its obligations under the *Anti-Dumping Agreement* by giving the United States authorities public notification of initiation of the investigation, a copy of the request to initiate an investigation and the annexes thereto, as well as the form to be completed by exporters and foreign producers.<sup>285</sup> For Mexico, the Panel's reasoning is flawed because the Panel made an *a priori* assumption that the diplomatic authorities of the exporting Member do not have any obligation to make their exporters or producers aware of the investigation, whereas such an obligation exists and is stated in footnote 15 to Article 6.1.1 of the *Anti-Dumping Agreement*.<sup>286</sup> Mexico adds that it complied with Articles 6.1 and 12.1 of the *Anti-Dumping Agreement* as there is no provision in the *Anti-Dumping Agreement*

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<sup>281</sup>Panel Report, para. 7.200.

<sup>282</sup>*Ibid.*, para. 7.201.

<sup>283</sup>Mexico's appellant's submission, para. 167.

<sup>284</sup>*Ibid.*, para. 168.

<sup>285</sup>*Ibid.*, para. 169.

<sup>286</sup>*Ibid.*, para. 173.

that requires an investigating authority to take any action in order to identify each and every one of the foreign producers or exporters.<sup>287</sup>

243. Mexico also contends that, under Article 6.8, Mexico was entitled to calculate a margin of dumping based on the facts available for the exporters and producers that were not investigated, because Mexico had met its obligations under Articles 6.1 and 6.10, and the firms that were not investigated had failed to provide the necessary information.<sup>288</sup>

244. We divide our analysis in three parts. First, we examine whether the Panel erred in finding that Economía did not comply with Articles 6.1 and 12.1 of the *Anti-Dumping Agreement* because "it failed to notify all interested parties known to have an interest in the investigation of the initiation of the investigation and of the information required of them."<sup>289</sup> In the second part, we turn to the question whether the Panel erred in finding that Mexico acted in breach of Article 6.10 of the *Anti-Dumping Agreement* "by not calculating an individual margin of dumping for each exporter ... that was known or should reasonably have been known to the investigating authority."<sup>290</sup> Finally, we discuss in the third part whether the Panel was correct in finding that, by applying the facts available in the calculation of a margin of dumping for the United States exporters that were known or could reasonably have been known to Economía, Mexico acted inconsistently with Article 6.8 and paragraph 1 of Annex II to the *Anti-Dumping Agreement*.<sup>291</sup>

1. Articles 12.1 and 6.1 of the *Anti-Dumping Agreement*

245. We begin our analysis with the text of Articles 12.1 and 6.1 of the *Anti-Dumping Agreement*:

*Public Notice and Explanation of Determinations*

12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

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<sup>287</sup>Mexico's appellant's submission, para. 174.

<sup>288</sup>*Ibid.*, paras. 178 and 182.

<sup>289</sup>Panel Report, para. 7.200.

<sup>290</sup>*Ibid.*, para. 7.201.

<sup>291</sup>*Ibid.*, para. 7.200.

*Evidence*

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

246. Article 12.1 provides that "interested parties known to the investigating authorities to have an interest" in the investigation "shall be notified" of the initiation of the anti-dumping investigation. We note that Article 6.11(i) defines "interested parties" for the purposes of the Agreement to include "an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product".

247. The Panel found that the term "interested parties known to the investigating authorities" in Article 12.1 covers not only the exporters known to the investigating authority, but also the exporters of which "it can reasonably obtain knowledge".<sup>292</sup> In our view, the extensive interpretation given by the Panel to this term is incorrect. The text of Article 12.1 is not ambiguous: the investigating authority is under the obligation to notify the initiation of the investigation to the exporters *known* to it at the time it is satisfied that there is sufficient evidence to justify the initiation of the investigation. Nothing in the text of Article 12.1 suggests that the notification requirement applies to importers other than those of which the investigating authority had actual knowledge at that time.

248. In this case, upon the initiation of the investigation, Economía knew the exporters referred to in the application, Producers Rice and Riceland. Economía sent a notice of initiation of the investigation to each of them.<sup>293</sup> Economía thus notified the initiation of the investigation to the exporters known to it at that time, thereby complying with Article 12.1 of the *Anti-Dumping Agreement*.

249. We move now to Article 6.1 of the *Anti-Dumping Agreement*. Under this provision, "[a]ll interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require". This element of Article 6.1 should be read in the light of Article 6.1.3, which provides:

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<sup>292</sup>Panel Report, para. 7.192.

<sup>293</sup>*Ibid.*, para. 7.197.

As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5. (footnote omitted)

This provision requires investigation authorities to "provide the full text of the written application ... to the *known exporters*". (emphasis added) We see no reason why there should be asymmetry between Articles 6.1 and 6.1.3. In our view, exporters that were given notice of the required information under Article 6.1 should be understood to be the same exporters entitled to receive the text of the application under Article 6.1.3, namely, the "known" exporters.

250. Thus, the explicit reference in Article 6.1.3 to "known exporters" supports the view that the exporters that shall be given notice of the required information under Article 6.1 are the exporters known to the investigating authority. These exporters include not only those referred to in the application, but also the exporters who might have made themselves known to the investigating authority following the issuance of the public notice required by Article 12.1 of the *Anti-Dumping Agreement*, and those that otherwise might have become known to it subsequent to the notice of initiation.

251. The Panel found that, under Article 6.1, the investigating authority has a duty to give notice of the required information to exporters of which "it can reasonably obtain knowledge".<sup>294</sup> As we explained above, Article 6.1 requires the investigating authority to give notice to the exporters known to it. Extending the duty to give notice under Article 6.1 to exporters of which the investigating authority does not know, but of which it might have obtained knowledge, would imply that, under Article 6.1, the investigating authority is subject to a duty to undertake an inquiry, which may be extensive, to identify the exporters. We cannot find, in Article 6.1 or anywhere else in the *Anti-Dumping Agreement*, any legal basis for such an obligation, which in some circumstances could be onerous. Accordingly, in our view, Economía was not obliged under Article 6.1 to give notice of the required information to exporters of which it did not know but of which it could have obtained knowledge.

252. In this case, Economía sent a questionnaire to each of the two exporters mentioned in the application, Producers Rice and Riceland. Two other exporters, The Rice Company and Farmers Rice, as well as an industry association, the USA Rice Federation, came forward on their own initiative. Economía also sent them each a questionnaire. Thus, we are satisfied that Economía gave

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<sup>294</sup>Panel Report, para. 7.192.

notice of the required information to all the exporters of which it had actual knowledge, and that, accordingly, Mexico did not act inconsistently with Article 6.1 of the *Anti-Dumping Agreement*.

253. For these reasons, we *reverse* the Panel's findings, in paragraphs 7.200 and 8.3(c) of the Panel Report, that, with respect to the exporters that Economía did not investigate, Mexico acted inconsistently with Articles 6.1 and 12.1 of the *Anti-Dumping Agreement*.

2. Article 6.10 of the *Anti-Dumping Agreement*

254. Article 6.10 reads as follows:

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

255. The first sentence of Article 6.10 provides that the investigating authority "shall, as a rule, determine an individual margin of dumping for each *known exporter or producer* concerned of the product under investigation." (emphasis added) For the Panel, the term "known exporter or producer" refers not only to the exporters or foreign producers of which the investigating authority knows, but also to those with which "an unbiased and objective investigating authority properly establishing the facts would be reasonably expected to have become conversant".<sup>295</sup> Again, we do not see in the *Anti-Dumping Agreement* a legal basis for such an interpretation of the term "known exporter or producer". This interpretation is difficult to reconcile with the ordinary meaning of the term: a known exporter or producer is an exporter or producer known to the investigating authority, not an exporter or producer of which it does not know, but should have known. In our view, the rule set out in the first sentence of Article 6.10 (determining an individual margin of dumping) covers the exporters or foreign producers of which the investigating authority knows at the time the calculation of the margins of dumping is made. Under the first sentence of Article 6.10, the investigating authority is not required to determine an individual margin of dumping for exporters or foreign producers of whose existence it was unaware.

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<sup>295</sup>Panel Report, para. 7.187.

256. In this case, Economía calculated individual margins of dumping for the two exporters explicitly listed in the application, namely, Producers Rice and Riceland. Economía also determined individual margins of dumping for the two exporters who came forward of their own initiative, namely, The Rice Company and Farmers Rice. Thus, Economía acted consistently with the first sentence of Article 6.10 of the *Anti-Dumping Agreement*, given that it determined an individual margin of dumping for each exporter of which it knew at the time it calculated the dumping margins.

257. Accordingly, we *reverse* the Panel's findings, in paragraphs 7.201 and 8.3(c) of the Panel Report, that, with respect to the exporters that Economía did not investigate, Mexico acted inconsistently with Article 6.10 of the *Anti-Dumping Agreement*.

3. Article 6.8 of the *Anti-Dumping Agreement*

258. Article 6.8 reads as follows:

In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

259. The last sentence of Article 6.8 provides that the provisions of Annex II shall be observed in the application of that paragraph. In particular, under the second sentence of paragraph 1 of Annex II, the investigating authorities should "ensure" that an interested party is "aware" that, if the required information is not supplied within a reasonable time, "the authorities will be free to make determinations on the basis of facts available, *including those contained in the application for the initiation of the investigation by the domestic industry.*" (emphasis added)<sup>296</sup> The second sentence of paragraph 1 of Annex II conditions the use of facts from the petitioner's application on making the interested party "aware" that, if the information is not supplied by it within a reasonable time, the investigating authority will be free to resort to these facts available. In other words, an exporter shall be given the opportunity to provide the information required by the investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. An exporter that is

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<sup>296</sup>The full text of paragraph 1 of Annex II reads as follows:

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



unknown to the investigating authority—and, therefore, is not notified of the information required to be submitted to the investigating authority—is denied such an opportunity. Accordingly, an investigating authority that uses the facts available in the application for the initiation of the investigation against an exporter that was not given notice of the information the investigating authority requires, acts in a manner inconsistent with paragraph 1 of Annex II to the *Anti-Dumping Agreement* and, therefore, with Article 6.8 of that Agreement.

260. In this case, four United States exporters—Producers Rice, Riceland, The Rice Company, and Farmers Rice—were given notice of the information to submit to Economía. The United States exporters that Economía did not investigate were not notified of the information it required. Notwithstanding this, Economía used facts available contained in the application submitted by the petitioner against these uninvestigated exporters.<sup>297</sup> As a result, Economía assigned to them a margin of dumping of 10.18 per cent, which was higher than the margins individually calculated for The Rice Company (3.93 per cent), Farmers Rice (zero per cent), and Riceland (zero percent).<sup>298</sup> In doing so, Economía acted in a manner inconsistent with paragraph 1 of Annex II to the *Anti-Dumping Agreement* and, therefore, with Article 6.8 of that Agreement.

261. For these reasons, we *uphold* the Panel's findings, in paragraphs 7.200 and 8.3(c) of the Panel Report that, by applying the facts available contained in the application submitted by the petitioner in calculating the margin of dumping for United States exporters that Economía did not investigate, Mexico acted inconsistently with paragraph 1 of Annex II to the *Anti-Dumping Agreement* and, therefore, with Article 6.8 of that Agreement.

262. Finally, we address Mexico's argument that the Panel made an *a priori* assumption that the diplomatic authorities of the exporting Member do not have an obligation to make their exporters or producers aware of the investigation. According to Mexico, such an obligation exists and is stated in footnote 15 to Article 6.1.1 of the *Anti-Dumping Agreement*.<sup>299</sup> Footnote 15 to Article 6.1.1 provides:

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<sup>297</sup>Final Determination, *supra*, footnote 9, para. 138.

<sup>298</sup>An individual margin of dumping was calculated for Producers Rice; however, this individual margin of dumping of 10.18 per cent was based on information submitted by the petitioner. This information was the same as that on the basis of which the margin of dumping for exporters not investigated was determined. (See Final Determination, *supra*, footnote 9, para. 138)

<sup>299</sup>Mexico's appellant's submission, para. 173.

As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

263. Footnote 15 establishes a general rule for counting the time that exporters have for replying to the questionnaires sent to them. Although this general rule refers to the date on which the questionnaire "was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member", it does not provide any indication as to whether it is incumbent on the government of the exporting country to make the relevant exporters or producers aware of the investigation. Accordingly, we cannot deduce from footnote 15 to Article 6.1.1, alone, an obligation for diplomatic authorities of the exporting Member to make their exporters or producers aware of the investigation.

264. In sum, we find that Economía was not under an obligation to give notice, under Articles 12.1 and 6.1 of the *Anti-Dumping Agreement*, to exporters of which it did not know. We also find that Economía was not required, under Article 6.10 of the *Anti-Dumping Agreement*, to determine an individual margin of dumping for exporters of which it did not know. However, we find that with respect to United States producers or exporters that were not given notice of the required information, Economía was not allowed to calculate a margin of dumping on the basis of the facts available contained in the application submitted by the petitioner. Accordingly, we *reverse* the Panel's findings, in paragraphs 7.200 and 8.3(c) of the Panel Report, that Mexico acted inconsistently with Articles 12.1 and 6.1 of the *Anti-Dumping Agreement*. We also *reverse* the Panel's findings, in paragraphs 7.201 and 8.3(c) of the Panel Report, that Mexico acted inconsistently with Article 6.10 of the *Anti-Dumping Agreement*. However, we *uphold* the Panel's findings, in paragraphs 7.200 and 8.3(c) of the Panel Report, that Mexico acted inconsistently with paragraph 1 of Annex II to the *Anti-Dumping Agreement* and, therefore, with Article 6.8 of that Agreement.

## **VII. The Foreign Trade Act**

265. The Panel found the following Articles of the FTA inconsistent with certain provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*: Articles 53, 64, 68, 89D, 93V, as well as Articles 68 and 97, read together. Mexico appeals each of these findings of inconsistency. We address below, first, Mexico's arguments that apply to the entirety of the Panel's analysis of the FTA provisions before turning to Mexico's claims of error with respect to each challenged provision of the FTA.

A. *Preliminary Issues*

266. We discuss in this section two cross-cutting issues raised by Mexico that apply to all of the Panel's findings of inconsistency relating to the FTA. First, we consider Mexico's contention that the Panel erred in ruling on the consistency of the challenged provisions of the FTA because the United States had not made out a *prima facie* case of inconsistency. Secondly, we consider Mexico's argument that the Panel erred in failing to recognize that the challenged provisions of the FTA are "discretionary" measures that permit the investigating authority to apply them in a WTO-consistent manner.

1. *Prima Facie Case*

267. Mexico contends that the United States failed to establish a *prima facie* case of inconsistency with respect to any of the challenged provisions of the FTA. Mexico submits that the text of each of these provisions is open to different interpretations and, accordingly, does not reveal a "clear obligation" for Economía to act in a certain manner.<sup>300</sup> Therefore, in Mexico's view, the United States was required, in order to establish a *prima facie* case, to provide evidence as to the scope and application of these measures *in addition to* their text. As the United States submitted only the text of the challenged provisions, Mexico argues, it did not establish its *prima facie* case, and the Panel was thereby not permitted to rule on those claims.<sup>301</sup>

268. One element of a *prima facie* case that a complaining Member must present with respect to a measure challenged "as such" consists of evidence and arguments "sufficient to identify the challenged measure and its basic import".<sup>302</sup> The evidentiary requirement of this element may be met by the text of the challenged measure alone.<sup>303</sup>

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<sup>300</sup>Mexico's response to questioning at the oral hearing.

<sup>301</sup>Mexico's appellant's submission, para. 189.

<sup>302</sup>Appellate Body Report, *US – Gambling*, para. 141.

<sup>303</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 263.

269. In this case, the United States submitted the text of each challenged provision of the FTA in support of its claims and argued in its submissions how it understood those provisions to operate.<sup>304</sup> A review of the challenged provisions indicates to us that the United States' proffered interpretation was adequately supported by the text so as to satisfy the requirement for a *prima facie* case.<sup>305</sup> In our view, the fact that the challenged provisions of the FTA may support multiple interpretations, and that Mexico considers the United States' interpretation "incorrect"<sup>306</sup>, does not render insufficient the *prima facie* case put forward by the United States based on the language of the provisions.

270. Moreover, we observe that, with two exceptions<sup>307</sup>, Mexico did not even contest before the Panel the interpretation of the FTA proposed by the United States; instead, Mexico limited its rebuttal of the United States' claims to contesting the applicability of the relevant WTO obligations. With respect to each of the challenged provisions, the Panel agreed with the United States' interpretation.<sup>308</sup> It appears, therefore, that the Panel found that the text and the parties' common understanding of the provisions were sufficient to determine what those challenged provisions required of the investigating

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<sup>304</sup>We note that, with respect to certain of these provisions, the United States also submitted evidence supporting its understanding of their operation. In relation to Article 68 of the FTA, the United States submitted the notice of initiation of a review under Article 68, indicating that the showing by an exporter of a "representative" volume of exports was a prerequisite to such a review. ("*Resolución por la que se declara el inicio de la revisión de la cuota compensatoria definitiva impuesta a las importaciones de manzanas de mesa de las variedades Red Delicious y sus mutaciones y Golden Delicious, mercancía clasificada actualmente en la fracción arancelaria 0808.10.01 de la Tarifa de la Ley de los Impuestos Generales de Importación y de Exportación, originarias de los Estados Unidos de América, independientemente del país de procedencia*", *Diario Oficial*, 21 October 2003, First Section, pp. 16-27 (Exhibit US-24 submitted by the United States to the Panel)) See also United States' response to Question 31 posed by the Panel, para. 76, Panel Report, p. B-22.

In support of its claims against Articles 68 and 97, read together, the United States submitted a letter from Economía to a United States producer, evincing the requirement that judicial proceedings be concluded before the review of an order may take place. (Exhibit US-20 submitted by the United States to the Panel) See also Panel Report, para. 7.289.

<sup>305</sup>The challenged provisions of the FTA, and the United States' and the Panel's interpretations of those provisions are set out in the Panel Report: paras. 7.213, 7.216, 7.220, and 7.224-7.225, (Article 53); paras. 7.226-7.227, and 7.236-7.237 (Article 64); paras. 7.243-7.244, 7.250-7.253, and 7.259 (Article 68); paras. 7.261, 7.264, and 7.266-7.267 (Article 89D); paras. 7.270, 7.273, and 7.278-7.279 (Article 93V); and paras. 7.281, and 7.287-7.290 (Articles 68 and 97).

<sup>306</sup>Mexico's appellant's submission, para. 192 ("*una interpretación incorrecta*").

<sup>307</sup>Mexico did assert before the Panel that: (i) all the provisions of the FTA were "discretionary", by virtue of Article 2 of the FTA and Article 133 of the Mexican Constitution; and (ii) Article 93V was "discretionary", on the basis of the opening language of that provision. These allegations have also been raised on appeal and are addressed *infra*, Sections VII.A.2 and VII.F.

<sup>308</sup>The Panel found that the United States had failed to make out a *prima facie* case with respect to Article 366 of the Federal Code of Civil Procedure. In so doing, the Panel did not reject an interpretation of that provision, but rather, determined that "the United States ha[d] not sufficiently explained which 'proceedings' this provision refers to and failed to provide sufficient arguments concerning the context of this provision the meaning and scope of which is not immediately clear to us." (Panel Report, para. 7.298) The United States does not appeal this finding.

authority.<sup>309</sup> In these circumstances, we do not see on what basis the Panel may be said to have made the case for the United States. Therefore, we *find* that the Panel *did not err* in considering that a *prima facie* case had been made out concerning the consistency of the challenged provisions of the FTA with Mexico's obligations under the *Anti-Dumping Agreement* and the *SCM Agreement*.

2. The "Mandatory" or "Discretionary" Nature of the FTA Provisions

271. Mexico contends that the Panel erred in determining that the FTA articles challenged by the United States require Economía to act in a way that is inconsistent with the *Anti-Dumping Agreement* and the *SCM Agreement*.<sup>310</sup> Mexico argued before the Panel that Article 2 of the FTA requires that the other provisions of the FTA not be applied in a manner contrary to any international treaty signed by Mexico, including the WTO Agreements.<sup>311</sup> According to Mexico, the Panel "disregarded totally" this argument.<sup>312</sup> Mexico submits that, had the other provisions of the FTA been properly understood in the light of Article 2, the Panel would have concluded that these provisions give Economía discretion to act in a manner consistent with its obligations under the WTO Agreements, which "necessarily" would have led the Panel to dismiss the United States' claims.<sup>313</sup> Instead, argues Mexico, the Panel failed to "undertake[] an impartial analysis"<sup>314</sup> and "did not correctly analyze the meaning and scope of the articles of the FTA" in concluding that the FTA provisions at issue were mandatory.<sup>315</sup>

272. We cannot accept Mexico's contention that the Panel "disregarded" Article 2 of the FTA, or Mexico's arguments relating to this provision, in arriving at a conclusion on whether the challenged provisions of the FTA were mandatory. In fact, the Panel asked Mexico questions specifically addressing Article 2 of the FTA.<sup>316</sup> The Panel subsequently posed additional questions after the second panel meeting, relating to the specific interaction between Article 2 and the other FTA provisions.<sup>317</sup> Following on these questions and responses, the Panel explicitly noted and responded

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<sup>309</sup>The Panel's description of the challenged provisions is found in the Panel Report: paras. 7.220 and 7.225 (Article 53); paras. 7.238-7.240 (Article 64); paras. 7.251, 7.253, and 7.259 (Article 68); paras. 7.266 and 7.268 (Article 89D); paras. 7.278-7.279 (Article 93V); and para. 7.289 (Articles 68 and 97).

<sup>310</sup>Mexico's appellant's submission, para. 195.

<sup>311</sup>*Ibid.*, paras. 211-212.

<sup>312</sup>*Ibid.*, para. 195(d) ("*desestimó por completo el argumento de México*").

<sup>313</sup>*Ibid.*, para. 204(f) ("*necesariamente*").

<sup>314</sup>*Ibid.*, para. 195(c) ("*analizarla de manera imparcial*").

<sup>315</sup>*Ibid.*, heading to paras. 205-220 ("*no analizó de forma adecuada el sentido y alcance de los artículos de la LCE*").

<sup>316</sup>Question 30 posed by the Panel to Mexico during the Panel proceedings, and Mexico's response thereto, Panel Report, p. B-34.

<sup>317</sup>Question 12 posed by the Panel to the United States during the Panel proceedings, Panel Report, p. C-11.

in the Panel Report to Mexico's argument that "any domestic law has to be applied in a manner which is compatible with Mexico's international obligations."<sup>318</sup> Mexico acknowledges the Panel's response to its arguments, but contends that it constitutes "an incorrect and incomplete interpretation of Mexico's arguments".<sup>319</sup> Although Mexico may disagree with the weight ascribed by the Panel to Article 2 of the FTA, we fail to see how this constitutes "disregard[]" of Mexico's arguments.

273. In any event, we are of the view that this aspect of Mexico's appeal should have been more appropriately brought under Article 11 of the DSU. Mexico's argument is premised on the Panel's purported failure to read the challenged provisions of the FTA in the light of *another* FTA provision that Mexico brought to the attention of the Panel. Mexico alleges that the Panel "disregarded" this evidence and "made unsubstantiated findings" on the mandatory nature of the challenged provisions of the FTA "virtually without undertaking any relevant analysis".<sup>320</sup> Mexico's claim of error, therefore, rests on the Panel's failure to conduct its analysis in a proper and impartial manner: Mexico does not contest, on the merits, the Panel's decision rejecting the supposed import of Article 2 for the interpretation of the other provisions of the FTA.

274. In this light, Mexico's claim on appeal appears to be a traditional Article 11 claim challenging the Panel's failure to accord sufficient weight to evidence submitted by one of the parties.<sup>321</sup> It is well settled that an Article 11 claim—by definition, one on which a panel could not have ruled—must be clearly discernible in a Notice of Appeal<sup>322</sup> and explicitly articulated in an appellant's written submission.<sup>323</sup> Mexico did not raise this claim under Article 11 of the DSU, either in its Notice of Appeal or in its appellant's submission. Therefore, we make no finding under that provision.<sup>324</sup>

275. For these reasons, we *find* that the Panel *did not disregard* Article 2 of the FTA, or Mexico's argument in relation thereto, in concluding that the challenged provisions of the FTA are "mandatory" measures, requiring Economía to take certain actions in given circumstances.

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<sup>318</sup>Panel Report, para. 7.224. (footnote omitted) See also footnote 203 to para. 7.224, and para. 7.225.

<sup>319</sup>Mexico's appellant's submission, para. 217 ("*una interpretación equivocada e incompleta de los alegatos de México*").

<sup>320</sup>*Ibid.*, para. 220 ("*desestimó los argumentos de México en tal sentido y sin realizar prácticamente ningún análisis al respecto, formuló constataciones que no tienen base alguna*").

<sup>321</sup>The Appellate Body has consistently recognized the appreciation of the evidence as a matter falling within the discretion of the panel. (See, for example, Appellate Body Report, *Australia – Salmon*, para. 267; Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 177; Appellate Body Report, *EC – Sardines*, para. 300; and Appellate Body Report, *Japan – Apples*, paras. 232-238)

<sup>322</sup>Appellate Body Report, *Japan – Apples*, para. 127; Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 74.

<sup>323</sup>Appellate Body Report, *US – Steel Safeguards*, para. 498.

<sup>324</sup>Mexico raises a distinct Article 11 claim in the context of its challenge to the Panel's finding on Article 93V of the FTA. (See *infra*, Section VII.F)

B. *Article 53*

276. Article 53 of the FTA provides:

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

277. The Panel found as follows:

We consider that Article 6.1.1 of the AD Agreement clearly provides that any exporter or foreign producer receiving a questionnaire shall be given 30 days for reply. This 30-day rule does not make a distinction between those exporters that received a questionnaire at the time of initiation because they happened to be known to the applicant and were thus informed of the initiation, and those that make themselves known or the existence of which becomes known to the authorities and to which questionnaires are sent following initiation. In our view, by using the date of publication of the initiation notice as the starting point for the time period for questionnaire responses, Article 53 of the Act effectively prevents Mexico from giving each exporter or foreign producer receiving a questionnaire 30 days to respond. For that reason we consider Article 53 of the Act to be inconsistent with the unequivocal requirement in Article 6.1.1 of the AD Agreement to provide for 30 days to respond to questionnaires. (footnote omitted)

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... In addition, we consider that the requirement contained in Article 6.1.1 of the AD Agreement to provide for 30 days to respond to questionnaires is identical to that of Article 12.1.1 of the SCM Agreement. For the same reasons as set forth above, we therefore find that Article 53 of the Act is as such also inconsistent with Article 12.1.1 of the SCM Agreement.<sup>325</sup>

278. Mexico submits that the Panel's interpretation of Article 6.1.1 of the *Anti-Dumping Agreement* and Article 12.1.1 of the *SCM Agreement* is in error. Mexico contends that the Panel interpreted the obligation in those provisions too broadly, requiring that 30 days be provided to each and every exporter or foreign producer receiving a questionnaire.<sup>326</sup> According to Mexico, the "ordinary meaning" of these provisions indicates that the 30 days need be provided only to those exporters and foreign producers to whom the investigating authority sends a questionnaire<sup>327</sup>, which, in Mexico's view, are the exporters and foreign producers made known to the investigating authority

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<sup>325</sup>Panel Report, paras. 7.220 and 7.223.

<sup>326</sup>Mexico's appellant's submission, para. 232(a).

<sup>327</sup>*Ibid.*, para. 233(b) ("*sentido corriente*").

at the outset of an investigation.<sup>328</sup> Mexico suggests that such a reading is also logical because, if an investigating authority were to provide 30 days to every respondent that makes itself known to the agency, investigations could not be completed within the time-limits set out in the *Anti-Dumping Agreement* and the *SCM Agreement*.<sup>329</sup>

279. We begin our analysis with the texts of the relevant provisions of the covered agreements. Article 6.1.1 of the *Anti-Dumping Agreement* provides, in relevant part:

Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.<sup>15</sup>

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<sup>15</sup> As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

Similarly, the relevant part of Article 12.1.1 of the *SCM Agreement* provides:

Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply.<sup>40</sup>

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<sup>40</sup> As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representatives of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

280. These provisions explicitly require that an investigating authority provide at least 30 days for reply to *all* exporters and foreign producers receiving a questionnaire, to be counted, "[a]s a general rule", from the date of receipt of the questionnaire. Article 6.1 of the *Anti-Dumping Agreement* provides for *all* interested parties in an anti-dumping investigation to receive a questionnaire from the investigating authority.<sup>330</sup> As we observed above, this includes not only those referred to in the

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<sup>328</sup> Mexico's response to questioning at the oral hearing.

<sup>329</sup> Mexico's appellant's submission, para. 233(c) (referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 73).

<sup>330</sup> Article 6.1 of the *Anti-Dumping Agreement* provides:

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



petition for anti-dumping duties, as Mexico argues, but also those that made themselves known to the investigating authority—further to the issuance of a public notice of initiation or otherwise—and those that the investigating authority might identify as a result of some inquiry of its own.<sup>331</sup> We are of the view that the same understanding applies to Article 12.1 of the *SCM Agreement*.<sup>332</sup> It follows, therefore, that the period of at least 30 days to reply to questionnaires, provided for in Article 6.1.1 of the *Anti-Dumping Agreement* and Article 12.1.1 of the *SCM Agreement*, must be extended to all such exporters and foreign producers, whether known to the investigating authority at the outset of the investigation or at some point thereafter.

281. We are not persuaded by Mexico's argument that such an interpretation of Article 6.1.1 of the *Anti-Dumping Agreement* and Article 12.1.1 of the *SCM Agreement* is "illogical" on the ground that granting 30 days to exporters and foreign producers appearing after the notice of initiation would prevent the agency from complying with the time-limits for investigations set out in those Agreements.<sup>333</sup> Mexico has not shown how providing 30 days for reply to all exporters and foreign producers receiving a questionnaire would prevent an investigating authority from complying with the time-frames set out in those Agreements. Those Agreements contemplate, in the typical case, that exporters and foreign producers not identified in the petition will make themselves known to the investigating authority in the earlier stages of the proceeding—for example, shortly after publication of the notice of initiation—rather than at some later stage.

282. Having said that, we recognize that it is theoretically possible, as Mexico posits, that the notification of interest by an exporter or producer is at such a late stage in the proceeding that an investigating authority, seeking to comply with the time-limits provided for in the *Anti-Dumping Agreement* and the *SCM Agreement*<sup>334</sup>, could not reasonably take into account information submitted by that respondent. The Appellate Body has observed, in this respect, that the due process rights in Article 6 of the *Anti-Dumping Agreement*—which include the right to 30 days for reply to a questionnaire—"cannot extend indefinitely" but, instead, are limited by the investigating authority's need "to 'control the conduct' of its inquiry and to 'carry out the multiple steps' required to reach a

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<sup>331</sup>*Supra*, para. 250.

<sup>332</sup>Article 12.1 of the *SCM Agreement* provides:

Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

<sup>333</sup>Mexico's appellant's submission, para. 233(c) ("ilógico").

<sup>334</sup>Article 5.10 of the *Anti-Dumping Agreement*; Article 11.11 of the *SCM Agreement*.

timely completion" of the proceeding.<sup>335</sup> As such, the time-limits for completing an investigation serve to circumscribe the obligation in Article 6.1.1 to provide *all* interested parties 30 days to reply to a questionnaire. In our view, the same may be said with respect to the identical obligation in Article 12.1.1 of the *SCM Agreement*. Accordingly, we fail to see how the argument put forward by Mexico can constitute a legal basis supporting an interpretation of Article 6.1.1 of the *Anti-Dumping Agreement* and Article 12.1.1 of the *SCM Agreement* under which, contrary to the plain language of those provisions, only those exporters and foreign producers known at the time of initiation must be provided 30 days to reply to the questionnaire.

283. In the light of our understanding of the obligation in Article 6.1.1 of the *Anti-Dumping Agreement* and Article 12.1.1 of the *SCM Agreement*, we turn to the challenged provision of the FTA. The time period provided by Article 53 to reply to questionnaires<sup>336</sup>—28 working days<sup>337</sup>—is counted from "the publication of the initiating resolution". As a result, a certain group of exporters and foreign producers—for example, those to whom questionnaires are sent *following* the notice of initiation, including those that may make themselves known to the investigating authority in response to the public notice of initiation—cannot be provided 30 days to reply without having to request an extension from Economía.<sup>338</sup> We, therefore, *uphold* the Panel's findings, in paragraphs 7.223, 7.225, and 8.5(a) of the Panel Report, that Article 53 of the FTA is inconsistent, as such, with Article 6.1.1 of the *Anti-Dumping Agreement* and Article 12.1.1 of the *SCM Agreement*.

C. *Article 64*

284. Article 64 of the FTA provides:

The Ministry shall determine a countervailing duty<sup>[339]</sup> on the basis of the highest margin of price discrimination or subsidization obtained from the facts available, in the following cases:

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<sup>335</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 242 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 73, in turn quoting Panel Report, *US – Hot-Rolled Steel*, para. 7.54).

<sup>336</sup>It is not contested by Mexico that the submission of information covered by Article 53 includes questionnaire responses of exporters and foreign producers.

<sup>337</sup>Both parties agreed before the Panel that the 28 days specified in Article 53 refers to "working days" ("*días hábiles*") by virtue of Article 3 of the FTA. (Panel Report, para. 7.218 and footnote 201 thereto)

<sup>338</sup>Before the Panel, Mexico argued that, under the FTA, Economía may authorize extensions to meet the 30-day requirement. The Panel responded that "[e]xporters or foreign producers receiving questionnaires should not be forced to use the possibility of requesting extensions to obtain the time period of 30 days they are entitled to, without any showing of good cause." (Panel Report, para. 7.222) We agree with this response of the Panel and note that, in any event, Mexico does not press this argument on appeal.

<sup>339</sup>The Panel observed that "the term 'countervailing duty' referred to throughout the [FTA] is used to refer to both anti-dumping duties and countervailing duties." (Panel Report, footnote 206 to para. 7.236)

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

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

285. The United States claimed that Article 64 was inconsistent with Article 6.8 of the *Anti-Dumping Agreement*, paragraphs 1, 3, 5, and 7 of Annex II thereto, and Article 12.7 of the *SCM Agreement*. The Panel determined that Article 6.8 of the *Anti-Dumping Agreement*, and paragraphs 1, 3, 5, and 7 of Annex II thereto, condition an investigating authority's reliance on the facts available on its use of whatever information is provided by the interested parties, where possible, and on its exercise of "special circumspection" when relying on secondary source information.<sup>340</sup> Moreover, the Panel was of the view that the title of Annex II—"Best Information Available in Terms of Paragraph 8 of Article 6"—makes clear that in such instances, the agency is to rely on the "best" information available, which requires on the part of the agency "an inherently comparative evaluation of the 'evidence available'".<sup>341</sup> The Panel understood Article 64 to require Economía to assign the highest margin calculated from the facts available to producers that do not appear or that did not export the subject merchandise during the period of investigation, without consideration of whether other evidence on record might prove more accurate. On this basis, the Panel found Article 64 inconsistent with Article 6.8 of the *Anti-Dumping Agreement*, paragraphs 1, 3, 5, and 7 of Annex II thereto, and Article 12.7 of the *SCM Agreement*.<sup>342</sup>

286. Mexico submits that these provisions of the *Anti-Dumping Agreement* and the *SCM Agreement* permit the use of facts available with respect to respondents that "do[] not provide" the information requested by the investigating authority.<sup>343</sup> According to Mexico, such respondents include producers that do not appear in an investigation or that do not export the subject merchandise

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<sup>340</sup>Panel Report, para. 7.238.

<sup>341</sup>*Ibid.*, para. 7.166 (and later referred to in footnote 209 to para. 7.238).

<sup>342</sup>*Ibid.*, para. 7.242.

<sup>343</sup>Mexico's appellant's submission, para. 245(e) ("*no facilita la información requerida*").

during the period of investigation.<sup>344</sup> Mexico further observes that paragraph 7 of Annex II explicitly recognizes that respondents failing to provide necessary information may face higher margins than if they had cooperated with the investigation.<sup>345</sup> In Mexico's view, because Article 64 permits Economía to use facts available when calculating margins for respondents that do not provide necessary information, it is consistent with the relevant provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*.<sup>346</sup>

287. We begin by reviewing the relevant provisions of the *Anti-Dumping Agreement* governing the use of facts available. Article 6.8 provides that an investigating authority may base its determinations on the basis of facts available where, *inter alia*, a respondent "does not provide ... necessary information within a reasonable period", subject to the conditions set out in Annex II, entitled "Best Information Available in Terms of Paragraph 8 of Article 6". Among these conditions is the obligation in paragraph 1 of Annex II to inform the relevant respondent that, if it fails to provide the necessary information, the agency will resort to use of facts available. Paragraph 3 obliges an investigating authority to "take[] into account" the information supplied by a respondent, even if *other* information requested has not been provided by the respondent and will need to be supplemented by facts available. Similarly, paragraph 5 prevents an investigating authority from rejecting the information supplied by a respondent, even if incomplete, where the respondent "acted to the best of its ability". Finally, paragraph 7 mandates, where an investigating authority relies on data from a secondary source to fill in gaps resulting from a respondent's failure to provide requested information, that the investigating authority examine such data "with special circumspection."

288. From these obligations, we understand that an investigating authority in an anti-dumping investigation may rely on the facts available to calculate margins for a respondent that failed to provide some or all of the necessary information requested by the agency. In so doing, however, the agency must first have made the respondent aware that it may be subject to a margin calculated on the basis of the facts available because of the respondent's failure to provide necessary information. Furthermore, assuming a respondent acted to the best of its ability, an agency must generally use, in the first instance, the information the respondent did provide, if any.

289. With respect to the facts that an agency may use when faced with missing information, the agency's discretion is not unlimited. First, the facts to be employed are expected to be the "best information available". In this respect, we agree with the Panel's explanation:

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<sup>344</sup>Mexico's appellant's submission, para. 245(e).

<sup>345</sup>*Ibid.*, para. 245(f).

<sup>346</sup>*Ibid.*, para. 245(c)-(e).

The use of the term "*best* information" means that information has to be not simply correct or useful *per se*, but the most fitting or "most appropriate" information available in the case at hand. Determining that something is "best" inevitably requires, in our view, an evaluative, comparative assessment as the term "best" can only be properly applied where an unambiguously superlative status obtains. It means that, for the conditions of Article 6.8 of the AD Agreement and Annex II to be complied with, there can be no better information available to be used in the particular circumstances. Clearly, an investigating authority can only be in a position to make that judgement correctly if it has made an inherently comparative evaluation of the "evidence available".<sup>347</sup> (original emphasis; footnote omitted)

Secondly, when culling necessary information from secondary sources, the agency should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties. Such an active approach is compelled by the obligation to treat data obtained from secondary sources "with special circumspection".

290. We turn now to Article 12.7 of the *SCM Agreement*. The Panel based its finding of inconsistency with that provision on the reasoning it had developed with respect to the obligations in Article 6.8 of the *Anti-Dumping Agreement* and paragraphs 1, 3, 5, and 7 of Annex II thereto.<sup>348</sup> We observe, however, that there are important textual differences between the relevant provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*—namely, the absence in the *SCM Agreement* of an equivalent to Annex II to the *Anti-Dumping Agreement*.

291. Article 12.7 of the *SCM Agreement* provides:

In cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

Like Article 6.8 of the *Anti-Dumping Agreement*, Article 12.7 of the *SCM Agreement* permits an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to subsidization (or dumping) and injury. As in the *Anti-Dumping Agreement*, Article 12.7 prescribes the information that may be used for such purposes as the "facts available". Unlike the *Anti-Dumping Agreement*, the *SCM Agreement* does not expressly set out in an annex the conditions for determining precisely which "facts" might be "available" for an agency to

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<sup>347</sup>Panel Report, para. 7.166.

<sup>348</sup>*Ibid.*, para. 7.242.

use when a respondent fails to provide necessary information. This does not mean, however, that no such conditions exist in the *SCM Agreement*.

292. Turning to the context of Article 12.7, we are of the view that, like Article 6 of the *Anti-Dumping Agreement*, Article 12 of the *SCM Agreement* as a whole "set[s] out evidentiary rules that apply *throughout* the course of the ... investigation, and provide[s] also for due process rights that are enjoyed by 'interested parties' *throughout* ... an investigation".<sup>349</sup> In this respect, Article 12.1 provides:

Interested Members and all interested parties in a countervailing duty investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

This due process obligation—that an interested party be permitted to present all the evidence it considers relevant—concomitantly requires the investigating authority, where appropriate, to take into account the information submitted by an interested party.<sup>350</sup>

293. Moreover, we note that Article 12.7 is intended to ensure that the failure of an interested party to provide necessary information does not hinder an agency's investigation. Thus, the provision permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization or injury determination.

294. In view of the above, we understand that recourse to facts available does not permit an investigating authority to use any information in whatever way it chooses. First, such recourse is not a licence to rely on only part of the evidence provided. To the extent possible, an investigating authority using the "facts available" in a countervailing duty investigation must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested of that party. Secondly, the "facts available" to the agency are generally limited to those that may reasonably replace the information that an interested party failed to provide. In certain circumstances, this may include information from secondary sources.

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<sup>349</sup>Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 138 (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 - India)*, para. 136). (emphasis added in *EC – Tube or Pipe Fittings*)

<sup>350</sup>We note that the Appellate Body has found that the obligation in Article 6.1 of the *Anti-Dumping Agreement*—the counterpart to Article 12.1 of the *SCM Agreement*—is not satisfied where the investigating authority "disregard[s]" information submitted by an interested party. (Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 246)

295. This understanding of the limitations on an investigating authority's use of "facts available" in countervailing duty investigations is further supported by the similar, limited recourse to "facts available" permitted under Annex II to the *Anti-Dumping Agreement*. Indeed, in our view, it would be anomalous if Article 12.7 of the *SCM Agreement* were to permit the use of "facts available" in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations.

296. We now consider the consistency of the challenged provision of the FTA with the above provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*. The Panel understood Article 64 to mandate Economía to calculate the highest possible margin on the basis of the facts available and apply that margin to, *inter alia*, foreign producers that do not appear in the investigation and to those that did not export the subject merchandise during the period of investigation.<sup>351</sup> In other words, Article 64 appears to require the agency to apply indiscriminately such a margin—the highest that could be calculated on the basis of the facts available—to certain foreign producers or exporters. The provision so requires even in instances—such as the case of foreign producers that do not appear in an investigation—where the producer is not sent a questionnaire and thus may not be informed of the consequences for its failure to provide requested information.

297. Article 64 also does not on its face permit the agency to use *any* information that might be provided by a foreign producer or exporter, even if incomplete, where the use of such information would result in a margin lower than the highest facts available margin. Nor does it allow the agency to engage in the "evaluative, comparative assessment"<sup>352</sup> necessary in order to determine which facts are "best" to fill in the missing information. Furthermore, Article 64 requires Economía to use those facts necessary to arrive at the highest margin that can be calculated, even if those facts, although "substantiated", might be deemed unreliable by the agency after exercising "special circumspection". Thus, in all situations of incomplete information—including those of producers not appearing in the investigation and producers not exporting the subject merchandise during the period of investigation<sup>353</sup>—we read Article 64 as preventing Economía from engaging in the reasoned and selective use of the facts available directed by Article 6.8 of the *Anti-Dumping Agreement*, Annex II thereto, and Article 12.7 of the *SCM Agreement*.

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<sup>351</sup>Panel Report, paras. 7.237-7.238.

<sup>352</sup>See *ibid.*, para. 7.166 (quoted *supra*, at para. 289).

<sup>353</sup>Like the Panel, we assume *arguendo* that Article 6.8 and Annex II apply to the calculation of individual margins for non-shipping exporters, that is, those that did not export the subject merchandise during the period of investigation. (See *Ibid.*, para. 7.241 and footnote 158 to para. 7.163)

298. In the light of the above, we *uphold* the Panel's findings, in paragraphs 7.242 and 8.5(b) of the Panel Report, that Article 64 of the FTA is inconsistent, as such, with Article 6.8 of the *Anti-Dumping Agreement*, paragraphs 1, 3, 5, and 7 of Annex II thereto, and Article 12.7 of the *SCM Agreement*.

D. *Article 68*

299. The Panel examined separately two different aspects of the United States' challenge to Article 68 of the FTA: (i) relating to administrative reviews for exporters found in the investigation to have *de minimis* margins; and (ii) relating to the "representativeness" requirement for respondents seeking an administrative review. We analyze these challenges in turn below.

1. Exporters with *De Minimis* Margins

300. Article 68 of the FTA provides, with respect to exporters with *de minimis* margins:

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

301. The United States argued before the Panel that Article 68 is inconsistent with Article 5.8 of the *Anti-Dumping Agreement* and Article 11.9 of the *SCM Agreement*. The Panel confirmed its finding, made in the context of evaluating the United States' "as applied" claims<sup>354</sup>, that Article 5.8 of the *Anti-Dumping Agreement* requires an investigating authority to exclude, from the definitive anti-dumping measure, exporters found not to have been dumping above *de minimis* levels. The Panel further observed that the "logical consequence" of such exclusion is that those exporters may not be subjected to administrative reviews or changed circumstances reviews.<sup>355</sup> As Article 68 requires that such exporters be subject to such reviews upon request of an interested party, the Panel found Article 68 to be inconsistent with Article 5.8 of the *Anti-Dumping Agreement* and, *mutatis mutandis*, Article 11.9 of the *SCM Agreement*.<sup>356</sup>

302. Mexico alleges on appeal that the Panel erred in interpreting Article 5.8 of the *Anti-Dumping Agreement* and Article 11.9 of the *SCM Agreement*. According to Mexico, by finding that Article 68—which deals exclusively with reviews—is inconsistent with these provisions, the Panel failed to recognize that the obligations contained in these provisions are limited to original

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<sup>354</sup>See Panel Report, para. 7.166.

<sup>355</sup>*Ibid.*, para. 7.251.

<sup>356</sup>The Panel provided no further reasoning as to why its analysis under Article 5.8 of the *Anti-Dumping Agreement* applies equally to Article 11.9 of the *SCM Agreement*.



investigations.<sup>357</sup> Mexico contends that Article 5.8 and Article 11.9 do not apply to events subsequent to the original investigation, including reviews.<sup>358</sup> Even if those provisions did apply, Mexico argues, they require only that the investigating authority not *levy duties* on the relevant respondents; these provisions do not address the question whether those respondents may be included in the *definitive measure* at the end of an investigation.<sup>359</sup> Thus, according to Mexico, because Article 68 does not require that duties be imposed on such respondents, this basis for the Panel's finding of inconsistency is erroneous.

303. We begin with the relevant provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*. Article 5 of the *Anti-Dumping Agreement* is titled "Initiation and Subsequent Investigation". Paragraph 8 of Article 5 provides:

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

304. Article 11 of the *SCM Agreement* is also titled "Initiation and Subsequent Investigation". Paragraph 9 of Article 11 provides:

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

305. We have already indicated that the Panel was correct in finding that Article 5.8 of the *Anti-Dumping Agreement* requires an investigating authority to terminate the investigation "in respect of" an exporter found not to have a margin above *de minimis*, and that the exporter consequently must be excluded from the definitive anti-dumping measure.<sup>360</sup> An investigating authority does not, of course, impose duties—including duties at zero per cent—on exporters excluded from the definitive anti-

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<sup>357</sup>Mexico's appellant's submission, para. 259(b).

<sup>358</sup>*Ibid.*, para. 259(c).

<sup>359</sup>*Ibid.*, para. 259(d)-(g). Mexico explains that inclusion of an exporter in the measure does not necessarily mean a duty will be levied on that particular respondent; this is because such a respondent may be assigned a duty of zero.

<sup>360</sup>*Supra*, paras. 216-218.

dumping measure. We therefore agree with the Panel that the "logical consequence"<sup>361</sup> of this approach is that such exporters cannot be subject to administrative and changed circumstances reviews, because such reviews examine, respectively, the "duty paid"<sup>362</sup> and "the need for the *continued imposition* of the duty".<sup>363</sup> Were an investigating authority to undertake a review of exporters that were excluded from the anti-dumping measure by virtue of their *de minimis* margins, those exporters effectively would be made subject to the anti-dumping measure, inconsistent with Article 5.8. The same may be said with respect to Article 11.9 of the *SCM Agreement*.

306. We now consider whether Article 68 of the FTA is consistent with these treaty provisions. The Panel found that Article 68 requires Economía to "review ... producers for which during the original investigation it was determined that they had not been engaged in dumping practices or had not received any subsidies."<sup>364</sup> As we have stated, such exporters were to have been excluded from the anti-dumping measure, by virtue of Article 5.8 of the *Anti-Dumping Agreement*, and from the countervailing duty measure, by virtue of Article 11.9 of the *SCM Agreement*. Excluding these exporters from anti-dumping or countervailing duty measures necessarily implies that they must also be excluded from administrative and changed circumstances reviews. By requiring Economía to conduct a review for exporters with no margins and, by extension, *de minimis* margins, Article 68 is inconsistent with Article 5.8 of the *Anti-Dumping Agreement* and Article 11.9 of the *SCM Agreement*.

307. We therefore *uphold* the Panel's findings, in paragraphs 7.251 and 8.5(c) of the Panel Report, that Article 68 of the FTA is inconsistent, as such, with Article 5.8 of the *Anti-Dumping Agreement* and Article 11.9 of the *SCM Agreement*.

## 2. The "Representativeness" Requirement

308. The Panel also examined the United States' challenge to another element of Article 68, which provides:

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

The Panel understood this aspect of Article 68 to require respondents, in order to obtain an administrative or changed circumstances review, to show that the volume of their exports to Mexico

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<sup>361</sup>Panel Report, para. 7.251.

<sup>362</sup>Article 9.3.2 of the *Anti-Dumping Agreement*. (emphasis added)

<sup>363</sup>Article 11.2 of the *Anti-Dumping Agreement*; Article 21.2 of the *SCM Agreement*. (emphasis added)

<sup>364</sup>Panel Report, para. 7.251.

during the period of review was "representative".<sup>365</sup> The Panel noted that the only condition placed on requests for administrative reviews by Article 9.3.2 of the *Anti-Dumping Agreement*, was that a respondent's request be supported by "evidence", which the Panel understood to refer to evidence necessary to permit the investigating authority to calculate a dumping margin. The Panel further stated that, as Article 9.3.2 provides for administrative reviews to determine the duties paid in excess of the dumping margin be refunded, the volume of exports is "completely irrelevant".<sup>366</sup> The Panel therefore concluded that Article 9.3 did not contemplate a prerequisite of showing a "representative" volume of export sales in order to obtain an administrative review.<sup>367</sup>

309. With respect to Article 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*, the Panel similarly observed that the only requirements to be satisfied by a respondent requesting a changed circumstances review under these provisions were that a reasonable period of time had elapsed since the imposition of the duty, and that the request be substantiated by "positive information".<sup>368</sup> The Panel was also of the view that this "positive information" related to the continued need for the duty and the likelihood of continuation or recurrence of injury, but did not necessarily include the volume of exports during the period of review.<sup>369</sup> The Panel thus concluded that an investigating authority must conduct a changed circumstances review whenever the two requirements stated in the provisions had been satisfied, regardless of the "representative" nature of the respondent's exports.<sup>370</sup>

310. Mexico contends that the Panel erred in its interpretation of Articles 9.3 and 11.2 of the *Anti-Dumping Agreement*, and Article 21.2 of the *SCM Agreement*. According to Mexico, the "only obligation" in those provisions is that the investigating authority *initiate* a review<sup>371</sup>; beyond initiation, however, the provisions "do[] not contain any guidelines on how [reviews] should be conducted or their outcome in the presence or absence of a particular element".<sup>372</sup> In Mexico's view, Article 68 does not preclude the *initiation* of a review, but requires only a showing of "representative" export volumes in order for a respondent to receive a re-calculated margin. Viewed

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<sup>365</sup>Panel Report, para. 7.253.

<sup>366</sup>*Ibid.*, para. 7.257.

<sup>367</sup>*Ibid.*

<sup>368</sup>*Ibid.*, para. 7.258 (quoting Article 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*).

<sup>369</sup>*Ibid.*, paras. 7.258-7.259.

<sup>370</sup>*Ibid.*, para. 7.258.

<sup>371</sup>Mexico's appellant's submission, para. 264 ("*la única obligación*"). (underlining omitted)

<sup>372</sup>*Ibid.*, para. 264 ("*No hay en su texto directriz alguna al respecto de cómo [los exámenes] deben llevarse a cabo ni del resultado que debe haber en presencia o ausencia de un determinado elemento*"). (underlining omitted)

in this light, Mexico submits, Article 68 is not inconsistent with the obligations in Articles 9.3 and 11.2 of the *Anti-Dumping Agreement*, or Article 21.2 of the *SCM Agreement*.

311. We begin our analysis by reviewing the WTO provisions at issue. Article 9.3 of the *Anti-Dumping Agreement* provides:

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

The sub-paragraphs of Article 9.3—including, of particular relevance here, sub-paragraphs 1 and 2—specify in greater detail how investigating authorities are to comply with this more general obligation, namely, by providing for refunds to respondents whose duties have exceeded their dumping margins. Article 9.3.1 deals with such refunds for Members employing a *retrospective* system for the assessment and collection of anti-dumping duties, whereas Article 9.3.2 deals with those Members, such as Mexico, employing a *prospective* system.

312. Article 9.3.2 provides:

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

We note, first, that this provision *mandates* a refund where an importer has paid duties in excess of the margin of dumping and the importer requests a refund. The refund of duties is conditioned solely on (i) the request being made by an importer of the product subject to the anti-dumping duty; and (ii) the request having been "duly supported by evidence". Other than these requirements, we see no basis for an investigating authority to decline to affect the mandated refund. Indeed, failure to do so would result in the importer having paid a duty in excess of the dumping margin, contrary to Article 9.3.

313. Article 11.2 of the *Anti-Dumping Agreement* governs reviews other than duty assessment reviews under Article 9.3, including changed circumstances reviews. Article 11.2 provides:

The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.<sup>21</sup> Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a result of the review under this paragraph, the authorities determine that the anti-dumping duty is no longer warranted, it shall be terminated immediately.

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<sup>21</sup> A determination of final liability for payment of anti-dumping duties, as provided for in paragraph 3 of Article 9, does not by itself constitute a review within the meaning of this Article.

314. Article 11.2 *requires* an agency to conduct a review, *inter alia*, at the request of an interested party, and to terminate the anti-dumping duty where the agency determines that the duty "is no longer warranted". The interested party has the right to request the authority to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. Article 11.2 conditions this obligation on (i) the passage of a reasonable period of time since imposition of the definitive duty; and (ii) the submission by the interested party of "positive information" substantiating the need for a review. As the Panel correctly observed, this latter condition may be satisfied in a particular case with information not related to export volumes.<sup>373</sup> Where the conditions in Article 11.2 have been met, the plain words of the provision make it clear that the agency has no discretion to refuse to complete a review, including consideration of whether the duty should be terminated in the light of the results of the review. We see no reason why the same understanding does not apply in the context of

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<sup>373</sup>Panel Report, para. 7.259.

countervailing duty investigations, in particular given the identical language in Article 21.2 of the *SCM Agreement*.<sup>374</sup>

315. Although, as Mexico emphasizes, none of the above provisions contains an express obligation *not* to condition a review on a showing of "representative" volume of exports<sup>375</sup>, this does not mean that those provisions permit such a condition. Rather, we consider that they require an investigating authority to undertake duty assessment reviews and changed circumstances reviews once the conditions set out in those provisions have been satisfied. In our view, these conditions are exhaustive; thus, if an agency seeks to impose additional conditions on a respondent's right to a review, this would be inconsistent with those provisions. This includes a showing of a "representative" volume of export sales, which Article 68 of the FTA imposes as an absolute requirement in every case before affording the respondent the right to a review or refund.<sup>376</sup>

316. We, therefore, *uphold* the Panel's findings, in paragraphs 7.260 and 8.5(c) of the Panel Report, that Article 68 of the FTA is inconsistent, as such, with Articles 9.3 and 11.2 of the *Anti-Dumping Agreement*, and Article 21.2 of the *SCM Agreement*.

E. *Article 89D*

317. Article 89D of the FTA provides:

Producers of goods subject to a final countervailing duty<sup>[377]</sup> who exported no such goods during the period under investigation in the proceedings that gave rise to such duty may request the Ministry to initiate a procedure for new exporters with a view to assessing individual margins of price discrimination, provided that:

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<sup>374</sup>Article 21.2 of the *SCM Agreement* provides:

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

<sup>375</sup>Mexico's appellant's submission, para. 264.

<sup>376</sup>See Panel Report, para. 7.259 ("Article 68 of the [FTA] requires *as a rule* that *each time* an interested party is unable to show that volume of exports during the review period was representative, such a review is to be denied." (original emphasis)).

<sup>377</sup>See *supra*, footnote 339.

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

318. Before the Panel, the United States asserted that Article 89D requires a producer to demonstrate that the volume of its exports during the period of review was "representative", in order to be entitled to an expedited review. According to the United States, this requirement constitutes a restriction on a respondent's right to an expedited review that is not permitted by Article 9.5 of the *Anti-Dumping Agreement* or Article 19.3 of the *SCM Agreement*.<sup>378</sup>

319. The Panel found that Article 9.5 of the *Anti-Dumping Agreement* requires an investigating authority to conduct an expedited review for a new shipper, provided that (i) the requesting exporter had not exported the subject merchandise to the importing Member during the period of investigation; and that (ii) the exporter can show that it is not related to an exporter or foreign producer already subject to the anti-dumping duties.<sup>379</sup> The Panel similarly found that Article 19.3 of the *SCM Agreement* requires an investigating authority to conduct an expedited review at the request of an exporter, provided that the exporter (i) is subject to a definitive duty; and (ii) was not examined during the original investigation for reasons other than a refusal to cooperate.<sup>380</sup> According to the Panel, Article 89D requires Economía to reject a request for an expedited review, not only where the above conditions have not been met, but also where the exporter fails to establish that the volume of exports during the period of review was "representative". As this latter ground for denying requests for expedited reviews was not provided for in either Agreement, the Panel found Article 89D inconsistent with Article 9.5 of the *Anti-Dumping Agreement* and Article 19.3 of the *SCM Agreement*.<sup>381</sup>

320. Mexico argues that both provisions are "silent" on the question whether an investigating authority may consider the "representativeness" of the volume of exports as part of its decision to grant an expedited review.<sup>382</sup> In Mexico's submission, this "silence" reflects the "deliberate intention" of negotiators to allow investigating authorities to implement these reviews in a manner best suited to the structure of their respective anti-dumping and countervailing duty systems.<sup>383</sup> Mexico contends

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<sup>378</sup>Panel Report, para. 7.261.

<sup>379</sup>*Ibid.*, para. 7.266.

<sup>380</sup>*Ibid.*, para. 7.268.

<sup>381</sup>*Ibid.*, paras. 7.266 and 7.268.

<sup>382</sup>Mexico's appellant's submission, para. 273 ("*guarda[n] silencio*").

<sup>383</sup>*Ibid.* ("*la intención deliberada*").

that the "silence" of these provisions must therefore be given meaning, which the Panel failed to do by finding therein an obligation that does not exist and, consequently, finding Article 89D inconsistent with this purported obligation.

321. We review, first, the text of the relevant WTO provisions. Article 9.5 of the *Anti-Dumping Agreement* provides:

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

We agree with the Panel that Article 9.5 *requires* that an investigating authority carry out an expedited review of a new shipper for an exporter that (i) did not export the subject merchandise to the importing Member during the period of investigation, and (ii) demonstrated that it was not related to a foreign producer or exporter already subject to anti-dumping duties.<sup>384</sup>

322. Article 19.3 of the *SCM Agreement* provides:

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

We also agree with the Panel that Article 19.3 *requires* that an investigating authority carry out an expedited review for an exporter that (i) is subject to a definitive countervailing duty; and (ii) was not examined during the original investigation for reasons other than a refusal to cooperate.<sup>385</sup>

323. We examine now the consistency of Article 89D with the above treaty provisions. The Panel found that Article 89D permits Economía to conduct an expedited review provided that, *inter alia*, the respondent make a showing of a "representative" volume of exports to Mexico during the period of

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<sup>384</sup>Panel Report, para. 7.266.

<sup>385</sup>*Ibid.*, para. 7.268.



review.<sup>386</sup> By so requiring, Article 89D, like Article 68 of the FTA<sup>387</sup>, imposes a condition not provided for in the relevant provisions of the Agreements. As such, Article 89D prevents Economía from granting a review in instances where the conditions set out in the relevant WTO provisions have, in fact, been met by a respondent.

324. For these reasons, we *uphold* the Panel's findings, in paragraphs 7.269 and 8.5(d) of the Panel Report, that Article 89D of the FTA is inconsistent, as such, with Article 9.5 of the *Anti-Dumping Agreement* and Article 19.3 of the *SCM Agreement*.

F. *Article 93V*

325. In its first written submission to the Panel, the United States quoted Article 93V of the FTA, in English, as follows:

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

\* \* \*

- (V) Importation, once the investigation is under way, of identical or like goods in significant quantities, as compared to total imports and domestic production, within a relatively short period, when in the light of the timing and the volume of the imports and other circumstances such imports are considered likely to undermine the remedial effect of the countervailing duty: by a fine equivalent to the amount resulting from the application of the final countervailing duty to the imports entered for up to five months following the date of initiation of the investigation. This penalty shall only be applied once the Ministry has issued the resolution determining the final countervailing duties . ...<sup>388</sup>

326. The United States alleged before the Panel that, pursuant to Article 93V, a "clear, direct and unavoidable connection" exists between, on the one hand, the constituent elements of dumping or subsidization and, on the other hand, the fines required to be imposed by Economía.<sup>389</sup> As a result, the United States argued, Article 93V constitutes a "specific action against"<sup>390</sup> dumping or

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<sup>386</sup>Panel Report, para. 7.266.

<sup>387</sup>See *supra*, para. 315.

<sup>388</sup>United States' first written submission to the Panel, para. 268 (quoting "Notification of Laws and Regulations under Article 18.5 of the Agreement: Communication from Mexico", G/ADP/N/1/MEX/1, 18 May 1995, p. 12; and "Notification of Laws and Regulations under Article 18.5 and 32.6 of the Relevant Agreements: Communication from Mexico", G/ADP/N/1/MEX/1/Supp.2, 24 April 2003, p. 15).

<sup>389</sup>Panel Report, para. 7.270 (quoting United States' first written submission to the Panel, para. 271, in turn quoting Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 242, in turn quoting Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.21).

<sup>390</sup>Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*.

subsidization and, therefore, is inconsistent within Article 18.1 of the *Anti-Dumping Agreement* and Article 32.1 of the *SCM Agreement*. Mexico contended that Article 93V did not *require* Economía to impose certain fines but, instead, only *authorized* the agency to do so. Therefore, in Mexico's view, this provision was not inconsistent with the WTO Agreements.<sup>391</sup>

327. The Panel determined that Article 93V requires Economía to impose fines on certain importers "only following a determination that the constituent elements of dumping or subsidization are present".<sup>392</sup> The Panel further found that Article 93V "threaten[ed]" to impose fines on any firm importing the product subject to an anti-dumping investigation.<sup>393</sup> On these bases, the Panel concluded that Article 93V provides for a "specific action against" dumping or subsidization that is not provided for in the *Anti-Dumping Agreement* or the *SCM Agreement*.<sup>394</sup> In response to Mexico's assertion that Article 93V did not *require* Economía to impose fines, the Panel stated:

We do not consider this argument to be convincing. When a law like the Act provides that it "shall be the responsibility of the Ministry to punish the following infringements",<sup>229</sup> it does more than just divid[e] competences among the government, but rather stipulates that fines are to be imposed in case the conditions of Article 93V of the Act are met and that it is up to the Ministry of Economy responsible also for the conduct of anti-dumping and countervailing duty investigations to impose such fines.<sup>395</sup>

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<sup>229</sup> The Spanish original of the law reads: "*Corresponde a la Secretaría sancionar las siguientes infracciones: ...*".

328. On appeal, Mexico argues that the Panel should have based its interpretation of Article 93V on the *Spanish* text of the provision, instead of relying on an inaccurate *English* translation.<sup>396</sup> Mexico contests, in particular, the opening phrase of the English translation, which provides that "[i]t shall be the responsibility" of Economía to impose fines in certain circumstances. In Mexico's view, the Panel, based on this understanding of Article 93V, erroneously concluded that Article 93V is a "mandatory" provision, requiring Economía to impose fines under certain conditions.<sup>397</sup> Referring to the same phrase in Spanish—" [*c*]orresponde a la Secretaría sancionar las siguientes infracciones"—

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<sup>391</sup> Mexico's first written submission to the Panel, paras. 283-285.

<sup>392</sup> Panel Report, para. 7.278.

<sup>393</sup> *Ibid.*

<sup>394</sup> *Ibid.*

<sup>395</sup> *Ibid.*, para. 7.279.

<sup>396</sup> Mexico's appellant's submission, paras. 279 and 282.

<sup>397</sup> *Ibid.*, para. 283(d) ("*la fracción V del artículo 93 de la LCE [\"FTA\"] es obligatoria*").

Mexico submits that the term "*corresponde*" is better translated as "to pertain" or "to belong".<sup>398</sup> According to Mexico, the Panel's failure to interpret Article 93V in such manner, and thereby to find it discretionary, constitutes error under Article 11 of the DSU. Had the Panel properly recognized the discretionary character of Article 93V, Mexico argues, the Panel could not have found that provision inconsistent with Mexico's obligations under the WTO Agreements.<sup>399</sup>

329. We note, at the outset, that the claim of error on appeal is under Article 11 of the DSU. Article 11 of the DSU requires panels, *inter alia*, to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case ". Thus, the question before us is *not* necessarily whether we agree with the Panel's interpretation of Article 93V, but, rather, whether the Panel committed an error, rising to the level of a failure to make an objective assessment, when it came to its conclusion on the meaning of that provision.

330. Turning to the circumstances of this case, we observe that Article 93V was notified by Mexico to the WTO Anti-Dumping Committee in 1995 and in 2003, as required by Article 18.5 of the *Anti-Dumping Agreement*.<sup>400</sup> The English translation of Article 93V that was provided to the Panel by the United States was the official WTO translation of these notifications.<sup>401</sup> Although Mexico argued in its submissions to the Panel that Article 93V was not mandatory—based in part on the opening language of Article 93<sup>402</sup>—Mexico never questioned the use of these official WTO translations as the basis for the Panel's examination.<sup>403</sup> We do not see how the Panel can be said to have failed to make an objective assessment when it relied on an official WTO English translation of Mexico's law, to

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<sup>398</sup>Mexico's appellant's submission, para. 282 ("*el significado de 'corresponde' es 'tocar, pertenecer'*").

<sup>399</sup>Mexico's opening statement at the oral hearing.

<sup>400</sup>"Notification of Laws and Regulations under Article 18.5 of the Agreement: Communication from Mexico", G/ADP/N/1/MEX/1, 18 May 1995, p. 12; "Notification of Laws and Regulations under Article 18.5 and 32.6 of the Relevant Agreements: Communication from Mexico", G/ADP/N/1/MEX/1/Supp.2, 24 April 2003, p. 15. Article 18.5 of the *Anti-Dumping Agreement* provides:

Each Member shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

<sup>401</sup>See *supra*, para. 325. The United States also provided the original Spanish text of this provision. (United States' first written submission to the Panel, footnote 207 to para. 268)

<sup>402</sup>Mexico's first written submission to the Panel, paras. 283-284; Mexico's second written submission to the Panel, paras. 236-237; Mexico's opening statement at the first meeting with the Panel, paras. 88-90; Mexico's opening statement at the second meeting with the Panel, para. 112.

<sup>403</sup>Mexico's response to questioning at the oral hearing.

which Mexico itself raised no objection. Therefore, we *find* that, in its interpretation of Article 93V of the FTA, the Panel *did not fail* to fulfil its obligations under Article 11 of the DSU.<sup>404</sup>

G. *Articles 68 and 97*

331. Mexico raises two challenges to the Panel's analysis of the United States' claims against Articles 68 and 97 of the FTA: (i) Mexico alleges that the United States failed to make a *prima facie* case that these provisions are inconsistent with Articles 9.3 and 11.2 of the *Anti-Dumping Agreement*, and Article 21.2 of the *SCM Agreement*; and (ii) Mexico contests the Panel's interpretation of Articles 9.3 and 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*, in particular, the Panel's understanding that a product is subject to a definitive anti-dumping duty once the duty is imposed following the investigation, rather than once judicial proceedings in relation to the anti-dumping order have concluded. We address these two challenges below in turn.

1. *Prima Facie Case*

332. Article 68 of the FTA provides:

Final countervailing duties<sup>[405]</sup> shall be reviewed annually at the request of a party ... as shall imports from producers for whom no positive margin of price discrimination or subsidization was determined in the investigation....

Article 97 of the FTA provides:

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

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

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<sup>404</sup>Article 93V, on its face, seeks to address the possible dumping of subject merchandise taking place during the anti-dumping or countervailing duty investigation. We note that, although the Panel found Article 93V inconsistent with provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*, both Agreements provide a means for investigating authorities to address this concern, namely, through the imposition of provisional measures and duties on products entered prior to the date of application of provisional measures. (See Articles 7 and 10 of the *Anti-Dumping Agreement* and Articles 17 and 20 of the *SCM Agreement*)

<sup>405</sup>*Supra*, footnote 339.

333. Mexico contends that Article 68 of the FTA "bears no relation whatsoever to [the] alleged prohibition" on the conduct of reviews while judicial proceedings are ongoing.<sup>406</sup> Mexico similarly asserts that Article 97 of the FTA contains "nothing ... establishing that the Mexican authority is prevented or obliged to refrain from undertaking reviews or examining anti-dumping or countervailing duties."<sup>407</sup> Because neither provision results in the alleged prohibition, Mexico argues, the United States did not establish a *prima facie* case of inconsistency with Articles 9.3 and 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*.<sup>408</sup>

334. We note, at the outset, that the United States submits that this aspect of Mexico's appeal should fail because the Panel found "*as a matter of fact*" that Articles 68 and 97 "work together to preclude reviews while judicial proceedings are ongoing", and that, therefore, Mexico's challenge to that interpretation should have been brought under Article 11 of the DSU.<sup>409</sup> However, Mexico is not challenging simply the Panel's *interpretation* of these provisions of the FTA; rather, Mexico contends that these provisions, on their face, are insufficient to establish a *prima facie* case of inconsistency with the relevant provisions of the *Anti-Dumping Agreement* and the *SCM Agreement*, and that, therefore, the Panel should not have ruled on these claims. An appeal based on a complaining Member's failure to make out a *prima facie* case need not be raised exclusively under Article 11 of the DSU.<sup>410</sup> We therefore decline the United States' request to reject this aspect of Mexico's appeal for failure to bring the claim of error under Article 11 of the DSU.

335. Turning to the merits of Mexico's *prima facie* challenge, we recall that the Appellate Body considered a similar challenge in *US – Gambling*, where the responding Member argued on appeal that the complaining Member had failed to make a *prima facie* case of inconsistency with respect to particular measures identified in the panel request. There, the Appellate Body observed that:

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<sup>406</sup>Mexico's appellant's submission, para. 293 ("*no tiene relación alguna con [la] supuesta prohibición*"). (emphasis omitted)

<sup>407</sup>*Ibid.*, para. 297 ("*la transcripción, en ninguna parte del artículo se establece que la autoridad mexicana está impedida u obligada a no realizar revisiones o exámenes de los derechos antidumping o compensatorios*").

<sup>408</sup>*Ibid.*, paras. 294 and 297.

<sup>409</sup>United States' appellee's submission, para. 171. (original emphasis)

<sup>410</sup>See, for example, Appellate Body Report, *US – Gambling*, paras. 133-157; and Appellate Body Report, *Japan – Agricultural Products II*, paras. 118-131.

The evidence and arguments underlying a *prima facie* case ... must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.<sup>411</sup>

336. The United States submitted the text of Articles 68 and 97, describing their meaning as follows:

Similarly, Article 68 of the Foreign Trade Act only allows for the review of "final" duties, and under Article 97 of the Foreign Trade Act, only determinations issued at the end of a judicial proceeding (including a "binational panel" review) can be considered "final." The preclusion of reviews applies not only to the exporters or producers that are plaintiffs in the judicial action, but also to all other producers and exporters that are subject to the antidumping or countervailing duties (which, given Mexican practice, means every producer or exporter of the product in the country subject to the order). On this basis, Mexico has denied several requests by U.S. producers and exporters to obtain reviews of the duties applied to their exports.<sup>412</sup>

The United States also submitted a letter from the investigating authority to a United States exporter, which denied the exporter a review on the basis of, *inter alia*, Articles 68 and 97.<sup>413</sup>

337. With respect to the relevant WTO provisions and the allegations of inconsistency, the United States argued:

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<sup>411</sup>Appellate Body Report, *US – Gambling*, para. 141.

<sup>412</sup>United States' first written submission to the Panel, para. 286. (footnote omitted)

<sup>413</sup>The Panel provided an English translation of the relevant parts of the letter from the Mexican investigating authority (Exhibit US-20 submitted by the United States to the Panel) as follows:

*[I]n conformity with Articles 68 of the FTA and 99, 100 and 101 of the Regulation, in order to be able to request a review it is required that the determination subject of the review be definitive, ...*

In this particular case, the final determination on bovine meat and edible offals, published in the Official Journal of 28 April 2000, is not of a definitive nature, as will be considered as final only the determination of the Secretaria which results from the decision taken by the mechanisms of alternative dispute resolution, *in conformity with Article 97 II of the FTA*.

(Panel Report, para. 7.289 (emphasis added))

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

... Article 9.3.2 of the AD Agreement states that Members "shall" provide for "a prompt refund, upon request, of any duty paid in excess of the margin of dumping." Mexico, however, asserts that Article 366, Article 68, and Article 97 preclude it from doing so. For this reason, the provisions are inconsistent with Article 9.3.2.<sup>414</sup>

338. It is clear from the "evidence *and* legal argument"<sup>415</sup> presented by the United States that its claim was based not on Article 68 *or* Article 97 *in isolation* but, rather, on Article 68 read *in conjunction with* Article 97, which the United States argued resulted in a prohibition against reviews of anti-dumping or countervailing duty measures that were the subject of ongoing litigation.<sup>416</sup> We are therefore of the view that the United States sufficiently identified the challenged measures as Articles 68 and 97 of the FTA, when read together; set out its understanding of the relevant legal obligations in Articles 9.3.2 and 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*; and explained how, in its view, those measures fail to comply with these obligations. Thus, the Panel did not err in considering that the United States had met the standard for a *prima facie* case, as that standard was set out in *US – Gambling*, quoted above. Accordingly, we see no merit in Mexico's argument that the United States did not make out a *prima facie* case with respect to Articles 68 and 97 of the FTA.

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<sup>414</sup>United States' first written submission to the Panel, paras. 288-289. (footnote omitted)

<sup>415</sup>Appellate Body Report, *US – Gambling*, para. 140 (quoting Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, 323, at 336). (emphasis added in *US – Gambling*)

<sup>416</sup>The Panel understood Mexico not to contest the United States' characterization of these provisions:

The United States argues that, in case a judicial review of the measure is requested, before a domestic or bi-national body, the challenged provisions require the authority to suspend all administrative, expedited and changed circumstances reviews. In essence Mexico confirms that the provisions operate in this manner, but argues that this does not constitute a violation of any of the provisions alleged to have been violated.

(Panel Report, para. 7.289)

2. Interpretation of Treaty Provisions

339. The Panel found that Articles 9.3 and 11.2 of the *Anti-Dumping Agreement*, and Article 21.2 of the *SCM Agreement*, require an investigating authority, in cases where a product is subject to a definitive duty, to review the amount of, and/or need for, continued imposition of such duties.<sup>417</sup> The Panel therefore examined at what point a product is subject to a definitive duty so as to trigger an agency's obligation to conduct the reviews described in these provisions. The term "duty" in these provisions, according to the Panel, "clear[ly]" refers to the duties that a Member may impose at the end of an investigation meeting the conditions in the Agreements.<sup>418</sup> The Panel further understood that Article 9 of the *Anti-Dumping Agreement* and Article 19 of the *SCM Agreement* make a "clear distinction" between the *imposition* and *collection* of a duty.<sup>419</sup> Following from this distinction, the Panel stated that a product is "subject to a duty" once a final determination has been made to *impose* a duty on that product, even if such duty has not been *collected* yet because of ongoing judicial proceedings. Thus, in the Panel's view, once a duty has been imposed following an investigation, the agency may not refuse to conduct the reviews provided for in Articles 9.3 and 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*.

340. Mexico argues that the Panel erred in its interpretation of Articles 9.3 and 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*, and in its consequent finding of inconsistency with respect to Articles 68 and 97 of the FTA. Mexico submits that, so long as there is a procedure for challenging the relevant duty—for example, judicial review—such duty cannot be "definitive" and a product cannot be said to be "subject to" it, because the court may declare the action of the investigating authority unlawful and thereby remove the duty.<sup>420</sup> In this light, Mexico argues that it complies with the requirements of these treaty provisions because it provides exporters an opportunity to request duty assessment and changed circumstances reviews as soon as judicial proceedings have concluded, that is, as soon as those duties become definitive. Mexico asserts that nothing in the challenged provisions of the FTA prevents the investigating authority from conducting such reviews.

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<sup>417</sup>Panel Report, paras. 7.294-7.295.

<sup>418</sup>*Ibid.*, para. 7.295.

<sup>419</sup>*Ibid.*

<sup>420</sup>Mexico's appellant's submission, para. 298(c) ("*firme*"; "*no se esté sujeto a*").



341. We consider, first, the treaty provisions at issue. Article 9.3 of the *Anti-Dumping Agreement* provides:

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

...

9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within 12 months, and in no case more than 18 months, after the date on which a request for a refund, duly supported by evidence, has been made by an importer of the *product subject to the anti-dumping duty*. ... (footnote omitted; emphasis added)

342. Article 11.2 of the *Anti-Dumping Agreement* provides:

The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed *since the imposition of the definitive anti-dumping duty*, upon request by any interested party which submits positive information substantiating the need for a review. ... (footnote omitted; emphasis added)

343. Similarly, in the countervailing duty context, Article 21.2 of the *SCM Agreement* provides:

The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed *since the imposition of the definitive countervailing duty*, upon request by any interested party which submits positive information substantiating the need for a review. ... (emphasis added)

344. As we observed in our previous discussion of Article 68 of the FTA, Articles 9.3.2 and 11.2 of the *Anti-Dumping Agreement*, and Article 21.2 of the *SCM Agreement*, place certain conditions—stated in those provisions themselves—on an agency's granting of refunds requested by importers for duties paid in excess of dumping margins, and on an agency's review of anti-dumping and countervailing duties when requested by interested parties.<sup>421</sup> If those conditions are met, the investigating authority must undertake a duty assessment review and refund the excess duties paid, or carry out a review on the need for continued imposition of the duty. Among the permissible

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<sup>421</sup>See *supra*, paras. 312 and 314.

conditions an agency may place on a duty assessment or changed circumstances review are the following: (i) the product at issue is "subject to [an] anti-dumping duty", in the case of Article 9.3.2 of the *Anti-Dumping Agreement*; and (ii) a reasonable period of time elapses since the imposition of the "definitive [anti-dumping or countervailing] duty", in the case of Article 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*. Determining the consistency of Articles 68 and 97 with these treaty provisions requires us to identify the point at which an anti-dumping or countervailing duty becomes "definitive", as well as the point at which a product may be said to be "subject to" an anti-dumping duty

345. Article 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*, referring to the "imposition of the definitive [anti-dumping or countervailing] duty", suggest that a duty may be characterized as "definitive" at the time of its imposition. Article 12.2.2 of the *Anti-Dumping Agreement* and Article 22.5 of the *SCM Agreement* set out requirements for an "affirmative determination providing for the imposition of a definitive duty". These provisions indicate that a definitive duty is imposed subsequent to a final affirmative determination. We are of the view, therefore, that a duty becomes "definitive"—and therefore satisfies one of the conditions to a review set out in Articles 9.3 and 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*—at the time of the investigating authority's final affirmative determination.<sup>422</sup>

346. We find confirmation of this understanding in the fact that, with respect to duties imposed by an agency, the *Anti-Dumping Agreement* and the *SCM Agreement* both appear to employ the term "definitive" as a contrast to the term "provisional". In this respect, Article 7 of the *Anti-Dumping Agreement* and Article 17 of the *SCM Agreement* authorize the use of "provisional measures", specifically including "provisional" duties<sup>423</sup>, following a *preliminary* affirmative determination by the investigating authority.<sup>424</sup> Other provisions of the Agreements refer to "definitive" measures, including "definitive" duties, following a complete investigation and a final affirmative determination made with respect to dumping, injury, and causation.<sup>425</sup> The Agreements therefore use the term "definitive" to distinguish duties imposed after a *final* determination (following an investigation) from "provisional" duties that may be imposed under certain conditions during the course of an investigation, namely, after a *preliminary* determination.

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<sup>422</sup>Thus, we agree with the Panel's statement that "[t]he duties imposed by an authority following an investigation which resulted in an affirmative final determination are final or definitive anti-dumping or countervailing duties, even if the authorities decide[] to collect such duties only provisionally, and conditional upon the results of the judicial review proceedings." (Panel Report, para. 7.296)

<sup>423</sup>Article 7.2 of the *Anti-Dumping Agreement*; Article 17.2 of the *SCM Agreement*.

<sup>424</sup>Article 7.1(ii) of the *Anti-Dumping Agreement*; Article 17.1(ii) of the *SCM Agreement*.

<sup>425</sup>See, for example, Article 9.1 of the *Anti-Dumping Agreement* and Article 19.1 of the *SCM Agreement*.

347. Turning to Article 9.3.2 of the *Anti-Dumping Agreement*, and the condition that the product be "subject to" an anti-dumping duty, we share the view of the Panel that "a product is subject to a duty as soon as an investigation has been concluded and a final determination has been made deciding to impose anti-dumping or countervailing duties."<sup>426</sup> In our view, this follows from the fact that imposition of a definitive duty occurs at the time of a final determination, and that an importer must pay anti-dumping duties to enter the subject merchandise once the anti-dumping duties have been imposed.

348. In the light of the above, we understand that Articles 9.3.2 and 11.2 of the *Anti-Dumping Agreement*, and Article 21.2 of the *SCM Agreement*, permit agencies to require that duties be *imposed* on a product—in the sense that a final determination be made, following an original investigation, with respect to the anti-dumping/countervailing duty liability for entries of such product—as a condition of the right to a refund or review of duties. This condition is permitted by virtue of the proviso in Article 9.3.2 of the *Anti-Dumping Agreement* that the product at issue be "subject to [an] anti-dumping duty", and the proviso in Article 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement* that a reasonable period of time elapse since the imposition of the "definitive [anti-dumping or countervailing] duty". Where duties have been imposed, however, and the remaining conditions of these treaty provisions have been satisfied, an investigating authority is not permitted to decline a request for a duty assessment or changed circumstances review.

349. We now examine the consistency of Articles 68 and 97 of the FTA with these treaty provisions. The Panel understood Articles 68 and 97, when read together, to prevent Economía from conducting duty assessment or changed circumstances reviews with respect to anti-dumping and countervailing duties that are the subject of judicial proceedings, including proceedings before binational panels of Chapter 19 of the North American Free Trade Agreement (NAFTA).<sup>427</sup> The reviews that are precluded by Articles 68 and 97 include reviews of duties that are "definitive" and that, therefore, govern the entries of the subject merchandise because they have been imposed following an original investigation. In other words, these provisions appear to impose a condition on duty assessment and changed circumstances reviews—that is, the completion of judicial proceedings—that is not provided for in Articles 9.3.2 and 11.2 of the *Anti-Dumping Agreement*, or in Article 21.2 of the *SCM Agreement*. For this reason, we *uphold* the Panel's findings, in paragraphs 7.297 and 8.5(f) of the Panel Report, that Articles 68 and 97 of the FTA, read together, are inconsistent, as such, with Articles 9.3.2 and 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*.

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<sup>426</sup>Panel Report, para. 7.295.

<sup>427</sup>*Ibid.*, paras. 7.281 and 7.289-7.290.

### VIII. Findings and Conclusions

350. For the reasons set out in this Report, the Appellate Body:

- (a) upholds the Panel's finding, in paragraph 7.43 of the Panel Report, that the claims in the United States' panel request, which were not "indicat[ed]" in the request for consultations, did not fall outside the Panel's terms of reference;
- (b) with respect to Economía's injury determination:
  - (i) finds that the Panel did not exceed its terms of reference in concluding, in paragraphs 7.65 and 8.1(a) of the Panel Report, that Economía's use of a period of investigation ending in August 1999 was inconsistent with Articles 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement*;
  - (ii) upholds the Panel's findings, in paragraphs 7.65 and 8.1(c) of the Panel Report, that Economía's use of a period of investigation ending in August 1999 resulted in a failure to make a determination of injury based on "positive evidence", as required by Article 3.1 of the *Anti-Dumping Agreement*, and that, as a consequence, Mexico acted inconsistently with Articles 3.2, 3.4, and 3.5 of that Agreement;
  - (iii) upholds the Panel's findings, in paragraphs 7.86 and 8.1(b) of the Panel Report, that, in limiting the injury analysis to the March to August period of 1997, 1998, and 1999, Mexico failed to make a determination of injury that involves an "objective examination", as required by Article 3.1 of the *Anti-Dumping Agreement*, and that, as a consequence, Mexico acted inconsistently with Article 3.5 of that Agreement; and
  - (iv) upholds the Panel's findings, in paragraphs 7.116 and 8.1(c) of the Panel Report, that Economía's injury analysis with respect to the volume and price effects of dumped imports was inconsistent with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement*;
- (c) with respect to Economía's dumping determination:
  - (i) upholds the Panel's findings, in paragraphs 7.145 and 8.3(a) of the Panel Report, that Mexico did not terminate immediately the investigation in respect of Farmers Rice and Riceland because Economía did not exclude

them from the application of the definitive anti-dumping measure, and, therefore, acted inconsistently with Article 5.8 of the *Anti-Dumping Agreement*;

- (ii) finds that the Panel did not exceed its terms of reference in concluding, in paragraphs 7.168 and 8.3(b) of the Panel Report, that Economía calculated a margin of dumping on the basis of the facts available for Producers Rice in a manner inconsistent with Article 6.8 of the *Anti-Dumping Agreement*, read in the light of paragraph 7 of Annex II to that Agreement;
  - (iii) reverses the Panel's findings, in paragraphs 7.200, 7.201, and 8.3(c) of the Panel Report, that, with respect to the exporters that Economía did not investigate, Mexico acted inconsistently with Articles 6.1, 6.10, and 12.1 of the *Anti-Dumping Agreement*; and
  - (iv) upholds the Panel's findings, in paragraphs 7.200 and 8.3(c) of the Panel Report, that, by applying the facts available contained in the application submitted by the petitioner in calculating the margin of dumping for those United States exporters Economía did not investigate, Mexico acted inconsistently with paragraph 1 of Annex II to the *Anti-Dumping Agreement* and, therefore, with Article 6.8 of that Agreement; and
- (d) with respect to the provisions of the Foreign Trade Act of Mexico (the "FTA"):
- (i) finds that the Panel did not err in considering that a *prima facie* case had been made out concerning the consistency of the challenged provisions of the FTA with Mexico's obligations under the *Anti-Dumping Agreement* and the *SCM Agreement*;
  - (ii) finds that the Panel did not disregard Article 2 of the FTA, or Mexico's argument in relation thereto, in concluding that the challenged provisions of the FTA are mandatory measures;
  - (iii) upholds the Panel's findings, in paragraphs 7.223, 7.225, and 8.5(a) of the Panel Report, that Article 53 of the FTA is inconsistent, as such, with Article 6.1.1 of the *Anti-Dumping Agreement* and Article 12.1.1 of the *SCM Agreement*;

- (iv) upholds the Panel's findings, in paragraphs 7.242 and 8.5(b) of the Panel Report, that Article 64 of the FTA is inconsistent, as such, with Article 6.8 of the *Anti-Dumping Agreement*, paragraphs 1, 3, 5, and 7 of Annex II thereto, and Article 12.7 of the *SCM Agreement*;
- (v) upholds the Panel's findings, in paragraphs 7.251, 7.260, and 8.5(c) of the Panel Report, that Article 68 of the FTA is inconsistent, as such, with Articles 5.8, 9.3, and 11.2 of the *Anti-Dumping Agreement*, and Articles 11.9 and 21.2 of the *SCM Agreement*;
- (vi) upholds the Panel's findings, in paragraphs 7.269 and 8.5(d) of the Panel Report, that Article 89D of the FTA is inconsistent, as such, with Article 9.5 of the *Anti-Dumping Agreement* and Article 19.3 of the *SCM Agreement*;
- (vii) finds that, in its interpretation of Article 93V of the FTA, the Panel did not fail to fulfil its obligations under Article 11 of the DSU; and
- (viii) upholds the Panel's findings, in paragraphs 7.297 and 8.5(f) of the Panel Report, that Articles 68 and 97 of the FTA, read together, are inconsistent, as such, with Articles 9.3.2 and 11.2 of the *Anti-Dumping Agreement* and Article 21.2 of the *SCM Agreement*.

351. The Appellate Body recommends that the Dispute Settlement Body request Mexico to bring its measures, found in this Report and in the Panel Report as modified by this Report, to be inconsistent with the *Anti-Dumping Agreement* and the *SCM Agreement*, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 10th day of November 2005 by:

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John Lockhart  
Presiding Member

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Georges Abi-Saab  
Member

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Yasuhei Taniguchi  
Member

ANNEX I

**WORLD TRADE  
ORGANIZATION**

**WT/DS295/6**  
20 July 2005

(05-3306)

Original: Spanish

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

Complaint with Respect to Rice

Notification of an Appeal by Mexico under Article 16.4 and Article 17 of  
the Understanding on Rules and Procedures Governing  
the Settlement of Disputes (DSU) and Rule 20.1 of  
the Working Procedures for Appellate Review

The following notification dated 20 July 2005 from the delegation of Mexico is circulated to Members.

Pursuant to Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 20 of the Working Procedures for Appellate Review, Mexico wishes to notify its decision to appeal certain points of law covered in the final report of the Panel that examined the case *Mexico – Definitive Anti-Dumping Measures on Beef and Rice* (WT/DS295/R) and the corresponding legal interpretations, as outlined below.

1. Mexico seeks review by the Appellate Body of the Panel's finding that the request for establishment of a panel presented by the United States was not inconsistent with Article 6.2 of the DSU. This finding is based on points of law and erroneous legal interpretations, such as extension of the legal basis of the complaint<sup>1</sup> through acceptance that the panel request should include 13 legal provisions that did not appear in the request for consultations.

2. Mexico seeks review by the Appellate Body of the Panel's findings and conclusions that Mexico's Ministry of the Economy acted inconsistently with Article 3.1, 3.2, 3.4 and 3.5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement) in issuing its determination of injury in the anti-dumping investigation on imports of long-grain white rice from the United States. Mexico holds that these findings and conclusions, as set forth below, lie outside the context established by the terms of reference applicable to this dispute, are in error and are based on misinterpretations of the cited Articles of the AD Agreement and of various Appellate Body reports (some of which were not considered at all although Mexico cited them in its written submissions):

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<sup>1</sup> See paras. 7.38 to 7.45 and 7.49 of the Panel's report.



- (a) The findings in paragraphs 7.50 to 7.65 of the final report of the Panel and the conclusion in paragraph 8.1(a) of the report, in which the Panel erred in determining that Mexico acted inconsistently with Article 3.1, 3.2, 3.4 and 3.5 of the AD Agreement by basing its injury determination on a period of investigation which had ended more than 15 months before the initiation of the investigation.
- (b) The findings in paragraphs 7.66 to 7.88 of the final report of the Panel and the conclusion in paragraph 8.1(b) of the report, in which the Panel erred in determining that Mexico acted inconsistently with Article 3.1 and 3.5 of the AD Agreement by limiting its injury analysis to six months of the years 1997, 1998, and 1999.
- (c) The findings in paragraphs 7.89 and 7.117 of the final report of the Panel and the conclusion in paragraph 8.1(c) of the report, in which the Panel erred in determining that Mexico acted inconsistently with Article 3.1 and 3.2 of the AD Agreement by failing to conduct an objective examination based on positive evidence of the price effects and volume of dumped imports as part of its injury analysis.

3. Mexico seeks review by the Appellate Body of the Panel's findings and conclusions that Mexico's Ministry of the Economy acted inconsistently with Articles 5.8, 6.1, 6.8, 6.10 and 12.1, and paragraphs 1 and 7 of Annex II of the AD Agreement in issuing its determination of the margin of dumping in the anti-dumping investigation on imports of long-grain white rice from the United States. Mexico holds that these findings and conclusions, as set forth below, lie outside the context established by the terms of reference applicable to this dispute, are in error and are based on incorrect interpretations of the aforementioned Articles and Annex of the AD Agreement and of various Appellate Body reports (some of which were not considered at all although Mexico cited them in its written submissions):

- (a) The findings in paragraphs 7.133 to 7.145 of the final report of the Panel and the conclusion in paragraph 8.3(a) of the report, in which the Panel erred in determining that Mexico acted inconsistently with Article 5.8 of the AD Agreement by not terminating the investigation on the United States exporters which, as the Panel notes, had exported at undumped prices, and by not excluding those exporters from application of the definitive anti-dumping measure.
- (b) The findings in paragraphs 7.146 to 7.168 of the final report of the Panel and the conclusion in paragraph 8.3(b) of the report, in which the Panel erred in determining that Mexico acted inconsistently with Article 6.8 and paragraph 7 of Annex II of the AD Agreement in its application of a facts available-based dumping margin to the exporter Producers Rice.
- (c) The findings in paragraphs 7.169 to 7.202 of the final report of the Panel and the conclusion in paragraph 8.3(c) of the report, in which the Panel erred in determining that Mexico acted inconsistently with Articles 6.1, 6.8, 6.10 and 12.1 and paragraph 1 of Annex II of the AD Agreement in its application of a facts available-based dumping margin to United States producers and exporters that it allegedly did not investigate.

4. Mexico seeks review by the Appellate Body of the Panel's findings and conclusions that Mexico's Foreign Trade Act (FTA) is inconsistent with Articles 5.8, 6.1.1, 6.8, 9.3, 9.5, 11.2 and 18.1, paragraphs 1, 3, 5 and 7 of Annex II of the AD Agreement, and Articles 11.9, 12.1.1, 12.7, 19.3, 21.2 and 32.1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Mexico holds that these findings and conclusions, as set forth below, are in error and are based on incorrect interpretations of the aforementioned Articles of the AD and SCM Agreements and of various Appellate Body reports (some of which were not considered at all although Mexico cited them in its written submissions):

- (a) The findings in paragraphs 7.213 and 7.225 of the final report of the Panel and the conclusion in paragraph 8.5(a) of the report, in which the Panel determined that Article 53 of the FTA is inconsistent as such with Article 6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement. The reason being that the Panel erred in determining that Article 53 of the FTA is mandatory and misconstrued Articles 6.1.1 and 5.10 of the AD Agreement and Articles 12.1.1 and 11.11 of the SCM Agreement.
- (b) The findings in paragraphs 7.226 to 7.242 of the final report of the Panel and the conclusion in paragraph 8.5(b) of the report, in which the Panel determined that Article 64 of the FTA is inconsistent as such with Article 6.8 and paragraphs 1, 3, 5 and 7 of Annex II of the AD Agreement and Article 12.7 of the SCM Agreement. The reason being that the Panel erred in determining that Article 64 of the FTA is mandatory and misconstrued Article 6.8 and paragraphs 1, 3, 5 and 7 of Annex II of the AD Agreement and Article 12.7 of the SCM Agreement. Furthermore, these findings are based on an erroneous interpretation of Article 6.8 and paragraphs 1, 3, 5 and 7 of Annex II of the AD Agreement and Article 12.7 of the SCM Agreement.
- (c) The findings in paragraphs 7.243 to 7.260 of the final report of the Panel and the conclusion in paragraph 8.5(c) of the report, in which the Panel determined that Article 68 of the FTA is inconsistent as such with Articles 5.8, 9.3 and 11.2 of the AD Agreement and Articles 11.9 and 21.2 of the SCM Agreement. The reason being that the Panel erred in determining that Article 68 of the FTA is mandatory and misconstrued Articles 5.8, 9.3 and 11.2 of the AD Agreement and Articles 11.9 and 21.2 of the SCM Agreement. Furthermore, these findings are based on an erroneous legal interpretation of Articles 5.8, 9.3 and 11.2 of the AD Agreement and Articles 11.9 and 21.2 of the SCM Agreement.
- (d) The findings in paragraphs 7.261 to 7.269 of the final report of the Panel and the conclusion in paragraph 8.5(d) of the report, in which the Panel determined that Article 89D of the FTA is inconsistent as such with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement. The reason being that the Panel erred in determining that Article 89D of the FTA is mandatory and misconstrued Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement. Furthermore, these findings are based on an erroneous legal interpretation of Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement.
- (e) The findings in paragraphs 7.270 to 7.280 of the final report of the Panel and the conclusion in paragraph 8.5(e) of the report, in which the Panel determined that Article 93V of the FTA is inconsistent as such with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement. The reason being that the Panel erred in determining that Article 93V of the FTA is mandatory and misconstrued Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement.
- (f) The findings in paragraphs 7.281 to 7.299 of the final report of the Panel and the conclusion in paragraph 8.5(f) of the report, in which the Panel determined that Articles 68 and 97 of the FTA are inconsistent as such with Articles 9.3 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement. The reason being that the Panel erred in determining that Articles 68 and 97 of the FTA are mandatory and misconstrued Articles 9.3 and 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement.

5. Mexico seeks review by the Appellate Body of the Panel's findings and conclusions concerning paragraphs 7.270 to 7.280 of the final report of the Panel and the conclusion in

paragraph 8.5(e) of the report, in which the Panel determined that Article 93V of the FTA is inconsistent as such with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement. By misinterpreting Article 93 of the FTA, the Panel failed to make an objective assessment of the facts of the case, in breach of Article 11 of the DSU.

6. Mexico seeks review by the Appellate Body of the Panel's findings and conclusions that Mexico acted inconsistently with the provisions of the AD and SCM Agreements and that this resulted in nullification or impairment of the benefits accruing to the United States under those Agreements.

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ANNEX II

**WORLD TRADE  
ORGANIZATION**

**WT/DS295/2**  
22 September 2003

(03-5043)

Original: English

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

Request for the Establishment of a Panel by the United States

The following communication, dated 19 September 2003, from the Permanent Mission of the United States to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

The United States considers that certain measures of the Government of Mexico are inconsistent with Mexico's commitments and obligations under the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). In particular:

(1) On 5 June 2002, Mexico published in the *Diario Oficial* its definitive antidumping measure on long-grain white rice.<sup>1</sup> This measure appears to be inconsistent with the following provisions of the AD Agreement and the GATT 1994:

- (a) Article VI of the GATT 1994 and Articles 1, 3.1, 3.2, 3.4, 3.5, and 4.1 of the AD Agreement because Mexico based its injury and causation analyses on only six months of data for each of the years examined; failed to collect or examine recent data; failed to properly evaluate the relevant economic factors; failed to base its determination on a demonstration that the dumped imports are, through the effects of dumping, causing injury within the meaning of the AD Agreement; and failed to base its injury determinations on positive evidence or to conduct objective examinations of the volume of dumped imports, the effect of those imports on prices in the domestic market of like products, and the impact of the imports on domestic producers of those products;
- (b) Article 5.8 of the AD Agreement, because Mexico failed to terminate the antidumping investigation after a negative preliminary determination of injury, and Articles 5.8 and 11.1 of the AD Agreement because Mexico failed to exclude certain

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<sup>1</sup> Resolución final de la investigación antidumping sobre las importaciones de arroz blanco grano largo, mercancía clasificada en la fracción arancelaria 1006.30.01 de la Tarifa de la Ley de los Impuestos Generales de Importación y de Exportación, originarias de los Estados Unidos de América, independientemente del país de procedencia, *Diario Oficial*, Segunda Sección 1 (5 de Junio de 2002).

respondent US exporters from the measure after negative final determinations of dumping;

- (c) Articles 6.1, 6.2, and 6.4 of the AD Agreement, because Mexico, *inter alia*, failed to give all of the interested parties in the investigation notice of the information that the authorities required or ample opportunity to present in writing all evidence which they considered relevant in respect of the antidumping investigation, failed to give all interested parties a full opportunity for the defense of their interests, and failed to provide timely opportunities for the respondent US exporters to see all information that was relevant to presentation of their cases, that was not confidential as defined in Article 6.5, and that the authorities used in their investigation;
- (d) Article 6.8 of the AD Agreement, and paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement, by improperly rejecting information submitted by US exporters and applying the facts available in the evaluation of injury;
- (e) Article 6.9 of the AD Agreement, because the investigating authorities, before the final determination was made, failed to inform the respondent US exporters of the essential facts under consideration which formed the basis for the decision to apply a definitive measure;
- (f) Articles 6.6, 6.8, 6.10, 9.3, 9.4, and 9.5 of the AD Agreement, and paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement, by applying the facts available to a US respondent rice exporter that was investigated and found to have no shipments during the period of investigation;
- (g) Articles 1, 6.1, 6.6, 6.8, 6.10, 9.3, 9.4, 9.5, 12.1, and 12.2 of the AD Agreement, and paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement, by applying the facts available in establishing the antidumping margins that it assigned to US exporters that were not individually investigated, and by doing so in an improper manner;
- (h) Article 12.2 of the AD Agreement, because Mexico failed in its final determination in the rice investigation to set forth in sufficient detail the findings and conclusions reached on all issues of fact and law considered material or to provide all relevant information on the matters of fact and law and reasons which led to the imposition of final measures; and
- (i) Article VI:2 of the GATT 1994, because Mexico levied an antidumping duty greater in amount than the margin of dumping.

(2) Certain provisions of Mexico's Foreign Trade Act also appear to be inconsistent with Mexico's obligations under various provisions of the AD Agreement and the SCM Agreement. Specifically:

- (a) Article 53 of the Foreign Trade Act requires interested parties to present arguments, information, and evidence to the investigating authorities within 28 days of the day after publication of the initiation notice. This provision does not appear to permit the investigating authorities to grant extensions of the 28-day deadline. Accordingly, the provision appears to be inconsistent with Articles 6.1.1 and 12.1.1 of the AD and SCM Agreements, respectively, which specify that due consideration should be granted to extension requests and that such requests should, upon cause shown, be granted whenever practicable;

- (b) Article 64 of the Foreign Trade Act codifies the "facts available" approach that Mexico applied in the rice investigation, as described in subparagraphs (f) and (g) of section (1) above. This provision appears to be inconsistent with Articles 6.1, 6.6, 6.8, 6.10, 9.3, 9.4, and 9.5 of the AD Agreement, and paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement; and with Articles 6.6, 6.8, 6.10, 9.3, 9.4, and 9.5 of the AD Agreement, paragraphs 1, 3, 5, 6, and 7 of Annex II of the AD Agreement, and Articles 12.5, 12.7, and 19.3 of the SCM Agreement, to the extent that it requires the application of facts available rates to exporters with no shipments during the period of investigation;
  - (c) Article 68 of the Foreign Trade Act appears to require reviews of respondent exporters that were not assigned a positive margin in an investigation, and appears to require that respondent exporters seeking reviews demonstrate that their volume of exports during the period of review was "representative." This provision appears to be inconsistent with Articles 5.8 and 11.1 of the AD Agreement (as described in subparagraph (b) of section (1) above), with Articles 9.3 and 11.2 of the AD Agreement, and with Articles 11.9, 21.1, and 21.2 of the SCM Agreement;
  - (d) Article 89D of the Foreign Trade Act appears to require that "new shippers" requesting expedited reviews demonstrate that their exports were subsequent to the period of investigation and that the volume of exports during the period of review was "representative." This provision appears to be inconsistent with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement;
  - (e) Article 93V of the Foreign Trade Act appears to provide for the application of fines on importers that enter products subject to antidumping and countervailing duty investigations while such investigations are underway. This provision appears to be inconsistent with Article 18.1 of the AD Agreement and Article 32.1 of the SCM Agreement.
- (3) Mexican officials have asserted that Article 366 of Mexico's Federal Code of Civil Procedure and Articles 68 and 97 of the Foreign Trade Act prevent Mexico from conducting reviews of antidumping or countervailing duty orders while a judicial review of the order is ongoing, including a "binational panel" review pursuant to Chapter Nineteen of the *North American Free Trade Agreement*. These provisions appear to be inconsistent with Articles 9.3, 9.5, and 11.2 of the AD Agreement, and Articles 19.3 and 21.2 of the SCM Agreement.

On 16 June 2003, the United States Government requested consultations with the Government of Mexico pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII:1 of the GATT 1994, Article 17.3 of the AD Agreement, and Article 30 of the SCM Agreement. The United States and Mexico held such consultations on 31 July and 1 August 2003. These consultations provided some helpful clarifications but unfortunately did not resolve the dispute.

Accordingly, the United States respectfully requests, pursuant to Article 6 of the DSU, Article 17.4 of the AD Agreement, and Article 30 of the SCM Agreement, that the Dispute Settlement Body establish a panel to examine this matter, with the standard terms of reference as set out in Article 7.1 of the DSU. The United States further asks that this request for a panel be placed on the agenda for the next meeting of the Dispute Settlement Body to be held on 2 October 2003.

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ANNEX III

**WORLD TRADE  
ORGANIZATION**

**WT/DS295/1  
G/L/631  
G/ADP/D50/1  
G/SCM/D54/1  
23 June 2003  
(03-3349)**

Original: English

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

Request for Consultations by the United States

The following communication, dated 16 June 2003, from the Permanent Mission of the United States to the Permanent Mission of Mexico and to the Chairman of the Dispute Settlement Body, is circulated in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the Government of Mexico pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), and Article 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), with respect to Mexico's definitive anti-dumping measures on beef and long grain white rice, published in the *Diario Oficial* on 28 April 2000<sup>1</sup> and 5 June 2002<sup>2</sup> respectively, as well as any amendments thereto or extensions thereof<sup>3</sup> and any related measures<sup>4</sup> and also with respect to certain provisions of Mexico's Foreign Trade Act and its Federal Code of Civil Procedure. These measures appear to be inconsistent with Mexico's obligations under the provisions of GATT 1994, the AD Agreement, and the SCM Agreement.

<sup>1</sup> *Resolución final de la investigación antidumping sobre las importaciones de carne y despojos comestibles de bovino, mercancía clasificada en las fracciones arancelarias 0201.10.01, 0202.10.01, 0201.20.99, 0202.20.99, 0201.30.01, 0202.30.01, 0206.21.01, 0206.22.01 y 0206.29.99 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia, Diario Oficial, Segunda Sección 8 (28 de Abril de 2000).*

<sup>2</sup> *Resolución final de la investigación antidumping sobre las importaciones de arroz blanco grano largo, mercancía clasificada en la fracción arancelaria 1006.30.01 de la Tarifa de la Ley de los Impuestos Generales de Importación y de Exportación, originarias de los Estados Unidos de América, independientemente del país de procedencia, Diario Oficial, Segunda Sección 1 (5 de Junio de 2002).*

<sup>3</sup> Including any further determinations made pursuant to court order or remand.

<sup>4</sup> These include, for example, the *Resolución final de la investigación sobre elusión del pago de cuotas compensatorias impuestas a las importaciones de carne de bovino en cortes deshuesada y sin deshuesar, mercancía clasificada en las fracciones arancelarias 0201.20.99, 0202.20.99, 0201.30.01, 0202.30.01 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia, Diario Oficial, Primera Sección 1 (22 de Mayo 2001).*

In particular, the United States believes that the anti-dumping measures on beef and rice are inconsistent with at least the following provisions:

- Article 3 of the AD Agreement, because Mexico, *inter alia*, based its injury (or threat) and causation analyses on only six months of data for each of the years examined; failed to collect or examine recent data; failed in the beef investigation to evaluate all relevant economic factors and indices having a bearing on the state of the industry; and failed to base its injury determinations on positive evidence or to conduct objective examinations of the volume of dumped imports, the effect of those imports on prices in the domestic market of like products, and the impact of the imports on domestic producers of those products;
- Article 5.8 of the AD Agreement, because Mexico failed to terminate the rice investigation after a negative preliminary determination of injury, and Articles 5.8 and 11.1 of the AD Agreement because Mexico failed to exclude certain respondent US exporters from the beef and rice measures after negative final determinations of dumping;
- Article 6 of the AD Agreement, because Mexico, *inter alia*, failed to provide respondent US exporters with ample opportunity to present in writing all evidence which they considered relevant in respect of the anti-dumping investigations and failed to give all interested parties a full opportunity for the defense of their interests, and Article 6 and Annex II of the AD Agreement by improperly applying the facts available to a US respondent rice exporter that was investigated and found to have no shipments during the period of investigation;
- Article 9 of the AD Agreement, in conjunction with Article 6, because of the manner in which Mexico determined anti-dumping margins for US exporters that were not individually investigated;
- Article 6 and 9 of the AD Agreement and Article VI of GATT 1994, because Mexico, *inter alia*, limited the application of the respondent-specific margins that it calculated in the beef investigation to selected grades of meat imported within 30 days of slaughter (applying "facts available" margins to the respondents' other shipments) and limited the application of a particular US respondent exporter's margin after conducting an "anti-circumvention review" that found the respondent was not engaged in circumvention;
- Articles 9 and 11 of the AD Agreement, because Mexico rejected requests by certain US respondent exporters to conduct reviews of the beef anti-dumping order; and
- Article 12 of the AD Agreement, because Mexico failed in its final determinations in both investigations to set forth in sufficient detail the findings and conclusions reached on all issues of fact and law considered material or to provide all relevant information on the matters of fact and law and reasons which led to the imposition of final measures.

In addition, the following provisions of Mexico's Foreign Trade Act appear to be inconsistent with Mexico's obligations under the provisions of the AD Agreement and the SCM Agreement:

- Article 53, which requires interested parties to present arguments, information, and evidence to the investigating authorities within 28 days of the day after publication of the initiation notice. This provision appears to be inconsistent with Articles 6.1.1 and 12.1.1 of the AD and SCM Agreements, respectively, which specify that exporters/foreign producers shall be given at least 30 days to respond to questionnaires, and that, as a general rule, the 30 days are to be counted from the date of receipt of the questionnaire;



- Article 64, which codifies the "facts available" approach that Mexico applied in the rice and beef investigations, as described in the fourth bullet above. This provision appears to be inconsistent with Article 9 of the AD Agreement, in conjunction with Article 6; and with Article 6.8 of the AD Agreement and Article 12.7 of the SCM Agreement to the extent that it requires the application of facts available rates to exporters with no shipments during the period of investigation;
- Article 68, which appears to require reviews of respondent exporters that were not assigned a positive margin in an investigation, and appears to require that respondent exporters seeking reviews demonstrate that their volume of exports during the period of review was "representative." This provision appears to be inconsistent with Articles 5.8 and 11.1 of the AD Agreement (as described in the second bullet above), with Article 9 of the AD Agreement, and with Articles 11.9 and 21.1 of the SCM Agreement;
- Article 89D, which appears to require that "new shippers" requesting expedited reviews demonstrate that their volume of exports during the period of review was "representative." This provision appears to be inconsistent with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement, which require authorities to conduct reviews without regard to such a condition; and
- Article 93V, which appears to provide for the application of definitive anti-dumping or countervailing duties on products entered prior to the date of application of provisional measures (1) for longer than allowed under the AD and SCM Agreements, and (2) even if not all AD or SCM Agreement requirements for applying such duties are met. This provision appears to be inconsistent with Articles 7 and 10.6 of the AD Agreement and Articles 17 and 20.6 of the SCM Agreement.

Finally, Article 366 of Mexico's Federal Code of Civil Procedure, in conjunction with Article 68 of the Foreign Trade Act, appears to be inconsistent with Articles 9 and 11 of the AD Agreement and Articles 19 and 21 of the SCM Agreement to the extent that the provisions prevent Mexico from conducting reviews of anti-dumping or countervailing duty orders while a judicial review of the order is ongoing, including a "binational panel" review pursuant to Chapter Nineteen of the *North American Free Trade Agreement*.

Mexico's measures also appear to nullify or impair benefits accruing to the United States directly or indirectly under the cited agreements.

We look forward to receiving your reply to the present request and to fixing a mutually convenient date for consultations.

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