

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

Report of the Panel

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
A. COMPLAINT OF THE EUROPEAN COMMUNITIES	1
B. ESTABLISHMENT AND COMPOSITION OF THE PANEL	1
II. FACTUAL ASPECTS	2
III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS.....	3
A. THE EUROPEAN COMMUNITIES	3
B. MEXICO.....	4
IV. ARGUMENTS OF THE PARTIES	6
V. ARGUMENTS OF THE THIRD PARTIES	6
VI. INTERIM REVIEW	6
A. TECHNICAL CORRECTIONS AND ADJUSTMENTS.....	6
B. REQUESTS FROM THE EUROPEAN COMMUNITIES.....	6
VII. FINDINGS	13
A. GENERAL ISSUES	13
1. Standard of Review.....	13
2. Burden of Proof.....	15
3. Treaty Interpretation.....	16
B. ARTICLE 13.1 OF THE SCM AGREEMENT.....	17
1. Arguments of the Parties.....	18
2. Reasoning of the Panel.....	18
(a) Did Economía Send the Invitation to Consultations <i>After</i> Initiation	19
(i) <i>"Initiation" Within the Meaning of the SCM Agreement</i>	<i>19</i>
(ii) <i>The Date on Which Economía Initiated the Olive Oil Investigation</i>	<i>21</i>
(b) The nature of the obligations in Article 13.1	22
C. ARTICLE 13(B)(I) OF THE AGREEMENT ON AGRICULTURE	24
1. Arguments of the Parties.....	24
2. Reasoning of the Panel.....	26
(a) Applicability of the Provision	26
(b) Article 13(b)(i) of the <i>Agreement on Agriculture</i>	<i>27</i>
(i) <i>Domestic Support Measures which Fully Conform with Article 6 of the Agreement on Agriculture</i>	<i>27</i>
(ii) <i>Exempt from Imposition of Countervailing Duties Unless a Determination of Injury or Threat Thereof is Made</i>	<i>28</i>
(iii) <i>Due Restraint Shall be Shown in Initiating Any Countervailing Duty Investigation.....</i>	<i>29</i>
D. ARTICLE 12.4.1 OF THE SCM AGREEMENT.....	32

1.	Arguments of the Parties.....	32
2.	Reasoning of the Panel.....	32
E.	ARTICLE 12.8 OF THE <i>SCM AGREEMENT</i>	36
1.	Arguments of the Parties.....	36
2.	Reasoning of the Panel.....	37
F.	ARTICLE 11.11 OF THE <i>SCM AGREEMENT</i>	40
1.	Arguments of the Parties.....	40
2.	Reasoning of the Panel.....	40
G.	ARTICLES 1 AND 14 OF THE <i>SCM AGREEMENT</i>	41
1.	Arguments of the parties.....	41
2.	Reasoning of the Panel.....	43
(a)	"Pass-through" of Subsidy Benefits.....	43
(i)	"Pass-through" Analysis in <i>WTO Law</i>	43
(ii)	Claim of the European Communities pursuant to Article 1.1 of the <i>SCM Agreement</i>	47
(iii)	Claim of the European Communities pursuant to Article 14 of the <i>SCM Agreement</i>	50
(b)	Article 14 – Other Calculation Issues	55
H.	DEFINITION OF "DOMESTIC INDUSTRY"	57
1.	Arguments of the Parties.....	58
2.	Reasoning of the Panel.....	59
(a)	Introduction.....	59
(b)	Definition of "domestic industry"	60
(c)	Was Fortuna a "Producer" Within the Meaning of Article 16.1 of the <i>SCM Agreement</i>	66
I.	ARTICLE 11.4 OF THE <i>SCM AGREEMENT</i>	69
1.	Arguments of the Parties.....	69
2.	Reasoning of the Panel.....	70
J.	ARTICLE 16.1 OF THE <i>SCM AGREEMENT</i> AND ARTICLE VI:6(a) OF THE <i>GATT 1994</i>	74
1.	Arguments of the Parties.....	74
2.	Reasoning of the Panel.....	75
K.	ARTICLES 15.1 AND 15.4 OF THE <i>SCM AGREEMENT</i> AND ARTICLE VI:6(a) OF THE <i>GATT 1994</i>	80
1.	Arguments of the Parties.....	80
2.	Reasoning of the Panel.....	82
(a)	Article 15 of the <i>SCM Agreement</i>	82
(b)	Facts Regarding Economía's Injury Investigation and Determination.....	84
(c)	Application of Articles 15.1 and 15.4 to the Facts of this Case.....	86
(i)	<i>The April – December Periods of Analysis for Injury</i>	86
(ii)	<i>Other claims and arguments</i>	89

L. ARTICLE 15.5 OF THE *SCM AGREEMENT*..... 89

1. **Arguments of the Parties**..... 89

2. **Reasoning of the Panel**..... 90

VIII. **CONCLUSIONS AND RECOMMENDATIONS**..... 96

LIST OF ANNEXES

ANNEX A

First Written Submissions by the Parties

	Contents	Page
Annex A-1	Executive Summary of the First Written Submission of the European Communities	A-2
Annex A-2	Executive Summary of the First Written Submission of Mexico	A-13

ANNEX B

Third Party Submissions

	Contents	Page
Annex B-1	Executive Summary of the Third Party Submission of Canada	B-2
Annex B-2	Executive Summary of the Third Party Submission of China	B-6
Annex B-3	Executive Summary of the Third Party Submission of Japan	B-8
Annex B-4	Executive Summary of the Third Party Submission of Norway	B-13
Annex B-5	Executive Summary of the Third Party Submission of the United States	B-18
Annex B-6	Third Party Oral Statement of Canada	B-24
Annex B-7	Third Party Oral Statement of the United States	B-25

ANNEX C

Second Submissions by the Parties

	Contents	Page
Annex C-1	Executive Summary of the Second Written Submission of the European Communities	C-2
Annex C-2	Executive Summary of the Second Written Submission of Mexico	C-10

ANNEX D

Oral Statements, First and Second Panel meetings

	Contents	Page
Annex D-1	Executive Summary of the Oral Statement of the European Communities – First Meeting	D-2
Annex D-2	Executive Summary of the Oral Statement of Mexico – First Meeting	D-8
Annex D-3	Executive Summary of the Oral Statement of the European Communities – Second Meeting	D-14
Annex D-4	Executive Summary of the Closing Statement of the European Communities – Second Meeting	D-20
Annex D-5	Oral Statement of Mexico – Second Meeting	D-22

ANNEX E

Request for the Establishment of a Panel

Contents		Page
Annex E-1	Request for the Establishment of a Panel by the European Communities	E-2

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Argentina – Ceramic Tiles</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy</i> , WT/DS189/R, adopted 5 November 2001, DSR 2001:XII, 6241
<i>Argentina – Footwear (EC)</i>	Appellate Body Report, <i>Argentina – Safeguard Measures on Imports of Footwear</i> , WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
<i>Argentina – Poultry Anti-Dumping Duties</i>	Panel Report, <i>Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil</i> , WT/DS241/R, adopted 19 May 2003, DSR 2003:V, 1727
<i>Brazil – Desiccated Coconut</i>	Appellate Body Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167
<i>Brazil – Desiccated Coconut</i>	Panel Report, <i>Brazil – Measures Affecting Desiccated Coconut</i> , WT/DS22/R, adopted 20 March 1997, upheld by Appellate Body Report, WT/DS22/AB/R, DSR 1997:I, 189
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
<i>Canada – Aircraft</i>	Panel Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report, WT/DS70/AB/R, DSR 1999:IV, 1443
<i>Canada – Dairy (Article 21.5 – New Zealand and US II)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, 213
<i>EC – Bed Linen</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/R, adopted 12 March 2001, as modified by Appellate Body Report, WT/DS141/AB/R, DSR 2001:VI, 2077
<i>EC – Bed Linen (Article 21.5 – India)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report, WT/DS141/AB/RW, DSR 2003:IV, 1269
<i>EC – Countervailing Measures on DRAM Chips</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
<i>EC – Trademarks and Geographical Indications (US)</i>	Panel Report, <i>European Communities – Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, Complaint by the United States</i> , WT/DS174/R, adopted 20 April 2005, DSR 2005:VIII-IX, 3499
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613
<i>EC – Tube or Pipe Fittings</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report, WT/DS219/AB/R, DSR 2003:VII, 2701

Short Title	Full Case Title and Citation
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, 2667
<i>Guatemala – Cement II</i>	Panel Report, <i>Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico</i> , WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, 5295
<i>India – Patents (US)</i>	Appellate Body Report, <i>India – Patent Protection for Pharmaceutical and Agricultural Chemical Products</i> , WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
<i>India – Quantitative Restrictions</i>	Appellate Body Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763
<i>India – Quantitative Restrictions</i>	Panel Report, <i>India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</i> , WT/DS90/R, adopted 22 September 1999, upheld by Appellate Body Report, WT/DS90/AB/R, DSR 1999:V, 1799
<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391
<i>Japan – DRAMs (Korea)</i>	Panel Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report, WT/DS336/AB/R
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
<i>Korea – Resins</i>	GATT Panel Report, <i>Panel on Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States</i> , ADP/92 and Corr.1, adopted 27 April 1993, BISD 40S/205
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853
<i>Mexico – Anti-Dumping Measures on Rice</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report, WT/DS295/AB/R, DSR 2005:XXIII, 11007
<i>Mexico – Corn Syrup</i>	Panel Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States</i> , WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, 1345
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
<i>Mexico – Steel Pipes and Tubes</i>	Panel Report, <i>Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala</i> , WT/DS331/R, adopted 24 July 2007
<i>Thailand – H-Beams</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001, DSR 2001:VII, 2701
<i>Thailand – H-Beams</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report, WT/DS122/AB/R, DSR 2001:VII, 2741

Short Title	Full Case Title and Citation
<i>US – 1916 Act (EC)</i>	Panel Report, <i>United States – Anti-Dumping Act of 1916, Complaint by the European Communities</i> , WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593
<i>US – Canadian Pork</i>	GATT Panel Report, <i>United States – Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada</i> , DS7/R, adopted 11 July 1991, BISD 38S/30
<i>US – Cotton Yarn</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131
<i>US – Countervailing Duty Investigation on DRAMS</i>	Panel Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report, WT/DS296/AB/R, DSR 2005:XVII, 8243
<i>US – Countervailing Measures on Certain EC Products</i>	Appellate Body Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities</i> , WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, 5
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663, and Corr.1
<i>US – Gasoline</i>	Appellate Body Report, <i>United States – Standards for Reformulated and Conventional Gasoline</i> , WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
<i>US – Lead and Bismuth II</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595
<i>US – Lead and Bismuth II</i>	Panel Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/R and Corr.2, adopted 7 June 2000, upheld by Appellate Body Report, WT/DS138/AB/R, DSR 2000:VI, 2623
<i>US – Norwegian Salmon AD</i>	GATT Panel Report, <i>Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway</i> , ADP/87, adopted 27 April 1994, BISD 41S/229
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)</i>	Panel Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report, WT/DS268/AB/RW

Short Title	Full Case Title and Citation
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Softwood Lumber III</i>	Panel Report, <i>United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada</i> , WT/DS236/R, adopted 1 November 2002, DSR 2002:IX, 3597
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
<i>US – Softwood Lumber IV</i>	Panel Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report, WT/DS257/AB/R, DSR 2004:II, 641
<i>US – Softwood Lumber VI</i>	Panel Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada</i> , WT/DS277/R, adopted 26 April 2004, DSR 2004:VI, 2485
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, 3117
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, and Add.1-Add.3, and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report, WT/DS267/AB/R, DSR 2005:II-VI, 299
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
<i>US – Wool Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323

I. INTRODUCTION

A. COMPLAINT OF THE EUROPEAN COMMUNITIES

1.1 On 31 March 2006, the European Communities ("the EC") requested consultations with Mexico pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), Article XXIII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") and Article 19 of the *Agreement on Agriculture*. The consultations concerned the definitive countervailing measures imposed by Mexico on imports of olive oil from the European Communities by the "Final Resolution in the investigation of price subsidization of imports of olive oil" published in the Official Journal of the United Mexican States ("Official Journal") on 1 August 2005.¹ The European Communities and Mexico held consultations on 5 May 2006. These consultations failed to resolve the dispute.

1.2 On 7 December 2006, the European Communities requested the establishment of a panel pursuant to Articles 4.7 and 6.2 of the DSU, Article XXIII of the GATT 1994, Articles 4 and 30 of the SCM Agreement, and Article 19 of the Agreement on Agriculture.²

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.3 At its meeting on 23 January 2007, the Dispute Settlement Body ("DSB") established the Panel pursuant to the request of the European Communities in document WT/DS341/2, in accordance with Article 6 of the DSU. At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the European Communities in document WT/DS341/2, the matter referred to the DSB by the European Communities in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.

1.4 On 13 February 2007, the European Communities requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. On 21 February 2007, the Director-General composed the Panel as follows:

Chair: Ms Debra Steger
Members: Mr. Jan Heukelman
Ms Gloria Peña

1.5 Canada, China, Japan, Norway, and the United States have reserved their rights to participate in the Panel proceedings as third parties.³

1.6 The Panel met with the parties on 26-27 June 2007 and 3-4 October 2007, and with the third parties on 26 June 2007.

¹ WT/DS341/1.

² WT/DS341/2.

³ WT/DS341/3.

II. FACTUAL ASPECTS

2.1 This dispute concerns the imposition by Mexico of countervailing duties on imports of olive oil from the European Communities.

2.2 On 12 March 2003, the Mexican company Fortuny de México, SA de CV ("Fortuny"), filed an application for the imposition of countervailing duties on olive oil originating in the European Communities (mainly from Spain and Italy). Fortuny's application alleged that during the period April-December 2002, subsidized imports of virgin and refined olive oil from the European Communities materially retarded the establishment of a domestic industry producing identical or similar products.⁴

2.3 On 2 July 2003, the Minister of Economy signed a resolution accepting the application and initiating the investigation.

2.4 On 4 July 2003, Mexico invited the European Communities to consultations pursuant to Article 13.1 of the *SCM Agreement*.⁵ On 11 July 2003, the European Communities sent a letter accepting the invitation.⁶ The consultations took place in Mexico City on 17 July 2003.⁷

2.5 The Initiation Resolution was published in the Official Journal on 16 July 2003.⁸ The investigation covered virgin olive oil, including the categories of extra virgin, fine virgin and ordinary virgin; refined, including first-class refined and second-class refined; and blended oil, including first-class blends and second-class blends. These goods were classified in tariff sub-headings 1509.10.01, 1509.10.99, 1509.90.01, 1509.90.02 and 1509.90.99 of the Mexican Tariff Schedule.⁹

2.6 The investigation covered the period April-December 2002¹⁰ ("Period of Investigation" or "POI"). The examination of "trends" in the context of the injury analysis covered the periods 1 April-31 December of 2000, 2001 and 2002¹¹ ("Injury Investigation Period" or "Injury POI").

2.7 During the course of the investigation, there were numerous communications and exchanges, including questionnaires, comments and submissions between the Mexican investigating authority, the Ministry of Economy ("Economía") and the parties to the investigation: Fortuny, the European Commission, the governments of the exporting EC Member States, importers, and exporters. Mexico and the European Communities also held consultations on 17 November 2003 and 2 December 2004.¹²

2.8 On 10 June 2004, Economía published the Preliminary Resolution in the Official Journal. The Resolution continued the investigation and imposed provisional countervailing duties on a per kilogram basis. To determine the specific amount payable on each shipment, the maximum duty

⁴ Exhibit EC-13, para. 2.

⁵ Exhibit EC-22, para. 22.

⁶ Exhibit EC-14.

⁷ Exhibit EC-22, para. 23.

⁸ Exhibit EC-13.

⁹ The Initiation Resolution (Exhibit EC-13) refers to tariff sub-headings 1509.10.99 and 1509.90.02. Subheadings 1509.10.01, 1509.90.01 and 1509.99.00 were added in the Preliminary Resolution (Exhibit EC-22, paras. 6-20) and maintained in the Final Resolution (Exhibit EC-1, paras. 15-24).

¹⁰ Exhibit EC-1, para. 3.

¹¹ Ibid.

¹² Ibid., para. 65.

payable in respect of the individual exporter, calculated on an *ad valorem* basis, was added to the customs value of the shipment, up to a maximum per kilogram reference price.¹³

2.9 On 1 August 2005, Mexico published the Final Resolution in the Official Journal, which imposed definitive countervailing duties. Individual rates of countervailing duties were imposed on imports from eight Spanish and Italian olive oil exporters and on "all other imports" from the EC. The per exporter duty amounts, calculated on a per kilogram basis, were added to the customs value of the imports, up to a maximum per kilogram reference price.¹⁴

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. THE EUROPEAN COMMUNITIES

3.1 The European Communities requests the Panel to find that the initiation and conduct of the investigation by Economía, as well as the imposition of the definitive countervailing measures are inconsistent with Mexico's obligations under, *inter alia*, Article VI of the *GATT 1994*, Articles 1, 11, 12, 13, 14, 15, 16 and 22 of the *SCM Agreement* and Articles 13 and 21 of the *Agreement on Agriculture*. In particular, the European Communities in its request for establishment of the panel requests the Panel find that Mexico violated:¹⁵

1. Articles 11.4 and 16 of the *SCM Agreement* by initiating the investigation in the absence a determination that the application was made by or on behalf of the domestic industry;
2. Article 11.11 of the *SCM Agreement* by failing to conclude the investigation within one year, and in no case more than 18 months, after its initiation;
3. Article 12.4.1 of the *SCM Agreement* by failing to require interested parties to provide non-confidential summaries of confidential information in sufficient detail to permit a reasonable understanding of the substance of the information;
4. Articles 12.8, 22.3, and 22.5¹⁶ of the *SCM Agreement* by failing to properly inform the interested parties and to a provide reasonable and adequate explanation of the existence of subsidisation, notably as regards pass-through of any benefit;
5. Article 13.1 of the *SCM Agreement* by failing to grant an opportunity for consultations before the initiation of the investigation with the aim of clarifying the situation as to matters referred to in Article 11.2 of the *SCM Agreement* and arriving at a mutually agreed solution;
6. Articles 1.1 and 14 of the *SCM Agreement* by failing to calculate the benefit conferred on the recipient pursuant to Article 1.1 of the *SCM Agreement* and to apply the method used to each particular case in a transparent way which is adequately explained as required by Article 14 of the *SCM Agreement*;
7. Article VI:6 of the *GATT 1994* and Articles 15.4, 15.5 and 16 of the *SCM Agreement* by failing to correctly define the domestic industry;

¹³ Exhibit EC-22, paras. 346-360.

¹⁴ Exhibit EC-1, paras. 446-454.

¹⁵ WT/DS341/2.

¹⁶ In its First Written Submission, the European Communities alleges a violation only of Article 12.8, and not Articles 22.3 or 22.5, of the *SCM Agreement*.

8. Article VI:6 of the *GATT 1994* and Articles 15.1 and 15.4 of the *SCM Agreement* by failing to make a determination of injury based on positive evidence involving an examination of all relevant economic factors and indices having a bearing on the state of the industry and to provide reasoned and adequate explanation;
9. Article 15.5 of the *SCM Agreement* by failing to examine any known factors other than the allegedly subsidized imports which were causing injury to the domestic industry; and
10. Articles 13(b)(i) and 21.1 of the *Agreement on Agriculture* by initiating a countervailing duty investigation on imports of an agricultural product (olive oil) outside the circumstances contemplated in Article 13(b)(i) of the *Agreement on Agriculture* and in violation of Article 21.1¹⁷ of the *Agreement on Agriculture*.

3.2 The European Communities requests that the Panel, in accordance with Article 19.1 of the *DSU* and WTO practice, recommend the Dispute Settlements Body to request that Mexico bring its measure into conformity with the cited Agreements; and, in the light of its authority pursuant to Article 19.1 of the *DSU*, that the Panel accompany this recommendation with a suggestion to Mexico that a complete repeal of the measure against EC olive oil would be the most appropriate and/or effective way of bringing the measure into conformity.¹⁸

B. MEXICO

3.3 Mexico requests the Panel to reject all of the claims and arguments raised by the European Communities in the proceeding. In particular, Mexico requests that the Panel find:

1. with regard to initiation, that Mexico acted in a manner consistent with Articles 11.4 and 16.1 of the *SCM Agreement* because Economía properly determined, based on sufficient facts in the application, that Fortuny was the sole domestic producer and was representative of the Mexican domestic industry¹⁹;
2. with regard to the duration of the investigation, that Mexico acted consistently with the provisions of Article 11.11 of the *SCM Agreement* because although the investigation lasted more than 18 months, there were "exceptional circumstances": the delays resulted from Economía's acceptance of requests for extensions by interested exporters, so the rights of interested parties were not adversely affected²⁰;
3. with regard to the non-confidential summaries of confidential information, that Mexico acted in a manner consistent with Article 12.4.1 of the *SCM Agreement* because there were sufficiently detailed public summaries of all confidential information, and because of Mexico's regime for access to the confidential information on the record²¹;
4. with regard to the disclosure of the essential facts that served as a basis for the decision to apply definitive measures, that Mexico acted in a manner consistent with Article 12.8 of the *SCM Agreement* because interested parties may be informed of the essential facts in a number of ways. The essential facts were disclosed in the Preliminary Resolution, which

¹⁷ In its First Written Submission, the European Communities alleges a violation only of Article 13(b)(i), and not Article 21.1, of the *Agreement on Agriculture*.

¹⁸ European Communities - First Written Submission, paras. 229-230.

¹⁹ Mexico - First Written Submission, paras. 19, 34 and 43-44.

²⁰ Ibid., paras. 99, 105-106.

²¹ Ibid., paras. 80-90.

described in detail the treatment of information, arguments and evidence furnished by the parties, and the reasons for information having been taken into account or rejected²²;

5. with regard to the invitation for consultations prior to initiation of the investigation, that Mexico acted consistently with Article 13.1 of the *SCM Agreement* because Economía invited the European Communities for consultations prior to the date of initiation²³;
6. with regard to the alleged failure to calculate the benefit conferred on the recipient pursuant to Article 1.1 of the *SCM Agreement* and to apply the method used to each particular case in a transparent way which is adequately explained, in violation of Article 14 of the *SCM Agreement*, that: (a) there is no provision in the *SCM Agreement* to indicate that a "pass-through" analysis is required, (b) as Economía correctly found that the subsidy was contingent on the production of olive oil, there was no need to analyze the transfer of the subsidy from olive growers to the producers of the olive oil; and (c) the methodology to calculate the subsidy margin used by Economía was correct²⁴;
7. with regard to Economía's definition of the domestic industry, that Mexico acted consistently with Article 16 of the *SCM Agreement* and did not violate Article VI:6 of the *GATT 1994*, because the European Communities failed to present a *prima facie* case of violation; and that, in any case, Economía made an exhaustive examination of all matters that might have been relevant to the evaluation of injury to the domestic industry and all the evidence reviewed pointed to the conclusion that the domestic industry was composed of Fortuny²⁵;
8. with regard to Economía's determination of injury, that Economía undertook its analysis of injury consistently with Article 15.1 and 15.4 of the *SCM Agreement*, and did not violate Article VI:6 of the *GATT 1994*, because Economía complied with Article 15.1 and 15.2 of the *SCM Agreement* by undertaking an objective examination based on positive evidence of the effect of the subsidized imports on prices, and Economía did examine all of the relevant factors listed in Article 15.4 of the *SCM Agreement* in its examination of the impact of the subsidized imports on the domestic industry²⁶;
9. with regard to Economía's consideration of "other known factors", that the European Communities has failed to present a *prima facie* case and that, in any event, Economía properly considered, as required by Article 15.5 of the *SCM Agreement*, any known factors, other than the allegedly subsidized imports, which were causing injury to the domestic industry²⁷; and
10. with regard to the investigation on imports of an agricultural product outside the circumstances contemplated in Article 13(b)(i) of the *Agreement on Agriculture*, that the European Communities has not presented a *prima facie* case and, in any event, that Economía exercised due restraint in the initiation of the investigation; that the obligation to show "due restraint" did not apply to any action in the investigation other than the initiation, and that the obligations contained in Article 13(b)(i) only applied to the initiation and not to any other aspects of the investigation on olive oil given that the Article expired on 31 December 2003 and thus was not applicable after the initiation of the investigation.²⁸

²² Ibid., paras. 93 and 94.

²³ Ibid., paras. 2-12.

²⁴ Ibid., paras. 116, 120-123 and 130.

²⁵ Ibid., paras. 157-158, 203-204.

²⁶ Ibid., paras. 249-276.

²⁷ Ibid., paras. 281 and 295.

²⁸ Ibid., paras. 48-49, 60-62 and 66, 74.

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties, as set forth in the executive summaries of their submissions provided to the Panel, are attached to this Report in Annexes A, C and D (see List of Annexes, pages iv-v).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties – Canada, China, Japan, Norway, and the United States – as set forth in the executive summaries of their submissions provided to the Panel, are attached to this Report in Annex B (see List of Annexes, pages iv-v).

VI. INTERIM REVIEW

6.1 Pursuant to Article 15.3 of the DSU, the findings of the final panel report shall include a discussion of the arguments made by the parties at the interim review stage. This section of the Panel report provides such a discussion. As is clear from Article 15.3, this Section is part of the Panel's findings.

6.2 The European Communities requested that we make a number of technical and substantive changes to the interim report. These are described in Section B, *infra*. Mexico informed us that it had no comments on the interim report. Mexico's reactions to the requests of the European Communities are described in section B, *infra*.²⁹

6.3 The Panel issued its final report to the parties on a confidential basis on 26 August 2008.

A. TECHNICAL CORRECTIONS AND ADJUSTMENTS

6.4 We have made certain technical corrections and adjustments, including on the basis of requests from the European Communities as referred to in section B, *infra*.

B. REQUESTS FROM THE EUROPEAN COMMUNITIES

6.5 With regard to paragraph 3.1, point 1, the European Communities requests that we adjust the drafting to better reflect the wording of this claim as set forth in the Request for Establishment of a Panel. Mexico makes no comment on this request. We have made the requested adjustment.

6.6 With regard to paragraphs 4.1 and 5.1, the European Communities requests that we attach in full all answers to questions from the Panel, and comments thereon, on the basis that these answers and comments contain arguments that are important to understand the case. Mexico makes no comment on this request. We have not acceded to the request of the European Communities because we consider it unnecessary given that we have quoted *in extenso* in the body of the report those answers to which we refer in our findings. Our decision not to annex the full questions and answers also is in the interest of conserving resources. As noted by the European Communities, these questions and answers are part of the record of the Panel proceeding and continue to be so regardless of whether they are annexed to the report of the Panel.

²⁹ We note that in their comments the European Communities and Mexico referred to the paragraph and footnote numbers as they existed in the Interim Report. However, some of these numbers have changed as a result to edits we have made in response to the interim comments. To assist in understanding the Interim Review as well as the Findings we have used the paragraph and footnote numbers as they currently exist in referring to the European Communities' and Mexico's comments on the Interim Report.

6.7 The European Communities requests that in paragraph 7.17 we add a new second sentence including the dates it received the invitation for consultations and the timing of the fixing of the date for consultations to more fully reflect its arguments as they were submitted to the Panel. Mexico makes no comment on this request. We have not made the requested additions. We note that the European Communities did provide additional chronological information in response to Panel question 101, however, the European Communities did not provide any legal arguments with respect to these dates in its written submissions or oral statements before us.

6.8 In respect of paragraph 7.31, second sentence, the European Communities requests that we change our factual finding regarding the date of initiation of the investigation from 17 July 2003, to 16 July 2003, on the basis that Mexico acknowledges this date in certain of its submissions. Mexico disagrees with this comment, stating that 17 July 2003 is the correct date of initiation, as referred to in the interim report, and as indicated in Mexico's Second written submission. We have not made the requested change, as our finding is based on our reading of the relevant legislation of Mexico. We note as well that the European Communities, in submissions before us, identified 17 July 2003 as the date on which the initiation resolution came into effect. (See, e.g., European Communities – First oral statement, para. 17; Second oral statement, para. 5.) Finally, as noted, in its reactions to the interim review request of the European Communities, Mexico confirms the date of 17 July 2003 as the correct date.

6.9 The European Communities requests that we replace "a *bona fide* one" in the penultimate sentence of paragraph 7.35 with "a *bona fides* one" or "made in *bona fide*". Mexico submits no comment on this request. We have changed the reference to refer to "*bona fides*".

6.10 The European Communities requests that we delete paragraphs 7.37 and 7.38, because its arguments "are not limited to the aim (object and purpose) of Article 13.1 of the *SCM Agreement*", arguing that it also submitted arguments relating to the context of that provision. Mexico submits no comment regarding this request. We have not accepted this request, as we consider that the report makes clear that we understood the European Communities to be making a textual argument based on the language pertaining to the "aim" of the consultations, not only an argument based on the "aim" (object and purpose) of Article 13.1. Additionally, we address the European Communities other arguments in the subsequent paragraphs. We have introduced certain drafting changes to these paragraphs to further clarify this point.

6.11 The European Communities further submits that paragraph 7.38 contains a denial of implicit obligations under the WTO agreements as well as a denial of the concept of implicit obligations *per se*. Mexico disagrees with this request, as in its view the paragraph in question does not deny the existence of implicit obligations as such, but rather states that in the specific case it is not possible to conclude that Article 13.1 of the *Agreement* contains the specific implicit obligation to *hold* consultations asserted by the European Communities. We have introduced certain drafting changes to this paragraph to clarify this point.

6.12 The European Communities requests that in paragraph 7.42, last sentence, we replace the term "4 July, the date of the invitation to consultations" with "8 July, the date of reception by the European Communities of the invitation by Mexico to hold consultations, which was issued by Mexico on 4 July", as "nobody is really invited before receiving the invitation". Mexico disagrees, stating that even if one cannot consider oneself invited until an invitation is received, the obligation on the importing Member cannot go to such an extreme, as this would imply that Mexico had the obligation to ensure that the specific office of the European Communities in charge of this matter in fact received the invitation. Mexico also submits that the issue under dispute is whether the obligation is to invite for consultations or to invite and hold consultations. We have not made the change requested by the European Communities. We consider that this does not reflect the arguments as presented by the European Communities, which consistently refer to the date on which the invitation

to consultations was sent (4 July 2003) (*see, e.g.,* European Communities – First written submission, para. 87), and which focus on whether Mexico was obliged to hold consultations, or at least issue the invitation in time that consultations could be held, before initiation.

6.13 Also concerning paragraph 7.42, the European Communities requests that in the last sentence we change the reference from "17 July 2003" to "16 July 2003". Mexico disagrees, for the reasons as outline in paragraph 6.8, *supra*, and we have declined to make the requested change for the same reasons.

6.14 In respect of paragraph 7.58, the European Communities requests that we delete the term "specifically", on the grounds that Mexico never disputed the conformity of the European Communities domestic support measures with Article 6 of the *Agreement on Agriculture*. Mexico submits no comment on this request. We have not made the requested change, we believe the language adequately reflects Mexico's representations to the Panel with respect to this issue. However, in light of the European Communities' request that we delete the term "apparent" in paragraph 7.59, we have made certain drafting changes in that paragraph which we believe further clarify the position Mexico took on the applicability of Article 13(b)(i) of the *Agreement on Agriculture* during the conduct of the olive oil investigation.

6.15 With respect to paragraph 7.59, the European Communities also requests that we delete the last sentence of this paragraph because it is redundant with what is already stated in paragraph 7.56. Mexico submits no comment on this request. We have not made the requested deletion, because we consider that the reference in paragraph 7.59, which concludes a sub-section of our reasoning, is more specific than the earlier reference which summarized the three steps that would be analyzed in the following sub-sections, and is necessary for our reasoning in the sub-section to be complete.

6.16 Regarding paragraphs 7.61 through 7.64, the European Communities requests that we change our findings and conclusions in respect of the European Communities' claim under Article 13(b)(i) of the *Agreement on Agriculture*. First, the European Communities argues, the language of the Peace Clause refers to "injury or threat thereof", and because footnote 45 of the *SCM Agreement* does not foresee threat of material retardation, the reference to "injury" in the Peace Clause must refer only to material injury (i.e., not to all the forms of injury referred to in footnote 45 of the *SCM Agreement*). Second, according to the European Communities, if the obligation not to apply duties in the case of material retardation does not extend to initiation, the result would be "absurd", in that an investigating authority would be entitled to initiate on the basis of a form of injury in respect of which a duty could not be imposed. Third, the European Communities submits, the Panel's remark that Economía initiated the investigation on the basis of "injury" in the broad sense, would allow any investigating authority to circumvent the application of the first clause of Article 13(b)(i) of the *Agreement on Agriculture*, which runs counter to the principle of effective treaty interpretation. Fourth, the European Communities considers that Economía's imposition of provisional and final measures on the basis of material injury is irrelevant for the aim of assessing the validity of the initiation. Mexico disagrees with this request, because it does not believe that there is a problem in initiating on the basis of injury in the general sense, especially where as in the present case the form of injury was not completely clear at the outset. Mexico argues that to presume that the investigating authority has to know before the investigation is initiated which form of injury has to be investigated would be equivalent to asking it to have evidence of the quantity and quality sufficient for issuing a preliminary or final determination. We have not accepted the request from the European Communities to change our findings in respect of this claim. We believe that the reasoning in the Report sufficiently addresses the arguments of the European Communities.

6.17 Also in respect of paragraph 7.64, the European Communities requests, in case we do not agree with its request described in the preceding paragraph, that we rephrase our finding to say that "the EC has not established that Mexico acted inconsistently with the first clause of Article 13(b)(i) of

the *Agreement on Agriculture*", i.e., the same wording as in our conclusions in Section VIII of the report. Mexico submits no comment on this request. We have changed the wording in paragraph 7.64 to reflect the wording in our conclusions in Section VIII.

6.18 Concerning paragraphs 7.72 to 7.80, the European Communities considers that our finding is that in order to comply with the Peace Clause in the *Agreement on Agriculture*, it is enough to abide by the legal requirements of the relevant provisions in the *SCM Agreement*, which interpretation gives no added value to the Peace Clause and therefore is contrary to the principle of effective treaty interpretation. The European Communities asks us, accordingly, to redraft our arguments and find that Mexico acted inconsistently with Article 13(b)(i) of the *Agreement on Agriculture*. Mexico submits no comment on this request. We disagree with the European Communities' characterization of our finding. As set forth in paragraph 7.72, having ruled against the claim of the European Communities under Article 13.1 of the *SCM Agreement* regarding the timing of the invitation to consultations, we do not find that that same timing constitutes *evidence* of "haste" in the sense of Article 13(b)(i) of the *Agreement on Agriculture* such that it would support a conclusion that Mexico acted without due restraint in its initiation of the olive oil investigation.

6.19 Regarding footnote 112, the European Communities requests that we check the reference to Mexico's exhibit cited in that footnote. Mexico submits no comment on this request. We have corrected the reference.

6.20 At the suggestion of the European Communities, we have corrected the punctuation in paragraph 7.75.

6.21 Regarding paragraph 7.115, the European Communities contests the accuracy of our statement that it was only in response to a direct question from the Panel that the European Communities identified specific "essential facts". In this regard, the European Communities cites its arguments in paragraphs 34 to 37 of its Second written submission. Mexico disagrees with this request as in its view the European Communities has not identified any essential fact that was dismissed by the investigating authority in its analysis, but rather has only made general statements in which it indicated that it was difficult to imagine that in certain procedural steps no essential fact had been obtained. We note that paragraphs 34 to 37 of the European Communities Second written submission were quoted in paragraph 7.111 (previously part of paragraph 7.110) and cited in footnote 141 to that paragraph. We have added additional citations to more fully reflect the arguments made by the European Communities in those paragraphs of its second written submission. We have also modified paragraph 7.115 to clarify our presentation of the arguments of the European Communities.

6.22 In respect of footnote 175, the European Communities requests that we add to the description of the Appellate Body finding in *Softwood Lumber IV* that that finding was limited to aggregated investigations, and that a pass-through analysis might be required in determining individual countervailing duty rates through a review procedure. Mexico makes no comment on this request. We have not modified the drafting of our report, and note in this regard that paragraph 7.168 of the report addresses the question of input products as it arose in the olive oil investigation.

6.23 Concerning paragraphs 7.145 through 7.154, the European Communities requests that we merge sections VII.G.2(a)(ii) and (iii), because in its view we inappropriately analyzed its claims under Articles 1 and 14 as separately claims. The European Communities asserts that it "never presented two separate claims", but rather that its claim was that Economía violated both articles, taken together, and that it had explained during the proceedings that the question was whether the olive oil imported into Mexico was a subsidized import, and for that purpose, it was necessary for the investigating authority to establish and explain adequately a connection between the original subsidy and the imported product, and that such a determination has to be evaluated by applying both articles

at the same time. Mexico disagrees that the interim report specifies that there were two distinct claims, and considers that the differentiation was made only for purposes of the Panel's analysis, noting that paragraph 7.148 of the report recognizes that there is a single argument: "The European Communities declined to elaborate further its legal arguments regarding how, precisely, Articles 1 and 14 in themselves require a pass-through analysis, in spite of our specific invitations at both the first and second meetings with the Panel to do so." We have not made the requested change as we disagree with the European Communities' characterization of our findings. First, as Mexico points out, we considered jointly the European Communities' arguments regarding the alleged obligation under Articles 1 and 14 to conduct a pass-through analysis, in paragraphs 7.147 and 7.148. Second, however, we note that the European Communities itself in presenting its arguments referred to distinct obligations in Articles 1 and 14 of the *SCM Agreement*, starting with its Request for Establishment of a Panel which reads, in relevant part:

"the failure to calculate the benefit conferred on the recipient pursuant to paragraph 1 of Article 1 of the *SCM Agreement* and to apply the method used to each particular case in a transparent way which is adequately explained, in violation of Article 14 of the *SCM Agreement*;"

Furthermore, we asked specific questions to the European Communities as to the nature of its claim under Article 14, and have described this exchange in paragraph 7.168 and footnote 196. The European Communities made no objection to our question on the grounds that it imperfectly reflected the nature of its claim. Finally, as a practical matter, in order to assess the merits of this claim, we had no choice but to analyze the provisions separately to see whether either one contains an obligation to conduct a pass-through analysis.

6.24 Also concerning paragraph 7.145, the European Communities requests that we delete the phrase "For reasons not clear to us, and" from the beginning of the first sentence, as it considers that it has submitted and explained to the Panel the legal reasons why it decided to base its claim on Articles 1 and 14 of the *SCM Agreement*. Mexico submits no comment on this request. We have not accepted this request, as the language in question is a statement of the perspective of the Panel.

6.25 The European Communities objects to our reference in footnote 203 to a lack of factual evidence, and refers to its reply to Panel question 45 in this respect. Mexico considers that the fact that the European Communities "listed" its evidence in this regard does not imply that it presented factual evidence, and notes that the Panel referred to this when it signalled that only arguments and not evidence were submitted. We have not accepted the request of the European Communities. Footnote 203 indicates that the replies provided by certain interested parties to information requests from Economía consisted of argumentation, rather than factual information. We have introduced certain drafting clarifications to this footnote.

6.26 Regarding paragraph 7.171, the European Communities objects to our finding nothing "unclear" about the explanation provided by Economía regarding the issue raised in the investigation that certain olive oil exported from the European Communities to Mexico was not of European origin. The European Communities states that it never alleged a lack of clarity. It also argues that we did not take into account the fact that during the investigation, the European Commission submitted certain evidence related to this point, referred to in paragraph 41(a) of the Final Resolution. Mexico submits no comment on this request. We have introduced certain drafting changes into this paragraph to more fully reflect the arguments of the European Communities.

6.27 The European Communities argues that paragraphs 7.193 to 7.196 should be deleted. The European Communities considers that *US – Lamb* is not relevant precedent for this case, given that the issues were distinct from those before us, and further that because that was a safeguards case,

there was no issue as to the subsidy POI, but rather a single period for injury and imports. Mexico submits no comment on this request. We have not made the requested change, as we consider that our findings are clear in explaining our reasons for looking at the reasoning in that case, while recognizing the differences in the nature of the two disputes and the fact that they concern two different Agreements.

6.28 The European Communities suggests deleting footnote 237, or at least its first three lines, because it addresses Article 15.2, while the statements and submissions of the European Communities that are referenced do not concern that provision. The European Communities also considers that this footnote conflicts with our exercise of judicial economy in respect of its claims under Articles 15.1 and 15.4. Mexico disagrees with this request, commenting that the drafting in the interim report is fully clear and adequate, and that the points referred to by the European Communities are related to one another, such that the Panel's statement appears pertinent. We have introduced some drafting changes to clarify that the references to Article 15.2 are by way of context in interpreting the term "domestic industry", rather than on the basis of a claim or argument of the European Communities. With respect to our findings under Articles 15.1 and 15.4, we have made some drafting changes in footnote 375.

6.29 Concerning paragraph 7.202, second sentence, the European Communities considers that the report misrepresents its arguments, because it did not argue that output is cumulatively required both at the time of initiation and during the subsidy POI. The European Communities requests that this paragraph and paragraph 7.181 be amended to take this into account. Mexico disagrees with this request, stating that the distinction drawn by the European Communities has no meaning. Mexico recalls the reply of the European Communities to Panel question 102, which refers to data for a particular period of time, as well as to "having current output ... at all stages of the procedure, including at initiation". We note that the European Communities' written submissions, particularly its answers to Panel Questions 13, 102, and 143 and its comment on Mexico's answer to 105 support our conclusion that the European Communities is making an argument about output being required at the time of application. Additionally, in its arguments on Article VI and 16 the European Communities refers to a necessity for production during the subsidy period of investigation. The European Communities never stated that it was making these arguments in the alternative. Therefore, we concluded that these were "cumulative" arguments, i.e., that the European Communities was arguing that production is required both at (or near) the time of application *and* during the subsidy POI. We have, however, modified the drafting of these paragraphs to clarify how the two issues were raised in the submissions of the European Communities.

6.30 Also concerning paragraph 7.202, the European Communities states that it "considers that seasonal industries will produce by definition 'at some point' within one year and the subsidy POI shall cover that period in order to allow the establishment of causal link. Similar arguments may be used for industries producing goods on a 'just in time' or made-to-order basis or shutting down for maintenance or upgrading." The European Communities therefore requests us to delete any references to industries of this kind as examples of industries that would be disqualified under the EC interpretation from being counted as domestic industries in countervailing duty investigations. Mexico submits no comment on this request. We have not made the requested change. First, the European Communities did not present this argument to us during the dispute. Second, the statement, to which the European Communities objects, reflects *our* interpretation and reasoning concerning the implications of the argument that a producer must have "output" at certain times in an investigation in order to be considered a "domestic industry" within the meaning of Article 16.1 of the *SCM Agreement*.

6.31 The European Communities requests that we correct the reference in footnotes 238 and 247 from "Panel question 14" to "Panel question 13". Mexico disagrees, indicating that the reference to

Panel question 14 is correct. We have reviewed the responses in question and made the requested correction.

6.32 Also regarding footnote 238, the European Communities requests that we insert at the end of the footnote the phrase: ", because the Panel is not faced with a borderline issue, [because] Fortuny has ceased production a whole year before its application was initiated, [and] it was clearly not producing", to reflect its reply to Panel question 13 and its comments on Mexico's reply to Panel question 105. Mexico submits no comment on this request. We have introduced certain drafting changes to this footnote *inter alia* to more fully reflect these arguments of the European Communities.

6.33 The European Communities considers that paragraph 7.203, first sentence misrepresents its arguments when it states that "an industry may be so badly injured by subsidised imports as to be forced to cease production for some period, but under the European Communities' interpretation, it would be disqualified from obtaining the very remedy aimed at addressing such injury." The European Communities maintains that all through these proceedings it has explained that the complainant must have been producing at least at some point during the period preceding the lodging of an application (arguably, the subsidy POI), referring here to its reply to Panel question 102. Mexico submits no comment on this request. We have introduced certain drafting changes to footnote 221 to more fully reflect the arguments of the European Communities. We also have modified the drafting in paragraph 7.203 to clarify that the statement to which the European Communities objects is our view as to the implications of its arguments.

6.34 The European Communities requests that we delete the last sentence of footnote 247 because it does not correspond to its arguments as presented in reply to Panel question 13. The European Communities also considers that the statement in the footnote that the European Communities did not provide any specific elaboration as to what constitutes a "borderline" situation clashes with the case-by-case approach followed by the panel in paragraph 7.206. Mexico considers that what is referred to in this footnote corresponds to the answer of the European Communities to Panel question 14, rather than 13. We have clarified that we were referring to the European Communities' answer to Panel question 13 and have made the requested deletion.

6.35 The European Communities requests that we correct footnote 254 to refer to its second oral statement, paragraph 12. Mexico submits no comment on this request. We have made the requested correction.

6.36 Regarding paragraph 7.233 the European Communities requests that we insert the dates of the two letters from the Government of the State of Baja California, in order to clearly place them in the chronology of the investigation. Regarding paragraph 7.234, the European Communities requests that we insert the date of the *Claridades* article, which it identifies as June 2001, to place it in the chronology of the investigation. Mexico objects to the date of the *Claridades* article referred to by the European Communities, stating that the correct date of publication was June 2002, such that this source was one year more recent than indicated by the European Communities. We have verified that the date of the article was June 2001, and have introduced this date into the text of paragraph 7.230. We also have inserted into the text of the same paragraph the dates of the letters from the Government of the State of Baja California.

6.37 Regarding paragraph 7.236, the European Communities requests that we insert footnotes to identify where, in the *Claridades* article the references to production and marketing of olive oil by Ybarra, to the experimental artisanal production, and the Ybarra (Fortuny) brand can be found. Mexico does not comment on this request. We have introduced the requested references, in new footnote 269.

6.38 Concerning paragraph 7.238, the European Communities suggests modifying the drafting to read, as in the Panel's conclusions, "we find that the European Communities has not established that Mexico acted inconsistently with its obligations...". Mexico does not comment on this request. We have made the requested change.

6.39 Concerning paragraph 7.245, the European Communities requests that we insert the dates of all of the correspondence referred to in subparagraphs (a) to (j), to clearly identify those letters in the chronology of the investigation. Mexico does not comment on this request. We have inserted the dates as requested.

6.40 In paragraph 7.245, at the request of the European Communities, we have corrected the spelling of Bufete Químico.

6.41 In footnote 395, the European Communities requests that we insert a reference to its first written submission, paragraph 222, and correct the reference to its second oral statement. Mexico states that this footnote is not related to what is signalled by the European Communities. We have adjusted the drafting of the footnote to properly reflect where the comments referenced in the main text are found in the European Communities' submissions.

6.42 In footnotes 398 and 399, the European Communities requests that we insert a reference to the Final Resolution (Exhibit EC-1), paragraph 437. Mexico does not comment on this request. We have made the requested additions.

6.43 In paragraph 7.321, at the suggestion of the European Communities, upon which Mexico did not comment, we have changed the drafting to read "we find that the European Communities has not established that Mexico acted inconsistently with its obligations..."

6.44 The European Communities reiterates the request, made in its first written submission and its closing statement at the second meeting of the Panel with the parties, that the Panel accompany its recommendations with a suggestion to Mexico, pursuant to Article 19.1 of the *DSU*, that a complete repeal of the measure challenged would be the most appropriate and/or effective way of bringing the measure into conformity with its WTO obligations. In the view of the European Communities this suggestion would help clarify Mexico's obligations in this respect and thus would contribute to securing a positive solution to this dispute. Mexico does not comment on this request. We have introduced new paragraph 8.6 referring to this request.

VII. FINDINGS

A. GENERAL ISSUES

1. Standard of Review

7.1 The dispute before us is concerned with the conformity of an investigating authority's actions in a countervailing duty investigation with certain provisions of the *GATT 1994* the *SCM Agreement* and the *Agreement on Agriculture*. We are aware that, as a reviewer of those actions, we must apply the correct standard of review.

7.2 We recall that Article 11 of the *DSU* sets out the applicable standard of review in proceedings under the *SCM Agreement*, the *Agreement on Agriculture*, and the *GATT 1994*. Article 11 of the *DSU* states, in relevant part, that:

[A] panel should make *an objective assessment* of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements... (emphasis added)

7.3 The Appellate Body has summarized the standard of review that panels are to apply under Article 11 of the DSU in assessing whether the competent authorities complied with their obligations in making their determinations as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assess whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.³⁰ On this last point, the Appellate Body has emphasized that a "panel may not reject an agency's conclusions simply because the panel would have arrived at a different outcome if it were making the determination itself."³¹ Furthermore, specifically with respect to disputes involving subsidy determinations in countervailing duty investigations, the Appellate Body recalled that a panel reviewing such a determination:

should bear in mind its role as *reviewer* of agency action, rather than as *initial trier of fact*. Thus, a panel examining the evidentiary basis for a subsidy determination should, on the basis of the record evidence before the panel, inquire whether the evidence and explanation relied on by the investigating authority reasonably supports its conclusions. ...(footnotes omitted)³²

7.4 In *US – Softwood Lumber VI (Article 21.5 – Canada)* the Appellate Body reiterated that "it is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority."³³ With respect to review of the *factual components* of the findings made by investigating authorities the Appellate Body has addressed the issue in numerous cases.³⁴ In *US – Softwood Lumber VI (Article 21.5 – Canada)* the Appellate Body explained that in a panel's evaluation of factual findings:

A panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report. A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. What is 'adequate' will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided

³⁰ See, e.g., Appellate Body Report, *US – Cotton Yarn*, para. 74.

³¹ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.

³² *Ibid.*, para. 188.

³³ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

³⁴ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*; Appellate Body Report, *Argentina – Footwear (EC)*, paras. 119-121; Appellate Body Report, *US – Cotton Yarn*, paras. 74-78; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 183, and 186-188; Appellate Body Report, *US – Hot-Rolled Steel*, para. 55; Appellate Body Report, *US – Lamb*, paras. 101 and 105-108; Appellate Body Report, *US – Steel Safeguards*, para. 299; and Appellate Body Report, *US – Wheat Gluten*, paras. 160-161.

demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by 'simply *accept[ing]* the conclusions of the competent authorities'.³⁵

7.5 We will conduct our assessment of the determinations of Economía with these statements of the Appellate Body in mind. In particular, in evaluating the claims of the European Communities regarding the determinations made by Economía, we will consider whether, in the light of the evidence on the record, the conclusions reached are reasoned and adequate.

2. Burden of Proof

7.6 We recall the general principles applicable to burden of proof in WTO dispute settlement, i.e., that a party claiming a violation of a provision of a covered agreement by another Member must assert and prove its claim.³⁶ In *US – Wool Shirts and Blouses* the Appellate Body stated that:

the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. Also, it is a generally-accepted canon of evidence in civil law, common law, and, in fact, in most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption. (original footnote omitted).³⁷

7.7 Furthermore, in *Canada – Dairy (Article 21.5 New Zealand and US II)* the Appellate Body stated explicitly that:

as a general matter, the burden of proof rests upon the complaining Member. That Member must make out a *prima facie* case by presenting sufficient evidence to raise a presumption in favour of its claim. If the complaining Member succeeds, the responding Member may then seek to rebut this presumption. Therefore, under the usual allocation of the burden of proof, a responding Member's measure will be treated as WTO-consistent, until sufficient evidence is presented to prove the contrary.³⁸

7.8 Moreover, the Appellate Body has stated that "[i]t is also well to remember that a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."³⁹ The Appellate Body also has said that "[a] *prima facie* case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to *each* of the elements of the claim. A complaining party may not simply submit evidence and expect the panel to divine from it a claim of

³⁵ [footnote original] Appellate Body Report, *US – Lamb*, para. 106. (original emphasis)

³⁶ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.

³⁷ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14

³⁸ Appellate Body Report on *Canada – Dairy (Article 21.5 New Zealand and US II)*, para. 66.

³⁹ Appellate Body Report on *EC – Hormones*, para. 104.

WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments."⁴⁰

7.9 The Appellate Body has also explained that "[i]n the context of the *GATT 1994* and the *WTO Agreement*, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case."⁴¹

7.10 In addition, the Appellate Body in *EC – Hormones* established that "when that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency."⁴² As the Appellate Body explained in *Japan – Apples*, the complaining party is not responsible for providing proof of all facts raised in relation to the issue of determining whether a measure is consistent with a given provision of a covered agreement. Although the complaining party bears the burden of proving its case, the responding party must prove the case it seeks to make in response.⁴³

7.11 In this dispute, the European Communities, which has claimed that Mexico acted inconsistently with provisions of the *SCM Agreement*, the *Agreement on Agriculture*, and the *GATT 1994*, thus bears the burden of demonstrating that Mexico acted inconsistently with the relevant provisions of those agreements.

3. Treaty Interpretation

7.12 Article 3.2 of the *DSU* directs panels to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is well settled in WTO case law that the principles codified in Articles 31, 32 and 33 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*") are such customary rules.⁴⁴ These provisions read as follows:

Article 31: General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:

⁴⁰ Appellate Body Report on *US – Gambling*, para. 140.

⁴¹ Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14.

⁴² Appellate Body Report on *EC – Hormones*, para. 98.

⁴³ Appellate Body Report on *Japan – Apples*, para. 154.

⁴⁴ See, *inter alia*, Appellate Body Report on *US – Gasoline*, p. 17; Appellate Body Report on *India – Patents (US)*, para. 45; and Appellate Body Report on *US – Shrimp*, para. 114.

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Article 33: Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

7.13 We shall apply these principles in interpreting the relevant provisions of the covered agreements.

B. ARTICLE 13.1 OF THE *SCM AGREEMENT*

7.14 The European Communities claims that Mexico failed to invite the European Communities to consultations and failed to hold consultations, or failed at least to provide a sufficient time interval for consultations to take place, before the initiation of the olive oil investigation, contrary to Article 13.1 of the *SCM Agreement*.

1. Arguments of the Parties

7.15 The European Communities asserts that Economía initiated its investigation on 2 July 2003⁴⁵, that Mexico only invited the European Communities for consultations on 4 July 2003, and that the first consultations were held only on 17 July 2003. According to the European Communities, because of its failure to hold consultations before the initiation, Mexico is "in outright breach of its obligations under Article 13.1".⁴⁶

7.16 Mexico argues that the date of initiation was not 2 July 2003, but 16 July 2003, as this was the date on which the Initiation Resolution was published in its Official Journal.⁴⁷ Mexico states that under Mexican law, the Initiation Resolution had no legal effect until the day after its publication in the Official Journal, and that the administrative timelines relevant in the investigation were set relative to that date.⁴⁸ On this basis, Mexico maintains that it complied with its obligations under Article 13.1 because it issued the invitation for consultations *prior* to the date of initiation.⁴⁹

7.17 The European Communities also argues that even if Mexico's argument were accepted that the date of initiation was 16 July 2003, Mexico still violated Article 13.1 because the invitation for consultations was not issued sufficiently before the initiation of the investigation to allow for a meaningful opportunity for consultations to be held prior to initiation.⁵⁰ The European Communities relies upon Articles 13.2 and 13.3 and footnote 37 to Article 10 as contextual support for its interpretation of Article 13.1. In particular, the European Communities argues that there is an *implicit* requirement that, whether or not the consultations actually take place before initiation, the invitation must be issued sufficiently prior to initiation that consultations *could* be held before initiation, i.e., "more broadly" that investigating authorities should "make themselves available for consultations at a stage when those consultations could influence the decision to initiate the investigation", i.e., before initiation.⁵¹ If this were not the case, the European Communities argues, the consultations would be pointless, given that their "aim" according to Article 13.1, is to "clarify[] the situation as to matters referred to in paragraph 2 of Article 11 [the content of the application] and arriv[e] at a mutually agreed solution."⁵²

7.18 In Mexico's view, the obligation in Article 13.1 is to issue the invitation to consultations prior to initiation, rather than to hold the consultations prior to initiation.⁵³ Furthermore, Mexico argues that there is no requirement that the invitation to consultations be issued in sufficient time that consultations could be held prior to initiation.⁵⁴

2. Reasoning of the Panel

7.19 The claim of the European Communities under Article 13.1 of the *SCM Agreement* has two parts. First, the European Communities alleges that Economía did not send the invitation to consultations prior to initiation as required by Article 13.1 of the *SCM Agreement*. This part of the European Communities' claim presents issues of both law and fact. As a matter of law, we must decide what action constitutes "initiation" within the meaning of the *SCM Agreement*. As a matter of

⁴⁵ The date on which the Minister signed the Initiation Resolution.

⁴⁶ European Communities - First written submission, para. 88.

⁴⁷ Mexico – First written submission, para. 3.

⁴⁸ *Ibid.*, paras. 4-10; Mexico – Second written submission, paras. 5-6.

⁴⁹ Mexico – First written submission, paras. 11-12.

⁵⁰ European Communities - Second written submission, paras. 8-11.

⁵¹ European Communities - Response to Panel question 99; European Communities – Second written submission, para. 10.

⁵² European Communities - Second written submission, para. 9.

⁵³ Mexico – Second written submission, para. 14; Mexico – Response to Panel question 98.

⁵⁴ Mexico – Response to Panel question 98.

fact, we must then decide on the date Economía initiated the countervailing duty investigation into olive oil from the European Communities.

7.20 Second, the European Communities' claim raises questions about the nature of the obligations in Article 13.1. Specifically, the issues are: (1) whether Article 13.1 contains an obligation to hold consultations prior to initiation, and, (2) whether this provision requires that a sufficient amount of time be allowed, between the invitation for consultations and the initiation, for consultations to be held.

(a) Did Economía Send the Invitation to Consultations *After* Initiation

7.21 The parties disagree on the actual date of initiation of the olive oil investigation, and thus on whether the invitation to consultations was issued by Mexico prior to that date as required by Article 13.1.⁵⁵ The European Communities contends that the investigation was initiated on 2 July 2003, the date on which the Minister signed the Initiation Resolution, and that Mexico only issued the invitation to consultations thereafter, on 4 July 2003, thereby breaching Article 13.1 of the *SCM Agreement*.⁵⁶ Mexico counters that the investigation was initiated on 16 July 2003, the day the Initiation Resolution was published in the *Official Journal* of Mexico.⁵⁷ This disagreement raises two questions. First, what does the term "initiation" mean for the purposes of the *SCM Agreement*? Second, applying the definition of "initiation" in the *SCM Agreement*, what is the date on which Economía initiated the countervailing duty investigation into olive oil from the European Communities? Once both questions are resolved, we can examine whether Economía's 4 July 2003 invitation to consultations occurred prior to or after initiation.

(i) "*Initiation*" Within the Meaning of the *SCM Agreement*

7.22 The term "initiated" is defined in footnote 37 to Article 10 of the *SCM Agreement*, which reads:

The term 'initiated' as used hereinafter means procedural action by which a Member formally commences an investigation as provided in Article 11.

7.23 According to the European Communities, the signature by the Minister of the Initiation Resolution was the "procedural action" that "formally" commenced the investigation, as referred to in this definition, because signature of a resolution is a formal act, and the focus of the particular resolution in question was the commencement of the investigation, the publication of which followed automatically after the Minister had signed.⁵⁸ Mexico counters that the *SCM Agreement* leaves to individual Members how, procedurally, to initiate an investigation. Mexico states that under Mexican law, it is publication in the *Official Journal* that constitutes initiation, as it is this publication that gives legal effect to initiation resolutions. In particular, Mexico argues, a resolution signed by a Minister, but never published in the *Official Journal*, would be entirely without legal effect in Mexico. Thus, while signature by the Minister is necessary, a resolution only enters legally into force, and the deadlines in the investigation only start running, when the resolution is published. For this reason, according to Mexico, the date of initiation is the date of publication in the *Official Journal*.⁵⁹

⁵⁵ See, e.g., European Communities – First oral statement, para. 14.

⁵⁶ European Communities – First written submission, para. 88.

⁵⁷ Mexico – First written submission, para. 3.

⁵⁸ European Communities – First oral statement, paras. 15-29.

⁵⁹ Mexico – Second written submission, paras. 5-6.

7.24 We begin by examining the definition of "initiated" in footnote 37 of the *SCM Agreement*. It is important to note that the definition describes a "procedural action by which a Member formally commences an investigation" [emphasis added], without specifying any particular action, or any particular procedure, that a Member must undertake in this regard. The European Communities admits that "the particular steps to be taken [in regard to initiation] are largely left to Members", and that while "[i]t can be inferred from Footnote 37 that the process will involve one element of formality ... precisely what this should consist of is not specified".⁶⁰

7.25 The heart of this dispute is not over what constitutes a "procedural action" as many steps within an investigation may qualify as such, but rather which procedural action "formally commences" an investigation. The Shorter Oxford English Dictionary defines "formally" as "In prescribed or customary form; with the formalities required to make an action valid or definite."⁶¹ The Shorter Oxford English Dictionary also defines "commence" as "make a start or beginning; come into operation."⁶² As footnote 37 states, we are concerned with "a Member's" initiation of an investigation. Because the *SCM Agreement* does not contain any specific standards for determining the validity of an action meant to start a countervailing duty investigation, the date of "formal commencement" must be in reference to the internal regime of the importing Member.

7.26 Other articles of the *SCM Agreement* that refer to initiation provide context for interpreting the term "initiated" in footnote 37. For example, Article 11 of the *SCM Agreement* contains a number of substantive requirements that must be satisfied before an importing Member may initiate a countervailing duty investigation. Article 11 demonstrates that when the drafters intended to prescribe that Members satisfy particular standards, they were perfectly able to do so.⁶³ Additionally, Article 22.2 requires investigating authorities to give public notice of the initiation. Article 22.2 (ii) requires that the investigating authority include in the published notice the "date of initiation". In our view, this confirms a reading of footnote 37 that leaves it up to the investigating authority to determine on what date it "formally commenced" an investigation and to then make the public aware of that date through the notice.⁶⁴

7.27 Finally, in terms of the object and purpose of the *SCM Agreement*, we note that the deadline for completing an investigation in Article 11.11; the requirement to release the application to interested exporters in Article 12.1.3; and the timeframes for imposing provisional measures in Article 17.3 all flow from the date of initiation. We view a reading whereby the date of initiation is based on the internal law of the importing Member as ensuring predictability for the interested parties in the investigation under the domestic system of each Member. If WTO dispute settlement proceedings taking place considerably after the termination of an investigation could revisit these procedural steps in the absence of any specific requirements in the *SCM Agreement*, this predictability would be substantially reduced.

7.28 Based on the foregoing analysis, we find that what constitutes "initiation" within the meaning of the *SCM Agreement* will vary based on the procedural actions defined in each Member's individual regime. Therefore, to determine the date on which Economía initiated the investigation and whether

⁶⁰ European Communities – First oral statement, para. 22.

⁶¹ Shorter Oxford English Dictionary Fifth Edition, p. 1015.

⁶² *Ibid.*, p. 458.

⁶³ We also note that other provisions in the *SCM Agreement* leave considerable discretion to Members to define their own procedures; e.g. Articles 12, 14 and 23. This leads us to believe that, in general, unless a specific procedure is set forth in the *Agreement* the precise procedures for how investigating authorities will implement those obligations are left to the Members to decide.

⁶⁴ We note that in response to Panel question 2 the European Communities, indicated that under its system "initiation" takes place when a Notice of Initiation is published. "The Notice of Initiation published in the Official Journal clearly indicates that the investigation is 'hereby initiated', i.e., the initiation of the proceeding takes place with the publication of the notice of initiation (Article 10.4 of the EC CVD Regulation)".

Mexico sent the invitation to consultations prior to initiation, as required by Article 13.1 of the *SCM Agreement*, we must examine what constitutes the procedural act by which an investigation is formally commenced in the Mexican system.

(ii) *The Date on Which Economía Initiated the Olive Oil Investigation*

7.29 As noted above, we see the issue of what date Economía initiated the olive oil investigation as one of municipal law, which is a matter of fact. Mexico provided information indicating that, by virtue of the interaction between Article 85 of the Mexican Foreign Trade Law and Article 7 of the Mexican Federal Tax Code, the Initiation Resolution "will enter into effect on the day following its publication".⁶⁵ This same language is repeated at the end of the Initiation Resolution itself.⁶⁶ Furthermore, as noted above, Mexico indicated that the time limits imposed upon the interested parties and on Economía in respect of the investigation ran from the date of publication, and this also is reflected in the Resolution.⁶⁷

7.30 We therefore find, as a matter of fact, that under Mexican law, the procedural act by which an investigation is formally commenced in the Mexican system is the publication of the Initiation Resolution, which takes legal effect the following day.

7.31 The Initiation Resolution was published on 16 July 2003. Therefore, on the basis of the evidence provided by Mexico on its domestic law, we find, as a matter of fact, that the date of initiation of the olive oil investigation, in the sense of the *SCM Agreement*, was 17 July 2003, the day after the Initiation Resolution was published, and not 2 July, the date of the Minister's signature, as argued by the European Communities. Given this finding, there is no basis for the European Communities' allegation that the invitation to consultations was only issued *after* initiation, contrary to Mexico's obligations under Article 13.1 of the *SCM Agreement*.

⁶⁵ Mexico first written submission at paras. 6-10. In particular Mexico quotes Article 85 of the Mexican Foreign Trade Law (FTL), and Article 7 of the Mexican Federal Tax Code (FTC) as follows:

"Article 85 [FTL].- In the absence of an express provision in this Law concerning the administrative proceedings relating to unfair international trade practices and safeguard measures, the Federal Tax Code shall be alternatively applied, insofar as consistent with the nature of these proceedings. This provision shall not apply to notifications and verification visits.

"Article 7 [FTC]. - Tax laws, their regulations and general administrative provisions shall enter into force throughout the Republic on the day following their publication in the *Diario Oficial de la Federación* [Official Journal], unless a later date is stipulated therein."

⁶⁶ Exhibit EC-13, para. 130. "This Resolution shall enter into force on the day following its publication in the Official Journal of the Federation." In this regard, we specifically reject the European Communities' argument that because para. 122 of the Initiation Resolution stated that "the Ministry accepts the request from Fortuny de Mexico, S.A. de C.V. and declares the initiation of an investigation. . ." the Minister's signing of that document constitutes the "formal commencement" of the olive oil investigation. (see European Communities – First oral statement, paras. 27-29). The Minister signed a document which included specific language delaying its effectiveness until after its publication. Therefore, the European Communities cannot demonstrate that by signing the Initiation Resolution the Minister was "commencing" the investigation.

⁶⁷ See in particular paragraphs 124-129 of the Initiation Resolution (Exhibit EC-13) establishing deadlines and procedural requirements pertaining to the investigation, including, in paragraph 124, a 30-working-day deadline, running from the date of publication of the Resolution, for importers, exporters and foreign legal entities or any other persons that considered that they had an interest in the outcome of the investigation to present themselves to Economía.

(b) The nature of the obligations in Article 13.1

7.32 The European Communities makes an additional argument that even if Economía sent the invitation to consultations prior to the initiation as required by Article 13.1, Mexico nevertheless acted inconsistently with Article 13.1, because it did not hold consultations, or provide sufficient time to hold the consultations, between the date it sent the invitation and the date of initiation. This argument focuses on the nature of the obligation contained in Article 13.1 of the *SCM Agreement*.

7.33 We start our analysis with the ordinary meaning of the terms of Article 13.1 which read as follows:

13.1 As soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation, Members the products of which may be subject to such investigation shall be invited for consultations with the aim of clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution.

7.34 Beginning with the action that is the subject of this provision, namely that the Member the products of which may be subject to the investigation "shall be invited for consultations", we note that the provision makes no explicit reference to consultations being held, referring instead to an invitation to consult. The dictionary definition of the word "invite" confirms that to invite someone to do something is simply to ask that person to do so if he or she wishes. For example, the *New Shorter Oxford Dictionary* defines "invite" as to "ask (a person) to come with one's permission *to* or *into* a place or *to* an event."⁶⁸ Thus, the ordinary meaning of the obligation on the importing Member that is considering initiating a countervailing duty investigation is to ask the Member, the products of which may be subject to that investigation (the exporting Member), to consultations. It then falls to the latter Member to decide whether or not to accept the invitation.

7.35 We do not see a requirement in the text of Article 13.1 that the Members involved must actually *hold* the referenced consultations. Indeed, if under Article 13.1, the Member considering whether to initiate an investigation were obligated to *hold* consultations with the exporting Member before it could initiate an investigation, the exporting Member could effectively block initiation simply by declining to consult. We find relevant contextual support in the language of Article 13.3 of the *SCM Agreement*, which reads: "...these provisions regarding consultations are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating the investigation..." This passage supports the view that Article 13.1 requires the Member considering whether to initiate to "invite" the exporting Member for consultations, but does not require that those consultations be held. We emphasize, however, that the invitation must be a *bona fides* one. That is, assuming that the exporting Member accepts the invitation, the Member considering whether to initiate an investigation cannot then refuse to participate in the consultations.

7.36 We now turn to the second, related line of argument by the European Communities, concerning the timing of the invitation to consultations. We start by recalling that the obligation in Article 13.1 that forms the basis of the claim of the European Communities is that the invitation be issued "*in any event before the initiation of an investigation*" (emphasis added). The claim of the European Communities is that Article 13.1 requires that the invitation to consultations be issued *sufficiently* "before" initiation that consultations *could* meaningfully be held prior to initiation.

7.37 We note that in respect of this claim, the European Communities argues that the obligation that it asserts is not explicit, but is "*implicit*", flowing from the stated "aim" of the consultations in the text of Article 13.1, i.e., clarifying the situation as to the contents of the application and arriving at a

⁶⁸ *The New Shorter Oxford Dictionary*, 1993.

mutually agreed solution. The argument of the European Communities is that this "aim" and the consultations themselves would be deprived of "*effet utile*" if the referenced consultations only took place after initiation.⁶⁹

7.38 Before considering the merits of this argument, we wish to emphasize that we are not convinced by the European Communities' theory that there is an "implicit" obligation in the *SCM Agreement* to *hold* consultations. We recall that pursuant to Articles 3.2 and 19.2 of the *DSU*, panels and the Appellate Body cannot add to or diminish the rights and obligations of Members. The obligations on Members, therefore, are those negotiated by Members and identified in the treaty text through the application of the appropriate principles of treaty interpretation, as discussed in section VII.A.3, *supra*. This is the standard to which we must adhere.

7.39 Returning now to the language of Article 13.1 that is at issue in this claim, we see no requirement that a sufficient interval must be allowed after issuance of the invitation and before initiation that consultations could be held. Rather, the requirement in that provision is that the invitation must be issued "in any event before" initiation, with no indication of any specific time interval. Nor does the remaining language of Article 13.1 lead to a different conclusion. First, while the opening clause of Article 13.1 – "[a]s soon as possible after an application under Article 11 is accepted and in any event before the initiation of any investigation" – establishes a window of time for the issuance of the invitation to consultations, this window is expressed not in absolute terms but in relation to the system of the individual Member, and thus falls short of establishing any minimum timeframes for the holding of such consultations.⁷⁰ In particular, we do not see in the phrase "as soon as possible after an application ... is accepted", either by itself, or in conjunction with the requirement to issue the invitation to consultations "in any event before the initiation", an obligation to allow sufficient time prior to initiation for consultations to be held. Second, the last clause of Article 13.1 defines the "aim" of the consultations – "clarifying the situation as to the matters referred to in paragraph 2 of Article 11 [the contents of the application] and arriving at a mutually agreed solution" – and says nothing about the timing of such consultations.

7.40 Other provisions of Article 13 provide further support for our view that there is no requirement in Article 13.1 to allow sufficient time for consultations to be held before initiation. First, as noted above, Article 13.3 states explicitly that the provisions on consultation – which include Article 13.1 – "are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating...". Not only does this language not indicate that some minimum time interval must be allowed prior to initiation, in fact, it makes explicit that the *SCM Agreement* strikes a balance between an exporting Member's need to be consulted, on the one hand, and an importing Member's need to proceed expeditiously, on the other hand. Nor does the obligation, referred to in Articles 13.2 and 13.3, to "afford reasonable opportunity for consultation" provide a requirement to allow a sufficient time interval that consultations could be held before initiation. Rather, we view this rather generally worded requirement to mean that the importing Member considering initiation or conducting an investigation has an ongoing obligation to be available for consultations. In this regard, we consider footnote 44 to be of particular relevance. This footnote reads: "It is particularly important ... that no affirmative determination whether preliminary or final be made without

⁶⁹ We note that the European Communities does not identify any specific amount of time that should be allowed for pre-initiation consultations, and instead refers to a list of considerations that should be taken into account by an investigating authority in setting this timeframe. See, e.g., European Communities - Second written submission, paras. 8-12, and response to Panel question 99.

⁷⁰ We note that the claim of the European Communities under Article 13.1 is based exclusively on the argument that Article 13.1 requires sufficient time *before* initiation that consultations could be held. The European Communities has presented *no* evidence or argumentation concerning the requirement in the first clause of Article 13.1 that the invitation to consultations is to be extended "as soon as possible after an application ... is accepted". This issue therefore is not before us, and we do not address it further.

reasonable opportunity for consultations *having been given*". In this footnote, the *SCM Agreement* puts particular emphasis on the importance of the *prior* opportunity for consultations in relation to two specific stages of an investigation, namely *before* issuance of affirmative preliminary or final determinations. The fact that footnote 44 omits entirely any mention of the pre-initiation stage further confirms our view that the *SCM Agreement* does not require a sufficient time interval before initiation that consultations could be held.

7.41 Turning, finally, to the object and purpose of the *SCM Agreement*, we first recall that according to Article 13.1, the aim of the consultations referred to is "clarifying the situation as to the matters referred in paragraph 2 of Article 11 [the contents of the application] and arriving at a mutually agreed solution". While we consider that, given their aims, consultations, as referred to in Article 13.1, would have the greatest potential to influence the initiation decision if they were held before initiation, we do not consider that such consultations would be wholly devoid of purpose, as argued by the European Communities, if they did not occur until after an investigation was initiated. In particular, if, during consultations held after initiation, it became clear that the factual basis of the initiation decision was erroneous (because, for example, the alleged subsidy programmes either were not subsidies or were not specific), then pursuant to Article 11.9 of the *SCM Agreement*, the investigating authority would be obligated to terminate the investigation immediately. We note that the European Communities acknowledges this, stating that "a solution can be reached at any stage of the investigation (as Article 13.2 makes clear)".⁷¹ Indeed, this is in keeping with the object and purpose of the countervailing duty provisions of the *SCM Agreement*, namely to provide the legal framework for Members to take countervailing action where subsidized imports are causing injury to domestic producers. While the consultation provisions create a mechanism that can be used to facilitate an agreed solution, they explicitly "are not intended to prevent" Members from "proceeding expeditiously" with their investigations and the application of measures.

7.42 For the foregoing reasons, we find that Article 13.1 does not require a Member considering whether to initiate an investigation to allow a sufficient time interval after its invitation to consultations is issued and before initiation, so that consultations could be held. Given our finding, we do not further consider the argument of the European Communities that, even accepting Mexico's contention as to the date of initiation, Mexico still acted in breach of Article 13.1, as there was not sufficient time between 4 July, the date of the invitation to consultations, and 17 July, the date of initiation, for consultations to have been held.

7.43 Therefore, we find that the European Communities has not established that Mexico acted inconsistently with its obligations under Article 13.1 of the *SCM Agreement*.

C. ARTICLE 13(b)(i) OF THE AGREEMENT ON AGRICULTURE

7.44 The European Communities claims that Mexico violated Article 13(b)(i) of the *Agreement on Agriculture* by initiating a countervailing duty investigation on imports of an agricultural product (olive oil) inconsistently with the provisions of Article 13(b)(i) of the *Agreement on Agriculture*.

1. Arguments of the Parties

7.45 The European Communities asserts that the production aids provided to olive growers by the European Communities that are the basis for Mexico's imposition of countervailing duties constitute "domestic support measures that conform fully to the provisions of Article 6 of the Agreement."⁷² The European Communities argues that Article 13(b)(i) imposes a double restriction on countervailing duty actions. First, duties must not be imposed unless there is a determination of

⁷¹ European Communities - Second written submission, para. 12.

⁷² European Communities – First written submission, para. 97.

"injury or threat thereof." In the European Communities' view, this means that "no action could be taken in respect of claims based on 'material retardation'".⁷³ Second, the Mexican authorities were required to exercise "due restraint" in the initiation of the investigation on olive oil. The European Communities alleges that Mexico failed to comply with both of these requirements.⁷⁴

7.46 The European Communities argues that Mexico failed to comply with the first restriction by initiating the investigation and imposing countervailing duties even though the applicant's claim was based on "material retardation".⁷⁵ Specifically, the European Communities argues that Mexico should not have initiated an investigation based on an application alleging "material retardation" and should have rejected Fortuny's application.⁷⁶

7.47 The European Communities also argues that Mexico failed to exercise due restraint in the initiation of the countervailing duty investigation on olive oil. Specifically, the European Communities argues that contrary to any notion of due restraint, Mexico embarked on the investigation with exceptional haste,⁷⁷ in that it did not hold consultations prior to initiation, it did not spend adequate time investigating the full extent of the domestic industry, and it "converted" an application based on "material retardation" into one of "material injury".⁷⁸

7.48 The European Communities contends moreover that the obligation to exercise "due restraint" must mean something more than the normal initiation standard in the *SCM Agreement*, because otherwise, Article 13(b)(i) of the *Agreement on Agriculture* would have no meaning.⁷⁹ There must be some circumstances in which "due restraint" could have the effect of preventing an investigation that might otherwise have been initiated.⁸⁰

7.49 Mexico argues with respect to the obligation to show "due restraint" in initiating a countervailing duty investigation on an agricultural product, that "due restraint" should not be interpreted as a prohibition on initiation, but rather as adopting an appropriate and reasonable standard for allowing an investigation to be initiated.⁸¹ Mexico also argues that the obligation to exercise due restraint contained in Article 13(b)(i) of the *Agreement on Agriculture* relates only to the period preceding the initiation of the investigation, and that thus to the extent that the European Communities is arguing that the due restraint provisions were violated by imposing countervailing duties, such an argument would have no merit.⁸²

7.50 With respect to the European Communities' argument that Article 13(b)(i) prohibited Mexico from imposing countervailing duties in response to an application based on material retardation, Mexico notes that there is no provision in the *SCM Agreement* that requires an investigating authority

⁷³ Ibid., para. 99.

⁷⁴ Ibid., para. 100.

⁷⁵ Ibid., para. 99.

⁷⁶ European Communities – First oral statement, para. 48.

⁷⁷ European Communities – First written submission, para. 101.

⁷⁸ *Id.*; European Communities – first oral statement, para. 52. The Panel notes that in its response to Panel question 101 the European Communities stated that:

"In speaking of 'exceptional haste' the EC was referring not to the whole length of Economía's consideration of the application but to the final phase between the internal finalisation of the notice of initiation and its publication on 16 July. As the EC has explained in regard to its claim under Article 13, this haste was such as to deny the EC its right to consultations."

⁷⁹ European Communities – Second written submission, para. 24.

⁸⁰ European Communities – Second oral statement, para. 24.

⁸¹ Mexico – First written submission, paras. 48, 52; Mexico – First oral statement, para. 9; Mexico – Response to Panel Question 22; Mexico – Second written submission, para. 55.

⁸² Mexico – First written submission, paras. 46-49.

to accept all of the conclusions in an application.⁸³ Mexico points out that the investigation was initiated on the basis of "injury" in the broad sense of that term.⁸⁴ Additionally, Mexico notes that, in any case, the duties were imposed after the investigating authority had made a determination of "material injury," not "material retardation".⁸⁵

2. Reasoning of the Panel

7.51 Article 13(b)(i) of the *Agreement on Agriculture* reads as follows:

Due Restraint

During the implementation period, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (referred to in this Article as the "Subsidies Agreement"):

(b) domestic support measures that conform fully to the provisions of Article 6 of this Agreement including direct payments that conform to the requirements of paragraph 5 thereof, as reflected in each Member's Schedule, as well as domestic support within *de minimis* levels and in conformity with paragraph 2 of Article 6, shall be:

(i) exempt from the imposition of countervailing duties unless a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations; . . .

(a) Applicability of the Provision

7.52 The first issue we must address is whether Article 13(b)(i) of the *Agreement on Agriculture* applies to the Mexican measures in this case. By its own terms, Article 13 of the *Agreement on Agriculture* applied only "[d]uring the implementation period," which is defined in Article 1(f) of that *Agreement* as follows:

. . . the six-year period commencing in the year 1995, except that, for the purposes of Article 13, it means the nine-year period commencing in 1995;

7.53 Both parties agree that the "implementation period" ran at least until the end of 2003.⁸⁶ The European Communities indicated, in response to a question from the Panel, that depending on whether 'years' are defined as financial or marketing years, the date of expiry of the implementation period might have been some point during 2004.⁸⁷

7.54 Although the parties do not agree on the actual date on which the implementation period expired, the claims raised by the European Communities relate to Mexico's *initiation* of the olive oil

⁸³ Mexico – First written submission, paras. 55-56.

⁸⁴ Ibid., para. 56.

⁸⁵ Mexico – First written submission, para. 61.

⁸⁶ European Communities – First written submission, para. 47; Mexico – First written submission, para. 49.

⁸⁷ European Communities – Response to Panel question 20.

investigation.⁸⁸ As we have found in paragraph 7.31 above, the investigation was initiated on 17 July 2003. This date was well within the implementation period and before Article 13 expired. Therefore, we do not need to decide, for the purposes of this case, precisely when Article 13 expired. It is clear that Article 13 was in force and applicable at the time Economía initiated the countervailing duty investigation on olive oil imports from the European Communities.⁸⁹ Therefore, we hold that Article 13 applies to the initiation of the countervailing duty investigation by Mexico in this case.

(b) Article 13(b)(i) of the *Agreement on Agriculture*

7.55 There are three legal elements in Article 13(b)(i). First, the chapeau of paragraph (b) provides that the obligations and exemptions set forth in the succeeding subparagraphs only apply to "domestic support measures" which conform fully to the provisions of Article 6 of the *Agreement on Agriculture*. Second, subparagraph (i) exempts such products from the imposition of countervailing duties, unless a determination of injury or threat thereof is made in accordance with Part V of the *SCM Agreement*. Third, subparagraph (i) also requires that "due restraint shall be shown in initiating any countervailing duty investigations" in relation to those measures.

7.56 The European Communities, as the complainant, bears the burden of proving that the provisions of Article 13(b)(i) are applicable to the measures at issue and that Mexico has acted inconsistently with its obligations under those provisions.⁹⁰ Therefore, the European Communities must first demonstrate that its domestic support measures satisfy the requirement in the chapeau of paragraph (b), namely that they conform fully to Article 6 of the *Agreement on Agriculture*. Then, the European Communities must demonstrate that Mexico has not complied with the provisions of subparagraph (i) of paragraph (b).

(i) *Domestic Support Measures which Fully Conform with Article 6 of the Agreement on Agriculture*

7.57 In its first written submission, the European Communities asserts that the production aid provided to olive growers by the European Communities, which are the basis for the imposition of countervailing duties, conform fully to Article 6 of the *Agreement on Agriculture*.⁹¹

7.58 Mexico did not specifically dispute this assertion and, in fact, conducted its countervailing duty investigation as if the European Communities' domestic support measures were in conformity with Article 6 of the *Agreement on Agriculture*.⁹²

7.59 As Mexico conducted the olive oil investigation as if Article 13(b) of the *Agreement on Agriculture* applied to that investigation, we will proceed on the basis of the same assumption, *arguendo*, for the purposes of this dispute.⁹³ We note, however, that had this issue been contested between the parties, it would have been incumbent upon the European Communities in the first instance to demonstrate that the provision was applicable.

⁸⁸ European Communities – First written submission, paras. 99, 100; European Communities – First oral statement, paras. 48-49; European Communities – Response to Panel question 20; European Communities – Second oral statement, para. 19.

⁸⁹ Panel Report, *US – Upland Cotton*, para.7.345 and footnote 469.

⁹⁰ See Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14; Panel Report, *US – Upland Cotton*, para. 7.285.

⁹¹ European Communities – First written submission, para. 97.

⁹² Mexico - Response to Panel question 111

⁹³ Preliminary Resolution (Exhibit EC-22), para. 74 where Economía explained how it exercised due restraint in initiating the countervailing duty investigation.

(ii) *Exempt from Imposition of Countervailing Duties Unless a Determination of Injury or Threat Thereof is Made*

7.60 The European Communities argues that Mexico acted inconsistently with Article 13(b)(i) because it accepted an application on the basis of an allegation of material retardation, which is not referred to in that provision, rather than an allegation of injury or threat thereof, which are referred to therein.⁹⁴ In particular, the first part of subparagraph (i) provides that products covered by the chapeau of paragraph (b) are "exempt from the imposition of countervailing duties unless a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement."

7.61 We note that the first clause of Article 13(b)(i) refers *inter alia* to "injury or threat thereof... in accordance with ...Part V of the *Subsidies Agreement*." The paragraph does not refer to "material injury", but rather to "injury". "Injury", in turn, is defined in footnote 45 of the *SCM Agreement* as "material injury to a domestic industry, threat of material injury to a domestic industry or *material retardation* of the establishment of such an industry" (emphasis added.) In other words, the definition of the term "injury" for purposes of the *SCM Agreement* encompasses the concept of material retardation. We therefore do not find that the first clause of subparagraph (i) prohibits the imposition of duties on the basis of a determination of material retardation as opposed to determinations of material injury or threat of material injury.

7.62 Furthermore, and in any case, we note that the claim of the European Communities focuses on the basis of Economía's *initiation* of the olive oil investigation, and not on the basis for the imposition of the measures. In particular, the argument of the European Communities is that no investigation should have been initiated on the basis of a form of injury (material retardation) that was not permitted as a basis for the imposition of measures. Even assuming *arguendo* that the European Communities were correct that the first clause of Article 13(b)(i) excluded determinations of material retardation, we disagree that this clause is relevant to initiation. Instead, the plain language at issue is expressly limited to the "imposition of countervailing duties". Here, we are mindful of the guidance of the Appellate Body not to impute into a treaty words that are not there or to import concepts that were not intended.⁹⁵ We also recognize that our duty is to interpret the words actually used in the agreement under examination, not the words the interpreter (or one of the parties) may feel should have been used.⁹⁶

7.63 Finally, even if the European Communities were correct both that the first clause of Article 13(b)(i) is relevant to initiation, and that it precludes initiation based on claims of material retardation, we note as a factual matter that Economía initiated the olive oil investigation on the basis of "injury", in the broad sense of the term as defined in footnote 45 of the *SCM Agreement*, and that it imposed provisional and final countervailing duties on the basis of "material injury"⁹⁷, not material retardation.

7.64 For these reasons, assuming *arguendo* that Article 13(b)(i) of the *Agreement on Agriculture* applied to the olive oil investigation, we find that the European Communities has not established that Mexico failed to comply with the requirement in Article 13(b)(i) of the *Agreement on Agriculture* to exempt olive oil from imposition of countervailing duties "unless a determination of injury or threat

⁹⁴ European Communities – First written submission, para. 99. We note that the European Communities has provided no argumentation based on the text, context, or object and purpose of Article 13(b)(i) to support its contention.

⁹⁵ Appellate Body Report, *India – Patents (US)*, paras. 45-46; See also Appellate Body Report, *India – Quantitative Restrictions*, footnote 23, para. 94.

⁹⁶ Appellate Body Report, *EC – Hormones*, para. 181.

⁹⁷ Preliminary Resolution (Exhibit EC-22), para. 343; Final Resolution (Exhibit EC-1), para. 438.

thereof is made in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement."

(iii) *Due Restraint Shall be Shown in Initiating Any Countervailing Duty Investigation*

7.65 The European Communities argues that Mexico acted inconsistently with Article 13(b)(i) by failing to show "due restraint" in initiating the countervailing duty investigation on imports of olive oil from the European Communities. The European Communities defines the verb "to restrain" as to "hold back or prevent from some course of action" or "restrict, limit."⁹⁸

7.66 Mexico argues that "due restraint" simply means adopting an appropriate and reasonable standard for allowing an investigation to be initiated, and that it does not involve doing anything differently in cases of agricultural, as compared with non-agricultural, products.⁹⁹

7.67 The term "due restraint" has not been interpreted by panels or the Appellate Body to date. To assist in determining the ordinary meaning of the terms "due" and "restraint", we look first to dictionary definitions. Black's Law Dictionary defines "due" as "just, proper, regular, and reasonable."¹⁰⁰ The definition in Webster's New Encyclopedic Dictionary is similar, referring to "appropriate", "adequate" and "regular".¹⁰¹ The New Shorter Oxford English Dictionary defines "restraint" as "(self-) control; the ability to restrain oneself; reserve; absence of excess or extravagance."¹⁰² The review of the French and Spanish texts, which are equally authentic,¹⁰³ suggests similar interpretations. In the French version the relevant term to be interpreted is the word "modération". The dictionary *Le Grand Robert de la langue française*¹⁰⁴ defines "modération" as "circonspection, pondération, reserve" and "retenue", which shows that all of these words express reserve, caution and balancing. Regarding the Spanish terms "debida moderación", the *Diccionario de la lengua española*¹⁰⁵ provides for the word "debida" the definition "como corresponde o es lícito" and "a causa de, en virtud de".¹⁰⁶ "Moderación" is defined as "cordura, sensatez, templanza en las palabras o acciones"¹⁰⁷ Therefore, considered on the basis of all three authentic texts of Article 13(b)(i) the ordinary meaning of "due restraint" is "a proper, regular, and reasonable demonstration of self-control, caution, prudence and reserve".

7.68 We consider this definition to be consistent with the context of Article 13 as a whole, as well as with the object and purpose of the provision, which is to provide a "peace clause", during the implementation period, for Members taking actions permitted under the *SCM Agreement* against subsidies that are provided consistent with the provisions of the *Agreement on Agriculture*.

⁹⁸ European Communities – Second oral statement, para. 23 citing The New Shorter Oxford English Dictionary, volume 2, N-Z, p. 2569. Clarendon Press, Oxford 1993. Exhibit EC-39.

⁹⁹ Mexico – First written submission, paras. 48, 52; Mexico – First oral statement, para. 9; Mexico response to Panel question 22; Mexico – Second written submission, para. 55.

¹⁰⁰ Black's Law Dictionary, 7th Edition, abridged. (2000), p. 405.

¹⁰¹ Webster's New Encyclopedic Dictionary, 2000, p. 310.

¹⁰² The New Shorter OED.

¹⁰³ See the final clause of the WTO Agreement. See also the Panel Report on *EC – Trademarks and Geographical Indications (US)*, para. 7.607.

¹⁰⁴ *Le Grand Robert de la langue française* (2000), p. 1595.

¹⁰⁵ *Diccionario de la lengua española* (segunda edición, 2001).

¹⁰⁶ *Diccionario de la lengua española* (segunda edición, 2001), p. 493.

¹⁰⁷ *Diccionario de la lengua española* (segunda edición, 2001), p. 1030. According to *the Collins Spanish Dictionary* (1985) these terms can be translated in English with "prudence, wisdom" ("cordura") or "good sense, sensibleness" ("sensatez") or "restraint, moderation" ("templanza").

7.69 Having determined what the obligation to show "due restraint" requires, we now apply that standard to the facts of this case to determine whether the European Communities has demonstrated that Mexico did not comply with this obligation in initiating the countervailing duty investigation.

7.70 The European Communities provides three reasons why, in its view, Economía failed to exercise "due restraint" within the meaning of Article 13(b)(i).¹⁰⁸ These are that: (1) Economía did not wait to hold consultations with the European Communities prior to initiation, but plunged into the investigation at the first possible moment¹⁰⁹; (2) Economía did not spend adequate time investigating, prior to initiation, whether there were domestic producers other than Fortuny, but paused only to take account of Fortuny's position; and (3) Economía accepted an application which was clearly based on "material retardation" and converted it into one of "material injury."¹¹⁰

7.71 We will examine each of these specific circumstances to determine whether Economía's actions in the olive oil investigation evince such a lack of restraint as to fall short of the "due restraint" obligation of Article 13(b)(i) of the *Agreement on Agriculture* as interpreted above, again assuming *arguendo* that that obligation applied to the investigation.

7.72 With respect to Economía's initiating the countervailing duty investigation prior to holding consultations, we note that Article 13(b)(i) of the *Agreement on Agriculture* requires investigating authorities to show "due restraint" in initiating any countervailing duty investigation on products covered by the chapeau of paragraph (b). As noted in our findings relating to the European Communities' claim under Article 13.1 of the *SCM Agreement*, a Member is not required to hold the consultations referred to in that provision prior to initiation. Therefore, we do not see how the failure to take an action that is not required for initiation can be considered evidence of a lack of due restraint in initiating the countervailing duty investigation. We also note that we have found that Mexico did not infringe its obligations under Article 13.1 of the *SCM Agreement* to invite the European Communities to consultations prior to initiation (see, para. 7.42, *supra*). Having made this finding, we do not see how the timing of this invitation is evidence of "haste" or of a lack of self-control or reserve, as alleged by the European Communities.

7.73 With respect to the lack of investigation into other possible domestic producers besides Fortuny we note, as described in Section VII.I, that in its application Fortuny asserted that it accounted for 100 per cent of the olive oil production on the commercial market in Mexico and that there were no other domestic producers other than those operating on a "local" or "experimental" basis.¹¹¹ Fortuny also provided a table of monthly production for 2000, 2001, and 2002.¹¹² Economía sent a "prevención" or supplemental questionnaire to Fortuny asking for, *inter alia*, additional data on injury indicators, annual capacity and capacity utilization as well as information on any government support programmes that may have been affected by the increase of subsidized imports, information on the world olive oil market, including European production and exports, and audited financial statements for 2000, for the 2001 separation of Formex-Ybarra, and for 2002 for Fortuny and an

¹⁰⁸ European Communities – First written submission, para. 101; European Communities – First oral statement, para 52; European Communities – Second written submission, para. 24. European Communities - Response to Panel question 22.

¹⁰⁹ The European Communities clarified in response to Panel question 108 that its reference to "exceptional haste" in paragraph 101 of its first written submission was only referring to the "final phase between the internal finalisation of the notice of initiation and its publication on 16 July. As the EC has explained in regard to its claim under Article 13, this was such as to deny the EC its right to consultations."

¹¹⁰ Cf. European Communities – Second oral statement, para. 20 (arguing that Mexico "must therefore be taken to have initiated the investigation on whatever basis it was requested, which in this case [*sic*] material retardation.").

¹¹¹ Exhibit MEX-41A, Fortuny's response to question 17.

¹¹² Exhibit MEX-51A, Annex 5.

income statement for the like product for 2000-2002.¹¹³ Fortuny responded with additional data, some based on simple worksheets that were in its possession rather than audited financial records that were in the possession of Distribuidora Ybarra.¹¹⁴

7.74 Economía compared the data provided by Fortuny to information from other sources, namely the government of Baja California and the article published in *Claridades Agropecuarias* about the olive oil industry in Mexico, which were also provided in the application. Economía found that these other sources corroborated Fortuny's statement that it comprised the entire domestic industry.

7.75 The evidence before us shows that Economía received an application from Fortuny. Economía, seeking to ensure that it had all the necessary information for initiation, sent additional questions to Fortuny and awaited a reply. Economía also checked the assertions of Fortuny against information from independent sources, the government of Baja California and the magazine *Claridades Agropecuarias*, which were provided by Fortuny as attachments to its application. Through this process, which took approximately four months, Economía satisfied itself that it had information sufficient to meet the requirements for initiating a countervailing duty investigation.

7.76 We find nothing in this behaviour that exhibits a lack of self-control or reserve. Therefore, we find that Economía did not fail to exercise due restraint by neglecting to investigate the extent of the domestic industry prior to initiation.

7.77 The European Communities also alleges that Economía's "conversion" of an application based on material retardation into one of material injury evinces a lack of due restraint within the meaning of Article 13(b)(i) of the *Agreement on Agriculture*.

7.78 In this regard, Mexico argues that Economía, upon reviewing Fortuny's application, concluded that it was not possible in principle to initiate an investigation for material retardation in respect of an enterprise that had been producing olive oil since the 1940s.¹¹⁵ Because of this, Economía sent additional questions to Fortuny with respect to the history of olive oil production in Mexico and the production history of Formex-Ybarra (Fortuny's predecessor company).¹¹⁶ Economía concluded that it would be best to initiate an investigation in respect of injury in general and then, during the course of the investigation, determine the specific nature of any injury caused to the domestic industry by subsidized imports.¹¹⁷ Consequently, Economía initiated the investigation on the basis of "injury" in the broad sense of the term within the meaning of footnote 45 of the *SCM Agreement*.¹¹⁸

7.79 We consider Economía's decision to delay initiation in order to gather more information from the applicant and to avoid initiating on a basis not supported by the evidence in the application to be indicative of self-control and reserve rather than the lack thereof. Therefore, we find that the European Communities has not established that Economía failed to exercise due restraint by "converting" Fortuny's application from one of material retardation into an investigation of injury.

7.80 In sum, we find that none of the reasons presented by the European Communities demonstrates a lack of due restraint on the part of Economía. To the contrary, based on our examination of the facts before us, Economía appears to have proceeded with prudence and caution, indicating self-restraint rather than a lack thereof. Therefore, we conclude that the European

¹¹³ Exhibit MEX-45.

¹¹⁴ Exhibit MEX-46.

¹¹⁵ Mexico – First written submission, paras. 58-60.

¹¹⁶ Exhibit MEX-45.

¹¹⁷ Mexico – First written submission, paras. 58-60.

¹¹⁸ Mexico – First written submission, paras. 59-60; see also Initiation Resolution (Exhibit EC-13), para. 54.

Communities has not established as a factual matter that Economía failed to show due restraint in initiating the countervailing duty investigation on olive oil.

7.81 Assuming *arguendo* that Article 13(b)(i) of the *Agreement on Agriculture* was applicable to the olive oil investigation, we find that the European Communities has not demonstrated that Mexico failed to comply with the requirement in that provision to exempt olive oil from imposition of countervailing duties "unless a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement". Nor has the European Communities demonstrated that Mexico failed to show due restraint in initiating the countervailing duty investigation on olive oil. Therefore, we find that the European Communities has not established that Mexico acted inconsistently with Article 13(b)(i) of the *Agreement on Agriculture*.

D. ARTICLE 12.4.1 OF THE *SCM AGREEMENT*

7.82 The European Communities asserts that Mexico failed to require interested parties to provide non-confidential summaries of confidential information and that Mexico therefore acted inconsistently with its obligations under Article 12.4.1 of the *SCM Agreement*.

1. Arguments of the Parties

7.83 The European Communities asserts that Mexico failed to require interested parties to provide non-confidential summaries of the confidential information that they submitted to Economía and that such interested parties did not justify their failure to provide non-confidential summaries by invoking "exceptional circumstances" within the meaning of Article 12.4.1 of the *SCM Agreement*.

7.84 Mexico asserts that the interested parties did furnish non-confidential summaries of confidential information in compliance with Article 12.4.1. It also argues that the Mexican legal system allows representatives of interested parties to access confidential information, so that even if the investigation file did not contain public summaries of information provided by an interested party, the obligations and objectives in Article 12.4.1 of the *SCM Agreement* would have been met.

2. Reasoning of the Panel

7.85 Article 12.4.1 of the *SCM Agreement* reads as follows:

12.4.1 The authorities shall require interested Members or interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such Members or parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

7.86 Article 12.4.1 provides that an investigating authority shall require interested Members or interested parties submitting confidential information also to supply non-confidential summaries of that information for the record. These summaries shall be "in sufficient detail to permit a *reasonable understanding* of the substance of the information submitted in confidence".

7.87 Where confidentiality is claimed with respect to a specific document, we consider that the provision of a public version of that document, from which confidential information has simply been removed, *may* not necessarily satisfy the requirements of Article 12.4.1. This is because what is required to be summarized pursuant to Article 12.4.1 is the confidential information. The remaining non-confidential parts of the document may not, by themselves, be sufficient to convey a "reasonable

understanding" of the substance of the confidential information that has been removed so as to constitute an adequate summarization of that information.

7.88 There may be circumstances in which the information remaining in the public version of a document may be sufficient, in itself, to provide the required summary of the confidential information. In such circumstances, no additional summary would be required. Such circumstances are likely to be limited, however, given that what the *SCM Agreement* requires is that the summary conveys a reasonable understanding of the substance of the confidential information. In any event, the sufficiency of a public version of a document from which confidential information has been removed as a "summary" of the removed information clearly must be determined on a case-by-case basis.

7.89 Article 12.4.1 recognises that there may be "exceptional circumstances" in which certain information may not be "susceptible of summary". In such "exceptional circumstances", a statement of the reasons why summarization "is not possible *must* be provided" (emphasis added). While this provision imposes an obligation on the interested party claiming confidentiality, in our view it also imposes an obligation on the investigating authority to require that such a statement be provided. This is consistent with the findings of various panels that have considered the equivalent provision in the *Anti-dumping Agreement* (Article 6.5.1).¹¹⁹ We find the reasoning applied in respect of Article 6.5.1 of that *Agreement* persuasive and applicable to Article 12.4.1 of the *SCM Agreement*.¹²⁰

7.90 We also note that, pursuant to Article 12.4.1, such a statement of reasons can substitute for a non-confidential summary only in "exceptional" circumstances. The use of the word "exceptional" signifies that the drafters considered that confidential information should usually be capable of being summarized. In fact, summarization of confidential information is expected to be the norm, as it is only in "exceptional circumstances" that summarization of the confidential information will not be possible. In such circumstances, the interested Member or party concerned must provide an explanation of why the summarization is not possible.

7.91 The panel in *Mexico – Steel Pipes and Tubes* considered the obligations of an investigating authority in assessing an assertion that summarization is not possible in the context of the equivalent

¹¹⁹ The panel in *Guatemala – Cement II* said:

"Although Article 6.5.1 does not explicitly provide that "the authorities shall require" interested parties to provide a statement of the reasons why summarization is not possible, any meaningful interpretation of Article 6.5.1 must impose such an obligation on the investigating authorities. It is certainly not possible to conclude that the obligation concerning the need to provide a statement of reasons is an obligation imposed exclusively on the interested party submitting the information, and not the investigating authority, since the *Anti-Dumping Agreement* is not addressed at interested parties. The *Anti-Dumping Agreement* imposes obligations on WTO Members and their investigating authorities. Accordingly, in our view Article 6.5.1 imposes an obligation on investigating authorities to require parties that indicate that information is not susceptible of summary to provide a statement of the reasons why summarization is not possible."

Panel Report, *Guatemala – Cement II*, para. 8.213. See also Panel Report, *Mexico – Steel Pipes and Tubes* at para. 7.379 and Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.135.

¹²⁰ Consistent with previous panels (Panel Report, *US – Countervailing Duty Investigation on DRAMs*, para.7.351) as well as the Ministerial Declaration on Dispute Settlement Pursuant to *the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* or *Part V of the Agreement on Subsidies and Countervailing Measures*, we will be guided by the Appellate Body and panel jurisprudence on the obligations in Article 6.5.1 of the *Anti-dumping Agreement*, which is identical to Article 12.4.1 of the *SCM Agreement*.

provision of the *Anti-dumping Agreement* (i.e. Article 6.5.1 of the *Anti-dumping Agreement*). There, the panel concluded:

There is no express provision regulating what should occur in the circumstance where an investigating authority considers that a request for confidentiality is warranted, beyond the obligation to treat such information as confidential. Nor does the text of the Article 6.5 or 6.5.1 contain any express obligation relating to *how* an investigating authority should decide in respect of a party's assertion that summarization of confidential information is not possible, nor how an investigating authority should or must communicate any decision on this matter.¹²¹ (footnotes omitted) (emphasis in original)

7.92 We differ with the above reasoning in that, while Article 12.4.1 does not set out any specific mechanism by which an investigating authority shall evaluate an assertion that summarization is not possible, the text of Article 12.4.1 nonetheless provides a clear indication of the basis of this evaluation: the investigating authority should examine the reasons given for not summarizing the confidential information and determine whether, indeed, these reasons constitute "exceptional" circumstances. By considering the extent to which an interested Member or party has shown exceptional circumstances, an investigating authority can determine whether the interested Member or party has substantiated that summarization is not possible.

7.93 Before turning to the facts of this case, we briefly consider Mexico's argument that its system, by providing certain representatives of interested parties with access to confidential information, means that even if no public summaries were provided the "obligation and objective established in Article 12 of the *SCM Agreement* would in any case be complied with".¹²²

7.94 The panel in *Mexico – Steel Pipes and Tubes* rejected a similar argument that Mexico's limited disclosure system excuses it from complying with the obligation in Article 6.5 of the *Anti-dumping Agreement* to require summaries of confidential information.¹²³ We agree with that panel and find no textual support in Article 12.4.1 of the *SCM Agreement* for the proposition advanced by Mexico. We therefore adopt the following statement of the panel in *Mexico – Steel Pipes and Tubes*:

Notwithstanding the foregoing, while such a system of limited disclosure is certainly envisaged by Article [12.4.1 of the *SCM Agreement*], and may certainly act as a supplement to a Member's fulfilment of its obligations under Article [12.4.1 of the *SCM Agreement*], we find no textual basis in Article [12.4.1 of the *SCM Agreement*] that would indicate to us that permitting limited access to the entire confidential record to individuals fulfilling certain conditions, provides a derogation from, or replaces, the obligations of an investigating authority under Article [12.4.1 of the *SCM Agreement*] to require justification for treatment of information as confidential and, if such treatment is justified, to require non-confidential summaries of the confidential information, or, alternatively, to require justification for the non-summarization of certain information. (footnotes omitted)¹²⁴

7.95 In its submissions before us, Mexico argued that the panel report in *Mexico – Steel Pipes and Tubes* supports its position that Mexico's access regime fulfils its obligations in Article 12.4.1.¹²⁵ On

¹²¹ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.382.

¹²² Mexico – First written submission, para. 86.

¹²³ Again, in the context of an examination of the equivalent provision of the *Anti-dumping Agreement*.

¹²⁴ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.398.

¹²⁵ For example at paragraph 81(a) of its Second written submission Mexico says:

the basis of the above cited passage, we disagree with Mexico's characterization of that panel's conclusions. While that panel ultimately found that Mexico had not acted inconsistently with Article 6.5.1 of the *Anti-dumping Agreement*, it did not rely on Mexico's arguments relating to its access regime.

7.96 We now consider whether, in this case, Mexico required non-confidential summaries satisfying the requirements of Article 12.4.1 of the *SCM Agreement*. Although the entire administrative record was not before us, we asked Mexico to provide us with certain documents, which the European Communities specifically alleged did not contain non-confidential summaries of confidential information in the administrative record.¹²⁶ Mexico provided us and the European Communities with the requested documents.¹²⁷ We find, in respect of the documents that we have examined, that there is a "public version" of each submitted document that contained confidential information. The public versions of all of these documents consist of the original documents from which all of the confidential information was simply removed. None of these documents contains any summary of the deleted confidential information.

7.97 We recall that Article 12.4.1 requires, in the first instance, that the submitting party provide a summary of the information that is claimed to be confidential. This summary must be sufficient to permit a reasonable understanding of the substance of that information. Mexico does not dispute that no stand-alone summaries of the confidential information were provided. Rather, its argument is that the "public" versions of the documents in themselves are the non-confidential summaries satisfying the requirements of Article 12.4.1. In this regard, Mexico states:

[The] only thing missing is the content between square brackets, which is confined to figures and a few words or sentences, so that even if these figures and words cannot be seen, the non-confidential summaries are in sufficient detail to permit a reasonable understanding of the information submitted in confidence.¹²⁸

7.98 We do not accept Mexico's characterisation of the public versions in question. While in certain instances it may be possible to glean a reasonable understanding of the deleted information by considering the non-confidential information surrounding it, this is often not the case. For example, in responding to a request for additional information¹²⁹, Fortuny removed significant information regarding: Fortuny's operations (including details in respect of equipment, purchasing and sourcing of raw materials, yields, and distribution); the virgin olive oil production process; the nature of the alleged injury; and plans and attempts to restart production. No summaries were provided in respect of the deleted information, and we do not find it possible to obtain a reasonable understanding of the *deleted information* by reading the public version of the document.¹³⁰ Given the extensive deletions

"We repeat that, as indicated in the final panel report in *Mexico – Steel Pipes and Tubes*, even if the summaries had not been in sufficient detail, there would not have been any violation on Mexico's part because the system of access to confidential information perfectly supplements the fulfilment of Mexico's obligations under Article 12.4 of the *SCM Agreement*."

¹²⁶ European Communities – First written submission, paras. 105-106.

¹²⁷ Fortuny Application (Public Version)(Exhibit MEX-41A); Questionnaire Response and Annex to Fortuny Application (Public Version)(Exhibit MEX-41B); Letter from Fortuny dated 9 November 2004 (Public Version)(Exhibit MEX-42A); Appendix 2 of Letter from Fortuny (Public Version) (Exhibit MEX-42B); Submission of Distribuidora Ybarra (Public Version) (Exhibit MEX-43A); Notification of Initiation and Sending of Application to European Communities (Exhibit MEX-44).

¹²⁸ Mexico – Second written submission, para. 81(a).

¹²⁹ Exhibit MEX-42 A.

¹³⁰ Similar wholesale deletions without summarization are evident in other documents, including the Fortuny Application (Public Version) Exhibit MEX-41A (see, for example, redactions to paragraphs 86 and 93)

from certain documents and the lack of specific summaries of any of the deleted information, we find that the investigating authority did not require the interested Members and interested parties to provide non-confidential summaries in sufficient detail to permit "a reasonable understanding of the substance of the information submitted in confidence" consistent with Article 12.4.1.

7.99 We next consider whether any party submitting non-confidential documents from which confidential information was deleted invoked "exceptional circumstances" and provided an explanation as to why summarization was not possible, as contemplated in the last sentence of Article 12.4.1. The European Communities' position in these proceedings is that no interested party invoked "exceptional circumstances". However, our review of the documents on the record reveals that certain interested parties, namely Fortuny and Ybarra, in cover letters accompanying information submissions to Economía asserted that the information for which confidentiality was claimed could not be summarized.

7.100 For example, the cover letter to Fortuny's application contains the following statement:

It is necessary to clarify that it is not possible to prepare public summaries of the information and documents that we classified as confidential because of the nature of such information and documents. Also, it is necessary to emphasize that consultation of the public version of the presented documents gives a reasonable and integral understanding of what is submitted.¹³¹

7.101 We consider that general statements of this sort are not sufficient as they constitute an unsupported assertion rather than a statement of reasons as required by Article 12.4.1. In this case, none of the documents provided to us containing blanket requests for confidential treatment make any attempt to explain the existence of exceptional circumstances that made it impossible to summarize the specific and varied information for which confidentiality was claimed. Consequently, these documents contain no basis on which Economía could have reached a conclusion as to whether or not "exceptional circumstances" in fact existed.

7.102 Based on our reasoning above, we conclude that Mexico has acted inconsistently with its obligations in Article 12.4.1 of the *SCM Agreement*.

E. ARTICLE 12.8 OF THE *SCM AGREEMENT*

7.103 The European Communities claims that Mexico failed to comply with its obligations in Article 12.8 of the *SCM Agreement* because Economía failed to inform the interested Members and interested parties of the "essential facts under consideration which form the basis for the decision whether to apply definitive measures" as required by this provision.

1. Arguments of the Parties

7.104 The European Communities claims that Economía did not provide any written communication to the interested Members and interested parties informing them of the "essential facts under consideration which form the basis for the decision whether to apply definitive measures"

and Questionnaire Response and Annex to Fortuny Application (Public Version) where information contained in paragraphs 19-26 is removed without summarization.

¹³¹ Fortuny Application (Public Version), Exhibit MEX-41A. Similar statements are made by Fortuny in Fortuny's answer to the Prevección (Public Version), Exhibit MEX-46A and by Ybarra in Submission of Distribuidora Ybarra (Public Version), Exhibit MEX-43 A and Distribuidora Ybarra's response to Information Request, Exhibit MEX-52C.

as required by Article 12.8 of the *SCM Agreement*, and that Mexico therefore has acted inconsistently with its obligations under that provision.¹³²

7.105 Mexico disagrees that no disclosure was made, and argues that Economía made the required disclosure via the Preliminary Resolution.¹³³ Mexico maintains that no further disclosure was necessary because no new essential facts were gathered between the issuance of the Preliminary and Final Resolutions, the latter of which formed the basis for the definitive measures.¹³⁴ In this context, Mexico states that Economía conducted a verification of Fortuny after the Preliminary Resolution was issued, and that this verification only confirmed the information that Fortuny had submitted previously, for which reason the verification did not generate any new essential facts. Mexico argues that the panel report in *Argentina – Ceramic Tiles* supports its position, as that panel found that the requirements of Article 12.8 can be met in a variety of ways depending upon the facts of the case, including through the issuance of a preliminary determination.¹³⁵

7.106 In response to Mexico's argument that Economía's Preliminary Resolution constituted the disclosure of "essential facts" the European Communities argues that that Resolution was inadequate for that purpose, *inter alia*, because it was not identified as performing that function.¹³⁶

2. Reasoning of the Panel

7.107 Article 12.8 of the *SCM Agreement* provides as follows:

The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

7.108 We recall that, as the party making the claim, the European Communities bears the burden of establishing a *prima facie* case of the alleged inconsistency. From this standpoint, we note that the main disagreement between the parties is factual, namely whether Economía's Preliminary Resolution satisfied the requirement in Article 12.8 to disclose "essential facts". In particular, Mexico does not assert that Economía provided the interested Members and interested parties with a specially prepared "essential facts" document, but instead points to the Preliminary Resolution as the means by which it complied with its obligations under Article 12.8. The European Communities, for its part, does not argue that there was no Preliminary Resolution, or that Article 12.8 imposes an obligation to produce a separate "essential facts document". Instead the European Communities maintains that the Preliminary Resolution did not satisfy the requirements of Article 12.8, in part because it was not identified as performing this function, and in part because factual evidence was gathered after the issuance of that Resolution, some of which must have constituted new "essential facts".¹³⁷

7.109 The European Communities argues that a preliminary determination could "hardly ever" provide adequate disclosure of essential facts, *inter alia* because confidential company-specific information cannot be revealed in such a public document, and because a preliminary determination provides the justification for provisional measures and there could be further factual investigations following the preliminary determination that could produce "new or changed essential facts".¹³⁸ The

¹³² European Communities – First written submission, paras. 108-109.

¹³³ Mexico – First written submission, paras. 92-94.

¹³⁴ Mexico – Response to Panel question 35; Mexico – Second written submission, para. 93 citing Mexico – Response to Panel question 32.

¹³⁵ Mexico – Response to Panel questions 32 and 35.

¹³⁶ European Communities – First oral statement, para. 64.

¹³⁷ *Ibid.*, paras. 64-68; European Communities – Response to Panel question 33..

¹³⁸ European Communities – Response to Panel question 33.

European Communities does not assert that a preliminary determination can *never*, as a legal matter, satisfy the disclosure requirement in Article 12.8, but it argues that in the olive oil investigation, Economía committed a legal error by not informing the parties that the Preliminary Resolution was serving this purpose, thereby denying them the opportunity to "defend their interests" as required by Article 12.8.¹³⁹ Mexico argues that previous panels, particularly the panel in *Argentina – Ceramic Tiles*, have made clear that Article 12.8 disclosure can be made via preliminary determinations, and that in the olive oil investigation this was sufficient because none of the essential facts changed between the preliminary and final determinations. Thus, the precise question raised by this claim is whether the European Communities has established that the Preliminary Resolution in the olive oil investigation did not satisfy the disclosure obligation in Article 12.8.

7.110 We start our analysis by considering the ordinary meaning of the term "essential facts" in Article 12.8, and in this regard, we agree with the panel in *Guatemala – Cement II* that the "essential facts" are not just any facts of record.¹⁴⁰ Rather, as the plain language of Article 12.8 makes clear, the "essential facts" are the particular facts that "form the basis for the decision whether to apply definitive measures". In other words, these are the specific facts that underlie the investigating authority's final findings and conclusions in respect of the three essential elements – subsidization, injury and causation – that must be present for application of definitive measures. Thus, while we note the findings of the panel in *Argentina – Ceramic Tiles* that a preliminary determination is one possible means of making the required disclosure, this will not necessarily be so in every case. In particular, if new "essential facts", i.e., facts that bring about a change in the authority's findings relating to subsidization, injury or causation, are incorporated into the record after the issuance of the preliminary determination, then that determination by definition could not satisfy the disclosure obligation in Article 12.8.

7.111 The allegation of the European Communities is along the same lines. The European Communities does not challenge the possibility as such of making disclosure under Article 12.8 via a preliminary determination, but rather argues that in the olive oil investigation, the preliminary determination was not sufficient for this purpose based on the facts, namely that Economía obtained a large volume of factual material after issuing the Preliminary Resolution, including at the verification of Fortuny. Specifically, the European Communities references three documents, Exhibits MEX-42A, 51D, and 51E1, which it asserts were submitted after the Preliminary Resolution and include substantial data regarding Fortuny.¹⁴¹ However, the European Communities maintains that it is "not in a position to state definitively whether these constituted essential facts because in the versions of the documents that Mexico has provided the confidential information has been blanked out"¹⁴². The European Communities, states, nevertheless, that "it can hardly be imagined" that among these "there was not some information that would not qualify as 'essential facts'"¹⁴³, and further that the interested parties were not informed that the Preliminary Resolution was performing the Article 12.8 disclosure function.

¹³⁹ European Communities – Second written submission, para. 33.

¹⁴⁰ Panel Report, *Guatemala – Cement II*, para. 8.229. The *Cement* panel ruled on the counterpart provision, Article 6.9, of the *Anti-dumping Agreement*. Given that that provision is worded identically to Article 12.8 of the *SCM Agreement*, we consider that the *Cement* panel's reasoning is fully applicable to the issue before us. The panel highlighted that the provision is concerned with the identification of the facts on the record that are "important" to the authority's determination. The panel stated that "[a]n interested party will not know whether a particular fact is 'important' or not unless the investigating authority has explicitly identified it as one of the 'essential facts' which form the basis of the authority's decision whether to impose definitive measures." *Id.* at para. 8.229.

¹⁴¹ European Communities – Second written submission, paras. 34-37.

¹⁴² *Ibid.*, para. 35.

¹⁴³ *Ibid.*, para. 37.

7.112 Concerning this latter argument of the European Communities, that pursuant to Article 12.8 Economía should have informed the interested parties that the Preliminary Resolution was performing the Article 12.8 disclosure function, the European Communities identifies the problem as one of due process. In particular, the European Communities asserts that because the interested parties did not know that the Preliminary Resolution was performing this function, they did not have the opportunity to "defend their interests" in respect of the "essential facts" contained therein.¹⁴⁴ The record of the investigation does not support this assertion, however. To the contrary, the Final Resolution identifies a number of steps in the investigation following the issuance of the preliminary determination during which the parties had the opportunity to present their views, including specifically in respect of the Preliminary Resolution. These steps, which are summarized at paragraphs 29-69 of the Final Resolution, included technical meetings between Economía and certain interested parties, a call by Economía for written submissions of arguments and evidence in respect of the Preliminary Resolution, consultations between the governments of the European Communities and Mexico, a public hearing, and an opportunity following the hearing to make further written submissions concerning any aspect of the proceedings.

7.113 Indeed, the assertion of the European Communities is not that the interested parties had no opportunity to present their views in respect of the Preliminary Resolution as such, but rather that they did not have the opportunity to present their views in respect of that Resolution in the guise of a document disclosing the "essential facts" pursuant to Article 12.8. Given that the Preliminary Resolution indicated that the facts stated therein were the basis of the preliminary determinations of subsidization, injury, and causation and given the numerous opportunities provided to the interested parties following the issuance of the Preliminary Resolution to provide such evidence and arguments as they wished, we do not consider that the European Communities has established that the interested parties were denied the opportunity to defend their interests in respect of the "essential facts".¹⁴⁵

7.114 We now turn to the factual aspect of this claim, i.e., that new "essential facts" almost certainly were obtained by Economía following its preliminary determination but were not disclosed. Given that the European Communities is the party asserting the claim it bears the burden of identifying any particular facts of record in the olive oil case that were not disclosed in the Preliminary Resolution but were nevertheless "essential facts" relied upon by Economía in making its final determinations in respect of subsidization, injury, and/or causation. Any such undisclosed "essential facts" relied upon by Economía should be evident in the Final Resolution.

7.115 In this regard, we note that in its second written submission, the European Communities identified several exhibits that were submitted to Economía after the Preliminary Resolution, which it argued must have contained essential facts. However, the European Communities did not identify any specific determination in the Final Resolution that relied upon the information in those exhibits. In response to a direct question from the Panel asking the European Communities to identify specific "essential facts" that were not included in the Preliminary Resolution, but formed part of the basis of the determination in the Final Resolution, the European Communities' response, however, consists only of brief and generally-worded assertions referring to large documents without referring to any specific fact of record, nor does the European Communities attempt to demonstrate that new facts changed the basis for Economía's determinations with respect to the key elements – subsidization, injury and/or causation – in the Final Resolution as compared with the Preliminary Resolution.¹⁴⁶ As

¹⁴⁴ Ibid., para. 33.

¹⁴⁵ We recall here that the basic questions addressed by preliminary determinations are the same as those addressed by final determinations, namely subsidization, injury and causation.

¹⁴⁶ Panel Question 120 reads: "Please indicate which specific 'essential facts', were not included in the Preliminary Resolution, but formed part of the basis of the determinations in the Final Resolution."

such, we do not find that the European Communities has established a *prima facie* case that Economía failed to disclose the "essential facts" as required by Article 12.8 of the *SCM Agreement*.

7.116 For the foregoing reasons, we find that the European Communities has not established that Mexico acted inconsistently with its obligations under Article 12.8 of the *SCM Agreement*.

F. ARTICLE 11.11 OF THE *SCM AGREEMENT*

7.117 The European Communities asserts that Mexico failed to conclude its investigation within one year, and in no case more than 18 months after its initiation of the investigation in violation of Article 11.11 of the *SCM Agreement*.

1. Arguments of the Parties

7.118 The European Communities asserts that Mexico has acted inconsistently with its obligations in Article 11.11 of the *SCM Agreement*, because the investigation lasted more than 24 months. In particular, the European Communities argues that the investigation was initiated on 2 July 2003¹⁴⁷ and was concluded on 1 August 2005. It is the position of the European Communities that Article 11.11 contains an absolute limit (18 months) on the length of an investigation, and that Mexico exceeded this limit.¹⁴⁸

7.119 Mexico does not deny that its investigation lasted more than 18 months. It argues that the purpose of Article 11.11 is "to protect the interested parties from any unjustified delay or inaction" and that delays were caused by requests for extensions from the interested parties and requests that Economía consider additional information at late stages in the investigation. Consequently, any delay in the investigation did not subvert the purpose of Article 11.11.¹⁴⁹

2. Reasoning of the Panel

7.120 Article 11.11 reads as follows:

Investigations shall, except in special circumstances, be concluded within one year, and *in no case* more than 18 months, after their initiation. (emphasis added)

7.121 We consider that the requirement set out in Article 11.11 is clear and unequivocal. This provision starts with a general rule – that investigations must be concluded within one year — and then provides for a limited, conditional exception. In particular, in "special circumstances" an

The European Communities response states that "[b]y its nature, the preliminary resolution cannot constitute disclosure of essential facts that had indeed arisen after the preliminary resolution, *inter alia*, on the following issues:

- the basis for the changes after the Preliminary Resolution in the level and form of the duties and in the methodology followed for the calculation of the subsidy margins and injury margins, as well as the methodology for the establishment of the level of the duty;
- the results of the on-spot-investigations, in particular to the EC exporter Borges, which was found to be not-integrated and which further substantiated the EC request of a pass-through analysis, and to Fortuny, which was not adequately investigated, and
- Distribuidora's comments on Fortuny's prices and costs."

¹⁴⁷ We note our earlier finding in paragraph 7.31 that the investigation was initiated on 17 July 2003. However, regardless of whether the date of initiation was 2 or 17 July 2003, the investigation still lasted longer than 18 months, so this earlier finding has no substantive effect on the European Communities' substantive claim under Article 11.11 of the *SCM Agreement*.

¹⁴⁸ European Communities – First written submission, para. 113; European Communities – First oral statement, para. 74.

¹⁴⁹ Mexico – First written submission, paras. 101-106.

investigation may be prolonged, but "in no case" may the total period of investigation exceed 18 months. We see no basis in this provision (nor authority in any other part of the *SCM Agreement*) to prolong an investigation beyond 18 months for any reason, including requests from interested parties.

7.122 Concerning the facts of the case, while Mexico disagrees with the European Communities about the exact date of initiation (see section VII.B, *supra*), it does not deny that the olive oil investigation lasted longer than the 18-month maximum provided for in Article 11.11. We recall our finding, above, that the date of initiation was 17 July 2003. As such, the total length of the investigation was more than 24 months, i.e., well in excess of the 18-month absolute maximum.

7.123 We find that Mexico's investigation in this case was concluded more than 18 months after the date of its initiation, and that Article 11.11 does not permit such prolongation under any circumstances. For that reason, we conclude that Mexico has acted inconsistently with its obligation under Article 11.11 of the *SCM Agreement*.

G. ARTICLES 1 AND 14 OF THE *SCM AGREEMENT*

7.124 The European Communities claims that Mexico has acted inconsistently with Articles 1 and 14 of the *SCM Agreement* by failing "to calculate the benefit conferred on the recipient pursuant to paragraph 1 of Article 1 of the *SCM Agreement* and to apply the method used to each particular case in a transparent way which is adequately explained, in violation of Article 14 of the *SCM Agreement*."

1. Arguments of the parties

7.125 The European Communities claims that Mexico has acted inconsistently with Articles 1 and 14 of the *SCM Agreement* by failing "to calculate the benefit conferred on the recipient pursuant to paragraph 1 of Article 1 of the *SCM Agreement* and to apply the method used to each particular case in a transparent way which is adequately explained, in violation of Article 14 of the *SCM Agreement*."¹⁵⁰ In its submissions before us in support of this claim, the European Communities argues that Mexico acted inconsistently with Articles 1 and 14 because Economía failed to conduct a "pass-through" analysis to determine the extent to which any benefits received by olive growers for the production of olive oil were transmitted to the exporters of olive oil to Mexico.¹⁵¹ In particular, the European Communities argues that a "pass-through" analysis was required because: (1) the oil obtained by simple crushing of the olives was an input into the product finally exported; and (2) the persons upon whom the countervailing measures were imposed (identified by the European Communities as the exporters) were not related to the initial recipients of the subsidy, the olive growers, and the product had been the subject of arms' length transactions while moving between them.¹⁵² According to the European Communities, olives are an input into the production of olive oil, and the olive oil obtained from extraction is an input into the olive oil exported to Mexico, because the extracted oil had to undergo further processing (refining, blending, bottling, packaging) before it was exported.¹⁵³ In response to questioning from us, the European Communities clarified that, in its view, a "pass-through" analysis is required even when only the second of the two conditions is met, i.e., when the exporters of olive oil are not related to the olive growers who receive the subsidies.¹⁵⁴

¹⁵⁰ WT/DS341/2, at tiret 6.

¹⁵¹ See, e.g., European Communities - First written submission, paras. 121, 128, and 135; Response to Panel question 43.

¹⁵² European Communities - Response to Panel question 43.

¹⁵³ Ibid.

¹⁵⁴ European Communities - Response to Panel question 121.

7.126 Concerning its allegation of inconsistency with Article 1.1 of the *SCM Agreement*, the European Communities argues that the crucial issue is whether the olive oil imported into Mexico from the European Communities is "subsidized" in the sense of the *SCM Agreement*. According to the European Communities, although the *SCM Agreement* says little about the relationship between the subsidy and the product in relation to countervail, Article VI:3 of the *GATT 1994* makes clear that countervailing duties may only be imposed where there is a "bounty or subsidy ... on the manufacture, production or export of [an imported] product", such that "the subsidy must be linked to some activity concerning the product".¹⁵⁵ We note here, however, that the European Communities brings no *claim* under Article VI:3 of the *GATT 1994* in relation to the "pass-through" issue. As regards Articles 1 and 14, the European Communities argues that "the *Agreement* does have a lot to say about [...] the notion of benefit", first, in Article 1 which explicitly makes benefit an element of "the notion of subsidy"¹⁵⁶; and, second, in Article 14, which "addresses the 'calculation of the amount of a subsidy in terms of the benefit to the recipient'".¹⁵⁷ The European Communities then states that what is to be "offset" in the sense of Article VI:3 of the *GATT 1994* is the benefit conferred by the subsidy.¹⁵⁸ The European Communities elaborates that "benefit is addressed by Article 1.1 of the *Agreement*, which defines it as one of the basic constituents of the concept of subsidy"¹⁵⁹, and that "[b]enefit is also addressed by Article 14" which, in "lay[ing] down explicit rules for the methods by which benefit is to be calculated, does nothing to detract from the notion of pass through as elaborated by the EC".¹⁶⁰ The European Communities also argues that "Article 14 puts beyond doubt the principle that the calculation of subsidy is one that is based absolutely on commercial realities, and ... that it is on these realities that the notion of pass-through is founded."¹⁶¹

7.127 The European Communities argues that because the subsidy was given to the olive producers, while other persons exported the product, olive oil, to the Member applying the countervailing measure, the investigating authorities needed to establish that the subsidy was passed through to the other persons.¹⁶² The European Communities cites the panel report in *US – Canadian Pork* which arose under the *GATT 1947*, as indicating that the existence of pass-through of the subsidy from live swine to pork producers would need to be determined by examining the degree to which the prices of the subsidized input product (live swine) were below market levels when the input was sold to the producers of the investigated processed product (pork). The European Communities further argues that the criterion of arms'-length sales has been established by the Appellate Body in the context of privatization of subsidized state-owned companies. In that context, according to the EC, "the criterion of arm's-length sale was coupled with that of sale for 'fair market value'".¹⁶³

7.128 Mexico argues that no pass-through analysis was necessary in the olive oil investigation. According to Mexico, the subsidy programme at issue was a direct subsidy on the production of the imported product, olive oil, and had been notified as such by the European Communities to the WTO Committee on Agriculture.¹⁶⁴ Mexico asserts that since the investigation was not related to an input product (olives) but to olive oil, which was the same product exported to Mexico, the investigating authority was not bound to conduct a pass-through analysis.¹⁶⁵ Mexico submits that the product that

¹⁵⁵ European Communities - First written submission, paras. 123-124.

¹⁵⁶ Ibid., para. 125.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid., para. 127.

¹⁵⁹ European Communities - Response to Panel question 46.

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² European Communities - First written submission, para. 128.

¹⁶³ Ibid. paras. 130-131, citing Panel report in *US – Canadian Pork* and Appellate Body report in *US – Countervailing Measures on Certain EC Products*.

¹⁶⁴ Mexico - First written submission, paras. 119 *et seq.*; Mexico - Second written submission, paras. 105 *et seq.*

¹⁶⁵ Mexico - Response to Panel question 43.

was subject to the investigation was olive oil in all its forms, from first crushed to blended and refined.¹⁶⁶ Mexico argues that the EC Regulation establishing the programme, and the amendments thereto, make clear that the programme concerned a subsidy for olive oil and not for olives.¹⁶⁷ Mexico argues that for these reasons, the jurisprudence on pass-through in the *US – Canadian Pork* and *US – Softwood Lumber IV* disputes is not applicable in this case.¹⁶⁸

7.129 Concerning the provisions of the *SCM Agreement* cited by the European Communities, Mexico argues that neither Article 1 nor Article 14 contains obligations to conduct a pass-through analysis as claimed by the European Communities. Regarding Article 1, Mexico submits that its text contains no requirement to provide a reasoned explanation of the existence of a subsidy or the need to undertake a pass-through analysis of the benefit. Rather, Article 1 only establishes, in a conceptual way, which elements must be present in order to determine that a subsidy exists.¹⁶⁹ Mexico recalls that the European Communities is not arguing before the Panel that the aid scheme for olive oil was not a subsidy.¹⁷⁰ Regarding Article 14, Mexico argues that this provision neither contains nor envisages any obligation to conduct a pass-through analysis of the benefit of a subsidy, and instead only provides guidelines applicable to the calculation of a benefit.¹⁷¹

2. Reasoning of the Panel

(a) "Pass-through" of Subsidy Benefits

(i) "Pass-through" Analysis in WTO Law

7.130 We start our analysis by examining the basis in WTO law for the obligation to conduct a pass-through analysis in a countervailing duty investigation. This issue has been addressed specifically in two prior disputes, notably in *US – Canadian Pork*, a case under the *GATT 1947*, and more recently by the Appellate Body in *US – Softwood Lumber IV*.¹⁷² Both of these disputes have established that Article VI:3 of the *GATT* requires an investigating authority in a countervailing duty investigation to conduct a pass-through analysis in certain circumstances, and in *Softwood Lumber IV*, the panel and the Appellate Body found the same requirement in footnote 36 of Article 10 of the *SCM Agreement*.

7.131 *US – Canadian Pork* was brought by Canada, under Article VI of the *GATT 1947*. In that case, the United States had applied countervailing measures on imports from Canada of fresh, chilled and frozen pork, while the subsidies that were the subject of the investigation had been provided to Canadian producers of live swine. The United States had effectively concluded that 100 per cent of the subsidies to swine producers had "passed through" to the producers of pork, although the subsidies were provided to the swine producers, not the pork producers, and the swine and pork producers were not vertically integrated, but rather were two separate industries composed of unrelated firms. Under US law at the time, subsidies provided to the producers of a raw agricultural product were deemed to be provided in respect of production of processed products made from the raw products if the demand for the raw product was "substantially dependent" on the demand for the processed product and the processing operation added only limited value to the raw product.

¹⁶⁶ Mexico - Response to Panel questions 122 and 123.

¹⁶⁷ Ibid.

¹⁶⁸ Mexico - Response to Panel question 57.

¹⁶⁹ Mexico - Second written submission, para. 120.

¹⁷⁰ Ibid., citing the response of the European Communities to Panel question 47.

¹⁷¹ Mexico - Second written submission, para. 121.

¹⁷² Panel Report, *US - Softwood Lumber III* (not appealed), which concerned the United States' preliminary countervailing duty determinations, came to essentially the same conclusion in respect of the pass-through analysis.

7.132 Canada complained that the US measures were inconsistent with Article VI:3 of the *GATT 1947* because the approach under US law did not correctly establish the amount of subsidization in respect of the imported product, pork. Canada's argument was that the US approach did not ensure that the countervailing measures were not applied "in excess" of the amount of subsidization of the product, contrary to the provisions of Article VI:3 of the *GATT 1947* requiring that:

No countervailing duty shall be levied on any product of the territory of a Member imported into the territory of another Member in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation.....

7.133 The panel in *US-Canadian Pork* noted that Article VI:3 of the *GATT 1947* limited the amount of countervailing duties to the amount of the subsidy "granted directly or indirectly on the production of 'such product'"¹⁷³, (i.e., the imported product), and found that the United States could apply countervailing measures on imports of pork only if a subsidy had been determined to be bestowed on the production of pork. In this regard, the panel found that application of the two-part test under US law did not result in such a "determination", because it did not take into account "all facts necessary to meet the requirements of Article VI:3". The reasoning of the panel was that the pork and swine industries were separate, and operated at arms' length, such that the subsidies granted to the swine producers could only be considered to have been "bestowed on the production" of pork (as required by Article VI:3 of the *GATT 1947*) if they had led to a decrease in the level of prices that pork producers paid for live swine to below the level they would have had to pay for swine from other commercially available sources. Because the US two-part test did not address this issue, the panel found that it did not meet the requirements of Article VI:3 of the *GATT 1947*.¹⁷⁴

7.134 The dispute in *US - Softwood Lumber IV* addressed a similar issue. In that case, the United States applied countervailing duties on imports of softwood lumber, including remanufactured lumber, from Canada on the basis of subsidies to the harvesting of timber, i.e., the production of raw logs, the input into the production of primary lumber. In particular, the subsidies arose from the fact that timber harvesters paid "less than adequate remuneration" for a government-provided good, standing timber. When the timber was harvested, some of the raw logs were converted to lumber by sawmills, and some of that lumber was then further processed into remanufactured lumber. The United States applied countervailing measures on the imported lumber, including remanufactured lumber, to offset the stumpage subsidies.

7.135 Canada claimed that the United States had improperly assumed, rather than analyzing and determining, that the stumpage subsidies had passed through to producers of the primary and remanufactured lumber products that were subject to the countervailing measures, and that the United States thus had acted inconsistently with Articles 10, 19 and 32 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*.

7.136 The panel found in favour of Canada's claims under Article 10, and consequentially Article 32 of the *SCM Agreement*, as well as Article VI:3 of the *GATT 1994*, in respect of the situations in which producers of logs were unrelated to the sawmills that processed the logs into primary lumber and in which producers of remanufactured lumber were unrelated to the lumber manufacturers (sawmills) from which the remanufacturers obtained their lumber inputs. The panel found that no pass-through analysis was required where the producer of the inputs was related to the lumber producer (i.e., where the production was vertically integrated). The panel exercised judicial economy in respect of Canada's Article 19 claim.

¹⁷³ Panel Report, *US – Canadian Pork*, para. 4.6

¹⁷⁴ Panel Report, *US – Canadian Pork*, paras. 4.8-4.10.

7.137 The Appellate Body upheld the panel's findings that Article 10 of the *SCM Agreement* and Article VI:3 of the *GATT 1994* require a pass-through analysis in circumstances in which a subsidy is received by a producer of an input product, and the imported product subject to the countervailing duty investigation is a different, downstream product produced by an unrelated producer using the subsidized input.

7.138 The Appellate Body began its analysis with Article VI:3, noting that this provision "prohibits levying countervailing duties on an imported product 'in excess of an amount equal to the estimated ... subsidy determined to have been granted, *directly or indirectly*, on the *manufacture, production or export of any merchandise*'".¹⁷⁵ On this basis, the Appellate Body held that it would not be possible to determine whether countervailing duties were imposed in excess of the amount of the total subsidy accruing to a processed product without establishing whether, and in what amount, the subsidies bestowed on the input product flowed through to the downstream, imported product. The Appellate Body noted that this interpretation was supported by the definition of a "countervailing duty" in footnote 36 to Article 10 of the *SCM Agreement*, that is, that a countervailing duty is a special duty levied for the purpose of "offsetting" a subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise.¹⁷⁶

7.139 More specifically, the Appellate Body found that if a subsidy is conferred on the production of an input product used to produce the imported product, and the producer of the input product is unrelated to the producer of the imported product, it would not be possible to establish that the countervailing duties on the imported product were not in excess of the amount of the subsidy if no analysis was performed to determine the extent to which the subsidy on the input product was transferred to the imported product. In the absence of a pass-through analysis, the Appellate Body emphasized, "it cannot be shown that the essential elements of the subsidy definition in Article 1 are present in respect of the *processed product*", such that "the right to impose a countervailing duty on the processed product for the purpose of offsetting an input subsidy [...] would not have been established in accordance with Article VI:3 of the *GATT 1994*, and, consequently, would also not have been in accordance with Articles 10 and 32.1 of the *SCM Agreement*."¹⁷⁷ Here, the Appellate Body quoted the panel's finding in *US – Canadian Pork* that the United States could apply countervailing measures on imports of pork "only if a subsidy had been determined to have been bestowed on the production of pork", and the Appellate Body's ruling in *United States – Countervailing Measures on Certain EC Products* that Article VI:3 of the *GATT 1994*, in conjunction with Article 10 of the *SCM Agreement*, require that "investigating authorities, before imposing countervailing duties, must ascertain the precise amount of a subsidy attributed to the imported products under investigation."¹⁷⁸

7.140 In *US - Softwood Lumber IV*, The Appellate Body emphasized that not every situation in which a subsidy provided on the production of an input product gives rise to an obligation to conduct a pass-through analysis. This also depends on the relationship between the producer of the input product and the producer of the imported, processed product. In that case, the panel's finding that where the input producer (the timber harvester) itself also was a lumber producer (i.e., owned a sawmill), no pass-through analysis was required. Regarding the situation in which the timber harvester either did not own its own sawmill, or sold some of its raw logs to unrelated sawmills, the Appellate Body upheld the panel's finding that a pass-through analysis was required to establish the amount, if any, of the stumpage subsidies that had flowed through to the further processed product, i.e., lumber.¹⁷⁹ Finally, the Appellate Body overturned the panel's finding that a pass-through analysis

¹⁷⁵ Appellate Body Report, *US - Softwood Lumber IV*, para. 141.

¹⁷⁶ Ibid.

¹⁷⁷ Ibid., para. 143.

¹⁷⁸ Ibid., para. 145.

¹⁷⁹ Ibid., paras. 140-147; 156-159.

was required where inputs in the form of lumber were sold by sawmills to unrelated lumber remanufacturers, because both the lumber inputs and the remanufactured lumber products were imported products covered by the countervailing duty investigation. Thus, the fact that the sawmills and the remanufacturers were unrelated was not, in the Appellate Body's view, sufficient in itself to require a pass-through analysis. Because the lumber, produced by the sawmills, and the remanufactured lumber, produced by the remanufacturers, were both imported products covered by the countervailing duty investigation, the Appellate Body found that a pass-through analysis was not required.¹⁸⁰

7.141 The disputes in *US – Lead and Bismuth II* and *US – Countervailing Measures on Certain EC Products* addressed a different question concerning transmission of subsidy benefits between unrelated parties, based on entirely different fact situations those in *US – Canadian Pork* and *US – Softwood Lumber IV*.¹⁸¹ The issue in those cases related to the effect of the privatization of state-owned firms on the continued *existence* of benefits from non-recurring subsidies that those firms had received in the past. In both of those cases, inconsistencies were found with Articles 10, 19.1, and 19.4 of the *SCM Agreement*, as well as, in the case of *US-Lead and Bismuth II*, Article 21.2 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*, and in the case of *US – Countervailing Measures on Certain EC Products*, with Article 14 of the *SCM Agreement*. All of these provisions were found to have been violated because the investigating authorities had presumed, instead of analyzing and determining, that the benefits from the past non-recurring subsidies continued to *exist* and had been fully transferred to the firms' new owners after the privatizations had taken place, in spite of the fact that the new owners had paid fair market value for the firms. The United States was found therefore to have improperly continued to apply countervailing duties to imports produced by the privatized firms, without having established whether any subsidies continued to *exist*.

7.142 To summarize, the *US - Softwood Lumber IV* and *US – Canadian Pork* cases have established that a pass-through analysis is required in circumstances in which *both* of the following conditions are present: (1) a subsidy is provided in respect of a product that is an input into the processed, imported product that is the subject of the countervail investigation; and (2) the producer of the input product and the producer of the imported product subject to the countervail investigation are unrelated. This obligation to conduct a pass-through analysis arises under Article VI:3 of the *GATT* and Article 10 of the *SCM Agreement*. As the Appellate Body stated in *US - Softwood Lumber IV*, "because Article VI:3 permits *offsetting*, through countervailing duties, no more than the 'subsidy determined to have been granted ... on the manufacture [or] production ... of such *product*', it follows that Members must not impose duties to offset an amount of the input subsidy that has *not* passed through to the countervailed processed products."¹⁸² There is also jurisprudence that in cases in which non-recurring subsidies were provided to state-owned enterprises that were later privatized at fair market values, the investigating authorities must conduct examinations to determine whether any of those past subsidies continued to exist following the privatization. We do not find this latter jurisprudence to be relevant in the case before us, and therefore we will focus on the cases relating to subsidies provided on input products.

7.143 The *US - Softwood Lumber IV* and *US – Canadian Pork* jurisprudence does *not* support the European Communities' argument that whenever there is *any* arms'-length transaction between unrelated companies in the chain of the production of an imported product subject to a countervail investigation, a pass-through analysis must be conducted. To the contrary, as discussed above, in *US*

¹⁸⁰ Ibid., para. 163. We recall that the situation in that investigation, as in the one that is the subject of the present dispute, was that the per unit subsidy amount was established on an aggregate, country-wide basis.

¹⁸¹ While the basic question in those cases has sometimes been referred to as "pass-through", it has to do with the continued *existence* of benefits from past certain subsidies, and thus is legally and factually distinct from the situation in *US – Canadian Pork* and *US – Softwood Lumber IV*.

¹⁸² Appellate Body Report, *US - Softwood Lumber IV*, para. 141.

– *Softwood Lumber IV*, the Appellate Body found that where an input product and a further manufactured product *both* are covered by the definition of the product subject to the countervailing duty investigation, a pass-through analysis is *not* required even if the producers of the respective products are *unrelated* and operating at arms' length.¹⁸³ If this is the case for certain arms'-length sales of *inputs* between unrelated firms, then *a fortiori* the mere existence of an arms'-length transaction between firms involving the product under investigation somewhere between the receipt of the subsidy and the export of the merchandise should not, by itself, give rise to an obligation to conduct a pass-through analysis under Article VI:3 of the *GATT 1994* and Article 10 of the *SCM Agreement*.

7.144 In this respect, we recall that the *SCM Agreement* and Article VI:3 of the *GATT 1994* both explicitly permit the application of countervailing measures to "offset" subsidies "bestowed upon [...] *the manufacture, production or export*" of a product (emphasis added). Taking the simplest hypothetical example, where a subsidy is provided directly to a producer of a product coming within the scope of a countervailing duty investigation, we do not see how that company's eventual sale of the product to an unrelated firm (e.g., a distributor) would have a bearing on the fact that a subsidy has been bestowed in respect of the "production" of that product. Taken to its logical conclusion, the argument by the European Communities, that a pass-through analysis must be conducted in every case in which there are transactions between unrelated firms relating to the product under investigation, would mean that a pass-through analysis would be required in almost every countervail investigation, even when the subsidy was provided directly on the investigated product. We now turn to examine the claims of the European Communities in relation to this issue.

(ii) *Claim of the European Communities pursuant to Article 1.1 of the SCM Agreement*

7.145 For reasons not clear to us, and in spite of the fact that the legal bases for a "pass-through" obligation in the past jurisprudence were found in Article VI:3 of the *GATT 1994* and Article 10 of the *SCM Agreement*, the European Communities has based its "pass-through" claims in this case solely on the basis of Articles 1 and 14 of the *SCM Agreement*. The Request for Establishment of a Panel makes no reference in this context to either Article VI:3 of the *GATT 1994* or to Article 10 of the *SCM Agreement*. In its written submissions and in response to questions from the Panel, the EC based its "pass-through" claims on Articles 1 and 14 of the *SCM Agreement*. We are therefore obliged to consider the European Communities' "pass-through" claims exclusively under the provisions it has cited.¹⁸⁴ This requires us to consider an entirely novel legal argument: that an obligation to conduct a

¹⁸³ Ibid., para. 163.

¹⁸⁴ We recall here various rulings of the Appellate Body concerning the duty of panels not to exceed their terms of reference by ruling on claims not before them. See, e.g., Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36 (finding that a failure to scrutinize the request for establishment of a panel for consistency with Article 6.2 of the DSU could result in the panel exceeding its terms of reference as set forth under Article 7.1 of the DSU and ultimately result in the panel failing to carry out its functions in accordance with Article 11 of the DSU); Appellate Body Report, *Korea – Dairy*, para. 123-24 (confirming that the identification of the treaty provisions claimed to have been violated by the respondent is "a *minimum* prerequisite if the legal basis of the complaint is to be presented at all."); and Appellate Body Report, *India – Patents (US)*, para. 89 (holding that "a claim must be included in the request for establishment of a panel in order to come within a panel's terms of reference in a given case"). Concerning pass-through, the European Communities' Request for Establishment of a Panel makes no reference to either Article VI:3 of the *GATT 1994* or Article 10 of the *SCM Agreement*. Paragraph 6 of that Request refers to "the failure to calculate the benefit conferred on the recipient pursuant to paragraph 1 of Article 1 of the *SCM Agreement* and to apply the method used to each particular case in a transparent way which is adequately explained, in violation of Article 14 of the *SCM Agreement*". In its arguments before us, the European Communities pursues this claim based on the issue of pass-through. Paragraph 4 of that Request alleges "the failure of the Mexican authorities to properly inform the interested parties and to provide reasonable and adequate explanation on the existence of subsidisation, notably as regards pass-through of any benefit, in violation of Articles 12.8, 22.3 and 22.5 of the *SCM Agreement*. Before us, however, the European Communities did not pursue the claims in paragraph 4 as

"pass-through" analysis in a countervail investigation exists in Articles 1 and 14 of the *SCM Agreement*.¹⁸⁵

7.146 Turning first to the European Communities' claim pursuant to Article 1.1 of the *SCM Agreement*, it is well established that the definition of "subsidy" set forth in that provision applies to the entire *SCM Agreement*¹⁸⁶ as well as to the relevant provisions of Article VI of the *GATT 1994*. This definition provides, in relevant part:

Article 1

Definition of a Subsidy

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government") ...

and

(b) a benefit is thereby conferred.

7.147 The European Communities' "pass-through" claim appears to be based on the definition of a subsidy in Article 1.1 and, in particular, on the element of "benefit" in subparagraph (b) of that provision. The European Communities' argument is that Mexico did not conduct a pass-through analysis, that it should have done so in the circumstances of this investigation, and that this failure was inconsistent with the "benefit" requirement of Article 1.1, because "the element of the definition of subsidy with which the notion of pass through is most closely linked is that of 'benefit'".¹⁸⁷ The European Communities also cites Article 14 in the context of "benefit", stating that this provision addresses the calculation of benefit in terms of benefit to the recipient, and establishes that such calculation must be based on "commercial realities", which are the basis for the notion of pass-through.¹⁸⁸

7.148 The European Communities declined to elaborate further its legal arguments regarding how, precisely, Articles 1 and 14 in themselves require a pass-through analysis, in spite of our specific invitations at both the first and second meetings with the Panel to do so.¹⁸⁹ In particular, we asked the European Communities to provide a legal analysis of the provisions it cited and to explain its legal arguments in detail, on the basis of the texts of those provisions, the Vienna Convention, and past case law, as to precisely how the obligation to conduct a pass-through analysis lies in Articles 1 and 14.

regards pass-through. See section VII.E, *supra* for our discussion of the European Communities' claim under Article 12.8 (essential facts) as raised in its submissions before us.

¹⁸⁵ We questioned the European Communities concerning why it had not cited the provisions in which, in past disputes, the requirement to conduct a pass-through analysis had been found. As described at paragraph 7.147, *infra*, the essence of the European Communities' answers was that the provisions it cites refer to the concept of "benefit".

¹⁸⁶ See, for example, the Panel report in *US – Softwood Lumber IV*, para. 7.104: "The chapeau of Article 1.1 *SCM Agreement* explicitly states that the concept and definition of what constitutes a 'subsidy', as set forth in that Article, applies to the entire Agreement. Thus, it is clear that this most basic definition of the Agreement informs every other reference to 'subsidy' in the Agreement." (footnote omitted.)

¹⁸⁷ European Communities - Response to Panel question 46.

¹⁸⁸ *Ibid.*

¹⁸⁹ European Communities - Responses to Panel questions 46 and 126.

The European Communities responded that the requirement is implicit, not explicit, and that the Vienna Convention is of limited use in respect of implicit requirements.¹⁹⁰ Concerning past cases, the European Communities stated that the claims in the *US - Softwood Lumber IV* dispute were based on other provisions than Articles 1 and 14 because that was how the complaining party chose to frame its claims in that case, and that the claim in *US- Canadian Pork* was necessarily based on the *GATT 1947* (given that the case predated the *SCM Agreement*). The European Communities cited *US – Countervailing Measures on Certain EC Products*, acknowledging that it concerned a different fact situation, but stating that it was relevant nevertheless because it stands for the proposition that the benefit must be conferred on the producer of the product concerned, and a violation of Article 14 was found in that case.¹⁹¹

7.149 Turning to the analysis of Article 1.1 specifically, we note that as a general rule under the *SCM Agreement*, if a measure under investigation in a countervailing duty investigation involves a financial contribution in the sense of Article 1.1(a)(1), but no benefit is conferred thereby in the sense of Article 1.1(b), then no subsidy exists, and no countervailing duty can be applied in respect of that measure. In such a circumstance, the investigated measure would not constitute a subsidy, and application of a countervailing duty would be inconsistent with Article 1.1 of the *SCM Agreement*.¹⁹²

7.150 However, in this case, the European Communities is *not* arguing that a benefit was not provided, and that therefore a subsidy did not exist within the meaning of Article 1.1. Indeed, in its submissions before us, the European Communities maintains that this is not its argument.¹⁹³ Rather, its allegation is that Mexico did not properly calculate the *amount* of the benefit from the subsidy that was directly attached to the *exporters* of olive oil.

7.151 As Article 1.1 contains a definition of the term "subsidy" for the purposes of the *SCM Agreement*, the issue in the cases interpreting that provision has been whether or not a "benefit" existed, and therefore whether or not there was a subsidy. We do not see in Article 1.1 any language specifically relating to how the amount of the benefit is to be calculated in a countervail investigation.¹⁹⁴

7.152 We find, therefore, that Article 1.1(b) in itself does not establish a requirement to calculate precisely the amount of the benefit accruing to a particular recipient in a countervail investigation. We find support for our view in the findings of the Appellate Body in *US – Countervailing Measures on Certain EC Products* that under Article 1.1(b), a benefit might be received by different recipients, that the recipient of the benefit might be different from the recipient of the financial contribution, and that a subsidy can be bestowed directly or indirectly, and in respect of production, manufacture or export of a product.¹⁹⁵ In other words, it is not necessary to identify the particular recipient or recipients of the benefit and the particular manner in which a subsidy is bestowed in order to

¹⁹⁰ European Communities - Response to Panel question 126.

¹⁹¹ Ibid.

¹⁹² Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.186 *inter alia*.

¹⁹³ European Communities – Response to Panel question 47; European Communities – First written submission, para. 77.

¹⁹⁴ We recall here the Appellate Body's ruling in *Canada – Aircraft* that to determine whether a benefit exists for the purpose of Article 1.1(b), the question to be answered is whether the recipient has received the government financial contribution on terms more favourable than those available to the recipient on the market, and that Article 14 provides contextual guidance for making this determination. We note, for example, that to determine whether a government-provided loan confers a benefit, and thus whether a subsidy exists, it will be necessary to evaluate whether the terms on which the government loan is provided are better than the terms on which the recipient could obtain the same loan from a commercial lender. If yes, then a benefit exists. It is not necessary to know the precise amount of the benefit, if any, to answer this question.

¹⁹⁵ Appellate Body Report, *United States – Countervailing Measures on Certain EC Products*, paras. 110-113.

determine that a benefit has been conferred, and that therefore a subsidy exists, within the meaning of Article 1.1(b).

7.153 On the basis of the foregoing analysis, we conclude that Article 1.1 of the *SCM Agreement* does not contain a requirement as to how the amount of the benefit must be calculated for the purposes of imposing countervailing duties. We therefore find that the European Communities has not established that Mexico acted inconsistently with its obligations under Article 1.1 of the *SCM Agreement* by failing to conduct a pass-through analysis in the olive oil investigation.

(iii) *Claim of the European Communities pursuant to Article 14 of the SCM Agreement*

7.154 We now turn to the European Communities' claim under Article 14 of the *SCM Agreement*. This claim, as set forth in the Request for Establishment of a Panel, is that Economía "fail[ed] to apply the method used [to calculate the benefit conferred on the recipient] to each particular case in a transparent way which is adequately explained, in violation of Article 14 of the *SCM Agreement*." During the course of the dispute, the European Communities elaborated on the basis for this claim. In respect of the issue of pass-through, the European Communities states, *inter alia*, that the claim is that "Economía failed to explain how it calculated the benefit conferred on the recipient, contrary to the obligation in Article 14", but that "in accordance with the practice of WTO dispute bodies where an *allegation of substantive infringement is coupled with one of failing to explain or publicize the point in question*, the EC has concentrated on the substantive infringement, which is the failure to examine the issue of pass-through when calculating the amount (if any) by which the imported olive oil is subsidized."¹⁹⁶ From this we understand that the European Communities' argument is that because Economía failed to conduct a pass-through analysis where one was required, its explanation of how it calculated the amount of subsidization of the investigated product was not reasoned and adequate.

7.155 Article 14 reads, in relevant part:

Article 14
Calculation of the Amount of a Subsidy in Terms
of the Benefit to the Recipient

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member

¹⁹⁶ WT/DS341/2, tiret 6. See also, European Communities – First written submission, para. 157 which states: "[T]he Mexican authorities acted inconsistently with Articles 1 and 14 of the *SCM Agreement* by failing to give a reasoned and adequate explanation of ... why they concluded that the benefit of the subsidy was passed through to the exporters of olive oil...".

To ensure that we fully understood the nature of this claim, we asked the European Communities (Panel question 53) to clarify whether the basis for its claim under Article 14 was that Mexico's application of its method in this case was not transparent or adequately explained. The European Communities answered affirmatively, stating that its claim was that Mexico "failed to provide a transparent and adequate explanation of the method used to calculate the amount of subsidy in this particular case" (emphasis in original). The European Communities also addressed this issue at the second substantive meeting of the Panel (at paragraph 42 of its oral statement), stating that "[s]ince Mexico appears to have doubts on the matter let us make it clear that, as stated in tiret 6 of its Panel Request, the EC claims that Economía failed to explain how it calculated the benefit conferred on the recipient, contrary to the obligation in Article 14. However, in accordance with the practice of WTO dispute bodies where an allegation of substantive infringement is coupled with one of failing to explain or publicize the point in question, the EC has concentrated on the substantive infringement, which is the failure to examine the issue of pass-through when calculating the amount (if any) by which the imported olive oil is subsidized."

concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines...

7.156 By its own terms, Article 14 concerns the "method" to be used in a countervailing duty investigation to *calculate* the *amount* of benefit to a recipient, and sets forth three basic requirements in this regard. The first has to do with the legislative framework, the second has to do with the application of the law to particular cases, and the third has to do with the general guidelines for how to determine the benefit to the recipient from four basic forms of government financial contributions: equity infusions, loans, loan guarantees, and government provision of goods or services or government purchase of goods.

7.157 The first requirement, that any method used to *calculate* the "benefit to the recipient" must be set forth in the importing Member's national legislation or implementing regulations, is not cited in the European Communities' claim. We thus do not consider it further.

7.158 The third requirement, that any method used to *calculate* "benefit to the recipient" must be consistent with certain specified guidelines relates only to the four types of financial contribution listed in that provision. We find that this requirement is not relevant in this dispute because the financial contribution of the measure at issue was in the form of recurring grants, in respect of which Article 14 contains no provision. We also note that the European Communities did not cite this requirement as one it alleges Mexico violated. For both of the above reasons, therefore, we do not need to consider this requirement further.

7.159 The second requirement, which is cited by the European Communities, is that the application of the method for calculating the benefit to the recipient in particular cases "shall be transparent and adequately explained". We see nothing in this provision that requires a Member to conduct a pass-through analysis. As noted above, we understand the allegation of the European Communities to be that the failure by Economía to conduct a pass-through analysis when one was required necessarily meant that its application of the calculation methodology in the olive oil case was not transparent or adequately explained.

7.160 In support of this claim, the European Communities refers to certain passages concerning the economic effects of the investigated subsidies on prices and supply in the market, in particular *vis-à-vis* exporters, in paragraphs 117-118 of Economía's Final Resolution, which appear at the end of a section entitled "Pass-through Mechanism". As these are the only specific parts of the Final Resolution referred to by the European Communities in the context of this transparency claim, the implication of the European Communities is that these passages constitute the entirety of Economía's analysis and examination of the pass-through issue in the olive oil investigation. According to the European Communities, these passages fail to explain, transparently and adequately, the benefit calculation methodology in respect of the issue of pass-through, as they are "mere assertions", and even if they were true, they could not explain how a subsidy could have passed through to the exporters.¹⁹⁷

7.161 We begin our analysis of this claim by noting that the Final Resolution contains considerably more information as to the nature of the investigated subsidy programme and Economía's analysis thereof than the few passages cited by the European Communities. We will consider these issues in detail, with a view to determining whether, as claimed by the European Communities, Economía failed to explain, transparently and adequately, its calculation of benefit to the recipient in respect of the pass-through issue raised by interested parties in the investigation.

¹⁹⁷ European Communities - First written submission, paras. 132-148.

7.162 We start by reviewing the portions of the Final Resolution which address the nature of the subsidy programme at issue in this case. According to the Final Resolution, the subsidy programme was provided under Regulation 136/66/EEC of September 1966 of the Council of the European Economic Community, establishing a common market in the oils and fats sector and describing the programme of aid to olive oil, which regulation had been amended on numerous occasions.¹⁹⁸

7.163 The Final Resolution also describes the operation of the subsidy programme as presented to Economía by interested parties in the investigation.¹⁹⁹ According to that description, in each marketing year, the grower presented to the national administrators of the programme a crop declaration specifying data concerning the farm and the number of olive trees. The olives were harvested and taken to mills for crushing into oil during the period November through March. The oil mill provided the grower with a certificate attesting to the amount of oil obtained from that grower's olives, which the grower transmitted along with its aid application to the national programme administration. The national administration then calculated the national total quantity of olive oil for which the aid was requested, and transmitted this request to the EC Commission. The total per country aid amount was then divided by the number of kilograms of oil produced to determine the per kilogram amount of aid to be paid. The EC Commission, published these figures.

7.164 The Final Resolution presents the factual findings of Economía concerning the olive oil aid programme, in paragraphs 100-104, as follows:

"100. In this stage of the investigation, the Ministry confirms its preliminary determination that the subsidy provided by the European Community is olive oil and only a small proportion is destined to olives. From a reading of Regulation 136/66/EEC the purpose and the benefited product are clear. We cite the following paragraphs (the underlining is ours):

'Whereas olive growing and the production of olive oil are particularly important to the economies of certain regions of the Community ... that for many consumers, olive oil is the most important source of oils and fats ... it is necessary to support this productions through appropriate actions.

'Whereas, to this end, the marketing of the crops must assure fair remuneration to Community producers, the level of which can be defined by a production target price for olive oil ...

Title II

Olive Oil

Article 4.

1. A production target price shall be set for the Community.

This price shall be fixed at the wholesale marketing stage for ordinary virgin olive oil with a free fatty acid content expressed as oleic acid of 3.3g / 100g.

¹⁹⁸ Final Resolution (Exhibit EC-1), para. 85.

¹⁹⁹ Ibid., para. 84, referring to representations on this issue made by the trade associations ASOLIVA and ASSITOL, the exporters, and the EC Commission.

2. For the 1998/99 to 2003/04 marketing years, the target production prices referred to in part 1 shall be fixed at 383.77 ecus/100 kg.

3. Except as otherwise decided by the Council by qualified majority pursuant to a proposal by the Commission, the marketing year for olive oil shall run from 1 November to 31 October of the following year.

Article 5

1. Aid for the production of olive oil shall be established. This aid is designed to contribute to the establishment of a fair income for the producers.

The aid shall be provided to the oil growers on the basis of the quantity of olive oil they actually produce.

...

7. With a view to establishing guidance for checks on the determination of the quantity of oil eligible for the aid, yields will be established for olives and oil per homogeneous production zones.

...

9. A percentage of the production aid provided to all or a part of the producers in each producing Member State shall be used to finance regional measures to improve the quality of the production of olive oil and table olives, and their environmental impact.

...

20. When olive oil is exported to third countries and the world prices are higher than the Community price, a regulatory levy may be collected to compensate for these price differences.'

101. The cited regulation establishes, in Article 1, that the aid is to be applied to certain products including olive oil classified in code NC 1509 which refers to olive oil and its fractions, whether or not refined, but without chemical modification, and code NC 1510 00 for the other oils obtained exclusively from olives, and their fractions, including refined oils, but without chemical modification, and blends of those oils or fractions of heading 1509.

102. Furthermore, the EC has notified the Committee on Agriculture of the WTO of its internal aid programme for different products. It should be emphasized that among the listed products, olive oil is identified as a "designated product".

103. As mentioned in the Preliminary Resolution, the Ministry is of the opinion that if a producer of olives brings its product to a mill to obtain olive oil, and in the extreme case obtains nothing, it is clear that this producer would not benefit under the aid programme. That is, the only way in which an olive producer would have access to the subsidy would be on the basis of the olive oil actually produced, which is the product referred to in Regulation 136/66/EEC.

104. On the basis of what is stated in paragraphs 100 to 103 of this Resolution, the Ministry considers that it is unquestionable that the subsidy provided by the European Community is to olive oil, that is, to the product that is subject to the investigation, and that this is not an incorrect interpretation or a problem of translation. At the same time, the Ministry accepts that, as mentioned in Regulation 136/66/EEC, there is a part of the aid that can be applied to support table olives, which are not part of the present investigation."

7.165 The Final Resolution then, in the section entitled "Pass-Through Mechanism" (from which the excerpts presented by the European Communities were taken), discusses the arguments of the interested parties and the findings of Economía in relation to the precise question of whether a pass-through analysis was required under the facts of the case. This discussion is found at paragraphs 105-118 of the Final Resolution. Economía's conclusion, as set forth in that section, was that no pass-through analysis of the type required in *US-Softwood Lumber IV* was necessary because, unlike in that case, the olive oil investigation did not involve a subsidy to an input into the final processed product exported to Mexico:

... this is not an investigation of a subsidy to an input (olives) but rather to olive oil, which is itself the product exported to Mexico, for which reason the investigating authority is not obligated to conduct a pass-through analysis of the subsidy because, as provided for in point 100 of the present Resolution, it is unquestionable that Regulation 136/66/EEC and its amendments establish that the aid programme is for olive oil.²⁰⁰

7.166 Finally, the Final Resolution sets forth, at paragraphs 119-180, the procedural and analytical steps undertaken by Economía in calculating the per unit subsidy amounts. In this context, the representations of the interested parties and the related conclusions of Economía are described.

7.167 We recall that the claim of the European Communities is that Economía failed to fulfil the transparency requirement in the chapeau of Article 14, i.e., that the method used by Economía to calculate the benefit to the recipient was not transparent and was not adequately explained. We do not agree with the European Communities' characterization of the relevant portions of the Final Resolution. To the contrary, we consider that the Final Resolution contains detailed descriptions of the nature and operation of the subsidy programme, the representations of the interested parties regarding the subsidy programme and the pass-through question, and Economía's reasons for concluding that a pass-through analysis was not required, as well as the calculations performed. We fail to see how the Final Resolution either lacks transparency as to the method used to calculate the benefit to the recipient or fails to adequately explain that method.

7.168 We further recall that we see no obligation in respect of pass-through analysis in the cited language of Article 14. Even if there were such an obligation, moreover, we would find no basis on which to conclude that Economía had acted inconsistently with it. In particular, bearing in mind the standard of review, we have considered carefully the evidence on the record made available to us as to the nature and operation of the subsidy programme, and have examined the conclusions that Economía drew on the basis of that evidence as presented in the Final Resolution. We consider that Economía's conclusion that the subsidy programme under investigation in this case consisted of aid to olive growers for the production of olive oil was one that could be reasonably reached on the basis of the record evidence. In this regard, we note, first, the language of the Regulation itself, which stipulates that the olive grower receives aid only to the extent that it can prove that it has converted its olives into olive oil²⁰¹, and is paid only for the actual kilograms of olive oil that its olives produce.

²⁰⁰ Final Resolution (Exhibit EC-1), para. 116.

²⁰¹ Except for the small fraction provided for as aid to the production of table olives.

The Final Resolution makes clear that the respondent interested parties in the investigation described the operation of the programme in the same way.²⁰² We also take note of the reference in the Final Resolution to the fact that the European Communities' notifications to the WTO refer to *olive oil* as a "designated product" for the purposes of its domestic support measures. In addition, the Final Resolution indicates that the respondent parties argued that the subsidized product was olives, not olive oil, but provides no indication that those parties submitted any factual evidence in support of this assertion.²⁰³ In fact, it appears from the Final Resolution that the principal argument of the respondent parties in respect of the pass-through issue was that the transactions and processing operations intervening between the production of olive oil (by crushing olives) and its exportation to Mexico were what purportedly "disconnected" the subsidy benefits from the product as exported, giving rise to the alleged need for a pass-through analysis.²⁰⁴ As discussed above, there is no support in the jurisprudence for this legal argument. On the basis of the foregoing, we consider that the record evidence supports Economía's finding that the subsidized product was olive oil. Because the evidence indicates that the only basis on which the subsidy could be obtained was the conversion by the growers of olives into olive oil, we consider that the evidence on the record reasonably supports Economía's conclusion that the programme provided a subsidy to the production of olive oil. Furthermore, olive oil in all its forms, from first-crushed to refined and blended oil, was the product covered by the investigation. Therefore, the evidence before Economía reasonably supported its conclusion that the subsidy was not provided on an input product, but rather was provided on the product that was the subject of the investigation, and that as such, no pass-through analysis was necessary.²⁰⁵

7.169 For these reasons, we find that the European Communities has not demonstrated that, concerning the question of pass-through, Mexico failed to comply with the requirement in Article 14 to provide a transparent and adequate explanation of its method to calculate benefit in respect of the subsidy programme in this case.

(b) Article 14 – Other Calculation Issues

7.170 The European Communities raises three additional claims under Article 14, as alternatives to its Article 14 claim addressed above related to pass-through. These claims have to do with certain aspects of Economía's calculation of subsidy benefits.²⁰⁶ The first of these claims is that Economía "refused, without giving a reasoned and adequate explanation, to make any adjustment for the fact

²⁰² Final Resolution (Exhibit EC-1), paras. 84 et seq.

²⁰³ Ibid., paras. 93-104. In this context, we note that Economía sent a number of requests for information related to the structure of the olive oil industry to the respondent parties (see Mexico's response to Panel question 60, and the documents referred to therein). We have reviewed the replies to those information requests, and find that they contain only argumentation, and not factual information. Indeed, these documents suggest that Economía conduct certain investigations and gather certain information and samples, rather than offering any concrete evidence themselves. In its submissions to the Panel the European Communities points exclusively to these documents, and to no other record evidence in the context of this argument. See European Communities response to Panel question 45, which refers to the same documents as Mexico's reply to Panel question 60.

²⁰⁴ Ibid., paras. 106-108.

²⁰⁵ We recall here the point made by Economía in the Final Resolution (Exhibit EC-1, para. 116) that this was the key difference between the situation in the olive oil investigation and that in the *Softwood Lumber* dispute. See our discussion of this legal issue at section VII.G.2(a)(i), *supra*.

²⁰⁶ The European Communities also alleges inconsistencies with Article 1.1(b) of the *SCM Agreement* in respect of these calculation issues. None of these allegations goes to the *existence* of the benefit as such, however. We thus consider that our finding, above, that Article 1.1 contains no requirement as to how the amount of the benefit must be calculated in a countervailing duty investigation, resolves these claims of inconsistency. We therefore restrict our analysis in this section to the claims of inconsistency with the chapeau of Article 14 of the *SCM Agreement*.

that a proportion of the exports from the EC to Mexico consisted of oil that had not been in any way subject to the EC aid scheme."²⁰⁷ According to the European Communities, the respondent interested parties presented arguments that certain olive oil exported from the European Communities to Mexico originated in non-EC countries (e.g., Tunisia), and was brought into the European Communities under an inward processing scheme and then re-exported, some to Mexico. The European Communities argues that the subsidy amount should have been adjusted downward to take these non-EC-origin imports into account. According to the European Communities, although the respondent interested parties presented certain information related to this point, Economía did not make the necessary adjustments and failed to provide a reasoned and adequate explanation for its decision.²⁰⁸

7.171 Mexico takes issue with the Article 14 claim as referred to by the European Communities, namely as the failure of Mexico to provide a transparent and adequate explanation of the method used to calculate the amount of the *subsidy*. Mexico argues that the obligation in Article 14 is to explain the method used to calculate the amount of *benefit* conferred by the subsidy.²⁰⁹ In addition, Mexico points to passages in the Preliminary and Final Resolutions which indicate that the respondent interested parties that raised this issue failed to provide factual evidence to enable a calculation of the level of the adjustments they sought, and that for that reason, Economía did not make the adjustments.²¹⁰ The European Communities has pointed to no specific aspects in which this explanation is either non-transparent or inadequate (e.g., incomplete, unclear, etc.), and we find none. Furthermore, on the substance, we consider that it was not unreasonable for Economía to have declined to make the requested adjustments given that the interested parties that requested them failed to provide any supporting factual evidence in spite of Economía's specific requests for such evidence.

7.172 A second issue raised by the European Communities relates to adjustments for certain costs incurred by exporting companies. The European Communities' complaint is that although Economía made requested adjustments for companies that provided it with the necessary data, it did not make them for companies that did not, and it unjustifiably requested the former companies to provide information relating to the latter. The European Communities argues that by thus failing to exercise properly its responsibilities to investigate the effect of costs on the level of benefit, Economía also failed to give a reasoned and adequate explanation for its determination.²¹¹

7.173 Mexico's response, quoting the Final Resolution, is that Economía received no response to its request, made to the companies that provided cost data on their own operations, to suggest alternative methodologies that Economía could use to estimate the adjustments for the other companies. Nevertheless, the Final Resolution indicates that Economía made an adjustment for the non-responding companies by averaging the adjustments for those that had provided data.²¹² We fail to understand the specific nature of the European Communities' complaint with respect to this issue. As is evident in the Final Resolution, certain interested parties requested, and obtained, an adjustment from Economía, and Economía made a comparable adjustment for non-respondent companies. We can find no factual basis to support the European Communities' argument on this point, and thus can find no basis on which to conclude that Economía committed a substantive error under Article 14. Nor do we see anything unclear about the explanation presented in the Final Resolution. Thus, we find that the European Communities has failed to establish that Mexico acted inconsistently with its Article 14 obligations in its treatment of the adjustments for exporters' costs.

²⁰⁷ European Communities - First written submission, para. 150.

²⁰⁸ European Communities - First written submission, paras. 150.-151.

²⁰⁹ Ibid., paras. 122-123.

²¹⁰ Mexico - First written submission, paras. 131-136, citing relevant excerpts from the Resolutions. (Preliminary Resolution (Exhibit EC-22), paras. 120-121; Final Resolution (Exhibit EC-1), paras. 131-134).

²¹¹ European Communities - First written submission, paras. 154-156.

²¹² Mexico - First written submission, paras. 147-152, quoting the Final Resolution (Exhibit EC-1) at paras. 138-141.

7.174 Finally, the European Communities claims that Economía's calculation of the margin of subsidy was artificially high due to the fact that it was calculated by comparing the amount of the subsidy with the exporter's sales prices adjusted to an ex-factory level. The European Communities argues specifically that because duties were imposed on the basis of the CIF price, it is on this basis that the margin of subsidy should have been determined. According to the European Communities, by comparing the subsidy to the ex-factory price (necessarily a lower figure than the CIF price), Mexico has produced inflated figures.²¹³

7.175 Mexico responds that because the subsidies were calculated as specific per kilogram amounts, rather than on an *ad valorem* basis, the fact that the calculations were performed at the ex-factory, rather than the CIF, level made no difference to the calculation of the subsidy margins. Mexico provides a numerical example to illustrate its argument.²¹⁴

7.176 We have reviewed the Final Resolution, as well as the explanation provided by Mexico, and we find, as a matter of fact, that the European Communities has not established that the subsidy margins were artificially inflated by having been calculated at the ex-factory level. In particular, the European Communities has not explained specifically how inflation of the figures allegedly occurred, and we find this difficult to envisage given that the margins were, as Mexico points out, calculated on a per kilogram rather than on an *ad valorem* basis. Nor has the European Communities indicated how the explanation in the Final Resolution lacked clarity. We therefore find that the European Communities has failed to establish that Economía's calculation of the subsidy margins on an ex-factory basis was inconsistent with Mexico's obligations under Article 14 of the *SCM Agreement*.

H. DEFINITION OF "DOMESTIC INDUSTRY"

7.177 The European Communities claims that Mexico improperly imposed countervailing duties because it initiated:

an investigation in the absence of a determination by the Mexican authorities that the application was made by or on behalf of the domestic industry, in violation of Articles 11.4 and 16 of the *SCM Agreement*²¹⁵

7.178 The European Communities also alleges that Economía's injury determination is invalid because Fortuny did not constitute a domestic producer, and thus the domestic industry, within the meaning of Article 16.1 of the *SCM Agreement*. The European Communities further argues that even if Fortuny could be considered the domestic industry, Economía failed to adequately investigate the possibility that domestic producers of the like products other than Fortuny existed, and that therefore any consideration of the injury suffered by that industry would be purely speculative.²¹⁶ As a result of this alleged failure, the European Communities claims that Mexico "failed to give a reasoned and adequate explanation of its findings and was therefore inconsistent with Article 16 of the *SCM Agreement*. As a consequence, the findings regarding injury were in breach of the [*sic*] Article VI:6 of *GATT 1994*."²¹⁷

7.179 This claim thus has two elements, one based on the interpretation of the term "domestic industry" in Article 16.1 of the *SCM Agreement*, and the other based on the alleged inadequacy of Economía's efforts to determine whether there were Mexican producers of olive oil other than Fortuny. We will address these two elements separately.

²¹³ European Communities - First written submission, para. 152.

²¹⁴ Mexico - First written submission, paras. 137-146.

²¹⁵ WT/DS341/2, tiret 1.

²¹⁶ European Communities - First written submission, para. 188.

²¹⁷ Ibid., para.189.

7.180 Before turning to the specific issues raised, however, we note that in its Request for Establishment of a Panel, the European Communities also referred to alleged inconsistencies with Articles 15.4 and 15.5 of the *SCM Agreement* in the context of this claim. However, it did not provide any argumentation in its written or oral submissions with respect to these provisions in relation to this claim. Instead, in its first written submission, the European Communities explicitly referred to these provisions only as context for its interpretation of Article 16.1 of the *SCM Agreement*.²¹⁸ As a result of questioning from the Panel regarding the articles on which the European Communities was alleging an inconsistency, it became apparent that the European Communities was not pursuing specific claims of inconsistency with Articles 15.4 or 15.5 with respect to the definition of the domestic industry.²¹⁹ Therefore, we will not make any findings on Articles 15.4 or 15.5 with respect to this claim.²²⁰

1. Arguments of the Parties

7.181 The **European Communities** argues that in order to constitute a "producer" for the purposes of the *SCM Agreement*, and thus to constitute part of the domestic industry or the entire domestic industry, as defined in Article 16.1 of that *Agreement*, an enterprise must actually produce "output" of the domestic like product at two specified times: at the time of presentation of the application for the purpose of initiation, and during the subsidy POI for the purpose of the injury investigation. With respect to initiation, the European Communities argues that if an applicant is not producing output at the time it presents its application, it is not a "producer" and thus cannot form part of or constitute the "domestic industry" within the meaning of Article 16.1. As a result, the requirements of Article 11.4 of the *SCM Agreement* will not be met, as that provision requires that applications be made "by or on behalf of the domestic industry".²²¹

²¹⁸ European Communities – First written submission, para. 177.

²¹⁹ European Communities – Response to Panel question 63.

Question 63 from the Panel asked:

In paragraph 158 of your First Written Submission, you claim that Mexico acted inconsistently with Article VI:6 of the GATT 1994 and Articles 15.4, 15.5, and 16 of the *SCM Agreement*. However, in paragraph 173 of the same submission, you reference Article 15.1 of the *SCM Agreement* and claim that Article VI:6 of GATT 1994 has been infringed. Furthermore, in paragraph 189 of that same submission, you conclude that Mexico has acted inconsistently with Article 16 of the *SCM Agreement* and as a consequence is in breach of Article VI:6 of the GATT 1994. Could you please clarify under which provisions your claims are based?

The European Communities responded:

The European Communities has identified in Article VI:6(a) of GATT 1994 the clearest expression of the *obligation* imposed on Members in respect of injury findings in anti-dumping and countervailing duty proceedings. Infringements of this obligation can arise from behaviour by national investigating authorities that is inconsistent with individual provisions of the *SCM Agreement*.

In its contentions in support of its claim under this heading the EC has sought to identify particular provisions in Articles 15 and 16 with which the actions of Economía was inconsistent. In each case where the EC has alleged inconsistency it has identified the particular provision in Article 15 or 16 where that inconsistency arises. The EC believes that it has also made clear that the inconsistencies are linked to the obligation in Article VI:6. Usually this link is stated explicitly, as reflected in the terms of the Panel's Question.

²²⁰ We do note that the European Communities makes other specific claims with respect to Mexico's consistency with Articles 15.4 and 15.5. These claims will be addressed in sections VII.K and VII.L

²²¹ European Communities – First written submission, paras. 90-91; and response to Panel question 13. In particular, the European Communities argues that that "production is relevant only if it is taking place at the time of the application". The European Communities goes on to say that it does not mean that no account could

7.182 With respect to the injury determination, the European Communities' argues that "if there is no production, there is no industry, and if there is no industry there can be no material injury".²²² The European Communities focuses on the subsidy POI because, in its view, "the only verified evidence of subsidization available to the investigating authority will be that from the investigation period and unless the domestic companies concerned have output in that period, no injury can be demonstrated."²²³ Accordingly, to the European Communities, Economía's alleged failure to comply with the definition of "domestic industry" in Article 16.1 of the *SCM Agreement* also gives rise to a violation of Article VI:6(a) of the *GATT 1994*.

7.183 **Mexico** disagrees with this analysis, which it recalls was raised during the course of the investigation and addressed by Economía in the Final Resolution. Mexico points to Economía's reasoning at paragraph 218 of that Resolution, that if the European Communities' interpretation were correct, the concept of material retardation of the establishment of an industry would not make sense; cases in which production was suspended due to planned or unforeseen reasons would be inadmissible; it would be impossible to prove production and material injury in the case of producers of agricultural goods, which by definition produce according to natural cycles; and countervailing duties would be unavailable to industries that had been forced to suspend production due to competition from subsidized imports.²²⁴

2. Reasoning of the Panel

(a) Introduction

7.184 The European Communities claims that by defining the domestic industry inconsistently with Article 16.1 of the *SCM Agreement*, Mexico acted inconsistently with that provision as well as, consequentially, with Article 11.4 of the *SCM Agreement* and Article VI:6(a) of the *GATT 1994*. Specifically, the European Communities argues that if an investigating authority does not properly identify the correct domestic industry consistent with Article 16.1, and imposes countervailing duties, it also acts inconsistently with Article VI:6(a) of the *GATT 1994*, which permits the imposition of countervailing duties only in the event that an investigating authority makes a determination of material injury or threat thereof to an established domestic industry. Likewise, the European Communities argues that because Fortuny was not the "domestic industry" as defined by Article 16.1, its application was not made "by or on behalf of the domestic industry" as required by Article 11.4.²²⁵

7.185 In particular, the European Communities advances an interpretation of Article 16.1 that, because Fortuny was not producing output of olive oil either at the time it presented its application or during the period analyzed to determine the existence of subsidization (the "subsidy POI"), it could not be considered a "producer" in the sense of Article 16.1, and as a consequence it could not constitute the "domestic industry" within the meaning of Article 16.1 of the *SCM Agreement*. As a result, the European Communities claims, Economía's decision to initiate the investigation and its injury determination were fundamentally flawed. The European Communities argues that these

be taken of producers that operate on a seasonal basis or are for some other reason not producing regularly, and also states (in its response to Panel question 102) that it was not suggesting that the issue should depend on whether domestic companies were producing on the particular day that the complaint was lodged. Nevertheless, it argues that "the general requirement of having current output applies at all stages of the procedure, including at initiation".

²²² European Communities – First written submission, para. 213.

²²³ European Communities – First oral statement, para. 57.

²²⁴ Mexico, First written submission, para. 209; Mexico – Second written submission, para. 167; see also Japan – Third party submission, paras. 23-24.

²²⁵ WT/DS341/2, tiret 1.

alleged inconsistencies with Article 16.1 of the *SCM Agreement* also give rise to violations of Article VI:6(a)²²⁶ of the *GATT 1994* and Article 11.4 of the *SCM Agreement*.

7.186 As noted above, the claims under Article VI:6(a) of the *GATT 1994* and Article 11.4 of the *SCM Agreement* both rest upon the central premise that Mexico acted inconsistently with Article 16.1 of the *SCM Agreement* because the applicant in the olive oil investigation, Fortuny, could not constitute the "domestic industry" within the meaning of that provision. We view these claims as consequential to the claim under Article 16.1 of the *SCM Agreement*, because they require us, first, to accept the European Communities' interpretation of Article 16.1 of the *SCM Agreement* as a precondition for finding that Mexico acted inconsistently with Article VI:6(a) of the *GATT 1994* and Article 11.4 of the *SCM Agreement*. Therefore, we turn first to the interpretation of Article 16.1 of the *SCM Agreement* before examining whether *as a consequence* of any inconsistency with that provision Mexico also acted inconsistently with Article VI:6(a) of the *GATT 1994* and Article 11.4 of the *SCM Agreement*.

7.187 We note that the European Communities also makes additional claims, in the context of both the initiation of the investigation and the determination of injury, that Economía has not provided a reasoned and adequate explanation of its determination that Fortuny represented the entire domestic industry. In this respect, the European Communities challenges the factual basis of Economía's determination that Fortuny was the sole Mexican producer of olive oil, thus constituting the entire Mexican domestic industry producing olive oil. These allegations are addressed in sections VII.I and VII.J, *infra*.

(b) Definition of "domestic industry"

7.188 The basic interpretive issue we must consider is whether the definition of "domestic industry" in Article 16.1 of the *SCM Agreement* requires an enterprise or a group of enterprises to be producing actual output of the like product at the points in time referred to by the European Communities in order to be considered "producers" for the purpose of that provision. Put another way, the legal question is whether an enterprise or group of enterprises may not be considered to constitute a domestic industry if, at the time of application is filed and/or during the subsidy POI, it or they were not actually producing output.

7.189 Article 16.1 reads as follows:

²²⁶ We note that there was some confusion during these proceedings as to whether the European Communities was alleging that Mexico's inconsistency with Article VI:6(a) of the *GATT 1994* arose from an inconsistency with Article 16.1 or with Article 15.1 of the *SCM Agreement*. Specifically, in paragraph 173 of its First written submission, in the section that deals with the claims under tiret 7 of its Request for Establishment of a Panel, the European Communities asserts that Economía's alleged failure to properly investigate the extent of the domestic industry also meant that Economía "could not possibly comply with the requirement in Article 15.1 [of the *SCM Agreement*] that a determination of injury for the purposes of Article VI of *GATT 1994* must involve an objective examination of the impact of the subsidized imports on the domestic producers of the product". The Panel asked the European Communities to clarify the meaning of this statement. In its response to Panel question 64, the European Communities stated that "this reference was made to illustrate the consequences of the non-existence of the domestic industry, rather than as an attempt to claim an inadequate inquiry into the extent of the domestic industry." Given this clarification by the European Communities, we do not consider that the European Communities has made a specific claim of inconsistency with Article 15.1 of the *SCM Agreement* in relation to Economía's findings on the domestic industry in this case. We will consider Article 15.1 in the context of the claim concerning the injury investigation in tiret 8 of the Request for Establishment of a Panel, which specifically refers to Article 15.1. This additional injury claim is addressed in section VII.K, *infra*.

16.1 For the purposes of this Agreement, the term 'domestic industry' shall, except as provided in paragraph 2, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term 'domestic industry' may be interpreted as referring to the rest of the producers. (footnote omitted)

7.190 By its own terms, Article 16.1 provides a definition of the term "domestic industry" "for the purposes of this Agreement", i.e., the definition applies to the entire *SCM Agreement*.²²⁷ As such, this term must be given a consistent meaning throughout the *SCM Agreement* including for the purposes of the term "domestic industry" as used in Article 11.4.²²⁸ With respect to Article VI:6(a) of the *GATT 1994*, the Appellate Body and prior panels have found that the *SCM Agreement* provides context for the interpretation of Article VI of the *GATT 1994*,²²⁹ Indeed, the panel in *Brazil – Desiccated Coconut* emphasized that "the meaning of Article VI of *GATT 1994* cannot be established without reference to the provisions of the *SCM Agreement*."²³⁰ The definition in Article 16.1, therefore also informs the meaning of the term "domestic industry" as used in Article VI:6(a) of the *GATT 1994*, and an enterprise or group of enterprises that qualifies as a "domestic industry" within the meaning of Article 16.1 of the *SCM Agreement* will also constitute the domestic industry for the purposes of Article VI:6(a) of the *GATT 1994*.

7.191 Turning to the specific language of Article 16.1, "domestic industry" is defined as referring either to "the *domestic producers* as a whole of the like products" (emphasis added) or "to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products...". The first part of the definition, "domestic producers as a whole", we take to mean *all of the domestic producers*. The second part, "those of them", clearly refers to a subset of all of the domestic producers. The word "producers" is obviously central to the definition of "domestic industry". In particular, the question we must ask ourselves is whether an enterprise is a "producer", and therefore whether it constitutes all or part of the domestic industry, if it is not producing "output" of the like product at the time of submission of the application and/or during the subsidy POI.

7.192 Consistent with the requirements of Article 31 of the Vienna Convention, we begin our analysis of the term "producer" by considering its ordinary meaning. The New Shorter Oxford English Dictionary defines the term, "producer", *inter alia* as "a person who or thing which produces something or someone", and the term, "produce", as "bring (a thing) into existence, bring about, make."²³¹ Other established dictionaries contain similar definitions.²³² We consider that the central

²²⁷ Although Mexico has not raised the issue before us, we recall that the panel in *Argentina – Poultry Anti-Dumping Duties* addressed the legal question whether it was possible to violate the counterpart provision in the *Anti-dumping Agreement* (Article 4.1) because it is a definition. The panel concluded that a violation was possible, because the language of the definition itself contains an express obligation on Members: "...the term 'domestic industry' shall be interpreted..." (emphasis added). (Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.338.) We agree with this conclusion, and proceed here on the same basis in our analysis of Article 16.1 of the *SCM Agreement*.

²²⁸ We note that any interpretation of domestic industry under Article 16.1 would also be relevant to the provisions governing the injury determination set forth in Article 15 of the *SCM Agreement*.

²²⁹ Appellate Body Report, *Brazil – Desiccated Coconut*, p. 15; Panel Report, *India – Quantitative Restrictions*, paras. 5.18-5.19; Panel Report, *US – 1916 Act (EC)*, para. 6.195.

²³⁰ Panel Report, *Brazil – Desiccated Coconut*, para. 238.

²³¹ New Shorter Oxford English Dictionary, 1993 edition.

²³² For example, the Merriam-Webster dictionary (online edition) defines "producer" as, *inter alia*, "one that produces; especially: one that grows agricultural products or manufactures crude materials into articles of

element in these definitions is their focus on the *nature* of the activity undertaken – the bringing into existence or making of something. There is no suggestion in any of these definitions that being a producer is something that changes from one moment to the next depending on whether or not there is actual production of output at that moment. Rather, the definitions indicate to us that the essence of being a "producer" of something is to have, as an activity or a business, the bringing into existence or making of a thing.

7.193 The interpretive question before us in this case is novel and has not been examined previously in cases under the *SCM Agreement*, the *Anti-dumping Agreement*, or the *GATT*. We recall that the panel and the Appellate Body in *US-Lamb* considered similar language in Article 4.1 of the *Agreement on Safeguards*, namely that:

'domestic industry' shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a Member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products.²³³

While the legal question and the agreement at issue in that case were different from those before us, and thus are not directly applicable to the present dispute, the language in the *Agreement on Safeguards* nevertheless is sufficiently similar to the language in the *SCM Agreement* that we consider the reasoning in *US – Lamb* to be useful to our inquiry into the meaning of the word "producer" in Article 16.1 of the *SCM Agreement*.

7.194 The panel in *US – Lamb*, in interpreting the term "producer" referred to dictionary definitions noting that:

a "*producer*" is variously defined as "a person or a thing which produces something", or "one that produces, especially one that grows agricultural products or manufactures articles". To "*produce*" means to "bring a thing into existence, bring about, effect or cause an action or result", or "to give being, form or shape to, make, or manufacture". ...

The Appellate Body, in reviewing the panel's interpretation, approved of the use of these definitions, stating that "[a]s the Panel indicated, 'producers' are those who grow or manufacture an article; 'producers' are those who bring a thing into existence."²³⁴

7.195 The specific legal issue in *US-Lamb* was whether enterprises whose *activities or businesses* did not include the *production* of the like product itself (in that case, they produced inputs into the like product) could be considered "producers" of the like product. The panel and the Appellate Body ruled in the negative, focusing on the nature of the respective business activities of the input producers (the growers of live lambs) and the producers of the like product (the packers and breakers of lamb meat). In particular, the conclusions of the panel and the Appellate Body were that because the growers of live lambs did not themselves engage in the processing of live lambs into lamb meat, and because the like product was lamb meat only (and did not include live lambs), the producers of live lambs could not be considered to be producers of the like product, and thus did not form part of the "domestic industry" producing lamb meat.

use". This dictionary defines "produce" as "to cause to have existence or to happen: bring about; to give being, form, or shape to: make; *especially* : manufacture".

²³³ Article 4.1(c) of the *Agreement on Safeguards*.

²³⁴ We recognize that the Appellate Body in *US – Lamb* was interpreting somewhat different language in a different agreement from that before us. Nevertheless, we consider informative the discussion of dictionary definitions in that case of the same terms as appear in the *SCM Agreement*.

7.196 The temporal question underlying the claim of the European Communities in the present dispute did not arise in *US – Lamb*. Nevertheless, we agree with, and consider relevant to the dispute before us, the approach taken in *US – Lamb*, i.e., the focus on the essential nature of the business activities of a given enterprise as determinative of whether that enterprise could be considered a producer of the like product and thus be included in the domestic industry for that product. We further consider that the temporal approach advanced by the European Communities, of excluding enterprises as domestic "producers" of the like product solely on the basis that they lack actual output at particular, defined moments, and regardless of the essential nature of their business activities, is fundamentally incompatible with what we believe to be the correct, substantive approach taken in *US – Lamb*.

7.197 A number of provisions of the *SCM Agreement*, including Article 15, which sets forth how investigating authorities should conduct investigations into whether a domestic industry is injured as a result of subsidized imports, provide relevant context for interpreting the word "producer" in Article 16.1. First, Article 15.1 provides that the overarching obligations²³⁵ pertaining to the determination of injury to a "domestic industry"²³⁶ involve (a) an examination of the volume of the subsidized imports and their impact on prices in the domestic market for like products, and (b) an examination of the impact the subsidized imports on the "domestic producers" of those products. We note here that Article 15.1 refers to "domestic producers" without mentioning the existence of output at any specified points in time. Articles 15.2 or 15.4 which respectively provide the obligations for the examinations of the volume of the subsidized imports and their impact on domestic prices, and of the impact of the subsidized imports on the domestic producers, referred to in Article 15.1 provide further context for our interpretation of the terms "domestic industry" and "producer" as used in Article 16.1 of the *SCM Agreement*.

7.198 Article 15.2 requires an examination of the volume of the subsidized imports and of the effect of those imports on domestic prices for the like product. Concerning the volume of the subsidized imports, the specific obligation on the investigating authority is to consider "whether there has been a significant increase" in the imports "either in absolute terms or relative to production or consumption". Notable here is that this provision stipulates that a valid determination of a *relative* increase in imports can be made in relation to *either* production *or* consumption. In particular, given that the text of Article 15.2 permits a relative increase in imports to be established on the basis of a comparison with consumption, we do not see any basis on which to conclude that the absence of production of actual output at certain specific points in time, such as during the subsidy POI would, by itself, mean that there were no producers, thus no industry, and no valid basis on which to perform the injury analysis required by Articles 15.1 and 15.2.

²³⁵ See, Appellate Body report, *Thailand – H-beams*, para. 106, referring to the identical counterpart provision, Article 3.1, of the *Anti-dumping Agreement*. The Appellate Body stated that:

Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in [respect of the determination of injury]. Article 3.1 informs the more detailed obligations in succeeding paragraphs. These obligations concern the determination of the volume of dumped imports, and their effect on prices (Article 3.2), investigations of imports from more than one country (Article 3.3), the impact of dumped imports on the domestic industry (Article 3.4), causality between dumped imports and injury (Article 3.5), the assessment of the domestic production of the like product (Article 3.6), and the determination of the threat of material injury (Articles 3.7 and 3.8)...

²³⁶ In particular, Article 15.1 establishes the examinations that must be carried out as the basis for "a determination of injury", and footnote 45 indicates that "injury" consists of material injury or threat of material injury to, or material retardation of the establishment of, a "domestic industry".

7.199 Concerning the examination of the effect of the subsidized imports on domestic prices for the like product (also required by Article 15.1 and elaborated in Article 15.2), we note first that Article 15.2 provides for a variety of bases for this examination: whether there has been significant price undercutting by the subsidized imports in relation to the price of the like product, whether those imports have depressed the price of the like product, or whether those imports have prevented to a significant degree price increases that otherwise would have occurred. Nothing in the description of the required analysis of the price effects of the subsidized imports implies that actual output must be occurring at certain specific points in time, such as during the subsidy POI, in order for the results of the price analysis to be valid.²³⁷ Indeed, price analysis is undertaken on the basis of sales data, not production data, and it is apparent to us that the two may be entirely de-linked in time. That is, a producer could produce, for a certain period, inventory all of the resulting production, and then later sell from that inventory, with potentially no overlap of the periods of production and sales. In our view, nothing in Article 15.2 indicates that such a factual situation would render the domestic enterprise in question ineligible to be considered a "producer" of the like product, and thus part of or the entire "domestic industry" during the period when it was only selling, and not producing.

7.200 Article 15.4 of the *SCM Agreement*, governing the examination of the impact of the subsidized imports on the domestic industry, provides additional context for the appropriate definition of "producer". In particular, the long and varied list of factors in Article 15.4 demonstrates that a variety of factors in addition to production are relevant in an examination of the condition of the domestic industry. Article 15.4 envisions a multifaceted approach to examining the condition of the enterprises involved, requiring the consideration of **actual** and **potential** declines in output, sales, market share, profits productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments; and in the case of agricultural products, an increased burden on government support programmes.

7.201 The factors in this list describe the types of activities that "producers" could be engaged in. Indeed, while the list includes actual and potential declines in output, this is only one element in the long list of mandatory factors that *must* be examined in every case. Article 15.4 states explicitly that no one or several of the listed factors can necessarily give "decisive guidance". In our view, the inclusion of output as one among many factors, which must be considered in an investigation of the condition of the industry, demonstrates that being a "producer" means more than simply producing output at the time of filing the application and during the subsidy POI. In particular, we consider that the non-prescriptive way in which Article 15.4 is drafted is aimed precisely at accommodating a wide range of potential factual situations that can present themselves in countervailing duty investigations. Indeed, we can conceive of several examples of industries which might not be producing output at the time of filing the application and/or during the subsidy POI due to the seasonal nature of the product, technological innovations, distribution cycles, *force majeure*, and other reasons.

7.202 We also consider that the interpretation advanced by the European Communities runs counter to the object and purpose of the countervail provisions of the *SCM Agreement*, which is to provide for application of trade remedies where subsidized imports cause material injury or threat thereof to an established domestic industry or the material retardation of the establishment of a domestic industry.

²³⁷ The European Communities maintains, however, that if there is no output during the subsidy POI "no injury can be demonstrated" (see European Communities – Second oral statement, para. 57; also European Communities – Response to Panel question 135). We are not convinced. Considering Article 15.2 as context, we note that in addition to its plain language, previous panels have found that this provision contains no "specific rule as to the time periods to be covered by the injury or dumping investigations, nor any relationship between or overlap of those time periods." (Panel Report, *EC – Tube or Pipe Fittings*, para. 7.320; and Panel Report *Egypt – Steel Rebar*, para. 7.130 on the identical provision in the *Anti-Dumping Agreement*; see also *US – Countervailing Duty Investigation on DRAMS*, para. 7.245.)

If the terms "producer", and by extension "domestic industry", were defined in such a way that, for the purposes of initiation, output was always required at or very near the date of the application, and for the purposes of the injury investigation, output was always required during the subsidy POI, this could have the effect of *per se* excluding certain kinds of industries from being able to seek countervailing measures, and we see no indication in the text of the *Agreement* of any such intention on the part of the drafters. For example, many agricultural and food industries, such as the olive oil industry, are seasonal in nature and only produce output at certain times of the year. Firms in these industries may be involved in planting, equipment maintenance, harvesting, processing, selling, maintaining inventory, marketing and distribution at different times of the year. Also, some industries produce goods on a "just in time" or made-to-order basis. In other industries, production facilities may be shut down during certain periods for maintenance or upgrading. We consider that the European Communities' interpretation would exclude these industries from obtaining countervailing remedies during such periods because they, by their very nature, do not produce output at all relevant times in a countervail investigation.²³⁸

7.203 Most importantly, in our view, the European Communities' interpretation could lead to the result that an industry may be so badly injured by subsidized imports as to be forced to cease production for some period, but would be disqualified from obtaining the very remedy aimed at addressing such injury.²³⁹ We believe that this outcome would be absurd and contrary to the intention of the drafters of the *SCM Agreement*. In this context, we are not persuaded by the European Communities' argument that the provisions on *ex officio* initiation in Article 11.6 address this problem.²⁴⁰ In particular, we do not see how this form of initiation could resolve the substantive question at issue, as Article 11.6 itself indicates that *ex officio* initiations require the same evidentiary basis as application-based initiations.²⁴¹ Thus, if the European Communities is correct that, for the purposes of initiation, an applicant must have actual output at or near the time it presents an application, Article 11.6 would likewise indicate that "output" would be required at the time of initiation even if it was undertaken *ex officio*. In addition, as the European Communities recognizes²⁴², all investigations require the same evidentiary basis, whatever the basis of their initiations. Thus, we fail to see how, if we were to follow the European Communities' interpretation of Article 16.1, initiating an investigation *ex officio* could provide a solution for an industry that had been forced to cease production – and thus was not producing at or near the time of initiation or during the subsidy POI – due to competition from subsidized imports. We see no indication in the

²³⁸ The European Communities, in response to Panel question 13, stated that this principle should not be applied rigidly and that there were borderline situations, but that, in its view, Fortuny did not present such a situation because it had ceased production one year before its application was filed and 16 months before the investigation was initiated.

²³⁹ We recall in this context that, due to this situation, the application was presented on the basis of material retardation, but that in the light of Fortuny's long history as a producer of olive oil, Economía concluded that this would not be appropriate, and instead initiated the investigation on the basis of "injury".

²⁴⁰ European Communities - Response to Panel question 16: "During the First Substantive Meeting the European Communities made reference to the possibility of an *ex officio* initiation for situations in which there is no domestic production. The reason is that an initiation upon a written application does require the existence of an industry that, according to the EC's interpretation, also requires production. Indeed, Article 11.1 of the *SCM Agreement*, refers to a written application "by or on behalf of the domestic industry", and Article 11.4 lays down that an investigation based upon a request by the domestic industry shall not be initiated unless there is sufficient support of the domestic industry. On the other hand, Article 11.6 does not make a direct reference to the existence of a domestic industry. However, even in that case, during the investigation the investigating authority must adhere to the definitions of injury and domestic industry provided in Articles 15 and 16 of the *SCM Agreement*, which require the existence of actual production." See also, European Communities – Second oral statement, paras. 16-17.

²⁴¹ Article 11.6 provides in relevant part that in respect of initiations *ex officio*, the authorities "shall proceed only if they have sufficient evidence of the existence of a subsidy, *injury* and causal link, as described in paragraph 2, to justify the initiation of an investigation."

²⁴² European Communities - Response to Panel question 16.

SCM Agreement that its drafters intended to preclude such situations from the application of countervailing measures.

7.204 With respect to the object and purpose of the *SCM Agreement*, Mexico has argued that the material retardation provisions of the *SCM Agreement* and Article VI:6(a) of the *GATT 1994* would be rendered inutile if the European Communities' interpretation of Article 16.1 were adopted.²⁴³ The European Communities responds that some production would be required even in the case of the "establishment of a domestic industry."²⁴⁴ The European Communities bases its argument on a dictionary definition of the term English term "establish" which it argues means to "set up on a permanent or secure basis", and asserts that this definition indicates that "the term [establishment] does not refer to the point of starting up a business, but to the achievement of a level of maturity".²⁴⁵ However, the European Communities provides only an excerpt of the cited definition. We note that the complete definition does, in fact, refer explicitly to starting up a business. The definition reads in full: "Set up on a permanent or secure basis; bring into being, found (a government, institution, business, etc.)." (Emphasis added.) This view is further confirmed by the corresponding provisions in the Spanish and French texts of the *SCM Agreement*, which are equally authentic, in which the term "establishment" appears as "creación" and "création", respectively. The definitions of these Spanish and French terms also refer to the founding or starting up of a business.²⁴⁶ This broader definition supports the view that the ordinary meaning of the term "establishment" in the context of material retardation includes the starting up, or bringing into being or founding, of an industry, which means that an applicant in such a situation may not yet be a domestic industry. Based on our understanding of the term "establishment of a domestic industry" we are not certain of the exact relevance of the definition in Article 16.1 to a material retardation case. Given that this case does not involve injury in the form of material retardation, we will not address this argument further.

7.205 Based on the ordinary meaning of Article 16.1 read in light of its context and object and purpose, we find that Article 16.1 does not require that an enterprise or group of enterprises seeking countervail remedies must actually produce output around the date of filing of an application or during the subsidy POI to be considered a "producer" or "producers" and therefore part of or the entire "domestic industry" within the meaning of that Article.

(c) Was Fortuny a "Producer" Within the Meaning of Article 16.1 of the *SCM Agreement*

7.206 The determination of whether an enterprise or group of enterprises constitutes a domestic industry must be made on a case-by-case basis, depending upon the particularities and peculiarities of the enterprise or group of enterprises being considered.²⁴⁷ The question before us is whether a real

²⁴³ Mexico - First written submission, para. 209; Mexico - Second written submission, para. 167; see also Japan - Third party submission, paras. 23-24.

²⁴⁴ European Communities - First oral statement, para. 33.

²⁴⁵ European Communities - Response to Panel question 14 citing New Shorter Oxford English Dictionary (Emphasis added.)

²⁴⁶ For example, the Dictionary of the Real Academia Española (online version) provides the following definition for "crear" (create) as: "establecer, fundar, introducir por vez primera algo; hacerlo nacer o darle vida, en sentido figurado. Crear una industria, un género literario, un sistema filosófico..." ("Establish, found, introduce something for the first time; cause to be born or give life to, in the figurative sense. Create an industry, a literary genre, a philosophical system..."). The Dictionary of the Académie Française (online version) defines "création" as, *inter alia*, "3. Action de fonder, d'instituer officiellement... La création d'une entreprise industrielle, ..." ("Action of founding, officially instituting...The creation of an industrial enterprise...").

²⁴⁷ In response to a specific question from the Panel, the European Communities stated that it "does not mean to imply that no account could be taken of producers that operate on a seasonal basis or are for some other reason not producing regularly. The principle should not be applied rigidly, and no doubt in applying it problems could arise because of borderline situations." European Communities - Response to Panel question

applicant, Fortuny in this countervailing duty investigation, could be considered a "producer" and thus constitutes the "domestic producers as a whole" within the meaning of Article 16.1 of the *SCM Agreement*. Therefore, we now turn to examining whether Economía made a reasoned and adequate determination that Fortuny itself constituted a producer within the meaning of Article 16.1 of the *SCM Agreement*.

7.207 The European Communities contends that Fortuny²⁴⁸ had ceased production for the entirety of the investigation period and for that reason "no reasonable investigating authority could have determined that it was an existing industry".²⁴⁹

7.208 Mexico argues that Economía relied upon extensive information in reaching its conclusion that Fortuny was a producer of olive oil, including that Fortuny was the legal and business successor of Formex Ybarra, which had produced olive oil uninterruptedly since the 1940s; that Fortuny had the necessary installations and personnel to produce olive oil; that Fortuny did produce the like product to the investigated imported olive oil during the period of investigation for injury; and that Fortuny was an ongoing business that had never been involved in any liquidation or insolvency proceedings.²⁵⁰

7.209 The record of the investigation demonstrates that during the investigation, Economía examined the questions of whether Fortuny could be considered a producer in spite of having ceased production in March 2002 and whether it had resumed production. As discussed in detail below, starting with Fortuny's application and response to the pre-initiation prevención, Economía obtained information concerning Fortuny's (and its predecessor's) history of olive oil production, monthly data for a number of economic indicators (capacity, production, sales, employment, etc.) for the three prior calendar years, information about the state of its production facilities, and information about its business plan for resuming operations. During the course of the investigation, Economía received additional information from Fortuny, including that it had resumed olive oil production after the imposition of provisional measures. The record of the investigation also indicates that Economía conducted a verification visit to Fortuny's premises, which confirmed the information that had been submitted by Fortuny relating to its plans for resuming operations and its actual resumption of operations.

7.210 Turning in more detail to Economía's examination, we note that the question of whether Fortuny was a "producer" is addressed in the Final Resolution *inter alia* at paragraphs 5 and 58, describing Fortuny's arguments and the information it submitted in this regard; at paragraphs 224, 226, 227 and 400, relating to Fortuny's physical capability to produce olive oil and its resumption of these activities in late 2004; at paragraphs 328-367, concerning the indicators of Fortuny's condition and performance during the period 2000-2002; at paragraphs 368-414, in terms of Economía's assessment of the viability of Fortuny's business plan for restarting operations; and at paragraph 330, in terms of the verification of the information that Fortuny had submitted.

7.211 Paragraph 5 of the Final Resolution describes the information submitted by Fortuny with the application "proving the existence of the applicant's production plant, its production capacity and the availability of raw materials to begin production and the technical feasibility of that production". Paragraph 58 refers to submissions made by Fortuny detailing, *inter alia*, the condition and

13. However, the European Communities declines to provide any specific elaboration as to what constitutes a "borderline" situation or how such situations should or could be differentiated from the one in which Fortuny found itself.

²⁴⁸ We will assume, for the purposes of this section, that Fortuny was the sole domestic producer of olive oil in Mexico, in which case it would have constituted the entire domestic industry for purposes of Article 16.1 of the *SCM Agreement*. We examine the question of whether, in fact, Fortuny was the sole producer in section VII.J.2 *infra*.

²⁴⁹ European Communities - Response to Panel question 143.

²⁵⁰ Mexico - First written submission, paras. 25-28 and 213.

availability of the company's production facilities, the resumption of production, the feasibility of olive oil production, the supply of olives, financing for the purchase of raw materials, activities for marketing and distributing olive oil, volumes and prices of sales, as well as production and financial data for 2004 (i.e., after production was resumed). Paragraph 224 indicates that the information contained in the administrative file showed not only that under certain circumstances it would be viable for Fortuny to resume production, but also that in fact Fortuny did resume production after the provisional countervailing measures were imposed. Paragraphs 226 and 227 indicate that from the outset, Economía had considered Fortuny to have the necessary legal standing to bring the case, because the company was incorporated under the laws of Mexico, and its main activities were the production and transformation of the products of the olive tree, including olive oil. In this regard, Fortuny had submitted documents from Mexican government agencies containing evidence of the existence of its production plant, its production capacity, and the availability of raw materials to start production, and the technical feasibility of that production. Paragraph 400 indicates that during the verification visit, Economía confirmed the nature and condition of Fortuny's production equipment as well as the fact that production was taking place at that time. Paragraphs 328-368 contain a detailed discussion of Economía's analysis of the effects of the investigated imports on Fortuny's condition during the period 2000-2002, i.e., prior to its ceasing operations. Finally, paragraph 330 indicates that as a result of the verification visit, only adjustments of "minor importance" were made to the information submitted by Fortuny.

7.212 Concerning Economía's assessment of the viability of Fortuny's business plan, paragraphs 368-414 of the Final Resolution indicate that Economía questioned and tested a number of the assumptions that Fortuny had presented, and that it also tested the viability of the plan against various arguments and objections raised by the respondent interested parties. These paragraphs also indicate that in respect of a number of variables, Economía substituted more conservative estimates than had been presented by Fortuny, and that during the verification visit to Fortuny, Economía confirmed and adjusted, as necessary, the information that had been submitted by Fortuny. Economía's conclusion at paragraph 414, which was based on its own simulations of various scenarios under Fortuny's business plan, was that "the project to resume production would be financially viable if countervailing duties were imposed on the subsidized imports and financially non-viable if they were not."

7.213 We note that the record of the investigation shows that the olive oil business is, by its nature, a seasonal one. This point was not contested, either in the investigation or in the present dispute. In the case of Fortuny, the record indicates that the picking of olives and the production of olive oil normally took place between December and April (with some variability depending on weather conditions).²⁵¹ Given that Fortuny halted production in March 2002, it had only missed one production season at the time it filed its application, and it produced olive oil in two of the three years under analysis for the determination of injury. Additionally, during the time it was not producing output of olive oil, Fortuny had maintained its olive groves and production facilities, as well as developed a business plan for resuming operations, created a new brand name and label, and prepared its application for countervailing duties. We, therefore, consider that the evidence relied upon and the explanation supplied by Economía reasonably and adequately supports the conclusion that Fortuny was a "producer" during the period of investigation for injury, i.e., that the essential nature of its business, despite a cessation of production for one season, was still the production, distribution, and sale of olive oil.

7.214 We have examined the facts surrounding Fortuny's particular circumstances and have found that Economía reached a reasoned and adequate determination, based on the evidence before it on the

²⁵¹ Exhibit MEX48A (showing a production season of January – June in 1999, January – April in 2000, January – June in 2001, and January – March in 2002); see also Mexico – Response to Panel question 17; Final Resolution (Exhibit EC-1), para. 9.

record, and consistent with Article 16.1 of the *SCM Agreement*, that Fortuny was in fact a producer of the domestic like product.

7.215 Given these conclusions, we find that the European Communities has not established that solely because Fortuny, which had been continuously producing olive oil for many years, was not producing output of olive oil at the time it presented its application or during the subsidy POI, it was not a "domestic producer" within the meaning of Article 16.1 of the *SCM Agreement*.

7.216 For the same reasons, we also find that the European Communities has not established its consequential claims under Article 11.4 of the *SCM Agreement* and Article VI:6(a) of the *GATT 1994*, respectively,²⁵² that because Fortuny was not a producer, and thus could not constitute the domestic industry, both Economía's decision to initiate and its injury determination were inconsistent with Mexico's obligations

7.217 We recall that the European Communities' claims under these provisions relating to the definition of the domestic industry do not end here, but have a second major component, to which we now turn. In particular, the European Communities alleges that even if Fortuny could be considered a producer of the like product, Economía's explanation of its determination that Fortuny constituted the sole producer of the like product, such that Fortuny by itself constituted the entire Mexican domestic industry producing olive oil, could not possibly be reasoned and adequate because Economía had an insufficient factual basis for that determination both at the initiation stage and in the injury investigation. We will address this claim of the European Communities in respect of the initiation of the investigation, under Article 11.4 of the *SCM Agreement*, in section VII.I, below; and we will address this claim in respect of the injury investigation, under Article VI:6(a) of the *GATT 1994* in section VII.J below. In this context, the European Communities cites statements by the Appellate Body that the review by panels of the "factual components" of findings by investigating authorities should focus on whether, in the light of the evidence on the record, the conclusions are "reasoned and adequate".²⁵³

I. ARTICLE 11.4 OF THE *SCM AGREEMENT*

7.218 As noted, in addition to the above-discussed claims based on the legal interpretation of Article 16.1 of the *SCM Agreement*, the European Communities argues that even if Fortuny could have been considered a producer of the like product, Mexico nevertheless acted inconsistently with its obligations under Article 11.4 of the *SCM Agreement* because Economía initiated the investigation without a proper examination of whether there were other Mexican producers of olive oil than Fortuny, and thus without a proper examination of the degree of support for the application. For this reason, the European Communities argues, Economía's determination that the application by Fortuny was made "by or on behalf of the domestic industry" was inconsistent with Article 11.4 of the *SCM Agreement*.

1. Arguments of the Parties

7.219 The European Communities asserts that Economía failed to properly determine that Fortuny had filed the application "by or on behalf of the domestic industry" because it did not adequately investigate the possible existence of domestic producers other than Fortuny prior to the initiation; i.e., that Economía's examination of the degree of support for the application was inadequate and that the initiation therefore was inconsistent with Article 11.4 of the *SCM Agreement*. According to the European Communities, "the investigating authority cannot solely rely on information provided in the

²⁵² See, para. 7.184, *supra*.

²⁵³ European Communities – First written submission, paras. 75 *et seq.*

application of the domestic industry".²⁵⁴ In addition, the European Communities argues that as a factual matter, the material provided by Fortuny either does not support the conclusion that there were no other producers or amounts to mere assertion rather than evidence.²⁵⁵

7.220 Mexico argues that Fortuny was, at the time of its application, the sole domestic producer of olive oil. With respect to the possible existence of olive oil producers other than Fortuny, Mexico argues that the evidence examined by Economía at the time of initiation supports the conclusion that there were no other domestic producers of olive oil.²⁵⁶

2. Reasoning of the Panel

7.221 Article 11.4 reads as follows:

11.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

7.222 We note, first, that Article 11.4 is a standing provision designed to ensure that applicants for countervailing duty investigations are sufficiently representative of the domestic industry producing the like product. As such, this provision requires an investigating authority to make a determination as to whether "the application has been made by or on behalf of the domestic industry." This determination is to be undertaken "on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product".

7.223 As noted above, Article 16.1 provides for two distinct bases on which to identify the domestic industry: the domestic producers as a whole of the like products or those of them whose collective output of those products constitutes a major proportion of the total domestic production of those products. In circumstances in which, as in the case before us, an applicant claims to constitute the entire domestic industry, two questions are raised for the investigating authority: (1) whether the applicant is a domestic "producer" of the like products; and (2) assuming that the answer to the first question is "yes", whether it constitutes the domestic producers as a whole, in which case it would constitute the entire domestic industry. Where an investigating authority has reached the conclusion that an applicant constitutes the entire domestic industry producing the like product, that authority will not, in practice, need to undertake the measurement and weighing exercise contemplated by the second and third sentences of Article 11.4. Rather, in such a situation, the criteria in those sentences necessarily will be satisfied. Factually, this is what occurred in the case before us: Economía concluded on the basis of the evidence before it that Fortuny constituted the domestic producers as a

²⁵⁴ European Communities - Second oral statement, para 12.

²⁵⁵ Ibid., paras 37-45; European Communities - Second written submission, paras. 17-22.

²⁵⁶ Mexico – First written submission, paras. 38-44.

whole of the like products and, as a result, did not engage in further measurement of the degree of support for the application.²⁵⁷

7.224 The questions underlying this claim of the European Communities relate to the quality and reliability of the evidence on which Economía relied. The European Communities makes essentially two arguments: first, that as a legal matter, investigating authorities are precluded from basing their standing determinations pursuant to Article 11.4 of the *SCM Agreement* solely on the information provided in the application; and second, that the factual information provided by Fortuny in the olive oil investigation was an insufficient basis for the conclusion that Fortuny was the sole Mexican producer of olive oil.

7.225 Concerning the first of these arguments, we see no language in Article 11.4, or in the *SCM Agreement* generally, prohibiting an investigating authority from basing its determination that an application has been made "by or on behalf of the domestic industry" solely on evidence provided by the applicant. In fact, there is no reference at all in Article 11.4, or elsewhere in the *SCM Agreement*, to particular sources of information that must or must not be used as the basis for this determination. The only stipulations concerning the quality of the evidence provided in an application are the general requirements in Articles 11.2 and 11.3 of the *SCM Agreement* (neither of which the European Communities has cited in its claims), that "simple assertions, unsubstantiated by relevant evidence, cannot be considered sufficient" for purposes of an application, and that the authority must "review the accuracy and adequacy of the evidence provided in the application". The focus of these provisions is on the quality and credibility of the evidence, rather than on its exact source.

7.226 Concerning the quality of the evidence to be used for standing determinations generally, we recognize that depending upon the specific nature of the information provided by an applicant in a particular case, an investigating authority might need to obtain additional supplementary or corroborating information in order to have a sufficient basis for its determination. If, however, the application itself contains factual evidence that corroborates the assertions of the applicant, no further information may be required. We consider pertinent the findings in past disputes that while an applicant need only provide in an application such information as is "reasonably available" to it, and such information need not be of the quantity and quality that would be required in order to make a preliminary or final determination, the information nevertheless may not constitute sufficient evidence to justify initiation, and an investigating authority, *may*, but is *not required to*, seek additional information to supplement that contained in the application.²⁵⁸

7.227 In this context, we disagree with the European Communities that the evidentiary standard applicable to a determination of standing is higher than the standards applicable to determinations of subsidization, injury and causation for the purposes of initiation.²⁵⁹ In particular, we see no textual basis for such a distinction, and consider that all of the information in an application, which pursuant

²⁵⁷ In its application Fortuny stated that "Fortuny constitutes 100 per cent of the domestic industry" Exhibit MEX-41A (proprietary version Exhibit MEX-51A) and Economía, in the Initiation Resolution (Exhibit EC-13), accepted this assertion. In particular, the Initiation Resolution contains two statements to this effect. In paragraph 22 under the heading "Standing" ("*Legitimación*"), the Resolution states "On the basis of written communications from the Department of Agriculture of the Government of the Free and Sovereign State of Baja California, Fortuny represents 100 per cent of the domestic industry, because it is the only company with the necessary economic and financial conditions and investments needed to establish a domestic industry in the United Mexican States in the product investigated, thus fulfilling the conditions in Article 11.4 and 16.1 of the *SCM Agreement*, Articles 40 and 50 of the Foreign Trade Law, and Articles 60 and 75 of the Foreign Trade Regulation." At paragraph 48, under the heading "Domestic Market", the Initiation Resolution states: "Therefore, in terms of capacity and facilities for producing the product most closely resembling or similar (virtually identical) to the one imported, Fortuny constitutes 100 per cent of the domestic industry".

²⁵⁸ See, e.g., Panel report in *Mexico – Corn Syrup*, para. 7.74.

²⁵⁹ European Communities - First oral statement, para. 36.

to Article 11.2(i) of the *SCM Agreement* includes information specifically pertaining to the standing determination of Article 11.4, is subject to the same qualitative "sufficiency" standard referred to in Article 11.3 of the *SCM Agreement*.

7.228 For these reasons, we consider that whether or not an investigating authority needs to obtain information beyond that contained in the application regarding the standing of an applicant is a matter to be decided on a case-by-case basis. Moreover, we see nothing in Article 11.4, the only provision cited by the European Communities, which requires an investigating authority in every case to seek additional information over and above the information provided by the applicant pertaining to its standing to request the investigation.

7.229 Moving to the second argument of the European Communities, concerning the evidence relied upon by Economía, Mexico confirmed to us that Economía relied solely on information provided by Fortuny in reaching its determination for the purposes of initiation that Fortuny was the only Mexican producer of olive oil.²⁶⁰ What Economía considered, in particular, was the information provided in, and attached to, Fortuny's application of 12 March 2003 and the additional information provided by Fortuny on 9 May 2003 in response to Economía's pre-initiation *prevención*.

7.230 Mexico identified the information provided by Fortuny, and examined by Economía, as the following:

- (a) statements made by Fortuny concerning the state of the domestic industry;
- (b) letters dated 3 October 2002, and 27 and 28 January 2003, from the state of Baja California in respect of Fortuny's productive capacity (these were attached to the application); and
- (c) information contained in the article "El Olivo, Eco del Mediterraneo" in the journal *Claridades Agropecuarias* ("*Claridades* article"), published June 2001 by the Government Agency the "Agricultural Marketing Support and Services" ("ASERCA") of the Federal Ministry of Agriculture, Livestock, Rural Development and Food (this article was also attached to the application).

The statements of Fortuny, the letters from Baja California, and the *Claridades* article are all referred to in the Initiation Resolution.²⁶¹

7.231 We note, and consider significant, that although all of this information was provided by Fortuny, much of it was from sources other than Fortuny, in particular, from government sources. The substance of this evidence is discussed below.

7.232 In its application, Fortuny stated that it constituted 100 per cent of the domestic industry. In making this statement Fortuny acknowledged that there was a "small cottage industry consisting of estates that produce hand pressed oil".²⁶² It did not, however, consider that those estates constituted part of the domestic olive oil industry as Fortuny was "the only firm in Mexico able to market its products through the same channels as the products under investigation".²⁶³ In its reply to Economía's *prevención*, Fortuny supplied information in respect of production and installed capacity both for Fortuny and for Mexican producers as a whole. That information indicated that Fortuny's historic production and current installed capacity were the same as national production and installed capacity

²⁶⁰ Mexico – Response to Panel question 103.

²⁶¹ Initiation Resolution (Exhibit EC-13), paras. 4, 19.

²⁶² Exhibit MEX – 41A (proprietary version at Exhibit MEX – 51A), para. 30.

²⁶³ Ibid.

(i.e., that there were no other domestic producers of olive oil, such that Fortuny constituted the entire domestic industry in respect of both production and installed capacity).²⁶⁴ No source is indicated in respect of this information, and we assume that it was based on Fortuny's records of its production and knowledge of its own capacity.

7.233 Fortuny attached to its application two letters from the Government of the State of Baja California.²⁶⁵ While the letters do not state that there were no other olive oil producers in Mexico or Baja California, they also do not mention or imply the existence of any producers other than Fortuny. The letters indicate that Fortuny maintained a production facility in good repair and that olives were available in the region to supply that facility should Fortuny make a decision to re-start production.

7.234 The *Claridades* article was published by the ASERCA programme of Mexico's Federal Ministry of Agriculture, Livestock, Rural Development and Food. Mexico submits that this is an authoritative body, and the European Communities does not contest this.

7.235 In submissions made before us, there was considerable discussion by the parties as to the meaning of a sentence at page 12 of the *Claridades* article which, reads as follows:

The main companies established in Mexico that process olives for [table consumption] are Ybarra and Bufalo and for oil only the former.²⁶⁶

Mexico considers that this statement indicates that there were two main companies in Mexico that processed olives for table consumption, but only one company that processed olives for oil, namely Ybarra (predecessor to Fortuny).²⁶⁷ The European Communities' position is that the adjective "main" refers both to the companies producing table olives and the companies producing oil (i.e., that Ybarra and Bufalo were the *main* companies producing table olives while Ybarra was the *main* company producing olive oil). For the European Communities, the use of the term "main" as applied to the production of olive oil implies that there were other entities producing olive oil, and it argues that on this basis Mexico was obliged to conduct further investigations to identify such entities and, presumably, to consider their production volume and support for the application in addressing standing pursuant to Article 11.4 of the *SCM Agreement*.²⁶⁸

7.236 Considered in isolation, it is unclear to us whether the term "main" in the quoted passage is intended to apply to the production of olive oil or only to the production of table olives. We note, however, that while elsewhere in the *Claridades* article there are references to production and marketing of olive oil by Ybarra (predecessor to Fortuny), there are no references to the production of olive oil by any other entity (with the limited exception of experimental artisanal production). Furthermore, in respect of brands of olive oil marketed in Mexico, the Ybarra (Fortuny) brand is the only domestic brand identified in the *Claridades* article.²⁶⁹ We consider that the *Claridades* article taken as a whole supports the proposition that Fortuny was the only producer of olive oil operating in Mexico.

7.237 We thus find, as a matter of fact, that there was no concrete evidence, in any of the information that was before Economía at the time it took the decision to initiate, that there were

²⁶⁴ Exhibit MEX – 45 (proprietary version at Exhibit MEX – 51B1).

²⁶⁵ Exhibit MEX- 39 .

²⁶⁶ *Claridades Agropecuarias* (Exhibit EC – 30), p.12. The Spanish version of the text refers to olives for "aderezo" which the European Communities explained to the Panel in response to Panel question 132 is "the process to transform olives harvested from the olive tree into table olives."

²⁶⁷ Mexico – First written submission, paras. 39-40.

²⁶⁸ European Communities – First oral statement, para. 40.

²⁶⁹ *Claridades Agropecuarias*, p. 14, 15, and p.19 (where, in the table comparing prices of olive oil by brand name, Ybarra is the only Mexican company listed, all others are from Spain and Italy) (Exhibit EC-30)

producers of olive oil other than Fortuny (except for small artisanal producers) operating in Mexico. Furthermore, we consider that the information was credible. In particular, although all of the material was provided by Fortuny, it included documents from external, government sources, in particular a government publication dedicated to an examination of the Mexican olive and olive oil industry. Upon examining the totality of the evidence that was before Economía at the time of initiation²⁷⁰, we find that Economía reasonably and adequately could have concluded, for purposes of the standing determination, that there were no other domestic producers of olive oil and that Fortuny thus constituted the entire domestic industry.

7.238 For the above reasons, we find that the European Communities has not established that Mexico acted inconsistently with its obligations under Article 11.4 of the *SCM Agreement* when it determined that the application was made "by or on behalf of" the domestic industry.

J. ARTICLE 16.1 OF THE *SCM AGREEMENT* AND ARTICLE VI:6(a) OF THE *GATT 1994*

7.239 In addition to its claim that Fortuny was not a producer within the meaning of Article 16.1 of the *SCM Agreement*, the European Communities also challenges, assuming that Fortuny was a producer, the factual basis of Economía's conclusions that there were no Mexican producers of olive oil other than Fortuny, thus constituting the entire domestic industry. In particular, the European Communities asserts that Economía's investigation into the possible existence of other olive oil producers was inadequate and that, as a consequence, Economía's conclusions concerning the extent of the domestic industry were not reasoned and adequate. For these reasons, the European Communities maintains Mexico's injury analysis was purely speculative and that Economía did not provide a reasoned and adequate explanation of its findings, and was therefore in contravention of its obligations under Article 16.1 of the *SCM Agreement*, as a consequence of which its injury findings also were in breach of Article VI:6(a) of the *GATT 1994*.²⁷¹

1. Arguments of the Parties

7.240 On the question of whether there were Mexican producers of olive oil other than Fortuny, the European Communities argues that the investigative record contained evidence (including the *Claridades* article discussed above, as well as information and arguments presented by respondent interested parties in the investigation) demonstrating that other producers existed. According to the European Communities, Economía's efforts to pursue this issue were inadequate, and the evidence on the record did not support the conclusion that there were no olive oil producers other than Fortuny. We understand the European Communities' argument to be that because of these alleged flaws in the factual basis underlying Economía's conclusion that Fortuny constituted the entire domestic industry, that conclusion was not reasoned and adequate, and thus Economía's injury determination was not made with respect to "the domestic industry" as required by Article 16.1 of the *SCM Agreement* and was therefore also inconsistent with Article VI:6(a) of the *GATT 1994*.

7.241 Mexico disputes the European Communities' characterization of Economía's analysis of the possible existence of producers other than Fortuny, arguing that the European Communities has relied

²⁷⁰ We consider that the relevant question facing Economía was not whether any individual document or statement was a sufficient basis for a conclusion that Fortuny was the sole domestic producer but, rather, whether upon examining the evidence in its totality Economía could reasonably reach that conclusion. This is consistent with the decision of the Panel in *Mexico – Steel Pipes and Tubes* (at para. 7.24) in respect of the obligation of an investigating authority to consider the accuracy and adequacy of information provided in an application pursuant to Article 5.3 of the *Anti-Dumping Agreement* (the counterpart to Article 11.3). There the panel noted: "... a piece of evidence that on its own might appear to be of little or no probative value *could*, when placed beside other evidence of the same nature, form part of a body of evidence that, in totality, was 'sufficient'."

²⁷¹ European Communities – First written submission, paras. 188-189.

on isolated sentences and paragraphs in the Final Resolution which can in no way be regarded as a valid basis for its arguments, and has ignored other relevant facts with respect to the investigating authority's enquiries into the possible existence of other producers.²⁷² Mexico also maintains that the European Communities has not satisfied its burden to present a *prima facie* case. Mexico argues that "even though the EC has indicated some other possible additional enquiries, these do not suffice to disregard the authority's evaluation of the extent of the domestic industry."²⁷³ Mexico contends furthermore that the replies from other government agencies, while not unequivocal, indicated that their records contained no indications that any other domestic producers existed.²⁷⁴ Mexico also maintains that the European Communities advances an unreasonable and unacceptable standard that would require an investigating authority to undertake enquiries *ad infinitum* even when it had collected sufficient information to conclude that there were no other producers.²⁷⁵

2. Reasoning of the Panel

7.242 We consider that this claim of the European Communities raises two questions: first, whether the efforts undertaken by Economía were adequate and reasonable, and second, whether the information before Economía in its investigation concerning the extent of the domestic olive oil industry reasonably supported its conclusion that there were no olive oil producers in Mexico other than Fortuny. We examine these on the basis of the relevant facts from the investigation as reflected in the Preliminary and Final Resolutions and other information contained in the investigative record. In doing so, we are mindful that according to the applicable standard of review, our task is to consider whether the evidence relied upon, and explanation provided by, Economía reasonably supports its conclusion that Fortuny was the only domestic producer of olive oil.²⁷⁶

7.243 We start our analysis by considering Economía's efforts to determine whether there were domestic olive oil producers other than Fortuny. The European Communities' characterizes those efforts as follows:

First, Economía contacted a Mexican firm, Maprinsa, alleged by the exporters to be producing olive oil. Economía reported that Maprinsa explained that it was engaged solely in bottling and packaging olive oil, and not in producing it. However, the Ministry apparently made no attempt to discover from Maprinsa whether the oil that it bought was of Mexican or foreign origin.

Second, Economía showed a similar lack of initiative when investigating two other firms that were revealed to be engaged in bottling only, and in regard to yet two more firms that were named as possible producers, Economía either relied on a third party's view or did nothing at all to determine the nature of their activities.²⁷⁷ In addition, Economía simply dismissed artisanal production as irrelevant because it was not distributed through the same channels as imports.

Third, Economía contacted a national association of oil and edible fat industries, but this association merely confirmed that Fortuny was the only olive oil producer registered with it and that it had no registrations of any domestic producer other than Fortuny. This carefully

²⁷² Mexico – First written submission, para. 157-204, citing Final Resolution (Exhibit EC-1), paras. 212 – 255.

²⁷³ Mexico – Second written submission, para. 136.

²⁷⁴ Ibid., para. 151.

²⁷⁵ Ibid., para. 154.

²⁷⁶ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 188.

²⁷⁷ (footnote original) Final Resolution (Exhibit EC-1), para. 241.

worded response, by avoiding the larger issue of whether the association knew of any other producers, does not inspire confidence.

Fourth, Economía contacted several government organisations, but these proved unable to provide relevant information. Despite this failure, Economía made no further efforts to gain information from government sources.²⁷⁸

7.244 The European Communities asserts that these enquiries were "limited" and argues that they "produced answers that any serious body would regard as demanding follow up questions."²⁷⁹ Additionally, the European Communities alleges that "in its enquiry about other national producers, [Economía] never wrote to the authorities of the States of Baja California and Sonora, which are regions where the Final Resolution declares that olive tree cultivation plays an important economic role."²⁸⁰

7.245 We have reviewed the Preliminary and Final Resolutions, as well as the actual correspondence from the record provided to us by Mexico, relating to Economía's enquiries as to the possible existence of other domestic producers. We find that, as matters of fact, in response to representations of respondent interested parties on this issue, Economía undertook the following steps in conducting its examination of this question:

- (a) Economía sent a letter to Maprinsa on 15 December 2003, asking *inter alia* whether it knew of any other domestic producers of olive oil and whether the olives it used were of Mexican origin and who its suppliers were.²⁸¹ Maprinsa's reply of 5 January 2004 indicated that it knew of three other domestic olive oil manufacturers (Olivos de California, Olivarera Tulyehualco, and Conservas Vermex). It also indicated that it did not buy olives, but olive oil which it bottled. Maprinsa also provided the trade names under which it sold its olive oil (San Lucas and El Olivo).²⁸²
- (b) In response to assertions by Fortuny that Maprinsa's product was not olive oil, Economía contacted on 8 December 2003 a laboratory company, Bufete Químico, which had been provided a sample of Maprinsa's oil by Fortuny. Economía asked for a copy of the laboratory report as well as assurances that the sample bore Maprinsa's trade name and had not been tampered with.²⁸³ Bufete Químico confirmed on 17 December 2003 that it had received a properly closed bottle with a label bearing Maprinsa's trade name "San Lucas, Aceite de Oliva, Gourmet" which it determined was not olive oil, but rather canola (rapeseed) oil.²⁸⁴
- (c) Economía on 8 December 2003 sent a request to the Mexican Industrial Property Institute ("IMPI") seeking information on Maprinsa's brand names and whether IMPI's database indicated if Maprinsa's products were manufactured in Mexico or only packaged there. Economía also requested information on the number of olive oil brands registered with IMPI and if their nationality could be discerned.²⁸⁵ IMPI responded on 19 January 2004 that San Lucas was registered to Maprinsa and that El Olivo was registered in the name of C. Luis Fernando Peniche Gallareta. IMPI also noted that there were 13,915 marks in international class 29, which includes edible

²⁷⁸ European Communities – First written submission, paras. 168-171.

²⁷⁹ European Communities - First written submission, para. 172.

²⁸⁰ Ibid., para. 105.

²⁸¹ Exhibit MEX-9

²⁸² Exhibit MEX-10. See also, Preliminary Resolution (Exhibit EC-22), paras. 193-194.

²⁸³ Exhibit MEX-11.

²⁸⁴ Exhibit MEX-12.

²⁸⁵ Exhibit MEX-13

oils and fats as well as meat, fish, birds, meat extracts, preserved fruits and vegetables, gelatines, marmalades, compotes, eggs, milk and milk products.²⁸⁶

- (d) Economía also sent letters to Conservas Vermex and Olivarera Tulyehualco, dated 15 October 2004, asking them to explain their products, whether they produced olive oil or imported and bottled it or both. Economía also asked them to explain their brands and distribution channels and to explain the inputs utilized in the production of olive oil and whether these inputs were of national origin or imported. Economía also asked them to indicate from where they acquired the inputs.²⁸⁷ Both companies, in replies dated 21 October 2004 and 1 November 2004 respectively, stated that they did not produce olive oil, but only bottled it.²⁸⁸ Conservas Vermex explicitly stated that it imported its olive oil from Spain and other Mediterranean countries which it purchased in bulk at the port of Veracruz.²⁸⁹ Olivarera Tulyehualco indicated that it only bottled olive oil which it purchased from a supplier in Baja California Norte. Additionally, Olivarera Tulyehualco provided labels for its oil products. One referred to "Aceite Vegetal" the other to "Aceite Puro de Oliva". Both labels indicated that the product was bottled by Olivarera Tulyehualco which was a registered import export company. There was no reference to the origin of the oil on either label.²⁹⁰
- (e) Economía sent a letter on 8 December 2003 to the National Association of Oil and Edible Fat Industries ("ANIAME") asking for information on domestic companies that produced olive oil: their number, names, and addresses as well as the brands under which they distributed. Economía also asked for information on the volume of domestic production in the years 1998-2003 and whether ANIAME had information on the current state of the olive oil industry.²⁹¹ ANIAME replied on 8 January 2004 that Fortuny was the sole olive oil producer registered with the association.²⁹²
- (f) Economía sent a letter on 8 December 2003 to the National Association of Self-Service and Department Stores ("ANTAD"), a group of some of the major self-service and commercial distribution stores in Mexico, requesting information on any domestic olive oil producer known to them.²⁹³ The ANTAD transmitted the request to two of its associates, Grupo Gigante and Comercial Mexicana.²⁹⁴ Grupo Gigante did not respond, but Comercial Mexicana responded on 17 December 2003 that it imported its olive oil from Italy and Spain and that it had not received any offers to market oil from any Mexican company.²⁹⁵ Economía also sent independent letters to those two companies, on 4 October 2004.²⁹⁶
- (g) Economía on 4 October 2004 sent requests for information to major self-service and department stores who were not members of ANTAD. These included Nueva Wal Mart, Grupo Corvi, Servicio Comercial Garis and La Europea Mexico.²⁹⁷ La Europea responded on 15 October 2004 that it purchased imported olive oil and that it had received offers from Maprinsa.²⁹⁸ Grupo Corvi replied on 11 October 2004 that it had

²⁸⁶ Exhibit MEX-40.

²⁸⁷ Exhibits MEX-14, 15.

²⁸⁸ Exhibit MEX-16, 17.

²⁸⁹ Exhibit MEX-16.

²⁹⁰ Exhibit MEX-17.

²⁹¹ Exhibit MEX-18.

²⁹² Exhibit MEX-19.

²⁹³ Exhibit MEX-22.

²⁹⁴ Exhibit MEX-23.

²⁹⁵ Exhibit MEX-26.

²⁹⁶ Exhibits MEX-24, MEX-25

²⁹⁷ Exhibits MEX-27, 28, 29, and 30.

²⁹⁸ Exhibit MEX-31.

not purchased Spanish or Italian olive oil and that it had received an offer from a Mexican company which was marketing "Carbonell" olive oil, a Spanish brand.²⁹⁹ Servicio Comercial Garis replied on 14 October 2004 that it had purchased Spanish olive oil and had not received any offers for domestically-produced olive oil.³⁰⁰

- (h) Economía sent letters to the government of the state of Baja California Norte, to SAGARPA (the federal authority for the agriculture and livestock sector), and to ASERCA a sub-division of SAGARPA, on 8 December 2003.³⁰¹ These letters asked for information (1) about the harvest of olive trees in the years 2000 through 2003 as well as the volume of table olives obtained and those destined for olive oil (as well as the conversion factor of olives necessary to produce one litre of olive oil); (2) information on olive tree plantations in Mexico; and (3) information, if possible statistical, bibliographic and/or hemerographic explaining the situation of the national productive industry for olive oil.³⁰² ASERCA responded to Economía on 19 January 2004 by indicating that the National System of Information for Rural Sustainable Development would have any relevant statistics and geographic information of the agriculture and fisheries sector.³⁰³
- (i) Based on its request mentioned in paragraph (h) above, Economía engaged in correspondence with the government of Baja California Norte. The Government of Baja California responded on 15 December 2003 to the initial request with a letter explaining the total available hectares in the Coastal Zone as well as the percentage of the hectarage (40 per cent) that was destined for oil production. It also annexed a table listing plantations in Baja by hectare, variety and capacity.³⁰⁴ Fortuny is listed in the table as having a plantation, but so are a variety of other companies. Economía then sent an additional request on 18 December 2003 to the Government of Baja California asking it about its specific knowledge of Fortuny as well as to indicate the addresses of the companies listed in the table and which ones other than Fortuny were then producing, had produced, or would produce olive oil.³⁰⁵ The Government of Baja California responded on 9 January 2004 with more information about Fortuny and again attached the same table from its earlier letter, which was now titled "Agroindustries of Olive Trees in Baja, CA". The third column, entitled "capacity" now had indicators for specific companies separating "olives" and "oil".³⁰⁶
- (j) Economía on 8 December 2003 also requested information from the Office of the Federal Attorney-General for Consumer Affairs and the Directorate General of Standards.³⁰⁷ The Directorate General of Standards on 29 January 2004 provided a copy of the Official Journal entry for the norm NMX-F-109-1982 Foods-Olive Oil, which set quality specifications for olive oil, and noted that compliance with these specifications was voluntary.³⁰⁸

²⁹⁹ Exhibit MEX-32.

³⁰⁰ Exhibit MEX-33.

³⁰¹ Exhibits MEX-49A, 49B, and 49C

³⁰² Ibid.

³⁰³ Exhibit MEX-49G.

³⁰⁴ Exhibit MEX-49D.

³⁰⁵ Exhibit MEX-49E.

³⁰⁶ Exhibit MEX-49F.

³⁰⁷ Exhibits MEX-20, 21. See also Preliminary Resolution (Exhibit EC-22), paras. 193-195; Final Resolution (Exhibit EC-1), paras. 231-232.

³⁰⁸ Exhibit MEX-49H

- (k) Economía consulted the magazine *Claridades Agropecuarias*, which is published by SAGARPA, for information about the company Llanos de San Francisco as well as the possibility of olive oil production in the state of Sonora.³⁰⁹
- (l) The European Communities, on 9 January 2004 submitted a letter, containing a table comparing purported figures for Mexican olive oil production from the International Olive Oil Council ("IOOC") and from the United Nations Food and Agriculture Organization ("FAO"). The data from the IOOC listed Mexican production of olive oil in 1999/2000 as 1,000 tons; 2000/2001 as 1,500 tons; and 2001/2002 as 2,000 tons. The figures from the FAO listed domestic production in all three years as 200 tons. This was consistent with Fortuny's production data set forth in Table 9 of the Preliminary Resolution.³¹⁰
- (m) Economía described the arguments and evidence submitted by the parties to the investigation in respect of this question, the efforts that it undertook and the evidence it obtained thereby in pursuing this issue, and its reasoning and conclusions with respect to the non-existence of other producers, at paragraphs 212-255 of the Final Resolution.

7.246 In addition to the above-described steps undertaken by Economía, we note that during the proceedings, no other Mexican company came forward presenting itself as a domestic producer, in spite of the calls in the Initiation and Preliminary Resolutions to any such companies that might have an interest in the proceedings, and therefore that no producer objected to the investigation.³¹¹

7.247 We have carefully considered both the above-cited steps and the underlying evidence on the record provided to us, as well as the descriptions in the Final Resolution of Economía's efforts, the evidence it obtained, and the reasoning underlying its conclusion that there were no Mexican olive oil producers other than Fortuny. We disagree with the European Communities' characterization that Economía's efforts were cursory or superficial. To the contrary, the record indicates that Economía went to considerable lengths to determine whether there were domestic producers other than Fortuny, that Economía was responsive to representations made by respondent interested parties on this issue during the investigation, and that it pursued this issue with considerable vigour. We also do not see any evidence in the investigative record demonstrating that there were producers other than Fortuny. To the contrary, there is no concrete indication in the record evidence that we have reviewed or in the Preliminary and Final Resolutions that there were any domestic producers other than Fortuny and, none came forward during the course of the investigation. We thus consider that the European Communities has not established either that Economía's efforts to pursue this issue were inadequate or that the relevant record evidence was insufficient to support a finding that there were no olive oil producers other than Fortuny in Mexico. For those reasons, we find that the evidence relied upon and the explanation provided by Economía reasonably support its conclusion that there were no domestic olive oil producers other than Fortuny during the injury period of investigation.

7.248 On the basis of the foregoing, we find that Economía provided a reasoned and adequate explanation in the Final Resolution on the basis of the evidence on the record as to why it determined that Fortuny was the only domestic producer, of olive oil, and thus constituted the "domestic producers as a whole" of the like product within the meaning of Article 16.1 of the *SCM Agreement*. We also find that the European Communities has not demonstrated that the factual basis underlying Economía's conclusion that Fortuny was the only Mexican producer of olive oil was insufficient and

³⁰⁹ Mexico – First written submission, para. 180; Mexico – Response to Panel question 73.

³¹⁰ Exhibit MEX-36 and Exhibit EC-28. Neither study was actually provided by the European Communities in its submissions to Economía during the investigation. Mexico notes that the IOOC data presented by ASOLIVA and ASSITOL did not list Mexico as a producer of olive oil. See Exhibits MEX-34 and MEX-35.

³¹¹ Final Resolution (Exhibit EC-1), para. 254.

inadequate, and therefore has not demonstrated that Mexico acted inconsistently with its obligations under Article 16.1 of the *SCM Agreement* and consequently with Article VI:6(a) of the *GATT 1994* on this basis.

K. ARTICLES 15.1 AND 15.4 OF THE *SCM AGREEMENT* AND ARTICLE VI:6(a) OF THE *GATT 1994*

7.249 The European Communities claims that Mexico failed to make a determination of injury based on positive evidence involving an examination of all relevant economic factors and indices having a bearing on the state of the industry and to provide a reasoned and adequate explanation of its injury determination, and thus has acted inconsistently with its obligations under Article VI:6 of the *GATT 1994* and Articles 15.1 and 15.4 of the *SCM Agreement*.

1. Arguments of the Parties

7.250 The European Communities makes a variety of arguments with respect to the consistency of Mexico's injury determination with Article VI:6 of the *GATT 1994* and Articles 15.1 and 15.4 of the *SCM Agreement*.

7.251 First, the European Communities argues that there was confusion as to whether Economía's injury determination was based on a finding of material retardation or material injury and that a simultaneous finding of both types of injury was inconsistent with Article VI:6.³¹²

7.252 Second, the European Communities argues that Mexico has acted inconsistently with Article 15.1(a) in its analysis of the volume of subsidized imports and the effect of the subsidized imports on prices in the domestic market for the like product.³¹³ In particular, the European Communities claims that the lack of "actual" price data for 2002, the period of investigation for subsidy, meant that Economía's determination of price undercutting was inconsistent with the obligation in Article 15.1 to make a determination based on positive evidence and pursuant to an objective examination.³¹⁴ The European Communities argues that the period of time when the injury and subsidy investigations overlap is crucial. In the European Communities' view, "unless there is output (allowing for temporary interruptions) during that overlapping period no finding of the existence of injury or domestic industry can be made."³¹⁵

7.253 Third, the European Communities raises various criticisms of the time frames used in Economía's examination of the impact of the subsidized imports on the domestic industry. The European Communities maintains that Economía's analysis was "confused" and that the time frame was repeatedly moved, sometimes focusing on what happened during the investigation period and earlier, and sometimes on the future.³¹⁶ In particular, the European Communities takes issue with the lack of production by Fortuny from April – December 2002, the period of investigation for subsidy, which it claims is the "central and irreplaceable element of the concept of industry."³¹⁷

7.254 Fourth, the European Communities argues that Economía failed to properly identify a domestic industry that suffered material injury, in that, "if there is no production there is no industry,

³¹² European Communities – First written submission, para. 194-200 citing, Panel Report, *Korea – Resins*, para. 222.

³¹³ European Communities – First written submission, paras. 201-207; European Communities – First oral statement, para. 112.

³¹⁴ European Communities – First written submission, paras. 204-207; European Communities – First oral statement, para. 112; European Communities – Response to Panel question 82; European Communities – Second written submission, paras. 55, 59.

³¹⁵ European Communities – Second written submission, para. 59.

³¹⁶ European Communities – First written submission, para. 211.

³¹⁷ *Ibid.*, para. 211-213.

and if there is no industry there can be no material injury, as that term is used in the *SCM Agreement*.³¹⁸

7.255 Finally, the European Communities also alleges that the use of successive nine-month investigation periods constantly undermines the injury analysis, and that "the use of 9-month periods for collecting data, overlapping with some data extending over 12 months, added a major element of unreliability while at the same time introducing needless complexity."³¹⁹ The European Communities maintains that the data from the three months excluded from each year could have significantly affected the results of the investigation.³²⁰ The European Communities argues that Economía's use of the nine-month periods is inconsistent with the obligation to conduct an "objective examination" in Article 15.1 which governs all aspects of the injury determination including the analysis of relevant economic factors having a bearing on the state of the industry pursuant to Article 15.4.³²¹ The European Communities also notes that in two recent disputes, the same practice by Mexico was found not to provide an accurate and unbiased picture of what was being examined.³²²

7.256 Mexico argues that its final determination was based on a finding of "material injury" to the domestic industry, not material retardation.³²³ With respect to the determination of the effect of subsidized imports on prices of the domestic like product, Mexico argues that it made its price undercutting analysis properly and that the data it used for Fortuny's prices during the time it was not producing were consistent with the concept of "positive evidence" in Article 15.1.³²⁴

7.257 Concerning the argument that Economía failed to properly identify a domestic industry that suffered material injury because Fortuny lacked production during the subsidy POI, and thus could not constitute the domestic industry, Mexico disagrees, for the reasons set forth at para. 7.183, *supra*.

7.258 With respect to its obligations under Article 15.4, Mexico asserts that Economía properly examined all relevant economic factors and that the evidence weighed in favour of making an affirmative determination of material injury to Fortuny from subsidized imports from Spain and Italy.³²⁵ Mexico argues that the European Communities is wrong that because there was no production during the period of investigation, it was not possible to determine material injury, and refers the Panel to Economía's analysis in the Final Resolution.³²⁶ Mexico also notes that Economía found "material injury" on the basis that Fortuny was prevented from resuming operations.³²⁷

7.259 Finally, regarding the use of the successive nine-month periods for the injury analysis, Mexico makes several arguments. First, Mexico states that Economía's analysis of trends and performance relating to the relevant factors was not limited to comparable periods for the three years (April-December 2000, 2001 and 2002), but also took into account monthly or annual data with the objective of gaining a more precise picture of the situation.³²⁸ Second, Mexico argues that the

³¹⁸ European Communities – Second oral statement, para. 63.

³¹⁹ European Communities – Second written submission, para. 53.

³²⁰ European Communities – First oral statement, paras. 115 – 117; European Communities – Second written submission, para. 53.

³²¹ European Communities – First oral statement, para. 117 citing Appellate Body Report, *US – Hot Rolled Steel*, para. 193.

³²² *Ibid.*, citing Appellate Body Report, *Mexico – Rice*, para. 180; Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.252.

³²³ Mexico – First written submission, para. 219-223 citing Preliminary Resolution (Exhibit EC-22), para. 219 and Final Resolution (Exhibit EC-1), para. 279.

³²⁴ Mexico – First written submission, paras. 236-237.

³²⁵ Mexico – First written submission, paras. 248-277.

³²⁶ *Ibid.*, at para. 260.

³²⁷ *Ibid.*, at para. 261.

³²⁸ *Ibid.*, para. 253.

European Communities' statement that the nine-month period undermined the objectivity of the examination of injury is a mere assertion. Mexico also notes that the *SCM Agreement* does not lay down any guidelines concerning the period of time that should be considered in carrying out the injury analysis, and that therefore it did not act inconsistently with the *SCM Agreement*.³²⁹

2. Reasoning of the Panel

7.260 The European Communities claims that Economía's "failure to make a determination of injury based on positive evidence involving an examination of all relevant economic factors and indices having a bearing on the state of the industry and to provide reasoned and adequate explanation" is inconsistent with Mexico's obligations under Article VI:6 of the *GATT 1994* and Articles 15.1 and 15.4 of the *SCM Agreement*.³³⁰ The European Communities' claims raise issues of both law and fact. We first consider the nature of the legal obligations under Articles 15.1 and 15.4 of the *SCM Agreement*, and we then consider whether Economía's actions in the olive oil investigation were, as alleged by the European Communities, inconsistent with those obligations.

7.261 Before turning to these arguments, we recall that the European Communities claims that Economía's injury determination failed because the domestic industry did not exist. In this regard, we note our discussion on Article 16.1 of the *SCM Agreement* in section VII.H.2(c), *supra* and our conclusion at paragraph 7.213 that the explanation supplied by Economía reasonably and adequately supported the conclusion that Fortuny was a "producer" during the period of investigation for injury. We therefore see no need to address this argument further.

(a) Article 15 of the *SCM Agreement*

7.262 Article 15.1 reads as follows:

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and an objective examination of (a) the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products and (b) the consequent impact of these imports on the domestic producers of such products.

7.263 Article 15.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation with respect to the determination of injury. Moreover, paragraph 1 informs the more specific obligations in the succeeding paragraphs of Article 15.³³¹

7.264 With respect to the obligation to base a determination of injury on "positive evidence", in *US – Hot-Rolled Steel*, the Appellate Body explained that the term relates to the *quality* of the evidence that investigating authorities must rely upon in making a determination.³³² In that case, the Appellate Body clarified that the use of the word "positive" means that the evidence must be "of an affirmative, objective and verifiable character, and that it must be credible."³³³

7.265 Also in that case, the Appellate Body examined the term "objective examination" and emphasized that it is not concerned with the specific facts underpinning the injury determination, but rather with the investigative process itself.³³⁴ Specifically, the Appellate Body found that the word "examination" relates to the way in which the evidence is gathered, inquired into, and subsequently

³²⁹ Mexico – First oral statement (executive summary), para. 37.

³³⁰ European Communities – Request for establishment of a panel (WT/DS341/2).

³³¹ Appellate Body Report, *Thailand – H-Beams*, para. 106.

³³² Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

³³³ *Ibid.*

³³⁴ Appellate Body Report, *US – Hot-Rolled Steel*, para 193.

evaluated.³³⁵ The Appellate Body has also interpreted the word "objective," which qualifies the word "examination", to indicate that the examination process must conform to the dictates of the basic principles of good faith and fundamental fairness.³³⁶ The panel in *Mexico – Steel Pipes and Tubes* recalled the Appellate Body's reasoning as follows:

...the term 'objective examination' is concerned with the investigative process itself. An 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an 'objective examination' recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process. Therefore, the identification, investigation and evaluation of the relevant factors must be 'even-handed'.³³⁷

7.266 The panel in *Mexico – Anti-dumping Measures on Rice* held that the requirements to base a determination of injury on positive evidence and pursuant to an objective examination impose certain obligations on investigating authorities with regard to the completeness of the data used as the basis for their determinations.³³⁸ We agree with that panel that an examination can only be "objective" if it is based on data "which provide an accurate and unbiased picture of what it is that one is examining."³³⁹

7.267 In our view, the selection by an investigating authority of the period of investigation is a critical element in the countervailing duty investigative process. It determines the data that will form the basis for the assessment of subsidization, injury and the causal relationship between subsidized imports and the injury to the domestic industry. Although the *SCM Agreement* does not set forth an express requirement regarding the selection of the period of investigation for the purpose of conducting an injury analysis, this does not mean that an investigating authority's discretion in this respect is unlimited. In our view, the requirements in Article 15.1 to base a determination of injury on positive evidence and pursuant to an objective examination impose certain constraints on an investigating authority's discretion in selecting the period of investigation necessary to ensure the comprehensiveness and reliability of the data used as the basis for an injury determination.³⁴⁰

7.268 As noted above, Article 15.1 is an overarching provision which requires an objective examination, based on positive evidence, of the volume of subsidized imports, their effect on domestic prices, and their impact on the domestic industry. The specific obligations with respect to the conduct of the examination of the impact of the subsidized imports on the domestic industry are contained in Article 15.4.

7.269 Article 15.4 of the *SCM Agreement* reads as follows:

The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on

³³⁵ Ibid.

³³⁶ Ibid.

³³⁷ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.214.

³³⁸ Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.77.

³³⁹ Ibid., para. 7.79 upheld by Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 180.

³⁴⁰ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.249.

cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

7.270 In conducting the analysis, an investigating authority must examine all of the listed factors and must also evaluate any other relevant economic factors affecting the condition of the industry.³⁴¹ However, an investigating authority may conclude that a particular factor is not probative in the circumstances of the domestic industry in a particular case, and therefore is not relevant in the actual determination.³⁴² Additionally, there is no requirement that each and every injury factor, individually, must be indicative of injury.³⁴³ Furthermore, as noted by the Appellate Body, an investigating authority conducting the examination required in Article 15.4 is obligated to do so objectively, and to base its determinations on positive evidence, as set forth in Article 15.1.³⁴⁴

(b) Facts Regarding Economía's Injury Investigation and Determination

7.271 We now turn to factual aspects of Economía's injury investigation and determination that pertain to the claims raised by the European Communities. In this regard, we rely on the account of those facts that appears in the Final Resolution, the accuracy of which is not contested by the European Communities.

7.272 In paragraph 3 of the Final Resolution, Economía sets forth the following as its description of the period investigated:

On the basis of articles 65, 76 and 77 of the Reglamento de la Ley de Comercio Exterior [Regulations on the Foreign Trade Act], hereinafter referred to as the RLCE, the period for investigation as proposed by the applicant was defined as the period from April to December 2002. For the purposes of evaluating injury, comparable periods of three years, including the period investigated were used, i.e. April to December 2000, 2001 and 2002, though the evaluation was not confined solely to these periods. However, monthly data relating to domestic production figures from January 1999 to March 2002 (production was suspended after that month) were analysed and, in the case of imports, figures up to December 2002. Likewise, due to the particular characteristics of the investigation, projections were also carried out and data was presented for the first three years of the investment project.

7.273 In its first written submission, Mexico clarifies that "the analysis of injury was conducted by comparing the periods April to December in 2002, 2001, and 2000 and that the indices for April to December for one year were thus compared with those for April to December in the other two years and not with those for January to March each year, irrespective of whether during each nine-month period the situation was worse or better than in the half-year January to June."³⁴⁵

7.274 The analysis of the effects of subsidized imports on prices is contained in paragraphs 294 - 327 of the Final Resolution. First, Economía analyzed the prices of imports and then compared them to domestic prices to determine whether there was price and cost undercutting. For both of these

³⁴¹ Appellate Body Report, *Thailand – H-Beams*, paras. 121-128; Panel Report, *EC – Bed Linen*, paras. 6.154-6.159. See also Panel Report, *Mexico – Corn Syrup*, para. 7.128; Panel Report, *Egypt – Steel Rebar*, para. 7.36.

³⁴² Panel Report, *Mexico – Corn Syrup*, para. 7.128.

³⁴³ Panel Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 6.163, 6.213.

³⁴⁴ Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

³⁴⁵ Mexico – First written submission, para. 271.

analyses, Economía used data from April – December 2000, 2001, and 2002.³⁴⁶ With respect to import prices, Economía examined monthly data from January 2000 through November 2003, as well as monthly data showing the percentage price differences compared with the same month of the previous year.³⁴⁷ With respect to domestic prices, Economía calculated a margin of price undercutting using domestic prices from the period from April – December 2000 as well as the same period in 2001, the results of which were displayed in Table 6 of the Final Resolution as follows:

Table 6. Undercutting

Undercutting/ price	April-Dec. 2000	April-Dec. 2001	April-Dec. 2002
European Union	-40.1%	-61.9%	n.a.
Undercutting/ cost			
European Union	-24.0%	-37.8%	n.a.

Source: SIC-FP and Fortuny.

7.275 Additionally, Economía compared the prices of imports observed in the period investigated – both with and without adding the calculated subsidy margin – to Fortuny's prices and costs projected over the three-year duration of Fortuny's business plan for restarting operations.³⁴⁸ Economía explained that:

[t]he data was in the form of projections because, during the period from April to December 2002, the domestic industry was prevented from carrying out operations and consequently did not record any real figures for costs or prices. It may be pointed out that the projected costs included the following items: olive oil production costs, cardboard boxes, cans and tape, labour, indirect manufacturing costs and depreciation, plus freight and insurance costs. In other words, the total production cost was taken into account.³⁴⁹

7.276 The analysis of the effects on the state of the domestic industry was contained in paragraphs 328 – 414 of the Final Resolution. As the injury alleged was the prevention of Fortuny's resumption of production, Economía also analyzed, in addition to data for the periods from April – December in the years 2000, 2001, and 2002, the projections for production, sales, and other indicators contained in Fortuny's Business Plan.³⁵⁰

7.277 Economía found that the data contained in the administrative record "shows a clear downward trend throughout the period under analysis in the production and sales volumes for the domestic industry until they reach zero."³⁵¹ Economía found that Fortuny's market share decreased by nine points, during the period investigated, until Fortuny disappeared from the market completely, when the subsidized imports increased their share. Economía also found that in the periods investigated, the domestic market was supplied almost entirely by subsidized imports (between 85 per cent - 94 per cent).³⁵² Economía discussed a variety of financial factors relating to income from sales, operating

³⁴⁶ Final Resolution (Exhibit EC-1), paras. 305-306; 313 – 315.

³⁴⁷ Ibid., paras. 307-310.

³⁴⁸ Ibid., para. 324.

³⁴⁹ Ibid.

³⁵⁰ Ibid., paras. 335, 368-414.

³⁵¹ Ibid., para. 333.

³⁵² Ibid., paras. 339 -340.

expenses, and sales cost.³⁵³ Specifically, Economía found that Fortuny experienced significant operating losses, which ultimately resulted in an operating loss of 53 per cent in 2002.³⁵⁴ Economía found, with respect to Fortuny's productivity, that operating costs fell by 32 per cent in 2001 and the operating margin recovered by 19 percentage points, rising from minus 15 per cent in 2000 to plus 4 per cent in 2001. However, in 2002 production was suspended.³⁵⁵ With respect to return on investment, Economía found that for 2000, it was minus 11 per cent; whereas for 2001, it was minus 0.5 per cent; and in 2002, it fell to minus 21 per cent.³⁵⁶ With respect to Fortuny's utilization of capacity, Economía found that the figures for use of installed capacity showed a close correlation between the large share of the domestic market held by imports at subsidized prices and the significant levels of underutilization of installed capacity to the point where, according to the applicant, it led to the closure of production. Economía also found that utilization of capacity would increase with the imposition of countervailing duties.³⁵⁷

7.278 Based on the analysis and findings in the Preliminary and Final Resolutions, as well as Mexico's clarifications in its submissions³⁵⁸, we find, as a matter of fact, that the period of investigation for subsidy was April to December 2002, and that the period of investigation for injury was the months from April to December in 2000, 2001, and 2002.

7.279 Before turning to the legal analysis of the claims raised by the European Communities, we recall the European Communities' argument that there was "confusion" as to whether Economía's injury determination was based on material retardation or material injury. In this regard, we find, as a matter of fact, that the injury determinations in both the Preliminary and Final Resolutions are clearly based on a finding of material injury, not on material retardation. In the Preliminary Resolution, Economía "decided that there were sufficient elements providing evidence that the subsidized imports of olive oil from the European Union were causing material injury to the domestic industry."³⁵⁹ Likewise, in the Final Resolution, Economía affirmed that "sufficient evidence existed to prove that subsidized olive oil imports originating from the European Union caused material injury to the domestic industry."³⁶⁰ Therefore, we find no "confusion", as alleged by the European Communities, regarding the basis of the injury finding. That finding was clearly based on material injury to the domestic industry. We therefore see no need to consider this issue further.

(c) Application of Articles 15.1 and 15.4 to the Facts of this Case

7.280 The European Communities has made a number of arguments with respect to how, in its view, Economía's analysis of the effect of subsidized imports on prices in the domestic market for like products, and its examination of the consequent impact of the subsidized imports on the domestic producers of such products, were inconsistent with Mexico's obligations under Articles 15.1 and 15.4 of the *SCM Agreement*.

(i) *The April – December Periods of Analysis for Injury*

7.281 One argument made by the European Communities has broad implications for the entire injury analysis conducted by Economía, precisely because it calls into question whether Economía has made an objective examination, based on positive evidence, of the effects of subsidized imports on

³⁵³ We note that it is not clear from the Final Resolution whether the periods referred to in the discussion of financial indicators are calendar years or the April-December periods of the referenced years.

³⁵⁴ Final Resolution (Exhibit EC-1), paras. 345 – 360.

³⁵⁵ Ibid., para. 354.

³⁵⁶ Ibid., para 352

³⁵⁷ Ibid., paras. 341-342.

³⁵⁸ Mexico – First written submission, para. 271-273; Mexico – Response to Panel question 84.

³⁵⁹ Preliminary Resolution (Exhibit EC-22), para. 343.

³⁶⁰ Final Resolution (Exhibit EC-1), para. 438.

domestic prices and on the state of the domestic industry. Specifically, the European Communities' claim that the injury analysis was "constantly undermined" by Economía's decision to use data from nine month periods in successive years presents a fundamental challenge to the validity of the *entire* injury determination and should therefore be addressed before any of the other claims relating to the injury determination in this case.

7.282 In the Final Resolution, Economía indicated that "for the purposes of evaluating injury, comparable periods of three years, including the period investigated were used, i.e., April to December 2000, 2001, and 2002, though the evaluation was not confined solely to these periods."³⁶¹ We recall our factual finding made in paragraph 7.278 that the periods of investigation for injury were the periods of April to December for the years 2000, 2001, and 2002.

7.283 The European Communities has alleged that the use of these April-December periods, rather than the whole years, undermined the credibility of the injury determination.³⁶² We therefore consider whether Economía's use of subsets of data temporally limited to the periods April to December for 2000, 2001 and 2002 was capable of yielding an accurate and representative picture that would enable Economía to make an objective examination, based on positive evidence, in reaching its affirmative injury determination.

7.284 As a preliminary matter, we recall our conclusion in paragraph 7.266 above, that an examination or investigation can only be "objective" if it is based on data which provide an accurate and unbiased picture of what it is that one is examining.³⁶³ The requirement in Article 15.1 to base a determination of injury on positive evidence and pursuant to an objective examination imposes certain limitations on an investigating authority's discretion with regard to the comprehensiveness and reliability of the data used as the basis for an injury determination.³⁶⁴

7.285 As a factual matter, we recall that Economía found that the harvesting of black olives for the extraction of oil typically begins in the autumn of a given year and continues into the first trimester of the following year.³⁶⁵ This was confirmed by the Government of the State of Baja California in its responses to Economía's questions regarding the olive oil industry in that State.³⁶⁶ We further recall that the article in *Claridades Agropecuarias* indicates that olives have to be pressed within 24 hours after harvesting.³⁶⁷ Finally, the production data that Fortuny provided on the administrative record of the investigation confirm our understanding that, although maintenance of the olive groves and the production facilities continues throughout the year, the pressing of olive oil from olives takes place over the several month autumn-winter harvest period, typically ending not later than March of each year, with the exact timing in a given year depending on relevant weather conditions.³⁶⁸ Based on this analysis, the April-December periods of investigation chosen by Economía for the years 2000, 2001, and 2002 therefore omitted some key months in which Fortuny was actually producing olive oil during the years examined.

7.286 As noted by the panel in *Mexico – Steel Pipes and Tubes*, to justify a truncated analysis based on discontinuous partial-year periods, an investigating authority needs to provide a sufficient

³⁶¹ Ibid., para. 3.

³⁶² European Communities – First oral statement, para. 115.

³⁶³ Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.79 upheld by Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 180.

³⁶⁴ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.249.

³⁶⁵ See, e.g., Final Resolution (Exhibit - EC 1), para. 9.

³⁶⁶ Exhibit – MEX 49D.

³⁶⁷ Exhibit – EC 30.

³⁶⁸ Exhibit – MEX 48A (showing a production season of January – June in 1999, January – April in 2000, January – June in 2001, and January – March in 2002); see also Mexico – Response to Panel question 17; Final Resolution (Exhibit EC-1), para. 9.

explanation that takes into consideration whether the developments within the temporal subsets examined reflect developments throughout the entirety of the multi-year period, and whether and why those subsets are justified and not anomalous in the particular case at issue.³⁶⁹ Although Economía did consider some data outside the April-December periods to "ensure that it had sufficient information to reflect objective trends allowing an evaluation of the situation of both imports and the domestic industry,"³⁷⁰ it did not provide any substantive justification in either the Preliminary or Final Resolutions for Economía having limited its injury analysis to the three nine-month periods.

7.287 Before us, Mexico explained that the period of investigation for subsidization of April – December 2002 (which formed the basis for the period examined for purposes of the injury analysis), was chosen because this was the period that Fortuny originally proposed in its application, and Economía accepted this period as reasonable for determining the existence of subsidization.³⁷¹ Mexico also maintained that once the period of investigation for subsidization was chosen, the investigating authority looked, for purposes of the injury analysis, at that same period and the equivalent periods in the preceding two years because they are "structurally the same" thereby avoiding bias or fluctuations and eliminating any distortions that otherwise might occur.³⁷²

7.288 It is not clear to us how the use of data relating to the whole three-year period 2000-2002, as opposed to the three nine-month periods within those years, would have caused "bias or fluctuations" or "distortions" in the assessment of either the effect of subsidized imports on domestic prices or on the state of the domestic industry. In general, examining data relating to entire years normally would yield a more accurate picture of the "state of the domestic industry" than an examination of limited, partial and discontinuous periods.³⁷³ In the instant case, it seems to us, distortions were especially likely to arise because the discontinuous nine-month periods of injury analysis excluded some of the key months in each year in which this seasonal, agricultural domestic industry actually produced the like product.

7.289 We find that with respect to Economía's investigation into imports of olive oil, an examination of data relating to the entirety of the years analyzed would have produced a more accurate and representative picture of the effect of the subsidized imports on domestic prices and the consequent impact on the domestic producers of the like product than the temporally limited examination conducted by Economía. While we do not believe that it would be impossible, as a legal matter, to justify a truncated injury analysis period under any circumstances³⁷⁴, in this case, given the particular circumstances of the domestic olive oil industry, it is evident that Economía would have had more reliable data and a fuller picture of the state of the industry if it had not excluded from its analysis the periods in time when the industry was actually producing the product under investigation. We note, in particular, that Mexico did not provide any substantive rationale for having chosen to limit its examination to the three nine-month periods, and instead simply indicated that April-December 2002 was the period of investigation for subsidy proposed by the applicant, and that Economía had analyzed the same periods in the injury analysis years to maintain structural symmetry. We thus find that Mexico has not provided a sufficient justification for Economía's use of the successive nine-month periods for its injury investigation in this case.

7.290 For the above reasons, we conclude that Economía's limitation of its injury analysis to the April-December periods of 2000, 2001 and 2002 is inconsistent with Mexico's obligations under

³⁶⁹ Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.252.

³⁷⁰ Mexico – Response to Panel question 78 (footnote 8); Final Resolution (Exhibit EC-1), paras. 307-310.

³⁷¹ Mexico – Response to Panel question 85.

³⁷² Mexico – First written submission, paras. 272-273.

³⁷³ Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 183.

³⁷⁴ We note that in some instances "seasonal" periods of investigation may indeed have utility.

Article 15.1 of the *SCM Agreement* to base its injury determination on positive evidence and pursuant to an objective examination.

(ii) *Other claims and arguments*

7.291 Having found that Mexico acted inconsistently with its obligations under Article 15.1 of the *SCM Agreement*, we see no reason to examine the European Communities' other claims relating to Articles 15.1 and 15.4 of the *SCM Agreement*.³⁷⁵ We therefore exercise judicial economy with respect to those other claims.

L. ARTICLE 15.5 OF THE *SCM AGREEMENT*

7.292 The European Communities claims that Mexico has failed to properly examine any known factors other than the alleged subsidized imports which were causing injury to the domestic industry, inconsistent with its obligations under Article 15.5 of the *SCM Agreement*.

1. Arguments of the Parties

7.293 The European Communities maintains that Mexico failed to comply with its obligations in Article 15.5 of the *SCM Agreement*, in particular, the obligation to examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry and to ensure that the injuries caused by these other factors are not attributed to the subsidized imports.³⁷⁶

7.294 The European Communities argues that Mexico failed to properly identify a domestic industry that suffered material injury with the consequence that Economía's conclusions regarding causation, in general, and the effect of 'other factors', in particular, were made in a vacuum and had no significance.³⁷⁷ The European Communities also maintains that Economía's examination was marked by failures that were sufficient in themselves to render its causation analysis ineffective.³⁷⁸ Specifically, the European Communities alleges that there were six factors known to Economía that either were not adequately examined or not examined at all. These are: (1) Fortuny's loss of its previous distribution network; (2) Fortuny's loss of the ability to use a leading Spanish brand name on its olive oil; (3) the loss of the guaranty of supply that the market demanded; (4) the lack of a guaranty of a product of the quality demanded by its purchasers; (5) the status, prior to 2002, of the relationship between Fortuny's predecessor and its distributor which was importing increasing amounts from the European Communities; and (6) the high level of Fortuny's costs.³⁷⁹

7.295 Mexico does not dispute the European Communities' interpretation of the requirements of Article 15.5, but asserts that it fully complied with those requirements.³⁸⁰ With respect to the specific "other known factors" that the European Communities cites in its first written submission, Mexico

³⁷⁵ Although we do not reach the substance of that the European Communities other claims under Article 15.1 and 15.4, we note that if Economía had included in its analysis the January-March 2002 period, it would not have even been open to such criticisms.

³⁷⁶ European Communities - First written submission, para. 215; European Communities - Second oral statement, para. 40; European Communities - Comments on Mexico's Response to Panel question 149.

³⁷⁷ European Communities - First written submission, para. 216.

³⁷⁸ Ibid., para. 217.

³⁷⁹ European Communities - First written submission, para. 221; European Communities - Response to Panel question 90.

³⁸⁰ Mexico - First written submission, paras. 282-283.

maintains that Economía in fact examined those factors and provided an analysis with respect to each of them in its Preliminary and Final Resolutions.³⁸¹

2. Reasoning of the Panel

7.296 Article 15.5 of the *SCM Agreement* states:

It must be demonstrated that the subsidized imports are, through the effects of subsidies, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the subsidized imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, *inter alia*, the volumes and prices of non-subsidized imports of the product in questions, contraction in demand or changes in the patterns of consumption, trade restrictive practices of competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry. (emphasis added)

7.297 Article 15.5 requires that an investigating authority conduct an examination in order to demonstrate a "causal relationship" between the subsidized imports and the injury to the domestic industry. In the course of demonstrating this causal relationship, investigating authorities are not permitted to attribute to subsidized imports injuries caused by other factors. Critical to the effective operation of the non-attribution obligation, and indeed to the entire causality analysis, is the requirement in Article 15.5 to "examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry", for it is the "injuries" caused by those "known factors" that must not be attributed to subsidized imports.³⁸² The European Communities' claim focuses on this requirement.

7.298 While this provision of the *SCM Agreement* has not previously been subject to dispute settlement, the identical counterpart provision in the *Anti-dumping Agreement* (Article 3.5) has been interpreted by the Appellate Body and a number of panels, and we consider those prior rulings to be directly relevant to the claim before us under Article 15.5 of the *SCM Agreement*.

7.299 First, concerning the situations in which the non-attribution language of Article 3.5 of the *Anti-dumping Agreement* is to be applied, we recall that the Appellate Body in *US – Hot-Rolled Steel* specified that this language applies "solely [to] situations where dumped imports and other known factors are causing injury to the domestic industry *at the same time*".³⁸³

7.300 On the issue of what are "known factors" other than the dumped imports, the panel in *Thailand – H-Beams*, in a finding not reviewed by the Appellate Body, held that:

other 'known' factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an AD investigation. We are of the view that there is no express requirement in Article 3.5 AD that investigating authorities seek out and examine in each case *on their own initiative* the

³⁸¹ Mexico – First written submission, paras. 284-295; Mexico – First oral statement, paras. 39-43; Mexico - response to Panel question 96; Mexico – Second written submission, paras. 92-96; Mexico - Response to Panel questions 148 and 149.

³⁸² Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175.

³⁸³ Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

effects of *all* possible factors other than imports that may be causing injury to the domestic industry under investigation.³⁸⁴ ... We note that there may be cases where, at the time of the investigation, a certain factor may be 'known' to the investigating authorities without being known to the interested parties. In such a case, an issue might arise as to whether the authorities would be compelled to examine such a known factor that is affecting the state of the domestic industry. However, it has not been argued that such factors are present in this case.³⁸⁵

7.301 Concerning the nature of the required examination of the "other known factors", the Appellate Body in *US – Hot Rolled Steel* held that:

... to comply with the non-attribution language in that provision, investigating authorities must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors. This requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports.³⁸⁶

7.302 In that case, the Appellate Body also explained that an investigating authority should not dismiss the other factors on the basis of qualitative assertions.³⁸⁷ The Appellate Body acknowledged in this context the practical difficulty of separating and distinguishing the injurious effects of different causal factors, but indicated that "although this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors."³⁸⁸ Non-attribution therefore requires the effects of other causal factors to be separated and distinguished from those of the dumped imports so that injuries caused by the dumped imports and those caused by other factors are not "lumped together" and made "indistinguishable".³⁸⁹

7.303 In *EC – Tube or Pipe Fittings*, the Appellate Body explained that the non-attribution obligation does not require investigating authorities to use any particular methodology. Specifically, the Appellate Body found that as long as an investigating authority does not attribute the injuries from other known causal factors to the dumped imports, it is free to choose the methodology it will use in examining the causal relationship between the dumped imports and the injury to the domestic industry.³⁹⁰

7.304 In the same appeal, the Appellate Body also considered whether the non-attribution provision requires, in every case, an assessment of the *collective* effects of other causal factors. The Appellate Body noted, in this regard, that there was no requirement in every case to make such a collective assessment, but that "there may be cases where because of the specific factual circumstances therein

³⁸⁴ (footnote original) The panel in *US – Norwegian Salmon AD*, para. 550 stated: "there is no express requirement that investigating authorities examine in each case on their own initiative the effects of all other possible factors other than imports under investigation." That panel was examining Article 3.4 of the Tokyo Round Anti-Dumping Code, which contained different language than Article 3.5 of the WTO *AD Agreement*.

³⁸⁵ Panel Report, *Thailand – H-Beams*, para. 7.273.

³⁸⁶ Appellate Body Report, *US – Hot-Rolled Steel*, para. 226; followed by Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras. 7.404-7.405.

³⁸⁷ Appellate Body Report, *US – Hot-Rolled Steel*, paras. 223 et seq; See also Panel Report, *US – Softwood Lumber VI*, para. 7.129.

³⁸⁸ Appellate Body Report, *US – Hot-Rolled Steel*, para. 228.

³⁸⁹ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 188.

³⁹⁰ *Ibid.*, para. 189.

the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports"³⁹¹ In that regard, the Appellate Body concurred with the statement of the panel that there might be "multiple 'insignificant factors'" that collectively were sufficiently significant as to break the link between the dumped imports under investigation and the injury.³⁹² The Appellate Body did not ultimately find that such an analysis was required on the facts of that case, because there were a number of factors that had made only an insignificant contribution to the injury, and the complaining party had not adduced any evidence demonstrating that a collective analysis of those factors was necessary.³⁹³ As a result, it did not elaborate further on the types of circumstances that might give rise to such a requirement. We recall that in the dispute before us, the European Communities has not made any allegation in relation to collective versus individual consideration by Economía of the "other known factors" that are the subject of this claim.

7.305 We find that the obligation in the third sentence of Article 15.5 in the *SCM Agreement* can be synthesized into two basic components. First, Economía was required to consider other factors known to it either as a result of its own investigation or because they were raised by the interested parties. Second, Economía was required to analyze each of these factors separately and to explain the nature and extent of the injurious effects of these other factors, separating and distinguishing them from the injurious effects of the subsidized imports. If the facts of the case so warranted, Economía might also have needed to consider the collective impact of the "other known factors".

7.306 With respect to the European Communities' claim that Economía's analysis under Article 15.5 suffered insuperable difficulties that negated its causation analysis because the domestic industry did not exist, we refer to our finding in section VII.H.2(c) that Economía made a reasoned and adequate determination that Fortuny constituted the domestic industry within the meaning of Article 16.1 of the *SCM Agreement*. Given our finding on that issue, we do not need to consider it further here. However, the European Communities also argues that Economía failed to adequately analyze other known factors causing injury, contrary to the requirements of Article 15.5 of the *SCM Agreement*. We will examine Economía's treatment of each of these alleged "other factors" in turn.

7.307 The six specific 'other factors' raised by the European Communities are: (1) the loss of the previous distribution network; (2) the loss of the ability to use a leading Spanish brand name on its olive oil; (3) the loss of the guaranty of supply that the market demanded; (4) the lack of a guaranty of a product of the quality demanded by purchasers of olive oil; (5) the status, prior to 2002, of the relationship between Fortuny's predecessor and its distributor which was importing increasing amounts from the European Communities; and (6) the high level of Fortuny's costs.³⁹⁴

7.308 Economía addressed each of these factors in its Preliminary Resolution and Final Resolution, and concluded that there were no injurious effects from any of them, as distinguished from the effects of the subsidized imports. The European Communities argues that Economía's analysis and findings were inadequate, with the result that the determination of causation infringed Article 15.5.³⁹⁵ Because the European Communities' claim focuses on the *adequacy* of Economía's causation analysis, we will first examine, factually, the actual nature of that analysis. Second, we will determine whether Economía's analysis was consistent with the requirements of Article 15.5, of the *SCM Agreement*.

³⁹¹ Ibid., para. 192.

³⁹² Ibid., fn. 232 citing Panel Report, *EC – Tube or Pipe Fittings*, para. 7.369.

³⁹³ Ibid., paras. 193-194.

³⁹⁴ European Communities - First written submission, para. 221; European Communities – Response to Panel question 90.

³⁹⁵ European Communities – First written submission, paras. 215-227; European Communities - Second oral statement, para. 67.

7.309 Economía devoted specific sections in its Preliminary and Final Resolutions to the discussion of other injury factors (paragraphs 319 through 342 of the Preliminary Resolution and paragraphs 415 through 437 of the Final Resolution). In addition, Economía noted, in paragraph 415 of the Final Resolution, that "it is important to point out that an assessment of the possible effect of factors other than those imports on the domestic industry's performance has been carried out throughout this Resolution, so that those factors may not necessarily be repeated in this section or else they may be described in more detail."³⁹⁶ In response to a specific question from the Panel, Mexico identified other paragraphs in the Preliminary and Final Resolutions that referred to the other injury factors identified by the European Communities. Mexico provided the following table³⁹⁷:

Issue	Preliminary Resolution (relevant paragraphs)	Final Resolution (relevant paragraphs)	Some of the documentary evidence
Distribution channels, and loss of mark	¶57, ¶178 to ¶180, ¶189, ¶216, ¶323 to 327, ¶344(J).¶	¶197 to ¶199, ¶213, ¶294 to ¶327, ¶427, ¶434, ¶435, ¶437 (which refers to ¶323 to ¶327 of the Preliminary Resolution).	In the reply to the request for information (MEX-55), Fortuny stated that the distribution network is a group of independent companies that handle various brands in the corresponding States and are dedicated to stocking, managing and representing the brand or brands with which they work. The information on new Spanish and Italian brands can be found in Appendix 30 <i>Consumer prices</i> VC to the investigation application. The market survey was submitted by various importers, including Bodega La Negrita, in MEX-47.
Supply of olives	¶54, ¶302, ¶318, ¶339 to ¶341.	¶42, ¶44, ¶58, ¶370 to ¶385, ¶391, ¶411, ¶427, ¶432	Reply of Government of Baja California. The information for calculating the possibilities of producing olives and oil was taken from the tables on page 10 of <i>Claridades Agropecuarias</i> on <i>Harvested Area (ha.)</i> and <i>Olive Yield (tons/ha.)</i> .
Buyers' guarantee of quality, and quality demanded by the market.	¶54(L), ¶57, ¶178 to ¶180, ¶323, ¶324, ¶329.	(Paras on the quality of the oil: ¶182 to 190); ¶197 to ¶199, ¶202, ¶434¶.	Reply to request for information (page 7 of MEX- 51C). Table: <i>Prices of Olive Oil on Retail Markets</i> in <i>Claridades Agropecuarias</i> , page 19.

³⁹⁶ Final Resolution (Exhibit EC-1), para. 415.

³⁹⁷ Mexico – Response to Panel question 149.

Issue	Preliminary Resolution (relevant paragraphs)	Final Resolution (relevant paragraphs)	Some of the documentary evidence
Fortuny's production costs.	¶213, ¶241, ¶242, ¶243, ¶244, ¶250, ¶252, ¶269, ¶275 to ¶278, ¶281, ¶287, ¶307, ¶308, ¶313, ¶314, ¶36, ¶317, ¶344(E).	¶58(D), ¶218(E), ¶244, ¶273, ¶275, ¶276, ¶302, ¶311, ¶313 to ¶316, ¶324, ¶325 to ¶327, ¶331, ¶345 to ¶351, ¶353, ¶354, ¶356, ¶362, ¶363, ¶389, ¶407, ¶408, ¶409, ¶411, ¶437, ¶439(D), ¶441, ¶442.	Prices of imports calculated from information taken from SIC-VR: Olive Oil Base 1993-2005. The cost information was taken from the applicant: Appendix 34 Costs, sales, profits VC. Cost of goods sold. Domestic prices were calculated on the basis of sales information (value and volume) from the applicant plus freight charges for sales (MEX-48A).

7.310 We have reviewed the paragraphs identified by Mexico in its response to our questions. These passages of the Preliminary and Final Resolutions indicate that Economía asked questions of Fortuny, other interested parties, and independent sources on all of the points identified by the European Communities as "other factors" causing injury. We also recall that the nature of the injury that Economía found to exist was Fortuny's inability to resume operations. As described in the paragraphs below, the cited passages indicate that Economía provided analysis of its reasons for reaching the conclusions that it did.

7.311 First, with respect to the evidence presented by the exporters regarding the loss of the Ybarra brand, Economía reviewed the market study that was submitted to it, and concluded, as a matter of fact, that the study did not say that a significant portion of Mexican consumers *preferred* the Ybarra brand, but rather that they *were aware of* the Ybarra brand. Economía also noted that other unknown brands had been successful in penetrating the Mexican market. For those reasons, Economía did not accept the argument by the exporters that Fortuny's inability to use the Ybarra brand was causing it injury³⁹⁸ in the sense of preventing Fortuny from resuming operations. In other words, Economía found that this factor made no contribution to the injury experienced by Fortuny.

7.312 With respect to the loss of the distribution network of Distribuidora Ybarra, Economía noted that Fortuny had indicated that it had access to a distribution network, which it planned to use when it resumed operations.³⁹⁹ Economía asked further questions of Fortuny with respect to this issue, and verified the information on its visit to Fortuny.⁴⁰⁰ Additionally, Economía took into account the freight and transportation costs of Fortuny when it calculated the price at which Fortuny's olive oil could compete against the Spanish and Italian imports if Fortuny were to resume production.⁴⁰¹ Economía concluded that the loss of the distribution network was not contributing to Fortuny's inability to resume operations, and, thus, was not contributing to the injury experienced by Fortuny.

7.313 The exporters also argued that Fortuny would not be able to obtain a sufficient supply of olives in order to restart production as planned, because most olive growers had begun to devote their crops to table olives. Economía examined the information from the Government of the State of Baja California with respect to the quantities of olives that were available to Fortuny. Economía relied on information from the State of Baja California about available hectares as well as the article in

³⁹⁸ Preliminary Resolution (Exhibit EC-22), para. 327; Final Resolution (Exhibit EC-1), para. 437.

³⁹⁹ Preliminary Resolution (Exhibit EC-22), para. 325; Final Resolution (Exhibit EC-1), para. 437.

⁴⁰⁰ Final Resolution (Exhibit EC-1) para. 67.

⁴⁰¹ Final Resolution (Exhibit EC-1), para. 324.

Claridades Agropecuarias to determine that a reasonable assumption would be that 40 per cent of the hectares of planted olive trees could be dedicated to olive oil production.⁴⁰² Economía therefore reasonably found that Fortuny did not face a problem of insufficient olive supply, and concluded that this was not a factor standing in the way of Fortuny resuming operations.

7.314 With respect to the issue of quality, Economía asked Fortuny specific questions about any quality differences between the Mexican olive oil marketed under the Ybarra brand and the imported olive oil marketed under the same brand. Fortuny responded that it was unlikely that the Spanish holder of the mark would have let Formex-Ybarra market olive oil under the Ybarra brand if there were significant differences in quality between the Spanish and Mexican products. Economía also asked ANTAD and some of its members if they were aware of any segmentation in the olive oil market based on quality. ASOLIVA and ASITOL confirmed that while various types of olive oil were sold for different purposes, there was no clear segmentation in the market according to the type of olive oil. Economía concluded that there were no objective data on which it could reasonably conclude that there were any significant quality problems with olive oil manufactured domestically compared to imported oil of the Ybarra brand, and that, in fact, both had been marketed under the same brand.⁴⁰³ Thus, Economía reasonably found that this factor also did not contribute to Fortuny's inability to restart its operations.

7.315 Regarding Fortuny's relationship with Distribuidora Ybarra prior to 2002, Economía analyzed the effects of the changes in that relationship on domestic production, including effects in the years 2000 and 2001, in paragraphs 328 -- 367 of the Final Resolution. Economía utilized data for 2000 and 2001 that it had received from Distribuidora Ybarra with respect to inventories, sales, operating costs, etc. It observed from those data that Distribuidora Ybarra had steadily decreased the volume of its purchases from Fortuny over the course of 2001 and 2002, while nearly doubling its purchases from foreign suppliers. Economía recognized that the relationship between Distribuidora Ybarra and Fortuny was significant, and that the decision by Distribuidora Ybarra to replace purchases of olive oil from Fortuny with purchases of imported olive oil caused considerable injury to Fortuny.⁴⁰⁴ However, Economía reached the conclusion that this meant that the subsidized imported olive oil, the product competing against Fortuny's olive oil for sales, was causing injury to Fortuny. That is, Economía's conclusion was that the change in the relationship of Distribuidora Ybarra and Fortuny was not an "other factor", but, in fact, was a demonstration of how the subsidized imports were injuring Fortuny.

7.316 Economía addressed Fortuny's production costs extensively throughout the Preliminary and Final Resolutions. It concluded that, according to the premises established in Fortuny's business plan, the project to resume production would be financially viable if countervailing duties were imposed on the subsidised imports and financially non-viable if they were not.⁴⁰⁵ That is, the business plan's viability was not dependent on Fortuny's production costs, as these were already taken into account in the plan. Thus, Fortuny's cost of production was found not to be a factor contributing to the injury it was experiencing.

7.317 In sum, Economía made determinations based on an evaluation of the evidence before it that none of the other known factors were causing injury, in fact, to Fortuny. Economía did not dismiss these factors with qualitative assertions. Rather it carefully examined, separated and distinguished the effects of each factor from the effects of the subsidized imports, and reasonably concluded that these factors were not contributing to the injury suffered by Fortuny.

⁴⁰² Preliminary Resolution (Exhibit EC-22), paras. 338-342; Final Resolution (Exhibit EC-1), paras. 370-385.

⁴⁰³ Final Resolution (Exhibit EC-1), paras. 200-202.

⁴⁰⁴ Ibid., para. 360.

⁴⁰⁵ Ibid., para. 414.

7.318 Concerning any possible obligation on Economía also to examine the collective impact of the factors identified by the European Communities in this claim, we recall that the Appellate Body has ruled that such a collective examination is not obligatory in every case, but that there might be factual circumstances in which this could be necessary in order to satisfy the non-attribution obligation of Article 15.5. While the Appellate Body has not specified what such circumstances might be, we note that in the dispute on *EC – Tube or Pipe Fittings*, where this issue was first raised, the Appellate Body found that the European Communities had not erred by not conducting an examination of the collective impact of the "other known factors" that it examined. We recall that, in that case, the European Communities had found that the other known factors had contributed to the injury, but that their individual contributions were "insignificant", or in one case "not so much as to break the causal link" between the dumped imports and the injury. In the present case, by contrast, Economía reasonably concluded that none of the alleged "other factors" made any contribution to the injury experienced by Fortuny. In such circumstances, we do not consider that a collective examination of those factors could have led to any different conclusion in respect of their impact. Thus, we do not find that the facts in the olive oil investigation by Economía were such as to necessitate an assessment of the collective impact of the "other factors" referred to by the European Communities in this claim.

7.319 We recall that our task is not to conduct a *de novo* review of the evidence on the record of the investigation and reach our own conclusions, or to substitute our judgment for Economía's. Instead, pursuant to Article 11 of the DSU, our task is to examine whether Economía provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings, and how those factual findings supported its determination.⁴⁰⁶

7.320 Based upon our review of the information on the record before Economía as well as its examination of that evidence and its explanation of its conclusions in the Preliminary and Final Resolutions, we find, that Economía provided reasoned and adequate explanations of its conclusions with respect to causation, in particular that the evidence relied upon and explanations provided by Economía reasonably and adequately support its conclusions that the other known factors did not contribute to injury experienced by Fortuny.⁴⁰⁷

7.321 On the basis of the foregoing, we find that Economía considered the other known factors that could be causing injury to the domestic industry, separated and distinguished each of these factors from the effects of the subsidized imports, and determined that none of them was causing injury. It also provided reasoned and adequate explanations of its conclusions. For these reasons, we find that the European Communities has not established that Mexico acted inconsistently with its obligations under Article 15.5 of the *SCM Agreement*.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 For the reasons set out above, we conclude that Mexico's definitive countervailing measures on olive oil from the European Communities are inconsistent with the requirements of the *SCM Agreement*, in that:

- (a) Mexico acted inconsistently with Article 11.11 of the *SCM Agreement* because Economía's investigation in this case was concluded more than 18 months after the date of its initiation, and Article 11.11 does not permit such prolongation under any circumstances;
- (b) Mexico acted inconsistently with Article 12.4.1 of the *SCM Agreement* because Economía failed to require non-confidential summaries of confidential information in

⁴⁰⁶ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186 - 187.

⁴⁰⁷ *Ibid.*, para. 188.

sufficient detail to permit a reasonable understanding of the information submitted in confidence, in the absence of sufficient explanations of the existence of exceptional circumstances and of the reasons why summarization was not possible; and

- (c) Mexico acted inconsistently with the obligation in Article 15.1 of the *SCM Agreement* to base the injury determination on positive evidence and pursuant to an objective examination because Economía limited its injury analysis to the periods from April to December of 2000, 2001 and 2002.

8.2 For the reasons set out above, we further conclude that:

- (a) the European Communities did not establish that Mexico acted inconsistently with its obligations in Article 13.1 of the *SCM Agreement* by failing to invite the European Communities for consultations before the initiation of the investigation;
- (b) The European Communities did not establish that Mexico failed to comply with the requirement in Article 13(b)(i) of the *Agreement on Agriculture* to exempt olive oil from imposition of countervailing duties "unless a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement", and did not establish that Economía failed to show due restraint in initiating the countervailing duty investigation on olive oil;
- (c) the European Communities did not establish that Mexico acted inconsistently with its obligations under Article 12.8 of the *SCM Agreement* by failing to inform the interested Members and interested parties of the essential facts under consideration which formed the basis for the decision to apply definitive measures;
- (d) the European Communities did not establish that Mexico acted inconsistently with its obligations under Articles 1 and 14 of the *SCM Agreement* by failing to calculate the benefit conferred on the recipient pursuant to paragraph 1 of Article 1 of the *SCM Agreement* and to apply the method used to each particular case in a transparent way which is adequately explained as required by Article 14 of the *SCM Agreement*;
- (e) the European Communities did not establish that Mexico acted inconsistently with its obligation under Article 16.1 of the *SCM Agreement* by failing to properly define the domestic industry during the countervailing duty investigation consequently the European Communities also failed to establish that:
 - (1) Mexico acted inconsistently with the obligation in Article VI:6(a) of the *GATT 1994* to not impose countervailing duties on a product unless a determination had been made that there was material injury or threat thereof to an established domestic industry;
 - (2) Mexico acted inconsistently with its obligations in Article 11.4 of the *SCM Agreement* by failing to properly examine whether the application by Fortuny was made "by or on behalf of the domestic industry"; and
 - (3) Because there was no existing domestic industry the injury analysis conducted pursuant to the obligations in Articles 15.1, 15.4 and 15.5 was inconsistent with the requirements of those provisions.
- (f) the European Communities did not establish that Mexico acted inconsistently with its obligations under Article 15.5 of the *SCM Agreement* by failing to properly examine

any known factors other than the alleged subsidized imports that were causing injury to the domestic industry.

8.3 In the light of our findings, it was not necessary for us to address, and we have exercised judicial economy in respect of, the European Communities' claims under Articles 15.1 and 15.4 of the *SCM Agreement* in respect of Economía's analysis of the volume of subsidized imports and the impact of these imports on prices in the domestic market for the like product and on the domestic industry.

8.4 Under Article 3.8 of the *DSU*, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that Mexico has acted inconsistently with certain provisions of the *SCM Agreement*, it has nullified or impaired benefits accruing to the European Communities under that *Agreement*.

8.5 Article 19.1 of the *DSU* reads:

Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

8.6 The European Communities has requested that we accompany our recommendation in this case with a suggestion, pursuant to the second sentence of Article 19.1 of the *DSU*, that a complete repeal would be the most appropriate means of bringing the measures into conformity with Mexico's WTO obligations. We decline to make a suggestion as to how Mexico should bring its measures into conformity with its obligations.

8.7 Pursuant to Article 19.1 of the *DSU*, having found that Mexico has acted inconsistently with provisions of the *SCM Agreement* as set out above, we recommend that Mexico bring its measures into conformity with that *Agreement*.

ANNEX A

FIRST WRITTEN SUBMISSIONS BY THE PARTIES

Contents		Page
Annex A-1	Executive Summary of the First Written Submission of the European Communities	A-2
Annex A-2	Executive Summary of the First Written Submission of Mexico	A-13

ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

(30 March 2007)

I. FACTUAL BACKGROUND

1. With 98 per cent of the world's olive trees, the area around the Mediterranean accounts for the bulk of world olive oil production. Olive trees take as long as ten years to reach maturity. They produce an annual crop, which is harvested in the winter. The great majority of olives produced in the EC are used in the production of olive oil, though there is significant production of table olives and of olives for use in prepared foods.

2. The production of olive oil starts with the crushing of the fruit to produce a paste, which is then malaxated. Oil extracted by purely physical means qualifies as 'virgin'. The remaining pomace contains oil that can be extracted by mechanical and chemical means and it is called 'refined olive oil'. The last remaining oil can be removed from the pomace by chemicals, and is known as 'olive-pomace oil'.

3. The number of olive growers in the EC is 2.5 million, including in Italy 1.1 million, Spain 450,000 and Greece 850,000. Olive producer organisations (PO) administer the EC aid scheme, grouping and verifying aid applications and distributing the aid itself.

4. Like the growing of olives, their processing into oil is highly fragmented. In 2002 there were more than 10,000 mills in operation in the EC. The fragmentation of the sector applies also to bottling/canning firms. Regarding refining and olive pomace plants, the number of operators remains stable because of the minimum size required, the complexity of the plant and the machinery needed. The following table contains data collected by the EC Commission from Member States:

	Spain	Italy
Olive oil growers	450,000	1,100,000
Mills	1,715	6,076
Refineries	29	13
Olive pomace plants	53	45
Bottling /canning plants	440	300

5. In the great majority of cases the companies that are engaged in exporting are completely independent of those who grow olives and produce olive oil.

6. Wide fluctuations in production are a feature of olive growing. They are linked to the uncertainties of the climate (for example, drought in Spain in 1995/96 and frost in Greece in 2001/02 seriously affected the harvest, whereas the exceptional Spanish harvest in 2001/02 was so large as to

lead to a drop in world prices) and the phenomenon of alternate bearing. The EC is the dominant producer (2.464 thousand tonnes in 2001/2002, out of a world production of 2.826 thousand tonnes) in the international market for olive oil and the larger exporter (325 thousand tonnes in 2001/2002, out of world exports of 395 thousand tonnes).

7. Since the 1990s significant quantities of olive oil have been consumed outside the production areas. World consumption of olive oil has been progressing fairly steadily, without the fluctuations that are a feature of production. Between 1995/96 and 2002/03 the average annual increase in consumption was 6 per cent, with even higher relative growth in new markets, such as Mexico. The EC is also a considerable importer of olive oil, although up to 80 per cent of importing is done under inward processing arrangements.

8. The EC production aid scheme applicable during the investigation period (April – December 2002) used by Mexico in the olive oil investigation was set out in a series of EC Regulations. These measures are no longer in force, and a single payment scheme, not based on production, is applied to olive oil and table olives since 1 January 2006.

9. The functioning of the scheme was based on the establishment of National Guaranteed Quantities (NGQ) for each Member State: i.e., the maximum quantity (expressed in olive oil) produced by olive growers for which the aid would be provided. The maximum amount of aid per unit was fixed for the marketing years 1998/1999 to 2003/2004 at EUR 1,322.5 per tonne, but the rate actually paid to farmers was reduced to the extent that overall production in their Member State exceeded the NGQ. In years when the production of a Member State was below its NGQ, 80 per cent of the difference was added to its NGQ for the following year and the remaining 20 per cent was distributed among other Member States that had exceeded their NGQs in the current year.

10. The aid was paid to the growers only in respect of the eligible production. With certain exceptions, olive trees planted after 1 May 1998, and those not covered by a cultivation declaration, were not eligible for aid.

11. Before 1 December of each marketing year (November to October) olive growers had to submit to the local producer organization a 'crop declaration' giving data relating to the farm such as location, area and number of olive trees. The olives were handed over to an approved mill for extraction of the oil. The mill owner issued a certificate to the grower stating the amounts of olives received and of oil that they had produced. The grower had to present this certificate and an aid application to the producer organization before 1 July.

12. Member States collected the relevant information and passed it to the EC Commission, which determined the level of production and the advance payment (up to 90 per cent) that could be given (after 16 October). The final payment was not calculated until the following May, and might not be received by growers for another three months.

II. LEGAL ANALYSIS

A. STANDARD OF REVIEW

13. Regarding the review of 'factual components' of findings made by investigating authorities, the Appellate Body said in *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93, that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority and that a panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report. The Appellate Body stressed that a panel must examine whether, in the light of the evidence

on the record, the conclusions reached by the investigating authority are reasoned and adequate, and offered guidelines for determining when an authority's conclusions were 'adequate'.

14. In *US – Line Pipe* (para. 217), the Appellate Body said, in regard to the examination of 'other factors' causing injury, that the explanation must be clear and unambiguous, it must not merely imply or suggest an explanation, and it must be a straightforward explanation in express terms. Likewise, speaking of the term 'reasoned conclusion', the Appellate Body explained in *US – Steel Safeguards* that such a conclusion is "not one where the conclusion does not even refer to the facts that may support that conclusion" (para. 326).

15. In *US – Lamb* the Appellate Body said (para. 106) that "a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel [; p]anel must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data". It concluded that "a panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation".

16. In these cases the Appellate Body has also enunciated the obligations that must be respected by investigating authorities. The EC places great emphasis on the duty to provide reasoned and adequate explanations because Mexico's failure to do so was a recurring feature of its Resolutions. The Ministry for the Economy of Mexico (the "Ministry") systematically failed to explain how the facts in the record supported its findings and conclusions, or even to refer to such facts when stating these conclusions. Furthermore, even when an explanation was provided it was often not clear what aspect of the rules the Ministry was applying.

B. CLAIMS AND LEGAL ARGUMENTS

17. The EC considers that the investigation carried out by the Ministry into alleged subsidized imports of olive oil from the EC was seriously defective in a number of ways.

18. The first claim is that Mexico failed to hold consultations under Article 13.1 of the SCM Agreement before the initiation of the investigation on 2 July 2003. The invitation to pre-initiation consultations was sent two days after the initiation and the first consultations took place only on 17 July 2003, a day after the initiation of the investigation was published.

19. The second claim is that Mexico initiated the investigation in the absence of an application made by or on behalf of the domestic industry as required by Article 11.4 of the *Agreement*.

20. In its investigation the Ministry accepted the applicant Fortuny's assertion that until the early months of 2002 it constituted the entire domestic industry for products like those imported, and furthermore that it ceased production of olive oil in March 2002. Thus, at the time of the application (12 March 2003), Fortuny was not a producer of the 'like product' and yet it was treated by the Ministry as constituting the Mexican domestic industry.

21. Article 11.4 requires that the investigating authorities' determination (that the application is made by or on behalf of the domestic industry) should be reached only 'on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product'. In the present case it is evident that the Ministry did not carry out a realistic investigation of this kind. In the Final Resolution the Ministry refers to enquiries that it made in the course of the investigation regarding the possible existence of other producers of olive oil (although even these enquiries were inadequate). At the time of the initiation of the investigation the Ministry

accepted a statement provided by Fortuny from a government department in one Mexican state that Fortuny was the sole Mexican producer, and attempted no investigation regarding the existence of other producers. This is confirmed by the Ministry's later resolutions, which indicate that the only checks which it made were ones concerning Fortuny's assertions about its own production.

22. The third claim is that Mexico failed to apply self-restraint in initiating the investigation, as required by Article 13(b)(i) of the *Agreement on Agriculture*. First, this provision prevented countervailing measures being imposed except when a determination was made of injury or threat thereof. Consequently, no action could be taken in respect of claims based on 'material retardation'. Nevertheless, although material retardation was the basis of Fortuny's claim, the investigation was initiated and countervailing measures were imposed.

23. Secondly, Article 13(b)(i) required the authorities to 'show due restraint' before initiating an investigation, whatever kind of injury was alleged. However, nothing indicates that the Ministry showed due restraint before initiating the investigation or gave even the least consideration to this issue. On the contrary, the Mexican authorities appear to have embarked on the investigation with exceptional haste. Thus, they did not wait to hold the consultations with the EC that they were obliged to, but plunged into the investigation at the first possible moment. Again, the Ministry clearly did not investigate the full extent of the domestic industry support, but only took account of Fortuny's position. Moreover, Mexico converted an application based on 'material retardation' to the establishment of a domestic industry it into one of 'material injury' of an industry.

24. The fourth claim is that Mexico failed to require the complainant to provide non-confidential summaries of confidential information, and failed to disclose essential facts, in breach of Articles 12.4.1 and 12.8 of the *SCM Agreement*.

25. Confidential information was presented by Fortuny, but that neither the Final nor the Preliminary Resolution contains any reference to non-confidential summaries being either required or provided. Although Article 12.4.1 has no explicit obligation for the investigating authority to require the production of appropriate non-confidential summaries, such a requirement is a necessary concomitant of the rules that it contains, as the Panel explained in *Guatemala – Cement II* (para. 8.213).

26. Mexico is in also breach of the specific requirement in Article 12.8 of the *SCM Agreement* to make disclosure to interested Members and parties before adopting definitive measures. Neither the EC nor the exporting EC companies nor their associations received any communication from the Ministry that constituted a disclosure of this kind.

27. The fifth claim is that Mexico failed to comply with the time limit set by Article 11.11 of the *SCM Agreement* regarding the completion of the investigation. The Mexican investigation into olive oil was initiated on 2 July 2003 and, consequently, it should have been concluded by 2 January 2005. However, the definitive measures were not adopted until 1 August 2005. Mexico is in clear breach of the obligation in Article 11.11: it gave no reasons why the circumstances were 'special' and would therefore have justified exceeding the one year limit, and it exceeded the absolute limit of 18 months.

28. The sixth claim is that Mexico failed to provide a reasoned and adequate explanation of the existence of subsidization, to calculate the benefit conferred on the recipient, and to apply the method used to each particular case as required by Articles 1.1 and 14 of the SCM Agreement.

29. The Ministry failed to provide a reasoned and adequate explanation for the imposition of countervailing duties on EC exports of olive oil in the light of Mexico's obligations under Articles 1.1 and 14 of the *SCM Agreement*. The EC will look first at the Ministry's conclusion that the EC aid in

question constituted a countervailable subsidy, and then at its application of this conclusion to the individual exporters.

30. The Ministry attempted to bridge the gap between the persons who received the subsidy (the olive growers) and the persons exporting the products to Mexico, by focusing on the product linked to the subsidy, and the question whether it was olives or olive oil.

31. As regards products, the term that one finds repeatedly in the *SCM Agreement's* provisions on countervailing duties is 'subsidized imports'. Article 15 makes clear that it is when subsidized imports are causing injury that countervailing duties may be imposed. The crucial issue therefore is whether the olive oil imported into Mexico from the EC can be described as 'subsidized'.

32. The *GATT 1994* addresses the issue of the relationship of the subsidy and the product in Article VI:3, which speaks of a 'bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product', where 'such product' is 'any product of the territory of any contracting party imported into the territory of another contracting party'. Two points should be noted. Firstly, the provision assumes that subsidies can be given 'indirectly'. Secondly, the conferring of the subsidy must be linked to some activity concerning the product.

33. The *Agreement* refers to the notion of benefit. Firstly, by Article 1 it is explicitly made an element of the notion of subsidy. Secondly, specifically in regard to the rules on countervailing duties, Article 14 addresses the 'calculation of the amount of a subsidy in terms of the benefit to the recipient'. The importance of identifying the beneficiary of the benefit that constitutes the subsidy was emphasized by the Appellate Body in *Canada – Aircraft* (para. 154).

34. Finally, reference should be made again to Article VI:3 of the *GATT 1994*, and in particular to the definition given there of the term 'countervailing duty': 'a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise'. Clearly, what is to be offset is the benefit conferred by the subsidy.

35. Where, as in the present case, the subsidy is given to one person, but it is another person that has exported the product to the Member claiming that injury has been caused, the authorities must establish that the subsidy has in some way 'passed through' to the second person. The issue is one that has arisen in *US – Softwood Lumber IV*. In that case the Appellate Body observed that (para. 140) that "the phrase "subsid[ies] bestowed ... *indirectly*", as used in Article VI:3, implies that financial contributions by the government to the production of *inputs* used in manufacturing products subject to an investigation are not, in principle, excluded from the amount of subsidies that may be offset through the imposition of countervailing duties on the *processed product*". However, "where the producer of the input is not the same entity as the producer of the processed product, it cannot be presumed [...] that the subsidy bestowed on the input passes through to the processed product", "in such case, it is necessary to analyze to what extent subsidies on inputs may be included in the determination of the total amount of subsidies bestowed upon processed products".

36. The nature of the enquiry that is necessary in order to determine whether and to what extent there is pass through of input subsidy benefits was indicated by the panel in a GATT Subsidies Code dispute (*US - Canadian Pork*). According to this panel the basic criterion was how much prices of the input product were lowered. The panel suggested that among the relevant considerations were the degree to which swine were internationally traded, and the per unit cost of producing the additional output of swine that the subsidies may have caused.

37. In *US – Countervailing Measures on Certain EC Products*, para. 127, the Appellate Body has also used the criteria of arm's-length sale and "fair market value" when considering whether a subsidy

given to a state-owned company can be taken to benefit the private body that emerges when that company is privatised (in this instance the term 'pass through' was not used).

38. In its Final Resolution, the Ministry asserted that the supply of olive oil and its prices were affected by the subsidy. Firstly, the supply increased because olive production was rendered more attractive than that of other crops. Secondly, the increased supply led to lower prices.

39. However, these propositions are mere assertions and, even if true, they would not explain how a subsidy could have passed through to the exporters. The Resolutions contain no indication of any attempt by the Ministry to support its statements with evidence. This cannot have been for lack of basic data. Much information regarding the production, prices and exports of olives and olive oil was available to it. The EC provided arguments to show the lack of connection between the levels of the production subsidy and those of prices over the period between 1992 and 2003.

40. The EC also explained how the arrangement of enterprises involved in the olive oil business meant that olive growers were quite distinct from olive oil exporters, and that prices were determined not by the production subsidies but by the operation of demand and supply. The EC criticised the failure of the Ministry not to extend its enquiries to olive growers, but to limit them to exporters and/or producers of olive oil.

41. In this context it is worth referring to an Australian investigation into imports of EC olive oil, which was virtually contemporaneous with the Mexican investigation. The report of the Australian investigating authority of 24 May 2004, which was known to the Ministry, shows the kind of enquiries that should be made in this context, as well as indicating the conclusions that would result from an objective investigation: that olive oil exporters were at arm length in the sales chain, that olive oil produced by the growers is an input product to the goods exported to Australia, that pass through of benefit could not be demonstrated and that market forces alone dictate the price of each transaction.

42. The second of the weaknesses affecting the Ministry's arguments about increased supply causing lower prices is that even if that were true it would not lead to the conclusion that the olive oil exported from the EC constituted 'subsidized imports'. A particular feature of the international market in olive oil is the dominant position of EC production and exports. Depending on the level of international demand, if the EC harvest is large prices may fall, but this effect will be felt immediately throughout the international market.

43. The Ministry also argued that 'because it is not an investigation on a subsidy on a consumable (olives) but on olive oil, which is the product itself exported to the United Mexican States for that reason, the investigating authority is not obliged to carry out an analysis of the system for pass through of the subsidy since Regulation 136/66/EEC establishes indisputably that the programme of aid is for olive oil.'

44. This attempt to exclude the issue of pass through because the subsidized product and the exported product were in some way the same is wrong or, even if correct, would be irrelevant.

45. The Ministry's argument is wrong because it assumes that the subsidy was given on the production of olive oil. In fact, the aid was given to those who (a) grew olives, and (b) had them crushed to produce olive oil. In concentrating on the second of these steps the Ministry completely overlooked the first. Thus, even if it could be established (which the Ministry does not try to do) that the olive oil that emerged after the second stage was the same as the oil that was exported to Mexico, the olive that was produced after the first stage certainly was not.

46. In this context further mention should be made to the contemporaneous Australian investigation into olive oil from the EC. In that case the investigating authority found that the oil produced by the crusher was not the same product as that imported into Australia because the imported oil had first been filtered and blended by the exporter. It concluded that the oil sold by the producer was an upstream product of the exported oil.

47. The Ministry's arguments regarding the sameness of the subsidized and the exported products are irrelevant because they are in effect an application of a test of 'likeness', and there is no WTO rule specifying such a test as between, on the one hand, the product on the production of which the aid is granted and, on the other, the product that is exported to the Member taking countervailing measures. The sole requirement of likeness that is found in WTO countervailing duty law is the one which exists as between the 'subsidized import' and the product being produced in the importing country. This requirement arises only in the context of injury causation, as defined in the *SCM Agreement*.

48. Even supposing that such a transfer of the subsidy had occurred, the Ministry failed to make appropriate adjustments to the value that the subsidy would have had for the exporters. The Ministry rejected several claims without giving a reasoned or adequate explanation for that rejection.

49. Firstly, the Ministry refused to make any adjustment for the fact that a proportion of the exports from the EC to Mexico consisted of oil that had not been in any way subject to the EC aid scheme. For the most part this consisted of oil on inward processing arrangements. This was oil that had been imported into the EC from non-EC countries (mostly from Tunisia) and blended with EC-origin oil before being exported to Mexico. Of course, such oil could in no way be said to have benefited from the EC's aid programme. Oil of this kind was estimated to be about 7 per cent of Spanish production and 10 per cent of Italian production.

50. Secondly, the Ministry calculated the margin of subsidy for each company by comparing the amount of the subsidy with the exporter's sales prices adjusted to an ex-factory level. The effect of such a comparison is to produce an artificially high margin.

51. The Ministry was also guilty of serious failings in the way in which it went about its investigations when it was making adjustments for costs incurred between the receipt of the subsidy and the export of the olive oil to Mexico. The Ministry abandoned its obligation to investigate the relevant facts. The Ministry undertook the task of investigating the costs incurred by companies engaged in bringing the olive oil to market with a view to making adjustments to the benefit derived from the aid. However, the Ministry also asked these companies to give an account of the costs of other companies that had been involved with the oil. An investigating authority cannot escape its responsibility to investigate and determine the level of subsidization by passing the task on to exporting companies.

52. Secondly, the Ministry continued addressing questions to the companies on this issue after the date when the investigation should have finished.

53. The seventh claim is that Mexico failed to give a reasoned and adequate explanation of the existence of a domestic industry and consequently acted inconsistently with Article VI:6 of the *GATT 1994* and Articles 15.4, 15.5 and 16 of the *SCM Agreement*.

54. Fortuny was the complainant in the Mexican proceedings that led to the imposition of countervailing duties against olive oil from the EC. It appears that a company named 'Formex Ybarra, SA de CV' ('Formex Ybarra') was engaged in both importing and producing olive oil until October 2001. In May 1999 it placed distribution of olive oil in the hands of a related company, Distribuidora Ybarra, SA de CV ('Distribuidora Ybarra'). In October 2001 Formex Ybarra underwent certain further changes. Fortuny took over the production activities of Formex Ybarra but, unlike its

predecessor, it did not import olive oil. Fortuny continued to rely on Distribuidora Ybarra for distribution of a large part of its olive oil, until it ceased production. Fortuny and Distribuidora Ybarra ceased to be related in December 2001, and Distribuidora Ybarra was purchasing increasing amounts of olive oil from foreign suppliers.

55. The Ministry accepted Fortuny's claim that it was the only olive oil producer in Mexico (until it ceased production in 2002), but it signally failed to provide a reasoned and adequate explanation for this conclusion. The Ministry failed to carry out a proper investigation of this matter.

56. Firstly, it contacted a Mexican firm, Maprinsa, alleged by the exporters to be producing olive oil. The Ministry reported that Maprinsa explained that it was engaged solely in bottling and packaging olive oil, and not in producing it. However, the Ministry apparently made no attempt to discover from Maprinsa whether the oil that it bought was of Mexican or foreign origin. Secondly, the Ministry showed a similar lack of initiative when investigating two other firms that were revealed to be engaged in bottling only, and in regard to yet two more firms that were named as possible producers the Ministry either relied on a third party's view or did nothing at all to determine the nature of their activities. In addition, the Ministry simply dismissed artisan production as irrelevant because it was not distributed through the same channels as imports. Thirdly, the Ministry contacted a national association of oil and edible fat industries, but this association merely confirmed that Fortuny was the only olive oil producer registered with it and that it had no registrations of any domestic producer other than Fortuny. Fourthly, it contacted several government organisations, but these proved unable to provide relevant information. Despite this failure the Ministry made no further efforts to gain information from government sources.

57. The Ministry's shortcomings in the determination of the existence or non-existence of producers should be seen in the light of the data produced by the International Olive Oil Council (IOOC), which, presumably relying on Mexican government sources, shows Mexican production levels of 1000 tonnes in 1999/2000, 1500 tonnes in 2000/01, and 2000 tonnes in 2001/02.

58. The failure to determine properly whether or not there were producers of olive oil in Mexico during the investigation period completely undermines the reliability of the injury finding made by the Ministry. As a consequence, the Ministry has failed to provide a reasoned and adequate explanation of its conclusions. More specifically, the failure to investigate properly the extent of the domestic industry means that the Ministry could not possibly comply with the stipulation in Article 15.1 that a determination of injury for the purposes of Article VI of *GATT 1994* must involve an objective examination of the impact of the subsidized imports on the domestic producers of the product. As a consequence, the obligation in Article VI:6 would necessarily be infringed.

59. The Ministry's finding on industry suffers fatally from the fact that it rests on a finding that there was no domestic production during the period of investigation used for the determination of the existence and amount of subsidy.

60. That some level of domestic production must exist is clear from the terms of Article 16.1 of the *Agreement*. Thus, the existence of domestic producers is essential, and those producers must have 'output'. Consequently, if, as the Ministry maintains, there was no output, there can have been no production, and if there was no production there can have been no industry.

61. This interpretation is reinforced by considering the context of Article 16. Article 15.4 lists the factors to be considered in examining the impact of the subsidized imports and the important feature of these factors (such as sales, market share, profits, and productivity) is that all refer to an activity that is ongoing and to the condition of an existing industry. The same conclusion follows from a consideration of Article 15.5, which speaks of subsidized imports that 'are ... causing injury'. The reference is clearly to the present, to what is happening when the investigation is carried out, not to

what might have happened in the past. Likewise, at another point Article 15.5 speaks of 'any known factors ... which at the same time *are* injuring the domestic industry'.

62. The Appellate Body has said in *US – Softwood Lumber IV* (para. 64) that the object and purpose of the *SCM Agreement* is to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while recognizing at the same time, the right of Members to impose such measures under certain conditions. In a similar vein it has described them as reflecting a 'delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures (*US – Countervailing Duty Investigations on DRAMS*, para. 115). These views suggest that it would be a mistake to look for particular economic theories as an aid to interpretation.

63. In conclusion, the investigation of injury is not an inquest into the causes of an industry's death, but an examination of its present condition and of the present causes of that condition. For that to be possible there must be an industry presently in existence; in other words, there must be existing producers.

64. In support of its argument that there need be no national production during the investigation period the Ministry invoked a decision of a Binational Panel established under the North American Free Trade Agreement, where the anti-dumping proceedings were found not to be affected by the fact that production at the only domestic producer had ceased.

65. However, that determination differs from the present investigation in a number of important particulars which serve to make its observations irrelevant. Firstly, the panel was interpreting Mexican law, whereas the present dispute is entirely governed by WTO rules. Secondly, the situation being considered by the Binational panel was not one where domestic production had ceased during the course of the investigation, but only after the end of the investigation period. In the present case, the applicant had no production at the time when the subsidy investigation was commenced or at any point in time during the investigation period.

66. The sole facts on which the Ministry relied for its acceptance of the applicant as constituting the domestic industry were (a) that it had previously produced olive oil, (b) that it allegedly had been forced to stop producing because of the imports of olive oil from the EC, and (c) that it intended to recommence production, and did indeed do so to some degree, following the investigation period.

67. None of these considerations, some of which were in any case unfounded, alter the basic inadequacy of the Ministry's findings. In particular, if the fact that there had previously been a domestic producer of olive oil was acknowledged to be sufficient, the concept of domestic industry would entirely lose its integrity. If other producers had existed during the investigation period then they would have constituted the domestic industry. However, because of the Ministry's failure to adequately investigate this possibility any consideration of the injury suffered by that industry would be purely speculative.

68. The eighth claim is that Mexico has failed to give a reasoned and adequate explanation of its injury determination, based on positive evidence, and involving an objective examination of all relevant economic factors and indices having a bearing on the state of the industry. As a consequence it has violated Article VI:6 of the *GATT 1994* and Articles 15.1 and 15.4 of the *SCM Agreement*.

69. The complaint by Fortuny alleged the existence of the third of the types of injury mentioned in Article VI:6 of *GATT 1994*: it alleged subsidization that was such as to 'retard materially the establishment of a domestic industry'.

70. However, in the Initiation Resolution the Ministry concluded that "there is evidence that the injury to the domestic industry is linked to the subsidies granted to imports from the European Union". In other words, it referred to injury that had already occurred. Furthermore, the factors listed in the Resolution were largely ones concerning alleged past harm to the domestic industry, although it also found that 'resumption of operations would be economically viable if the distortion caused by subsidized imports is eliminated.' This ambiguous approach continued throughout the investigation. The Ministry's ultimate conclusion came down in favour of 'material injury'.

71. In any case, a simultaneous finding of both 'material injury' and 'material retardation' on the same facts is not possible, as the GATT panel in *Korea – Resins* declared.

72. As a first step in the determination of injury Article 15.1(a) of the *SCM Agreement* requires investigating authorities to make an objective examination of 'the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products'.

73. As regards volume, the Ministry looked at imports from the EC and other countries in successive 9-month periods (April to December) in three years, 2000, 2001 and 2002 (the last of these periods being the subsidy investigation period). It found that there had been significant increases.

74. As regards 'the effect of the subsidized imports on prices in the domestic market for like products', the Ministry concluded that there was 'significant price undercutting' by EC olive oil of that of Fortuny in the years 2000 and 2001. Of course, because Fortuny ceased selling in March 2002, there were no data for undercutting for that year, the subsidy investigation period. However, the only calculations of subsidization that the Ministry had made were for the investigation period in 2002. Its determination of 26.5 per cent subsidization in 2002 was invoked to explain the level of undercutting for the years 2000 and 2001.

75. Such a disjunction cannot be reconciled with the obligation in Article 15.1 of the *Agreement* that determinations of injury must be 'based on positive evidence', and that they must 'involve an objective examination' of the effect of the subsidized imports on prices in the domestic market for like products. Likewise, it conflicts with the basic obligation on national authorities to give reasoned and adequate explanations of their decisions.

76. It is also worth noting that in making the undercutting calculation, the Ministry never explained the basis for the prices assigned to domestic (Fortuny's) olive oil. In fact, the efforts of the Ministry to identify buyers of Fortuny's oil, or even firms that had received offers from Fortuny, were wholly unsuccessful.

77. In relation to Article 15.4. (evaluation of all relevant economic factors and indices having a bearing on the state of the industry) the Ministry was faced with the problem that during the investigation period there was no production. That in itself would be sufficient to prevent any examination of injury that was compatible with Article 15.4, and this fundamental flaw may account for the confused state of the Ministry's presentation of data pertaining to injury. Furthermore, the time frame is repeatedly moved, sometimes the focus is on what happened in the investigation period and earlier, and sometimes on what Fortuny planned for the future. The objectiveness of the examination was also undermined by the choice of investigation periods of nine months in three successive years, of which the last period, although coinciding with the investigation period for subsidization, started only after the shut down of Fortuny's production.

78. In addition, some of the trends noted by the Ministry appear to contradict the notion that Fortuny was suffering injury in the period prior to its cessation of production. Thus, production, prices and employment actually increased at this time. The profit data also show a marked increase in performance in 2001, which is also reflected in return on investment.

79. The ninth claim is that Mexico has failed to properly consider, as required by Article 15.5 of the *SCM Agreement*, any known factors, other than the alleged subsidized imports, which were causing injury to the domestic industry.

80. The Ministry's failure to identify an industry that had suffered material injury has the consequence that its conclusions regarding causation in general, and the effect of 'other factors' in particular, were made in a vacuum, and have no significance. Moreover, the Ministry's analysis of 'other factors' was marked by failures that were sufficient in themselves to render that analysis ineffective.

81. The EC and the exporters raised a number of factors, other than exports from the EC, which they said were causes of any injury that was suffered by the alleged Mexican industry.

82. The Ministry's examination of these factors was cursory. Firstly, it said that there did not seem to be a problem with new brands since at least nine new brands (Spanish and Italian) had had no problems entering the domestic market in spite of their being previously unknown. Secondly, the Ministry said that one would expect higher relative prices in the market for products of recognised brands, whereas olive oil imported from the EC was systematically lower priced. As regards the loss of links with the distribution network, the Ministry ignored Fortuny's experience of the period from 2000 to 2002 in favour of comments regarding the future. Likewise, in regard to the issue of guaranty of supply, the Ministry looked only to the future in the form of Fortuny's expected levels of production. Regarding the alleged lack of a guaranty of product quality the Ministry confined itself to calling for more information. Finally, the Ministry gave no consideration to the high level of Fortuny's costs.

83. The Ministry's analysis fails completely to provide the reasoned and adequate explanation of the Ministry's conclusions that is required by WTO law, as elaborated in the jurisprudence.

84. Finally, according to Article 19.1, the EC requests that the Panel accompany its recommendation with a suggestion to Mexico that a complete repeal of the measure against EC olive oil would be the most appropriate and/or effective way of bringing the measure into conformity with its WTO obligations. In this respect two factors are of particular relevance. Firstly, the initiation of the investigation was accompanied by serious procedural defects, notably regarding the holding of consultations, the exercise of due restraint, the adequacy of the complaint, the provision of non-confidential summaries, and the time limit regarding the completion of the investigation. Secondly, the basis for imposing countervailing duties has disappeared because at the beginning of 2006 the system of EC production aids was replaced by an entirely different system.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF MEXICO

(18 May 2007)

LEGAL ARGUMENTS

A. CLAIMS CONCERNING PROCEDURAL VIOLATIONS ALLEGEDLY COMMITTED BEFORE OR DURING THE COURSE OF THE INVESTIGATION

1. **Mexico complied with Article 13.1 of the Agreement on Subsidies and Countervailing Measures (SCM) in inviting the European Communities (EC) to hold consultations before initiating its investigation**

1. In its first written submission (FWS), the EC appears to argue that the Ministry of the Economy (hereinafter "the Ministry") decided to initiate the investigation on 2 July 2003, that on 4 July it invited the EC for consultations in accordance with Article 13.1 of the SCM Agreement and, as a result, consultations were held only on 17 July, in violation of the above-mentioned article.

2. The EC's claim is unfounded since, in accordance with footnote 37 to the SCM Agreement, the investigation was initiated on 16 July, the date of publication of the Initiation Resolution (IR) in the *Diario Oficial de la Federación* or DOF (Official Journal). This footnote says that initiation is the formal action by which an investigation is commenced, which may vary according to the legal system of each Member of the World Trade Organization (WTO). Pursuant to Article 85 of the Mexican Foreign Trade Law (FTL) and Article 7 of the Federal Tax Code (FTC), any general administrative provision, such as the initiation of an investigation, shall enter into effect on the day following its publication in the DOF. This means that the investigation was initiated on 16 July 2003 and not 2 July.

3. Consequently, having invited the EC for consultations on 4 July, Mexico clearly complied with the requirements of Article 13.1 of the SCM Agreement, as it made this invitation before the initiation of the investigation. Therefore we request the Panel to find and conclude that there is no substance to the claim made by the EC.

2. **Mexico initiated its subsidy investigation on the basis of an application made by the domestic industry, in compliance with Article 11.4 of the SCM Agreement**

4. In its FWS, the EC wrongly maintains that Mexico violated Article 11.4 of the SCM Agreement, on two grounds: (a) During the investigation period Fortuny was not producing, an indispensable requirement under Articles 16.1 and 11.4 of the SCM Agreement; and (b) the degree of support or opposition among the rest of the domestic producers was not examined (it is also maintained that the measures taken in the course of the investigation to determine whether there were other domestic producers were inadequate).

- (a) The Ministry treated Fortuny as a domestic producer in a manner consistent with the SCM Agreement

5. The EC stresses that as Fortuny was not producing during the investigation period it cannot be regarded as a producer and claims to base this conclusion on Articles 16.1 and 11.4 of the SCM Agreement. We note that these are general provisions applicable to all, not just some, subsidy investigations.

6. If the EC's claim were correct, these articles could not be applied in matters concerning material retardation, since the domestic producers would not be producing. The same thing would happen if production were temporarily suspended because of planned or unforeseen stoppages, in cyclic or seasonal industries, or if production had been suspended and could not be resumed, despite everything being in place, because subsidized imports were preventing the domestic product from finding a market.

7. As pointed out in paragraph 7.147 of the final report of the panel in *Mexico – Corn Syrup*, Article 4.1 of the AD Agreement (and hence 16.1 of the SCM Agreement) is in fact applicable in the case of material retardation of the establishment of a domestic industry, and for this reason the EC's claim lacks substance. We therefore believe that Articles 16.1 and 11.4 of the SCM Agreement should be interpreted in a reasonable manner and not strictly, so that the fact that domestic producers were not producing at a particular moment would not prevent their being treated as producers.

- (b) Fortuny was a producer and represented the Mexican domestic industry

8. The investigating authority (IA) found that Fortuny was the legal and business successor of Formex Ybarra in its olive oil production activities, which had continued uninterrupted from the 1940s until 2002. Fortuny had, and has, the appropriate installations and qualified personnel for producing olive oil. The Ministry had evidence to show that Fortuny did produce the identical or like product during the determination of injury period. Moreover, Fortuny has never been involved in liquidation or insolvency proceedings, re-registration, change of corporate purpose or anything else that might imply the termination of its activities as an olive oil producer.

9. Thus, being an entity with a legal and commercial existence on the domestic market, it cannot be regarded as defunct because production was interrupted. The nature of the injury suffered is therefore not considered to be material retardation. We reiterate that Fortuny stopped producing olive oil after a period of more than 55 years of uninterrupted production, which is why it had information about the indicators needed to determine injury.

10. The fact that Fortuny requested the initiation for material retardation is irrelevant. We do not see why the IA should have to restrict itself strictly to the grounds mentioned by the applicant. There is no such provision in the SCM Agreement, which is why we refer to the argument in which we explained why it should be considered that if a WTO Agreement is silent on a particular point, there is a reason for it, since if a provision is to be applied in another context, the negotiators would have said so explicitly. Consequently, Mexico was under no obligation to initiate the investigation on grounds of material retardation. In fact, the Ministry, anxious not to make an incorrect assertion and proceeding with the utmost moderation, initiated the investigation on grounds of "injury" in the general sense as defined in footnote 45 to the SCM Agreement, switching to "material injury" in the light of the information provided by the parties in the course of the investigation. The Ministry initiated the investigation upon determining that the application included sufficient and relevant evidence of the existence of a subsidy, injury, and a causal link between both (paragraphs 54 to 121 of the IR).

11. Consequently, there was nothing to prevent the finding that the applicant did exist and was an olive oil producer and that it was therefore inappropriate to conclude that the injury caused was material retardation. This was confirmed by the exporters, who argued that the situation of the domestic industry was adjusting to material injury and not to material retardation since it was not a new industry (paragraphs 279 of the Final Resolution (FR) and 219 of the Preliminary Resolution (PR)).

12. With regard to the degree of support, the EC argues that the Ministry did not carry out a realistic investigation because it did not investigate whether there were other producers. We believe that in order to initiate an investigation, the evidence does not necessarily have to be of the quality of that required for a preliminary or definitive determination, since it does not have to be anything more than circumstantial evidence sufficient for the IA to decide to initiate an investigation, during which it will determine whether it is appropriate to apply a countervailing duty. Support for this position can be found in paragraphs 7.74 and 7.76 of the final panel report in *Mexico – Corn Syrup*, paragraph 8.35 of the final panel report in the *Guatemala – Cement II* dispute and paragraph 7.81 of the final panel report in *Argentina – Poultry*. In the olive oil investigation, the Ministry determined that there were sufficient facts to justify the assumption that Fortuny was indeed the only domestic producer and that these consisted of the statement from Fortuny (paragraphs 22 and 47 of the IR) to the effect that it represented 100 per cent of domestic production, corroborated by two important documents: (a) a specialist publication of the Ministry of Agriculture, Livestock, Rural Development, Fisheries and Food (SAGARPA), which is an authoritative source of agricultural information indicating that Formex Ybarra (Fortuny) was the only olive oil producer; and (b) a statement by the Agricultural Promotion Department of the State of Lower California confirming that the applicant had production-ready installed capacity. Thus, even where there was only one domestic producer, the Ministry determined that Fortuny constituted the entire domestic industry, as supported by the findings in paragraph 6.72 of the final panel report in *EC – Bed Linen*.

3. The investigating authority complied with its obligations under Article 13(b)(i) of the Agreement on Agriculture

13. In its FWS, the EC argues that Mexico violated Article 13(b)(i) of the Agreement on Agriculture by failing to observe the following two restrictions on the imposition of countervailing duties: (a) Countervailing measures may only be imposed if there is a determination of injury or threat of injury; and (b) due restraint should be shown in initiating any investigation.

14. First, it is important to point out that Article 13(b)(i) is applicable to the period preceding the initiation of an investigation, hence the EC's claim concerning the imposition of measures has no merit. Moreover, for a rule to be violated two elements must be present: (a) a rule in force; and (b) an action at variance with that rule. In the olive oil investigation, the due restraint clause was not applicable after initiation as it expired on 31 December 2003, in accordance with Article 1(f) of the Agreement on Agriculture. Consequently, no rule was in force after initiation.

15. Moreover, due restraint does not constitute a different standard for investigations of agricultural products. Even if it were so, we reiterate that it is only applicable at the time of initiation of the investigation, as acknowledged by the WTO itself, the United States (US) and the EC. Due restraint is not a prohibition on initiation, but an appropriate and reasonable standard for initiation. Thus, in addition to the fact that the Ministry did apply a reasonable standard (as demonstrated by the sending out of a request for supplementary information or "*prevención*"), it should be taken into account that the subsidy was first granted long before the investigation was initiated (1966), that injury to the domestic industry began long before the initiation, that Mexico waited almost to the end of the period of validity of the due restraint clause to initiate the investigation and that there was an ample interval between the application for and the initiation of the investigation.

16. Accordingly, we consider that the Ministry did not act in a manner inconsistent with Article 13(b)(i) of the Agreement on Agriculture.

17. With respect to the first restriction and the statement that Mexico unduly imposed countervailing measures because measures could not be adopted in response to complaints made by the applicant relating to material retardation, we note that there is no provision in the SCM Agreement to the effect that an IA must abide strictly by the terms of the initial application, which is why Mexico was not obliged to initiate the investigation on grounds of material retardation. Indeed, the Ministry initiated the investigation on grounds of "injury" in the general sense of footnote 45 to the SCM Agreement and issued its determination of "material injury" in the light of the information supplied by the interested parties during the investigation. We recall that, as explained in our FWS, if a WTO Agreement is silent on a particular point, there is a reason for it, since if the negotiators had intended the requirements of a provision to be applicable in another context, they would have said so explicitly.

18. Article 11.2 of the SCM Agreement states that the application is to include evidence of the existence of injury within the meaning of Article VI of GATT 1994, that is to say, in accordance with footnote 45 to the SCM Agreement, and not that the mode of injury alleged in the application is that which the IA has necessarily to investigate. Thus, having reviewed the information and evidence in the application, the IA sent the above-mentioned "*prevención*" in order to clarify and/or supplement data on the injury suffered. From the application and the applicant's reply, the IA decided to initiate an investigation for injury in general, as reflected in paragraph 54 of the IR, and then, during the investigation, determine the specific nature of the injury suffered by the domestic industry. This was because, in principle, it was not possible to initiate an investigation for retardation when the domestic industry had existed since the 1940s and still existed. The imposition of measures was based on the existence of material injury and not material retardation. Thus, the authority did not act in a manner inconsistent with the WTO Agreements.

19. As regards the second restriction, the EC maintains that the Ministry violated the Agreement on Agriculture for the following reasons: (a) The IA initiated the investigation with exceptional haste (as shown by the supposedly belated holding of consultations); (b) in examining the degree of support, it did not spend enough time on familiarizing itself with the domestic industry; and (c) it converted an application based on material retardation into one based on material injury. There is no basis for the EC's claims and we therefore request that the Panel reject them. We note that the lack of due restraint should be demonstrated positively, not merely by means of assertions.

20. Regarding the alleged "exceptional haste", it is not clear why initiating an investigation promptly is at variance with due restraint and how that could constitute a violation of Article 13(b)(i) of the Agreement on Agriculture. As regards the consultations under Article 13.1 of the SCM Agreement, we refer to the comments above. Even if initiating an investigation promptly is regarded as a violation of due restraint, a period of four months elapsed between the application for the initiation of an investigation and the publication of the IR, largely due to the "*prevención*" (request for supplementary information), which is why we do not consider there to have been the alleged haste mentioned by the EC.

21. With regard to the degree of support, the EC's argument is not based on the facts of the case. We refer to the paragraphs detailing the efforts made and the criteria used by the IA to determine the domestic industry, which demonstrate that the IA proceeded with due restraint.

22. Similarly, regarding the claim that the IA took an application based on material retardation and converted it into one based on material injury, we reiterate that nothing in the WTO Agreements prevents an IA, even if the application is based on retardation, from initiating an investigation for injury on the basis of footnote 45 to the SCM Agreement. The IA analysed the data in the application

and the reply to the request for supplementary information and on that basis decided to initiate an investigation for injury, in a manner consistent with Article 13(b)(i) of the Agreement on Agriculture.

23. The EC's assertions do not therefore constitute a prima facie presumption of a violation on Mexico's part, so we request that its claims be dismissed. In this regard, we refer to the Appellate Body (AB) report in *United States – Wool Shirts and Blouses*, paragraphs 99 and 100 of the AB report in *EC – Hormones*, and paragraph 129 of the AB report in *Japan – Agricultural Products II*.

24. Moreover, as a treaty must be interpreted in accordance with its text, and considering that if a WTO Agreement is silent, there is a reason for it to be so, it is impossible to make a valid case for the existence of obligations under the SCM Agreement which are not stipulated in that Agreement. Thus, we repeat, there has been no violation of the Agreement on Agriculture that could be imputed to Mexico.

4. Mexico acted in a manner consistent with Articles 12.4.1 and 12.8 of the SCM Agreement

25. We note that this EC argument can be divided basically into two parts. Firstly, it is maintained that the Ministry acted in a manner inconsistent with Article 12.4.1 of the SCM Agreement because, without any justification, it failed to ensure that the interested parties furnished non-confidential summaries of their confidential information and that these summaries contained sufficient detail, all of which prejudiced the opportunities for the EC and the exporters to defend their interests. Secondly, it is claimed that the essential facts that served as a basis for the decision to apply definitive measures were not disclosed, in breach of Article 12.8 of the SCM Agreement.

26. We do not consider the EC's assertions to constitute a prima facie presumption of a violation on Mexico's part. In this respect, we consider it impossible for a panel to rule in favour of a party that has not established such a presumption and we therefore request that the claim be dismissed and refer to the considerations set forth in paragraphs 66 to 70 of our FWS.

27. With respect to the EC's first premise, Mexico believes that all the provisions of the SCM Agreement have a *raison d'être* and that in this context, in accordance with the jurisprudence established in paragraph 6.38 of the final panel report in *Argentina – Ceramic Tiles*, the purpose of Article 12.4.1 of the SCM Agreement is to provide a mechanism which allows interested parties to become acquainted with the content of confidential information, while at the same time protecting the interests of the parties providing that information.

28. Thus, as the basic purpose of the relevant provisions of the SCM Agreement is to enable the parties to acquaint themselves with the confidential information they need to defend their interests, it would be best to focus on determining whether in this investigation the parties were acquainted with such information so as to be able to defend their interests properly. In order to be able to determine this, it is necessary to analyse both the legal framework applicable to that investigation and the questions of fact as reflected in the administrative file.

29. With regard to applicable standards, Mexican legislation concerning access to confidential information establishes a sufficient mechanism for the interested parties to acquaint themselves with that information, so it is quite wrong to suggest that the EC or the exporters would not have been able to acquaint themselves with that data. As stated in Articles 80 of the FTL and 147 of its Regulations, Mexico allows the legal representatives of all interested parties access to all the confidential information contained in the investigation file, provided that they comply with certain requirements. This, so that the parties are acquainted with it and, in full exercise of their right to defend themselves, may put forward their arguments relating to that information.

30. Thus, even if there are no public summaries, the parties may become acquainted with all the confidential information. We consider that such access undermines any claim that the parties' right to due process was adversely affected, since, we repeat, all the confidential information could have been consulted and not only the public summaries. Thus, the objective indicated in the final panel report in *Argentina – Ceramic Tiles* is entirely fulfilled by the Mexican legal regime. In fact, the record shows that the joint legal representative of the exporters did consult, on several occasions, the confidential information contained in the administrative file, as can be seen from the entries in the Access Control Register of the IA (Exhibit MEX-2), from which it is clear that the exporters were acquainted with the information which the EC claims they could not see.

31. In addition, it is important to note that the interested parties did furnish non-confidential summaries of all the confidential information with which they supplied the Ministry, in compliance with both the international rules and the IR notification and the IA's requests for information, since in all these it is stated that the parties are under an obligation to furnish all their information in public and confidential versions. Thus, all the interested parties furnished public summaries of all the documents they supplied that contained confidential information.

32. It is therefore untrue to say that the rights to due process of the EC and its exporters were undermined since, firstly, under the Mexican legislation they were always able to obtain access to all the confidential information in the administrative file on the investigation (which they in fact did) and, secondly, there actually were public summaries of all the confidential information.

33. With respect to the EC's claim regarding Article 12.8 of the SCM Agreement, it should be recalled that according to paragraph 6.125 of the final panel report in *Argentina – Ceramic Tiles*, as the manner in which an authority is to comply with the disclosure obligation is not prescribed, parties may be informed of the essential facts in a number of ways, for example, by issuing a special document, a verification report, a preliminary determination, etc. In this case, the Mexican IA disclosed the essential facts by making them available to the interested parties in the PR, which is consistent with the WTO Agreements. The PR describes in detail the treatment of the information, arguments and evidence furnished by the parties, what information was taken into account and what was rejected and why, which refutes the EC's assertion to the effect that the parties were not provided with this information. Consequently, the EC's arguments are completely unfounded.

5. Mexico complied with the provisions of Article 11.11 of the SCM Agreement

34. The EC argues that the investigation lasted more than 24 months, and that Mexico acted in breach of Article 11.11 of the SCM Agreement. It claims that: (i) Mexico did not explain why the circumstances were "special", thereby justifying the extension from 12 to 18 months; and (ii) it exceeded the absolute limit of 18 months for concluding the investigation.

35. The EC also tries to excuse the lack of cooperation on the part of both the interested parties and the EC itself, suggesting that they were "placed ... in the dilemma that if they wished to defend their interests they would have to condone the Ministry's failure to respect Article 11.11" and also arguing that even though this was their "only means of insisting on the importance of the rules of the [SCM] Agreement", the Ministry presumed that the points they were maintaining had not been established and that in effect they were penalized for the IA's own failures.

36. With regard to the publication of the reasons why the circumstances were special, we consider that the EC's interpretation of Article 11.11 of the SCM Agreement is incorrect, as this article does not establish an obligation to issue a notice explaining the special circumstances. It is certainly not possible to be accused of violating an obligation not specified in the SCM Agreement. What should

be examined is whether there were circumstances justifying an extension of the time limit rather than whether a formal explanation of those circumstances was offered.

37. With regard to the 18-month time-limit, it should be pointed out that, as can be seen from the various resolutions (initiation, preliminary and final), the volume of information involved represented a serious procedural burden for the parties, so that all the interested parties (exporters, importers, applicant and the EC itself) requested numerous extensions in the course of the proceeding (the corresponding list is annexed to our FWS). In most cases, the IA granted these extensions in order to observe due process and to gather as much information as possible so as to make a correct determination. These extensions, the verification visit to the applicant's premises, and the action taken by the IA in response to the questions put by the parties themselves all served to prolong the proceeding.

38. We consider that Article 11.11 of the SCM Agreement protects the parties from any unjustified delay or inaction, so that they are not left defenceless and so that the delay does not work in favour of one of the parties, which was not the case with this investigation. The IA was not inactive, biased or negligent, quite the opposite. Given the complexity of the case, there was no alternative but to extend the time limit so as to ensure a sound basis and a proper determination.

39. At the same time, the public hearing raised various concerns and questions that could not be ignored. The IA therefore asked for replies to these questions in writing and also requested the information necessary to clarify the significance of the data and the questions related thereto. In addition, during the hearing and subsequently, by written communication, the exporters asked the IA to carry out an on-the-spot investigation at Fortuny to verify, on its premises, the information that it had submitted. This investigation was carried out on 19 January 2005.

40. Thus, it is incongruous to assert that the rights of the interested parties were adversely affected because the extensions requested were granted and because their requests for various forms of administrative action (such as the on-the-spot investigation) were accepted. The Ministry considered it better to ensure the rights of the parties than to ignore these requests and conclude the investigation on time.

41. With regard to the EC's lack of cooperation, we consider its assertion completely unfounded. The EC admits that it did not provide the information requested, but also maintains that there were no valid grounds for requesting that data. In principle, there is no article to support its actions, since under no circumstances would it have been excused from submitting the information requested from it in the investigation. We see no reason why "the only way of stressing the importance of the rules of the SCM Agreement" was to refuse to provide information. The same applies to its assertion that providing this information would be tantamount to "condoning" the actions of the Ministry. Accepting the EC's assertion would be tantamount to handing over complete control of the investigation to the parties, which is unacceptable, as they could refuse to provide information under any pretext. It would be impossible to gather data during an investigation or make a proper determination. In addition, Article 12.7 of the SCM Agreement does not indicate any exceptions to the obligation upon the parties to provide the information requested, which means that the IA could validly use the "facts available" to make its determinations. Therefore, we respectfully request the Panel to reject the EC's arguments.

B. CLAIMS CONCERNING THE CONDUCT OF THE INVESTIGATION AND THE FINAL AFFIRMATIVE DETERMINATION

1. **Mexico did provide a reasoned and adequate explanation of the existence of subsidization, did calculate the benefit conferred on the exporters of the product investigated and did apply the method used to each particular case as required by Articles 1.1 and 14 of the SCM Agreement**

42. This claim can be divided into two parts: (a) subsidization in general; and (b) calculation of the subsidy margins.

(a) Subsidization in general

43. The EC argument has no basis in the SCM Agreement. Under the SCM Agreement there is no obligation to make the pass-through analysis claimed, which is why we request that the Panel reject this claim. Moreover, the subsidy programme is set out in Regulation 136/66/EEC and has been notified to the WTO Committee on Agriculture as a subsidy granting mechanism. Being regulated by a legal instrument, the programme exists and was in effect during the investigation period. In fact, the EC has never claimed otherwise. It is a subsidy whose existence, validity and application are beyond dispute.

44. Regulation 136/66/EEC indicates that: (a) Aid is expressly established for olive oil production; (b) for checking the quantity of olive oil eligible for the aid, oil yields are fixed for each marketing year; and (c) the reason for subsidizing olive oil is its economic importance in certain regions of the EC and the fact that it is the most important source of oil and fats.

45. Thus, the subsidy is intended to encourage the production of olive oil. The Regulation is categorical in this respect, which is why the IA assumed that the subsidy was being granted for the production of this product. The IA did not focus on a product linked to the subsidy, but on the subsidized product. We feel it is incorrect that the subsidy was granted to someone other than the exporter, since it is designed, regulated and implemented to aid olive oil production. In the light of this, we do not see why there should be any need to analyse the transfer of the subsidy.

46. In our opinion, countervailing duties are not designed to offset a benefit or a subsidy, but to offset the injury caused by an actionable subsidy. As we shall see, this is the reason why, rather than countervailing duties being imposed for the entire margin of subsidy, a reference price was established to offset the injury suffered by the domestic industry, thereby interfering as little as possible with imports of the European product.

47. In addition, Mexico notes that in order to interpret the SCM Agreement properly, and according to the AB report in *United States – Carbon Steel*, where a WTO agreement is silent on a specific issue, there is a reason for this inasmuch as when the negotiators intended that a provision be applied in another context, they did so expressly. Thus, it is impossible to make a valid argument for the existence of obligations under the SCM Agreement which are not mentioned in the Agreement itself. The SCM Agreement does not establish the duty to analyse the transfer of the subsidy, hence there is no obligation at all in this sense.

(b) Calculation of the subsidy margins

48. The EC states that even if there had been a pass-through analysis, the calculation of the subsidy margins would have been inconsistent with the SCM Agreement.

49. With respect to the claim concerning the pass-through analysis, we refer to the above considerations, which show that the methodology used by the IA was correct.

50. Concerning the adjustment for imported oil of non-Community origin, no adjustment was made because the interested parties did not propose a methodology or submit relevant documentary evidence that would have enabled the IA to quantify, for each exporting company, the percentage of olive oil that had not benefited from aid and then make the corresponding adjustment. The exporters repeatedly refused to provide relevant information that would have enabled the Ministry to make this adjustment. As is noted, the authority gave the interested parties ample opportunity to provide a methodology and documentary evidence in support of their request and asked that if this information was not specifically available, they propose an alternative calculation method. Despite this, the IA never received a reply from the exporters, which is why it decided to reject their request. Thus, the absence of the adjustment was for reasons imputable to the exporters and not the Ministry.

51. With regard to the comparison of the amount of the subsidy with the exporters' ex-factory sales prices, we consider that in order to clarify the situation, it is important to point out that an IA has at least two ways of establishing margins of dumping or subsidy: (i) *ad valorem*; and (ii) in specific or unit terms.

52. The Ministry established subsidy margins in unit terms (dollars/kg). When an IA calculates specific subsidy margins, the use of export prices at ex-factory level or at c.i.f. level does not affect the result, as shown below. For determining the subsidy margin two export prices are required, those that the IA determined using the method described in paragraph 150 of the FR. Thus, the Ministry calculated two export prices: (i) the ex-factory export price (subsidized price); and (ii) the constructed price (unsubsidized price), which was obtained by adding the unit amount of subsidy to the subsidized export price. The following example shows how the margin of subsidy in unit terms is unaffected by the use of ex-factory or c.i.f. prices:

- Scenario 1:

53. Suppose that the price at which the goods were exported to Mexico was 3 € per kg and that the unit amount of subsidy was 0.64 € per kg. By applying the method described, we obtain the following result:

Ex-factory export price or subsidized price (€/kg)	Unit amount of subsidy (€/kg)	Constructed export price or unsubsidized price (€/kg)	Margin of subsidy (€/kg)
A	B	C = A+B	D = C-A
3.00	0.64	3.64	0.64

- Scenario 2:

54. Suppose that the price at which the goods were exported to Mexico was 3 € per kg, that to obtain the price at c.i.f. level 1 € per kg is added (the additional cost to obtain the export price at the importing country frontier) and that the unit amount of subsidy was 0.64 € per kg. By applying the method described, we obtain the following result:

Ex-factory export price or subsidized price (€/kg)	C.i.f. export price or subsidized price (€/kg)	Unit amount of subsidy (€/kg)	Constructed export price or unsubsidized price (€/kg)	Margin of subsidy (€/kg)
A	$B = A + 1 \text{ €/kg}$	C	$D = B + C$	$E = D - B$
3.00	4.00	0.64	4.64	0.64

55. As can be seen, in both scenarios the margin of subsidy in specific terms was 0.64 € per kg for each exporting company. As stated earlier, the margin of subsidy was not affected by considering ex-factory or c.i.f. export prices. Therefore, the EC's claim to the effect that Mexico artificially increased the margin of subsidy for each exporter by using the ex-factory sales prices in its calculations is incorrect.

56. With regard to the exporters being asked for cost information from other companies, it is important to note that these were not isolated requests sent out for no good reason. The purpose of the IA's requests was to obtain data and evidence to deal with a request by the exporting companies, the associations and the EC Delegation to the effect that the olive oil subsidy could not be passed through in its totality to the product exported to Mexico, since there were processes intermediate between the production of the oil and its exportation. In response, the Ministry tried to gather information to calculate the percentage represented by olive oil in the production cost structure for the oil from extraction to exportation, which proved to be impossible because this data was not provided. Aware of the difficulty of gathering data, the Ministry repeatedly asked for alternative calculation methods, as a much more accessible option, but still did not receive any reply.

57. If an interested party asks for certain adjustments, it has an obligation to provide the elements which make it possible for the proposed adjustment to be accepted. Even though this was not done, the Ministry decided to calculate an adjustment factor that reflected the percentage represented by subsidized olive oil in the production cost structure for the oil, using the facts available in accordance with Article 12.7 of the SCM Agreement.

58. Finally, with regard to the exporters' alleged dilemma when it came to providing information requested by the IA, because the time-limit for concluding the investigation had already expired, we refer to the considerations set out in the relevant paragraphs of our FWS.

59. It is therefore quite wrong to suggest that the Ministry acted in a manner inconsistent with the SCM Agreement and the Panel is therefore requested to reject the EC's claims.

2. Mexico did correctly define the domestic industry

60. The EC maintains that Mexico failed to identify its domestic industry on the basis of positive evidence and consequently acted inconsistently with Article 15.1 of the SCM Agreement.

(a) The Ministry properly determined that Fortuny was the sole domestic producer

61. Mexico considers it important to point out that, as stated in paragraphs 97 and 99 of the AB report in *United States – Softwood Lumber VI* (Article 21.5), the examination of the conclusions of the IA must be based on the information contained in the record and on the reasoning found in its resolutions. Accordingly, the work of the Panel does not consist of carrying out a *de novo* examination nor of replacing the judgement of the Ministry with its own reasoning, but only of

determining whether the IA could reasonably have arrived at the conclusions contained in its Resolution.

62. The EC relies on isolated sentences and paragraphs of the FR which do not constitute a prima facie presumption of violation, as explained in paragraphs 66 to 70 of our FWS, hence we request that the assertions be dismissed. Nevertheless, even if this presumption had been established, its argument would still be erroneous, since the Ministry's exhaustive efforts and the evidence available showed that the applicant was the sole domestic producer.

63. A comprehensive reading of paragraphs 212 to 255 of the FR clearly shows why it was concluded that Fortuny met the requirements of representativeness and legitimacy for the purposes of requesting and conducting the present anti-subsidy investigation, in terms of the provisions of Articles 11.4 and 16 of the SCM Agreement. This section describes the efforts made by the authority to inquire into the alleged existence of other domestic producers.

64. As for the EC's assertion that the IA made no attempt to obtain information on the origin of the oil marketed by Maprinsa, this is unfounded. The exporters declared that Maprinsa was a producer of olive oil and that it obtained this oil from a plant located in Mexico City. In response, Fortuny indicated that it had sent samples of the oil to the laboratory Bufete Químico, S.A. de C.V. for analysis and that it was not olive oil but canola oil.

65. In order to ascertain the accuracy of the contradictory information, the Ministry sent an information request to Bufete Químico and to Maprinsa. Bufete Químico confirmed the authenticity of the samples sent to it for analysis and that the oil sold by Maprinsa was not olive oil. As indicated in paragraphs 193 and 194 of the PR, in its reply Maprinsa stated the following: (i) It only bottled and packaged olive oil and other products; (ii) it did not produce olive oil but only bought it and packaged it for distribution; (iii) it did not belong to any industrial chamber; (iv) the olive oil manufacturers known to it were: Olivarera Tulyehualco, Olivos de California and Conservas Vermex; and (v) it bought oil from those offering the lowest price and then packaged it, and its most regular suppliers were Olivarera Tulyehualco, Olivos de California, Wal Mart and Importaciones Colombres.

66. Contrary to the statement by the EC, Maprinsa declared that the oil which it packaged could be Mexican or imported, as it bought oil either from these producers or from importers. Moreover, with regard to the alleged domestic producers, it should be noted that Wal Mart and Importaciones Colombres are marketing companies. The Ministry requested information from Conservas Vermex and Olivarera Tulyehualco and both companies replied that they did not produce olive oil but only packaged it. Consequently, in addition to the fact that neither of them were producers, the product they were marketing was not olive oil but canola oil.

67. Consequently, the ASOLIVA and ASSITOL associations subsequently claimed that by simply bottling the "imported product", Maprinsa could be deemed a domestic producer. Even though there was no obligation to examine this argument since the oil packaged by Maprinsa was not the product investigated, the Ministry examined it and determined that pursuant to the criteria laid down in the Free Trade Agreement between Mexico and the European Union, packaging is insufficient to confer the status of originating products, which is why Maprinsa cannot be considered a domestic producer. Furthermore, the Ministry sent various information requests to the Mexican Industrial Property Institute (IMPI) in order to verify the use and registration of trademarks and the existence of other possible brands registered by domestic producers of olive oil. From the replies given by the IMPI, it was not possible to identify any other domestic producers.

68. As regards other possible producers, both ASOLIVA and ASSITOL indicated that Aceites Navarra did not produce olive oil but only packaged it. Consequently, it could not be considered a domestic producer either. With regard to Llanos de San Francisco, it is clearly stated in a specialized

publication by SAGARPA, the specialized government authority in Mexico for the agricultural and livestock sector, that "Llanos de San Francisco is producing olive oil on an experimental basis". In this connection, we consider that an experimental producer cannot be considered a domestic producer as it is at the evaluation and sampling stage and is thus not really an economic agent in the industry inasmuch as, *inter alia*, its product is not yet involved in the market and the final specifications of the product to be sold have not been defined.

69. Regarding the EC's argument that the Ministry had dismissed artisanal production because it was not distributed through the same channels as the imports, it must be pointed out that, contrary to what may happen in some other countries, Mexico's production sector in general is largely made up of micro-enterprises or establishments that are little more than workshops with low technology and often composed of two or three people. Moreover, very few of them are organized in trade unions or similar groups and it is therefore extremely difficult to obtain information on their existence. In our case, information was requested from government institutions, the interested parties, and entities that were not interested parties but which could provide information.

70. Contrary to the claim by the EC, the Ministry did not dismiss artisanal production because it was not distributed through the same channels as the imports. It was Fortuny who alleged this, but the Ministry did not accept that. The IA did not dismiss artisanal production. Quite the contrary, it sent requests for information to various entities requesting them to identify any domestic producer of olive oil. The Ministry never limited its search to manufacturers whose production was marketed through the same channels as the imported product. The Ministry issued requests for information on any domestic producer of which the recipients were aware. All channels were exhausted in order to obtain this data; nevertheless, the efforts made were in vain.

71. The EC continued their claims by stating that the IA had contacted the ANIAME, which had only confirmed that Fortuny was the sole olive oil producer registered therewith, and that this reply "does not inspire confidence". In our view, this statement cannot constitute a *prima facie* case of violation by Mexico, so we request that it be rejected. In this regard, we reiterate what is stated in our FWS to the effect that an IA must take into account all the information provided by the parties or obtained by itself, as found by the AB in its report on the *United States – Softwood Lumber VI (Article 21.5)* case. With regard to the reliability of the reply by the ANIAME, two factors must be considered: (a) the ANIAME is the Mexican association of edible oils and fats manufacturers and, consequently, its information was important to the investigation; and (b) the information submitted by the ANIAME reaffirmed the other evidence indicating Fortuny as the only domestic producer.

72. The EC also claims that the Ministry contacted various government offices, which were unable to provide relevant information, and did not make further efforts to obtain more data. This information alone cannot be considered a *prima facie* case of violation by Mexico either, so we request that it also be rejected. Firstly, there were no other government bodies in addition to those from which information was requested which could provide information on the existence of domestic olive oil producers. The Ministry sent requests to all government offices that could provide information on the existence of domestic producers. The IA requested information from the Office of the Federal Attorney-General for Consumer Affairs, the IMPI, and the Directorate-General of Standards, which is responsible for official technical standards regarding commercial matters. None of them provided information suggesting the existence of other domestic producers of olive oil.

73. Moreover, in order to obtain further data on producers other than Fortuny, the Ministry requested information from the following non-party companies: the *Asociación Nacional de Tiendas de Autoservicio y Departamentales, A.C.* – ANTAD (National Association of Self-Service and Department Stores), which groups some of the major self-service and commercial distribution chains in Mexico, the Grupo Gigante and Comercial Mexicana, and companies which did not belong to the ANTAD, such as Nueva Wal Mart, Grupo Corvi, Servicio Comercial Garis and La Europea México,

asking them for information on any domestic olive oil producer known to them. In their replies (submitted as annexes to our FWS), most of the entities replied that the olive oil they marketed was imported and that they had not received any offers to market olive oil from Mexican companies. Despite these efforts, it was still not possible to obtain information on any producer other than the applicant.

74. The EC also claims that the Ministry's passivity can be seen from the fact that the information on which it based itself is inconsistent with that from the IOOC, which – "presumably" based on Mexican Government data – shows that production in Mexico was 1,000 tonnes in 1999/2000, 1,500 tonnes in 2000/2001 and 2,000 tonnes in 2001/2002. However, the EC itself presented a table in which, in contradiction to the data from the IOOC, the Food and Agriculture Organization of the United Nations (FAO) showed that Mexican production barely reached 200 tonnes. As can be seen in Table 9 of the PR, domestic production (by Fortuny) ranged from 254 to 310 tonnes between 2001 and 2002, which is consistent with the information from the FAO submitted by the EC. This indirectly confirmed that the applicant was the only Mexican producer as it produced 100 per cent of the production cited by the FAO and the EC. Furthermore, the information on the global market for olive oil taken into account by the Ministry was that presented by ASOLIVA and ASSITOL (annexed to our FWS), which does not mention Mexico as an olive oil producer. Thus, the parties could not demonstrate the existence of any other domestic producer either (except for Maprinsa, whose situation has already been explained).

75. Thus, the authority had information from the interested parties, government organizations and other entities not party to the investigation, and from all this information it was not possible to infer that other domestic producers existed. Moreover, despite the invitation issued through the initial and preliminary resolutions, no company came forward as a domestic producer. All the evidence led to the conclusion that the domestic industry was composed of Fortuny. Consequently, the IA conducted an objective examination of the information obtained as well as that furnished to it, acting consistently with Article 15 of the SCM Agreement. The Ministry was proactive and made an impartial and objective evaluation of all the information obtained. We therefore consider the EC's claims to have no basis whatsoever and we renew our request that they be rejected.

(b) The domestic industry exists and suffered material injury

76. The EC states that, as no olive oil was produced during the period investigated, it cannot be claimed that there was a domestic industry and that the investigation should focus on the present situation and not on what might have occurred in the past. According to the EC, the IA based itself on a decision by the Binational Panel established under the North American Free Trade Agreement (NAFTA). Furthermore, it claims that the Ministry did not take proper action to identify other domestic producers.

77. In relation to the claim concerning the identification of other domestic producers, we refer to the comments above. With regard to the Binational Panel (case MEX-USA-00-1904-01), the Ministry did not base its conclusions on the findings in this procedure but on the following: (a) if the mere absence of production sufficed to consider that there was no domestic industry, then the form of injury consisting of material retardation in the establishment of such an industry would lose all meaning; (b) cases in which production has been temporarily suspended because of planned or unforeseen stoppages would not be admissible; (c) material injury or threat of material injury could not be determined in the case of cyclic or seasonal industries; and (d) injury could not be determined in cases where a domestic industry had suspended its production and could not resume it, even though all the necessary means were available, because of the subsidized imports. The FR explains the reasons why the IA rejected the Binational Panel's decision.

78. Likewise, the IA did not focus on determining what happened to the domestic industry prior to the period investigated. The Ministry's conclusions are clear insofar as the material injury caused to the domestic industry consisted of the fact that the subsidized imports prevented it from resuming its activities.

79. Lastly, with regard to the relevance of the production element in determining the existence of a producer, we refer to the considerations in our FWS, which explain that Fortuny was a domestic producer as it had produced for many years and that there was sufficient documentary proof to consider that it represented 100 per cent of the domestic industry, which was subsequently confirmed during the course of the investigation.

3. Mexico made a proper determination of injury in accordance with Article 15 of the SCM Agreement

(a) Nature and existence of the alleged injury

80. Regarding the alleged ambiguity of the type of injury analysed, we refer to the paragraphs in which we explain why there is no obligation on the IA to confine itself to the type of injury alleged by the applicant. The investigation was initiated into injury in the general sense of footnote 45 to the SCM Agreement, which is totally valid. We see no reason for any confusion whatsoever. We consider that there is no violation of the SCM Agreement because the IA differs from the applicant's description of a situation prejudicial to domestic production. From a factual standpoint, it is an industry that cannot resume activities because of the unfavourable situation deriving from subsidized imports.

81. The PR and the FR determined that the situation faced by the domestic industry conformed to the concept of material injury as it was not a new industry (we recall that it had existed and produced for decades and was not the subject of procedures that implied the termination of its production activities) but had simply suspended its activities and could not resume them because of the subsidized imports. Even the exporters argued that the situation in the industry corresponded to material injury and not to retardation, and the IA agreed with this. The analysis of injury is clear in respect of the type of injury caused because the Ministry obtained relevant information to analyse the domestic industry during a sufficiently long and representative period. If that had not been the case, there would be no reason for the IA to request information from Fortuny on the indices mentioned in Articles 15.2 and 15.4 of the SCM Agreement concerning the company's prior activities over a period of at least three years. The statement by the EC therefore has no substance.

82. With regard to the argument that the factors taken into account by the IA concerned injury that had occurred before the period investigated, it appears that the EC assumes that the injury was the suspension of activities at Fortuny, which is incorrect. The Ministry determined that the material injury caused to Fortuny consisted of preventing the company from resuming its activities. The suspension of activities was only one element of the situation during the period analysed for the purposes of injury, which was impossible not to analyse, as it was also relevant for evaluating the viability of resumption of activities if the injury caused was offset. Consequently, it was relevant to include this information in the analysis of injury, and it was never considered to be an element supporting a determination of material retardation, contrary to the EC's claim.

83. We consider it important to emphasize that the Ministry never issued a simultaneous finding of both material injury and material retardation. We do not know the EC's basis for making such a statement, since the resolutions clearly establish that the measure was taken because of material injury.

(b) Examination of volumes and prices

84. Regarding the volumes of imports, the EC does not make a claim as such, so there is no prima facie case of violation. We therefore request that its assertion be rejected. Moreover, the FR contains a comprehensive analysis of the effects of these imports on prices on the Mexican market. Thus, we believe that this issue has been properly explained.

85. In the light of the above, the IA noted that the prices of the subsidized product fell during the first two years of the period of analysis of injury and that this trend was reversed when Fortuny suspended production. The IA complied with Articles 15.1(a) and 15.2 of the SCM Agreement by undertaking an objective examination based on positive evidence of the effect of the subsidized imports on prices, the results of which showed that the prices of the imports were even below domestic production costs. The IA based itself on concrete and potential information.

86. Regarding the alleged absence of data on the domestic industry's prices, it suffices to refer to paragraphs 312 to 316 of the FR, which clearly indicate the way in which the Ministry considered the prices of the domestic product and which include the effect of the imports on prices and the existence of undercutting in relation to both the domestic prices and production costs. In this respect, there was concrete information (historical data) and potential information (period of suspension of activities and their possible resumption). The undercutting margin in question was determined in comparison with the actual prices and costs recorded (not estimated). The subsidy largely explains the difference compared to the actual domestic costs and prices recorded for this period.

87. Moreover, it is wrong to say that the IA was not able to obtain information on Fortuny's prices through its buyers. In addition to the actual prices indicated, Distribuidora Ybarra provided information on prices that coincided with those submitted by Fortuny. This was verified by the Ministry itself. Therefore, the information on prices provided by Fortuny was confirmed by Distribuidora Ybarra (the main buyer of Fortuny) and verified by the IA. In addition, Distribuidora Ybarra declared that it had ceased to purchase from Fortuny for price reasons, which is proof of the existence of undercutting.

88. It is not clear to us why, according to the EC, a comparison between import prices and domestic costs is irrelevant when analysing injury. Any company sets up and operates in the hope of generating profits by selling a product at a price higher than its production cost. Consequently, it cannot be ignored if the price of the subsidized import is lower than the domestic producer's production costs. If a company is confronted by prices below its costs and cannot wage a "price war", it is logical that it will suspend its activities and find it difficult to resume them. If, in addition, the low prices of the competition are the result of an unfair practice that has an artificial impact on prices, then a small company such as Fortuny simply cannot compete, and much less with the financial resources of the EC, which is the major global producer.

89. The evidence available showed that there were significant margins of undercutting by the subsidized imports with respect to domestic prices and costs, and that the domestic industry incurred operating losses. Furthermore, the Ministry also took into account the comparison between the relative prices of the imports and the estimated prices and costs of the domestic industry during the period when activities were suspended and the resumption project.

(c) Determination of material injury

90. We consider it incorrect to state that the deterioration of Fortuny ceased to be of significance because the company was unable to resume operations. The examination by the IA to determine the existence of injury covered three years including the period investigated for the purposes of the subsidy. Moreover, its analysis of trends and performance relating to the relevant factors was not

limited to comparable periods of each year, but also took into account monthly or annual data so as to gain a more precise picture of the situation. Furthermore, in conformity with Article 15.4 of the SCM Agreement, the IA specifically examined the actual and potential effects of the imports on domestic production. In this respect, the FR reflects the growing trend in imports, together with the effects on prices and on the domestic industry.

91. With regard to the trend in domestic production, there was monthly information for the whole period from January 1999 to December 2002, which confirms that even taking into account the information in annual terms, there was a clear downward trend in domestic production. The analysis cannot concentrate on a single isolated indicator, nor can it only be based on comparison between one year and another. Accordingly, if we take into account production for the periods January-December of the various years analysed, there was apparently a recovery in April-December 2001 and 2000, but if 2001 is compared to 1999, there is a decrease of 60 per cent in production until operations were suspended in 2002. There must be a full-scale evaluation in this respect. There was a continual decrease in the applicant's production indices, which confirmed that the subsidized imports from the EC were worsening the situation of the domestic industry to the point of interrupting its operations and preventing their resumption.

92. With regard to the absence of production during the period investigated, reading the FR in full reveals the extremity of the situation faced by the domestic industry as a result of the effects of the subsidized imports. Furthermore, we reiterate that the Ministry determined that the material injury consisted of preventing the resumption of operations and not the suspension itself. It is not possible to claim that the analysis of injury caused by the subsidy should be limited to the period investigated, since it should include an examination of the relevant economic factors in the domestic industry over a broader and sufficiently representative period in order to reach a positive determination. For this reason, the statement on the alleged irrelevance of the deterioration at Fortuny has no substance.

93. Regarding the focus during the period investigated and Fortuny's future plans, we reiterate that the material injury caused to the applicant was the prevention of resumption of its operations. Thus, the analysis was based on the facts that had caused the domestic industry to suspend its activities and on the conditions that would allow it to resume operations, considering whether the elimination of the effects of the subsidy was a condition for such resumption. In this context, the analysis must take into account what occurred during the period investigated and in previous periods in order to discover what made Fortuny suspend operations, and the analysis of feasibility of its business plan in order to see whether it was possible to resume operations if the subsidy was offset. In fact, it is not possible to know with certainty what factors prevent the resumption of activities when the circumstances which led to the temporary shutdown of operations are not known. Consequently, the IA's exhaustive analysis is consistent with the SCM Agreement, which states that the indices for the domestic industry must be analysed both in actual and potential terms.

94. Regarding the use of nine-month periods for each year in the evidence of injury, the EC does not present a *prima facie* case for violation by Mexico and simply states that it undermined the objectivity of the analysis of injury. We therefore request that this assertion be rejected.

95. Furthermore, the SCM Agreement does not contain any directive on how the analysis of injury in a subsidies investigation should be conducted in terms of the period to be considered for each of the years analysed. In accordance with paragraphs 61, 65 and 69 of the AB report in *United States – Steel Products from Germany*, we consider that as there is no indication in the SCM Agreement as to how the analysis of injury should be conducted as regards the periods to be used, there is thus no violation of the Agreement when using nine-month periods for each year.

96. Nevertheless, the analysis of injury was conducted by comparing the periods April to December in 2002, 2001 and 2000, and the indices for April to December for one year were thus

compared with those for the same period in the other two years and not with those for any other period, irrespective of whether during each nine-month period the situation was better or worse than in the half-year January to June. In this way, if the Ministry had found that the indices for April to December in 2002, 2001 and 2000 had shown an extremely negative situation in the domestic industry but had been the same year after year, it would not have determined that injury had been caused, even when the period April to December was less favourable to the domestic industry than January to March.

97. The information used by Mexico therefore allowed a comparison of the relevant indices for the domestic industry with previous comparable similar periods, as a nine-month period in one year is structurally the same as the equivalent period in the preceding year. Consequently, by definition, the structure is the same. Thus, in order to avoid bias or fluctuations, the same periods of each year were compared. By using comparable periods for the analysis of injury, possible distortions were eliminated and it was possible to compare properly the information for the period investigated with that for prior comparable periods. Consequently, the objectivity of the analysis of injury was not affected.

98. With regard to the analysis of the factors provided in Article 15.4 of the SCM Agreement, paragraphs 328 and 367 of the FR show that the IA examined each and every one of them. It is necessary to clarify that when an index shows a variation it is not immediately reflected in the other factors. The economic situation of a company is not automatically and immediately affected by such a variation. Consequently, even when two or three of Fortuny's indices increased slightly prior to the suspension of activities, this does not mean that there was no material injury. We recall that the material injury caused to the domestic industry consists of not being able to resume operations. It is therefore Fortuny's actual situation during the period investigated that is relevant. In fact, even where the injury consists of the suspension of operations, the increase in these indices would not indicate absence of injury, as immediately after the improvement they deteriorated to the extent that operations were suspended.

99. As a result of the foregoing, Mexico requests the Panel to determine that the IA undertook its analysis of injury consistently with Article 15 of the SCM Agreement and Article VI.6 of the GATT 1994.

4. Mexico did properly consider, as required by Article 15.5 of the SCM Agreement, other factors which were causing injury to the domestic industry

100. The EC states that the analysis of non-attribution of injury must consist of more than listing other factors of injury and then dismissing them with mere qualitative assertions. It states that an IA must explain the nature and extent of the harmful effect of these other factors, preferably on a quantitative basis, and that the Ministry did not comply with this criterion.

101. It suffices in this regard to turn to paragraphs 415 to 437 of the FR to see that quantitative reasons were taken into account when determining that the other factors did not contribute to the injury suffered by the domestic industry. The EC's arguments are therefore mere assertions which do not constitute a prima facie case of violation by Mexico, and for this reason we request that the allegation be dismissed.

102. In fact, the IA analysed the factors mentioned in Article 15.5 of the SCM Agreement: (a) The analysis of the volume and price of non-subsidized imports is found in paragraphs 416 to 425 of the FR, where it is stated that the subsidized imports from the EC accounted for over 93 per cent of total imports and that the share of non-subsidized imports fell during the period analysed for the purposes of injury; (b) the analysis of the contraction in demand or changes in the pattern of consumption is to be found in paragraph 429 of the FR and paragraphs 330 to 332 of the PR, where it is explained that,

far from there being a contraction in demand, there was an increase; (c) restrictive trade practices by foreign and domestic producers and competition among them are referred to in paragraph 337 of the PR, which states that there are no indications of such practices; (d) developments in technology are mentioned in paragraph 337 of the PR, which states that there is no information on whether these are affecting the market; (e) export performance is referred to in paragraph 337 of the PR, which states that there are no indications of whether this was affecting the domestic industry (particularly as there were no exports throughout the period analysed for the purposes of injury); and (f) other known factors which might have caused the alleged injury such as those mentioned in the following paragraphs.

103. The EC claims that the factors listed in paragraph 221 of its FWS were not examined by the IA. We consider its argument to be without substance, as Mexico did analyse these factors. It should be noted that the fact that the EC mentioned a list of "possible" factors which, in its view, had affected the domestic industry does not mean that it submitted evidence that these factors did in fact have any effect on the domestic industry and still less that such evidence was sufficient to prove that.

104. In this regard, the importer, Distribuidora Ybarra provided elements to the Ministry in order to determine whether any of the factors mentioned by the EC were the cause of injury to the domestic producer. In this respect, Distribuidora Ybarra indicated that it had ceased to purchase products from Fortuny because of its prices. Thus, the problem was neither the alleged loss of a distribution network, problems of supply nor the quality of the product, but the low prices of European oil.

105. In addition, concerning the loss of the distribution network previously supplied by Distribuidora Ybarra, it is important to note that in the PR it was indicated that the applicant had the necessary distribution resources to carry out its activities (107 lorries, market stalls and vans, 217 supervisors, sales persons and promoters and 24,000 m² of warehouses). Consequently, there was no loss of distribution network and therefore this was not a cause of injury.

106. With regard to the loss of the Spanish brand Ybarra, both the importers and exporters submitted a "market survey" as proof of this claim. However, the survey did not show the alleged preference for the Spanish brand, only that it was known, and consequently, as there is no link between the content of this document and the claim, the Ministry did not consider the document a relevant element to prove that the injury caused to Fortuny derived from loss of the Ybarra brand. Moreover, even if the findings of the survey were those indicated by the importers and exporters, the preference for the Ybarra brand would also have affected the market share of Italian brands and of the other Spanish brands of olive oil, as well as that of other new brands. In contradiction to the statement by the importers and exporters, however, the volumes of these brands showed a marked increase. Consequently, the Ministry rejected the claim by these interested parties.

107. Regarding the consumers' alleged mistrust of the Fortuny product, it is important to point out that none of the interested parties indicated this as being a possible cause of injury. Nevertheless, bearing in mind that the reason put forward by Distribuidora Ybarra for ceasing to purchase Fortuny's oil was the price itself and not problems regarding consumer preferences related to aspects other than the price, it may be assumed that this was not a cause of injury for the applicant either.

108. Regarding Fortuny's allegedly high costs, the Ministry did not only analyse them but also took into account several additional factors. All this can be seen in paragraphs 368 to 414 of the FR, in which all the elements that would allow Fortuny to resume its production activities are considered. The way in which production costs were considered in order to determine whether it was economically feasible to resume operations is reflected throughout these paragraphs. The conclusion reached at the end of the feasibility analysis is that the subsidized imports from the EC were being sold in Mexico at low prices and that this did not allow Fortuny to resume operations, a conclusion that corresponds to the information provided by Distribuidora Ybarra and mentioned above.

109. In addition, it is important to bear in mind that olive oil production is given a subsidy in the EC, that this subsidy allows olive oil to enter the Mexican market at prices below the domestic price and even below the domestic production costs, thereby allowing new brands from unknown producers to emerge in Mexico. This allowed a traditional dealer such as Ybarra to dissociate itself from the domestic industry and devote itself entirely to imports, which led to an increase in imports in both absolute and relative terms.

110. The IA therefore did not only analyse the factors indicated by the EC but, in addition, examined all the aspects which it considered might have influenced the situation in the domestic industry, therefore, the EC's argument has no substance.

ANNEX B

THIRD PARTY SUBMISSIONS

Contents		Page
Annex B-1	Executive Summary of the Third Party Submission of Canada	B-2
Annex B-2	Executive Summary of the Third Party Submission of China	B-6
Annex B-3	Executive Summary of the Third Party Submission of Japan	B-8
Annex B-4	Executive Summary of the Third Party Submission of Norway	B-13
Annex B-5	Executive Summary of the Third Party Submission of the United States	B-18
Annex B-6	Third Party Oral Statement of Canada	B-24
Annex B-7	Third Party Oral Statement of the United States	B-25

ANNEX B-1

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF CANADA

(21 June 2007)

I. INTRODUCTION

1. Canada considers that these proceedings raise significant systemic issues regarding countervailing investigations conducted under the *WTO Agreement on Subsidies and Countervailing Measures* (SCM Agreement). Canada's submission focuses on two issues. The first issue concerns the necessity for investigating authorities to ensure that the procedural rights of parties to the investigations are respected. The second issue relates to the necessity for a Member to demonstrate the pass through of a subsidy. That is, in circumstances where an input subsidy is received by someone other than the producer or exporter of the product under investigation, investigating authorities may not impose countervailing measures on the product unless they have demonstrated that the subsidy was passed through to the producer or exporter of the product under investigation.

II. ARGUMENT

1. Procedural Claims

2. Canada notes that, among its specific claims of violation, the European Communities (the EC) alleges several procedural violations by the Mexican investigating authority both before and during the course of the investigation. These include the failure: to afford the EC an opportunity for consultations prior to the initiation of the investigation, contrary to Article 13.1 of the SCM Agreement; to require the complainant to provide non-confidential summaries of confidential information, contrary to Article 12.4.1 of the SCM Agreement; to disclose essential facts, contrary to Article 12.8 of the SCM Agreement; and to provide a reasoned and adequate explanation of key determinations underpinning the imposition of countervailing duties.

3. Canada, and indeed the broader WTO Membership, has an overarching systemic interest in ensuring that the investigating authorities of all Members adhere to the basic requirements of due process (procedural fairness) as prescribed in the covered agreements, including the SCM Agreement. In this regard, while Canada does not intend to opine on the merits of the EC's individual claims of procedural violation, it feels compelled to raise certain concerns about the potential broader ramifications of the denial of due process in trade remedy investigations.

4. Each party to a countervail investigation (or, for that matter, an anti-dumping or safeguard investigation) is entitled to a reasonable opportunity to defend its interests. This ability depends directly upon the party having adequate knowledge of the opposing case (i.e., of the specific allegations and supporting evidence of parties adverse in interest), and being afforded a reasonable opportunity to present its own case (i.e., to present arguments and evidence in support of its own position and to rebut opposing positions). Clearly, the EC's claims of violation – if borne out – would constitute critical breaches of the basic due process requirements set out in the SCM Agreement. In this regard, if substantiated, the failure of the Mexican investigating authority to provide an opportunity for pre-initiation consultations would have deprived the EC of any prospect of influencing the initiation decision, while the authority's failures in respect of the disclosure of information in the

record would have deprived the EC of adequate knowledge of the case against it. Likewise, if demonstrated, the absence of reasoned and adequate explanations of key determinations would have compromised the ability of the EC to identify and assess all potential grounds for the invocation of further related proceedings (e.g., administrative or judicial review).

2. Pass-Through

5. Canada would like to stress the importance of, when dealing with input products, conducting a pass-through analysis where circumstances require it. The necessity of a pass-through analysis flows from the GATT 1994 and the SCM Agreement and has been acknowledged by panels and the Appellate Body.

6. When conducting an investigation concerning allegedly subsidized products, a Member must establish that a subsidy exists before it may impose countervailing duties, and it may not impose such duties in an amount greater than the amount of the subsidy demonstrated to exist. Article VI:3 of the GATT 1994 sets out this fundamental obligation. The obligation to not impose countervailing measures in excess of any subsidy demonstrated to exist is reaffirmed in Article 10 of the SCM Agreement.

7. Finally, Article 32.1 of the SCM Agreement confirms that the imposition of duties is unlawful where a Member fails in this obligation. It provides that "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

8. Nothing in the context or object and purpose of these provisions alters the fundamental obligation to demonstrate the existence and the amount of a subsidy with respect to a product before imposing countervailing duties on that product. This includes, in the context of an investigation concerning allegedly subsidized input products, the requirement to demonstrate that an input subsidy to an upstream recipient has been passed through to the downstream producers or exporters of the product under investigation.

9. Article 1.1 of the SCM Agreement sets out an exhaustive definition of "subsidy" that applies to this obligation. Under this provision, there is no "subsidy" when a "benefit" has not been conferred upon a recipient. The panel in *US – Softwood Lumber IV*, referring to the findings of the Appellate Body in *Canada – Aircraft*, found that the term "benefit" "implies some kind of comparison" and that the "marketplace" provides a basis for this comparison.

10. In a pass-through context, the obligation on Members is to compare the transactions in question to the marketplace to determine whether, and to what extent, a benefit under Article 1.1(b) of the SCM Agreement is conferred. As explained by the panel in *US – Softwood Lumber IV*, the results of such analysis may not be presumed:

The heart of the pass-through issue is whether, where a subsidy is received by someone other than the producer or exporter of the product under investigation, the subsidy nevertheless can be said to have conferred benefits in respect of that product. If it is not demonstrated that there has been such a pass-through of subsidies from the subsidy recipient to the producer or exporter of the product, then it cannot be said that subsidization in respect of that product, in the sense of Article 10, footnote 36, and Article VI:3 of GATT 1994, has been found. Thus, we find that a pass-through analysis is required by these provisions ... where there are such upstream transactions.

11. Accordingly, where a subsidy is received by "someone other than the producer or exporter of the product under investigation", a Member must establish whether and to what extent the benefit to an upstream recipient passes to a downstream entity through the purchase of an input product.

12. In *US – Softwood Lumber IV*, the Appellate Body agreed with the panel's interpretation. Drawing on the text of Article VI:3 of the GATT 1994, the Appellate Body found that a Member may not presume that a subsidy passes through transactions where "the producer of the input is not the same entity as the producer of the processed product". The Appellate Body also explained in no uncertain terms that analysis under Article 1.1(b) of the SCM Agreement is required:

Where a subsidy is conferred on input products, and the countervailing duty is imposed on processed products, the initial recipient of the subsidy and the producer of the eventually countervailed product, may not be the same. In such a case, there is a *direct recipient* of the benefit – the producer of the *input* product. When the input is subsequently processed, the producer of the *processed product* is an *indirect recipient* of the benefit – provided it can be established that the benefit flowing from the input subsidy is passed through, at least in part, to the processed product. Where the input producers and producers of the processed products operate at *arm's length*, the pass-through of input subsidy benefits from the direct recipients to the indirect recipients downstream cannot simply be presumed; it must be established by the investigating authority. In the absence of such analysis, it cannot be shown that the essential elements of the subsidy definition in Article 1 are present in respect of the processed product.

13. Thus, the Appellate Body and panels have stressed the importance of demonstrating that a product is subsidized before imposing countervailing duties.

14. In this case, the different steps that led from the production of olives to the exportation of olive oil and the relationships between the entities involved are not entirely clear to Canada. However, Canada observes that the EC Regulation that established the production aid scheme indicated that the subsidy was granted to olive growers, albeit on the basis of the olive oil produced from their olives. In these circumstances, it would appear to Canada that olives constitute an input product in relation to the processed product, olive oil, that is exported from the EC to Mexico.

15. Moreover, Canada notes the EC argument that the great majority of exporting EC companies had no involvement with olive growing and that their dealings were carried out entirely at arm's length.

16. Therefore, under the circumstances of this case, it appears to Canada that the subsidy was received by someone other than the producer or exporter. Accordingly, the requirement to demonstrate the pass through of a subsidy under Article VI of the GATT and Articles 10 and 32.1 of the SCM Agreement applies. So too does the reasoning of the Appellate Body in *US – Softwood Lumber IV*, where it stated that in such circumstances a Member may not presume that the product under investigation was subsidized; rather, a Member must demonstrate subsidization by means of a pass-through analysis.

17. Where input producers, here olive growers, and producers and/or exporters of the processed product, olive oil, operate at arm's length, the SCM Agreement requires clear evidence that input subsidy passed through to the producers of the processed product, so that there is a clear demonstration that the product against which countervailing measures are imposed is in fact subsidized.

18. Accordingly, under the circumstances of this case, the investigating authority was required to conduct a pass-through analysis to determine whether the subsidy that was granted to the olive

growers benefited the producers and/or exporters of the olive oil subject to the investigation before it imposed countervailing measures to offset any such subsidization.

ANNEX B-2

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF CHINA

(21 June 2007)

EXECUTIVE SUMMARY

China participates, as a third party, in this panel proceeding concerning the Mexico's imposition of definitive countervailing measures on imports of olive oil originating in EC. In this submission, China will briefly address three issues:

(1) *Whether a Petitioner Must Have Actual Output When It Files a Petition for a Countervailing Duty Investigation?*

China believes that this question requires a careful interpretation of the term *producer*. While EC does not explicitly state so, its argument in this proceeding is to narrow the term to *actual producers* who have live output. Broader reading of the term, however, may also include *potential producers* who are substantially committed to the production of like product.

The ordinary meaning of the text in Article 11.4 of the *SCM Agreement* does not provide definitive answer. The textual analysis does not either support a reading that *producers* may include *potential producers* or preclude it.

The context of the text of Article 11.4, however, warrants a broader reading of the term *producer*. If EC's narrow reading of the term *producer* were supported, no petition alleging injury in the form of retardation would have been permissible. This would undermine footnote 45 of the *SCM Agreement* and make the injury in the form of "retardation of the establishment of such an industry" meaningless. Accordingly, China believes that EC's narrow reading of the term *producer* is not warranted.

EC's own practice does not support such a narrow reading of the term *producer* as EC suggested in this case. In an antidumping investigation on *Imports of DRAMs from Japan* conducted by EC, the European investigating authority did not adopt such a narrow reading. In that proceeding, the Commission found that the community industry comprises four producers. None of them, however, had actual output when the application for investigation was filed.

(2) *Whether the Domestic Industry Cannot Be "Injured" When the Petitioner Has No Actual Output during the POI-Subsidy But Had Output during the POI-Injury?*

Obviously, EC's claim 2 and claim 7 are closely related. Both of them are based upon an allegation that no *domestic industry* of olive oil existed in Mexico. However, the time point and period for assessment of whether a domestic industry exists are different. For claim 2 (standing issue), such time point, as EC put it, is "at the time of the application." On the other hand, for claim 7 (injury issue), such time period is "during the period of investigation used for the determination of the existence and amount of subsidy."

China agrees that for different issues, e.g. standing issue and injury issue, the time point and time period, within which the production and output of domestic producers are measured, may be different. China disagrees, however, that for injury issue the appropriate time period, against which

the existence of domestic industry is evaluated is *only* the POI-Subsidy. China believes that whether or not a domestic industry exists shall be examined against the POI-Injury rather than the POI-Subsidy. China has assumed as a fact that, during the POI-Injury, a domestic industry existed in Mexico, and such an industry can be injured by the subsidized imports.

(3) *Whether a "Pass-Through" Analysis Is Required Given the Facts Found in the Underlying Investigation?*

Pass-through is a unique concept under the *SCM Agreement*. It arises from the context that subsidy is bestowed *indirectly* upon producers of product subject to the investigation. The issue is confusing in this case because, under the EC production aid program, the aid was provided to *olive growers* while EC, in its various regulations, states that the aid was bestowed upon *olive oil*. The Ministry found in paragraph 116 of its *Final Resolution* that pass-through analysis is unnecessary because the subsidy is provided upon olive oil which is both the product subject to investigation and, in this case, the processed product.

China disagrees with Mexico, who relies heavily on the statement in relevant EC regulations that the production aid is provided upon *olive oil* but elects to ignore the fact that the production aid is provided to *olive growers* rather than manufacturers of *olive oil*. These complexities in factual situations require special caution in ascertaining benefits and their recipients.

As concluding remarks, China believes that certain aspects of Mexico's countervailing duty investigation raise systemic issues. Mexico shall bring its measure in conformity with its obligation in case the Panel finds any inconsistency. However, it is also China's view that some of EC's arguments have driven the treaty interpretation to an extent beyond the expressed intent of the treaty negotiators; and, therefore, should not be supported.

ANNEX B-3

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF JAPAN

(21 June 2007)

TABLE OF CONTENTS

I.	INTRODUCTION	9
II.	ARGUMENT.....	9
A.	MEXICO'S HANDLING OF THE INVESTIGATION RAISES SERIOUS SYSTEMIC CONCERNS	9
1.	By Failing to Complete the Investigation within 18 Months, Mexico Did Not Comply with the Deadline Set Forth in Article 11.11 of the Agreement on Subsidies and Countervailing Measures.....	9
2.	Mexico's Failure to Provide Non-Confidential Summaries Was Inconsistent with Article 12.4.1 of the Agreement on Subsidies and Countervailing Measures	9
3.	Conclusion	10
B.	THE PANEL SHOULD EXAMINE WHETHER MEXICO'S DETERMINATION CONCERNING THE DOMESTIC INDUSTRY WAS APPROPRIATE	10
C.	MEXICO DID NOT PROPERLY ADDRESS THE ISSUE OF SUBSIDIZATION.....	11
III.	CONCLUSION	12

I. INTRODUCTION

1. As a third party to this dispute, Japan would like to address, from a systemic viewpoint to ensure objective and consistent interpretation of the WTO Agreement, the following issues:

- Mexico's handling of the investigation raises serious systemic concerns;
- The Panel should examine whether Mexico's determination concerning the domestic industry was appropriate; and
- Mexico did not properly address the issue of subsidization.

II. ARGUMENT

A. MEXICO'S HANDLING OF THE INVESTIGATION RAISES SERIOUS SYSTEMIC CONCERNS

2. Japan is of the view that the integrity of the dispute settlement process is compromised whenever a Member conducts a domestic countervailing duty investigation that does not comply with the procedural rules set forth in the ASCM. Japan will focus on two procedural issues that the EC raised.

1. **By Failing to Complete the Investigation within 18 Months, Mexico Did Not Comply with the Deadline Set Forth in Article 11.11 of the Agreement on Subsidies and Countervailing Measures**

3. Mexico's investigation lasted more than 24 months from initiation to adoption of definitive measures.¹ The EC contends that, by virtue of this lengthy timeframe, Mexico's actions were inconsistent with Article 11.11 of the ASCM, which stipulates that the duration of the investigation shall be "in no case more than 18 months".

4. Japan sympathizes with the position of the EC on this issue. Although Japan understands the need for Mexico to accept the parties' reasonable requests for extension and verification, a Member's approval of such extension requests does not free it from the obligation to complete an investigation within the time limit set forth in Article 11.11.

5. Similarly, we need not address Mexico's questionable assertion of the object of Article 11.11. Here, Article 11.11 states that investigations shall be concluded "*in no case* more than 18 months" (emphasis added): the text is completely clear and allows for only one interpretation. The Article 11.11 prohibition against extending investigations beyond 18 months does not allow for any exception.

6. For these reasons, Japan is of the view that Mexico's investigation was inconsistent with Article 11.11 of the ASCM.

2. **Mexico's Failure to Provide Non-Confidential Summaries Was Inconsistent with Article 12.4.1 of the Agreement on Subsidies and Countervailing Measures**

7. The EC argues that Mexico committed another procedural violation of the ASCM by failing to provide, or to require private parties to provide, non-confidential summaries of confidential

¹ EC First Written Submission, para. 113.

information submitted during the course of the investigation.² The relevant obligations are set forth in Article 12.4.1 of the ASCM.

8. Mexico claims that all parties provided both confidential and non-confidential versions of their submissions.³ Further, Mexico alleges that it fulfilled the object of Article 12.4.1 by allowing counsel to all parties to the investigation access to the entire investigation file, including both confidential and non-confidential data.⁴

9. In Japan's view, if Mexico failed, as the EC claims, to require non-confidential summaries of the information listed by the EC, then Mexico acted inconsistently with Article 12.4.1. Mexico's provision of access to the investigation files does not by itself fulfil Mexico's obligation under Article 12.4.1.

10. Moreover, Mexico did not assert or seek to explain that it was faced with "exceptional circumstances" such that the information provided could not be summarized, as is permitted by Article 12.4.1.

3. Conclusion

11. It is the obligation of all Members to strengthen and uphold the WTO system on all levels, and to abide by all rules, both procedural and substantive. Nowhere is this more important than in the rules area, where Members are granted the right to impose trade remedy measures only as long as they comply with the disciplines set forth in the relevant agreements. The failure to comply with procedural obligations compromises due process and fairness, which leads to systemic weakness and a lack of predictability that damages both Members and private parties. For these reasons, the procedural errors in Mexico's investigation are of concern to Japan.

B. THE PANEL SHOULD EXAMINE WHETHER MEXICO'S DETERMINATION CONCERNING THE DOMESTIC INDUSTRY WAS APPROPRIATE

12. Japan is of the view that a critical issue of general interest raised in this dispute is the proper determination of the existence of a domestic industry. The specific, very narrow, question Japan wishes to address is as follows: must the domestic industry exist and be producing during the time that an investigation takes place?

13. First, Japan agrees with the EC that in general some level of domestic production must exist during the period of investigation for the purpose of making an injury determination. The EC seems to argue that the relevant period for the production of olive oil is "the investigation period of the product subject to the investigation".⁵ Japan understands this to be, by definition, a time period separate from that during which the investigation is actually conducted.

14. However, the EC also appears to argue that the domestic industry must have produced during the time that the investigation was conducted.⁶ The EC interprets words such as "causing injury" in Article 15.5 of the ASCM to refer clearly to the present, "to what is happening when the investigation is carried out".⁷ In addition, the EC refers to the factors listed in Article 15.4 as requiring

² *Id.*, paras. 103-107.

³ *Id.*, para. 89.

⁴ Mexico's First Submission, paras. 82-87.

⁵ EC First Written Submission, para. 183.

⁶ *Id.*, paras. 174-189.

⁷ *Id.*, para. 180 (emphasis added).

consideration concerning "the condition of an existing industry".⁸ The EC concludes that "there must be an industry presently in existence; in other words, there must be existing producers".⁹

15. In Japan's view, the EC's apparent reading of the ASCM would preclude a countervailing measure in precisely the situation where the subsidy was most pernicious - where it knocked the domestic producers out of the market. There is nothing in the ASCM indicating that the Members intended to create this type of exception to the coverage of the ASCM.

16. Article VI:6 of the GATT 1994 and Articles 10 and 15 of the ASCM clearly require a finding of injury during the period of investigation. Without any production during that period there can be no evidence of injury as a result of an overall evaluation of the elements listed in Article 15.4 of the ASCM. However, this does not mean that domestic production needs to occur throughout the period of investigation or the time period during which investigation is being conducted.

17. In Japan's view, if a company produces the subject merchandise even for a limited period of time during the period of investigation, the company should be qualified as a part of the domestic industry for the purpose of injury determination.

18. Mexico's determination states, "[f]or the purpose of evaluating injury, comparable periods of three years, including the period investigated were used, i.e. April to December 2000, 2001, and 2002."¹⁰ Although Fortuny stopped production of olive oil in March 2002, it did engage in production in 2000 and 2001.

19. The Panel might find that Mexico appropriately set a longer period of investigation for the injury analysis (one that included 2000 and 2001) than for the subsidy determination. Such a finding would support a further finding that Mexico did not err when it conducted an assessment of injury based on information related to this period, since it would mean that there was some production during the period of investigation.

C. MEXICO DID NOT PROPERLY ADDRESS THE ISSUE OF SUBSIDIZATION

20. Mexico failed to properly analyze the subsidy issue by declining to engage in a pass-through analysis to determine whether and to what extent the subsidy given to olive growers benefited olive oil producers and exporters.¹¹

21. Mexico bluntly rejects the need for a pass-through analysis. Apparently, the Mexican authority found that a *purpose* of the EC subsidy scheme was to promote olive oil production, and therefore concluded that a pass-through analysis was not required.

22. Mexico is correct that the ASCM does not expressly require a pass-through analysis. However, in light of the provisions under Article 1.1(b) of the ASCM as well as Article VI:3 of GATT 1994, where the direct recipients of the alleged subsidy are not those who produce or export the product subject to the investigation, as in this case, the authority shall determine whether the producers or exporters concerned have actually indirectly received any benefit from the subsidy. Article 14 of the ASCM also requires that an investigating authority, before imposing countervailing duties, calculate the amount of a subsidy in terms of the benefit conferred.

23. Well-established WTO practice shows that the investigating authority must perform an analysis to determine the link between a subsidy and its alleged recipient. In *United States - Softwood*

⁸ EC First Written Submission, para. 178.

⁹ *Id.*, para. 182.

¹⁰ Final Resolution, para. 3.

¹¹ Mexico's First Submission, para. 116.

Lumber IV, the Appellate Body noted that "the pass-through of input subsidy benefits from the direct recipients to the indirect recipients downstream cannot simply be presumed; it must be established by the investigating authority".¹² Moreover, guidance on how to assess the impact of a subsidy granted to raw material producers on the price which processors of that material have to pay was provided under the earlier GATT regime. (See, *United States - Canadian Pork*, a GATT panel interpreting the obligations under GATT Article VI.).¹³

24. Mexico's argument is also flawed in that it mischaracterizes the purpose of countervailing duties. Mexico contends that "countervailing duties are not a mechanism to offset either a benefit or a subsidy"; according to Mexico, "[t]heir purpose is to offset the injury caused by an actionable subsidy".¹⁴

25. Article VI:3 of the GATT 1994 as well as footnote 36 to the ASCM clarifies the definition of the countervailing duty as "a special duty levied for the purpose of offsetting any subsidy bestowed...." Article 19.4 of the ASCM provides that countervailing duties may be levied only up to the amount of the subsidy found to exist. In addition to this "capping" of the duty amount at the "full amount of the subsidy", Article 19.2 of the ASCM leaves to the discretion of the authority whether or not to set the duty at a lesser amount that would be adequate to remove the injury.

26. Furthermore, in *U.S. – Softwood Lumber IV*, the Appellate Body suggested that, for processed products in particular, the use of a pass-through analysis may be necessary to preserve the connection between the countervailing duty to be imposed and the subsidy determined to have been granted.¹⁵ In this way the authority can measure the extent to which a subsidy granted on an input may be included in the determination of the amount of the subsidy on the processed product.¹⁶

27. Japan does not consider that, in light of the significance of a pass-through analysis, Mexico's reference to the *purpose* of the subsidy or its assertion that countervailing duties are designed to offset *injury* (not the subsidy), justifies its rejection of a pass-through analysis. Therefore, in the view of Japan, Mexico erred in its determination that benefits were conferred to the exporters concerned.

III. CONCLUSION

28. Japan respectfully requests the Panel to examine carefully the facts and arguments presented by the EC and Mexico in light of the comments above, in order to ensure objective and consistent interpretation of the WTO agreements, particularly the ASCM and the DSU. We welcome any questions that the Panel may have regarding this submission.

¹² *United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (US – Softwood Lumber IV)*, WT/DS257/AB/R (17 February 2004), para. 143.

¹³ See *United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, adopted 11 July 1991, BISD 38S/30, para. 4.10.

¹⁴ Mexico's First Written Submission, para. 122.

¹⁵ *US – Softwood Lumber IV*, para.140.

¹⁶ See *Id.*

ANNEX B-4

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF NORWAY

(21 June 2007)

TABLE OF CONTENTS

I.	INTRODUCTION	14
II.	DEFINITION OF THE DOMESTIC INDUSTRY	14
2.1	Introduction.....	14
2.2	Whether injury was caused to an established industry	14
2.3	Industry support for the initiation	15
III.	PROCEDURAL ISSUES.....	15
3.1	The duty to ensure non-confidential summaries of confidential information	15
3.2	The duty to disclose essential facts	16
IV.	STANDARD OF REVIEW: THE DUTY TO PROVIDE A REASONED AND ADEQUATE EXPLANATION IN SUPPORT OF THE AUTHORITY'S CONCLUSIONS	17
V.	CONCLUSION	17

I. INTRODUCTION

1. As a third party to this dispute, Norway would like to address the following issues discussed in the First Written Submissions of the EC and Mexico:

- whether Mexico correctly defined the domestic industry as required by the GATT 1994 and the *Agreement on Subsidies and Countervailing Measures (ASCM)* (Section II);
- whether Mexico fulfilled certain procedural requirements in the *ASCM* (Section III); and
- the appropriate Standard of Review (Section IV).

II. DEFINITION OF THE DOMESTIC INDUSTRY

2.1 Introduction

2. The EC contends that Mexico failed to define domestic industry in a manner that is consistent with the GATT 1994 and the *ASCM*.¹ According to the EC, the wrongful determination of the domestic industry lead to both a wrongful injury determination and a failure by Mexico to determine that there was sufficient industry support for the initiation of the investigation.²

3. The present case concerns an investigation where the Investigating Authority found injury to an established industry. Norway understands the Final Resolution (imposing the definitive measures) to be based on "material injury to the domestic industry".³ The case does not concern "material retardation to the establishment of such an industry", as also confirmed by Mexico.⁴

2.2 Whether injury was caused to an established industry

4. Article VI.6 (a) of the GATT 1994 requires that injury must be to an "established domestic industry". The definition of "domestic industry" in *ASCM* Article 16.1 provides that "domestic industry" must be understood as referring to: "the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total production of those products." This provision defines the domestic industry in relation to two elements, "producers" and the "products" they produce. The ordinary meaning of the words "producers" and "product" indicate in Norway's view that there must exist a certain domestic production for there to be a "domestic industry".

5. Relevant context for the interpretation of the definition of "domestic industry" is found in *ASCM* Article 15.4 and Article 15.5, and the conclusion to be drawn from these provisions supports the view that "domestic industry" must be understood to mean an existing industry with on-going production.

6. The object and purpose of the rules on countervailing duties in the *ASCM* is to provide a right for Member to impose such measures under certain conditions. However, those rights have to be balanced against the right to use subsidies under certain conditions.⁵ The necessity to find the right

¹ EC's First Written Submission, paras. 158 ff.

² EC's First Written Submission, paras. 93 – 94.

³ Norway refers in this respect to the translation provided in EC's First Written Submission, para. 199, where the EC cites the Final Resolution, para. 438.

⁴ Mexico's First Written Submission, paras. 227 and 229.

⁵ Appellate Body Report, *US – Softwood Lumber IV*, para. 64 and Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 115.

balance in this equation suggests a narrow interpretation of "domestic industry" when it comes who should be protected. An industry that does not produce the like product should, therefore, not be afforded a protection as envisaged in the *ASCM* under the provisions relating to injury to an established industry.

7. In the present case, the Investigating Authority found that the domestic industry was constituted of only one company – Fortuny de Mexico, SA de CV (Fortuny). Mexico admits that Fortuny ceased production before the IP, in March 2002, just before the investigating period started.⁶ The question for the Panel is thus whether a company having ceased to produce before the IP, can still be considered to form (part of) the established domestic industry, in an investigation into injury to an established industry. Based on the facts as presented by the parties to the dispute so far, it would seem that Fortuny, having ceased production, cannot be considered part of the domestic industry producing the like product.

8. Norway notes that Mexico employs the term "suspensión de actividades de Fortuny".⁷ Norway does not pronounce itself on the proper connotations to be given to this Spanish term, or the factual situation of Fortuny and its possible plans for any resumption of production after the investigation period. Norway only notes that, to the extent that the Panel considers it necessary to also evaluate whether a "suspension" of production has different implications upon which companies may be considered part of an established industry, the Panel must take into account that its interpretation must not undermine the distinction between investigations into injury caused to an *established industry* as opposed to an investigation into subsidization causing *material retardation* of the establishment of an industry.

2.3 Industry support for the initiation

9. To the extent that the Panel finds that Fortuny could not be considered part of the domestic industry for purposes of the contested investigation, the initiation itself is vitiated, and the investigation as such should never have been initiated.

III. PROCEDURAL ISSUES

10. In this section, Norway will discuss the allegations by the EC that Mexico violated procedural rules in *ASCM* Articles 12.4.1 and 12.8. Rather than go into the factual details of the case, Norway will outline how to interpret the mentioned provisions.

3.1 The duty to ensure non-confidential summaries of confidential information

11. The EC contends that Mexico failed to require the complainant to provide non-confidential summaries of confidential information, inconsistent with *ASCM* Article 12.4, and likewise that Mexico did not ensure that such summaries contained sufficient detail.⁸

12. Mexico argues, *amongst others*, that its system provides opportunity for a legal representative of any interested party to see confidential information through its system of "protected access".⁹ Mexico also argues that all interested parties did actually present non-confidential summaries of all confidential information presented to the Mexican investigating authority.¹⁰

⁶ Mexico's First Written Submission, paras. 222 and 226.

⁷ Mexico's First Written Submission, para. 226.

⁸ EC's First Written Submission, paras 103 – 108.

⁹ Mexico's First Written Submission, paras 84 – 85.

¹⁰ Mexico's First Written Submission, para. 89.

13. Norway will not discuss the factual aspects here, but point to two issues raised by the parties to the dispute: (i) The relationship between a system of "protected access" to the obligation to provide non-confidential summaries; and (ii) the need to refer, in the preliminary or final resolution, to whether non-confidential summaries were requested or provided.

14. In cases where a Member has set up a system of "protected access" allowing interested parties access to all confidential information (provided their legal representative meets certain requirements), due process concerns may be safeguarded. However, the interested party will only be incited to go through that process if it knows that there is confidential information there to see. The submission of non-confidential summaries of confidential information, or statements explaining why such information cannot be summarized, being placed in the non-confidential file, serves as a marker for the interested party to have its legal representative go through the process of gaining access to the confidential file. Norway, therefore, believes that the existence of a system of "protected access" to the confidential file does not in itself absolve the Investigating Authority of its duty to request the provision of non-confidential summaries of confidential information submitted to it.

15. As to the second issue, Norway believes that the reference to whether Mexico required, and interested parties provided, certain non-confidential summaries, is not an issue that revolves around whether there is a "statement" or "reference" to this effect in the final or preliminary resolution. The question for this Panel is whether Mexico actually required the provision of such summaries from interested parties, whether access to such information was provided, whether any reliance upon such information was disclosed in accordance with *ASCM* Article 12.8, and whether sufficiently detailed information was provided in the relevant reports or notices under *ASCM* Article 22.

3.2 The duty to disclose essential facts

16. The EC claims that Mexico is in breach of the requirement to disclose essential facts before a final determination is made, as the investigating authority did not (as the EC is aware) communicate a disclosure within the meaning of *ASCM* Article 12.8.¹¹ Mexico, on the other hand, argues that it provided disclosure through the "Resolución Preliminar" (RP) of 10 June 2004.¹²

17. This issue raises *first* substantive issues as to what information was actually provided in any disclosure provided by the Investigating Authority of Mexico, and *second* whether the provision of such information in the RP allowed interested parties sufficient time and opportunity to defend their interests.

18. Absent the factual record, Norway will not address the substantive issue of whether any disclosure of Mexico actually provided the required information. Norway will only high-light certain arguments that may be of importance to the Panel when interpreting the requirements of *ASCM* Article 12.8 and applying that interpretation to the facts of this particular case.

19. WTO Panels and the Appellate Body have, in the anti-dumping context, interpreted the parallel provision in Article 6.9 of the *Anti-Dumping Agreement* on several occasions. Panels have found that the aim of disclosure is to "actually disclose to the interested parties the essential facts which, being under consideration, are anticipated by the authorities as being those which will form the basis for the decision whether to apply definitive measures."¹³ Article 12.8 is meant to place interested parties in a position where they can properly understand, verify, and challenge the facts that are likely to lead the investigating authority to impose definitive measures.

¹¹ EC's First Written Submission, para. 109.

¹² Mexico's First Written Submission, paras. 93 – 94.

¹³ Panel Report, *Argentina – Ceramic Tiles*, para. 6.125.

20. The Panel will have to assess whether the RP contained the required information, and whether Mexico provided interested parties with the opportunity to comment and defend their interests based on this document. Norway notes that – according to the time-line of events presented by the EC in its First Written Submission¹⁴ – a number of new questionnaires were sent out, and new submissions and verification visits took place after 10 June 2004. The Panel will thus also have to assess whether, based on the evidence presented by the EC, there are any new facts submitted after the RP that fall within the scope of essential facts subject to disclosure, and that were not disclosed.

IV. STANDARD OF REVIEW: THE DUTY TO PROVIDE A REASONED AND ADEQUATE EXPLANATION IN SUPPORT OF THE AUTHORITY'S CONCLUSIONS

21. The EC claims that Mexico violated ASCM Articles 22.3 and 22.5 because the investigating authority failed to provide a reasoned and adequate explanation for many of its findings.¹⁵ Under these provisions the investigating authority is given a comprehensive obligation to provide a transparent statement of the reasons for the imposition of definitive countervailing duties. Thus, the authority must set forth the relevant facts in the record, and must explain "in sufficient detail" the factual and legal determinations made on the basis of the evidence in the record that led to the imposition of measures. The Appellate Body and panels have consistently ruled that the investigating authorities are required to provide a *reasoned and adequate explanation*, among others, of how the evidence in the record supports the authority's determination.¹⁶ The authority's explanation must demonstrate in a "clear and unambiguous" manner that the substantive conditions for imposition of trade remedy measures have been satisfied.¹⁷ If an authority fails to explain itself adequately, it cannot demonstrate that it has respected the substantive requirements of the ASCM governing those determinations.

22. In concluding, Norway submits that the Appellate Body – with regard to the standard of review – has stated that a panel must examine whether the authority has provided a "reasoned and adequate explanation" of "how individual pieces of evidence can be reasonably relied on in support of particular inferences, and how the evidence in the record supports its factual findings".¹⁸

V. CONCLUSION

23. Norway respectfully requests the Panel to examine carefully the facts presented by the parties to this case in light of our arguments, in order to ensure a proper and consistent interpretation of the ASCM.

¹⁴ EC's First Written Submission, paras. 59 – 70.

¹⁵ EC's First Written Submission paras. 77 – 85.

¹⁶ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 99.

¹⁷ Appellate Body Report, *US – Line Pipe*, para 217.

¹⁸ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 99.

ANNEX B-5

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF THE UNITED STATES

(21 June 2007)

TABLE OF CONTENTS

Table of Reports Cited.....	19
I. INTRODUCTION	20
II. THE PERIOD OF INVESTIGATION FOR DETERMINING INJURY MAY BE LONGER THAN THE PERIOD EXAMINED FOR DETERMINING A SUBSIDY	20
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	21
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	21
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.....	22

Table of Reports Cited

<i>EC– Pipe Fittings (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report, WT/DS219/AB/R
<i>EC – Pipe Fittings (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
<i>EC – DRAMS</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005
<i>Mexico – Rice (Panel)</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice</i> , WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report, WT/DS295/AB/R
<i>Mexico – Rice (AB)</i>	Appellate Body Report, <i>Definitive Anti-Dumping Measures on Beef and Rice</i> , WT/DS295/R, adopted 20 December 2005
<i>US – DRAMS (Panel)</i>	Panel Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , 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 of investigation in an injury investigation be longer than the period of investigation in a dumping investigation.⁵

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.

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).

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.

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

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 *Mexico – Rice (AB)*, para. 176.

¹⁰ *Mexico – Rice (AB)*, para. 183.

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.

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

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."

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.

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

¹⁸ *US – DRAMS (Panel)*, para. 7.353.

ANNEX B-6

THIRD PARTY ORAL STATEMENT OF CANADA

(26 June 2007)

1. Madam Chair, Members of the Panel, Canada first thanks you for your service on this panel. Canada's written submission, filed at the end of last week, addressed two of the issues raised by this case, two issues that Canada believes are of fundamental systemic importance to WTO Members. I would like to briefly recall those issues without repeating our submissions.

2. First, Canada emphasized the importance of a Member's investigating authority respecting the principles of due process contained in the SCM Agreement. A further example of the concerns that motivated Canada's decision to intervene regarding the importance of respecting the principles of due process is Mexico's assertion that it would act consistently with Article 13.1 of the SCM Agreement if it sent an invitation for consultations anytime up to the day before the investigation was formally initiated. In Canada's view, such an approach is inconsistent with the object and purpose of this provision, which is aimed at affording a reasonable opportunity for meaningful consultations between the exporting Member and importing Member, with a view to reaching a mutually agreed solution before an investigation is launched. The fact that Article 13.1 requires that the timing of the invitation allow for consultations before the investigation is formally initiated is confirmed by Article 13.2 of the Agreement, which speaks of the opportunity to "continue" the consultations "throughout the period of investigation."

3. Second, with respect to the issue of pass-through, although the facts of this case are not entirely clear, it seems that the subsidy at issue is granted to the European producers of olives. It further appears that a number of arm's length transactions take place before the exportation of the actual product subject to the investigation of the Mexican investigating authority. In these circumstances, based on the relevant provisions we have cited in our brief and a line of cases up through the Appellate Body's decision in *Softwood Lumber IV*, it is Canada's submission that the Mexican investigating authority should have conducted a pass-through analysis to determine whether and to what extent the subsidy granted to the olive growers had passed through to the producer and/or exporter of the olive oil subject to the investigation.

4. This concludes Canada's oral statement. We would be glad to answer any questions the panel members may have concerning our written submission or oral statement.

ANNEX B-7

THIRD PARTY ORAL STATEMENT OF THE UNITED STATES

(26 June 2007)

1. Madame Chair and members of the Panel, the United States is pleased to present its views as a third party in this dispute. As the Panel will recall, the United States has already filed a written submission, and we will not repeat the discussion contained therein. Since that submission, we have had an opportunity to review all of the other third party submissions filed, and we wanted to raise one matter today for the Panel's attention. We would like to comment on the discussion by Norway in its third party submission regarding Article 12.8 of the SCM Agreement.

2. Norway suggests that Mexico did not satisfy the requirements of Article 12.8 because Mexico failed to identify "which facts in the file [are] likely to lead the authority to impose final duties." However, the claim advanced by the EC regarding Article 12.8 of the SCM Agreement is that there was no disclosure of any kind under Article 12.8 of the SCM Agreement, and not that Mexico did not disclose a particular fact, or that Mexico breached Article 12.8 by failing to identify particular facts. Thus, the question presented by Norway is not implicated by the EC's claim, and it would therefore be inappropriate for the Panel to reach it.

3. It is well-established that the burden of establishing a breach of an obligation under a covered agreement lies with the complaining party. Further, the burden of establishing a fact lies with the party asserting that fact.¹ For the EC to establish a breach of Article 12.8, it is the EC that would need to identify which facts were "essential" and to demonstrate that Mexico did not inform Members and interested parties of such facts in sufficient time.

4. In light of this, it would be inappropriate for the Panel to identify particular facts that need to be disclosed under Article 12.8, as Norway suggests, because it is not the role of panels to establish a claim for a party where the burden for establishing that claim lies with the party. As the Appellate Body has stated, **"panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a prima facie case of inconsistency based on specific legal claims asserted by it."**²

5. This concludes my presentation. Thank you for your attention.

¹ Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, p. 14. See also, Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 97.

² Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, para. 129.

ANNEX C

SECOND SUBMISSIONS BY THE PARTIES

Contents		Page
Annex C-1	Executive Summary of the Second Written Submission of the European Communities	C-2
Annex C-2	Executive Summary of the Second Written Submission of Mexico	C-10

ANNEX C-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

(17 August 2007)

1. The EC's Second Written Submission will address individually the responses that Mexico has made to the EC's claims, notably in the answers that it has given to Panel's questions.
2. In relation to the claim concerning Article 13.1 of the SCM Agreement, Mexico's answers confirm that the Mexican procedure for initiating investigations is entirely automatic once the Minister has signed the instrument. Consequently, for the purposes of the *SCM Agreement*, the investigation is 'initiated' once the Minister has performed that act.
3. Moreover, the timing obligations in Article 13.1 extend not merely to the invitation, but also include the consultation that follows from that invitation. The invitation must be made at a point when it is possible to hold the consultations referred to in the invitation before the investigation is initiated.
4. This interpretation is apparent from the text of Article 13.1 which does not simply state an obligation (to invite for consultations), but provides an aim. The aim is that of 'clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution'. The matters referred to in Article 11.2 are those concerning the application for an investigation. However, once the investigation has been commenced its scope is determined by the instrument of initiation, and the scope and nature of the application becomes a matter of historical interest only. There would be nothing to be gained at that stage in clarifying the details of the initial application. Consequently, such clarification can have meaning only if it takes place before initiation at a time when it is possible to influence the scope of that initiation, or indeed affect the decision whether there is to be an investigation. Thus, in accordance with the doctrine of 'effet utile' the only interpretation that gives meaning to Article 13.1 is one that requires the invitation to consultations to be made in time for those consultations to be held before the initiation decision is made.
5. This interpretation is reinforced by the final clause of Article 13.1. Whereas a mutually agreed solution can be reached at any stage of the investigation (as Article 13.2 makes clear), the interests of all parties and Members are best served by reaching such a solution sooner rather than later. In this respect, to reach that solution before companies are subjected to an investigation is obviously the most desirable goal.
6. This obligation is confirmed by the context of Article 13.1. Article 13.2 addresses the 'period of investigation', which begins with the initiation, and the opportunity to continue consultations during that period. Thus, the paragraphs distinguish two phases in the proceedings, one prior to initiation and one that follows initiation. The aim of the consultations specified in paragraph 2 is broader than that of those referred to in paragraph 1 since paragraph 2 makes no reference to what aspects of the 'situation' are to be clarified. This distinction serves to underline the specific nature of the clarification referred to in paragraph 1. Moreover, the use of the word "continue" in Article 13.2 confirms that consultations should have begun *before* the initiation of the investigation.

7. Finally, in referring to the consultations covered by paragraphs 1 and 2, Article 13.3 refers to the 'obligation to afford reasonable opportunity for consultation'. Thus, even if it had not already been implicit in the terms of paragraph 1, paragraph 3 makes clear that the obligation created by paragraph 1 is to afford a 'reasonable opportunity for consultation'. The only sense in which such a reasonable opportunity can be given in the context of paragraph 1 is if the consultation takes place prior to initiation.

8. The EC notes that neither Mexico's Foreign Trade Act nor its Regulation provide that the investigating authority shall invite the exporting country, whose products may be subject to investigation, to pre-initiation consultations. However, this regulatory lacuna does not justify Mexico's lack of compliance with its obligations under Article 13.1 of the *SCM Agreement*.

9. Regarding the failure of the Mexican authorities to ensure that the application for countervailing measures was made by or on behalf of the domestic industry, as required by Article 11.4 of the *SCM Agreement*, Mexico has still provided no satisfactory explanation of Economía's failure to examine the extent of the domestic industry and its acceptance, almost without questioning, of Fortuny's assertion that it comprised that entire industry.

10. The confidential information provided in Mexico's most recent exhibits is also significant. In its Preliminary and Final Resolution Mexico cited documents from the authorities in the state of Baja California in support of the proposition that Fortuny was the sole domestic entity with the capacity to produce olive oil. A letter from the authorities in Baja California of 28 January 2003, while urging Economía to take action against imports, gives no reason to believe that Fortuny was the only producer in the state. The letter states that Fortuny's action in ceasing production had a direct and significant impact in the agricultural areas where olives are grown for the production of oil. Had Fortuny been the only producer of olive oil the letter would surely have used terms rather more forceful than 'direct and significant impact'. On the basis of this information Mexico should have verified the accuracy and adequacy of the figures provided by Fortuny before initiating an investigation. The existence of other producers was indeed confirmed at a later stage during the investigation.

11. Mexico argues that Fortuny's claim that it represented 100 per cent of the domestic industry is supported by the fact that the figures for Fortuny's production and the figures for national production were the same. This argument relies on mere assertions made by the applicant in its own interest. Mexico should have verified the accuracy and adequacy of these figures before initiating an investigation on the basis of this information.

12. The EC sees nothing in the response of Mexico to the Panel's questions that adds to its previous statements on the due restraint obligation imposed by Article 13(b)(i) of the *Agreement on Agriculture*.

13. Mexico repeats its assertion that the 'due restraint' obligation consists merely of a 'reasonable minimum standard', and is no different from the standard applicable to investigations regarding non-agricultural productions. However, this is an interpretation which deprives the due restraint obligation of any meaning, and as such runs contrary to the interpretative principle of "*effet utile*", which is well established in WTO jurisprudence. 'Due restraint' is self-evidently a standard. If Mexico, by describing it as a *minimum* standard, seeks to imply that it is a *low* or *easily-satisfied* standard then it should attempt to justify that interpretation. However, the EC can see nothing in the text of the provision, or in its context or object and purpose, which would lead an interpreter to such a conclusion. Even without taking into account the notion of due restraint, the rules for initiating investigations could not be described as setting a low or easily-satisfied standard. And when the additional factor of due restraint is taken into account the applicable standard must be more demanding than the normal one. In identifying that standard in the present case the EC's approach has

been to describe the circumstances of the initiation of the investigation into olive oil and to show that they are incompatible with any notion of restraint.

14. In response to the EC's criticisms of Economía for failing to secure the provision of non-confidential summaries of confidential submissions Mexico pleads ignorance of how such summaries would have been possible. However, it is common practice in anti-dumping and countervailing duty investigations for numeric data to be presented in indexed rather than absolute terms in the non-confidential summary. Such a technique should have been used in regard to numerical data submitted to Economía in respect of which confidentiality was claimed. Mexico's argument is in any case patently inadequate since much of what was treated as confidential was textual rather than numeric in character.

15. Mexico concludes that interested parties and/or their legal representatives are entitled to have access to the confidential record. However, the relevant element in the Mexican legislation is that individuals or representatives of legal persons who are not counsels/lawyers (*abogados*) only have access to the confidential record if they are assisted by a counsel/lawyer (Article 159.II, second subparagraph of the Foreign Trade Regulation. The EC, therefore, considers that Mexico's legislation is similar to the US law that the panel considered in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* as not satisfying the obligation in Article 12.4.1 of the *SCM Agreement*.

16. In any case, the panel in *Mexico – Steel Pipes and Tubes* has also rejected that access to the confidential file under a protective order replaces the obligations of an investigating authority in relation to the treatment of confidential information, including the requirement to provide non-confidential summaries.

17. As regards the EC's claim under Article 12.8 and the requirement to disclose 'essential facts', Mexico's responses appear to be premised on the view that the disclosure of such facts can be achieved informally in the course of the investigation. The point that the EC wishes to emphasize is that, as found by the Panel in *Guatemala – Cement II*, an important aspect of the disclosure is that the interested party or Member receiving the disclosure should know what is taking place.

18. Thus, even if it were true, as Mexico alleges, that all the essential facts were stated in the Preliminary Resolution, the interested parties and Members were not informed of this. Moreover, since Economía was actively engaged in the investigation in the period following the Preliminary Resolution (by holding meetings with interested parties, requesting information and receiving data and submissions from them) there was every reason to think that additional essential facts were being obtained. Consequently, at no stage were the essential facts identified as such to interested parties and Members, and they were in consequence denied the right, guaranteed by Article 12.8, to defend their interests.

19. The exhibits presented by Mexico have now revealed the contents of some of communications to Economía. Thus, on 9 November 2004, many months after the Preliminary Resolution, Economía received from Fortuny substantial information in response to questions that it had posed. In the versions of the documents that Mexico has provided the confidential information has been blanked-out, however, even from these documents it is possible to see that the information concerned important aspects of Fortuny's financial and commercial circumstances.

20. Again, on 10 January 2005 Fortuny supplied information in response to a request from Economía. This information consisted of financial details of Fortuny's business plan for restarting production of olive oil, which was perceived by Economía as a vital part of the assessment of injury. In this document Fortuny acknowledged that the figures presented on 9 November 2004 (above) differed from that presented in the response to the 'Prevención' in May 2003 because in the intervening time some of the data had changed.

21. Finally, during the verification visit to Fortuny in January 2005 Economía obtained a large number of documents. Although no explanation is provided for the various tables and documents contained in this exhibit, it is apparent that they include substantial data regarding transactions of Formex Ybarra and Fortuny. It can hardly be imagined that among these there was not some information that would not qualify as 'essential facts'.

22. The EC cannot see that Mexico, in its answers to the Panel's questions, has added anything of substance to the arguments which it has previously presented in its attempt to answer the EC's claim under Article 11.11. The fact that various parties requested extensions for responding to Economía's questions is no excuse for exceeding the maximum period. Economía should have organized the investigation in such a way to avoid a breach of the limit. It should also be recalled that the main reason for the delay was that the only visit made to the complainant, Fortuny, took place after the 18-months deadline, whereas the verification of the situation of the domestic industry should be an early step in any investigation.

23. The notion of subsidization is addressed in a number of Mexico's responses to the Panel's questions. As the following examination will show, these responses do not provide answers to the EC's complaints. These complaints focus on the failure of Economía to investigate the pass-through of the subsidy, and on the calculation of the level of subsidy of the individual exporting companies.

24. In its response to the Panel's Question 41 regarding the product on which the subsidy is bestowed Mexico appears to attach importance to the fact that if the olive grower brings olives to a mill but obtains no oil then no aid will be paid. From this it deduces that the subsidy is paid on the oil rather than on the olives. Olive oil serves only as the basis to calculate the amount of aid granted. This is underlined by the fact that also the aid for table olives is expressed in terms of "olive oil equivalent".

25. As the EC has emphasized in its First Written Submission, the central question in this dispute is whether the olive oil imported into Mexico was a subsidized import. For that purpose it is necessary to establish a connection between the original subsidy and the import, and show that the benefit of the subsidy extends to that import. Economía did not carry out such an investigation.

26. Mexico goes on to assert that the oil is sold by exporters at a lower price that would be the case if there were no subsidy. But this, like Economía's arguments in the Resolutions, is mere assertion. Economía made no serious attempt to justify its assertion.

27. Mexico purports to correct the EC by saying that the situation is one of a subsidized product rather than of a subsidy linked to a product. However, the distinction that Mexico tries to introduce cannot be attributed to the EC and is in any event irrelevant. Question 57 only refers to the pass through analysis which the EC claims that Mexico failed to carry out. The EC used the term "link" in the sense of "pass through" between the imported product and the subsidy. The EC has repeatedly explained that the scheme under analysis grants an aid to olive growers which are upstream producers of the olive oil exported to Mexico and olive oil exporters are even further away from the actual beneficiary of the aid. The details of that reality must be taken into account in order for a determination to be made as to whether there have been 'subsidized imports'. A simple characterization of olive oil as a 'subsidized product' will hide this reality and lead to an oversimplified and mistaken conclusion.

28. Although the question of the 'subsidized product' is difficult to answer, that of the subsidized person, in the sense of the person to whom the subsidy is given in the first instance, is quite straightforward. And in this particular respect Mexico's error is equally obvious since it says that the exporter is the person receiving the subsidy. Clearly Mexico is referring to the person who it claims *benefits* from the subsidy. But the exporter is not that person, unless Mexico is implying the existence of a pass-through. The EC, both during the investigation in Mexico and during these proceedings, has

provided good reasons to conclude that no subsidy passed through to the imported olive oil. These arguments were also raised and substantiated by the exporters. However, as far as these proceedings are concerned, the issue is not whether pass-through occurred, but whether Economía was obliged to investigate the issue and if so whether it did so properly. The EC submits that Mexico should have done a pass-through analysis, and that it failed to do so.

29. Regarding the calculation of the level of subsidy and in particular the use of ex-factory or CIF prices the EC and the Panel remain in ignorance of whether Economía committed an error. The reason for this continuing ignorance is Mexico's failure to adequately explain its methodology, despite the Panel's questions.

30. Finally, with reference to the issue of the articles of the *SCM Agreement* with which the Panel may make findings, it should be noted that in the recent *Japan – DRAMS* case the panel upheld Korea's claim that Japan's measure was inconsistent with Articles 1.1(b) and 14 of the *Agreement*, without invoking any other articles.

31. The EC has already given several reasons why Economía failed to determine whether Fortuny constituted the entire domestic industry of olive oil.

32. The letters to Economía from the authorities of Baja California revealed the existence of other olive oil producers in that state which Economía entirely ignored. Apart from the letter received prior to initiation, which is discussed above, a further letter of 17 December 2003 (Exhibit MEX-49-D, page 3) contained a table that showed the existence of several such producers with significant levels of production. In a further letter of 9 January 2004 (Exhibit MEX-49-F) the state authorities provided a list of 12 producers. Data from these were arranged in a table, and they show that some producers had a capacity for oil and table olives, whereas others were identified with olives only.

33. Despite these clear indications that there were producers of olive oil in addition to Fortuny, Economía made no further efforts to find out about them. Mexico acknowledges this failure in its responses to Questions 72 and 73 from the Panel.

34. Further evidence for the existence of olive oil production distinct from Fortuny is to be found among the data provided by Fortuny during the verification visit by Economía in January 2005. These contain details of purchases of olive oil during the 1999 harvest.

35. In its questions to Mexico the Panel has sought to examine the adequacy of Economía's investigation of injury. The discussion of this subject during the first substantive meeting of the Panel demonstrated the extent of confusion that affected this investigation. In particular, the use of 9-month periods for collecting data, overlapping with some data extending over 12 months, added a major element of unreliability while at the same time introducing needless complexity.

36. The EC does not need to emphasize that these proceedings are not intended to provide an opportunity for Mexico to make good the defects of Economía's investigation. That investigation must stand or fall by what was done at the time. Mexico's explanations do nothing to detract from the conclusion that the investigation of injury was beset by errors that deprive its findings of all validity.

37. In its answer to Panel Question 79 the EC undertook to enlarge upon its comments on the particular aspects of Article 15 that it claims Mexico has violated. The EC has already addressed Economía's failure to respect Article 15.1 of the *SCM Agreement* as regards the objective examination of the effect of imports on prices in the domestic market. This conclusion has now been reinforced by Mexico's responses to the Questions posed by the Panel, and by the exhibits now made available by Mexico. In particular, Mexico's responses have failed to remove the confusion, mentioned above, regarding the periods for which data were collected and consequently as regards the findings on the prices of imported and domestic olive oil. The nature and extent of this confusion is further examined

below (paragraph 50). Moreover, Mexico's continued reference to comparisons with hypothetical domestic cost of production is out of place, since it is domestic prices alone that are recognized as relevant in this context by the *SCM Agreement*.

38. The other provision which the EC has invoked in this context is Article 15.4 of the *SCM Agreement*. The EC identified the various factors that should have been considered in accordance with Article 15.4, and showed how Economía had addressed them inadequately or not at all. Although provided by the Panel with an opportunity to make a response to this accusation, Mexico has merely repeated its previous arguments.

39. Finally, the EC would like to address the topic of the period of investigation for injury. It is well established that when considering injury the data will normally be taken from a longer period than is used in the determination of subsidization (or of dumping). Indeed, in the parallel case of anti-dumping investigations, the relevant WTO committee has recommended that it should normally be at least three years, unless a party from whom data are being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation.

40. As was stated in the Panel report *Mexico – Anti-Dumping Measures on Rice*, the purpose of looking at a longer period is to allow an analysis of trends over time of the various factors requiring investigation. Indeed, providing an indication of what the industry was capable of achieving in the absence of allegedly injurious imports would facilitate a finding that the industry was in an injured state at the time when the determination of subsidization was made – i.e., in the last of the three years.

41. It is thus the period of time when the injury and subsidy investigations overlap, that is crucial. Consequently, in the EC's view, unless there is output (allowing for temporary interruptions) during that overlapping period no finding of the existence of injury or domestic industry can be made.

42. Regarding the examination of "other factors" in injury causation, Mexico has on a number of occasions presented the *movements of the price of olive oil from the EC* in the form of a graph. The distinctive U shape of the graph is explicitly used to portray the EC exporters as having sharply lowered prices until the sole identified Mexican producer ceased its activities, and then raising their prices again. It would seem that Mexico is accusing the EC exporters of having engaged in a deliberate attempt to drive Fortuny out of business and then exploiting the absence of competition.

43. The fallacy of this argument lies in the notion that competition in the Mexican market for olive oil was maintained solely by the presence of Fortuny. However, oil from Mexican olives never constituted more than a minor part of the Mexican market, and the various EC exporters were engaged here, as elsewhere, in vigorous competition among themselves.

44. The overall price trends clearly show that Mexico's insinuations as to the deliberate lowering of prices of the EC exporters in order to attack the Mexican producers is without foundation. The olive oil price is influenced by a number of factors such as harvests, production volumes, supply and demand. Since the EC is the biggest producer and exporter, EC export prices to all third country markets follow the same trends as prices in the EC. Even though the EC had submitted detailed information on these issues since the beginning of the investigation, Mexico has not taken them into account. The prices in Italy and Spain show similar fluctuations as the export prices to Mexico, to the US and the average EC export prices: they all underwent a dip in the years 2000 and 2001, when the complainant reduced its production.

45. Moreover, a comparison of the exchange rate movements on a monthly basis with the price movements shown in Mexico's graph reveals even more clearly that much of the alteration in price can be attributed to the temporary increase in the value of the dollar.

46. Economía seems to have made no effort to examine the above described movements in world prices of olive oil which enhances the doubts as to the soundness of the causal link analysis.

47. The new exhibits provided by Mexico serve to confirm the EC's argument that Economía failed to adequately investigate the known 'other factor' constituted by *Fortuny's high prices*.

48. According to the Final Resolution, Distribuidora Ybarra explained that it had ceased to purchase products from Fortuny because of its prices. However, what Distribuidora Ybarra actually said in its submission of 9 January 2004 was that it had ceased to buy from Fortuny because Fortuny's prices were higher than those that had been charged by its predecessor Formex Ybarra. This comment was omitted from the 'non-confidential' version of the text. Furthermore, Mexico does not mention that Distribuidora Ybarra went on to say that, with (now) an unknown trademark, Fortuny's prices were too high to attract buyers.

49. The increase in Fortuny's prices is confirmed by Mexico's answers to the Panel's Question 86, in which it gives figures for national (i.e. Fortuny) prices in the nine-month periods (from April to December) in 2000 and 2001. In 2000 the figure is \$5.51, in 2001 \$7.41.

50. In any event, the data which Mexico has presented to the Panel throw considerable doubt on its calculation of prices of Mexican olive oil. Appendix 24 to Fortuny's response of 7 May 2003 to Economía's Previsión, which provided the basis for Economía's calculations, shows almost arbitrary monthly variations in prices. Prices apparently changed by a factor of up to three from one month to another. According to Economía these data were verified by comparing them with data covering the same transactions from Distribuidora Ybarra. The latter data are contained in Distribuidora Ybarra's submission of 9 January 2004. The Distribuidora Ybarra figures show a steady decline in prices between January and August 2000, but the monthly Fortuny figures show no overall trend, and the August figure is higher than that for January. However, it should be said that the exact nature of the data presented by Mexico in these documents is not clear. The EC requests the Panel to call on Mexico to explain fully what data they contain, and to provide the data supplied by Distribuidora Ybarra for the period after August 2000. For example, the table does not contain prices for the first three months of 2002, nor it seems to take into account the relation between Distribuidora Ybarra, on the one hand, and Formex and Fortuny, on the other, before and after the division of the group to which both Formex and Distribuidora used to belong.

51. The EC has also referred to the inadequacy of the way in which Economía dealt with the extent to which the *abandonment of the Ybarra trademark* had been the cause of its problems. During the course of the investigation the importance of marks in the selling of olive oil in Mexico was raised by the EC in its letter of 9 January 2004. In the same letter the EC provided details of the trademarks used by EC exporters.

52. The point was also brought to Economía's attention by Distribuidora Ybarra, first in its submission of 9 January 2004, and at greater length in its submission of 5 August 2004. There Distribuidora Ybarra described in detail the importance of marks, and the amounts which companies were prepared to pay in royalties for the use of marks. It went further by encouraging Economía to question the owners and licensees of marks pertaining to olive oil about their value.

53. It now appears that Fortuny itself acknowledged this problem. In its response to the Previsión Fortuny noted that the mark had remained with Distribuidora Ybarra, and that Fortuny could no longer sell its product with this mark, and had to go to the market with a new mark which, it said, was practically like going with a new product.

54. Furthermore, Mexico has now provided the market survey referred to in paragraph 327 of the Preliminary Resolution. Contrary to the impression created by Mexico, this document reveals the dominance of the Ybarra brand in the Mexican market: 78 per cent of olive oil buyers usually buy

this brand, and 91 per cent have bought it at one time or another. In addition, the survey shows that this popularity is strongly associated with the brand, and has very little to do with price since only a small minority of buyers regarded it as cheap and those who bought another brand were not put off Ybarra by the price.

55. Mexico failed to reply adequately to the Panel's questions with regard to the impact of *Fortuny's high costs*. In paragraph 350 of the Final Resolution the Ministry observed that in the period under analysis Fortuny had considerable operating losses throughout the company. This clearly suggests that the overall situation of the complainant was critical and the economic difficulties were not limited to its olive oil activity. Furthermore, Distribuidora Ybarra explains that it stopped buying from Fortuny because its prices were higher than those of Formex-Ybarra before the split. Distribuidora adds that Fortuny's high fixed and variable costs are due to an inefficient administration of this company.

56. This factor was not taken into account by Economía whereas it has an impact on the whole picture: as stated by Distribuidora, high costs caused the exclusion of Fortuny from the market since wholesalers and distributors did not accept to pay such high prices for an unknown brand.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF MEXICO

(27 August 2007)

LEGAL ARGUMENTS

A. CLAIMS CONCERNING PROCEDURAL VIOLATIONS ALLEGEDLY COMMITTED BEFORE OR DURING THE COURSE OF THE INVESTIGATION

1. **Mexico complied with Article 13.1 of the Agreement on Subsidies and Countervailing Measures (SCM) in inviting the European Communities (EC) to hold consultations before initiating its investigation**

1. To avoid repeating previous arguments, Mexico reaffirms the claims it made in this connection in its First Written Submission (FWS), its first oral statement and its replies.

2. It appears that as stated by the EC during its oral statement and its reply to question 1, Mexico and the EC agree that the invitation to hold consultations under Article 13.1 of the SCM Agreement should be extended as soon as possible – that is to say, without wasting any time – once the application for the initiation has been accepted, as actually happened in the case of this investigation.

3. However, the two governments have different interpretations with respect to the moment of acceptance and the moment of initiation of an investigation. Judging from the EC's replies to questions 2, 3 and 4, under the EC system an application is accepted when submitted by the applicant and received by the investigating authority (IA), while the formal action initiating the investigation is publication in the Official Journal of the European Union, from which moment presumably the investigation clock begins to run.

4. In Mexico, the applicant files his application and the IA merely receives it and stamps it to acknowledge receipt, which does not imply that it has been accepted, only received for examination, since there has been no evaluation of its content. In fact, the application is often incomplete, and the authority has to ask the applicant for further data. Once the IA has analysed the information, it determines whether or not to draw up a draft acceptance of the document. If the authority considers the application pertinent, it sends this draft to the Minister for the Economy, who can decide whether or not to accept the application. If the Minister decides to accept the application, he signs the document which is then sent to the Official Journal (DOF) for publication as an Initiating Resolution (IR). If for some reason the document is not published, it will have no legal force whatsoever. In fact, under the laws in force, the investigation clock does not begin to run until the day following publication. The Minister's signature does not mean the initiation of the investigation. If this were the case, the periods would have to begin to run at that date, which is not what happens. As in the European system, if the document is not published, the periods do not begin to run.

5. The "formal action by which an investigation is initiated" means that the investigation process begins in every respect, especially with regard to the time-limits imposed on the interested parties and the authority and with regard to inquiries. In Mexico, the clock begins to run from the publication of the IR and never until then. Consequently, it is incongruous to consider that the signature of the

Minister is the formal act of initiation. We consider that in Mexico, as happens in the EC, the formal action by which the investigation is initiated is the publication of the notice of initiation in the Official Journal.

6. Moreover, we do not understand how the EC can consider that an application is accepted at the precise moment at which it is submitted to the IA without its having undergone any examination as to whether it is appropriate or not. In our opinion, the application needs to be examined to find out whether it contains sufficient information and hence whether it should be accepted or not. This is why the Mexican IA examines the application before accepting it. Thus, the mere submission of the petition only implies that the authority can begin examining the viability of the document, and does not imply that the application has been accepted.

7. As we indicated in our FWS, footnote 37 to the SCM Agreement states that initiation is the formal action by which an investigation is commenced, which, in our opinion, may vary according to the legal system of each WTO Member. We do not understand why at the first hearing the EC maintained that questions of this kind cannot be left to the legal systems of each country. In our opinion, each Member is free to define the requirements that must be met for the investigation to be considered to have been commenced. Nor do we understand why, if the invitation to hold consultations has to be issued as soon as possible after the application has been accepted, the EC takes between 15 and 20 days to extend the invitation to the Member concerned, as indicated in their reply to the Panel's question 3 (paragraph 10).

8. In Mexico, if an application is not accepted, then there are no grounds for holding consultations on initiation, as the application would have been rejected. For this reason, the invitation is issued once an application has been accepted by the Minister for the Economy through his signature. Hence the invitation was sent to the EC immediately after that signature.

9. We disagree with the interpretation in the EC's replies according to which the consultations under Article 13.1 of the SCM Agreement must be held before the investigation is initiated. This is contrary to what they said during the first hearing, namely that the obligation contained therein was limited to inviting a Member to hold consultations, since there is no way of forcing a Member to attend them. Accordingly, this new interpretation would imply the possibility of a Member invited to hold consultations being able to decline or ignore the invitation, and afterwards claim before a panel that the failure to hold consultations was a violation committed by the responding Member.

10. Thus, as an exporting Member cannot be forced to hold consultations, we consider that Article 13.2 of the SCM Agreement simply establishes that regardless of when those consultations may have been begun, the importing Member should afford a reasonable opportunity for them to be continued. In fact, Article 13.3 of the SCM Agreement states that the consultations are not intended to prevent the expeditious initiation of the investigation, which confirms that there cannot be any binding obligation to hold consultations before initiation, since that would obstruct initiation.

11. On the other hand, in its reply to question 6 the EC maintains: (a) that introducing a new concept (legal commencement of the investigation), not found in footnote 37 to the SCM Agreement, raises the question of whether the legal system applicable is that of Mexico or that of the WTO; (b) that the date on which the investigation legally commenced under Mexican law is not necessarily the same as the date of the procedural action by which the investigation is formally commenced and that Mexico contends that the "legal commencement" of the investigation occurs on the day following its publication, but no procedural action occurs on that day.

12. With regard to the first point, the EC appears erroneously to assume that the WTO has a completely self-sufficient legal system. There is no complete theory of the concept, nature and scope of the administrative action *per se* in the WTO legal system. Thus, the WTO only provides guidelines that are more or less general, depending on the case, concerning certain aspects, but it is necessary to

examine, case by case, whether the authority acted appropriately. Accordingly, the AB recognized that the SCM Agreement was silent on many aspects and that this had some meaning (paragraphs 65 and 74 of the AB report in *United States – Carbon Steel*). Likewise, it recognized that one of the objectives of the SCM Agreement was to establish a framework of rights and obligations and a set of rules that must be respected in the use of such rights. Among the rules applicable to the use of the rights established in the SCM Agreement, there are none that define the specific administrative action by which the investigation is commenced. On the contrary, what was established was merely a guideline.

13. The EC has merely repeated that the signature of the Minister for the Economy constitutes the formal act of commencement, without explaining why this is the case. Taken to the extreme, its argument would mean that the pre-initiation actions taken by the IA to determine whether or not an application is appropriate would have to be treated as part of the investigation, and that consequently the formal act of commencement would be receipt of the application, which we do not think that the EC itself accepts, given that it considers that an investigation commences with publication in its Official Journal. Therefore, there can be no confusion as to whether the Mexican or the WTO legal system should be used, since the SCM Agreement does not specifically establish what the act of commencement is; and as there are not two sets of rules applicable, there can be no conflict.

14. With regard to the EC's second point, there is no basis for the date on which the investigation legally commenced being different from the formal date of its commencement. Likewise, the presence or absence of procedural action has absolutely no effect on the moment at which the investigation should be regarded as having commenced. An administrative action does not necessarily produce its effects immediately. Thus, we refer to our previous plea to the effect that there is nothing in the SCM Agreement to support the EC's claim.

2. Mexico initiated its subsidy investigation on the basis of an application made by the domestic industry, in compliance with Article 11.4 of the SCM Agreement

15. In its reply to question 13, the EC insists on arguing that the term "domestic industry" alludes exclusively to the producer that is producing at the time his application is filed, an interpretation with which we disagree. The EC refers only to an argument in its FWS based on a literal reading of Articles 11.4 and 16 of the SCM Agreement, an argument which Mexico rebutted in its own FWS. Mexico rejects the EC's interpretation of Articles 11 and 16 of the SCM Agreement. In its FWS, Mexico argued that these articles could not be interpreted so literally, since that would have unacceptable consequences. The fact that Fortuny was not producing at the time of initiation has no effect on whether it can be regarded as a domestic producer, inasmuch as it is an enterprise that has existed for decades, was actually producing, has all the material resources necessary to resume production and has the appropriate legal status. It had to suspend production because of the injury inflicted by subsidized imports from the EC, injury which was continuing to be caused insofar as the company was being prevented from recommencing production.

16. With respect to the EC's reply to question 14, Mexico considers that the notion of material retardation of the establishment of a domestic industry is important for the Panel's analysis in that Article 11.4 of the SCM Agreement applies to all modes of injury. The EC has not explained how the concept of "production" could be used as a factor to be analysed if the injury suffered by the domestic industry is the material retardation of its establishment. Therefore, we repeat that the literal interpretation it gives of this article is inappropriate. The EC does not go beyond the definition of "establishment" given in an English dictionary which, in our opinion, does not say much about the meaning of this word and even less about the scope of the expression "establishment of a domestic industry" used in the SCM Agreement. However, the EC concludes that "[t]hus, when applied in a commercial context, the term does not refer to the point of starting up a business, but to the achievement of a level of maturity." According to the dictionary of the Spanish Royal Academy of Language, "to establish" means "to found or institute. To open for one's own account a commercial or

industrial establishment", from which it is clear that "to establish" means founding or starting a commercial or industrial business. In other words, the establishment of an industry does relate to its being commenced. As distinct from the Oxford Dictionary, that of the Spanish Royal Academy contextualizes its definition by referring to commercial or industrial activities, which is why we prefer to use it. However, this dictionary provides no basis at all for the EC's interpretation.

17. Even supposing, for the sake of argument, that "to establish" means "to achieve a level of maturity", we do not see how a company which produced olive oil for many years could not be regarded as already being mature, and, being a mature company, it could not be assumed to be a new industry. Nor is it clear to us how a company that is producing could be regarded as not being established. The concept of "maturity" is not contemplated in the SCM Agreement and therefore its use could give rise to an infinity of interpretations. If it were the fundamental concept to be considered in the case of material retardation, then investigations for material retardation could be initiated even if the industry were already producing, since it may not have reached "maturity", a conclusion which seems to us untenable.

18. The EC claims to find justification for its reply to question 14 in paragraph 174 of its FWS. However, that paragraph cannot constitute a justification for its reply, as it is merely an assertion. The EC is attempting to base one assertion on another. Even so, we consider it important to point out once again that the analysis made by the IA and the criterion on which it based its final determination was material injury (being prevented from recommencing operations) and not material retardation.

19. In fact, the above is closely related with the EC's reply to question 16. It should be noted that Mexico's FWS explains why the fact that the domestic producers were not producing at a particular time does not mean that they cannot be regarded as producers.

20. In its replies, as at the first substantive meeting, the EC points out that regardless of whether an investigation is initiated as a result of an application or ex officio, domestic production must necessarily exist. We again find the EC ignoring those cases in which there is no domestic production. According to its interpretation, there would be no possibility of a new domestic industry being established, an argument which is untenable. If the EC's claim were valid, there would be no need for the material retardation requirement – material injury would suffice. The EC has not explained what treatment would have to be given to those cases where production is temporarily suspended for planned or unforeseen stoppages, or to a cyclical or seasonal industry, to cite a few examples.

3. The investigating authority complied with its obligations under Article 13(b)(i) of the Agreement on Agriculture

21. With respect to its obligations under Article 13(b)(i) of the Agreement on Agriculture, Mexico reiterates the arguments contained in paragraphs 45 to 77 of its FWS and 8 to 11 of its oral statement at the first hearing, as well as in its replies to questions 20 to 22.

22. Judging from the EC's reply to question 20, both Members appear to agree that the due restraint clause applies only to the period prior to the initiation of the investigation and not to the imposition of countervailing duties. We therefore conclude that the EC has abandoned its claim to the effect that due restraint must be applied to the imposition of countervailing duties, and consequently we request the Panel to disregard this claim.

23. Nor do we believe that there is any foundation for the assertion that the imports were exempt from the imposition of countervailing measures. We can find no support in the SCM Agreement or in the Agreement on Agriculture for such an interpretation.

24. In the event that the EC is suggesting – as in its FWS – that the imposition of countervailing measures is incompatible with the Agreement on Agriculture because such measures could not be adopted on the basis of an application that claimed material retardation, we repeat that the investigation was not initiated for material retardation, but on the basis of injury in the general sense, and was concluded on the basis of material injury, namely prevention of the resumption of production. There is no provision in the SCM Agreement that says that an IA must adhere strictly to the terms of the application for initiation. In this connection, we refer to paragraphs 124 to 128 of our FWS.

25. The IA considered that it was not possible to initiate an investigation for material retardation with respect to a company which, as already mentioned in this dispute, had existed since the 1940s, was producing olive oil, had all the production facilities it needed to operate and had never been involved in any proceedings that might imply its being shut down or could affect its operations (liquidation or insolvency proceedings, re-registration, change of corporate purpose, etc). Thus, the IA determined that the most appropriate course of action would be to initiate the investigation without specifying the particular mode of injury suffered by the applicant. Consequently, there is no violation whatsoever of the SCM Agreement or the Agreement on Agriculture.

26. In its reply to question 22, the EC refuses to say what is meant by due restraint under the Agreement on Agriculture and merely argues that the actions of the IA lacked restraint. We do not understand how the EC can refuse to explain a concept and then claim that the IA acted in a manner contrary to that unexplained concept. At the same time, the EC argues that due restraint is "clearly" an additional obligation for Members, but, it should be emphasized, does not explain why it constitutes an obligation additional to that of maintaining a reasonable standard. It seems to us that these assertions do not constitute a *prima facie* presumption of a violation on the part of Mexico, and we therefore request that they be dismissed.

27. We repeat that, in our opinion, due restraint is a concept that relates to an appropriate and reasonable standard for allowing an investigation to be initiated. It does not involve doing anything differently in cases of agricultural, as compared with non-agricultural, products. Furthermore, the IA took measures which demonstrate the application of a reasonable standard (such as sending the applicant a request for information, so-called "*prevención*", before initiating the investigation). Here we refer to paragraphs 53 and 58 to 77 of our FWS.

28. In its reply to question 25 the EC states that if an investigation was initiated prior to the expiry of the implementation period, then Article 13(b)(i) of the Agreement on Agriculture applies to any determination, in the course of that investigation. Once again, we can find no support for this claim. As pointed out in paragraphs 47 and 48 of our FWS, for a rule to be violated two elements must be present: (a) a rule in force; and (b) an action at variance with that rule.

29. The due restraint was only applicable to the initiation because Article 13(b)(i) so provides and because after that it was no longer in effect. As regards initiation for retardation, we repeat that the investigation was not initiated for this mode of injury. Accordingly, we cannot see why the due restraint clause would have to be applied to the determinations issued during the olive oil investigation.

4. Argument relating to the claims concerning Article 12.4.1 and 12.8 of the SCM Agreement

(a) Mexico acted in conformity with Article 12.4 of the SCM Agreement

30. In paragraphs 56 and 57 of its first oral statement, the EC alleges that Mexico's argument concerning systematic access to all the confidential information was rejected in the panel reports in *United States – OCTG (Article 21.5 – Argentina)* and *Mexico – Steel Pipes and Tubes*. We do not agree.

31. With respect to *United States – OCTG (Article 21.5 – Argentina)*, the EC bases its argument on paragraph 7.137 of the Panel report, which mentions that the United States system is inadequate because access to confidential information is given exclusively to counsel, and it cannot be used by the parties themselves. This determination is not applicable to the Mexican legal system, which does not function that way. Under the Mexican system, a legal representative is not necessarily "counsel", but may be anyone legally authorized to act on behalf and as the representative of another.

32. Clearly, if an interested party is a company, the only way in which it can exercise a right is through a legal representative, who does not necessarily have to be counsel. Thus, the representative could be one of the members of the company's board of directors or its equivalent. In fact, this situation is recognized in Article 51 of the Foreign Trade Law (FTL). If an interested party is a natural person, then clearly he may appear for himself or through a representative. Thus, the interested party can have access to confidential information.

33. We refer in this connection to Article 80 of the FTL and Articles 147 and 159 of the Regulations thereto, which, taken together, state that: (a) interested parties and/or their representatives are granted access to the confidential information; (b) if the interested party is a company, it always acts through a representative, since a company is an association of capital and persons; (c) the representative of the company may be anyone legally authorized to represent it, including a member of the board of directors or its equivalent; (d) if the interested party is a natural person, he has every right to access the confidential information himself or through a representative; (e) if the one granted access to the confidential information (interested party or representative) is not a lawyer, he must be accompanied by a lawyer. Unlike what happens in other countries, under the Mexican legal system the interested parties and/or their legal representatives are always granted access to all the confidential information. Consequently, in the olive oil investigation the impairment of due process for the parties on which the panel focused in *United States – OCTG (Article 21.5 – Argentina)* did not exist.

34. On the other hand, the EC also argues that paragraph 7.398 of the panel report in *Mexico – Steel Pipes and Tubes* confirms the findings in paragraph 7.137 of the panel report in *United States – OCTG (Article 21.5 – Argentina)*. We consider this to be incorrect.

35. As can be seen in paragraphs 7.373, 7.382, and 7.391 to 7.398 of the panel report in *Mexico – Steel Pipes and Tubes*, the panel's findings concern two different aspects: first, whether or not the non-confidential summaries of some confidential documents permit a reasonable understanding of the confidential data; and second, the standard of review applicable to the decisions of the IA concerning the granting of confidential treatment to specific information and whether or not that information could be summarized, as well as the way in which the IA should have communicated these decisions.

36. In our view, the panel determined that the non-confidential summaries were inadequate, but as Mexico had acted in a manner consistent with Articles 6.5 and 6.5.1 of the AD Agreement as regards the evaluation and granting of confidential treatment, the evaluation of the assertions to the effect that it was not possible to make non-confidential summaries of certain confidential information, and maintaining a system of access to confidential information that permitted the effective legal representation of an interested party and could serve as a supplement to fulfilment of the provisions of Article 6.5 of the AD Agreement, there had been no violation of Mexico's obligations under the AD Agreement. Thus, it is necessary to take into account the panel's entire analysis and not just isolated findings. Mexico considers that the panel's determinations are not applicable to this particular case, in the way that the EC suggests. However, we note that even if they were, the report supports Mexico's position in the present dispute.

37. At the same time, we note that in paragraph 104 of its FWS, the EC makes the same claim as did Guatemala in *Mexico – Steel Pipes and Tubes*, to the effect that the AI did not evaluate whether

"good cause" had been demonstrated for certain information to be considered confidential. In this connection, we repeat that in the aforementioned dispute, the panel determined that this claim was unfounded (see paragraphs 7.382, 7.393 and 7.394) because there was no provision in the SCM Agreement establishing what process the IA should follow when it considered that a request for confidential treatment was justified, other than to treat the corresponding information as confidential. Therefore, we respectfully request the Panel to reject these claims by the EC.

38. In addition, there are other aspects that cannot be ignored, for example the difference between the documents about which Guatemala complained in *Mexico – Steel Pipes and Tubes* and those submitted in the olive oil investigation, and the fact that in the olive oil investigation, what happened was the same as indicated in footnote 451 to the final panel report in *Mexico – Steel Pipes and Tubes*, in the sense that both the applicant and the exporters and importers used exactly the same system for presenting their non-confidential summaries.

39. On the other hand, as already noted in our FWS, the EC alleged that its and its exporters' due process rights were prejudiced. With respect to its exporters, we repeat that they had every right to examine the confidential information, as in fact they did. In the case of the EC, even though it had the right to examine that information, for reasons unknown to us, it refrained from exercising that right and now maintains that this amounts to a Mexican violation of the SCM Agreement. This cannot be attributed to the IA. For the above reasons, we request that the Panel dismiss the EC's claims.

40. Likewise, in its reply to question 26, the EC states that its complaint relates to the non-existence of non-confidential summaries and not to their adequacy. We take this change of position to mean that the EC is waiving its claim concerning the adequacy of the non-confidential summaries contained in paragraph 104 of its FWS, and therefore request that the claim concerning the alleged inadequacy of the summaries be dismissed.

41. Now, assuming this new EC position, if Mexico can show that non-confidential summaries of the confidential information do exist, then it will necessarily follow that the EC's claim is unfounded. Moreover, the claim concerning the alleged inadequacy of the non-confidential summaries having been abandoned, it would be appropriate to dismiss all the EC's claims in this respect. Thus, as noted in Exhibit MEX 38 (Index), it is not true that there are no such summaries. These exhibits show that non-confidential summaries of all the documents in connection with which confidential treatment was accorded are contained in the record of the investigation. The fact that the non-confidential summaries do not take the form requested by the EC does not mean that they do not exist. The summaries are there and if there is any problem with them it clearly cannot be their non-existence.

42. We further recall that the SCM Agreement offers no guidance with regard to the form which a non-confidential summary should take. In any case, if the summaries do not satisfy the condition of permitting a reasonable understanding of the confidential information, the problem would be one of sufficiency and not of existence – a claim which the EC has withdrawn and which, even if they had maintained it, would have been without foundation. For all of the above reasons, we respectfully request this Panel to reject the EC's argument.

(b) Mexico acted in a manner consistent with Article 12.8 of the SCM Agreement

43. We repeat what was stated in paragraphs 91 to 95 of our FWS, where we explained why Mexico maintains that it complied with Article 12.8 of the SCM Agreement in disclosing the essential facts of the investigation in its PR.

44. We reiterate that the EC has failed to show that the PR issued by the Ministry was insufficient to acquaint the parties with the essential facts considered during the investigation, so that it has not established a prima facie presumption of violation by Mexico. In its reply to question 33, the EC only states that a provisional measure could hardly provide adequate disclosure of essential facts. As noted

in paragraphs 92 to 94 of Mexico's FWS, this point was examined by the panel in *Argentina – Ceramic Tiles*, which establishes very clear guidelines concerning the disclosure of essential facts and describes various ways of disclosing them. Consequently, we request that the EC claim be dismissed.

45. As we asserted in our reply to question 35, the reason why Mexico maintains that the essential facts were disclosed in the PR is that, during the procedural stages following the Resolution, no information came to hand that could be included within the scope of Article 12.8 of the SCM Agreement. As already indicated in our replies to questions 32 to 35, the facts which must be disclosed are the most important ones and must have served as the basis for the decision to apply definitive measures. Thus, not all the facts subsequently obtained automatically constitute essential facts under Article 12.8 of the SCM Agreement. This was not the case with the information gathered subsequent to the PR which, at best, only confirmed the relevance of the essential facts which were already known prior to the PR and were disclosed therein (as in the case of the verification report on Fortuny or the requests made by the IA to other parties). Thus, as it was not new information which affected the authority's decision, there was no obligation to disclose it.

5. Mexico acted in a manner consistent with Article 11.11 of the SCM Agreement

46. The EC claims that Mexico acted in a manner inconsistent with Article 11.11 of the SCM Agreement because, as it maintains, Mexico failed to explain why the circumstances were "special", thereby justifying the extension from 12 to 18 months and, moreover, exceeded the absolute limit of 18 months for concluding the investigation. In addition, the EC tries to excuse the lack of cooperation on the part of both its exporters and the EC itself, suggesting that as a consequence of the above they were placed in the "dilemma" that if they wished to defend their interests they would have to "condone" the Ministry's failure to respect Article 11.11, and thus, that the IA should not have resorted to the facts available.

47. With respect to the obligation to notify the reasons for the special circumstances, we repeat that there is no such obligation in the SCM Agreement.

48. With regard to the exceeding of the 18-month limit under the SCM Agreement, we refer to paragraphs 100 to 104 of Mexico's FWS and our replies to questions 39 and 40, where we indicate the reasons why – and the documents that support our assertions – the IA decided to extend the period for the investigation, by giving priority to the need to gather more information and afford the parties an adequate opportunity to defend themselves and by granting the extensions they requested, and explain the relevance of carrying out the administrative actions requested by the parties (such as the on-the-spot investigation). We repeat that these extensions, the verification visit to the applicant's premises, and the actions taken by the IA in response to the questions raised by the parties themselves were the cause of the delay in the proceedings.

49. We consider that Article 11.11 of the SCM Agreement is designed to protect the interested parties from any unjustified delay or inaction, by ensuring that they are not left defenceless and that the delay does not work in favour of one of the parties. We do not see the IA as having breached this guarantee or undermined any due process rights. The EC's claim is not based on any specific and genuine impairment of its rights of defence or those of its exporters – it is merely an excuse for not supplying the information that the IA requested of it.

50. Therefore we reaffirm what we said in paragraph 106 of our FWS and request the Panel to take these circumstances into consideration in its analysis, since the delay was due not to negligence on the part of the IA but to a desire to obtain the best information possible, as requested by the interested parties themselves.

51. As already pointed out in our FWS, we consider that there is no foundation at all for the EC's attempts to excuse the lack of cooperation on its part and on that of its exporters (we recall that

the EC itself has admitted that it did not respond to the requests for information made after the public hearing). Accordingly, we repeat what was stated in paragraphs 108 to 110 of our FWS.

52. It would appear that the EC's only objective in arguing the exceeding of the limit is precisely to justify its failure to fulfil its obligations under the olive oil investigation procedure in order subsequently to maintain that the IA was wrong to apply the "available facts". However, we note that the SCM Agreement does not provide for any exception to the application of the available facts on the grounds that the investigation has taken more time than indicated in Article 11.11 of the Agreement. We fail to understand the nature of the EC's alleged "dilemma" in responding to the requests for information.

53. Furthermore, we repeat what was said in paragraph 110 of Mexico's FWS, to the effect that assuming the behaviour of the EC and its exporters to have been justified would be tantamount to handing over control of the investigation to the parties, which we consider unacceptable.

B. ARGUMENTS CONCERNING THE CONDUCT OF THE INVESTIGATION AND THE FINAL AFFIRMATIVE DECISION

1. Mexico did provide an adequate and reasoned explanation of the existence of subsidization, calculation of the benefit conferred on the exporters of the product investigated and the method used in each particular case, as required by Articles 1.1 and 14 of the SCM Agreement

54. In its reply to question 42, the EC states that the recipient of the benefit under the subsidies programme is the olive grower and that this is consistent with Article 5 of Council Regulation (EC) No. 1638/98, amending Regulation No. 136/66/EEC. It also claims that in paragraph 100 of the FR in this investigation part of this Article was deliberately omitted.

55. Contrary to what the EU claims in its reply to question 42, there was no omission in the FR. The FR never referred to Article 5 of Council Regulation (EC) No. 1638/98, but to Article 5 of Regulation No. 136/66/EEC, and did not omit any substantive part thereof. In any case, we do not detect any element in Article 5 of Council Regulation No. 1638/98 that could be used to support the claim that the subsidization programme was not directed at olive oil. On the contrary, that Article also indicates that it is a subsidized good.

56. As stated earlier, the EC's subsidization programme is covered by Regulation No. 136/66/EEC, and was notified by the EC to the WTO's Committee on Agriculture as a subsidization mechanism. Consequently, it is a subsidy whose existence, validity and application are not open to question. Moreover, it is directed, in Article 5 of both Regulations, towards encouraging the production of olive oil. Both regulations are categorical in this respect. It was therefore assumed, quite correctly, that the subsidy was specifically given for the production of olive oil.

57. Regarding the alleged need to undertake a pass-through analysis of the subsidy's benefit, we once again state that in the SCM Agreement there are no grounds for the EC's argument. There is no provision in this Agreement indicating that such an analysis should be made, so we once again request the Panel to reject this claim. Moreover, we do not see why a pass-through analysis of the benefit should have been made when the subsidy is granted for the product investigated.

58. Furthermore, we note that in its reply to question 46, the EC explains its claim that the absence of a reasoned explanation of the existence of subsidization and the failure to carry out a pass-through analysis of the subsidy's benefit constitute violations of Articles 1 and 14 of the SCM Agreement. We see no basis in these articles for its claim.

59. In its reply to question 53, the EC claims that Mexico failed to provide a transparent and adequate explanation of the method used to calculate the amount of the subsidy. This claim has no substance. There is no obligation in Article 14 of the SCM Agreement to explain the calculation of the amount of the subsidy, but rather the benefit conferred. It cannot therefore be claimed that Mexico violated an obligation that does not exist in the SCM Agreement. In addition, paragraphs 126 to 178 of the FR set out the methodology used to determine both the amount of the subsidy and its effect on olive oil prices and the resulting benefit.

60. Likewise, in its reply to question 54, the EC does not explain why it considers that the necessary adjustments to the amount of the subsidy granted were not made. We cannot give any further details in this respect because the EC's argument is not clear. Nevertheless, we repeat the explanations given in paragraphs 137 to 146 of our FWS and in our replies to questions 59 and 61.

2. Mexico correctly defined its domestic industry

61. The EC claims that Mexico did not identify its domestic industry on the basis of positive evidence and thereby violated Article 15.1 of the SCM Agreement.

(a) The Ministry adequately determined that Fortuny was the only domestic producer

62. The EC's reply to question 64 incites two considerations: (a) The EC does not indicate what concrete action should have been taken by the IA during the investigation into the domestic industry; (b) it specifically states that its claim in paragraph 173 of its FWS was made to "illustrate the consequences of the non-existence of the domestic industry, rather than as an attempt to claim an inadequate inquiry into the extent of the domestic industry".

63. However, what paragraph 173 appeared to claim was precisely that there was an inadequate inquiry. What it is now contending its reply to question 64 is that this paragraph is not a claim that the enquiry was inadequate, but rather an illustration of the consequences of the non-existence of the domestic industry. In other words, the EC sets aside its claim regarding an alleged inadequate enquiry into the extent of the domestic industry and instead adopts the position that the domestic industry *did not exist*. There are therefore basically two consequences: (1) there is no reason whatsoever to take into account the claim in paragraph 173 of the EC's FWS inasmuch as the EC itself has set this aside; and (2) because its claim is based on the non-existence of the domestic industry, it is enough to show that the domestic industry did exist in order to invalidate its claim.

64. Despite the foregoing, however, we repeat that paragraphs 212 to 255 of the FR set out the reasons why the IA confirmed that Fortuny did meet the requirements of representativeness and legitimacy in order to request and proceed with the investigation, in accordance with Articles 11.4 and 16 of the SCM Agreement (the issue of the scope of these two Articles will be dealt with below). This section describes the efforts that were made by the authority to determine whether there were other domestic producers.

65. In addition, in paragraphs 27, 28 and 29 of the summary of its first oral statement, the EC claims the following: (a) even though Maprinsa did not produce olive oil, this was not sufficient reason to abandon further enquiries; (b) the Ministry did not investigate the existence of the two domestic producers indicated by Oliverara Tulyehualco; (c) the Ministry decided not to make enquiries into Aceites Navarra, even though it was a bottler, or into Llanos de San Francisco, which might have moved on from the experimental stage; (d) the National Association of Edible Oils and Fats Manufacturers (ANIAME) only reported that Fortuny was registered with it; and (e) in this dispute the Ministry did not present the reply from the Mexican Institute of Industrial Property (IMPI) and did not request information from the authorities of Baja California and Sonora, where olives are grown.

66. In this respect, we repeat what is stated in paragraphs 154 to 209 of Mexico's first written submission and even though the EC has indicated some other possible additional inquiries, these do not suffice to disregard the authority's evaluation of the extent of the domestic industry. The large amount of evidence in the record enables it to be reasonably determined that Fortuny constituted 100 per cent of the domestic industry. In this respect, Mexico considers it important to reiterate that, as provided in paragraphs 97 and 99 of the AB report in the *US – Softwood Lumber VI* (21.5) dispute, the review of the IA's findings should be based on information contained in the record as well as the considerations contained in its resolutions.

67. Each one of the specific claims set forth above was refuted both in Mexico's FWS and in its rebuttal submission, which also reflect the complexity of the inquiries and the proactive and unbiased attitude of the IA. In most cases, these inquiries were indeed carried out (for example Maprinza and its suppliers, although they did not produce olive oil), while in other cases there were sufficient reasons and evidence in the record to suggest that the inquiries were not necessary (according to official data, Llanos de San Francisco was still at the experimental stage; Aceites Navarra, according to the exporters themselves and according to official data, did not produce olive oil; and the State of Sonora did not produce olive oil). Moreover, attention was drawn to the relevance of the reply by the ANIAME and to the IA's evaluation of the replies given by the different authorities.

68. On this point, we repeat that, in order to obtain further information, requests for information were also sent to non-party companies, as indicated in paragraphs 191 and 193 of Mexico's FWS, and again it was not possible to infer from their replies that there was any other domestic producer.

69. Far from having acted negligently, the IA undertook all possible inquiries. We do not consider that the fact that suppliers of canola oil were not investigated or that requests for information were not sent to a State whose production was non-existent according to official data are sufficient grounds for determining that Mexico acted inconsistently with the SCM Agreement. We repeat, moreover, that the IA did not only have the information collected but also took into account the fact that no other company came forward as a domestic producer.

70. We recall that both the interested parties and non-party entities, local governments and government offices were unable to provide information on a single domestic producer other than the applicant, and therefore, the IA's conclusion was fully justified. All this information cannot be considered as circumstantial or insufficient evidence and we fail to see how it can reasonably be assumed that, despite the foregoing, there must necessarily have been domestic producers other than the applicant. We cannot see what is the EC's basis for assuming this. The EC relies on the unfounded premise that they exist and no proper search was made for them, but it does not indicate what the IA should have done to find them.

71. In addition, assuming, for the sake of argument, that there was another domestic producer, it would not be likely either, in view of all the evidence contained in the record, that its level of production was such that it nullified Fortuny's legitimate status as the entity which acted for or on behalf of the domestic industry or had a decisive impact on the examination of injury caused by the subsidized import.

72. In this connection, attention should first be drawn to what is laid down in Articles 16.1 and 11.4 of the SCM Agreement, which are the rules directly applicable to this case. We know from Article 16.1 of the SCM Agreement that the term "domestic industry" has two meanings: (a) all domestic producers of like products; or (b) domestic producers whose products constitute a major proportion of the domestic production of like products.

73. In other words, there are two ways of meeting the obligation to examine the domestic industry: by examining all producers or by examining a major proportion of them. In this regard, Article 11.4 of the SCM Agreement gives us the guidance for determining whether the domestic

producers requesting the initiation of the investigation can be deemed sufficient to consider that the application is being made "by or on behalf of the domestic industry": when it is supported by domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application.

74. Consequently, if an application is made by a domestic producer constituting more than 50 per cent of the total domestic industry expressing support for or opposition to the application and accounting for at least 25 per cent of the country's total production, this shall be understood to mean that the investigation is being requested by the domestic industry and, as a result, the comprehensive examination to determine the existence of injury may focus solely and exclusively on that producer without this being considered as lacking objectivity. The EC itself, in its reply to question 65, stated that by representing 100 per cent of domestic production, there was in fact no need to examine the concept of "collective output".

75. In addition, we also recall that, according to the data in the article in "*Claridades Agropecuarias*", information also submitted by the EC, Mexico's total annual output of olive oil was around 1,000 tonnes, and according to the correction submitted in our reply to question 18 and the corresponding explanations, Fortuny produced a very similar amount. Assuming for the sake of argument that there were other domestic producers of olive oil, these additional producers' output would not be sufficient to nullify the conclusions reached by the Ministry regarding Fortuny's right to request the initiation of the investigation and the analysis of injury caused by the subsidized imports.

(b) The domestic industry does exist and suffered material injury

76. The EC has stated that if a domestic industry ceases to produce during an investigation, the procedure would conclude without the imposition of measures. For Mexico, the rigid application of such a criterion could mean that even where domestic producers had suffered the maximum degree of injury during the investigation and because of this had ceased to produce, they would be left to their own devices and the domestic industry would end up by disappearing. Imports that are the subject of unfair practices would then have destroyed the domestic producers' market.

77. Contrary to what is stated by the EC, the important point regarding the existence of a domestic industry is not simply to determine whether in fact it is producing or not or if it produced before the investigation was initiated or once it had commenced. The point is to determine, on the basis of various factors, whether the domestic industry exists or not and once it has been determined that it does exist to examine whether the suspension of production is the result of the injury suffered because of imports of products that are the subject of an unfair practice.

78. In our view, in its reply to question 68 the EC bases itself on two premises that are not substantiated in the SCM Agreement: (1) there must exist an industry-production level correlation throughout the period analysed in order to determine the existence of injury; and (2) the analysis should focus solely and exclusively on what occurred during the investigation period in order to calculate the subsidies, in other words, in this particular case, the nine months for which the subsidy margins were calculated.

79. We consider that the first of these premises is based on an erroneous assumption because, as we explained on several occasions, it is possible for industries to exist but not to produce at a particular time owing to various circumstances, (for instance if, for climatic reasons, there is no harvest in a particular year, which is no reason why they should be considered to have disappeared. In this respect, the EC's premise cannot in our view be sustained. Mexico considers that there should be a more detailed analysis of the causes that incited an industry to suspend production, whether the suspension is definitive or whether operations could be resumed under certain circumstances.

80. Regarding the second premise, in our view it is not possible to omit an analysis of historical trends in the industry, including those prior to the period investigated, in order to determine the existence of subsidization, when the relevant information is available, to examine how these changed or were modified during the period investigated, and to analyse the reasons for those changes. It could also be relevant to analyse any important event that occurred during the investigation, subsequent to the period investigated (for example, to determine its causes and examine whether these events are in any way linked to what occurred during the period investigated or their effect on the investigation itself). We do not, therefore, think that an investigation into injury should be limited to the situation prevailing during the period investigated in which subsidization was determined. Examination of injury should go further.

81. We agree with the EC's final indication to the effect that the process cannot be automatic but that the merits of each case should be taken into account. In the investigation into olive oil it was shown that the reason why the domestic industry could not resume operations was the presence of subsidized imports. Consequently, according to the merits of this case, it was considered that, even though there was no output during the period investigated, there was a domestic industry – a determination that was reached after various factors had been analyzed, as stated on several occasions during this dispute.

82. We consider that a domestic producer does not necessarily have to be producing at the time of submitting an application or during the investigation because in trade a producer may possibly have to suspend production of the article in question temporarily without this meaning that it loses its status as a domestic producer. This circumstance has to be analysed on a case-by-case basis.

3. Mexico made a proper definition of injury in accordance with Article 15 of the SCM Agreement

83. The EC would appear to contend, in its reply to question 80, that when production reaches zero this cannot be considered a decline. In our view, the word "decline" implies that a specific indicator has moved downward over a lapse of time. It is not possible validly to contend that if this decrease reaches zero, it should be excluded as a "decline", and the EC does not explain how such a situation could be considered. To accept the EC's interpretation would be tantamount to awarding a premium for unfair imports because the maximum degree of injury has been achieved (inciting the domestic industry to cease production).

84. Furthermore, in our view the EC's arguments are contradictory for the following reasons: (1) it claims that the decline in output to zero is not really a decline; it has also stated that a domestic industry that is not producing simply does not exist; (2) nevertheless, in its reply to question 80 it states that provisional suspension of a domestic industry may be considered as an injury factor; (3) if it claims that decline in output to zero is not properly speaking a decline, then it is not clear to us how such decline could be analyzed as an injury factor; (4) if it claims that a domestic industry that is not producing does not exist, then we do not understand how it could be considered as a factor in the decline in output to zero since, according to what the EC has claimed, this industry does not exist.

85. In our opinion, the decline in output means a decrease over time, and if such decrease reaches zero, this simply means that the injury factor has reached its maximum level. It is indisputable that once it has been determined that a domestic industry exists and that it has scaled down or suspended operations as a result of the unfair practice, this constitutes a highly relevant factor in the injury analysis. Regarding the emphasis that the EC has given to the fact that the domestic industry suspended production one year before making its request, we repeat that the material injury consisted of the obstacle caused by unfair imports, which did not allow domestic producers to resume operations, making it necessary to examine the trend in production. It is thus obvious that the decline in Fortuny's output had to be taken into account in this examination. Furthermore, the EC's statement does not appear to us to be relevant, in that the EC does not take into account various steps that

companies undertake before requesting an investigation and the burden this imposes. Firstly, particularly in the case of small companies, when they are faced with unfair practices they try to expand their sales through other channels (new clients, new channels of distribution, etc.) and only afterwards do they turn to legal channels. Then there is a lapse of time during which the company contacts an office or expert to prepare their application for an investigation, which is not easy. Consequently, the lapse of time between the suspension of operations and the submission of an application for initiation may be as much as one year or even more.

86. In its reply to question 81, the EC indicates that the word "potential" in Article 15.4 of the SCM Agreement does not have great significance, at least as regards investigations that are based on an allegation of material injury. Mexico considers that an investigation into material injury should take into consideration the potential situation of the industry in the immediate future in order to examine whether the unfair practice could persist and continue to cause injury, and to assess the future situation of the domestic industry, as well as to determine what would be the alternative situation if there were no subsidized imports (for example, what might have been the level of domestic output "*if it had not been for*" the imports investigated). We see no grounds for the claim that it would only be relevant to examine the potential situation of the domestic industry in cases of threat of injury and that even then it is questionable. Article 15.4 of the SCM Agreement clearly indicates that there should be an examination of "actual and potential decline" of the factors enumerated therein and makes no distinction as to whether the potential examination only applies to cases of threat of injury.

87. Moreover, Article 15.2 of the SCM Agreement provides that, in order to consider the effect of the subsidized imports on prices, the authority should consider whether there is price undercutting, prices are depressed or price increases prevented. In a situation where price increases are prevented, we do not see how the relevant analysis can be made without potential aspects and the EC has not explained this. Moreover, the injury suffered by a domestic industry at the present time does not produce all its effects immediately. As it is usually a question of trends, these effects can occur in the future and can serve to carry out a proper examination of injury. We do not therefore accept that the word "potential" is of marginal or no importance in Article 15.4 of the SCM Agreement, and in a proper examination, we do not see how injury could be double counted.

88. Likewise, we consider that paragraph 7.77 of the Panel report in the *Mexico – Corn Syrup* dispute does not support the EC's statement. This paragraph merely indicates that in cases of threat of injury it is relevant to include projections in the application, but failure to include them does not suffice to reject the application. The Panel's finding did not refer to the material injury examination but to the application for initiation in which the threat of material injury is claimed. It is therefore important to include projections in the application regarding threat of injury because the injury claimed implies future developments; but this does not mean that potential data should only be considered in the case of applications regarding threat of injury.

89. As already stated, to consider that there is no domestic industry because production has been suspended would be tantamount to giving unfair imports a premium for having inflicted extreme injury on domestic producers, in that under this interpretation it would be impossible for domestic producers to request an investigation. For Mexico, the fact that this industry was unable to resume operations for a year shows the injury it suffered.

90. With regard to the EC's assertions concerning models, we note that any model or estimate is by nature an approximation of something, inasmuch as the results of its application are not real data but information that reflects the "possible reality" to a greater or lesser degree of accuracy. In fact, the exactitude of any model can be verified *a posteriori* once its greater or lesser accuracy in predicting the future has been proven. We do not, therefore, understand how one can advocate the use of models, projections or estimates and then question them.

91. At the same time, it is incongruous for the EC to maintain that there is no information on injury and in the next line to indicate that this is because the Mexican industry had ceased to produce, when what is being claimed is that the Mexican industry's production fell to zero as a result of the practice of exporting subsidized products from Europe. It is also important, as indicated in Mexico's replies concerning the price undercutting under which the imports from the EC entered, that the Panel should bear in mind that this examination was not only made in relation to the costs estimated by Fortuny in its business plan. In fact, the examination also covered the real-historical costs incurred by Formex, Fortuny's predecessor. In any event, the prices of the subsidized imports from the EC were also well below Fortuny's production costs. Furthermore, it is important to bear in mind that there was also an examination of what would occur if the subsidies were eliminated, and the finding was that the Mexican product could have been more competitive in comparison with the imports from the EC.

4. There was proper consideration of any known factors other than the subsidized imports which at the same time could have caused injury to the domestic industry, in accordance with Article 15.5 of the SCM Agreement

92. As mentioned in our FWS, the EC originally claimed that various factors (loss of the distribution network, loss of the Ybarra brand, high costs, etc.) were specific reasons for the injury suffered by the applicant, and that the IA had failed to carry out a *proper* analysis of these factors. In contradiction to the foregoing, the EC claims that these factors were *not* examined by the IA and that this is inconsistent with the SCM Agreement. In other words, the EC first asserts that the analysis was not proper and then claims that there was no analysis at all.

93. Regarding the alleged absence of analysis, we already stated in our FWS that this statement would be invalidated if it were shown that these factors were in fact analysed. We also explained in our FWS what was involved in that analysis, which in our opinion was proper. We therefore request the Panel to reject this claim by the EC.

94. Regarding the alleged lack of a proper analysis, we reiterate what is stated in our first written submission (paragraphs 273 to 290), namely that these (and other) factors were properly analysed. These paragraphs clearly show what was involved in the aforementioned analysis and the reasons why the Ministry made the determinations contained in the FR.

95. In addition, the EC has provided no evidence that these factors did in fact have any effect on the domestic industry, still less that the evidence sufficed for this purpose. As we have already stated, simple assertions cannot constitute a prima facie presumption of violation on Mexico's part.

96. We repeat that the IA did not only properly analyse the factors indicated by the EC but, in addition, also examined all those aspects which it considered might affect the situation of the domestic industry, therefore, the EC's argument is without substance.

ANNEX D

ORAL STATEMENTS, FIRST AND SECOND PANEL MEETINGS

Contents		Page
Annex D-1	Executive Summary of the Oral Statement of the European Communities – First Meeting	D-2
Annex D-2	Executive Summary of the Oral Statement of Mexico – First Meeting	D-8
Annex D-3	Executive Summary of the Oral Statement of the European Communities – Second Meeting	D-14
Annex D-4	Executive Summary of the Closing Statement of the European Communities – Second Meeting	D-20
Annex D-5	Oral Statement of Mexico – Second Meeting	D-22

ANNEX D-1

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE EUROPEAN COMMUNITIES - FIRST MEETING

(26 June 2007)

1. Mexico does not dispute that, under Article 13.1 of the SCM Agreement, before the initiation of the investigation the EC had to be invited to consultations and that an invitation was not made until 4 July 2003. However, the parties disagree over the date of the 'initiation' of the investigation: the EC says it was 2 July 2003, when the Minister signed the initiation measure, while for Mexico it was the date of publication of the measure on 16 July 2003. Mexico reaches this conclusion on the basis of an analysis of Mexican law regarding the entry into force of the instrument. The EC's contention is that the legal system in which the analysis has to be carried out is not that of Mexico but of the WTO. Footnote 37 to the *SCM Agreement* defines the word 'initiated' as a "procedural action by which a Member formally commences an investigation".
2. The signing by the Minister is a 'procedural action'. In contrast, the publication of the instrument in the *Diario Oficial* may be procedural, but it cannot be considered as the first procedural action in the Mexican investigation procedure.
3. Mexico cannot deny that the signing of the Resolution is a "formal" act, and, in relation to the word 'commence', there can be no doubt that that action taken by the Minister is focused on commencing the investigation: paragraph 122 of the initiation Resolution affirms that "the Ministry accepts the request from Fortuny [...] and declares the initiation of an investigation".
4. Moreover, the EC's position is sustained by the objectives of that provision. Mexico's haste in commencing the investigation did not provide a real and adequate opportunity for prior consultations with the EC. The consultations were not able to clarify the situation and to allow Mexico and the EC to arrive at a mutually agreed solution, which are the objectives of the consultations under Article 13.1 of the *SCM Agreement*, as, in a similar situation although under the *Safeguards Agreement*, the Appellate Body explained in *US – Line Pipe*.
5. The second of the EC's claims is that the Mexican investigation was not commenced following an application made by or on behalf of the domestic industry.
6. Mexico claims that the EC's interpretation of Article 16.1 of the *SCM Agreement* would mean that claims of injury in the form of material retardation of the establishment of a domestic industry would never be possible. Such a claim is not correct. While an entity with no domestic production would not be eligible for consideration as a domestic industry, a firm that was producing but which was having difficulties in developing because of dumped or subsidized imports would have the possibility of exploiting this option.
7. Mexico quotes from the panel report in *Mexico – Corn Syrup* in support of its argument that a firm that has ceased production may yet qualify as a domestic industry. However, the extract does not

have the meaning given by Mexico, since it merely emphasizes the three different forms that injury can take, and the significance that these forms have for the conduct of the investigation.

8. Mexico seeks to evade the terms of the *SCM Agreement* by arguing that Fortuny had the means to produce olive oil even though there was no production during the investigation period. However, the *Agreement* repeatedly emphasises the significance of production. This has also been underlined by Norway in its third-party submission, which makes reference to the Appellate Body report in *US-Lamb*.

9. Mexico invokes those cases where panels have considered the level of evidence that is necessary to commence an investigation. However, these cases concerned the issues of dumping (*Guatemala – Cement II*, *Argentina – Poultry*) and injury (*Mexico – Corn Syrup*), which are ones that are also examined in depth during the course of the investigation. On the contrary, the question whether the application has been made by or on behalf of the domestic industry will not be further examined during the course of the investigation. Consequently, the examination of this issue carried out prior to initiation must be a thorough one. It is this standard that the Mexican authorities have failed to meet.

10. To justify that Mexican industry consisted solely of Fortuny, Mexico refers to an article in the journal *Claridades Agropecuarias*. Although this article was referred to in the Preliminary and Final Resolutions, there is no record of its use in the Initiation Resolution and it should therefore not be permitted as a justification of that Resolution. Secondly, this article appeared in June 2001, and it mentioned that one other firm, Llanos de San Francisco, was in an experimental phase of production. Thirdly, contrary to what Mexico claims, from the article in *Claridades* it cannot be deduced that Ybarra was the only company producing olive oil in Mexico: the article only declares that Ybarra was the main olive oil producer in Mexico at that time. Finally, the article in *Claridades* refers to olive oil production figures in Mexico that are much higher (1 000 tons in 2000) than Fortuny's production (between 254 and 310 tons in 2001-02).

11. The sole items of supporting evidence that were cited by the Ministry in the Initiation Resolution were some letters from the Agriculture Department of the state of Baja California. However, they seem to refer only to the installed and productive capacity of Fortuny. In any event, the statement was made by an authority of the state of Baja California, whereas Mexico admits that there is also substantial olive production in the state of Sonora.

12. Finally, Mexico justifies the decision of the Minister regarding Fortuny's status as the sole Mexican producer by saying that this was confirmed by the investigation. However, a later finding of this kind is irrelevant to the question whether the original decision to initiate was justified as regards the standing of Fortuny.

13. The third of the claims made by the EC concerned Article 13(b)(i) of the *Agreement on Agriculture*. Mexico refers to the fact that the rule expired at the end of 2003. However, the EC considers that it applied to all proceedings initiated before that date, and the fact that it was within only a few months of expiry at the time of the olive oil investigation was commenced was not a reason for disregarding it.

14. Moreover, Mexico argues that, although the complaint invoked the notion of material retardation, the investigation focused on that of material injury (which was not prohibited under Article 13(b)(i)). However, such an approach cannot be reconciled with the terms of the *Agreement on Agriculture*, under which Mexico should have rejected a complaint based on material retardation.

15. Mexico argues that the 'due restraint' requirement of Article 13(b)(i) was no more than an obligation to respect a reasonable minimum standard. However, this presentation of that provision adds nothing to the original, provided that what is reasonable is recognised to be an objective matter

and not one to be decided by each WTO Member for itself. If Mexico is arguing that the standard is the same for agricultural and non-agricultural products, such a reading would deprive Article 13(b)(i) of utility, and clash with a principle of interpretation (*effet utile*) that has been repeatedly confirmed by WTO jurisprudence. The EC has noted the Ministry's haste in commencing the investigation: its failure to consult the EC in due time and in good faith, its inadequate consideration of the extent of the domestic industry, and its treatment of the alleged form of injury. These are defects that could have been cured by taking more time and/or giving a more thorough examination to the complaint. They necessarily reflect a failure on the part of the Ministry to exercise 'due restraint'.

16. In relation to Article 12.4.1 of the SCM Agreement and the obligation to provide non-confidential summaries of confidential information supplied to the investigating authorities, Mexico argues that an access to the confidential file under a protective order was possible and was used. But this line of defence has already been rejected by the report of the panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, confirmed by the report of the panel in *Mexico – Steel Pipes and Tubes*.

17. Mexico also claims that the requirement to provide non-confidential summaries was satisfied by the provision of versions of parties' submissions, with the confidential material blanked-out. But a document with confidential material deleted is patently not a *summary* of the confidential material that it contained. This was the conclusion of the panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*.

18. On the disclosure obligation in Article 12.8 of the SCM Agreement, Mexico contends that it satisfied this disclosure obligation by issuing its Preliminary Resolution. However, the Ministry should have informed the interested parties that the Resolution had this purpose. Moreover, following the adoption of the Preliminary Resolution of 18 May 2004, the Ministry engaged in a considerable amount of fact finding. In some, if not all, of these steps the Ministry was explicitly obtaining factual information from the interested parties.

19. Mexico seeks to defend itself against the accusation that the Ministry exceeded the 18-month time limit set by Article 11.11 of the SCM Agreement by invoking the complexity of the investigation and the need to treat the parties fairly. Article 11.11 provides that 'in special circumstances' investigations may exceed the one year limit, but this exception is explicitly limited by the rule that 'in no case' may they last more than 18 months. Assuming, *quod non*, Mexico's arguments that the delay was due to requests by interested parties for more time to respond to the Ministry's enquiries, Mexico's defence is irrelevant. The drafters specified an absolute limit to the length of investigations and Mexico had no option but to respect that limit.

20. Concerning the existence of subsidization and calculation of a 'benefit', the EC has explained the notion of 'subsidized import', which is not defined in the *SCM Agreement*. Mexico purports to find confusion as to whether the 'offsetting' is directed at the subsidies or at the benefits of the subsidies. Given that the rules clearly identify the benefit afforded by the subsidy as setting the maximum level of countervailing duties, the EC does not find this a meaningful distinction. The offsetting is directed at the subsidies, and its level is determined by calculating the benefit received under the subsidy.

21. Mexico claims that its measures on olive oil were targeted at the injury rather than the subsidy. However, the errors that the Ministry made in calculating the amount of the subsidy cannot be disregarded simply because it then decided to set duties at lower levels, based on an injury criterion.

22. A major element of the EC's criticism of the Ministry's determination concerns the argument that the benefit of the subsidy was not 'passed-through' from the firms that had received it to affect the products imported into Mexico. Mexico has entirely ignored the EC's arguments.

23. Another of the matters to which the EC took objection in the Ministry's finding of subsidization was its failure to take account of the fact that some of the olive oil exported from the EC to Mexico was actually made from olives bought from outside the EC, which had not been part of any aid scheme. Mexico's attitude has been that, because the companies could not prove what proportion had come from this source, no adjustment could be made.

24. The *Agreement* does not explicitly address the situation where information necessary for the completion of the investigation is not in the hands of an interested party or Member. Mexico's attitude appears to be that the investigating authority may demand such information from the party whose interest it is likely to serve, and if the party cannot provide it, to assume that such information is completely unfavourable to that party. Such an attitude misunderstands the proper allocation of the burden of obtaining evidence necessary for a countervailing duty investigation. The Appellate Body explained in *US - Wheat Gluten* that the word 'investigation' suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study must actively seek out pertinent information. Thus, the responsibility to obtain information lies on the investigating authority. If the information is held by interested Members or parties the authority can demand it from them. But, where the information lies elsewhere, the authority may not, as Mexico sought to do, escape its own responsibility by giving an interested party the task of obtaining it, or of suggesting how the problem might be overcome.

25. The same issue arose in respect of the information regarding costs incurred in relation to the olive oil after production of the oil. Again, there is a responsibility on an investigating authority to obtain the information necessary for its findings, and the Ministry did not properly discharge it.

26. Moreover, even assuming, *quod non*, that the subsidy passed through from the olive growers to the producers of olive oil, the Mexican authorities failed to adequately explain the methodology used to establish the countervailing duties and in particular to justify the use of the ex-work export price as basis for the calculation. Mexico calculated for each company an ad valorem subsidy margin in the provisional resolution and a specific duty in the definitive resolution, but apparently using the same methodology. The ex-work export price is an unsuitable basis for the calculation of a subsidy margin in the case of a production subsidy, which benefits the total production and not only exports.

27. As regards the accusation that the Ministry failed to make an adequate investigation of the extent of the domestic industry, Mexico reveals that a sample of Maprinsa's production was found to consist of rapeseed oil (canola). However, given that Maprinsa claimed to have used domestically sourced oil, and provided the names of several traders from whom it had acquired it, the fact that a sample of Maprinsa's output was found not to contain olive oil hardly seems a reason for abandoning further enquiries. A further indication of the inadequacies of the Ministry's investigations is also provided in the response by one of those bottlers, Olivarera Tulyehualco, SA de CV, which refers to two national producers of olive oil located in Baja California. The Ministry did nothing to investigate their existence or extent.

28. Similar indications of inadequacy are found in relation to Aceites Navarra. Because the exporters had identified this firm as one that only bottled olive oil, the Ministry chose not to make further enquiries of it. However, the crucial issue was whether there were Mexican producers of olive oil, a point on which this firm could have provided direct evidence. There is also no indication that the Ministry sought information from Olivos de California, a company indicated by Maprinsa as a producer of olive oil. The firm Llanos de San Francisco was also dismissed by the Ministry because, according to the article in *Claridades Agropecuarias*, it was only in an experimental stage. However, the article was published in June 2001, and presumably relied on information gathered before that date. Moreover, Llanos was operating at a sophisticated level, and it might well have been expected in the intervening period to have moved to actual production. The inadequacy of the Ministry's

investigations is also reflected on the fact that firms merely bottling olive oil were not always clearly asked to identify domestic sources of oil.

29. The Ministry contacted the national association of oil and edible fat industries, ANIAME. However, the association did not provide information on national olive oil producers, but merely reported that Fortuny was the only such producer that was *registered* with it.

30. Among the official bodies that the Ministry contacted as part of its investigation was the Mexican Institute of Industrial Property. Mexico has provided the letter that the Ministry wrote to the Institute, but not the response. Finally, the Ministry never wrote to the authorities of the States of Baja California and Sonora, which are regions where the Final Resolution declares that olive tree cultivation plays a very important economic and social role.

31. The indicia of injury listed in Article 15.4 cannot be applied in the situation of Fortuny because it was not a producer during the investigation period. To circumvent this problem Mexico invents a new index of injury: the state of being unable to restart operations. There is no such index of injury in the *Agreement*, a fact which is directly linked to the definition of industry.

32. The third of the 'substantive' claims that the EC makes against Mexico concerns the determination of injury. The Ministry failed to establish injury in accordance with the criteria listed in Article 15.4 of the *SCM Agreement*. First of all, the notion of prevention of restarting operations, that Mexico identifies as the injury suffered by its domestic industry, is not one recognized by the *Agreement*. It is not enough for Mexico merely to describe it as a form of material injury; it must be able to explain how that description is supported in the factors listed in Article 15.4. The fundamental problem that Mexico faces is that there was no production, and if there was no production there can have been no industry, and without an industry there can have been no material injury.

33. On the analysis of prices required by Articles 15.1 and 15.2, and despite the fact that in its chosen investigation period there were no sales by Fortuny, the Ministry claims to have made comparisons based on 'actual prices'. But the Final Resolution gave only undercutting margins for the previous two years. However, the absence of price data for 2002 did not entitle the Ministry to use a spurious indicator of price based on Fortuny's costs. Any price resulting from such an exercise is entirely artificial, and provides no indicator that can plausibly be used when applying Article 15.

34. Moreover, the usefulness of the price comparisons carried out under Article 15.1 and 15.2 is put in doubt by the bizarre pricing policy pursued by Fortuny. 2001 was a time when olive oil prices were falling everywhere. Thus, the fall in prices of exports to Mexico was merely part of an international trend. However, Fortuny's reaction to this development was actually to increase its prices by 34 per cent. In addition, Fortuny's price information prior to the end of 2001 is all derived from sales made by Fortuny's "predecessor", Formex Ybarra, to a company, Distribuidora Ybarra, to which it was related. As such it cannot be regarded as a reliable basis on which to make comparisons with the prices of imported olive oil.

35. The Ministry's examination of various indices of injury listed in Article 15.4 is constantly undermined by its decision to use data from periods of nine months in successive years. Mexico tries to justify the use of a nine-month investigation period by indicating that no distortion of information resulted from using such a period. However, apart from the fact that this period was suggested by the complainant, no explanation was provided for excluding data from several months of the year and, at times, the Ministry felt compelled to support its conclusions by reference to figures from the complete year.

36. Mexico says that the absence of an explicit provision in the *Agreement* means that a Member is under no obligation regarding the choice of the length of the investigation period. However, as confirmed by the Appellate Body in *US – Hot-Rolled Steel*, the criterion of an 'objective examination'

stated in Article 15.1 governs all aspects of the injury determination. In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body applied this principle to the selection of the investigation period, found that the use of six-month periods did not provide an accurate and unbiased picture of what was being examined. The recent panel report in *Mexico – Steel Pipes and Tubes* reinforces this conclusion: the panel said that "absent any proper justification for doing so, such an examination on the basis of an incomplete set of data proposed by an applicant cannot, in principle, be an objective examination of positive evidence".

37. In its First Written Submission the EC identified a series of causation factors, known to the Mexican authorities, which had not been investigated or had not been investigated adequately. Mexico has stressed that the prices charged for imported EC oil were below even the cost of production of Fortuny. However, it simply attributed this to the effects of subsidization on the prices of EC exports.

38. In the light of Mexico's First Written Submission it is easier to understand the reasons for Fortuny's high costs. The article in *Claridades Agropecuarias* explains that the greater part of the olive harvest in Mexico is used in the production of table olives. Consequently, olive growers in Mexico have a real choice of purchasers, and firms, such as Fortuny, which are considering olive oil production, have an objective criterion for costing their basic raw material. Moreover, because the olives are of varieties that are suitable for both uses, they are not specialized for oil production and their yield of oil (16 per cent) is relatively low. These considerations affecting cost remained unexplored in the Ministry's investigation. Furthermore, it is not only the production costs that were not addressed by the authorities, but also the impact of the high operating costs of Fortuny and Ybarra was not taken into account.

39. The issue of cost also seems to be an element in other aspect of causation. Alongside the dramatic fall in its sales, the main feature in Fortuny's history in the period examined by the Ministry is the break-up of its arrangements with Distribuidora Ybarra. This separation meant the loss not only of the distribution network and the relations with retailers, but also of the Ybarra trademark. As regards the trademark, the Ministry seems to have given very cursory attention to what seems to have been a crucial factor. Thus, the Ministry made no reference to a significant study of the marketing of olive oil in Mexico by the International Olive Oil Council in 2001, which shows that the trademark "Ybarra" has an extraordinary high rate of recognition in Mexico.

40. Mexico points out that Distribuidora Ybarra ceased to buy from Fortuny because olive oil imported from the EC was cheaper. However, the Ministry's investigations did not reveal how the prices of oil from Fortuny's "predecessor", Formex Ybarra, compared with those of oil imported from the EC. It seems to have been presumed by the Ministry that the price advantage of the imports was a recent development that just happened to coincide with the splitting-off of Fortuny. However, the only new fact that was clearly established was the separation of Fortuny from its sole customer, Distribuidora Ybarra. It is entirely possible that this development caused Distribuidora Ybarra to look more closely at its costs, and to take a more hard-headed decision on its purchases. Moreover, Fortuny chose the very moment, when it was losing its distributor and the valuable trademark, to increase its prices by 34 per cent.

ANNEX D-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF MEXICO – FIRST MEETING

(26 June 2007)

1. As explained in Mexico's first written submission, the anti-subsidy investigation began on the day following publication of the initiation resolution in the Official Journal of 16 July 2003 and not on 2 July as indicated by the EC. Therefore, in sending the EC the invitation to hold consultations on 4 July (as the EC itself acknowledges), Mexico acted in conformity with the text of Article 13.1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Thus, we consider the EC's claim to be without foundation.
2. With regard to Mexico's alleged violations of Articles 11.4 and 16.1 of the SCM Agreement, relating to the recognition of Fortuny as a domestic producer and the examination of the degree of support from the domestic industry, we repeat that the Ministry treated Fortuny as a domestic producer in a manner consistent with the SCM Agreement, since, in Mexico's opinion, there was no valid reason to believe that there was no domestic producer simply because Fortuny had temporarily suspended operations (a suspension which, moreover, was linked with unfair imports), while having sufficient production facilities to resume them, particularly as there were no factual or legal elements to suggest that it had disappeared as a legally recognized entity. We recall that, in accordance with *Mexico – Corn Syrup*, the articles of an Agreement should be interpreted reasonably and not necessarily literally.
3. We consider that the investigating authority (IA) is under no obligation to restrict itself to the terms of the application. Thus, the fact that Fortuny requested initiation for material retardation does not signify a violation of the SCM Agreement, since that Agreement does not impose any obligation in this respect. In this connection, we refer to the argument set out in Mexico's first written submission to the effect that when a WTO Agreement is silent on a particular point, there is a reason for it; otherwise the negotiators would have expressly mentioned it in the Agreement. Mexico decided to initiate on the basis of objective evidence of injury in the general sense as defined in footnote 45 to the SCM Agreement. Then, during the investigation, the IA determined that the type of injury suffered by the domestic industry was material injury. In fact, the European exporters themselves agreed with the IA in pointing out that the situation of the domestic industry corresponded more closely to material injury than to material retardation, since it was not a question of a new industry.
4. With regard to the question of whether Fortuny represented the domestic industry and the examination of the degree of support, it should again be pointed out that the Ministry had sufficient data to conclude that Fortuny accounted for 100 per cent of the domestic production of goods identical or similar to those investigated. Fortuny provided information concerning its status as a producer and the domestic industry as a whole (data on production, installed capacity, employment, etc.). The fact that it was producing 100 per cent of domestic output was corroborated by various documents, such as a specialized publication issued by the Mexican Federal Government's Ministry of Agriculture, Livestock, Rural Development, Fisheries and Food, which is accepted as an authoritative agricultural source, and by a statement from the Ministry of Agricultural Promotion of the Government of the State of Baja California confirming that the applicant had installed production capacity.

5. Thus, having determined that Fortuny was a domestic producer and having evidence that the enterprise accounted for 100 per cent of olive oil production in Mexico, the Ministry correctly concluded that Fortuny constituted the entire domestic industry, so that it was representative and the degree of support necessary to initiate a subsidy investigation was present.

6. Contrary to what the EC maintains, the Mexican IA fulfilled its obligations under Article 13(b)(i) of the Agreement on Agriculture. On the one hand, the due restraint mentioned in that Article applied to the stage prior to the initiation of an investigation, so that the EC's claim is unfounded. On the other hand, in accordance with Article 1(f) of the Agreement on Agriculture, the due restraint clause expired on 31 December 2003, so that as the rule was no longer in force when the measures were imposed there was no possibility of its being violated.

7. This having been made clear, we consider that in initiating the investigation the Ministry acted in a manner consistent with Article 13(b)(i). Due restraint does not constitute a different standard of initiation for agricultural products but an appropriate and reasonable standard, such as that applied by the IA. Moreover, the Ministry requested additional information from the applicant (by issuing a *prevención*) before initiating the investigation, in an attempt to obtain more data.

8. Furthermore, we consider that initiating an investigation promptly and efficiently can hardly be a violation of Article 13(b)(i), and even if it were, we should point out that 4 months elapsed between the application for initiation and the publication of the commencement of the investigation, a period which, to a considerable extent, was taken up by the above-mentioned efforts to obtain additional information (*prevención*). Thus, we cannot see any evidence of the unusual hurry claimed by the EC.

9. In relation to the imposition of definitive measures under the Agreement on Agriculture, we recall that the countervailing measures were imposed on the basis of the existence of material injury and not retardation, so that we fail to see the relevance of the EC's allegations in this respect.

10. We also disagree that the EC's assertions concerning the alleged violations of Article 12 of the SCM Agreement constitute a prima facie presumption of a violation on Mexico's part. In accordance with the findings in *Argentina – Ceramic Tiles*, the purpose of Article 12.4.1 of the SCM Agreement is to provide a mechanism which allows interested parties to become acquainted with the confidential information, while at the same time protecting the interests of the parties providing it. In the olive oil investigation, the parties were aware of this information and were therefore able to defend their interests properly. Mexican law allows the legal representatives of the interested parties access to all the confidential information. That alone is sufficient to achieve the above-mentioned objective, as the panel found in the case *Mexico – Steel Pipes and Tubes*, recently circulated to Members. Furthermore, there is evidence that the legal representatives of the exporters did in fact consult the confidential version of the administrative file, so that there is no basis for any claim in this respect.

11. Moreover, the interested parties did provide non-confidential summaries of the confidential information they submitted, so that the EC's claim that there were no such summaries is equally devoid of substance.

12. With regard to the EC's claim concerning Article 12.8 of the SCM Agreement, according to the panel's findings in *Argentina – Ceramic Tiles*, there being no guidance with respect to how an authority should comply with the obligation to make known the essential facts, this can be done in a number of ways. The Mexican IA disclosed the essential facts by presenting them to the interested parties in the Preliminary Resolution, which is consistent with the above-mentioned case-law. Thus, there is no basis for the EC's claim in this respect.

13. The EC argues that the duration of the investigation was incompatible with Article 11.11 of the SCM Agreement. It also endeavours to excuse the lack of cooperation on its own part and on the part of its exporters with unfounded assertions.

14. With regard to the duration of the investigation, it should be pointed out that the amount of information involved placed a heavy burden on the interested parties, so that they all requested numerous extensions during the proceedings. Almost all these requests were granted by the authority with a view to gathering as much information as possible and enabling the parties to defend themselves. Moreover, as a result of the information obtained at the public hearing, the authority had to request further details from the parties. Likewise, the exporters requested the IA to carry out an on-the-spot investigation at Fortuny, which it did on 19 January 2005. All this led to delays in the proceedings. Thus, the IA was not inactive, partial or negligent, quite the opposite. Given the complexity of the case, there was nothing for it but to extend the time allowed in order to establish a sound basis for a proper determination.

15. The EC admits not having provided the information requested by the Ministry and, moreover, maintains that it was not a valid request. There is no justification for this, since in no circumstances could it have been considered exempt from providing the information requested of it. We disagree with the EC when it says that "the only means of insisting on the importance of the rules of the SCM Agreement" was to refrain from providing information. The same applies to its claim that to provide this information would have been tantamount to "condoning" the actions of the Ministry. To accept the claims of the EC would be equivalent to ceding control over the investigation to the parties, which is unacceptable, since it would do significant harm to the multilateral system. Moreover, Article 12.7 of the SCM Agreement does not mention any exceptions to the obligation upon the parties to provide information requested; therefore recourse was had to the "facts available", in accordance with that Agreement.

16. Mexico gave an adequate and reasoned explanation of the existence of subsidization, its calculation of the benefit conferred on the olive oil exporters and the method applied in each particular case, in conformity with the SCM Agreement.

17. With regard to subsidization in general, we consider that the EC's argument has no basis in the SCM Agreement, since that Agreement does not require the pass-through analysis claimed. In this connection, as we have already pointed out, we consider that when a WTO Agreement is silent, there is a reason for it. In addition, the subsidy programme has been notified to the Committee on Agriculture as a subsidy-granting mechanism, and the EC has not maintained that that programme does not exist or was not in effect during the investigation period. Thus, there can be no question that the subsidy existed, was in effect and was being applied.

18. In this context, Regulation 136/66/EEC clearly indicates that the subsidy is intended to promote the production of olive oil, so that the IA assumed that the subsidy is actually granted for olive oil production. Thus, it had no reason to carry out a pass-through analysis.

19. With respect to the calculation of subsidy margins, we stress that even though the IA offered the parties the opportunity to propose methodologies and present documentary evidence, the exporters declined to provide the information necessary to enable the Ministry to make the adjustments that they themselves had requested, so that their request was denied. Nevertheless, even though the exporters failed to submit information or methodologies, the Ministry decided to calculate an adjustment factor that reflected the percentage of subsidized olive oil in the production cost structure for the oil, using the facts available.

20. On the other hand, with regard to the comparison of the amount of the subsidy with the exporters' ex-factory sales prices, it is important to point out that the Ministry established unit subsidy

margins (dollars/kg) and that when margins of this type are calculated the use of ex-factory or c.i.f. export prices does not affect the result.

21. Regarding the dilemma allegedly faced by the exporters in providing information requested by the IA, and the claim that they did not provide it because the time-limit for concluding the investigation had expired, we repeat that we cannot see why this should constitute a valid reason for not cooperating.

22. Concerning the determination that Fortuny was the only domestic producer, we consider it important to point out that, as established in the Appellate Body report in *United States – Softwood Lumber VI* (21.5), the examination of the conclusions of the IA should be based on the information contained in the record as well as on the considerations contained in its resolutions. Thus, we consider it important that the analysis of these aspects should focus on the evidence contained in the record and that the question of whether the IA could reasonably have arrived at the conclusions it notified should be decided on that basis. As the EC has not established a *prima facie* presumption of violation on the part of Mexico, we request that its allegation be rejected. Moreover, the Ministry's actions and the evidence in its possession show that Fortuny was the only domestic producer.

23. In the final resolution it is clearly explained why it was confirmed that Fortuny complied with the requirements of representativeness and legitimacy to apply for an investigation. The resolution also mentions the efforts made by the authority to investigate the existence of other domestic producers.

24. Moreover, it is wrong to assert that the Ministry dismissed artisan production because it was not distributed through the same channels as imports. The Ministry did not dismiss artisan production. What happened is that it could not establish the existence of producers other than Fortuny, whether artisanal or not. It reached this conclusion after evaluating the replies to the requests for information that the IA sent to various entities, requesting them to identify any domestic producer of olive oil. The search was never restricted to manufacturers whose output was marketed through the same channels as the imported product. Everything possible was done to gather data but, nevertheless, the search was unsuccessful.

25. The EC submitted data from the Food and Agriculture Organization of the United Nations according to which Mexican production barely amounted to 200 tonnes, a figure consistent with Fortuny's production. Moreover, the world market information provided by the exporters' associations ASOLIVA and ASSITOL does not mention Mexico as an olive oil producing country. All this also indirectly confirmed that the applicant was Mexico's only producer.

26. Thus, the Ministry obtained information from the interested parties, government agencies and numerous entities not party to the investigation, and from all these data it was unable to deduce the existence of other domestic producers. All the evidence led it to believe that the domestic industry consisted of Fortuny. Consequently, the IA based its conclusions on an objective examination of the available facts, acting in a manner consistent with Article 15 of the SCM Agreement. The IA did not concentrate on determining what happened to Fortuny prior to the investigation period. The material injury consisted in the fact that the subsidized imports prevented it from resuming its operations.

27. Finally, concerning the relevance of the production element for determining whether or not a producer exists, we refer to the considerations set out in our first written submission, where the reasons why Fortuny was in fact a domestic producer are explained.

28. At the same time, with respect to the determination concerning the existence of injury, we note that the discussion falls under three heads: (a) the nature and existence of the alleged injury; (b) the examination of volumes and prices; and (c) the determination of material injury.

29. With regard to the nature and existence of the alleged injury, we first of all refer to our previous argument to the effect that the investigation began with the definition of injury in the general sense as set out in footnote 45 to the SCM Agreement, which in our opinion is perfectly valid.

30. We repeat that, with respect to both the provisional and the definitive measure, the IA made its determinations on the basis of an analysis of material injury, because it was not a question of a new industry but of one that had already existed for several decades and had suspended its activities, and then found itself unable to resume them because of the subsidized imports. As already noted, the exporters themselves argued that the situation of the domestic industry corresponded more closely to material injury than to retardation.

31. It would appear that in suggesting that the injury occurred before the investigation period the EC is assuming that the injury caused to the domestic industry was the suspension of Fortuny's activities, which, we stress, is incorrect. The Ministry determined that the injury consisted in the prevention of the resumption of operations by the domestic industry. The suspension of production was something that happened in the period examined for effects of injury, and was relevant to the material injury analysis; however, contrary to what the EC says, this does not mean that the IA had determined the existence of material retardation. In fact, the Ministry never issued a simultaneous determination of material injury and retardation.

32. With regard to the examination of volumes and prices, we consider it important to point out that the EC does not make any claim as such concerning import volumes and therefore does not offer a prima facie presumption of violation.

33. Concerning the examination of prices, the Mexican IA found that the prices of the subsidized product decreased during the first two years of the period examined for effects of injury, only to increase once Fortuny had suspended its production activity. An objective examination, based on positive evidence, of the effect of the subsidized imports on prices was carried out and it was found that the prices of those imports were even lower than domestic production costs, all this on the basis of relevant information. The subsidy largely explains the differential with respect to the real domestic costs and prices recorded during the examination period.

34. In addition, the IA obtained information from the real prices reported by Fortuny, which were confirmed by data provided by Distribuidora Ybarra, Fortuny's main customer. Distribuidora Ybarra stated that it had stopped buying from the domestic producer for price reasons, thus confirming the evidence on price undercutting.

35. As regards the determination of material injury, the IA's examination by which it determined its existence covered three years, which included the period investigated for the effects of the subsidy. The analysis of the trends and behaviour of the relevant factors was based on monthly and annual data in order to establish the situation more precisely and, in accordance with Article 15.4 of the SCM Agreement, the actual and potential effects of the imports on domestic production were also examined.

36. The trends in domestic production must be assessed comprehensively and not merely by comparing one year with another. Thus, we note that there was a steady decline in the applicant's production indicators, which confirmed that the subsidized imports from the EC had adversely affected the situation of the domestic industry to the extent of forcing it to interrupt its operations and preventing it from resuming them.

37. With respect to the use of nine months of successive years in the examination of injury, the EC has failed to offer a prima facie presumption of violation on the part of Mexico, confining itself to asserting that this undermined the objectiveness of the examination of injury. In this connection, the SCM Agreement does not lay down any guidelines concerning the time interval that should be

considered in carrying out the analysis, and we therefore consider that there cannot have been any violation of the SCM Agreement.

38. It should be made clear that it is incorrect that the IA only analyzed the information for 9 months of each year. The Ministry evaluated the data on trends at a monthly or annual level, from January 2000 to November 2003 and even beyond. In our opinion, this in no way affected the objectivity of the injury analysis.

39. With respect to the analysis of non-attribution of injury, it is sufficient to glance at the final resolution to confirm that reasons of a quantitative and qualitative nature were considered in order to determine that other factors were not causing the injury suffered by the domestic industry, so that the EC's arguments do not constitute a *prima facie* presumption of violation on Mexico's part.

40. At the same time, the importer Distribuidora Ybarra provided the Ministry with material to enable it to determine whether any of the factors mentioned by the EC were a cause of injury to the domestic producer. Specifically, it indicated that it had stopped buying Fortuny's product for price reasons. Thus, the problem was not the alleged loss of a distribution network or difficulties relating to the supply or quality of the product, but the low prices of European oil.

41. With regard to the loss of the Spanish brand Ybarra, both the importers and the exporters submitted a "*marketing study*" as proof of their claim. After examining it, the Ministry determined that it was not sufficient to show that the loss of the trademark was a cause of injury, since it only reflected the level of identification of the mark by the consuming public and not whether or not they preferred it to other brands. Moreover, preference for the Ybarra brand would also have affected the market share of the other European brands, which was not the case. Consequently, the Ministry rejected the claim of these interested parties.

42. With respect to the consumer's alleged mistrust of the Fortuny product, considering that the reason given by Distribuidora Ybarra for stopping buying Fortuny oil concerned price and not consumer preference, it was clear that this was not a cause of injury for the applicant either. As for Fortuny's allegedly high costs, the Ministry not only analyzed them but also considered several additional factors. The final resolution describes how the production costs were taken into account in order to determine whether the resumption of operations was economically feasible. The conclusion reached at the end of the feasibility study was that the subsidized imports from the EC were being sold to Mexico at low prices and it was that which was preventing Fortuny from resuming operations, which is consistent with the above-mentioned information from Distribuidora Ybarra.

43. Thus, the IA not only analyzed the factors mentioned by the EC, but also examined all the aspects that it considered might affect the state of the domestic industry, so that the EC's argument has no validity.

ANNEX D-3

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE EUROPEAN COMMUNITIES – SECOND MEETING

(13 October 2007)

1. The EC will concentrate its Second Oral Statement to respond to the evasive defence presented by Mexico in its Second Written Submission.
2. In relation to the claim concerning Article 13.1 of the SCM Agreement, contrary to Mexico's suggestion, the EC does not imply that the *Agreement* should be interpreted in a way that would allow an exporting Member to block an investigation by refusing to participate in consultations. The reference to expeditiousness in Article 13.3 makes any such interpretation impossible. In any case, the EC did not refuse to participate in pre-initiation consultations on olive oil. On the contrary, it accepted quite swiftly, only three days after having received the invitation from Economía.
3. As regards the date of initiation of the investigation, Mexico accuses the EC of basing its arguments on mere assertion. However, in footnote 37, the *SCM Agreement* provides a definition of the term 'initiated', and in its First Oral Statement the EC has given a detailed explanation of why the action in the Mexican procedures that most closely matches that definition is the Minister's signature.
4. Finally, Mexico argues that according to the EC's interpretation an investigation would be initiated as soon as the investigation authority carries out any activity. However, the relationship between any ancillary administrative action concerning the complaint and the initiation of the investigation is not an issue that is relevant to the present dispute. In our case, the initiation was decided by the Minister, who is the highest post in Economía, when he signed it on 2 July 2003.
5. The EC's second claim is that Economía failed to determine that the application by Fortuny was made "by or on behalf of the domestic industry", contrary to Article 11.4 of the *SCM Agreement*.
6. The EC notes that Mexico continues to confuse the meaning of article 11.4 (standing test at initiation stage), which is relevant under this claim, and Article 16.1 (definition of domestic industry). As a result of this confusion, Mexico states that the term domestic industry has two "meanings" and that there are two ways of meeting the obligation to examine the domestic industry. But this interpretation is wrong since Article 11.4 clearly requires that the investigating authority has to determine the degree of support of the domestic industry before initiation. The investigating authority cannot solely rely on information provided in the application of the domestic industry, as done by Economía in this case. The analysis described in Mexico's Second Written Submission refers to the investigation period and thus cannot make good failings at the initiation stage of the investigation.
7. Mexico continues to criticize the EC's contention that production and output are at the heart of the notion of 'industry' in the *Agreement*. Far from being mere assertion, as alleged by Mexico, the contention has been supported by a careful analysis of the terms of the *Agreement*.

8. Mexico attempts to use the notion of material retardation as a means of attacking the EC's contentions, while acknowledging that the case under analysis relates to material injury. In particular, Mexico argues that the notion of establishment implies the starting up of an undertaking rather than its setting up on a secure basis. Mexico gives a definition of the Spanish term 'establecer' (establish) in support of its view. However, the EC's interpretation is also supported by an authoritative Spanish dictionary, the "María Moliner", which defines 'establecer' as 'dejar puesta una cosa en un sitio para que permanezca y realice su función en él' (to put something in a place to remain and fulfil its function there). Moreover, the term "establecimiento" (establishment) is defined as "local en que se desarrolla una actividad [...] industrial" (premises where an industrial activity takes place). Both terms, "establecer" and "establecimiento", derive from the Latin word 'stabilire', which is linked to the notion of stability, something which is quite difficult to find in Fortuny's activities.

9. The fact that there may be difficulties in applying the notion to situations where an industry undergoes temporary closures in no way undermines the validity of the concept proposed by the EC. Borderline situations are an everyday legal occurrence. They would also arise in applying the criterion proposed by Mexico.

10. Mexico asserts that, as interpreted by the EC, the *SCM Agreement* would provide no remedy for companies in the situation of Fortuny. This argument does not take into account the possibility provided by the *SCM Agreement* to initiate an "ex officio" investigation.

11. The third of the claims made by the EC concerns Article 13(b)(i) of the *Agreement on Agriculture*.

12. The EC claims, firstly, that Mexico should not have entertained a complaint based on the notion of material retardation. Mexico's response is that, although Fortuny based its claim on an allegation of material retardation, Economía did not define which of the three kinds of injury it was relying on when initiating the investigation. However, Economía was obliged not to commence an investigation unless it had sufficient evidence of injury. It must not be allowed to invoke its own breaches of the rules in order to avoid other obligations, and must therefore be taken to have initiated the investigation on whatever basis it was requested, which in this case material retardation. Mexico says that the findings of an investigating authority are not limited to the particular kind of injury specified by the complainant. That, however, is not the issue in the present instance. Rather the issue is the connection between the type of injury identified in the complaint and that given as the basis for commencing the investigation.

13. Secondly, Mexico criticises the EC for failing to provide a comprehensive definition of 'due restraint'. 'Due restraint' was the expression used by the drafters and presumably they thought it was an adequate expression, or they would have added a definition (as they did, for example, regarding the notion of injury). The *New Shorter Oxford Dictionary* defines "restraint" by reference to the verb "to restrain", which means "hold back or prevent from some course of action" or "restrict, limit".

14. Mexico repeats that 'due restraint' is the same standard that applies to the initiation of all investigations. The EC has already made reference to the doctrine of 'effet utile', and Mexico has given no explanation of why that doctrine should not apply in this context. There must be some circumstances in which 'due restraint' could have the effect of prohibiting an investigation that might otherwise have been initiated. Mexico does not attempt to show how its decision to initiate reflected a standard of due restraint.

15. Finally, Mexico appears to argue that the failure to respect the due restraint standard had no effect on the investigation as a whole. This is at complete variance with WTO law and practice, as demonstrated by such cases as *Guatemala – Cement II*, and *Argentina – Poultry Anti-Dumping Duties*, where the panels condemned anti-dumping determinations because of infringements of the rules regarding initiation.

16. The claims under the fourth of the EC's headings also fall into two parts. The first of the claims concerns Article 12.4.1 and Mexico's failure to provide non-confidential summaries of confidential information supplied to the investigating authorities.

17. Although Mexico reproduces ten paragraphs from the report in *Mexico – Steel Pipes and Tubes* to support its arguments, paragraph 7.398 of the report refutes its contention that allowing access to the confidential file serves to satisfy the obligation in Article 12.4.1. Mexico has finally admitted this in its Second Written Submission.

18. Mexico's summation of the panel rulings in *Mexico – Steel Pipes* omits the vital fact that the panel had found that the non-confidential summaries satisfied the *Agreement* because sufficient reasons had been given for excluding summaries of the confidential information. No such reasons were given in the present investigation. The EC is not claiming that Economía wrongly accorded confidential treatment. Rather the EC contends that, in according such treatment, Economía failed to provide non-confidential summaries. The issues of access to non-confidential information and to confidential information are quite separate. Moreover, contrary to the impression that Mexico seeks to create, the panel in *Mexico – Steel Pipes and Tubes* said nothing to suggest that access to confidential information would compensate for failure to provide non-confidential summaries (or to explain why they could not be provided). Furthermore, contrary to Mexico's assertion, very substantial amounts of information are blanked out in the non-confidential versions made available by Economía.

19. The real issue is not how the interested parties submitted information, but whether Economía ensured proper provision of non-confidential summaries, and Economía completely failed in this respect. Where Mexico has provided non-confidential versions of documents, they do not satisfy the requirement of Article 12.4.1 because they do not contain non-confidential summaries of the confidential information.

20. Mexico's arguments in its Second Written Submission regarding Article 12.8 merely repeat what it has said previously, so the EC will not add anything to its own previous remarks.

21. The fifth of the EC's 'procedural' claims concerns the breach of the 18-month time limit set by Article 11.11 of the *SCM Agreement*. Mexico's Second Written Submission adds nothing to its previous observations on this issue, except to accuse the EC of trying to find excuses for not cooperating with the investigation, and thereby avoid the application of 'facts available' by the investigating authority. But the EC has not chosen to make a claim against Mexico regarding the use of 'facts available'.

22. The first of the claims on the substantive rules of the *SCM Agreement* concerns the existence of subsidization and the calculation of the benefit supposedly received by the imported olive oil. Once again, Mexico's treatment of this subject is a repetition of its earlier observations. As regards the purpose of the subsidy, the EC will emphasize once more the futility of trying to determine whether the original subsidy was given to olives or to olive oil. The crucial issue is whether the imported olive oil was a subsidized import. The EC has already shown that given the transformation in the product and the arm's-length transfers involved in its movement from olive tree to import, Economía was not justified in assuming a pass through of the subsidy and should have carried out a proper investigation of the issue.

23. Mexico challenges the EC's invocation of Articles 1 and 14 of the *SCM Agreement* as the basis for its claims. The EC has fully explained its choice in answer to the Panel's Question 46.

24. Mexico seeks to confuse the issues by means of shallow debating points concerning the calculation of the subsidy and the calculation of the benefit, as mentioned in Article 14. The EC

claims that Economía failed to explain how it calculated the benefit conferred on the recipient, contrary to the obligation in Article 14. However, in accordance with the practice of WTO dispute bodies where an allegation of substantive infringement is coupled with one of failing to explain or publicize the point in question, the EC has concentrated on the substantive infringement, which is the failure to examine the issue of pass-through when calculating the amount (if any) by which the imported olive oil is subsidized.

25. Finally, Mexico complains that the EC has not explained in what way Economía did not make appropriate adjustments. However, the EC fully addressed this issue in its First Written Submission.

26. As regards the issue of the domestic industry, Mexico makes an attempt to justify Economía's finding that Fortuny constituted the whole of the Mexican olive oil producing industry. The EC has shown that Economía failed to take steps that could reasonably be expected of it to determine the extent of the domestic industry, and in particular disregarded evidence of the existence of producers other than Fortuny.

27. Thus, Mexico tries to justify Economía's investigation of Maprinsa and its suppliers. Economía asked Bufete Químico to test a sample of just one of Maprinsa's two supposed olive oil products and found it was in fact rapeseed oil. From this it concluded that Maprinsa did not market olive oil, although one of Maprinsa's suppliers, Olivarera Tulyehualco, had informed Economía that it obtained olive oil from Baja California. Economía entirely disregarded this information. Mexico states that Olivarera Tulyehualco supplied rapeseed oil to Maprinsa. This is a completely new assertion, because in the Final Resolution Economía said that Olivarera Tulyehualco informed that it was not an olive oil producer and that it bottled the product under investigation, which is olive oil not rapeseed oil.

28. Regarding the firm Llanos de San Francisco, it was negligent of Economía not to have made enquiries regarding its activities during the investigation period. Mexico cites the periodical *Claridades Agropecuarias* as though its pronouncements were always irrefutable. However, it is evident that much of the information in the article is anecdotal, and at times it seems implausible.

29. As regards to the question of registration with the producers' organisation ANIAME, where only Fortuny was listed in respect of olive oil, Economía took this as evidence of the existence of a producer, but Economía did not enquire into the take-up among producers of registration with ANIAME, so Mexico's statement that any olive oil producer would have registered is mere assertion.

30. Mexico does not deny that Economía did not approach the authorities in Sonora, one of the two major olive producing states. However, in basing its assertion of low production on the article in *Claridades Agropecuarias* Mexico chooses to overlook the table on page 11 of that article, which shows that the level of olive production in Sonora regularly rivalled that of Baja California (4,930 tons and 4,127 tons, respectively, in 1999). Mexico argues that production in Sonora is not used for making olive oil, but the extract from *Claridades* on which it bases this assertion states just the contrary: according to *Claridades*, less than 5 per cent of the olives is processed as table olives in Caborca, the main region producing olives in Sonora.

31. The EC has shown that, contrary to Mexico's assertions, Economía had clear indications of olive oil production in Mexico apart from Fortuny. Such evidence was available to Economía and was not pursued. The responsibility of the investigating authority is not merely to reach a reasonable decision on the basis of the file, but to make sure that the file contains sufficient supporting evidence. Mexico is not entitled to assume that Fortuny, which it admits had zero output during the investigation period, would completely overshadow any such producers that might exist.

32. Mexico shifts from the individual steps that were or were not taken to the legal framework that applied to them. It proposes to equate the 'major proportion' criterion of Article 16.4 with the 'by

or on behalf of' standard of Article 11.4. However, it provides no reasoning or authority to support taking such a step.

33. Finally, Mexico seeks to retrospectively justify Economía's exclusive reliance on Fortuny by saying that the figure for total Mexican production of olive oil in 2000 was very similar to that of Fortuny. In fact the figure given by Fortuny is 742 tonnes, while that for total production is given as 1,000 tonnes. Those data alone should have given Economía reason to doubt that Fortuny was the sole producer. The figure of 1 000 tonnes is given in the *Claridades* article but it is not provided, as one would have expected, as part of a table showing annual production figures and citing a source. It is worth recalling that the International Olive Oil statistics refer to an olive oil production in Mexico of 1,500 tonnes in 2000/2001, 2,000 tonnes in 2001/2002 and 2,500 tonnes in 2002/2003.

34. Mexico's Second Written Submission has little to add to its previous responses to the EC's claim that, without output, Fortuny cannot constitute a domestic industry. It is not the EC's position that companies must have output throughout the subsidy investigation period in order to count towards the domestic industry. Rather, it is that a company with no production whatsoever during the period cannot qualify. The EC does not deny the relevance of trends over the period leading up to the investigation period. Nevertheless, the only verified evidence of subsidization available to the investigating authority will be that from the investigation period and unless the domestic companies concerned have output in that period, no injury can be demonstrated.

35. The third of the 'substantive' claims concerns the determination of injury. Mexico's latest contentions on this topic reflect the confused basis on which Economía developed its arguments. Thus, Mexico appears to argue that, since the notion of 'decline in output', is one of the factors of injury listed in Article 15.4 of the *SCM Agreement*, therefore zero output should be taken into account. However, the EC's point is that if output is zero there can be no industry within the terms of the *Agreement*.

36. Mexico calls for 'potential' injury to be considered, but does not explain how that notion is relevant to the present case. Neither Mexico is entitled to complete the investigation now, because Economía made no findings of potential injury in respect of the factors listed in Article 15.4.

37. Mexico's explanation of the ruling at paragraph 7.77 of the *Mexico – Corn Syrup* panel report is not easy to understand. The point at issue was the extent to which, as regards threat of material injury, projections of injury should be examined. However, the issue had arisen in regard to the contents of the application for an investigation rather than to the scope of the investigation itself. Mexico says that the panel ruling did not purport to confine the use of projections to cases of threat of injury. However, the panel did emphasize the importance of past experience as the source of evidence for future developments, and it evidently had in mind the use of data from the investigation period. In that respect the panel's ruling is clearly at odds with the approach adopted by Economía.

38. Mexico accuses the EC of contradicting itself in denying the existence of injury when Fortuny has ceased production. This is to misrepresent the EC's case, which is that if there is no production there is no industry, and if there is no industry there can be no material injury. Mexico also asserts that its output of olive oil fell because of subsidized imports, but Economía failed to establish this causal link.

39. The last claim concerns the Ministry's consideration of causation by 'other factors', and Mexico alleges that the EC changed its accusation regarding the examination of known factors from saying that there had been no examination to saying that the examination was inadequate. The criticism is of no significance but it is in any case wrong. The EC has from its first submission focused on the issue of inadequacy.

40. Finally, Mexico argues that the 'other known factors' identified by the EC had no effect on the domestic industry. This criticism reflects a lack of understanding of the nature of these proceedings, whose function is to review the decision taken by Mexico, not to retake that decision. Consequently, the EC merely seeks to establish that the factors that it has identified are ones that should have been properly examined, and that Economía, in so far as it looked at them at all, did so inadequately, so that the resulting determination constituted an infringement of Article 15.5.

ANNEX D-4

EXECUTIVE SUMMARY OF THE CLOSING STATEMENT OF THE EUROPEAN COMMUNITIES – SECOND MEETING

(13 October 2007)

1. Mexico should have never initiated this investigation since no standing test was performed, no due restraint was exercised and no pre-initiation consultations were held. Also during the investigation, besides the blatant exceeding of the 18-month deadline, Economía did not comply with its WTO obligations as regards the determination of pass-through, injury and causal link.
2. The EC will not to rehearse the arguments that have already been presented to the Panel. What the EC intends to do is pick out a handful of issues that we think call for special attention, and but which we think have not been adequately ventilated in these proceedings.
3. First, the Panel will by now be well aware of the somewhat curious path which was taken by Mexico's investigation of olive oil. Fortuny launched its complaint on the basis of an allegation of injury taking the form of material retardation of the establishment of domestic industry. The investigating authority began the investigation without any clear idea of whether what was at issue was material retardation or material injury. It was only in the course of the investigation, in particular in the Provisional Resolution, that the authority formed the view that what had occurred amounted to material injury rather than material retardation. It is clear that, in order to achieve or avoid a particular result, an authority is impeded from redefining that result in the course of the proceedings.
4. Mexico seeks to pass off its actions as a matter of administrative discretion or convenience. However, what might be convenient for the investigating authority and for the complainant Fortuny was not convenient for other interested parties or Members. The exporters and the EC sought to defend their interests on the reasonable understanding that what was at issue was a question of material retardation, only to discover in the Provisional Resolution, that the nature of the injury identified by the investigating authority was quite different. Of course they had the opportunity to address the issue following the publication of the Provisional Resolution, but by that time they had devoted considerable efforts to pursuing what proved to be an irrelevancy.
5. The EC is not trying to slip into these proceedings a claim based on failure to give parties a fair hearing during Economía's investigation. We have deliberately chosen to concentrate our claims on particular issues in order to simplify the proceedings. Nevertheless, the negative consequences for interested parties of the investigating authority's actions give further emphasis to the EC's claim that Mexico has not properly initiated the investigation because it did not make an adequate determination of injury in accordance with Article 15.4 of the *SCM Agreement*.
6. The EC would also like to add that the confusion by Economía between material injury and material retardation has been maintained by Mexico all through the Panel proceedings.
7. The second point that the EC would like to bring to your attention in this Closing Statement concerns the documentation supplied by Mexico to defend this action. Mexico has shown a

regrettable tendency to make arguments on the basis of documents that it does not produce. It was only in response to the specific request of the Panel that many relevant documents were produced.

8. Unfortunately, when they were produced, the manner in which they were presented made the task of the EC, and that of the Panel, extremely difficult. Although Mexico produced what it says is the list of documents in the administrative file, the significance of many of the elements in that list is obscure. The problem was compounded by Mexico's failure to make any connection between the individual documents included in the list and the exhibits that it presented to the Panel.

9. Furthermore, some of the exhibits appear to be almost miscellaneous collections of documents, whose precise nature was sometimes very difficult to determine and, indeed, in some cases continues to elude us. We do not accuse Mexico of deliberately trying to create confusion, but we have to say that this was sometimes the result of its actions.

10. Confusion is also an aspect of the third topic that we wish to bring to the Panel's attention. In making its claims the EC has clearly distinguished between those errors that were committed by the investigating authority in the initiation of the investigation, and those that arose in the course of the investigation. Thus, the EC has made separate claims concerning the notion of injury when the decision to initiate is being made, which is addressed in Article 11.4 of the *SCM Agreement*, and to the determination of injury to industry made in the substantive findings of the investigating authority. Unfortunately, Mexico has moved back and forth between the topics as and when it appeared to best serve its interests. This distinction between initiation and substantive investigation also applies to other aspects of the EC's claims. Thus, in regard to the failure to provide summaries of confidential information or give an explanation for this failure the EC has laid special emphasis on the communications made to the investigating authority by Fortuny prior to initiation. The obligations in Article 12.4 apply as much to such communications as they do to those made in the course of the investigation.

11. Finally, the European Communities would like to thank the Panel, the Secretariat and the interpreters for so thoroughly and efficiently carrying out your responsibilities.

12. The EC would also like to thank Mexico's delegation for its efforts to defend such a difficult case for them. The EC considers Economia's investigation to be peculiar, confuse, unfounded and, most importantly, irreconcilable with the WTO Agreements. For these reasons and because the system of EC production aid in the olive sector was replaced at the beginning of 2006 by an entirely different system, the EC has requested the Panel to suggest to Mexico the complete repeal of the measure against olive oil.

ANNEX D-5

ORAL STATEMENT OF MEXICO - SECOND MEETING

(2-3 October 2007)

Representatives of the European Communities (EC) and of the third parties in these proceedings, Members of the Panel and officials of WTO Secretariat, good morning and thank you for the opportunity to present, orally, our country's position in this dispute.

Rather than running through our arguments once again, in this oral submission we shall be emphasizing the essential points that we think the Panel should take into account.

1. Regarding the EC argument concerning the obligation to hold consultations prior to initiation, it appears that under the EC system an application is accepted when submitted by the applicant and received by the Investigating Authority (IA), while the formal action initiating the investigation is publication in the Official Journal of the European Union, from which moment presumably the investigation clock begins to run.

2. In Mexico, the applicant files his application and the IA merely receives it and stamps it to acknowledge receipt, which does not imply that it has been accepted, only received for examination. In other words, receipt of the document does not imply acceptance. Once the IA has analysed the information, it determines whether or not to draw up a draft acceptance of the document. If the application is satisfactory, the IA sends this draft to the Minister of the Economy, who can decide whether or not to accept the application. If the Minister accepts the application, he signs the document which is then sent to the Official Journal (DOF) for publication. Up until that moment, what has happened is that the application has been submitted and accepted, but nobody knows that the application exists. The investigation has not begun.

3. Consequently, if for some reason the document is not published, it will have no legal force whatsoever. In fact, the investigation clock does not begin to run until the day following publication, clearly because by then, the interested parties know that an investigation has been initiated. The Minister's signature does not mean the initiation of the investigation. If this were the case, the periods would have to run at that date, which simply cannot happen, since apart from the applicant, nobody knows that an application has been filed.

4. Footnote 37 of the SCM Agreement states that initiation is the formal action by which an investigation is commenced, but it gives no indication as to what requirements must be met for that action to take place. A "formal action" is an action which meets the legal requirements for being considered as valid. Clearly, each domestic legal system establishes what those requirements are. If the negotiators had intended that all Members should use only one particular action or type of action to consider an investigation as having been initiated, they would at least have established the specific requirements for that "formal action". Given that this is not the case, we assume that each Member has to define the legal act by which the investigation is initiated. We do not understand why the EC maintains that such questions cannot be left to the legal systems of each country.

5. The EC merely repeated that the signature of the Mexican Minister of the Economy constitutes the formal act of initiation without explaining why this is the case. Taken to the extreme, its argument would mean that the pre-initiation actions taken by the IA to determine whether or not an

application is appropriate would have to be treated as part of the investigation, and that consequently, the formal act of initiation would simply be receipt of the application, which is unacceptable. Consequently, regarding its reply to question 6, there can be no confusion as to whether the Mexican or the WTO legal system should be used, since the SCM Agreement does not establish what the act of commencement is; and as there are not two sets of rules applicable, there can be no conflict.

6. During the first hearing, the EC stated that the obligation in Article 13.1 of the SCM Agreement was to invite a Member to hold consultations before initiating the investigation. However, in its replies it maintains that there is an obligation to hold the consultations prior to initiation. This new interpretation would mean that a Member invited to hold consultations could decline or ignore the invitation, and afterwards claim before a panel that the Member invited violated the SCM Agreement because the consultations did not take place prior to initiation. This is unacceptable. In fact, Article 13.3 of the SCM Agreement states that the consultations are not intended to prevent the expeditious initiation of an investigation, which confirms that there cannot be any obligation to hold consultations before initiation, since that would obstruct initiation.

7. The EC insists that the term "domestic industry" alludes exclusively to the producer that is producing at the time its application is filed. Mexico takes the view that the EC's interpretation of Articles 11 and 16 of the SCM Agreement would have unacceptable consequences. The fact that Fortuny was not producing at the time of initiation has no effect on whether it can be regarded as a domestic producer, for reasons which have already been mentioned in this dispute. Fortuny had to suspend production because of the subsidized imports from the EC, and the injury inflicted, for the purposes of an investigation, was that it was being prevented from resuming production.

8. The EC has not explained how the concept of "production" could be used as a factor to be analysed, when the injury suffered by the domestic industry is the material retardation of its establishment. We do not agree with the EC's interpretation of the scope of the term "establishment" ("material retardation of the establishment of such an industry") in the English version of footnote 45 to the SCM Agreement. Even supposing, for the sake of argument, that – as the EC claims – "to establish" means "to achieve a level of maturity", we do not see how a company that produced olive oil for decades could not be regarded as being mature, and being a mature company, it could not be assumed to be a new industry. Nor is it clear to us how a company that is producing could be regarded as not being established. The concept of "maturity" is not contemplated in the SCM Agreement, and therefore its use could give rise to unfortunate interpretations. If that were the main concept in the case of material retardation, then investigation for material retardation could be initiated even if the industry were already producing, since it may not have reached "maturity", which is untenable.

9. Moreover, both the Spanish and French versions of the SCM Agreement state, in footnote 45, that a cause of injury is material retardation in the creation of an industry. In other words, those two versions of the SCM Agreement do not support the EC's interpretation that the term implies "to achieve a level of maturity".

10. The EC points out that regardless of whether an investigation is initiated as a result of an application or ex officio, domestic production must necessarily exist. We insist that according to its interpretation, there would be no possibility of a new domestic industry being established, which is contrary to the concept of "creation" of a domestic industry. If the EC's claim were valid, there would be no need for the material retardation requirement – material injury would suffice. The EC has not explained what treatment would have to be given to those cases where production is temporarily suspended for planned or unforeseen stoppages, or to a cyclical or seasonal industry, to cite a few examples.

11. Judging from the EC's reply to question 20, both Members appear to agree that the due restraint clause applies only to the period prior to the initiation of the investigation and not to the imposition of countervailing duties.

12. Nor do we believe that there is any foundation for the assertion that the imports were exempt from the imposition of countervailing measures. We can find no support in the SCM Agreement or in the Agreement on Agriculture for such an interpretation.

13. The IA considered that it was not possible to initiate an investigation for material retardation with respect to a company which, as already mentioned in this dispute, had existed since the 1940s, was producing olive oil, had all the production facilities it needed to operate and had never been involved in any proceedings that might imply its being shut down or could affect its operations (liquidation or insolvency proceedings, re-registration, change of corporate purpose, etc). Thus, the IA determined that the most appropriate course of action would be to initiate the investigation without specifying the particular mode of injury suffered by the applicant. Consequently, there is no violation whatsoever of the SCM Agreement or the Agreement on Agriculture.

14. In its reply to question 22, the EC refuses to say what is meant by due restraint under the Agreement on Agriculture and merely argues that the actions of the IA lacked restraint. We do not understand how the EC can refuse to explain a concept and then claim that the IA acted in a manner contrary to that unexplained concept. At the same time, the EC argues that due restraint is "clearly" an additional obligation for Members, but, it should be emphasized, does not explain why it constitutes an obligation additional to that of maintaining a reasonable standard. It seems to us that these assertions do not constitute a prima facie presumption of a violation on the part of Mexico, and we therefore request that they be dismissed.

15. We repeat that, in our opinion, due restraint is a concept that relates to an appropriate and reasonable standard for allowing an investigation to be initiated. It does not involve doing anything differently in cases of agricultural, as compared with non-agricultural, products. Furthermore, the IA took measures which demonstrate the application of a reasonable standard (such as sending the applicant a request for information, so-called "*prevención*", before initiating the investigation).

16. In its reply to question 25 the EC states that if an investigation was initiated prior to the expiry of the implementation period, then Article 13(b)(i) of the Agreement on Agriculture applies to any determination, in the course of that investigation. Once again, we can find no support for this claim. The due restraint was only applicable to the initiation because Article 13(b)(i) so provides and because after that it was no longer in effect. As regards initiation for retardation, we repeat that the investigation was not initiated for this mode of injury. Accordingly, we cannot see why the due restraint clause would have to be applied to the determinations issued during the olive oil investigation.

17. Regarding the EC complaint that Mexico's argument concerning systematic access to all the confidential information was rejected in two panel reports, we do not agree.

18. With respect to *United States – OCTG (Article 21.5 – Argentina)*, unlike what happens in the US system, under the Mexican system the parties do have access to confidential information, so that in the olive oil investigation, the impairment of due process for the parties which the Panel examined in the mentioned case did not exist.

19. Regarding the panel report *Mexico – Steel Pipes and Tubes*, as we discussed in our rebuttal, the Panel's findings concerned two different aspects: first, whether or not the non-confidential summaries permit a reasonable understanding of the confidential data; and second, the standard of review applicable to the decisions of the IA concerning the granting of confidential treatment to

specific information, as well as whether or not that information could be summarized and the way in which the IA should have communicated these decisions.

20. The Panel determined that the non-confidential summaries were inadequate, but as Mexico had acted in a manner consistent with Article 6.5 and 6.5.1 of the AD Agreement as regards the evaluation and granting of confidential treatment, and by maintaining a system of access to confidential information that permitted the effective legal representation of an interested party and could serve as a supplement to fulfilment of the provisions of Article 6.5 of the AD Agreement, there had been no violation by Mexico of the AD Agreement. Mexico considers that the Panel's determinations are not applicable to this dispute in the way that the EC suggests. In any case it seems to us that the report supports Mexico's position in this dispute.

21. At the same time, the EC claims that the IA did not evaluate whether "good cause" had been demonstrated for certain information to be considered confidential. In *Mexico – Steel Pipes and Tubes*, the Panel determined that this claim was unfounded because there was no provision (in this case in the SCM Agreement) establishing what process the IA should follow when it considered that a request for confidential treatment was justified.

22. On the other hand, the exporters did in fact examine the confidential information. In the case of the EC, even though it had the right to examine that information, for reasons unknown to us, it refrained from exercising that right. This cannot be attributed to the IA. We cannot see what this alleged impairment of its rights of defence consists of.

23. On the matter of the non-confidential summaries, the EC maintains that its claim relates to the non-existence of such summaries, and not to their inadequacy. Regarding the non-existence of the summaries, Exhibit MEX-38, which contains the index of the record, shows that there are non-confidential summaries of every one of the documents to which confidential treatment was accorded. The fact that the non-confidential summaries did not take the form requested by the EC does not mean that they do not exist. The summaries are there, and if there is any problem with them, it clearly cannot be their non-existence as the EC claims.

24. We further recall that the SCM Agreement offers no guidance with regard to the form which a non-confidential summary should take. In any case, if the summaries do not satisfy the condition of permitting a reasonable understanding of the confidential information, the problem would be one of sufficiency and not of existence.

25. Moreover, the EC failed to demonstrate that the PR was insufficient to acquaint the parties with the essential facts considered during the investigation. It only stated that a provisional measure could hardly acquaint the parties with the essential facts. Consequently, it has not established a prima facie presumption of violation by Mexico.

26. With regard to the exceeding of the 18-month limit under the SCM Agreement, in our submissions we explain the reasons why – and the documents that support our assertions – the IA decided to extend the period for the investigation, by giving priority to the need to gather more information and afford the parties an adequate opportunity to defend themselves. Thus, the granting of the extensions requested by the parties, the verification visit to the applicant's premises and the actions taken by the IA in response to the questions raised by the parties themselves were the cause of the delay in the proceedings. The EC's claim is not based on any specific and genuine impairment of its rights of defence or those of its exporters. It is merely an invalid excuse for not supplying the information that the IA requested of it.

27. The EC continues to admit not having provided the information requested by the IA and, moreover, maintains that it was not a valid request. There is no justification for this, since in no circumstances could it have been considered exempt from providing the information requested of it.

We disagree with the EC when it says that "the only means of insisting on the importance of the rules of the SCM Agreement" was to refrain from providing information. The same applies to its claim that to provide this information would have been tantamount to "condoning" the actions of the IA. To accept the claims of the EC would be equivalent to ceding control over the investigation to the parties, which is unacceptable, since it would do significant harm to the multilateral system. Moreover, Article 12.7 of the SCM Agreement does not mention any exceptions to the obligation upon the parties to provide information requested; therefore recourse was had to the "facts available", in accordance with that Agreement. We fail to understand the nature of the EC's alleged "dilemma" in responding to these requests by the IA.

28. We request the Panel to take these circumstances into consideration in its analysis, since the delay was due not to negligence on the part of the IA but to a desire to obtain the best information possible, as requested by the interested parties themselves.

29. The EC states that the recipient of the benefit under the subsidies programme is the olive grower and that this is consistent with Article 5 of Council Regulation (EC) No. 1638/98, amending Regulation No. 136/66/EEC. It also claims that in the FR in this investigation, part of that Article was deliberately omitted.

30. We do not think that there was any omission in the FR. The FR never referred to Article 5 of Council Regulation (EC) No. 1638/98, but to Article 5 of Regulation No. 136/66/EEC, and did not omit any substantive part thereof. In any case, we do not detect any element in Article 5 of Council Regulation No. 1638/98 that could be used to support the claim that the subsidization programme was not directed at olive oil. On the contrary, that Article also indicates that it is a subsidized good.

31. As stated earlier, the EC's subsidization programme is covered by Regulation No. 136/66/EEC, and was notified by the EC to the WTO's Committee on Agriculture as a subsidization mechanism. Consequently, it is a subsidy whose existence, validity and application are not open to question. Moreover, it is directed, in Article 5 of both Regulations, towards encouraging the production of olive oil. Both regulations are categorical in this respect. It was therefore assumed that the subsidy was given for the production of olive oil. In that connection, paragraphs 126 to 178 of the FR set out the methodology used to determine both the amount of the subsidy and its effect on olive oil prices and the resulting benefit.

32. Likewise, in its reply to question 54, the EC does not explain why it considers that the necessary adjustments to the amount of the subsidy granted were not made. Consequently, we cannot give any further details in this respect.

33. The EC claims that Mexico did not identify its domestic industry on the basis of positive evidence and thereby violated Article 15.1 of the SCM Agreement. However, the EC does not indicate what concrete action should have been taken by the IA during the investigation into the domestic industry. Moreover, it states that its claim in paragraph 173 of its FWS was made to "illustrate the consequences of the non-existence of the domestic industry, rather than as an attempt to claim an inadequate inquiry into the extent of the domestic industry".

34. In other words, the EC sets aside its claim regarding an alleged inadequate enquiry into the extent of the domestic industry and instead adopts the position that the domestic industry *did not exist*. Consequently, it is enough to show that the domestic industry did exist in order to invalidate its claim.

35. We repeat that the FR sets out the reasons why the IA confirmed that Fortuny did meet the requirements of representativeness and legitimacy in order to request and proceed with the investigation, in accordance with Articles 11.4 and 16 of the SCM Agreement. This section describes the efforts that were made by the authority to determine whether there were other domestic producers.

36. Now, with respect to certain comments by the EC concerning some other possible additional inquiries, we repeat that these do not suffice to disregard the authority's evaluation of the extent of the domestic industry. The IA's findings in this regard are based on the information contained in the record taken as a whole.

37. Our submissions reflect the complexity of the inquiries and the proactive and unbiased attitude of the IA. In most cases, these inquiries were indeed carried out (for example Mapinsa and its suppliers, although they did not produce olive oil), while in other cases there were sufficient reasons and evidence in the record to suggest that the inquiries were not necessary (according to official data, Llanos de San Francisco was still at the experimental stage; Aceites Navarra, according to the exporters themselves, did not produce olive oil; and according to official data, the State of Sonora does not produce olive oil). Moreover, attention was drawn to the relevance of the reply by the ANIAME and to the IA's evaluation of the replies given by the different authorities, replies which confirmed the presumption that Fortuny was representative of the domestic industry as a whole.

38. Added to all of this is the requests that were sent to the non-participating enterprises. Thus, far from having acted negligently, the IA undertook all possible inquiries. We do not consider that the fact that suppliers of canola oil were not investigated or that requests for information were not sent to a State whose production was non-existent according to official data and other evidence are sufficient grounds for determining that Mexico acted inconsistently with the SCM Agreement. We repeat, moreover, that the IA did not only have the information collected, but also took into account the fact that no other company came forward as a domestic producer.

39. In addition – according to the evidence in the record – assuming, for the sake of argument, that there was another domestic producer, it would not be likely either that its level of production was such that it nullified Fortuny's legitimate status as the entity which acted for or on behalf of the domestic industry or had a decisive impact on the examination of injury caused by the subsidized import. The EC itself, in its reply to question 65, stated that by representing 100 per cent of domestic production, there was in fact no need to examine the concept of "collective output".

40. At the same time, we recall that, according to the data in the article in "*Claridades Agropecuarias*", information also submitted by the EC, Mexico's total annual output of olive oil was estimated at around 1,000 tonnes in 2000, and according to the correction submitted in our reply to question 18 and the corresponding explanations, Fortuny produced a similar amount in 1999 and 2000 (specifically, according to the data supplied by Fortuny, it produced 1,306 tonnes in 1999 and 742 tonnes in 2000, or an average of 1,024 tonnes per year). We note that in the course of this hearing, Mexico is ready to provide any clarifications that could be helpful concerning the production data mentioned in its written submissions and its replies to the Panel.

41. The EC has stated that under its procedures, if a domestic industry ceased to produce during an investigation, the investigation would conclude without the imposition of measures. For Mexico, the rigid application of such a criterion could mean that even where domestic producers had suffered the maximum degree of injury during the investigation and because of this had ceased to produce, the domestic industry would end up by disappearing. Imports that are the subject of unfair practices would then have destroyed the domestic producers' market.

42. Contrary to what is stated by the EC, the important point regarding the existence of a domestic industry is not simply to determine whether in fact it is producing or not or if it produced before the investigation was initiated or once it had commenced. The point is to determine, on the basis of various factors, whether the domestic industry exists or not and once it has been determined that it does exist to examine whether the suspension of production is the result of the injury suffered because of imports of products that are the subject of an unfair practice.

43. We agree with the EC's final indication to the effect that the process cannot be automatic but that the merits of each case should be taken into account. In the investigation into olive oil it was shown that the reason why the domestic industry could not resume operations was the presence of subsidized imports. Consequently, according to the merits of this case, it was considered that, even though there was no output during the period investigated, there was a domestic industry – a determination that was reached after various factors had been analysed, as stated on several occasions during this dispute.

44. We consider that a domestic producer does not necessarily have to be producing at the time of submitting an application or during the investigation because in trade a producer may possibly have to suspend production of the article in question temporarily without this meaning that it loses its status as a domestic producer.

45. The EC would appear to contend that when production reaches zero this cannot be considered a decline in that production. In our view, the word "decline" implies that an indicator has moved downward over a lapse of time. It is not possible validly to contend that if this decrease reaches zero, it should be excluded as a "decline", and the EC does not explain how such a situation could be considered. To accept the EC's interpretation would be tantamount to awarding a premium for unfair imports because the maximum degree of injury has been achieved (inciting the domestic industry to cease production).

46. Furthermore, in our view the EC's arguments are contradictory for the following reasons: (1) it claims that the decline in output to zero is not really a decline; it has also stated that a domestic industry that is not producing simply does not exist; (2) nevertheless, in its reply to question 80 it states that provisional suspension of a domestic industry may be considered as an injury factor; (3) if it claims that decline in output to zero is not properly speaking a decline, then it is not clear to us how such decline could be analysed as an injury factor; (4) if it claims that a domestic industry that is not producing does not exist, then we do not understand how it could be considered as a factor in the decline in output to zero since, according to what the EC has claimed, this industry does not exist.

47. In our opinion, the decline in output means a decrease over time, and if such decrease reaches zero, this simply means that the injury factor has reached its maximum level. It is indisputable that once it has been determined that a domestic industry exists and that it has scaled down or suspended operations as a result of the unfair practice, this constitutes a highly relevant factor in the injury analysis.

48. At the same time, we recall that the material injury consisted of the impediment to the domestic producers' resuming operations, making it necessary to examine the trend in production. It is thus obvious that the decline in Fortuny's output had to be taken into account in this examination. On the other hand, regarding its argument that production was suspended months prior to the submission of the application, the EC does not take into account various steps that Fortuny had to undertake before requesting an investigation. In practice, the lapse of time between the suspension of operations, where applicable, and the submission of an application for initiation may be as much as one year or even more.

49. In its reply to question 81, the EC indicates that the word "potential" in Article 15.4 of the SCM Agreement does not have great significance, at least as regards investigations that are based on an allegation of material injury. Mexico considers that an investigation into material injury should take into consideration the potential situation of the industry in the immediate future in order to examine whether the unfair practice could persist and continue to cause injury, and to assess the future situation of the domestic industry, as well as to determine what would be the alternative situation if there were no subsidized imports. Article 15.4 of the SCM Agreement clearly indicates that there should be an examination of "actual and potential decline" of the factors enumerated therein and makes no distinction as to whether the potential examination only applies to cases of threat of injury.

50. Moreover, Article 15.2 of the SCM Agreement provides that, in order to consider the effect of the subsidized imports on prices, the authority should consider whether there is price undercutting, prices are depressed or price increases prevented. In a situation where price increases are prevented, we do not see how the relevant analysis can be made without potential aspects and the EC has not explained this. Moreover, the injury suffered by a domestic industry at the present time does not produce all its effects immediately. As it is usually a question of trends, these effects can occur in the future and can serve to carry out a proper examination of injury. We do not therefore accept that the word "potential" is of marginal or no importance in Article 15.4 of the SCM Agreement, and despite what the EC contends, in a proper examination, we do not see how injury could be double counted.

51. Likewise, we consider that paragraph 7.77 of the Panel report in the *Mexico – Corn Syrup* dispute does not support the EC's statement. This paragraph merely indicates that in cases of threat of injury it is relevant to include projections in the application, but failure to include them does not suffice to reject the application. The Panel's finding did not refer to the material injury examination but to the application for initiation in which the threat of material injury is claimed. It is therefore important to include projections in the application regarding threat of injury because the injury claimed implies future developments; but this does not mean that potential data should only be considered in the case of applications regarding threat of injury.

52. With regard to the EC's assertions concerning models, we note that any model or estimate is by nature an approximation of something, inasmuch as the results of its application are not real data but information that reflects the "possible reality" to a greater or lesser degree of accuracy. In fact, the exactitude of any model can be verified *a posteriori* once its greater or lesser accuracy in predicting the future has been proven. We do not, therefore, understand how one can advocate the use of models, projections or estimates and then question them.

53. At the same time, it is incongruous for the EC to maintain that there is no information on injury and in the next line to indicate that this is because the Mexican industry had ceased to produce, when what is being claimed is that the Mexican industry's production fell to zero as a result of the practice of exporting subsidized products from Europe. It is also important, as indicated in Mexico's replies concerning the price undercutting under which the imports from the EC entered, that the Panel should bear in mind that this examination was not only made in relation to the costs estimated by Fortuny in its business plan, but also the real-historical costs incurred by Formex, Fortuny's predecessor. In any event, the prices of the subsidized imports from the EC were also well below Fortuny's production costs.

54. As mentioned in our FWS, the EC originally claimed that various factors (loss of the distribution network, loss of the Ybarra brand, high costs, etc.) were specific reasons for the injury suffered by the applicant, and that the IA had failed to carry out a proper analysis of these factors. In contradiction to the foregoing, the EC claims that these factors were not examined by the IA and that this is inconsistent with the SCM Agreement. In other words, the EC first asserts that the analysis was not proper and then claims that there was no analysis at all.

55. Regarding the alleged absence of analysis, we already stated in our FWS that this statement would be invalidated if it were shown that these factors were in fact analysed. We also explained in our FWS what was involved in that analysis.

56. Regarding the alleged lack of a proper analysis, we reiterate what is stated in our FWS, namely that these (and other) factors were properly analysed. Our FWS clearly shows what was involved in the aforementioned analysis and the reasons why the Ministry made the determinations contained in the FR.

57. In addition, the EC has provided no evidence that these factors explained the state of decline of the domestic industry, still less that the evidence sufficed for this purpose, or to break or even undermine the causal link between the subsidized imports and the injury to the domestic industry (as expressly acknowledged in its reply to question 92). As we have already stated, simple assertions cannot constitute a prima facie presumption of violation on Mexico's part.

58. We repeat that the IA did not only properly analyse the factors indicated by the EC but, in addition, also examined all those aspects which it considered might affect the situation of the domestic industry, therefore, the EC's argument is without substance.

59. Finally, Mexico would like to note that owing to the inherent complexity of this procedure and for practical reasons (e.g. translation into Spanish of certain documents), our remarks may at times lack precision, and we would be glad to provide any clarifications that may be needed.

ANNEX E

REQUEST FOR THE ESTABLISHMENT OF A PANEL

Contents		Page
Annex E-1	Request for the Establishment of a Panel by the European Communities	E-2

ANNEX E-1

REQUEST FOR THE ESTABLISHMENT OF A PANEL

WORLD TRADE ORGANIZATION

WT/DS341/2
8 December 2006

(06-5907)

Original: English

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

Request for the Establishment of a Panel by the European Communities

The following communication, dated 7 December 2006, from the delegation of the European Communities to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

The European Communities hereby requests the establishment of a panel pursuant to Articles 4.7 and 6 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article XXIII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Articles 4 and 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") and Article 19 of the *Agreement on Agriculture*.

This request concerns Mexico's imposition of definitive countervailing measures on imports of olive oil originating in the European Communities by the "Resolución final de la investigación por subvención de precios sobre las importaciones de aceite de oliva" published in the *Diario Oficial de la Federación* of 1 August 2005.

The European Communities considers that the initiation and conduct of the investigations, as well as the imposition of the definitive countervailing measures are inconsistent with Mexico's obligations under *inter alia* Article VI (in particular VI:6) of the *GATT 1994*, Articles 1, 11 (in particular paragraphs 2, 4 and 11), 12 (in particular paragraphs 4 and 8), 13, 14, 15, 16 and 22 of the *SCM Agreement* and Articles 13(b)(i) and 21.1 of the *Agreement on Agriculture*.

Specifically, this request concerns the imposition of countervailing measures despite:

1. the initiation of an investigation in the absence of a determination by the Mexican authorities that the application was made by or on behalf of the domestic industry, in violation of Articles 11.4 and 16 of the *SCM Agreement*;

2. the failure to conclude the investigation within one year, and in no case more than 18 months, after its initiation, in violation of Article 11.11 of the *SCM Agreement*;
3. the failure by the Mexican authorities to require interested parties to provide non-confidential summaries of confidential information in sufficient detail to permit a reasonable understanding of the substance of the information in violation of Article 12.4.1 of the *SCM Agreement*;
4. the failure of the Mexican authorities to properly inform the interested parties and to provide reasonable and adequate explanation on the existence of subsidisation, notably as regards pass-through of any benefit, in violation of Articles 12.8, 22.3 and 22.5 of the of the *SCM Agreement*;
5. the failure to grant the opportunity for consultations before the initiation of the investigation with the aim of clarifying the situation as to matters referred to in paragraph 2 of Article 11 of the *SCM Agreement* and arriving at a mutually agreed solution, in violation of Article 13.1 of the *SCM Agreement*;
6. the failure to calculate the benefit conferred on the recipient pursuant to paragraph 1 of Article 1 of the *SCM Agreement* and to apply the method used to each particular case in a transparent way which is adequately explained, in violation of Article 14 of the *SCM Agreement*;
7. the failure to correctly define the domestic industry, in violation of Article VI:6 of the *GATT 1994* and Articles 15.4, 15.5 and 16 of the *SCM Agreement*;
8. the failure to make a determination of injury based on positive evidence involving an examination of all relevant economic factors and indices having a bearing on the state of the industry and to provide reasoned and adequate explanation, in violation of Article VI:6 of the *GATT 1994* and Articles 15.1 and 15.4 of the *SCM Agreement*;
9. the failure to examine any known factors other than the alleged subsidized imports which were causing injury to the domestic industry, in violation of Article 15.5 of the *SCM Agreement*;
10. the initiation of a countervailing duty investigation on imports of an agricultural product (olive oil) outside the circumstances contemplated in Article 13(b)(i) of the *Agreement on Agriculture* and in violation of Article 21.1 of the *Agreement on Agriculture*;

On 31 March 2006, the European Communities requested consultations with Mexico on the above-mentioned with a view to reaching a mutually satisfactory solution of the matter. The request was circulated in document WT/DS341/1 dated 4 April 2006. The consultations were held on 5 May 2006. Unfortunately, they have not led to a satisfactory resolution of the matter.

Therefore, the European Communities requests that a panel be established, with standard terms of reference under Article 7 paragraph 1 of the DSU, to consider the above complaint with a view to finding that Mexico's measures nullify or impair the EC's benefits in respect of Mexico's obligations under the above cited Articles.

The European Communities asks that this request be placed on the agenda for the meeting of the Dispute Settlement Body to be held on 19 December.
