WORLD TRADE ORGANIZATION

WT/DS295/AB/R
29 November 2005

(05-5638)

Original: English

MEXICO – DEFINITIVE ANTI-DUMPING MEASURES ON BEEF AND RICE

Complaint with Respect to Rice

AB-2005-6

Report of the Appellate Body

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
Argentina – Poultry Anti-Dumping Duties	Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*

US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
US – Countervailing Measures on Certain EC Products	Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003
US – DRAMS	Panel Report, *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, DSR 1999:II, 521
US – Gambling	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Hot-Rolled Steel	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
US – Hot-Rolled Steel	Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled*

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*,

succeeded SECOFI as Mexico's investigating authority.[5] 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").[6] 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.[7]

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[8] and issued its final affirmative determination on 5 June 2002.[9] 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.[10]

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*

[5]As the Panel noted, the name of Mexico's investigating authority was changed from SECOFI to

(the "*Anti-Dumping Agreement*") and Annex II thereto.[11] 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.[12] In addition, the United States claimed th

(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*[19];

(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*[20]; 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*.[21]

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*.[22] With respect to the remaining claims of the United States, the Panel exercised "judicial economy".[23] The Panel therefore recommen 0 TD-0.0004 T10.2 0 hmen5nt -2-35d toD -21(igreems -24(p)2(umen5n0.2 0 t -2-3511(

submissions estimated by the WTO Language Services and Documentation Division.[27] 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.[28]

8.

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*.[35] 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.[36] In its reply, the Division noted that "[i]n the light of [Mexico's] request", the WTO Language Services

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*").[38] Mexico points out that, in the light of Article 31 of the *Vienna Convention*, the "ordinary meaning"[39] 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 0.0009SMiniste04TD268 ons9-.0003 a0n (ga)-5

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.[40]

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.[41] 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*.

[40]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*").

[41]*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

based on positive evidence. According to Mexico,

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

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 dumpi

36. Mexico contends that the Panel "ignore[d]"[50] 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.[51]

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

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

[51]

analyze whether Mexico calculated the margin of

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

49. Mexico alleges that the Panel erred in its findings with regard to the FTA because it "disregarded"[52] 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 A

(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

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

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"[55] 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 97of 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

[55]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 1. du/ *Appe8.4(tons10(*

the complaint sufficient to present the problem clearly"

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*.[64] 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.[65] 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.

---

[64]United States' appellee's submission, para. 53.

[65]*Ibid*., para. 55.

deciding.[67] 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 Pa

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

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.[70]

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. T

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[71], and are "similarly without merit".[72]

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 TJ/TT2 rStatTT2 r tTT2 rn thata view of91, as su

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".[85] 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.[86]

(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.[87] China agrees with the Panel that the

[85]China's third participant's submission, para. 7.

[86]*Ibid*., para. 8 (quoting Appellate Body Report, *Brazil – Aircraft*, paras. 127, 130, and 132; and

2.

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

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

(vi) whether the Panel erred in finding that Article 89D of the FTA is inconsistent, as such, with Article 9.5 of the

> 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.[106] (emphasis added)

The Appellate Body has also emphasized this objective of consultations in finding that, with respect

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.[108] 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"))[109] 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".[110] At the oral hearing, Mexico and the United States agreed with this approach.[111] 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.[112] The United States alleged, in the request for consultations, that this was inconsistent with certain treaty provisions dealing generally

[108]Mexico's appellant's submission, para. 1.

[109]See Panel Report, paras. 8.1(a)-(b) and 8.4(b)-(c).

[110]Appellate Body Report, *Japan – Apples*, para. 215 (quoting Article 3.7 of the DSU).

[111]Mexico's and the United States' responses to questioning at the oral hearing.

[112]

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*.[113] 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*.[114] 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*.[115] These latter treaty provisions require that "specific action against" dumping or

[113]The United States identified Article 11 (without specification of paragraph) of the *Anti-Dumping Agreement*

subsidization be taken only in accordance with the GATT 1994 and the *Anti-Dumping Agreement* or the *SCM Agreement*.[116]

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.[117] 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.

---

[116]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*

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."[122] 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."[123]

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

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*.[127] 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.[128]

152. It is well settled that the terms of reference of a panel define the scope of the dispute[129] 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.[130] Panels are not permitted to address legal claims falling outside their terms of reference.[131] 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*.[132] 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.

---

[127]Mexico's appellant's submission, para. 36.

[128]*Ibid*., paras. 37 and 39.

[129]Appellate Body Report, *US – Carbon Steel*, para. 126.

[130]Appellate Body Report, *EC – Bananas III*, para. 141.

[131]Appellate Body Report, *EC – Hormones*, para. 156.

[132]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.[133] 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*.[134]

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).

[133]Mexico's appellant's submission, paras. 35-36.

[134]*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 in existence io0

Body indicated in *US – Certain EC Products*, a panel is not obliged to limit its legal reasoning to arguments presented by the parties.[135] 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.[136]

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

exactly with the time period in which the investigating authority conducts its investigation.[141] 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.[142]

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.[151] 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.[152]

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

the determination of whether injury exists should be based on data that provide indications of the situation prevailing when the investigation takes place.[155]

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.[156] 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."[157] 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.[158]

167. We agree with Mexico that using a remote investigation period is not *per se* a violation of Article 3.1.[159] In our view, however, the Panel did not set out such a principle, as its findings relate toj10.98 tylato es

Anti-Dumping Agreement.[160] 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.[161] Thus, it is not only the remoteness of the

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.[166] 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."[167]

175.

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

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

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.[179] Mexico further submits that the information used by Economía does not constitute an "incomplete set of data"[180] but, rather, is complete in that it allows a comparison of the relevant indicators for the domestic industry with prior comparable periods.[181] 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.[182] 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.[183]

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.[184] 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.[185] 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.[186]

---

[179]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*.")

[180]Panel Report, para. 7.81.

[181]Mexico's appellant's submission, para. 81.

[182]*Ibid*., para. 82.

[183]*Ibid*.

[184]*Ibid*., para. 83.

[185]*Ibid*., paras. 83-84.

[186]*Ibid*., para. 89.

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."[196] 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"[197]—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.[198] 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.[199] 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

[196]Panel Report, para. 7.82.

[197]*Ibid*., para. 7.85.

[198]Mexico's appellant's submission, para. 81.

[199]*Ibid*., para. 84.

was unnecessary to do so.[200] 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.[201] As we mentioned above, we are of the view that the Panel did not err by taking into account this factor in its analysis.[202]

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.

---

[200]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.

[201]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

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.

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[208]: (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[209]; (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[210]; 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.[211] 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.[212]

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.[213] (footnote omitted)

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

---

[208]Panel Report, para. 7.111.

[209]*Ibid*.

[210]*Ibid*.

[211]*Ibid*., para. 7.112.

[212]*Ibid*.

[213]*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

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 consump

the dumped imports on prices in the domestic market on information that has the quality of positive evidence.[224]

203. In the methodology used to determine the volume of dumped imports, Economía relied on three assumptions, which we set out above.[225] 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.[226] 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".[227] 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

[224]Panel Report, para. 7.110.

[225]See *supra*, para. 197.

[226]Final Determination, *supra*, footnote 9, para. 270.

[227]Panel Report, paras. 7.111-7.113.

company-specific, rather than country-wide.[230] In particular, the Panel observed that "[a] number of

imposed and collected after it has been established that a duty may be applied to a given exporter or producer.[235] 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[236], 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.[237] For Mexico, the main purpose of anti-dumping procedures is to undertake a review with regard to products, not exporters.[238] 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.[239]

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"[240], 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.[241] Mexico goes on to argue that nowhere in the *Anti-Dumping Agreement*

[235]Panel Report, para. 7.144.

[236]Mexico's appellant's submission, para. 124.

[237]*Ibid*.

[238]*Ibid*.

[239]*Ibid*.

[240]Panel Report, para. 7.144.

[241]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.[242]

213.

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

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.[249]

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

[249]Panel Report, para. 7.140.

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

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.[254] Some of those conditions are set out in Annex II to the *Anti-Dumping Agreement*.[255] 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."[256] 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".[257]

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."[258] (original emphasis)

[252]Panel Report, para. 7.158.

[253]*Ibid*., para. 7.159.

[254]*Ibid*., para. 7.166.

[255]Annex II is entitled "Best Information Available in Terms of Paragraph 8 of Article 6".

[256]Panel Report, para. 7.166.

[257]*Ibid*. (quoting para. 7 of Annex II).

[258]*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.[259] 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*.[260]

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.[261] .3(wity)-.0nds 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 Mexicoy[(g to th and th

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."[264] 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* 0.00(-.0016 Tc0.5134)26c68 2atm1D0.00

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

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."[268] 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."

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."[273] The Panel added that this is "evidenced also by the requirement in paragraph 1 of Annex II of the [*Anti-Dumping Agreement*]".[274]

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.[275] 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).[276] 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.[277] 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."[278] 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."[279]

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."[280] 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 p

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

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

Evidence

> 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

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

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,

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.[297] 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).[298] 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*.[299] Footnote 15 to Article 6.1.1 provides:

297

> 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

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.[300] Therefore, in Mexico's view, the

9 . 0 2 - c T 4 5 c 3 (r 0 o 2 2 267.a

authority.[309] 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*.[310] 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.[311] Accord2 1 Tnot be

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)
>
> …
>
> ... 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.[325]

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.[326] 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[327], which, in Mexico's view, are the exporters and foreign producers made known to the investigating authority

325... 4

at the outset of an investigation.[328] 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

timely completion" of the proceeding.[335] 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[336]—28 working days[337]—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.[338] 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[339] on the basis of the highest margin of price discrimination or subsidization obtained from the facts available, in the following cases:

---

[335]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).

[336]

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

during the period of investigation.[344] 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.[345] 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*.[346]

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:

---

[344]Mexico's appellant's submission, para. 245(e).

[345]*Ibid*., para. 245(f).

[346]*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

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

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.

in ac-7.2(m).3(pin1.8(7(lete,-5.4(quere the pre))-ch a)form)8ion

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.[351] 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

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[354], 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.[355] 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*.[356]

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

[354]See Panel Report, para. 7.166.

[355]*Ibid.*, para. 7.251.

[356]

investigations.[357] Mexico contends that Article 5.8 and Article 11.9 do not apply to events subsequent to the original investigation, including reviews.[358] 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.[359] 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.[360] An investigating authority does not, of course, impose duties—including duties at zero per cent—on exporters excluded from the definitive anti-

[357]Mexico's appellant's submission, para. 259(b).

[358]*Ibid*., para. 259(c).

[359]*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.

[360]*Supra*, paras. 216-218.

dumping measure. We therefore agree with the Panel that the "logical consequence"[361] of this approach is that such exporters cannot be subject to administrative and changed circumstances reviews, because such reviews examine, respectively, the "duty *paid*"[362] and "the need for the *continued imposition* of the duty".[363] 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."[364] 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*.

.060thea upholdicle 11.9 of t

The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a review.[21] Interested parties shall have the right to request the authorities to examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, or both. If, as a

countervailing duty investigations, in particular given the identical language in Article 21.2 of the *SCM Agreement*.[374]

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[375], 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.[376]

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 inconsiste

> 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*.[378]

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.[379] 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.[380] 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*.[381]

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.[382] 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.[383] Mexico contends

---

[378]Panel Report, para. 7.261.

[379]*Ibid*., para. 7.266.

[380]*Ibid*., para. 7.268.

[381]*Ibid*., paras. 7.266 and 7.268.

[382]Mexico's appellant's submission, para. 273 ("*guarda[n] silencio*").

[383]*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 releva

review.[386] By so requiring, Article 89D, like Article 68 of the FTA[387], 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*

Mexico submits that the term "

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.[404]

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[405] 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. ...

[404]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*)

[405]*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.[406] 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."[407] 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*.[408]

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.[409] 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*xico's appeal6.6( )]TJ072 1 Tfpa6 0 ular

> 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.[411]

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

> ... 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. [414]

338. It is clear from the "evidence *and* legal argument"[415] 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

2. Interpretation of Treaty Provisions

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.[422]

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[423], following a *preliminary* affirmative determination by the investigating authority.[424] 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.[425] 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.

---

[422]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)

[423]Article 7.2 of the *Anti-Dumping Agreement*; Article 17.2 of the *SCM Agreement.*

[424]Article 7.1(ii) of the

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."[426] 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*

,0068 Tc0 Tw( )to [an vied0 TD38/TT2 1 TfT616dem(i)5.9688-28duties have been imposed, however, Tw[("suC2Ag

provisionsJhave been fied, an investigating authority

uest for a duty assessment or changed circumstaces review.

exaine the consistency 4nt0.2,32A these tw TD3(a)2.1(ty)-7.3( )]TJ-22.4536 -1.7322 TD0.0011 Tc0.0385 Tw[(provisions.)5

assessment or changed circumstances reviews with respect to anti-dumping and

uties t8ih wre the subject 4ntjudicial proceedings, including proceedings before

J4ntChapter 19 4nticl0Nor/TT2 118.ing4 0 TD0.0003 Tc0.165 Tw[(h A)-4.3dmerican Free Trade Agreeme0 T2.4(t (NAFTA).TT

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

(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:

_____

John Lockhart
Presiding Member

ANNEX I

WORLD T

(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

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.[1] This measure appears to be inconsistent with the following provisions of the AD Agreement and the GATT 1994:

(a) Article VI of the GATT 1994 and Articles 1, 3.1, 3.2, 3.4, 3.5, and 4.1 of the AD Agreement because Mexico based its injury and causation analyses on only six months of data for each of the years examined; failed to collect or examine recent data; failed to properly evaluate the relevant economic factors; failed to base its determination on a demonstration that the dumped imports are, through the effects of dumping, causing injury within the meaning of the AD Agreement; and failed to base its injury determinations on positive evidence or to conduct objective examinations of the volume of dumped imports, the effect of those imports on prices in the domestic market of like products, and the impact of the imports on domestic producers of those products;

(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

[1] Resolución final de la investigación antidumping sobre las importaciones de arroz blanco grano largo, mercancía clasificada en la fracción arancelaria 1006.30.01 de la Tarifa de la Ley de los Impuestos Generales de Importación y de Exportación, originarias de los Estados Unidos de América, independientemente del país de procedencia, Diario Oficial, Segunda Sección 1 (5 de Junio de 2002).

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;

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

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

- 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