Mexico – Definitive Anti-Dumping Measures on Rice and Beef
(Complaint with Respect to Rice)
WT/DS295

Opening Statement of the United States
First Meeting of the Panel

May 17, 2004

1. Thank you Mr. Chairman, and members of the Panel, we appreciate this opportunity to appear before you today to provide further views on the reasons why Mexico's antidumping (AD) measure on U.S. long-grain white rice, and certain provisions of its Foreign Trade Act (FTA) and its Federal Code of Civil Procedure (FCCP), are inconsistent with WTO rules. Our intention today is not to repeat all of the statements we made in our first written submission. Rather, we will focus on replying to points that Mexico made in its submission. We will also be pleased to receive any questions you may have.

2. Mr. Chairman, authorities conducting AD investigations must conduct their examinations in an objective and unbiased manner. As the Appellate Body stated in *United States – Hot-Rolled Steel*, an "objective examination" means the authority must investigate the domestic industry, and the effects of dumped imports, in an unbiased manner, without favoring the interests of any party in the investigation.[1] In addition, the authorities "are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured."[2]

---

1 Report of the Appellate Body, *United States – Hot-Rolled Steel from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 193 ("*United States – Hot-Rolled Steel AB*").

2 *Id.* at para. 196.

3. Mexico did not conduct its rice investigation in an objective and unbiased manner. Mexico allowed the petitioner to decide which exporters and producers should be sent the antidumping questionnaire, and to choose which part of the year should be examined for dumping and injury. It rejected requests from the exporters to conduct its analysis of injury in a more inclusive manner. When the U.S. firm Producers Rice cooperated fully by participating in the investigation and demonstrating that it had no shipments of rice to Mexico during the period of investigation (POI), Mexico rejected its information and based its margin on adverse facts available. And Mexico failed even to collect, much less examine, more than a year's worth of data that preceded the initiation of the investigation.

4. Not surprisingly, Mexico's investigation concluded with an affirmative finding of dumping and injury. It then applied an adverse margin, taken from the petition, to the vast majority of the U.S. industry.

5. Mr. Chairman, in responding to our arguments, Mexico generally offers mere assertions, conclusory statements, and legal analysis consisting of broad claims that the AD Agreement creates no obligations. However, the AD Agreement does place obligations on Mexico, and Mexico has failed to rebut our *prima facie* case that it has breached them.

A. Mexico's Use of a Stale POI Breached Articles 1, 3.1, 3.2, 3.4, and 3.5 of the AD Agreement, and Articles VI:2 and 6(a) of the GATT 1994

6. Mr. Chairman, the first issue I would like to discuss today is Mexico's decision to base its dumping, injury, and causation analyses on a data set that ended fifteen months prior to the initiation of its investigation, and nearly three years prior to the final determination.

7. With the exception of Mexico, all of the parties in this dispute agree that a Member's discretion in setting a POI is not boundless. The period investigated cannot be so remote in time that the information that the authority collects is incapable of providing a basis for an objective finding of dumping, injury, and causation.

8. In our first submission, we cited numerous provisions of the AD Agreement and the GATT 1994 that support this conclusion, and we demonstrated why the fifteen month gap in the present case (and the three year gap between the end of the POI and the final determination) is inconsistent with numerous provisions of the AD Agreement and the GATT 1994. In addition, Mexico's approach is inconsistent with Article VI:6(a) of the GATT 1994, because an objective and unbiased authority would not have concluded that the record data was sufficient to support a finding that the "effect" of the alleged dumping was such "as to cause" injury to the domestic industry.

9. Mexico's response to our claims on this issue is to argue that the AD Agreement creates no obligations with respect to the age of the data that a Member may use in reaching its determinations, and that Mexico has complete freedom to do whatever it wants (paras. 45, 49).

10. Mr. Chairman, this is not correct. For example, even Mexico cannot possibly believe that a Member may base its findings of dumping, injury, and causation on data that is ten years old. Rather, the POI should end as close to the initiation date as practicable, with the determination of whether a particular data set is WTO-consistent to be determined on a case-by-case basis.

11. For example, in the *Guatemala – Cement* panel report that Mexico cites (at para. 46), the Panel determined that Guatemala was justified in using a particular POI because Guatemala was able to point to evidence on the record of the investigation that supported its action. Mexico has

pointed to nothing in the record of the rice investigation to justify its decision to ignore 15 months worth of recent data, let alone the three years of data by the time of the final determination. In truth, the only rationale that Mexico provided in its determinations for the approach it took was that the POI it selected was the one the petitioner wanted.

B. Economía Breached Articles 1, 3.1, 3.5, and 6.2 of the AD Agreement by Limiting Its Examination of Injury to Only Six Months of 1997, 1998, and 1999

12. I would like to turn at this point to discuss Mexico's decision to limit its examination of injury to only six months of 1997, 1998, and 1999.

13. Mr. Chairman, an authority conducting an analysis of injury and causation must conduct an objective examination, and it must base its determinations on positive evidence. We demonstrated in our first submission that Mexico's decision to limit its investigation to only half of each of the years at issue failed to meet either of these requirements.

14. As with the previous issue, Mexico has failed to address our textual analysis of the various AD Agreement provisions presented. Rather, it argues, once again, that the Agreement creates no obligations on this matter, that Mexico is "entirely free" to do whatever it wants, and that therefore its approach was objective and based on positive evidence (paras. 55, 57).

15. Once again, Mexico's argument is wrong. For example, the text of Article 3.5 of the AD Agreement plainly states that an authority must examine "all relevant evidence" that is before it. Mexico has failed to explain why the evidence for half of the POI was not "relevant," and by failing to consider it, Mexico breached Article 3.5.

16. Mexico says that it took this approach to eliminate distortions (para. 55). But in actuality, its approach created distortion, because focusing an injury and causation analysis on the period

when import presence is highest cannot help but create a misleading picture of the state of the domestic industry. The reality is that Mexico has no idea what the state of the industry was over the course of the entire POI, because Mexico did not examine the data for half of that period.

17. Although Mexico's submission tries to question whether imports were in fact concentrated in the March – August period (paras. 62, 63), its published determinations were quite clear on this point. For example, in paragraphs 64 and 65 of its initiation notice, Mexico mentions the petitioner's allegation on this point, and states that it agreed with the petitioner. The concentration of imports during March to August was the sole reason Mexico gave for structuring the POI in the way that it did. It is simply not credible for Mexico to claim otherwise now.

18. Furthermore, the table that Mexico included in its submission (para. 60), which by the way does not appear to be record evidence (they have provided no citation to the record for it), focuses entirely on domestic production. Therefore, it does nothing to disprove the fact that Mexico based its analysis on the time of year when imports were at their highest. Nor does it rebut the fact that by taking this approach, Mexico's conclusions were based on an import market share that was overstated.

19. Moreover, Mexico's interpretation of Article 6.2 of the AD Agreement (paras. 73-74) ignores the first sentence of that Article, which requires a Member to give interested parties a "full opportunity" to defend their interests. Contrary to Mexico's assertion, a "full opportunity" requires more than simply holding a hearing and allowing parties to submit oral views. In the rice investigation, Mexico refused to allow the exporters and importers to make arguments using data from the September to February time frame. In so doing, Mexico breached Article 6.2.

C. Mexico's Conduct of its Injury Analysis Breached Articles 3.1, 3.2, 3.4, 3.5, 6.8, 12.2, and Annex II of the AD Agreement

20. In addition to the breaches arising from Mexico's failure to collect or examine recent data and its failure to examine data for half of the POI, Mexico also breached the AD Agreement in the way that it conducted its examination of the data that it did consider. We discussed four such flaws in our submission, and I will touch briefly on those issues here as well.

21. The first of the four flaws arises from Mexico's failure to collect the evidence on price effects and volumes that it needed to conduct its injury analysis in an objective manner, and its improper use of the facts available.

22. Mexico's response to this issue (paras. 88, 91), as with so many other issues, is that the AD Agreement creates no obligations, so Mexico is free to take whatever approach it wants. Mexico fails, however, to explain why the approach that it chose was objective and based on positive evidence, as Article 3.1 requires. It simply asserts that this is so, and mischaracterizes our arguments to the contrary.

23. For example, we noted in our submission that if Mexico had sought information from purchasers of long-grain white rice, it would have been able to directly compare the prices the purchasers paid for the domestic product and the prices they paid for the imported product. Mexico claims that it would have been absurd to require it to send questionnaires to all mills, supermarkets, stores, shops, restaurants, and other sellers and users of long-grain white rice (para. 92). But we never suggested that Mexico should have sought the information from all purchasers. If it had sought the information from even some of the purchasers, Mexico would have had actual sales prices to use in its analysis.

24. Similarly, Mexico argues that we are confused when we suggest that it could have obtained data from the *pedimentos* (para. 93). But to be clear, we were referring to the *pedimentos* themselves, and not to the *listado*s that contain only abstracts of information taken from the *pedimentos*. In paragraph 14 of our written submission, we noted that the *pedimentos* themselves include the identity of the foreign exporter and its address, and the volume and value of the shipment. We also attached two samples of *pedimentos*, confirming this point, as Exhibit US-12. Although Mexico could have sought the *pedimentos* from Mexican Customs, it chose not to do so.

25. Furthermore, we noted in our submission that Mexico rejected accurate volume and value data that The Rice Company submitted for the year 1999, in favor of using inaccurate data from the petitioner. Mexico responds that we are being "tendentious" by citing only part of its determination on that issue (para. 101). It is true that we were only referring to the data for 1999. However, if one examines the methodology that Mexico used in determining the volume data that it used for 1997 and 1998, it is clear that its analysis of those years was not objective either, because Mexico simply guessed about the volume in those two years.[3] And the fact remains that Mexico does not explain why it was being objective in rejecting the accurate data that The Rice Company supplied, and accepting inaccurate data that the petitioner supplied, particularly since both data sets applied only to 1999.

26. Finally, Mexico's only response to our claim that it improperly used the facts available in its evaluation of injury is that it was under no obligation to send questionnaires to exporters,

---

3 *See* Final Determination, Exhibit US-6&7, para. 239.

importers, and purchasers, and so it was free to seek information only from the exporters that the petitioners identified in the petition (para. 106). It then cites Article 6.1.1 of the AD Agreement in its defense. But Article 6.1.1 only refers to the time frame for exporters to respond to questionnaires. It does not nullify the obligation in Article 3.1 of the AD Agreement that Mexico must conduct an objective examination and base its determination on positive evidence.

27. Nor does it excuse Mexico from the obligations of Article 6.8 and Annex II. Those provisions do not permit an authority to base its analysis of injury on the facts available without first making an effort to obtain the data from the interested parties, or to use that data without first seeking to corroborate it against independent data sources at its disposal. Yet this is exactly what Mexico did.

28. The second flaw in Mexico's analysis of the injury data arises from its failure to objectively consider whether there was a significant increase in the volume of dumped imports or significant price effects.

29. Mexico's only response to this issue is to assert that it was under no obligation to provide an explicit "finding" on whether the increase in imports was significant, and to direct the Panel to a full 84 paragraphs of its final determination (paras. 115, 116).

30. Mr. Chairman, Mexico is unable to provide a more specific citation because it has no real response to our claim. As we pointed out in our submission,[4] only four of those 84 paragraphs have relevance to the examination of the dumped imports, and those paragraphs show that the

4 U.S. First Written Submission, para. 104.

volume of the dumped imports declined during the three-year period of the injury analysis. And none of those paragraphs even mention significant price effects.

31. Mexico's own examples confirm these conclusions. Mexico cites paragraphs 212 and 217 of the final determination (para. 117). Paragraph 212 addresses all imports of rice from all countries, not just dumped imports of long grain white rice from the United States. And similarly, paragraph 217 of the final determination addresses all imports of all white rice from the United States, not just dumped imports of long grain white rice.

32. I will turn now to the third flaw in Mexico's analysis, its failure to conduct an objective analysis of certain "relevant economic factors" that it was required to evaluate under Article 3.4 of the AD Agreement.

33. As we demonstrated in our submission, Mexico's examination of inventories and market share was not objective, and it did not even examine "other factors affecting domestic prices." First, the record evidence on inventories showed that inventories actually decreased significantly during the period of injury analysis. There is no support in the factual record for Mexico's claim (para. 120) that the data showed a trend toward an increase. Moreover, there is no way to know whether inventories increased or decreased after the POI, because Mexico failed to collect any data for the 15 months between the end of the POI and the initiation of the investigation, and then the three years between the end of the end of the POI and the final determination..

34. Second, although Mexico baldly asserts that it objectively analyzed market share (para. 120), it provides no support for its assertion. This is not surprising, because the evidence on market share showed that market shares were stable throughout the period of injury analysis.

35. Finally, the fact that Mexico points to its entire final determination, and 85 paragraphs relating to its analysis of imports (para. 121), shows that it is unable to identify where in its determination it actually considered "other factors affecting domestic prices."

36. The final flaw in Mexico's analysis of the injury data is that it included non-dumped imports in its evaluation of volume, price effects, and the impact of the dumped imports on the domestic industry.

37. In our first submission, we pointed to numerous paragraphs of Mexico's final determination showing that it inappropriately considered the volume and price effects of all imports of U.S. long grain white rice, and not just the dumped imports. Mexico has not replied to any of these points, except to argue that 74.9 percent of total U.S. imports were dumped (para. 124). Rather than belabor this point, we simply refer the Panel to our submission, and note that even Mexico appears to concede that at least 25.1 percent of the imports it included in its analysis were not dumped.

38. Finally, Mexico's only response to our claim that its final determination breached Article 12.2 of the AD Agreement is to argue in a conclusory manner that the determination was consistent with WTO rules (paras. 127-129). It then refers the Panel, once again, to the entire final determination. This is obviously no response at all.

D. Mexico's Failure to Exclude Firms with Antidumping Margins of Zero Percent from the Antidumping Measure Is Inconsistent with Article 5.8 of the AD Agreement

39. I would like to move now from Mexico's analysis of injury to the breaches arising from its failure to exclude Farmers Rice and Riceland from the AD measure after it found that neither firm was dumping.

40. Mexico argues that a proper approach to interpreting the AD Agreement requires the interpreter to examine the ordinary meaning of the terms used, in their context, and in the light of the object and purpose of the Agreement. This is true. Applying these rules to Article 5.8 demonstrates that Mexico's treatment of Farmers Rice and Riceland breached its obligations.

41. Mexico's response on this point (paras. 135-36) ignores that the second and third sentences of Article 5.8 refer to the "margin" of dumping being *de minimis*. As the Appellate Body found when it interpreted Article 9.4 of the AD Agreement in *United States – Hot-Rolled Steel*, the term "margin" refers to the "individual margin of dumping determined for each of the investigated exporters and producers" of the investigated product.[5] Nothing in the text of Article 5.8 suggests that the term "margin" should be interpreted differently in Article 5.8 than in Article 9.4, and Mexico has suggested no reason for doing so. Thus, when Article 5.8 refers to terminating the investigation when the "margin" of dumping is *de minimis*, it is referring to termination for individual firms.

42. The fourth sentence of Article 5.8 provides contextual support for this interpretation. That sentence demonstrates that the "volume" analysis may be done on a country-wide basis. There is no similar language addressing the dumping analysis. And if the object and purpose of the AD Agreement is to offset injurious dumping, then it makes no sense to apply a measure to a firm that has been investigated and found not to be dumping.

E. Mexico Breached Numerous Provisions of the AD Agreement and the GATT 1994 by Applying an Adverse "Facts Available" Dumping Margin to Producers Rice and to U.S. Producers and Exporters that It Did Not Examine

5 *United States – Hot-Rolled Steel AB*, para. 118.

43. The fifth issue in this case involves Mexico's decision to only investigate the two exporters that the petitioner named in the petition and two other firms that came forward on their own, and to apply an adverse, facts-available margin to Producers Rice and every other exporter and producer in the United States.

44. Yet again, Mexico argues in its submission that the AD Agreement contains no obligations with respect to this topic, and that it has complete freedom in deciding how to treat exporters and producers that the petitioner does not designate as "known" exporters in the petition (paras. 140-41). Mexico also argues that it has total freedom to apply the facts available to such firms, including "less favorable," or "adverse," facts available from the petition (para. 159).

45. Mexico's argument is illogical, inconsistent with the text of the AD Agreement, and contradictory to the findings of the Appellate Body on this topic.

46. First, Mexico's argument is inconsistent with the text of the AD Agreement because Mexico bases its entire argument on a flawed interpretive approach that relies on partial citations of Articles 6.8 and 6.10, viewed in isolation, and divorced from the broader context of the overall Agreement (paras. 149, 160). Mexico's approach is wrong. A proper interpretive approach must take into account the entirety of the AD Agreement. This means Mexico must address:

- Article 6.1 and paragraph 1 of Annex II, which prohibit an authority from applying the facts available to a firm unless the firm has been sent a copy of the questionnaire and informed of the consequences of not responding;
- The second sentence of Article 6.8, which explicitly states that the provisions of Annex II shall be observed in applying Article 6.8;
- Articles 1 and 5, which require an authority to carry out an active "investigation" and not remain passive;

- Articles 5.3 and 6.6, which require Mexico to satisfy itself as to the accuracy of the information submitted by interested parties on which its findings are based;

- Article 12.1, which requires a Member to provide notice to interested parties, in addition to a public notice; and

- Paragraph 7 of Annex II, which does not allow an authority to apply a margin that is "less favorable" to a party (i.e., adverse) unless the party does not cooperate and withholds relevant information.

47. Mexico must also explain how its interpretation is consistent with Article 9.5 of the AD Agreement, because "deeming" all exporters and producers as being "in the investigation," and applying a facts available margin to them, means all of those firms are "subject to the anti-dumping duties on the product" and thus not eligible for an expedited review.

48. Second, Mexico's argument is contrary to the findings of the Appellate Body because the Appellate Body found in *EC Bed Linen 21.5* that Article 6.10 of the AD Agreement "requires, 'as a rule', that individual dumping margins be established for *each* producer or exporter."[6] Mexico ignores this finding.

49. Finally, Mexico's interpretation of Article 6.8 is illogical because the drafters clearly went to substantial trouble to establish a detailed set of rules that were meant to ensure that unexamined firms are not unfairly prejudiced if they are not included in an AD investigation. The idea that the drafters would have created detailed rules to protect "known" firms, and left "unknown" firms subject to the application of adverse facts available, is implausible at best.

50. Mr. Chairman, the fact is that the AD Agreement protects both known firms and unknown firms. It does this by requiring authorities to send their questionnaire to firms that are

---

6 *EC Bed Linen 21.5 AB*, para. 125 and n. 157 (emphasis in original).

included "in the investigation," and by restricting the application of margins based on the facts available to cases where a firm is sent the questionnaire, is warned about the consequences of not responding, but nevertheless fails to provide the necessary information. An authority cannot base a firm's margin on the facts available without first taking these steps. If an authority does not take these steps, then it cannot claim to be including the firm "in the investigation," and the firm is entitled to a neutral all other's rate calculated in accordance with Article 9.4 of the AD Agreement.

51. Mexico argues that Article 9.4 only applies when the authority limits its investigation to a subset of exporters. But Mexico did limit its investigation. It did so explicitly when it chose not to send its questionnaire to The Rice Company, a firm identified in the petition as one of the largest exporters of long grain white rice in the United States. It also did so implicitly, when it (1) failed to consult the *pedimento* data held by Mexican Customs, which would have provided a complete list of all U.S. exporters of the subject product to Mexico during the POI;[7] (2) when it chose not to reference readily available public data that would have identified every producer of the subject product in the United States;[8] and (3) when it chose not to ask the petitioner whether the two firms listed as "known" exporters in the petition were truly the only exporters or producers that the petitioner knew of. (As an aside, it is also worth noting that of the two identified as "known" exporters in the petition, Farmers Rice was found not to be dumping, and Producers Rice had no exports. This also calls into question Mexico's reliance on the

7 Exhibit US-12.

8 Exhibits US-18&19.

petitioner's data.) Therefore, Mexico should have applied a neutral all other's margin, calculated in accordance with Article 9.4, to Producers Rice and the unexamined exporters and producers.

52. Mr. Chairman, before I move on to the next issue, I want to correct a factual misstatement that Mexico made in its written submission, and then note some of the other claims on this topic that Mexico has ignored in its submission.

53. First, Mexico argues that its treatment of Producers Rice was consistent with paragraph 3 of Annex II because the information that Producers Rice submitted was late, incorrect, or unverifiable (para. 171). There is absolutely no support for this assertion on the record of the investigation, and Mexico points to none.

54. Second, Mexico's submission does not contest several of our claims addressing its treatment of Producers Rice and the unexamined firms. In addition to those that I have already discussed:

- Mexico has failed to respond to our claim that Mexico's treatment of Producers Rice was inconsistent with paragraph 7 of Annex II;
- Mexico has failed to address our argument that Mexico breached Article 6.6 of the AD Agreement by failing to satisfy itself that the petitioner's list of only two "known" exporters was accurate;
- Mexico has failed to explain how an objective and unbiased authority could have concluded that there were only two exporters of long grain white rice in the entire United States;
- Mexico has not responded to our claim that Mexico breached Articles 6.2 and 6.4 of the AD Agreement by failing to provide the U.S. exporters and producers the *pedimento* data that it gave to the Mexican industry;
- Mexico has not contested our demonstration that the margin contained in the petition was adverse within the meaning of paragraph 7 of Annex II;

- Mexico has provided no reply to the our claim that Mexico's failure to provide notice to interested parties breached Article 12.1 of the AD Agreement; and

- Mexico has provided only a conclusory reply to our claim that its published determination was inconsistent with Article 12.2 of the AD Agreement.

55. In sum, Mexico has failed even to contest, much less rebut, the majority of our claims.

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

56. I will now turn to our claims addressing certain provisions of Mexico's Foreign Trade Act, and its Federal Code of Civil Procedure.

57. Before addressing the provisions themselves, however, I would like to respond to two preliminary points that Mexico makes with respect to these claims.

58. First, Mexico asserts that we have failed to recognize that treaties are self-executing under Mexican law, and that Mexico must apply its laws in a way that is consistent with its treaties – including the AD Agreement and the GATT 1994 (paras. 203, 206). The self-executing nature of treaties under Mexican law is beside the point, however, if Mexico's laws mandate WTO-inconsistent action.

59. Furthermore, Mexico's response to our arguments shows that it is trying to interpret its WTO obligations in a way that is consistent with what its laws require, and not the reverse. The fact that it is taking this approach suggests that Mexico may have been misinterpreting its WTO obligations when it drafted its law.

60. Therefore, the proper approach for addressing the WTO-compatibility of Mexico's laws is to determine, first, whether the challenged provisions mandate some action, and second, if they do, whether that action is inconsistent with the cited provisions of the AD Agreement and the

GATT 1994. If a provision requires Mexico to take a WTO-inconsistent action, then the law is, as such, WTO-inconsistent.

61. My second preliminary point pertains to Mexico's recurring argument that the United States has not introduced evidence of the scope and meaning of the challenged provisions (*e.g.*, paras. 231, 275-80, 294-96). Mexico is wrong. We have, in fact, provided the text of the relevant provisions themselves. While a Member may also choose to submit additional evidence, it is under no obligation to do so, especially if, as here, the responding Member offers no credible reason to conclude that the law means anything other than what it says.

A. Article 53 of the FTA

62. I will now turn to the first of the challenged provisions, Article 53 of the FTA.

63. The United States demonstrated in its submission that Article 53 of the FTA sets a mandatory deadline of 28 working days for interested parties to respond to Mexico's AD questionnaire, and that the law counts the 28 days from the date of publication of the initiation notice, and not from the date that the party receives the questionnaire. Mexico does not contest our interpretation of the law, which is very straightforward. Instead, Mexico contests our interpretation of the relevant provisions of the AD and SCM Agreements.

64. Remarkably, Mexico claims that Articles 6.1.1 of the AD Agreement and 12.1.1 of the SCM Agreement only require authorities to provide a 30 day response time to producers and exporters that are "sent" the questionnaire. Mexico even argues that it would be "illogical" to provide the full 30 days to interested parties that are not initially sent the questionnaire.

65. Given Mexico's position, the issue for the Panel is quite clear: Is Mexico correct that Articles 6.1.1 and 12.1.1 only apply when an authority "sends" the questionnaire to an interested

party? Or is the proper interpretation that the two provisions count the 30 day deadline from the date of receipt, which is the logical conclusion based on the text of Article 6.1.1 and footnote fifteen? If it is the latter, then Article 53 will mandate a breach of WTO rules whenever an interested party "receives" the questionnaire more than 8 days after publication of the initiation notice.

B. Article 64 of the FTA

66. The second statutory provision at issue in this dispute is Article 64 of the FTA. Article 64 is the provision that "codifies" the facts available approach that Mexico applied in the rice investigation, when it applied the adverse facts available margin taken from the petition to Producers Rice and the U.S. exporters and producers that were never sent a copy of the questionnaire. Article 64 requires Mexico to apply the highest level of facts available to such firms.

67. Mexico does not contest our reading of Article 64. Rather, it contests our interpretation of the requirements of the AD Agreement. Therefore, we will focus our comments today on the AD Agreement provisions at issue.

68. Mexico's defense of Article 64 of the FTA mirrors its defense of its treatment of Producers Rice and the other unexamined exporters and producers: namely, that Article 6.8 of the AD Agreement permits a Member to apply the facts available to a party that fails to provide necessary information, and Mexico is therefore justified in applying the facts available to firms that have no shipments during the POI or that do not "appear" in the investigation (paras. 238-240). Mexico also argues that Article 9.4 is not relevant to calculating antidumping rates for

such firms (para. 241-44). Once again, Mexico's argument is based on a misinterpretation of the AD Agreement.

69. Mexico's breaches with respect to Article 64 arise from the same erroneous interpretation that it relied upon when seeking to justify its treatment of Producers Rice and the other exporters and producers. Mexico cites a portion of Article 6.8 without reference to any of the other provisions of the AD Agreement that we have already discussed, including Article 6.1 and paragraph 1 of Annex II. Rather than repeat those discussions, I will simply refer the Panel to our earlier response to this very same point.

70. Mexico also argues that Article 64 is not inconsistent with Article 9.4 of the AD Agreement because the calculation methodology in Article 9.4 requires Members to exclude margins that are based on the facts available (paras. 242-44). Mexico misses the point. Article 64 is inconsistent with Article 9.4 of the AD Agreement, because Article 64 requires Mexico to apply facts available-based margins to firms that should have received a neutral "all others" margin calculated in accordance with Article 9.4.

71. Mexico also misinterprets Article 9.3 of the AD Agreement. Mexico argues that there can be no breach of Article 9.3 in a case where Article 9.4 does not apply (paras. 244-45). Article 9.3 is an independent obligation that can be breached in various ways, including where a Member refuses to provide a refund review, where it calculates a particular margin under Article 2 of the AD Agreement but applies a higher level of duty to a firm's exports, or, as in this case, applies a facts available-based margin to a firm where there is no legitimate basis to do so. Thus, a Member can breach Article 9.3 of the AD Agreement independently of a breach of Article 9.4. Article 64 of the FTA, however, breaches Article 9.3 and Article 9.4.

72. Mexico's argument with respect to paragraph 1 of Annex II (para. 251) ignores that an authority must "specify in detail the information required" and "ensure that the party is aware" of the consequences of not providing the information, before it may apply the facts available. And its argument that paragraph 7 of Annex II permits a "less favorable" result if a firm refuses to cooperate (paras. 251-52) ignores that by requiring Mexico to always apply the highest level of facts available, Article 64 precludes taking such cooperation into account.

73. Rather than repeat our arguments about paragraphs 3 and 5 of Annex II, I will simply refer the Panel to the detailed discussion in our submission.

74. Finally, I would again just note that Mexico does not contest our claim that Article 64 of the FTA breaches Article 9.5 of the AD Agreement or Article 19.3 of the SCM Agreement.

C. Article 68 of the FTA

75. The third statutory provision at issue is Article 68 of the FTA. Article 68 mandates a breach of WTO rules for two reasons: first, it requires Mexico to review firms that were found not to be dumping or receiving countervailable subsidies in the original investigation; and second, it mandates that Mexico require firms seeking reviews to demonstrate that the volume of their exports was "representative." Once again, Mexico's defense is that the AD and SCM Agreements do not create any obligations in this area. Mexico is wrong.

76. We explained in our first submission that Articles 5.8 of the AD Agreement and 11.9 of the SCM Agreement require authorities to exclude firms from AD and CVD measures if the authorities find during the investigation that the firms are not dumping or receiving countervailable subsidies. We provided further explanation with respect to Article 5.8 today. Mexico's response that Articles 5.8 and 11.9 do not apply to reviews misses the point (para.

256). If a firm is excluded from the measure, then there is no basis to subject the firm to a review. Yet Article 68 requires such reviews. Therefore, it breaches Articles 5.8 and 11.9.

77. Mexico also misses the point with respect to the breaches caused by the requirement for firms to demonstrate that the volume of their sales was "representative." Yet again, Mexico's defense is that the AD and SCM Agreements contain no obligations on this topic (para. 265). But as we set out in our first submission, a proper textual analysis of Articles 9.3, 11.2, and 21.2 demonstrates that a firm that meets the criteria in those provisions has a right to obtain a review. Since those conditions do not include showing that import volumes were "representative," Article 68 of the FTA – by imposing that condition – breaches Articles 9.3, 11.2, and 21.2.

D. Article 89D of the FTA

78. I will now turn to the fourth statutory provision at issue: Article 89D of the FTA.

79. Like Article 68, Article 89D mandates that firms seeking expedited reviews demonstrate that the volume of their exports was representative. And as with Article 68, Mexico defends its requirement by claiming that the AD and SCM Agreements create no obligations on this topic (para. 270).

80. Again, Mexico is mistaken. Although Mexico describes its requirement as "natural and logical," and cites the "context" and "object and purpose" of the AD and SCM Agreements (without elaboration, though) (para. 270), the fact remains that the ordinary meaning of the text of the provisions demonstrates that a firm that meets the criteria in those provisions has a right to obtain an expedited review. Those conditions do not include showing that import volumes were "representative," and Article 89D – by imposing that condition – breaches Articles 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement.

81. Article 89D also breaches Articles 9.5 and 19.3 because it only allows producers, and not non-producing exporters, to obtain reviews. Mexico appears to implicitly concede that this aspect of Article 89D is inconsistent with the AD and SCM Agreements (paras. 268-69). Indeed, the inconsistency is inescapable, since subparagraph II of the Article (which sets conditions for obtaining reviews) states that the producers must demonstrate they are not related to producers or exporters that are already subject to the duty. The specific reference to producers and exporters in subparagraph II means one cannot interpret the chapeau, which only refers to producers, to include exporters.

E. Article 93V of the FTA

82. The fifth statutory provision at issue is Article 93V, which requires Mexico to impose fines on importers that import certain goods subject to an AD or CVD investigation. Article 93V is inconsistent with Articles 18.1 of the AD Agreement and 32.1 of the SCM Agreement because it is a non-permissible specific action against dumping.

83. Before I address Mexico's arguments, it is important to note that Mexico has not contested 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. Therefore, the provision is WTO-inconsistent.

84. Mexico's only defense to this claim is to argue that it has discretion not to impose the fine. The plain language of the provision rebuts Mexico's argument. Although Article 93V gives Mexico discretion to determine whether the factual predicates for applying a fine exist, it mandates the application of a fine if they do.

F. Article 366 of the FCCP and Articles 68 and 97 of the FTA

85. The final set of Mexico's legal provisions at issue are Article 366 of the FCCP, and Articles 68 and 97 of the FTA. These provisions are inconsistent "as such" with Articles 9.3, 9.5, and 11.2 of the AD Agreement, and Articles 19.3 and 21.2 of the SCM Agreement, because they preclude the Mexican authorities from conducting reviews of AD and CVD measures while judicial proceedings are underway.

86. Turning first to Article 366 of the FCCP, Mexico argues that the United States has not provided any evidence as to the meaning of that provision (paras. 291-92). Mexico is wrong, because our submission provides the text of the provision itself. Article 366 states that a proceeding "shall be suspended" pending resolution of another matter. By precluding Mexico from conducting reviews in this manner, Article 366 is inconsistent with Articles 9.3, 9.5, and 11.2 of the AD Agreement, and Articles 19.3 and 21.2 of the SCM Agreement.

87. Turning next to Articles 68 and 97 of the FTA, Mexico's submission does not even address our claim that the challenged provisions breach Articles 11.2 of the AD Agreement and 21.2 of the SCM Agreement. Since Mexico has not contested these claims, I will not discuss them further.

88. As for our claim that Articles 68 and 97 breach Articles 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement, Mexico's defense is the remarkable assertion that those WTO provisions allow a Member to wait as long as it likes before initiating an expedited review, provided that it conducts the review in a prompt manner once it decides to initiate (paras. 305-07). Mexico's argument contradicts the ordinary meaning of the text of Articles 9.5 and 19.3.

89. The first sentence of Article 9.5 of the AD Agreement says a Member must "promptly carry out a review" to establish an individual margin for a new shipper. If a Member refuses

even to initiate a review, it is not carrying out the review "promptly." And if the first sentence of Article 9.5 leaves any confusion on this point, the second sentence settles the matter, because it states that the review shall be "initiated" and "carried out" on an accelerated basis. Mexico's interpretation would read the "initiation" language out of Article 9.5, contrary to the principle of effectiveness of treaty interpretation.

90. Similarly, Article 19.3 of the SCM Agreement states that a previously uninvestigated exporter is entitled to an "expedited" review in order to "promptly establish" an individual rate for that exporter. If a Member refuses even to initiate the review, the review is not "expedited," and the individual rate is not "promptly established."

91. Mexico's suggestion that Articles 68 and 97 of the FTA might not preclude reviews under Article 9.5 and 19.3 is surprising, to say the least, because Mexico confirmed during consultations that the provisions do, in fact, preclude such reviews.

92. Finally, Mexico does not contest that Articles 68 and 97 of the FTA preclude Mexico from conducting reviews of measures under Article 9.3.2 of the AD Agreement while judicial reviews of the measures are underway (para. 304). It argues instead that its approach is permissible because the duties are not "definitive" until the judicial review is complete (paras. 301, 304). But Mexico is wrong on the facts. For example, Mexico's Semi-Annual Report on Anti-Dumping Measures for the period of January 1 to June 30, 2000,[9] reports that it applied "definitive duties" on U.S. exports of beef on April 28, 2000. And yet – as Exhibit US-20 to our

9 G/ADP/N/65/MEX, at 2 (Sept. 27, 2000).

first submission illustrates – Mexico has refused for the past four years to conduct the reviews of the beef measure that U.S. exporters have requested.

93. It is also important to note that Articles 68 and 97 preclude Mexico from conducting reviews requested by any party, including parties not challenging the measure. Mexico claims that its approach provides certainty (para. 300). However, since Mexico believes it is permissible to investigate only the exporters that are identified in the petition, and to apply the "highest" margin of facts available to everyone else, the only real certainty is that a firm that is not included in the original investigation will be precluded from gaining an individual rate until the conclusion of a judicial challenge that may take years. Nothing in Article 9.3.2 permits a Member to limit the ability of an exporter to gain a review in this manner.

G. Conclusion

94. Mr. Chairman, this concludes the oral statement of the United States. Thank you for your attention. We would be pleased to receive any questions you may have.