MEXICO – DEFINITIVE ANTI-DUMPING MEASURES ON BEEF AND RICE

(Complaint with respect to Rice)

(WT/DS295)

EXECUTIVE SUMMARY
OF THE
OPENING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE SECOND MEETING OF THE PANEL

August 13, 2004

A. Mexico's Use of a Stale POI

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

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

3. In its second submission, Mexico says it would be "preposterous" for a Member to base its findings on information that is ten years old. Thus, Mexico apparently now concedes that an authority's discretion in setting a POI is not without limit. According to Mexico, the appropriateness of a particular POI will depend on the facts of a particular case. The United States and Mexico apparently agree. However, Mexico has pointed to nothing to justify its decision to ignore 15 months worth of recent data, or its decision not to collect any additional injury data after the initiation of the investigation. Although Mexico baldly asserts in its second submission that the POI in the rice investigation yielded objective information on dumping and injury, it has provided no evidence in support of its claim.

B. Economía Limited Its Injury Examination to Six Months of 1997, 1998, and 1999

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

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

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

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

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

C. Mexico's Conduct of its Injury Analysis

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

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

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

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

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

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

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

D. Mexico's Failure to Exclude Firms with AD Margins of Zero Percent

16. Mexico argues that Article 3.3 of the AD Agreement demonstrates that the Article 5.8 *de minimis* calculation applies to the country as a whole. Article 3.3 has nothing to do with the dumping

determination. Article 3.3 is an injury provision that uses the definition of *de minimis* in Article 5.8 as a means to establish a threshold for determining which countries may be cumulated for injury purposes. The cumulation analysis is country-wide by its very nature.

17. Article 5.8 itself states that the margin of dumping is to be considered *de minimis* if the margin is less than 2 percent, "expressed as a percentage of the export price." Export prices are inherently firm-specific. If the drafters had intended to require termination only if the weighted average margin of dumping for all of the investigated firms was *de minimis*, they could have said so. This is what they did in Article 9.4 of the AD Agreement, which requires authorities to calculate the all other's rate on the basis of the "weighted average margin of dumping" calculated for the selected exporters and producers.

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

E. Mexico's Application of an Adverse "Facts Available" Dumping Margin

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

20. Mexico argues that a Member is only required to apply a neutral margin under Article 9.4 of the AD Agreement when it has investigated a sample of exporters and producers. In Mexico's view, Economía did not sample, so it is under no obligation to apply a neutral margin to the unexamined firms. But Articles 6.1 and 6.8, and paragraph 1 of Annex II, contain an independent set of obligations that a Member must always observe when it bases margins on the facts available. One of the key obligations is that an authority that includes a particular exporter "in an anti-dumping investigation" must give notice to that individual exporter, by sending the exporter a copy of the questionnaire, asking it to respond, and ensuring that the exporter understands that a failure to respond may result in the application of a margin based on the facts available. If an authority fails to take these steps with respect to an individual exporter or producer, then it cannot apply a margin based on the facts available.

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

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

23. Mexico responds to our demonstration that the petition margin was adverse by arguing that the petitioners did not inform it that the petition overstated the normal value, and thus overstated the

dumping margin. But the petitioners' silence does not excuse Economía from its obligation to examine the accuracy of the information, as Articles 5.3 and 6.6 of the AD Agreement require, or its obligation to check the information in the petition against other independent sources, as paragraph 7 of Annex II of the AD Agreement requires. Nor does it change the fact that the petition margin was adverse.

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

F. Claims Regarding the FTA and Article 366 of the FCCP

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

26. Article 64: Mexico argues in its second submission that we have not explained why Article 64 is inconsistent with Article 6.1 of the AD Agreement. Mexico is mistaken. Article 64 is inconsistent with Article 6.1 of the AD Agreement because it requires Economía to apply the highest facts available to firms that do not "appear" in the investigation, even when Economía has not complied with Article 6.1. Mexico also argues that Article 9.4 only applies when an authority investigates a sample of exporters or producers. But by its plain terms, Article 64 always requires Economía to apply the highest level of facts available to exporters and producers that have no exports during the POI or that do not "appear" in its investigations. Therefore, even if Economía were to overtly limit its investigation in accordance with Article 6.10, Article 64 would still require it to apply the highest facts available to those producers and exporters. But Article 9.4 requires an authority that has limited its investigation to apply the neutral margin to all of the exporters or producers that are not included in the examination.

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

28. Article 93: Mexico has not contested our demonstration that Article 93V is (1) "specific" to dumping or subsidization; (2) "against" dumping or subsidization; and (3) not "in accordance with the provisions of GATT 1994," as interpreted by the AD and SCM Agreements. Moreover, Mexico argues in its second submission that Article 93V is discretionary, because Economía allegedly has discretion to decide in a particular case whether the conditions for imposing a fine are met. But if Economía finds the conditions are met, it must impose a fine. Mexico also argues that Article 93V is discretionary because it

merely states that it "shall be the responsibility" of Economía to punish the infringing activity. This is equivalent to saying that the law is discretionary because Economía may simply choose not to enforce it. As the panel stated in *United States – Alcoholic Beverages*, the non-enforcement of a provision that mandates WTO-inconsistent action does not make the provision itself discretionary.

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

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

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

G. Conclusion

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

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

33. All of the claims that we have raised in this dispute were in our panel request. So Mexico's claim that we did not set forth certain claims in our request is wrong.

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