

A Landmark WTO Anti-Dumping Report:

Mexico – Rice

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In a series of recent dispute settlement reports such as *US – Cotton Subsidies* or *EC – Sugar Subsidies*,² the WTO has once again shown that it is not afraid to quash any protective measure in breach of international trade rules. While this strict scrutinization of actions taken by importing country administrations affects all sorts of trade protective measures, it is perhaps nowhere as visible and directly felt as in the area of the Anti-Dumping where respectable exporters and reputable importers, who have done nothing wrong in their lives, can suddenly get caught up in proceedings that put them out of business forever. Fortunately, the "*WTO Anti-Dumping Agreement*",³ offers more relief than the mere text of it upon first reading would appear to suggest.

While we previously reported⁴ on other landmark reports such as *US–Hot Rolled Steel*, *EC–Bed Linen*, *Argentina–Floor Tiles*, *Guatemala Cement II*, *US–Steel Plate from Korea*, etc.,⁵ one new Panel report merits specific attention. *I.e.*, in this brief review we will highlight some of the more important aspects of *Mexico–Rice*,⁶ a remarkable report. The report is remarkable since virtually all claims of the claiming party (U.S.) were vindicated and because it offers a number of new insights into the interpretation of the Anti-Dumping Agreement while offering certain important admonitions for importing country administrations. Although this Panel Report is currently under appeal, at the time of writing, it is expected that the U.S. will prevail before the Appellate Body.

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² *United States – Subsidies on Upland Cotton WT/DS267/AB/R*, adopted on 21 March 2005, and *European Communities – Export Subsidies on Sugar WT/DS265, 266, 283/AB/R*, adopted on 19 May 2005.

³ Agreement on Implementation of Article VI of GATT 1994 (hereinafter: AD Agreement).

⁴ See for example the book, *WTO DISPUTES: ANTI-DUMPING, SUBSIDIES, SAFEGUARDS* by Edwin Vermulst and Folkert Graafsma (2002, Cameron May London, 869 pages) or the Articles: *Recent WTO Jurisprudence in the field of Anti-Dumping*, published in 28:3 *Legal Issues of Economic Integration* (2002) by Folkert Graafsma or *WTO Dispute Settlement with respect to Trade Contingency Measures*, by Edwin Vermulst and Folkert Graafsma published in *Journal of World Trade*, April 2001.

⁵ Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697; Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, 2049; *Argentina–Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R of 28 September 2001; Panel Report, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295.

⁶ *Mexico – Definitive Anti-Dumping Measures on Beef and Rice – Complaint with Respect to Rice*, Panel Report of 6 June 2005, WT/DS295/R.

1. Background of the *Mexico – Rice* dispute settlement proceeding

The US had challenged Mexico's definitive anti-dumping measures on beef and long-grain white rice, published on 28 April 2000 and 5 June 2002 respectively, as well as certain provisions of Mexico's Foreign Trade Act (FTA) and Mexico's Federal Code of Civil Procedure (FCCP). This Panel report deals with the complaint with respect to rice. Some procedural issues related to the admissibility of the request to establish a panel –and the consistency of several domestic Mexican provisions with the Anti-Dumping Agreement (AD Agreement). However, the main issues in this Panel report concerned the selection of the period of investigation (POI) and its impact on the injury determination; the inclusion of exporters with *de minimis* dumping margins in an anti-dumping order; and the use of facts available to an exporter that did not ship during the POI and non-co-operating exporters that had not been notified. In this summary, we will only address these main substantive issues. The report also assessed the conformity of several provisions in domestic Mexican regulations with the AD Agreement and the SCM Agreement *as such*. In view of space constraints we will not address those latter violations.

2. Substantive issues

2.1 *Claims relating to the injury determination*

2.1.1 Use of Period of Investigation that ended more than 15 months prior to the initiation of the investigation and nearly three years prior to final determination violates art. VI.2 GATT 1994 and art. 1, 3.1, 3.2, 3.4 and 3.5 AD Agreement

The US argued that the use of a Period of Investigation ("POI") that ended fifteen months prior to the initiation of the investigation does not allow an investigating authority to make an objective determination based on positive evidence of dumping which is causing injury and therefore constitutes a violation of art. 3.1, 3.2, 3.4 and 3.5 AD Agreement.⁷ Mexico agreed that it is desirable to have a POI as recent as possible, but argued that there are no guidelines regarding the selection of the POI and thus no limits on the remoteness of the POI. Only the facts of the case can determine what period is appropriate and Mexico considers the selected period suitable.⁸

The Panel held that several provisions in the AD Agreement provide textual evidence of an inherent time link between the imposition of a measure and the conditions for application of the measure. This means data considered concerning dumping, injury and the causal link should include, to the extent possible, the most recent information, taking into account the inevitable delay caused by the need for an investigation, as well as any practical problems of data collection.⁹ As Mexico did not provide any reason why more recent data were not sought, a gap of 15 months between the POI and the initiation of the investigation is sufficiently long as to question the reliability of the POI to deliver credible and reliable information and thus does not meet the criterion of positive evidence.¹⁰ Mexico therefore violated art. 3.1, 3.2, 3.4 and 3.5 AD Agreement.

⁷ Paras. 7.50-7.51.

⁸ Para. 7.52.

⁹ Para. 7.58.

¹⁰ Para. 7.64.

The Panel did not examine whether Mexico had also breached art. 1 AD Agreement and art. VI.2 GATT 1994.

It may be noted that here the panel may have generated a problem with implementation by virtue of having limited its finding regarding the Period of Investigation (POI) to an inconsistency with Article 3.1; that is, to an inconsistency with an injury provision. As the panel did not make a finding as to whether the POI was inconsistent with a dumping margin provision (as it declined making a finding under Article VI), it appears that, unless the Mexican investigating authority redoes the dumping margin aspects *ex-officio* upon implementation (which it is not supposed to do), the re-determination is going to be limited to redoing the injury aspects. Hence, the US exporters are going to end up with a re-determination where there is a mismatch between the POI for the dumping margin calculations and the POI for the injury determination (as the latter was updated, but not the former). The question is whether this is an example of the follies of judicial economy or did the panel want to avoid the possibility that respondents be served questionnaires (asking for data now several years old) in the remand?

2.1.2 The selection of only six months in 1997, 1998 and 1999 as POI for the injury determination violates art. 1, 3.1, 3.5 and 6.2 AD Agreement

The US argued that only considering evidence for half the POI for the injury analysis does not allow an investigating authority to determine the true state of the domestic industry over the course of the entire POI and make an objective determination based on positive evidence, thereby violating art. 3.1 AD Agreement and art. 1 AD Agreement. The POI should include all months of the year in which there is domestic production, assuming these data are reasonably available. Not doing so also constitutes a violation of art. 3.5 AD Agreement because the analysis of a causal link is flawed since it is not based on all relevant evidence. Moreover, dismissing exporters' concerns regarding the POI prevented them from pointing to evidence from the missing months that might have supported their arguments and is thus inconsistent with art. 6.2 AD Agreement.¹¹

Mexico refuted these allegations and argued that the AD Agreement does not stipulate anything on the selection of the POI, thereby leaving it to investigating authorities to determine the appropriate POI. Since the AD Agreement is silent on the issue of POI selection, there is no basis for the argument that not all relevant evidence has been examined as required by art. 3.5 AD Agreement or that interested parties were not given an opportunity to defend their interests.¹²

The Panel held that the selection of only certain time periods in a POI to determine injury is in itself not objective and does not constitute a proper establishment of facts on which to base the determination, unless there are convincing and valid reasons for examining only parts of years, but this had not happened in the rice investigation. To support this reasoning, the Panel referred to the situation discussed by the Appellate Body in *US – Hot-Rolled Steel* involving an analysis of only a segment of the domestic industry, rather than the domestic industry as a whole. The Appellate Body found that an examination of only certain parts of a domestic industry does not ensure

¹¹ Paras. 7.66 – 7.70.

¹² Paras. 7.71-7.73.

a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of objectivity in art. 3.1 AD Agreement.¹³ Moreover, the acceptance of a POI proposed by the applicants because it allegedly represented the period of highest import penetration is not what can be expected of an objective and unbiased investigating authority.¹⁴ As Mexico failed to base the determination of the causal relationship between the dumped imports and the injury to the domestic industry on *all relevant evidence*, there was also a violation of article 3.5 AD Agreement. The Panel did not address the US claims regarding article 1 and 6.2 AD Agreement.¹⁵

2.1.3 Violation of art. 3.1, 3.2, 6.8 and Annex II of the AD Agreement by not collecting evidence on price effects and volumes

The US argued that the injury determination regarding the volume and price effects of dumped imports was not based on an objective examination of positive evidence as required by art. 3.1 and 3.2 AD Agreement. Information on the volume and the prices of the dumped imports was not obtained from direct sources such as importers or customs declarations but on inferences drawn from extrapolation piled upon extrapolation. Moreover, by not corroborating these data, there was a violation of art. 6.8 and paragraphs 1 and 7 Annex II AD Agreement.¹⁶ Mexico, on the other hand, argued that the AD Agreement does not impose a particular methodology for conducting a volume or price analysis nor does it impose an obligation to obtain more information than such as provided by the parties, as long as there is an objective determination based on positive evidence. There was therefore no duty to take the initiative to obtain more information on price and sales volumes and injury has been established in conformity with art. 3.1 and 3.2 AD Agreement.¹⁷

The Panel held that the way in which the investigating authority established the facts on the basis of which it examined the trends in volume of dumped imports and the price effects of dumped imports was not a proper establishment of the facts since the facts were established on the basis of unjustified assumptions.¹⁸ The Panel found that the Mexican investigating authority failed to comply with its obligation to determine the volume of dumped imports on the basis of positive evidence and to make an objective examination by failing to conduct a proper investigation since it did not actively seek out pertinent information.¹⁹ The injury analysis with regard to the volume and price effects of dumped imports was thus inconsistent with the requirements of art. 3.1 and 3.2 AD Agreement to conduct an objective examination based on positive evidence of the volume and price effects of the dumped imports.²⁰ The Panel did not decide on the US claim regarding inconsistencies with art. 6.8 and Annex II AD Agreement.

¹³ Para. 7.84. See also Appellate Body Report, *US – Hot-Rolled Steel*, para. 206.

¹⁴ Paras. 7.81-7.86.

¹⁵ Paras. 7.87-7.88.

¹⁶ Paras. 7.89-7.91.

¹⁷ Para. 7.93.

¹⁸ Paras. 7.110-7.113.

¹⁹ Para. 7.114.

²⁰ Para. 7.116.

2.2 *Claims relating to the dumping margin and the use of facts available*

2.2.1 Violation of art. 5.8 AD Agreement by not excluding firms with zero anti-dumping margins from the anti-dumping measure

The US argued that art. 5.8 AD Agreement requires the termination of the investigation in case of a dumping margin below *de minimis*. Since "margin" refers to the individual margin of dumping determined for each of the investigated exporters or producers, the investigation against an exporter that did not dump needs to be terminated. Mexico, however, argued that art. 5.8 AD Agreement refers to the investigation against imports from a particular country and that its decision not to exclude exporters that did not dump from the measure (although at a zero duty rate) is consistent with art. 5.8 AD Agreement.²¹

The Panel followed the US interpretation of art. 5.8 AD Agreement by deciding that the term "margin of dumping" refers to the individual dumping margin rather than the country-wide dumping margin. Support for this view can be found in several articles in the AD Agreement (art. 2.2.1.1, 2.2.2, 2.3, 6.10, 8.1, 9.3, 9.5 and 12.2.1); the fact that article 5.8 AD Agreement explicitly links negligible import volume to a country-wide basis whereas the *de minimis* dumping margin does not; and the *US – DRAMs* case which also held that the *de minimis* rule of art. 5.8 AD Agreement concerns the question whether an individual exporter will be subject to an anti-dumping order.²² The fact that *in casu* the *de minimis* exporters did not dump and were given a zero duty did not justify them being included in the anti-dumping order since the essential difference between art. 5.8 and 9.3 AD Agreement is that the latter deals with the amount of the duty to be imposed and collected whereas the former deals with the termination of an investigation.²³

2.2.2 Violation of art. 6.2, 6.4, 6.8, 6.9, 9.4 and 9.5 AD Agreement and paragraphs 3, 5, 6 and 7 of Annex II to the AD Agreement by applying an adverse facts available dumping margin to a non-shipping exporter

The US claimed that the decision to apply an adverse facts available margin to the US firm Producers Rice violates art. 6.8 AD Agreement and Annex II of the AD Agreement since Producers Rice, which did not export the subject product to Mexico during the POI, fully co-operated with the authorities. There was also a breach of para. 3 Annex II because the investigating authority failed to take into account that Producers Rice did co-operate; a breach of para. 6 because the investigating authority failed to inform Producers Rice of the fact that its questionnaire response or the explanations and evidence provided therein were in any way unacceptable; a breach of para.5 because there was no evidence Producers Rice failed to act to the best of its ability; and a violation of para. 7 because the investigating authority did not check the presumptions in the application. Moreover, the calculation of a residual duty based on facts available for this producer is a violation of art. 9.4 and art. 9.5 AD Agreement since Producers Rice can no longer benefit from an expedited review once it starts exporting to Mexico. Finally, the US claimed there was a breach of art. 6.2 and 6.4

²¹ Paras. 7.133-7.134.

²² Paras. 7.137-7.142. See also Panel Report, *US – DRAMs*, para. 6.90.

²³ Para. 7.144.

AD Agreement because the export price information that was used in the calculation of the adverse facts available margin was not disclosed to Producers Rice.²⁴

Mexico tried to rebut these claims and pointed out that since Producers Rice did not provide export price information necessary for the calculation of a dumping margin, facts available could be used. In addition, Mexico argued that art. 9.4 AD Agreement only applies when there is sampling and that the AD Agreement does not regulate how the dumping margin needs to be calculated for producers that did not export during the POI. Finally, the export price information was available to all interested parties, so there was no breach of art. 6.2 and 6.4 AD Agreement either.²⁵

The Panel rejected the US' claim that art. 9.4 AD Agreement applies to non-shipping exporters and stressed that art. 9.4 AD Agreement only applies to the situation the investigating authorities resort to sampling.²⁶ However, the application of the facts available rule for the calculation of the dumping margin was not consistent with art. 6.8 AD Agreement and paragraph 7 Annex II since no attempts were made to check the applicant's information against information from other sources, the applicant's information was not used with special circumspection and the information submitted by applicant was not compared with information from other interested parties.²⁷ The Panel did not find it necessary to examine the claims relating to violations of art. 6.2, 6.4 and 9.5 AD Agreement and paragraphs 3, 5 and 6 of Annex II to the AD Agreement.²⁸

2.2.3 Violation of art. 6.1, 6.6, 6.8, 6.10, 9.4, 9.5 and 12.1 of the AD Agreement and paragraphs 1 and 7 of Annex II by applying an adverse facts available-based dumping margin to exporters it did not investigate

The US argued that there was a violation of art. 6.10 AD Agreement since no efforts were made to calculate individual dumping margins for all exporters by only sending a questionnaire to the two listed exporters and examining two others that appeared voluntarily, meanwhile assuming there was a lack of cooperation by the others. Likewise, there was a violation of art. 6.6 AD Agreement because the investigating authority did not satisfy itself of the accuracy of the information supplied by the applicants. This resulted in a *de facto* situation of sampling to which art. 9.4 AD Agreement should apply. By basing the calculation of the dumping margin on facts available, there was thus a violation of art. 9.4 AD Agreement and by investigating all exporters or producers in this manner, no later new exporter reviews are possible. In addition, the US claimed further violations of art. 6.1 and 6.2 AD Agreement because not all exporters were informed of the information the investigating authority needed so not all exporters were given an opportunity to defend their interests. There was also a breach of art. 6.8 AD Agreement and paragraph 7 of Annex II for not treating the information from the applicant with circumspection.²⁹

²⁴ Paras. 7.146-7.149.

²⁵ Paras. 7.150-7.153.

²⁶ Para. 7.159.

²⁷ Para. 7.167.

²⁸ Para. 7.168.

²⁹ Paras. 7.170-7.175.

Mexico, on the other hand, argued it had no obligation to actively identify all the exporters; that relevant documents and information only need to be sent to known exporters; and that individual dumping margins only need to be calculated for known exporters. There was also no *de facto* sampling so facts available could be used to determine the dumping margin for the non-cooperating exporters.³⁰

The Panel first held that an investigating authority required to conduct an investigation in an objective and unbiased manner has to play an active role in the search of the information it requires in order to make its determination. The term "known exporter or producer" in art. 6.10 AD Agreement refers to the exporters or producers that an unbiased and objective investigating authority properly establishing the facts would be reasonably expected to have become conversant with. What is reasonable to expect of the investigating authority as far as the identification of foreign exporters or producers goes will depend on the circumstances of each case and the information provided by the interested parties that could assist the authority in identifying such foreign exporters or producers, but an investigating authority cannot remain entirely passive as art. 12.1 and 6.1.3 AD Agreement require informing those interested parties investigating authorities reasonably obtain knowledge about.³¹ The Panel held that an objective and unbiased investigating authority conducting an investigation in a reasonable manner should have made more effort to obtain knowledge of other US exporters since it knew the list of exporters in the application was not complete and it had sufficient information before it that would have enabled the authority to identify other US producers and exporters.³² Since the investigating authority did not fulfil its obligations under art. 12.1 and 6.1.3 AD Agreement, it could not rely on article 6.8 AD Agreement and had breached art. 6.10 AD Agreement by not calculating individual dumping margins for every exporter it should have known.³³

The Panel did not consider it necessary to examine the US claims concerning art. 6.6, 9.4, and 9.5 of the AD Agreement.³⁴ Likewise, claims relating to the failure to provide sufficient information on the findings and conclusions of fact and law and the reasons that led to the imposition of the adverse facts available-based margin; the imposition of a duty higher than the dumping margin to Producers Rice and the unexamined US exporters and producers were not dealt with (alleged violations of art VI.2 GATT 1994 and art. 1, 9.3 and 12.2 AD Agreement).³⁵

3. Conclusions

The Panel has clarified several important provisions of the AD Agreement, the following of which were discussed above:

First, investigating authorities are not entirely free in the selection of the POI. Since there is an inherent time link between the imposition of a measure and the conditions for application of the measure, the data used to determine dumping, injury and

³⁰ Paras. 7.176-7.178.

³¹ Paras. 7.185-7.193.

³² Paras. 7.196-7.199.

³³ Paras. 7.200-7.201.

³⁴ Para. 7.202.

³⁵ Paras. 7.205, 7.209 and 7.212.

causation should include, to the extent possible, the most recent information. However, this does *not* mean a gap of 15 months between the POI and the initiation of the investigation is *in itself* too long since there might be valid reasons for such a selection of the POI. Further, the selection of only certain time periods in the POI to examine injury is in itself not objective and does not constitute a proper establishment of facts, unless there are convincing and valid reasons for examining only parts of years.

Second, whenever the dumping margin for exporters is zero or *de minimis*, the investigation against these exporters needs to be terminated, even though the country-wide dumping margin is not *de minimis*. This also means those exporters that have not dumped cannot become subject to later reviews.

Third, investigating authorities can only rely on best information available when they have met the standard of an objective and unbiased investigating authority – which depends on the circumstances of the case and the information provided by interested parties – in identifying exporters and seeking out pertinent information. Moreover, when investigating authorities resort to the use of best information available, they have to compare the information eventually used with information from other sources and treat such information with circumspection. This also means that legal provisions requiring the automatic use of the highest dumping margin to firms that do not cooperate are inconsistent with art. 6.8 AD Agreement and Annex II to the AD Agreement.

Once again, a WTO panel has very clearly shown that *not* all that is *not* explicitly forbidden in anti-dumping-law is therefore automatically permitted. Basic notions of fair play, of what makes sense, and of what *should* make sense, must still drive any investigation. By relaying this message in such clear language, while providing important guidance for future investigations, as well as for future panels, the report may be categorized as a landmark report.

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