MEXICO – DEFINITIVE ANTI-DUMPING MEASURES ON BEEF AND RICE

(Complaint with respect to Rice)

(WT/DS295)

EXECUTIVE SUMMARY OF THE SECOND SUBMISSION OF THE UNITED STATES OF AMERICA

June 24, 2004

I. Introduction

1. Mexico's imposition of an antidumping measure on U.S. long-grain white rice breached numerous provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). Several provisions of Mexico's *Foreign Trade Act* ("FTA") and its *Federal Code of Civil Procedure* ("FCCP") are inconsistent with provisions of the AD Agreement and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

2. Mexico's responses to the United States' claims have barely addressed the substance of the U.S. arguments. Instead, Mexico has mostly replied with broad assertions that the AD and SCM Agreements create no obligations with respect to the issues that the United States has raised, and that Mexico has freedom to do whatever it wants. Mexico is incorrect. The AD and SCM Agreements do place obligations on Mexico, and Mexico has failed to rebut the U.S. *prima facie* case that Mexico has breached these obligations.

II. Economía's Use of a Stale Period of Investigation

A. Mexico Is Unable to Justify Economía's Use of a Stale POI

3. The purpose of an antidumping investigation is to determine whether a domestic industry is presently injured (or threatened with injury) by dumping that is presently occurring. Therefore, an authority must seek to base its determinations of dumping and injury on a period that includes the most recent available information. If an authority chooses instead to examine information that does not include the most recent available information, it must be able to justify its approach and explain why its determinations are objective, unbiased, and based on positive evidence.

4. Mexico's response to the Panel's question 2(c) has confirmed that Economía had no justification for its decision to base its injury determination on stale data, except that it selected the POI that the petitioner asked it to examine. It took this approach even though the foreign respondents and the importers objected. Mexico has also confirmed that Economía did not seek to use a POI that ended as close to the initiation date as practicable.

5. Furthermore, Mexico has not contested that Economía took no steps to update the injury information after it initiated its investigation, with the result that its final determination of injury was based on data that was three to five years old.

6. Mexico's sole defense on this issue is that it interprets the AD Agreement as placing no limits on the age of the information that an authority may use in reaching its determinations of dumping and injury, and that Economía is under no obligation to obtain the most recent information available when it conducts its investigations. Mexico is wrong.

B. An Investigating Authority Must Base its Injury Investigations on a Period that Includes the Most Recent Available Information

7. 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. For example, Article 3.7 of the AD Agreement requires an authority to base a threat determination:

> on facts, and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

If an authority fails to evaluate data that includes the most recent available data, it will not be in a position to make judgments about situations that are imminent; at most, it will be able to make predictions about situations that might have been imminent at some time in the past.[1] Thus, Article 3.7 of the AD Agreement presumes that the authority is making its determination based on data that include the most recent available information.

8. Similarly, Article 3.4 of the AD Agreement requires an authority to evaluate all relevant economic factors, including actual and potential decline in sales, profits, etc., and actual and potential negative effects on cash flow, inventories, etc. The term "potential" refers to the future, and implies that the authority is evaluating data that includes information that is as current as possible.

9. In addition, Article VI:1 of the GATT 1994 states that dumping "is to be condemned if it causes or threatens material injury," and Article VI:6(a) states that a contracting party may only levy an antidumping duty if it finds that the dumping is such as to cause or threaten material injury (emphasis added). Both of these provisions imply that the injury is occurring in the present (or threatening to occur in the near future). An objective authority will only be in a position to make determinations about the present, or the near future, if it is examining a period that includes the most recent data available.

10. The necessity for an authority to consider events that happened in the past does not give an authority free rein to choose which part of the past to consider. In the rice investigation, Economía made no effort to collect information for the period between the end of the POI and the initiation of the antidumping investigation or to update its data thereafter. The fifteen-month gap between the end of the POI and the date of initiation and the nearly three-year gap between the end of the POI and the final determination means (1) Economía's examination of volume and price effects was not objective or based on positive evidence as required by Articles 3.1 and 3.2 of the AD Agreement; (2) Economía's examination of "all relevant economic factors" having a bearing on the state of the domestic industry was not objective or based on positive evidence as required by Articles 3.1 and 3.4 of the AD Agreement; and (3) Economía's determination that the dumped imports were "causing" injury to the domestic industry was not objective or based on positive evidence as required by Articles 3.1 and 3.5 of the AD Agreement.

III. Economía's Limitation of its Examination of Injury

11. Economía's decision to allow the petitioners to set the POI for its dumping analysis as March - August 1999 and its focus on only March to August of 1997, 1998, and 1999 for its injury analysis resulted in breaches of Articles 1, 3.1, 3.5, and 6.2 of the AD Agreement.

12. First, the sole reason for Economía's decision to base its dumping analysis on the March to August time period was that the petitioner requested it to examine that period. Moreover, instead of using a neutral approach, Economía always assumes that the POI that the petitioner suggests is appropriate; if the foreign respondents disagree, it places the evidentiary burden on them to demonstrate

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[1] Similarly, footnote 10 to Article 3.7 states that one situation that might support an affirmative finding of threat of material injury is where "there is convincing reason to believe that there will be, in the near future, substantially increased importation of the product at dumped prices." An authority will only be in a position to make predictions about the "near future" if it is basing those predictions on information that includes recent data.

that it should use another period instead. Contrary to Mexico's assertion, footnote 4 of the AD Agreement is not relevant, because it merely addresses the determination of whether sales have been made below cost over an extended period of time.

13. Second, the sole reason for Economía's decision to base its injury analysis on the March to August time period was that the petitioner requested it to examine that period. Mexico's statement that Economía conducted its injury analysis on the basis of the "period selected by the petitioners" speaks volumes. The petitioner requested Economía to examine the March to August time period specifically because the petitioner believed imports were concentrated in that period, and Economía initiated the case on that basis. An objective and unbiased authority would not have done so.

14. Third, Mexico has rejected the idea that Economía took "seasonality" into account in making this decision. Therefore, there are absolutely no grounds to conclude that concerns about seasonality justified the approach that Economía took.

15. Fourth, Economía did collect data for every month in the three-year injury POI; it simply chose not to examine half of that information. By contrast, a proper injury analysis looks at the evidence for the entire POI. The fact that the non-examined half of each of the three years reflects a large portion of domestic production makes it vital for an authority to examine evidence for the entire POI.

16. The Appellate Body made a similar point in *United States – Hot-Rolled Steel AB*, when it found that an authority could not objectively examine a domestic industry if it focused on just one part of that industry. As the Appellate Body stated:

> Different parts of an industry may exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry . . . may give a misleading impression of the data relating to the industry as a whole, and may overlook positive developments in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry.

17. In sum, "an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of 'objectiv[ity]' in Article 3.1 of the *Anti-Dumping Agreement*."

18. The Appellate Body's observations are equally valid with respect to the examination of the entirety of the injury data relating to an industry. The economic performance of a domestic industry may vary over the course of a year. To examine only one part of the year may overlook positive developments in other parts of the year, and thus give a misleading impression of the data relating to the condition of the industry as a whole. Yet this is exactly what Economía did.

19. Moreover, ignoring the evidence for half of each of the three years of the POI precluded Economía from conducting an objective examination of the causal relationship between the dumped imports and any injury to the domestic industry. Economía's approach ensured that its examination was not based on all relevant evidence before it, as Article 3.5 of the AD Agreement requires.

IV. Economía's Conduct of its Injury Analysis

20. Economía's injury analysis breached Articles 3.1, 3.2, 3.4, 3.5, 6.8, 12.2, and Annex II of the AD Agreement on at least four different grounds.

21. Mexico's response to the Panel's questions further demonstrates that Economía breached Articles 3.1, 3.2, and 6.8 of the AD Agreement, as well as Annex II, by failing to collect the information on price effects and volumes that it needed to conduct its injury analysis in an objective manner and to base its determinations on positive evidence.

22. To be specific, Mexico has confirmed that numerous types of non-subject rice entered during the POI under tariff heading 1006.30.01 of Mexico's tariff schedule, and its answers demonstrate that Economía failed properly to separate the subject imports from the non-subject imports before it conducted its injury analysis.

23. Mexico argues that Economía did separate the subject imports from the non-subject imports, and that it used several methodologies to do so. In actuality, however, the only methodology that Economía used was the flawed procedure supplied by the petitioner. Furthermore, Mexico is mistaken in claiming that Economía also sought to base its injury determination on information obtained from the exporters. In actuality, Economía only sought volume and value information from Farmers Rice, Riceland, The Rice Company, and Producers Rice.

24. Mexico is also mistaken in claiming that Economía sought to separate the subject imports from the non-subject imports using information on the total volume of imports from the United States. The fact that the import data contained both subject and non-subject merchandise in tariff heading 1006.30.01 is what created the need to separate the two in the first place.

25. Finally, Mexico has confirmed that Economía ignored one reliable and neutral method that would have allowed it to collect the information that it needed to conduct an objective examination of the injury factors, and to base its determination on positive evidence – namely, consulting the *pedimentos*.

26. Mexico confirms that the *pedimentos* identify the volume and value of each import. Thus, it is indisputable that Economía could have used the *pedimentos* to obtain volume and value data that would have been specific to the subject merchandise, and substantially more accurate than the information on which it relied.

27. Mexico argues that the description field in the *pedimentos* does not necessarily describe in sufficient detail the product being imported, and that Economía would have needed to consult the invoices in cases where the description was not sufficiently precise. The invoices, however, are attached to the *pedimentos*. Moreover, even if Economía had only used the *pedimentos* that specifically identified the imports as long-grain white rice, it still would have had a substantial amount of precise data on volumes and values that it could have used in its determinations.

28. Mexico also argues that it would have been "impractical" to consult each and every *pedimento*. Even if Economía had only consulted a representative sample, however, it still would have had better data that it could have used in performing its analyses.

29. In addition, Mexico confirmed that the *pedimentos* identified the exporter and importer for each shipment. Thus, if Economía had consulted the *pedimentos* and encountered questions about the content of a particular shipment, it could have consulted either party, confirmed the nature of the merchandise, and ensured that it had accurate information on volumes and values. Alternatively, since the *pedimentos* listed the names and addresses of the exporters and importers, Economía could have simply sent them its questionnaire, and asked them to provide the necessary information. Economía failed to do so.

30. Finally, the Panel may wish to keep in mind the evidence that the United States submitted in response to question 17 from the Panel, which demonstrates that Mexico has been willing to use the *pedimentos* to benefit domestic industries seeking the imposition of antidumping measures. Mexico has gone so far as to release actual *pedimentos* to its domestic industry, and has allowed them to use the *pedimentos* to support their allegations of dumping and injury.

V. Economía's Failure to Exclude Farmers Rice and Riceland from the Measure

31. Article 5.8 of the AD Agreement requires Members to exclude from antidumping measures firms that are individually examined in an antidumping investigation and found not to be dumping. Mexico's failure to exclude Farmers Rice and Riceland from the antidumping measure on long-grain white rice breached Article 5.8.

32. Mexico will impose an antidumping measure on every producer and exporter in the investigated country as long as it finds at least one exporter to be dumping at more than *de minimis* levels. This includes applying the measure to producers that are investigated and found not to be dumping. Economía will not examine whether the weighted average margin of all exporters is greater than *de minimis* when it decides to impose an antidumping measure.

33. The outcome of the rice investigation illustrates the consequences of Mexico's approach. By "deeming" every exporter and producer in the investigated country as being included in the investigation and applying an adverse, facts available-based margin to the unexamined exporters and producers, Economía will almost certainly find at least one firm to be dumping in every antidumping investigation, and thus it will never find a basis to terminate an investigation due to *"de minimis*" dumping margins. Mexico's interpretation of Article 5.8 reads the *de minimis* dumping language out of the AD Agreement.

34. Mexico's interpretation of Article 5.8 fails to take into account that the second and third sentences of Article 5.8 refer to the "margin" of dumping being *de minimis*. The Appellate Body has interpreted the term "margin" in Article 9.4 of the AD Agreement as referring to the "individual margin of dumping determined for each of the investigated exporters and producers" of the investigated product. Nothing in the text of Article 5.8 of the AD Agreement suggests that the term "margin" should be interpreted differently in Article 5.8 than in Article 9.4.

35. The fourth sentence of Article 5.8 of the AD Agreement provides contextual support for the U.S. view. That sentence states that the "volume" analysis is normally done on a country-wide basis. The absence of similar language suggesting that the dumping analysis is to be done on a country-wide basis supports the conclusion that the *de minimis* standard is to be applied on a company-specific basis.

36. The EC claims that the term "country" is used in various places in the AD Agreement and the GATT 1994, and that the concept of dumping involves a "strong connotation of a country-wide assessment." In actuality, however, the concept of dumping involves a strong connotation of firm-specific assessment. Several provisions of the AD Agreement support this view.

37. Moreover, there is no "internal inconsistency" involved in terminating an antidumping investigation on a firm-specific basis, and no risk that doing so will lead to "parallel" investigations. Nor will interpreting Article 5.8 to require the exclusion of firms with zero margins of dumping require or lead to "several company specific cases or investigations." On the contrary, an authority can conduct a single investigation of multiple firms, and then terminate its investigation with respect to specific firms by excluding firms that were investigated and found not to be dumping from the measure.

VI. Economía's Application of an Adverse "Facts Available" Dumping Margin

A. Economía Should Have Taken Steps to Investigate Additional Exporters

38. Mexico has confirmed that the *pedimentos* identify the exporters of the subject merchandise, and that Mexico therefore knew the identity of every exporter of the subject merchandise to Mexico during the POI. Economía's failure to review the *pedimentos* to obtain the contact information for the exporters or to take any other steps to investigate more than just the two exporters that the petitioner designated in the petition was neither objective nor unbiased.

39. First, Mexico's argument that examining the *pedimentos* would have caused a "significant delay" in the initiation of the investigation is not credible. Economía only investigated dumping for March to August 1999, so even under Mexico's theory, reviewing the *pedimentos* would have taken approximately two weeks at most. It took Economía six months to initiate the investigation; the need to spend two weeks to gather the information it needed to contact the "known" exporters would not have dissuaded an objective and unbiased authority.

40. Second, Economía could have chosen instead to take other steps to identify additional exporters. For example, if Economía had consulted the *Rice Journal*, it would have obtained the names, addresses, and phone numbers for every rice miller in the United States.

41. Third, Mexico mischaracterizes the U.S. arguments on this issue when it claims that it was under no obligation to identify all of the exporters of long-grain white rice in the United States. The United States agrees that there is no such obligation. On the contrary, the second sentence of Article 6.10 explicitly permits an authority to limit its investigation. Therefore, Economía only needed to identify enough exporters to allow it to take either approach. An objective and unbiased administering authority would have done so.

42. Fourth, Economía's failure to conduct a proper investigation of the known exporters was particularly biased and non-objective because of the consequences for the firms that it did not individually investigate. Economía treated every exporter or producer in the United States as being included in the investigation. It then applied an adverse, facts available-based margin taken from the petition to any firm that did not learn of the investigation on its own and appear at the clerk's office in Mexico City to obtain a copy of the questionnaire. Given the negligible consequences for the petitioner of a slight delay in initiation, an objective and unbiased authority would have taken the necessary time to ensure that the due process rights of the foreign respondents were adequately protected.

43. Finally, Economía did not satisfy itself as to the accuracy of the petitioner's listing of only two exporters, as Articles 5.3 and 6.6 of the AD Agreement require. Although Economía used the *listado* data to check the volume and value data that the petitioner submitted, it was not able to use that source to confirm the identity of the exporters, and it did not check the *pedimentos*.

B. Mexico Is Misinterpreting the Relevant Requirements of the AD Agreement

44. Economía also breached the AD Agreement and the GATT 1994 by applying an adverse, facts available-based margin taken from the petition to Producers Rice and the unexamined exporters and producers. Mexico's only response to the U.S. claims has been to argue that the AD Agreement creates no obligations with respect to "unknown" exporters and producers, or exporters that had no shipments during the POI, and that Article 6.8 of the AD Agreement authorized it to apply adverse facts available to

such firms. Mexico even claims that an authority only needs to consider the exporters that are "known" to the petitioner, and not those known to itself. Mexico's interpretation is incorrect.

45. The illogic of Mexico's interpretation can perhaps best be seen by considering the response that the EC provided to the Panel's question 1(A) to the EC. Like Mexico, the EC disclaims any need for an authority to take any steps to identify exporters other than those listed in the petition. The EC further argues that it would be permissible for an authority to initiate an antidumping investigation even if the petitioner only identifies the exporting country, and identifies no exporters or producers at all. The EC has also agreed with Mexico that an authority is under no obligations with respect to "unknown" exporters or producers, and that it is permissible to apply facts available-based margins to those firms.

46. Thus, taken to its logical conclusion, the EC's and Mexico's interpretation of Articles 6.10 and 9.4 and the facts available provisions would permit an authority to initiate an investigation on the basis of a petition that did not identify any "known" exporters, publish a notice of the initiation of an antidumping investigation in its official journal, and then send its questionnaire to nobody. Then, unless a firm learned of the investigation on its own, entered an appearance, and obtained a copy of the questionnaire, the authorities could apply the petition margin to the entire country without having to examine anyone. While this outcome might be expedient for the authority (and beneficial for the petitioner), it is not consistent with the terms of the AD Agreement.

47. As the United States has previously discussed, Mexico's interpretation is based 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 AD Agreement. Mexico's approach is wrong. A proper interpretive approach must take into account the entirety of the AD Agreement. This means Mexico must take into account all of the provisions that the United States has identified in its submissions and statements, and that Mexico has ignored to date.

48. Mexico must also explain how its interpretation is consistent with Article 9.5 of the AD Agreement, which permits certain exporters to receive an expedited review if they can demonstrate, among other conditions, that they are "not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product." (Emphasis added.) This provision applies specifically to exporters and producers who did not export the subject merchandise to the importing Member during the POI. Mexico includes every exporter or producer of the product in its investigations, and it applies the antidumping duties on the product to all of them (either because they receive an individual calculated rate or because they are assigned the adverse, facts available rate taken from the petition). Therefore, because Producers Rice and the unexamined exporters and producers are all "subject to the antidumping duties on the product," they do not qualify for an expedited review under Article 9.5 of the AD Agreement. Mexico's interpretation reads Article 9.5 out of the AD Agreement.

C. An Investigating Authority May Not Apply a Facts Available Margin to an Exporter That Was Never Even Sent the Questionnaire

49. The AD Agreement prohibits an authority from applying a margin based on the facts available to an exporter or producer that was never even sent the questionnaire. Article 6 and Annex II of the AD Agreement are the provisions most relevant to this point. The Appellate Body has described Article 6 as an article that:

> "establishes a framework of procedural and due process obligations." Its provisions "set out evidentiary rules that apply *throughout* the course of the anti-dumping investigation, and provide

also for due process rights that are enjoyed by 'interested parties' *throughout* such an investigation."

50. This "framework of procedural and due process obligations" includes Article 6.1 of the AD Agreement, which requires investigating authorities to give interested parties "in an anti-dumping investigation" notice of the information that they require and ample opportunity to present in writing all evidence which the interested parties consider relevant in respect of the investigation in question. Moreover, the Appellate Body has emphasized that Article 6.1 creates obligations with respect to individual exporters and producers.

51. Paragraph 1 of Annex II of the AD Agreement then reiterates this obligation by requiring investigating authorities to ensure that respondents receive proper notice of the rights of the investigating authorities to use the facts available. Although Article 6.8 permits investigating authorities to apply the facts available to firms that fail to provide necessary information, they "are *not* entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required."

52. Given these requirements, Economía cannot simply publish a general notice in its *Diario Oficial* announcing the initiation of an antidumping investigation, purport to be investigating every producer and exporter in the subject country, and apply a facts available-based margin to any firms that do not come forward on their own and enter an appearance in the proceeding. Rather, it must observe the procedural and due process obligations that are contained in Article 6 and that it owes to interested parties throughout the investigation. This means that if Economía is including a particular exporter "in an anti-dumping investigation," it 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 it fails to take these steps, then it cannot apply a facts available-based margin to that exporter.

53. Alternatively, an authority may choose to limit its investigation in accordance with Article 6.10 of the AD Agreement. In that case, however, it may only apply a neutral "all others" rate, calculated in accordance with Article 9.4 of the AD Agreement, to the unexamined exporters and producers. Regardless of the approach it chooses, an authority cannot apply a facts available-based margin to an exporter or producer that is never sent the questionnaire.

D. Economía Breached Paragraph 7 of Annex II

54. Mexico concedes that it did not observe the requirements of paragraph 7 of Annex II when it applied the facts available to Producers Rice. Mexico claims that it was under no obligation to do so. It also failed to observe paragraph 7 with respect to the unexamined exporters and producers. Contrary to Mexico's assertions, Economía was subject to paragraph 7 of Annex II when it applied the facts available to Producers Rice and the unexamined firms. Economía's failure to observe the requirements of that provision was inconsistent with Mexico's WTO obligations.

VII. Mexico's Foreign Trade Act and its Federal Code of Civil Procedure

55. Mexico has largely agreed with the U.S. interpretation of the operation of the various articles of the FTA and the FCCP at issue in this dispute; it has focused its defense instead on the U.S. interpretation of the relevant WTO obligations. For the most part, this defense has been composed of broad assertions that the AD and SCM Agreements create no obligations with respect to the matters addressed by the challenged provisions. Mexico's arguments are wrong.

56. Mexico has also argued that the U.S. arguments on this issue have failed to take into account the interrelationship between the AD and SCM Agreements and Mexico's domestic law. The United States has previously explained why this argument is incorrect as well.

57. Mexico's replies to the Panel's questions have also failed to rebut the U.S. *prima facie* case. In question 28, the Panel asks Mexico whether it would be required to amend a law in the event that the DSB adopted a panel report finding the law to be WTO-inconsistent. Mexico fails to respond directly to the question, stating only that it would be obligated to remove the inconsistency. It is not at all clear what this means. The important point, however, is that the stated scenario will only arise if the Panel finds the laws to be WTO-inconsistent. Mexico views each of the actions that the challenged provisions require as consistent with its WTO obligations; therefore, Mexico does not, as a matter of its municipal law, have any ability not to perform the actions the challenged provisions require.

58. Furthermore, because Mexico sees no conflict between its WTO obligations and the actions that the challenged provisions require, the scenario that the Panel sets out in question 29 can also arise, if at all, only if the Panel itself finds the laws to be WTO-inconsistent (and the Dispute Settlement Body adopts that finding). At that point, Mexico would be in the same position as any other Member whose laws are found to be inconsistent with WTO rules – it will need to determine what steps are necessary to remove the inconsistency.

59. Similarly, Mexico states that the WTO agreements would prevail over the Foreign Trade Act in the event that a certain provision of the law were found inconsistent with WTO rules. Again, even if this were true, the key point is that Economía is the administrator of the FTA, and Economía views each of the challenged provisions as consistent with WTO rules. Therefore, in Mexico's view, there is no conflict, and thus there is no basis in Mexico's municipal law for the WTO Agreement to override any of the challenged provisions.

60. In reply to the Panel's question 31, Mexico asserts that Article 68 of the FTA does not require an exporter to demonstrate that its volume of exports was "representative" as a *sine qua non* for the initiation of a review. It states that the exporter "should" make this demonstration during the course of the proceeding itself, however. As the United States demonstrated in its response to this same question, Economía does in fact require exporters seeking reviews to make such a demonstration; Economía addresses the issue in the initiation notice itself.

61. In any event, Mexico's argument seeks to elevate form over substance. Rejecting a review request in the course of a proceeding for a failure to demonstrate a "representative" volume of sales is tantamount to rejecting the review at the outset. In either event, Article 68 precludes firms from obtaining a review; therefore, it is inconsistent as such with Articles 9.3 and 11.2 of the AD Agreement, and with Article 21.2 of the SCM Agreement.[2]

62. Mexico's response to the Panel's question 33 attempts to defend Article 89D of the FTA by pointing to Article 47 of its regulations. The cited provision does nothing to rebut the U.S. *prima facie* case that Article 89D is inconsistent "as such" with Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement. Article 47 establishes rules for determining the costs of production for trading

[2] Mexico makes the same assertion with respect to Article 89D of the FTA in its response to the Panel's Question 32. As the United States demonstrated in its response to Panel Question 32, Mexico's arguments about Article 89D are similarly without merit, and the Panel should reject them as well.

companies. It appears in the section of Mexico's antidumping regulations that sets out the methodologies that Economía is to apply in calculating antidumping margins. It has nothing to do with the question of who is entitled to obtain an expedited review, however. And even if it did, the hierarchy of laws in Mexico is such that the regulations are subordinate to the FTA; the decree that implemented Article 89D makes clear that the regulations continue in effect only insofar as they are not inconsistent with the provisions of the decree.

63. Finally, Mexico seeks to convince the Panel that no issue arises from the fact that Article 366 of Mexico's FCCP and Articles 68 and 97 of Mexico's FTA preclude Mexican authorities from conducting reviews of antidumping and countervailing duties while a judicial review of the underlying antidumping or countervailing duty measure is ongoing, because the interested parties may post a bond in lieu of paying the duties themselves while the litigation is underway. The ability to post a bond does not ameliorate the negative effects of the preclusion of reviews, or to remedy the WTO breaches that result therefrom.

64. The United States previously submitted to the Panel a letter from Economía to Sun Land, a U.S. beef exporter that is subject to Mexico's antidumping measure on certain U.S. beef products. That measure, imposed in July 2000, is being reviewed by a "binational panel" established under Chapter Nineteen of the *North American Free Trade Agreement.* Economía denied Sun Land's request for a review on the grounds that Articles 68 and 97 of the FTA preclude it from conducting the review while the NAFTA litigation is underway. Although the binational panel recently remanded the beef determination to Economía for further proceedings, the litigation continues today.

65. Antidumping duties are assessed against the importers, not the exporters or producers. Thus, it is the importer, and not the exporter or producer, that has to decide whether it is willing to post a bond as security against potential antidumping duties. After Mexico refused to conduct a review of Sun Land while the NAFTA litigation was ongoing, Sun Land's importer informed Sun Land that it was not willing to post a bond with respect to <u>any</u> of Sun Land's beef products that are subject to the Mexican antidumping measure. In addition, Sun Land was unable to find another importer willing to post a bond. As a consequence of its inability to obtain a review and post a bond, Sun Land has been effectively locked out of the Mexican market for the products subject to the antidumping measure.

66. Thus, the preclusion of reviews causes real and substantial commercial harm to exporters that are subject to Mexican antidumping measures. It also presents exporters that are subject to Economía's adverse, facts available-based petition margins with two mutually exclusive choices: they can seek judicial review of the order itself, knowing that doing so will preclude them from obtaining an administrative review that might reduce their margin, thus guaranteeing their exclusion from the market for a period of years; or they can seek an administrative review in an effort to reduce their margin, and thus forfeit any chance to challenge the legitimacy of the order in court.[3] Neither the AD Agreement nor the SCM Agreement permits a Member to impose such a choice under its domestic law.

VIII. Mexico Has Failed to Contest Numerous U.S. Claims

67. Finally, Mexico has failed to date to contest – let alone rebut – numerous U.S. claims.

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[3] In addition, if they forfeit their chance to seek judicial review and wait to seek an administrative review instead, they run the risk that a different firm will request judicial review in the meantime. In that case, they will find themselves with no remedy at all, because Mexico refuses to conduct administrative reviews of any firm if any other firm is seeking judicial review.