Check against delivery

ORAL STATEMENT OF THE UNITED STATES
AT THE ORAL HEARING OF THE APPELLATE BODY

Mexico – Definitive Anti-dumping Measures on Beef and Rice
(Complaint with Respect to Rice)

(AB-2005-6)

1. Good morning Mr. Chairman, members of the division. My delegation and I have the honor of representing the United States in today's hearing.

2. The United States filed a written submission responding in detail to Mexico's arguments in its appeal. We did not file an other appeal, and our appellee submission was the last document filed in this appeal. Therefore, we will not make a lengthy opening statement. Instead, we will simply touch briefly on some overarching issues and make a few new points that we did not make in our written submission.

1. Mexico's Determination of Injury

3. Mr. Chairman, the first issue we will discuss today is Mexico's appeal of the Panel's three sets of findings relating to Economía's injury determination.

4. Mexico's arguments on these three sets of findings suffer from a common flaw: Mexico simply refuses to acknowledge that the obligation in Article 3.1 of the AD Agreement for an investigating authority to base a determination of injury on positive evidence and to conduct an "objective examination" applies even when the AD Agreement does not establish a specific methodology for a particular determination.

5. Therefore, if an investigating authority allows the petitioner to select the period of investigation ("POI") for the injury analysis, over the objection of the foreign respondents, and if the petitioner chooses a period that omits a substantial amount of recent data, Mexico cannot

simply argue that the AD Agreement contains no rule concerning the period to be used for an injury analysis. Rather, it is necessary to determine whether, in light of the facts of the case, Economía's approach was objective and resulted in a determination that was based on positive evidence, as Article 3.1 requires. As the Panel correctly found, the POI that the petitioner selected in the *Rice* investigation ended 15 months before the initiation of the investigation. Economía took absolutely no steps to collect or examine any of the data covering those 15 months, even though the data were clearly relevant. Mexico provided no reasons for Economía's failure to do so, except that Economía's normal practice is to examine whatever period the petitioner asks it to examine. The Panel correctly found that Economía's determination was not based on positive evidence, and that it did not involve an objective examination. Mexico's arguments to the contrary provide no basis for reversing the Panel.

6. Similarly, Mexico cannot justify Economía's decision to disregard half of the injury data for each of the three years of the POI by arguing that the AD Agreement establishes no particular time period for injury determinations. Economía decided to set a three-year POI, and it collected data for that entire period. It then ignored half of the data, because the petitioner wanted it to focus its analysis on the part of the year when imports were at their highest. The Panel correctly found that Economía's methodology was not that of an unbiased and objective authority, and that its analysis was not based on positive evidence. Mexico has failed to provide any legitimate grounds for reversing the Panel's findings.

7. Finally, Mexico argues that Economía's analysis of import volumes and price effects was consistent with the AD Agreement because the Agreement contains no specific rules on the methodology that an authority must use. But Mexico fails to recognize that an investigating authority's ability to devise its own methodology in the first instance does not mean the authority is free to use a methodology that results in an investigation that is not objective and based on positive evidence. As the Panel correctly found, the methodology that Economía used for its volume and price analysis relied on unfounded assumptions, instead of facts. Therefore,

Economía's determination was inconsistent with Articles 3.1 and 3.2 of the AD Agreement. The Appellate Body should reject Mexico's arguments and uphold the Panel's findings.

2. Mexico's Failure to Exclude Firms with Antidumping Margins of Zero Percent from the Antidumping Measure

8. Mr. Chairman, we will turn now to the issues regarding Economía's calculation of the dumping margins and the application of the antidumping measure.

9. The first of these issues concerns the Panel's finding that Economía breached Article 5.8 of the AD Agreement by applying the measure to two U.S. exporters that it investigated and that it found were not dumping. Since we addressed all of Mexico's arguments in our written submission, we are going to limit our comments in this statement to a short, additional response to an argument that the EC made in its third participant submission.

10. The EC argues that Article 5.8 only applies on a country-wide basis. It bases much of its argument on the fact that Article 2 of the AD Agreement refers several times to the term "country." In the EC's view, these references indicate that the concept of dumping involves a strong connotation of a country-wide assessment, and that the obligations in Article 5.8 should therefore be read to apply only to the country as a whole. But as we noted in our written submission,[1] the EC is ignoring that the substance of Article 2 involves a series of calculations that are clearly exporter-specific, not country-wide.

11. For example, Article 2.2.1 of the AD Agreement permits an investigating authority to disregard sales that are made below cost if the sales are made, among other things, "within an extended period of time." If the EC's theory is correct, then Article 2.2.1 requires an investigating authority to include the below cost sales in its analysis unless all of the exporters in the country are selling below cost for an extended period of time. Plainly, this would make no

[1] *See* U.S. Appellee Submission, n.107.

sense. Like the "margin of dumping" analysis in Article 5.8, the determination in Article 2.2.1 is exporter-specific.

12. As the substance of Article 2 makes clear, the dumping side of an antidumping investigation is not a country-wide analysis, it is a series of parallel examinations of individual exporters and producers. Therefore, if an investigating authority examines a particular exporter and finds the firm is not dumping, the authority must exclude the firm from the antidumping measure, as Article 5.8 requires. The Panel's findings on this point were correct, and the Appellate Body should uphold them.

3. Mexico's Application of an Adverse, Facts Available-Based Dumping Margin to the Non-Shipping Exporter Producers Rice

13. Mr. Chairman, Mexico's arguments with respect to the non-shipping exporter Producers Rice can be quickly disposed of. It is indisputable that Economía applied a 10.18 percent facts available antidumping margin, taken from the petition, to Producers Rice, even though the firm cooperated fully in the investigation. It is also indisputable that the U.S. panel request and our submissions to the Panel claimed that Economía's action was inconsistent with Article 6.8 and paragraph 7 of Annex II of the AD Agreement. Paragraph 7 of Annex II states that an investigating authority that bases its findings on a secondary source – such as the petition – should do so with special circumspection, including by checking the information against other independent information at its disposal. The Panel found as a matter of fact that Economía made no attempt to check the petition margin against other independent information. Therefore, Economía's application of the 10.18 percent facts available margin to Producers Rice was inconsistent with Article 6.8 and paragraph 7 of Annex II of the AD Agreement.

4. Mexico's Application of Facts Available-Based Dumping Margins to U.S. Exporters and Producers That it Did Not Investigate

14. The next set of issues concerns the Panel's finding that Economía breached Articles 6.1, 6.8, 6.10, 12.1, and paragraph 1 of Annex II of the AD Agreement by applying facts available-based dumping margins to the U.S. exporters and producers of long-grain white rice that it never even investigated. We will focus our comments this morning on the relationship between Articles 6.1, 6.8, and paragraph 1 of Annex II.

15. Both during the panel proceedings and again now, on appeal, Mexico's argumentation on this issue has ignored that Article 6.8 of the AD Agreement is not the sole provision that is relevant to determining whether an investigating authority's application of the facts available is WTO-consistent in a particular case. As the Panel correctly found, Article 6.1 and Annex II are also fundamental to this issue.

16. Article 6.1 states that "[a]ll interested parties in an antidumping investigation shall be given notice" of the information that the authority requires from them. As the Appellate Body has previously found, it is the investigating authority that must provide this notice, and it must give it to each individual exporter and producer that it includes in the investigation.[2] And paragraph 1 of Annex II requires investigating authorities to "ensure" that such interested parties receive proper notice of the right of the investigating authorities to use the facts available if the party fails to provide the required information.

17. Over the course of this dispute, Mexico has never explained how Economía's failure to provide individual notice to all of the U.S. exporters and producers that it included in its investigation was consistent with the obligations in Article 6.1 and paragraph 1 of Annex II. It has completely ignored the latter provision, and its only response to the obligation in Article 6.1

[2]Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, WT/DS244/AB/R, adopted 9 January 2004, para. 152.

is to argue that Economía complied with Article 6.1.3, a provision that was never at issue. Mexico's arguments provide no basis for reversing any of the Panel's findings, and the Appellate Body should uphold the Panel.

5. Mexico's Foreign Trade Act

18. Mr. Chairman, the final set of issues today concerns Mexico's appeals of the panel's findings on the Foreign Trade Act ("FTA"). Our written submission addressed each of the relevant FTA provisions in detail, so we will not address all of them here. Instead, we will make brief comments about some of them.

19. Before turning to the substantive FTA provisions at issue, we would like to recall briefly our response to Mexico's arguments regarding Article 2 of the FTA.[3] Mexico has argued that its FTA provisions cannot be found to be WTO-inconsistent "as such," because Article 2 of the FTA requires Mexico to apply its provisions in a WTO-consistent manner. But as the Panel correctly found, each of the FTA provisions at issue in fact requires Economía to take a particular action that conflicts with Mexico's WTO obligations. Since Mexico argues that each of these required actions is WTO-consistent on its face, there is no basis under its domestic law for Article 2 to override them. Therefore, Article 2 cannot shield the FTA provisions from Appellate Body or panel review.

20. Turning now to the substantive FTA provisions, the first provision at issue is Article 53, which requires Economía to deny a full 30-day response time to any exporter or producer that is not sent the questionnaire at the very outset of the investigation. We explained in our written submission why Mexico's arguments on this issue are based on a misinterpretation of Article

[3] *See* U.S. Appellee Submission, paras. 121-123.

6.1.1 of the AD Agreement and Article 12.1.1 of the SCM Agreement.[4] It is also worth noting the consequences of accepting Mexico's interpretation.

21. Economía only sends its questionnaire to an exporter or producer at the outset of the investigation if the Mexican petitioner specifically identifies the firm as a "known" exporter or producer in the petition. Therefore, Article 53 creates an incentive for Mexican petitioners to try to bias the investigation from the outset by identifying as few "known" exporters or producers as possible, in order to deny the remaining exporters and producers the full 30-day response time they are entitled to. And we know that Economía will take no steps to identify any additional respondents because it rejects the idea that it has any independent obligation to do so. The negative consequences for exporters and the likelihood of bias in the investigation are obvious. The Panel correctly found that Article 53 is inconsistent with Mexico's obligations under the AD and SCM Agreements, and the Appellate Body should uphold the Panel's findings.

22. We will now turn briefly to Articles 64, 68, and 89D of the FTA. We explained in our written submission why the Panel was correct to find that Article 64 of the FTA is inconsistent with Article 6.8 and Annex II of the AD Agreement and Article 12.7 of the SCM Agreement because Article 64 requires Economía to always apply the "highest" margin of dumping or subsidization, including the margin from the petition, when it establishes a margin on the basis of the facts available.[5] Neither Agreement permits this approach. We also explained why the Panel was correct to find that Articles 68 and 89D of the FTA are inconsistent with several provisions of the AD and SCM Agreements because they require Economía to refuse to conduct reviews unless exporters and producers can demonstrate that they had a "representative" volume of sales during the review period.[6] Neither Agreement permits an investigating authority to impose such an additional condition for obtaining a review.

---

[4] *See* U.S. Appellee Submission, paras. 126-129.

[5] *See* U.S. Appellee Submission, paras. 130-139.

[6] *See* U.S. Appellee Submission, paras. 150-157, 158-162.

23. In addition to these points, it is also important to note that the interrelationship between Article 64 of the FTA, on the one hand, and Articles 68 and 89D of the FTA, on the other hand, makes it likely that any exporter or producer that Economía does not individually examine will be precluded from obtaining a review. This is because Article 64 requires Economía to always assign the "highest" margin of dumping or subsidization to such firms. This "highest" margin will make it difficult for the firms to sell the "representative" volume of goods needed to qualify for a review.

24. Finally, Articles 68 and 97 of the FTA further exacerbate the problems caused by Articles 64, 68, and 89D, because they require Economía to deny reviews requested by any party if the antidumping measure is subject to judicial review. Exporters and producers that are not individually examined in the original investigation lose yet again: If they seek to challenge the legitimacy of the measure in court, they lose their chance to seek a reduction of their "highest" facts available margin through an administrative review. If they choose instead to seek an administrative review, they forfeit their chance to challenge the measure in court. Neither the SCM Agreement nor the AD Agreement permits a Member to impose such a choice under its domestic law.

6. Conclusion

25. Mr. Chairman, members of the division, this concludes our statement. The United States delegation looks forward to answering your questions. Thank you.