MEXICO – DEFINITIVE COUNTERVAILING MEASURES ON OLIVE OIL FROM THE EUROPEAN COMMUNITIES

(WT/DS341)

THIRD PARTY SUBMISSION OF THE UNITED STATES

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EC – DRAMS	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
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US – DRAMS (Panel)	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report, WT/DS296/AB/R

I. Introduction

1. The United States makes this third party submission to provide the Panel with its view of the proper legal interpretation of certain provisions of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") that are relevant to this dispute. The United States recognizes that many of the issues raised in this dispute are solely or primarily factual in nature. The United States takes no view as to whether, under the facts of this case, the measure at issue is inconsistent with Mexico's WTO obligations.

II. The Period of Investigation for Determining Injury May Be Longer Than the Period Examined for Determining A Subsidy

2. The EC makes an argument concerning Article 15.1 and the difference in the period of investigation for subsidy and injury.[1] The EC's argument is not entirely clear on this point. To the extent that the EC is arguing that the periods of investigation for subsidy and injury must be completely coincident, there is no basis in the provisions of the SCM Agreement for such a finding. Article 15.1 of the SCM Agreement provides that a determination of injury "shall be based on positive evidence and involve an objective examination of ... the effect of the subsidized imports on prices in the domestic market for like products ... ." However, the SCM Agreement does not require that the period investigated for purposes of determining injury exactly match the period investigated for purposes of determining subsidization.

3. In the dispute involving the United States' countervailing duty measure concerning DRAMs from Korea, the period for determining the subsidy was 18 months, whereas the period for determining injury exceeded three years in duration.[2] In evaluating the investigation by the United States, the panel stated:

> Article 15.2 does not require an investigating authority to demonstrate that all of the subject imports covered by the period of injury investigation are subsidized ... . It is not necessary that the period of review for subsidization must mirror the period of review for injury.[3]

4. In *EC – Pipe Fittings*, the EC's investigating authority had examined a longer period for its injury determination than for its dumping determination. The panel found that the EC's approach was not inconsistent with the EC's obligations under Articles 3.1 and 3.2 of the *Agreement on Implementation of Article VI of GATT 1994* ("AD Agreement"), the provisions that mirror the obligations of Articles 15.1 and 15.2 of the SCM Agreement.[4] In its finding, the panel noted that the *Recommendation Concerning Period of Data Collection for Anti-Dumping Investigations* of the WTO Committee on Anti-Dumping Practices recommends that the period

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[1] First Written Submission of the European Communities, paras. 204-07.

[2] *US – DRAMS (Panel)*, paras. 2.2, 7.243.

[3] *US – DRAMS (Panel)*, para. 7.245.

[4] *EC – Pipe Fittings (Panel)*, para. 7.321.

of investigation in an injury investigation be longer than the period of investigation in a dumping investigation.[5]

III. The Text of Article 15 of the SCM Agreement Does Not Require the Investigating Authority to Base Its Injury Determination on the Type of Injury Alleged by the Petitioner or Applicant

5. The EC takes issue with the fact that, while the Mexican domestic industry's complaint alleged injury based on material retardation of an industry, Mexico's affirmative injury determination was based on a finding of present material injury.[6]

6. Article 15 of the SCM Agreement provides the obligations of Members with respect to a "Determination of Injury," and then in a footnote defines "injury" as meaning material injury, threat of material injury, *or* material retardation to the establishment of an industry (emphasis added). Nothing in the text of the SCM Agreement provides that a determination of injury by an investigating authority must be based on the same type of injury as that alleged by the petitioner or applicant.

IV. The Panel Should Determine Whether Mexico's Injury Analysis Based on An Examination of Certain Months of Each Year is Consistent with the "Objective Examination" Requirement in Article 15.1 of the SCM Agreement

7. The EC has criticized Mexico's choice of investigation periods encompassing only the months of April through December in the years 2000, 2001, and 2002.[7] The EC claims that Mexico's choice of investigation periods "undermined" the "objectiveness of the [injury] examination." Article 15.1 of the SCM Agreement requires that the investigating authority's injury determination be based on an "objective examination" of the evidence pertaining to volume, price and impact. Article 3.1 of the AD Agreement identically requires authorities to base injury determinations in antidumping investigations on an "objective examination" of the evidence pertaining to volume, price, and impact. In past disputes, the Appellate Body has raised concerns about analyzing only parts of years in an injury investigation under Article 3.1 of the AD Agreement.[8]

8. In *Mexico – Rice*, the Appellate Body examined whether Mexico's use of investigation periods encompassing only six months of each of the three calendar years examined satisfied this requirement.

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[5] *EC – Pipe Fittings (Panel)*, para. 7.321 (noting that the EC's period of investigation for the dumping investigation covered one year, while the period of investigation for injury covered three years).

[6] First Written Submission of the European Communities, paras. 194-197.

[7] First Written Submission of the European Communities, para. 211. *See also* First Written Submission of Mexico, para. 253-54.

[8] *Mexico – Rice (AB)*, paras. 173-88.

9. The panel in that dispute had found that Mexico's injury analysis did not satisfy this requirement for two reasons:

> [F]irst, whereas the injury analysis was selective and provided only a part of the picture, no proper justification was provided by Mexico in support of this approach; and secondly, [Mexico's investigating authority] accepted the 'period of investigation proposed by the applicants because it allegedly represented the period of highest import penetration and would thus show the most negative side of the state of the domestic industry.'[9]

The Appellate Body sustained the panel's analysis.[10]

10. While there may be circumstances in which there could be "convincing and valid reasons for examining only parts of years,"[11] such an injury analysis could raise concerns under Article 15.1 of the SCM Agreement depending on the underlying reasons for that approach.

V. Article 15.5 of the SCM Agreement Does Not Require an Investigating Authority's Non-Attribution Analysis to Be Performed on a Quantitative Basis

11. The EC also claims that Mexico breached Article 15.5 of the SCM Agreement because it failed to ensure that injury allegedly caused by other factors was not attributed to the subsidized imports. In support of this claim, the EC argues that the non-attribution analysis should be "preferably on a quantitative basis."[12]

12. The United States takes no position with respect to whether Mexico's analysis demonstrated that any injury caused by other factors was not attributed to the subsidized imports. Nonetheless, the United States would point out that, although Article 15.5 of the Agreement sets out several factors that "may" be considered by investigating authorities in ascertaining whether there is a "causal relationship" between subsidized imports and injury to the domestic industry,[13] it does not specify the type of information that an authority must collect and examine for this purpose, or identify the detail in which the authority must explain its analysis of the information. Rather, Article 15.5 simply provides that the investigating authority must determine, on the basis of "all relevant evidence" before it, whether such a causal relationship exists.

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[9] *Mexico – Rice (AB)*, para. 176.

[10] *Mexico – Rice (AB)*, para. 183.

[11] *Mexico – Rice (Panel)*, para. 7.82.

[12] First Written Submission of the European Communities, paras. 215-227.

[13] Article 15.5 provides that "{f}actors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry."

13. Article 15.5 also provides that the investigating authorities must examine any known factors other than the subsidized imports which are injuring the domestic industry to ensure that injury caused by these other factors is not attributed to the subsidized imports. As the Appellate Body has recognized, the non-attribution provision of Article 3.5 of the AD Agreement, which mirrors the non-attribution provision of Article 15.5 of the SCM Agreement, does not prescribe the specific methods that investigating authorities must use to demonstrate that any injury caused by factors other than unfairly traded imports is not attributed to such imports. The Appellate Body has stated that "provided that the investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the 'causal relationship' between dumped imports and injury."[14]

14. Consequently, the EC's assertion that any non-attribution analysis should preferably be on a quantitative basis finds no support in the text of the SCM Agreement.[15] In support of its argument, the EC cites a panel report concerning an EC countervailing duty measure against DRAMs from Korea.[16] However, in that report, the panel's concern was that the investigating authority conduct a sufficient analysis rather than merely "check the box" with respect to the non-attribution analysis.[17] The panel suggested ways that a non-attribution analysis could be made more concrete, but the panel did not suggest that an otherwise sufficient non-attribution analysis should be rejected merely because the investigating authority's analysis was not quantitative. Further, in a panel report issued nearly contemporaneously with *EC – DRAMS*, the panel found that the United States was not required to quantify the injury caused by other factors in order to perform the non-attribution analysis required by Article 15.5 of the SCM Agreement.[18]

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[14] *EC – Pipe Fittings (AB)*, para. 189.

[15] First Written Submission of the European Communities, para. 218.

[16] First Written Submission of the European Communities, para. 218, citing *EC – DRAMS* , paras. 7.405, 7.437.

[17] *EC – DRAMS*, para. 7.405.

[18] *US – DRAMS (Panel)*, para. 7.353.