MEXICO – DEFINITIVE ANTI-DUMPING MEASURES ON BEEF AND RICE

(Complaint with respect to Rice)

(WT/DS295)

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

May 28, 2004

1. Authorities conducting AD investigations must conduct their examinations in an objective and unbiased manner. 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. 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. Mexico did not conduct its rice investigation in an objective and unbiased manner. It 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. When the U.S. firm Producers Rice demonstrated that it had no shipments of rice to Mexico during the 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. The AD Agreement places 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

3. 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. 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.

4. Mexico argues 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 it has complete freedom to do whatever it wants. This is not correct. The POI should end as close to the initiation date as practicable. Mexico has pointed to nothing justifying its decision to ignore 15 months worth of recent data, let alone the three years of data by the time of the final determination. The only rationale that Mexico provided in its notice was that it selected the POI the petitioner wanted.

B. Mexico Limited its Injury Analysis to Only Six Months of 1997, 1998, and 1999

5. An authority conducting an analysis of injury and causation must conduct an objective examination, and it must base its determinations on positive evidence. Mexico's limitation of its investigation to only half of each of the years at issue failed to meet either of these requirements.

6. Mexico argues that the AD Agreement creates no obligations on this matter, that it is "entirely free" to do whatever it wants, and that therefore its approach was objective and based on positive evidence. Mexico 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."

7. Mexico's approach created distortion, because focusing an injury and causation analysis

on the period when import presence is highest cannot but create a misleading picture of the state of the domestic industry. 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.

C. Mexico's Conduct of its Injury Analysis

8. Mexico's examination of the injury data was flawed in four ways. The first flaw arises from Mexico's failure to collect the evidence on price effects and volumes that it needed to conduct its analysis in an objective manner, and its improper use of the facts available. Mexico argues that the AD Agreement creates no relevant obligations. It fails, however, to explain why the approach that it chose was objective and based on positive evidence, as Article 3.1 requires.

9. For example, 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. Similarly, Mexico could have obtained data from the *pedimentos*. Furthermore, Mexico rejected accurate data that The Rice Company submitted for the year 1999, in favor of using inaccurate data from the petitioner. In addition, Article 6.8 and Annex II 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.

10. The second flaw arises from Mexico's failure to objectively consider whether there was a significant increase in the volume of dumped imports or significant price effects. Only four paragraphs of its determination were relevant to the examination of the dumped imports, and they show that the 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.

11. The third flaw arises from Mexico's failure to conduct an objective analysis of certain "relevant economic factors." Mexico's examination of inventories and market share was not objective, and it did not even examine "other factors affecting domestic prices." 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.

D. Mexico's Failure to Exclude Firms with AD Margins of Zero from the Measure

12. Mexico ignores that the second and third sentences of Article 5.8 refer to the "margin" of dumping being *de minimis*. The term "margin" refers to the "individual margin of dumping determined for each of the investigated exporters and producers" of the investigated product. When Article 5.8 refers to terminating when the "margin" is *de minimis*, it is referring to termination for individual firms. 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 such language addressing the dumping analysis.

E. Mexico's Application of an Adverse "Facts Available" Margin to Producers Rice and to U.S. Producers and Exporters that It Did Not Examine

13. Mexico investigated only the two exporters that the petitioner named in the petition and two other firms that came forward on their own, and it applied an adverse, facts-available margin to Producers Rice and every other exporter and producer in the United States. Mexico argues that the AD Agreement contains no obligations with respect to this topic and that it has total freedom to apply the facts available to such firms, including "less favorable" facts available from the petition. 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.

14. 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. Its 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." Its interpretation is illogical because the drafters established 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.

15. The AD Agreement protects both known firms and unknown firms. It does this by requiring authorities to send their questionnaire to firms that are 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. 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.

16. 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 by choosing not to send its questionnaire to The Rice Company. It also did so by failing to consult the *pedimento* data held by Mexican Customs, when it chose not to reference public data that would have identified every producer of the subject product in the United States, and 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. Mexico's submission does not contest several of our claims addressing its treatment of Producers Rice and the unexamined firms.

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

17. Mexico argues that treaties are self-executing under Mexican law and that it must apply its laws in a way that is consistent with its treaties. This is beside the point if Mexico's laws

mandate WTO-inconsistent action.

18. The first statutory provision at issue is Article 53 of the FTA, which sets a mandatory deadline of 28 working days for interested parties to respond to Mexico's AD questionnaire, and counts the 28 days from the date of publication of the initiation notice. Mexico argues that it would be "illogical" to provide the full 30 days to interested parties that are not initially sent the questionnaire. 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 both provisions count the 30 day deadline from the date of receipt?

19. The second statutory provision at issue in this dispute is Article 64 of the FTA. Article 64 requires Mexico to apply the highest level of facts available to firms that do not export during the POI or that do not "appear" in its investigation. Mexico argues 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. Mexico's argument is based on a partial citation of a portion of Article 6.8 without reference to any of the other provisions of the AD Agreement, including Article 6.1 and paragraph 1 of Annex II.

20. Mexico argues that Article 64 is not inconsistent with Article 9.4 of the AD Agreement because Article 9.4 requires Members to exclude margins that are based on the facts available. 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.

21. Mexico's argument with respect to paragraph 1 of Annex II 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. Its argument that paragraph 7 of Annex II permits a "less favorable" result if a firm refuses to cooperate ignores that by requiring Mexico to always apply the highest level of facts available, Article 64 precludes taking cooperation into account. It does not contest that Article 64 of the FTA breaches Article 9.5 of the AD Agreement or Article 19.3 of the SCM Agreement.

22. The third provision at issue is Article 68 of the FTA, which 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 subsidies; and second, it mandates that Mexico require firms seeking reviews to demonstrate that the volume of their exports was "representative."

23. 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 that the firms are not dumping or receiving subsidies. 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. Moreover, a proper textual analysis of Articles 9.3 and 11.2 of the AD Agreement, and

Article 21.2 of the SCM Agreement 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.

24. The fourth provision at issue is Article 89D of the FTA, which mandates that firms seeking expedited reviews demonstrate that the volume of their exports was representative. 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 breaches Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement because it only allows producers (and not non-producing exporters) to obtain reviews.

25. The fifth provision is Article 93V of the FTA, 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. Mexico has not contested that Article 93V is "specific" to dumping or subsidization; "against" dumping or subsidization; and not "in accordance with the provisions of GATT 1994," as interpreted by the AD and SCM Agreements. Mexico's only defense is to argue that it has discretion not to impose the fine. But, 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.

26. The final set of provisions at issue are Article 366 of the FCCP and Articles 68 and 97 of the FTA. They are inconsistent "as such" with the AD and SCM Agreements because they preclude the Mexican authorities from conducting reviews of AD and CVD measures during judicial proceedings. 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.

27. Mexico's submission does not even address our claim that Articles 68 and 97 of the FTA breach Article 11.2 of the AD Agreement and Article 21.2 of the SCM Agreement. As for the fact that Articles 68 and 97 breach Article 9.5 of the AD Agreement and Article 19.3 of the SCM Agreement, Mexico asserts that those provisions allow a Member to wait as long as it likes before initiating an expedited review, if it conducts the review promptly once it initiates. Mexico's argument contradicts the text of Articles 9.5 and 19.3.

28. 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. It argues instead that its approach is permissible because the duties are not "definitive" until the judicial review is complete. Mexico is wrong on the facts.