

**GUATEMALA - ANTI-DUMPING  
INVESTIGATION REGARDING PORTLAND  
CEMENT FROM MEXICO**

**REPORT OF THE PANEL**

The report of the Panel on Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 19 June 1998, pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

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## I. INTRODUCTION

1.1 On 15 October 1996, Mexico requested consultations with Guatemala under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("ADP Agreement") regarding the anti-dumping investigation carried out by Guatemala concerning imports of portland cement from Cooperativa Manufacturera de Cemento Portland la Cruz Azul, SCL, of Mexico ("Cruz Azul") (WT/DS60/1). Mexico's request for consultations preceded Guatemala's final determination of dumping and consequent injury and the imposition of the definitive anti-dumping duty.

1.2 Mexico and Guatemala held consultations on 9 January 1997, but failed to reach a mutually satisfactory solution.

1.3 On 4 February 1997, pursuant to Article 17.4 of the ADP Agreement, Mexico requested the establishment of a panel to examine the consistency of Guatemala's anti-dumping investigation into imports of portland cement from Mexico with Guatemala's obligations under the World Trade Organization ("WTO"), in particular those contained in the ADP Agreement (WT/DS60/2).

1.4 At the meeting of the Dispute Settlement Body ("DSB") on 25 February 1997, Guatemala stated that it could not join the consensus to establish a panel until certain domestic procedures concerning the investigation had been completed. The DSB agreed to revert to this matter at a later date.

1.5 At its meeting on 20 March 1997, the DSB established a panel in accordance with Article 6 of the DSU with standard terms of reference. The terms of reference were:

"To examine, in the light of the relevant provisions of the covered agreements cited by Mexico in document WT/DS60/2, the matter referred to the DSB by Mexico 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".  
(WT/DS60/3)

1.6 Canada, El Salvador, Honduras and the United States reserved their rights to participate in the Panel proceedings as third parties.

1.7 On 21 April 1997, Mexico requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 1 May 1997, the Director-General composed the following Panel:

Chairman: Mr. Klaus Kautzor-Schröder  
Members: Mr. Christopher Norall  
Mr. Gerardo Teodoro Thielen Graterol

1.8 Mr. Christopher Norall resigned from the Panel on 27 June 1997. On 11 July 1997 the Director-General, acting on a request from Mexico, appointed a new member to the Panel. Accordingly, the composition of the panel was:

Chairman: Mr. Klaus Kautzor-Schröder  
Members: Mr. Gerardo Teodoro Thielen Graterol  
Mr. José Antonio S. Buencamino

1.9 The Panel met with the parties on 28/29 July 1997 and 13/14/15 October 1997. It met with third parties on 28 July 1997.

1.10 On 30 July 1997, the Chairman of the Panel informed the DSB that the Panel would not be able to issue its report within six months of the agreement on the composition and terms of reference of the Panel. The reasons for the delay are set out in WT/DS60/5.

1.11 The Panel submitted its interim report to the parties on 23 March 1998. On 3 April 1998, both parties submitted written requests for the Panel to review precise aspects of the interim report. At the request of Guatemala, the Panel held a further meeting with the parties on 16 April 1998 on the issues identified in the written comments. The Panel submitted its final report to the parties on 18 May 1998.

## II. FACTUAL ASPECTS

2.1 This dispute concerns the initiation and subsequent conduct by Guatemala's Ministry of Economy ("Ministry") of an anti-dumping investigation against imports of grey portland cement from Cruz Azul, a Mexican producer. Cementos Progreso SA ("Cementos Progreso"), the only cement producer in Guatemala, filed a request for an anti-dumping investigation on 21 September 1995 and a supplementary request on 9 October 1995. On 11 January 1996, based on these requests, the Ministry published a notice of initiation of an anti-dumping investigation regarding allegedly dumped imports of grey portland cement from Cruz Azul of Mexico. The Ministry notified the Government of Mexico of the initiation of the investigation on 22 January 1996. The Ministry requested certain import data from Guatemala's Directorate-General of Customs by letter dated 23 January 1996. On 26 January 1996, the Ministry transmitted questionnaires to interested parties, including Cruz Azul and Cementos Progreso, with a response originally due on 11 March 1996. In answer to Cruz Azul's request, the Ministry extended the deadline for submission of the questionnaire responses until 17 May 1996. Cruz Azul filed a response on 13 May 1996. On 16 August 1996, Guatemala imposed a provisional anti-dumping duty of 38.72% on imports of type I (PM) grey portland cement from Cruz Azul of Mexico. The provisional duty was imposed on the basis of a preliminary affirmative determination of *inter alia* threat of injury. That provisional duty expired on 28 December 1996.

2.2 The original investigation period set forth in the published notice of initiation ran from 1 June 1995 to 30 November 1995. On 4 October 1996, the Ministry extended the investigation period to include the period 1 December 1995 to 31 May 1996. On 14 October 1996, the Ministry issued supplemental questionnaires to Cruz Azul and Cementos Progreso, requesting, *inter alia*, that Cruz Azul provide cost data and provide data for the extended investigation period.

2.3 A verification visit was scheduled to take place from 3 - 6 December 1996. This verification visit was cancelled by the Ministry shortly after it commenced on 3 December 1996.

2.4 On 17 January 1997, Guatemala imposed a definitive anti-dumping duty of 89.54% on imports of grey portland cement from Cruz Azul of Mexico.

## III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

3.1 Mexico requests the Panel to make the following rulings, findings and recommendations:

- (a) "reject all the preliminary objections raised by Guatemala";
- (b) "conclude that the measures adopted by Guatemala, in particular though not exclusively those relating to the initiation of the investigation, are inconsistent with the obligations of that Member country of the WTO under Article VI of GATT 1994

and, at least, Articles 2, 3, 4, 5, 6 and 7 and Annex I of the Anti-Dumping Agreement";

- (c) "also conclude that the measures adopted by Guatemala in contravention of its obligations under GATT 1994 and the Anti-Dumping Agreement nullify or impair Mexico's benefits within the meaning of Article XXIII of the GATT 1994"; and
- (d) "recommend to the Government of Guatemala that it revoke the anti-dumping duties imposed on Cruz Azul's exports of grey cement to that country and refund the corresponding anti-dumping duties".

3.2 Guatemala asks the Panel to make the following preliminary rulings:

- (a) "determine that the Panel does not have the authority to examine the final measure, as the final measure is outside the Panel's terms of reference:"
- (b) "determine that the final measure is not within the Panel's terms of reference, taking into account Mexico's recognition of this at the first substantive meeting with the Panel and in its second submission to the Panel"<sup>1</sup>;
- (c) "reject Mexico's complaint because Mexico does not claim, much less provide evidence, that the provisional measure has had a "significant impact" in conformity with Article 17.4 and because such an impact cannot be demonstrated in this case";
- (d) "reject Mexico's complaint, because Mexico does not claim, much less provide evidence, that the provisional measure violates paragraph 1 of Article 7, as required by Article 17.4";
- (e) "alternatively, reject the claims made regarding the initiation of the investigation because Mexico failed to claim, much less provide evidence, that Guatemala had violated Article 1 or Article 7.1 by imposing an anti-dumping measure in an investigation that was not initiated properly";
- (f) "alternatively, reject all [Mexico's] claims regarding the final stage of the investigation";
- (g) "alternatively, reject the seven individual claims made by Mexico ... [that] ... do not come within the Panel's terms of reference. Also to reject the two individual claims made by Mexico shown on page 32 of the English text of Guatemala's first written submission, which were not raised during the consultations"; and
- (h) alternatively, reject the new claims raised by Mexico during the Panel proceedings.

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<sup>1</sup> As originally submitted, Mexico's second submission to the Panel stated that "the final measure was not included in the request for the establishment of a panel", and "the final measure in itself is not challenged". Mexico submitted a corrigendum to its second submission, correcting its argument to read "the final determination was not included in the request for the establishment of a panel", and "the final determination in itself is not challenged".

3.3 In the event the Panel does not reject Mexico's claims on the basis of Guatemala's preliminary objections, Guatemala requests the Panel to find that:

- (i) "Guatemala initiated the investigation in conformity with the ADP Agreement";
- (j) "without prejudice to the foregoing argument, that any alleged procedural errors committed at the time of initiating the investigation do not affect the provisional measure because (a) they do not nullify or impair Mexico's rights under the ADP Agreement; (b) Mexico gave cause for estoppel by failing to submit its arguments in the administrative file on the investigation at the proper time and in due form; and (c) they constituted a 'harmless error'";
- (k) "Guatemala imposed the provisional measure in compliance with the ADP Agreement"; and
- (l) "Guatemala imposed the final measure in compliance with the ADP Agreement".

3.4 In the event the Panel finds that Guatemala acted in a manner inconsistent with the ADP Agreement, Guatemala requests that the Panel:

- (m) "recommend that Guatemala bring the allegedly incompatible measure into conformity with the ADP Agreement"; and
- (n) "not recommend or suggest any specific or retroactive remedy".

#### IV. MAIN ARGUMENTS OF THE PARTIES

##### A. Preliminary Objections

4.1 **Guatemala** raises a number of preliminary objections to argue that the Panel has no jurisdiction to consider the present dispute. Guatemala submits that the initiation of the investigation, the provisional measure, the conduct of the final stage of the investigation, and the final measure fall outside the Panel's terms of reference.

4.2 **Mexico** asserts that the dispute is properly before the Panel, and that the Panel has jurisdiction to consider all the claims identified in Mexico's request for the establishment of a panel.

##### 1. Whether the final measure is before the Panel

4.3 **Guatemala** argues that the provisional measure adopted on 16 August 1996 is the only anti-dumping measure that was the subject of Mexico's request for consultations, dated 15 October 1996, and of its request for the establishment of a dispute settlement panel, dated 4 February 1997. Consequently, Guatemala contends that the Panel lacks a mandate or jurisdiction to consider the final anti-dumping measure adopted on 17 January 1997. By virtue of Article 17.4 of the ADP Agreement<sup>2</sup>, only three types of measure may be the subject of recommendations by a panel,

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<sup>2</sup> Article 17.4 provides that:

"If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB."

that is, a provisional measure imposed in accordance with Article 7, a price undertaking given under Article 8, or a final measure imposing an anti-dumping duty in accordance with Article 9. Anti-dumping investigations, or actions or decisions taken during the course of the investigation, do not constitute "measures" within the meaning of Article 19.1 of the DSU. According to Article 1 of the ADP Agreement, "[a]n anti-dumping measure shall be applied only ... pursuant to investigations". This shows that the "investigation" itself cannot be the "measure" in dispute.

4.4 Guatemala submits that Article 6.2 of the DSU requires that the complainant should identify the "specific measures" at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in its request for the establishment of a panel. In other words, the request should (a) identify the measures at issue; and (b) identify the claims relating to such measures. It does not suffice simply to identify the measures at issue or only identify the claims. Consequently, in order for a panel to have a mandate to examine claims relating to a provisional measure, a price undertaking or the final measure, the complainant must indicate in its request for the establishment of a panel whether the dispute hinges on a provisional measure or a price undertaking, or whether it relates to a final measure. When uniform terms of reference are used, the request for the establishment of a panel is the document which specifies the measure and the individual claims concerning the measure that come under a panel's terms of reference.<sup>3</sup> According to Guatemala, only the specific measure and the individual claims concerning that measure, and which are duly identified in the request for the establishment of a panel, come within the jurisdiction of the Panel.

4.5 Guatemala notes that, in its request for the establishment of a panel (WT/DS60/2), Mexico did not identify the final measure, nor present individual claims challenging the final measure, nor invoke Articles 1, 9 or 12.2.2 of the ADP Agreement, nor make claims regarding the imposition of the final measure by Guatemala. Thus, the Panel lacks jurisdiction to examine the final measure, because the final measure falls outside the Panel's terms of reference. The only measure covered by the Panel's terms of reference is the provisional anti-dumping measure in effect from 28 August 1996 to 28 December 1996.

4.6 Guatemala recalls that in Brazil - Measures Affecting Desiccated Coconut<sup>4</sup> the WTO Appellate Body determined that "... the 'matter' referred to a panel for consideration consists of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference".<sup>5</sup> According to the text of Articles 4.4 and 6.2 of the DSU, the claims must refer to a particular "measure" that has allegedly been imposed in a manner inconsistent with any covered agreement. Unless the claims in the matter concern a "measure", the matter (and the individual claims) are irrelevant. According to Article 19.1 of the DSU, a panel may only make a recommendation to "bring the measure into conformity with" the Agreement. A panel is not authorized to make recommendations on a matter (nor on the individual claims therein) if it is not related to the "measure" mentioned in the panel's terms of reference. Furthermore, according to Article 17.6(ii) of the ADP Agreement, the Panel must state whether the "measure" adopted is in conformity with the Agreement.

4.7 Guatemala submits that, in an anti-dumping context, this interpretation is consistent with Articles 17.3 and 17.4 of the ADP Agreement. Appendix 2 of the DSU identifies Article 17.4 - but not Article 17.3 - as a special or additional rule for the settlement of disputes under the ADP

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<sup>3</sup> EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, ADP/137, paragraph 450, adopted on 30 October 1995; United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87, paragraph 336, adopted on 27 April 1994; United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, SCM/153, paragraph 208, adopted on 28 April 1994; EC - Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan, ADP/136, paragraph 303, not adopted, dated 28 April 1995.

<sup>4</sup> Report of the Appellate Body, Brazil-Measures Affecting Desiccated Coconut, DS22/AB/R, adopted 21 February 1997.

<sup>5</sup> *Ibid*, page 22.

Agreement. Article 4.4 of the DSU (applicable to consultations) must be interpreted consistently with Article 17.3 of the ADP Agreement. Article 4.4 of the DSU requires that a complaining Member identify the "measures at issue" in its request for consultations. The "matter" referred to in Article 17.3 must consist of the "claims" brought by the complainant challenging the anti-dumping measure identified in the request for consultations under Article 4.4 of the DSU. Therefore, if it is to be consistent with Article 4.4 of the DSU, the "matter" cannot include any claim that refers to a measure other than the "measures" identified in the request for consultations.

4.8 Guatemala notes that Article 17.4 imposes a special rule according to which, for the purpose of establishing the Panel's competence for the provisional measure in question, the complainant Member must prove that the provisional measure has a significant impact. The DSU, on the other hand, does not require proof of any trade effect as a condition for contesting a measure before a panel. According to Guatemala, other than the requirement to prove a trade effect in challenging a provisional anti-dumping measure, there is no other inconsistency between Article 17.4 of the ADP Agreement and Article 6.2 of the DSU. Article 17.4 of the ADP Agreement (which is a special or additional rule or procedure under the DSU) is to be read, as it can be, consistently with Article 6 of the DSU, to require that parties must refer matters to the Dispute Settlement Body (about which they have consulted) by "identify[ing] the specific measures at issue" (Article 6.2 of the DSU). Guatemala asserts that the interpretation must therefore be that the ADP Agreement and the DSU are consistent, with the exception of the "significant impact" requirement for disputes concerning provisional measures. In this light Guatemala provides an interpretation of the procedures for the settlement of anti-dumping disputes contained in Article 17 of the ADP Agreement and Articles 4 and 6 of the DSU:

- ▶ Informal consultations: Prior to the imposition of a provisional measure and at any other time, Members may hold informal consultations on any aspect of the anti-dumping procedures, including *inter alia* the initiation, gathering of evidence during the preliminary stage of the investigation, and procedural requirements;
- ▶ Formal consultations regarding the provisional measure: Once the provisional measure has been imposed, the complaining Member may request formal consultations under Article 17.3 of the ADP Agreement. According to Article 4.4 of the DSU, in its request for formal consultations the Member must identify the provisional measure as the "measure at issue". Consequently, the individual claims that constitute the "matter" that is the subject of consultations under Article 17.3 of the ADP Agreement must contest the provisional measure. A request for formal consultations gives third parties the opportunity of joining in the consultations held on the provisional measure, as required by Article 4.11 of the DSU;
- ▶ Request for the establishment of a panel to examine the provisional measure: After expiry of the 60-day consultation period prescribed in Article 4.7 of the DSU, the complaining Member may request the establishment of a panel to examine "the matter" that was the subject of the consultations held under Article 17.3 of the ADP Agreement, provided the Member believes that it can prove to the panel that the provisional measure had a "significant impact", within the meaning of Article 17.4 of the ADP Agreement. According to Article 4.4 of the DSU, the "matter" must refer to the provisional measure. Guatemala states that pursuant to Article 6.2 of the DSU, in its request for the establishment of a panel the Member must identify the provisional measure as "the specific measure at issue". Consequently, the individual claims that constitute the "matter" - the subject of the request made under Article 17.4 - must contest the provisional measure;
- ▶ Request for consultations on the final measure: If the complaining Member is unable to prove that the provisional measure had a significant impact, Guatemala submits

that it must wait until the investigating authority has taken a final decision to impose definitive dumping duties or accepted a price undertaking. Once the final action has been taken, according to Article 17.3 of the ADP Agreement, the complaining Member may request formal consultations. In accordance with Article 4.4 of the DSU, in its request for formal consultations the Member must identify the final measure as the "measure at issue". Consequently, the individual claims that constitute the "matter" that is the subject of consultations must contest the final measure. Guatemala notes that a request for formal consultations gives third parties the opportunity of joining in the consultations held on the final measure as required by Article 4.11 of the DSU; and

- ▶ Request for the establishment of a panel to examine the final measure: After expiry of the minimum 60-day consultation period prescribed in Article 4.7 of the DSU, the complaining Member may invoke Article 17.4 of the ADP Agreement and request the establishment of a panel to examine "the matter" that was the subject of the consultations held under Article 17.3 of the ADP Agreement. According to Article 6.2 of the DSU, in its request for the establishment of a panel, the Member must identify the final measure as the "specific measure at issue". Consequently, Guatemala asserts that the individual claims that constitute the "matter" - the subject of the request made under Article 17.4 of the ADP Agreement - must contest the final measure.

4.9 **Mexico** denies that the final measure is not within the Panel's terms of reference. Although Mexico acknowledges that the final determination was not included in its request for the establishment of a panel, it denies that the final measure was similarly excluded.<sup>6</sup> The final determination was not included in the request for the establishment of a panel since that determination had not yet been adopted when Mexico requested consultations with Guatemala under Article 17.3 of the ADP Agreement and Article 4 of the DSU. While it is true that Mexico did not challenge the final determination as such, this does not mean that the final measure, i.e. the definitive anti-dumping duties applied by Guatemala, is consistent with Guatemala's obligations under GATT 1994 and the ADP Agreement, or that those duties are not within the terms of reference of the Panel. According to Mexico, the fact that the final determination in itself is not challenged cannot and should not legitimize the violations committed in the earlier stages of the investigation. That would completely nullify the content and purpose of the second sentence of Article 17.4 of the ADP Agreement, contrary to the rules of interpretation of the Vienna Convention on the Law of Treaties ("Vienna Convention").

4.10 Mexico suggests that according to Guatemala's argument, even if the violations of the ADP Agreement were committed in the initiation of the investigation, the complainant would have to wait until the final anti-dumping duties were applied before requesting consultations with a view to establishing a panel. Otherwise, the final anti-dumping duties would remain outside the terms of reference of the panel. Alternatively, if the consultations were requested following the preliminary determination pursuant to Article 17.4 of the ADP Agreement, in the time it took to hold the consultations and establish a panel, the preliminary determination would have ceased to exist and would have been replaced by the final determination. Since, according to Guatemala, panels have no mandate to recommend specific or retroactive remedies, when the complainant finally managed to obtain a ruling that the investigation was invalid from the start and should not in fact have been initiated, that ruling would have no effect in practice since the anti-dumping duties that had been collected would wrongfully remain in the coffers of the importing country. That is to say that when

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<sup>6</sup> As originally submitted, Mexico's rebuttal stated that "the final measure was not included in the request for the establishment of a panel", and "the final measure in itself is not challenged". Mexico submitted a corrigendum to its rebuttal, correcting its argument to read "the final determination was not included in the request for the establishment of a panel", and "the final determination in itself is not challenged".

the conclusions of a panel relating to a provisional measure were received, that measure would have become meaningless, because it would have been replaced by that time by a definitive measure which could not have been examined by the panel for the simple reason that it was adopted only after the panel had been established.

4.11 According to Mexico, this would create a strong incentive for WTO Members to ignore the disciplines of the ADP Agreement as regards the initiation of investigations. The worst that could result from initiating an investigation without complying with the relevant disciplines of the ADP Agreement would be to gain the time it takes to carry out the entire anti-dumping investigation from its initiation to the final determination, plus the time required to hold consultations on the final measure and, subsequently, to obtain a ruling from the panel and, where applicable, the Appellate Body. Mexico notes that, in addition to gaining that time, the violating Member would have obtained the duties collected as a result of violating its obligations under the ADP Agreement. It is clear from the actual wording of the second sentence of Article 17.4 that there is no need to wait until the importing Member has adopted a final measure. This is dealt with only in the first sentence. Mexico suggests that combining the first sentence with the second sentence distorts the paragraph as a whole and creates confusion. If the Members of the WTO had to wait until final measures were adopted before resorting to the DSB, the second sentence of Article 17.4 would simply not exist.

4.12 According to Mexico, its request for the establishment of a panel which forms part of the terms of reference of the Panel, shows that from the outset Mexico challenged: (a) the initiation, (b) the preliminary resolution, and (c) the final stage of the proceedings of the anti-dumping investigation in question. Thus, if it is to comply with its terms of reference, the Panel must rule on each one of these claims or, according to Article 7.2 of the DSU, it must address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute. Mexico submits that if the Panel were to find that the anti-dumping investigation in question was initiated and conducted in violation of the relevant provisions of the ADP Agreement, or simply that it was not initiated in conformity with the ADP Agreement, then it would have to conclude that the resulting anti-dumping duties were also inconsistent with Guatemala's obligations under the ADP Agreement. In other words, although Mexico may not have challenged the final determination as such, this does not mean that Mexico did not challenge the resulting anti-dumping duties. It did so as early as during its consultations with Guatemala by pointing out to Guatemala that the investigation should not have been initiated, and subsequently, by asking the Panel to cancel the investigation and order the refund of the corresponding anti-dumping duties.

4.13 **Guatemala** notes the fact that Mexico recognized in its second submission that the definitive measure was not included in the request for the establishment of a panel because "that measure had not yet been adopted when Mexico asked for consultations", which means that in Mexico's view, it is indispensable that any measure to be examined should have been adopted before the request for consultations.<sup>7</sup> Applying this same reasoning, for the Panel to examine Mexico's claims concerning the final stage, it is also indispensable that the events or actions in question should have taken place before the consultations were held. However, Guatemala notes that when Mexico requested formal consultations on 15 October 1996, various phases of the final stage of the investigation had not yet taken place, including the extension of the period of investigation, the use of non-governmental experts in the verification, the request for information on costs and sales during the verification, the submission of the technical accounting evidence, the information on facts essential to the investigation, the submission of confidential information and the non-establishment of deadlines for the submission of information. Applying Mexico's logic, these phases of the final stage of the investigation should also have been excluded from Mexico's request for the establishment of a panel.

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<sup>7</sup> As originally submitted, Mexico's rebuttal stated that "the final measure was not included in the request for the establishment of a panel", and "the final measure in itself is not challenged". Mexico submitted a corrigendum to its rebuttal, correcting its argument to read "the final determination was not included in the request for the establishment of a panel", and "the final determination in itself is not challenged".

2. Whether the final stage of the investigation is before the Panel

4.14 Guatemala claims that the Panel has no mandate to examine claims relating solely to the final stage of the investigation. Guatemala argues that, in order to be able to make claims concerning aspects of an investigation subsequent to the provisional measure, a complainant is obliged to challenge the final measure under which the anti-dumping duties were imposed. In its request for the establishment of a panel and in its first written submission, Mexico raises only the dispute regarding the provisional measure, not the final measure. Guatemala therefore claims that the Panel must disregard Mexico's claims concerning the final stage of the investigation, inasmuch as they are irrelevant to the Panel's task of reviewing the provisional measure.

4.15 Furthermore, Guatemala asserts that the claims in question relate to a stage in the investigation process which (1) is completely different from the stage referred to in consultations, (2) had not even occurred when Mexico requested consultations, and (3) concern a measure which is totally different under the terms of the ADP Agreement. Guatemala notes that because Mexico did not put forward the whole range of claims relating to the final stage of the investigation until the last day of the consultations<sup>8</sup>, Mexico deprived Guatemala of the right to hold consultations regarding those claims during the consultation period provided for in Article 4.5 of the DSU. Guatemala relies on United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, in which it alleges that the panel found that, in accordance with Article 15 of the special dispute settlement provisions of the Tokyo Round Anti-Dumping Code, "before a party to a dispute could request a panel concerning a matter, the parties to the dispute had to have been given an opportunity to reach a mutually satisfactory resolution of the matter. This condition would not be meaningful unless the matter had been raised in consultations and conciliation".<sup>9</sup> Guatemala argues that because Mexico waited until the last day of the consultations to raise the entire range of claims relating to the final stage of the investigation, it prevented the special provisions enacted for anti-dumping cases from fulfilling their function of giving the parties the opportunity to reach "a mutually satisfactory resolution" of the claims regarding the final stage as required by Article 17.3 of the ADP Agreement. For this reason, Guatemala asserts that the Panel must reject all of Mexico's claims relating to the final stage.

4.16 **Mexico** states that Guatemala's argument that a complainant is obliged to challenge the final measure in order to raise claims against aspects of the investigation subsequent to the provisional measure is not supported by any provision of the ADP Agreement. Furthermore, Mexico notes that the entire range of claims relating to the final stage were dealt with in consultations. Moreover, Mexico contends that all such claims were included in the request for the establishment of a panel, and therefore form part of the Panel's terms of reference, consistent with the ADP Agreement and United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway.<sup>10</sup>

4.17 **Guatemala** further argues that any claim in respect to the final stage is entirely irrelevant to the only "measure at issue" identified in the terms of reference of the Panel. Under Article 19.1 of the DSU, only measures may be brought into conformity, and consequently, even in the remote hypothesis that the Panel should conclude that there was, indeed, a violation in the final stage, the Panel could not issue any recommendation in respect of the final measure because the final measure is

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<sup>8</sup> Guatemala asserts that the request for consultations submitted by Mexico on 15 October 1996 (WT/DS60/1) contains no claims relating to the "final stage" of the proceedings. However, on the last day of the consultations Mexico submitted a list of questions to Guatemala, which included various queries regarding the final stage of the investigation.

<sup>9</sup> United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87, paragraph 333, adopted on 27 April 1994.

<sup>10</sup> *Ibid.*

not within the terms of reference of this dispute. Thus, the Panel should reject Mexico's claims with respect to the final stage of the investigation.

3. Whether the provisional measure is before the Panel

4.18 Guatemala asserts that, according to Article 17.4 of the ADP Agreement, a Member may only refer a provisional measure to the DSB if that measure has a "significant impact". Guatemala notes that Article 17.4 provides that a Member may refer the matter that was the subject of consultations to the DSB for the establishment of a panel if such Member "considers" that consultations have failed and if final action has been taken. Article 17.4 also provides that the Member may refer a provisional measure to the DSB if such measure "has a significant impact" and the Member "considers" that the measure was taken contrary to paragraph 1 of Article 7. Because the drafters excluded the term "considers" from describing the prerequisite that the provisional measure have a significant impact, Guatemala argues that a complaining party must demonstrate such impact to the panel in its request for establishment of a panel or as a jurisdictional prerequisite in its first written submission. Guatemala states that Mexico neither contends nor demonstrates that the provisional measure actually had a "significant impact".

4.19 According to Guatemala, "significant impact" is measured with regard to the impact on the Members's trading interests, and not the impact on the exporter or exporters under investigation. The complainant in a dispute before the WTO is the Member, not the exporter or exporters under investigation. According to Article 17.4 of the ADP Agreement and Article 6.2 of the DSU, the only party empowered to request the establishment of a panel is the Member. Moreover, the duties and obligations laid down in the ADP Agreement apply to Members, not to exporting firms. The drafters of the ADP Agreement could have provided in Article 17.4 that the "significant impact" applied to the exporter or exporters investigated, but they did not do so. Guatemala suggests that this was precisely the position adopted by Mexico in a previous case. In United States - Anti-Dumping Duties on Grey Portland Cement and Cement Clinker from Mexico<sup>11</sup>, Mexico had stressed that the GATT was called upon to regulate conduct between the signatory countries and that the dispute settlement mechanism was a government-to-government process. According to Guatemala, Mexico had contended that the earlier version of Article 17.4 of the ADP Agreement "expressly allowed the signatories to challenge ... final determinations, and even preliminary determinations where these had a significant impact on their trading interests".<sup>12</sup> According to Guatemala, Mexico had not suggested that it sufficed to show a significant impact on the exporters investigated.

4.20 Guatemala denies that the provisional measure had a significant impact on Mexico's trading interests. Guatemala also argues that, under the terms of the provisional measure, importers could choose between providing a surety or making a cash deposit to cover the estimated margin of dumping, or paying the actual provisional duty. If on the occasion of the first administrative review Cruz Azul were to demonstrate that the imports in question were not dumped imports, sureties provided by the importers in Guatemala would be released and their cash deposits would be refunded. Furthermore, Guatemala notes that the provisional measure was in force for only four months, and that the imports covered by the provisional measure accounted for only a fraction of total Mexican exports during that four-month period. According to official export data from Bancomex, during 1996 exports of grey portland cement from Mexico to Guatemala constituted only 0.016% of Mexico's exports of all products to all countries (\$96 billion in total exports to all countries/\$15.6 million in cement exports to Guatemala). Using data supplied by Mexico and Bancomex, Mexico's exports of grey portland cement to Guatemala in 1996 constituted only 4.3% of Mexico's exports of all products to Guatemala in 1996 (\$360 million in total exports to Guatemala/\$15.6 million in cement exports to Guatemala). For the period during the application of the provisional measure

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<sup>11</sup> United States - Anti-Dumping Duties on Grey Portland Cement and Cement Clinker from Mexico, ADP/82, not adopted, dated 7 September 1992.

<sup>12</sup> *Ibid*, paragraph 3.1.11.

(September-December 1996), Mexico's exports of grey portland cement to Guatemala constituted only 3% of Mexico's exports of all products to Guatemala (\$101.8 million in total exports to Guatemala from September-December 1996/\$3.1 million in cement exports to Guatemala from September-December 1996). Because of its low value to weight ratio and the high cost of overland transportation, Guatemala submits that cement is not a significant export product for Mexico. In addition, Guatemala suggests that the traditional export markets for Mexican cement are the United States and other countries that have cement consumption that is many times greater than that of Guatemala. Even after the United States imposed very high anti-dumping duties against Mexican cement in August 1990, the Mexican industry did not redirect its exports to Guatemala. Instead, Mexico redirected its cement exports to Asian markets that are accessible by ocean freight, which is much less costly than overland freight. Guatemala therefore argues that the provisional measure did not have a significant impact on Mexico's trading interests.

4.21 Guatemala also argues that Mexico failed to allege, and cannot demonstrate, that the provisional measure had a significant impact on the Mexican industry producing grey portland cement. Guatemala asserts that the provisional measure only concerned exports of cement by one Mexican producer, and that it did not involve exports by the main Mexican cement producers - CEMEX, Apasco or Cementos de Chihuahua. Guatemala notes that both CEMEX and Apasco currently export cement to Guatemala. Thus, the fact that Guatemala applied the provisional measure to a very small share of the Mexican cement industry demonstrates that the provisional measure did not have a significant impact on the Mexican cement industry, much less on Mexico's trading interests as a whole. Referring to information from the Mexican National Bank for Foreign Trade and the 1996 Global Cement Report, Guatemala argues that Mexico's exports of grey portland cement to Guatemala during 1996 (287,545 tonnes) only accounted for 0.65% of the Mexican cement industry's production capacity (44 million tonnes) and 1.1% of Mexico's total cement production forecast for 1996 (26,331,000 tonnes). Thus, with an impact of less than 1%, one can conclude that the exports from the Mexican cement industry to Guatemala, or the loss thereof, could never have a significant impact on the overall trading interests of the Mexican cement industry, much less on the overall trading interests of Mexico.

4.22 Guatemala considers that the aim of the limitations on jurisdiction contained in Article 17.4 of the ADP Agreement is that Members should not unreasonably question any provisional measure imposed temporarily, when such measure has only a negligible impact and only affects one enterprise on the territory of the exporting Member. According to Guatemala, the logic of this approach is apparent when one considers that under Article 13 of the ADP Agreement, the right of domestic judicial review is limited to final determinations. WTO resources are intended to be used for considering disputes relating to the imposition of definitive anti-dumping duties and price undertakings, except where the imposition of the provisional measure has a significant impact on the Member's trading interests. Guatemala asserts that the provisional measure imposed by Guatemala had no significant impact on Mexico's overall trading interests. According to Guatemala, the Panel therefore lacks authority to consider the question raised by Mexico regarding the Guatemalan provisional measure, and Mexico's claim should therefore be rejected.

4.23 Guatemala submits that it is an essential prerequisite that the Member bringing a claim in respect of a provisional measure prove to the panel that the measure has had such a negative impact on its trade interests that it is not possible to await the final determination before seeking resolution of the dispute. If the exporting Member against whom the provisional measure has been applied does not demonstrate its impact, how is the panel to know for certain whether or not a provisional measure has a significant impact? There is no way it can know unless the Member that requested establishment of the panel provides irrefutable evidence of significant impact.

4.24 **Mexico** disputes Guatemala's argument that, for the Panel to have jurisdiction to deal with the provisional measure, Mexico must demonstrate that the provisional measure had a "significant impact" on its overall trading interests. Mexico states that the second sentence of Article 17.4 of the

ADP Agreement nowhere contains the term "demonstrate" and hence the obligation to prove or establish the existence of a "significant impact" cannot be inferred. The omission of the term "demonstrate" contrasts with the precision with which the same term is used, for example, in the first two sentences of Article 3.5 of the ADP Agreement on determination of injury.<sup>13</sup> If those who drafted the ADP Agreement had considered or agreed that it was necessary to demonstrate "significant impact", the text of Article 17.4 of the ADP Agreement would have contained at least one reference to the term "demonstrate".

4.25 Mexico asserts that there is no trace of the term "overall trading interests" used by Guatemala, either in Article 17.4 or anywhere else in the ADP Agreement. Using Guatemala's definition of this term, Mexico considers that neither the United States nor other Members of the WTO with overall trading interests of several billions of dollars could make use of this provision of Article 17.4 of the ADP Agreement. Mexico submits that Guatemala's approach would render the second sentence of Article 17.4 meaningless.

4.26 In Mexico's opinion, the reference to "significant impact" is sufficiently broad to leave the decision to invoke the second sentence of Article 17.4 of the ADP Agreement to the exporting Member affected, even before the results of the final resolution are known. In this connection, Mexico notes that Article 6.1 of the DSU begins with the words "[i]f ... the complaining party so requests ...".

4.27 **Guatemala** denies that a finding of significant impact is subjective; it must refer to concrete effects which can, in fact, be assessed. Guatemala further denies that it is up to the exporting Member to decide whether to submit the case to the dispute settlement system or not. Discretion with respect to bringing a case only applies to cases in which the exporting Member is challenging the final measure, because where the final measure is concerned it is the general guidelines set forth in Article XXIII of GATT 1994 and Article 3.7 of the DSU that apply, according to which a Member wishing to bring a case may exercise its discretion in deciding whether or not to do so. On the other hand, in anti-dumping cases concerning provisional measures, Article 17.4 of the ADP Agreement, far from allowing the complaining Member to exercise its discretion with respect to the impact of the measure, expressly requires that the complainant should prove significant impact.

4.28 **Mexico** states that on 4 February 1997 the DSB was asked to establish a panel at its meeting on 25 February 1997. The DSB's consideration of the request was postponed because Guatemala opposed the establishment of a panel, alleging only that two appeals by Cruz Azul and Distribuidora Comercial Molina were pending. The establishment of a panel was again submitted for consideration by the DSB at its next meeting on 20 March 1997, at which Guatemala also had ample opportunity to make whatever arguments it thought fit. However, Mexico notes that Guatemala did not advance any arguments relating to significant impact. Therefore, even if it were assumed, for argument's sake, that it was necessary to demonstrate "significant impact", Mexico considers that this is no longer the appropriate moment in the procedure for advancing that argument, since Guatemala is claiming that the Panel should examine what was a matter for examination by the DSB.

4.29 **Guatemala** submits that it was not obligated under any provision of the ADP Agreement or the DSU, nor did it have any reason, to make this preliminary objection before the DSB. The Panel - and not the DSB - is the appropriate body for defining the scope of a panel's authority, including whether a measure may or may not be examined according to Article 17.4 of the ADP Agreement. According to Article 7.1 of the DSU, the uniform terms of reference are "to examine, in the light of the relevant provisions in (name of the covered agreement(s)) ... the matter ... and to make such findings ...". Article 7.2 of the DSU confirms that "[p]anels shall address the relevant provisions in

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<sup>13</sup> The first sentence of Article 3.5 provides that "[i]t must be demonstrated that ... the dumped imports are ... causing injury ...". The second sentence begins "[t]he demonstration of a causal relationship ... shall be based on ...".

any covered agreement or agreements cited by the parties to the dispute." Consequently, a panel established under the WTO has the authority and the obligation to examine the relevant provisions cited by the parties to the dispute. On the other hand, Article 2 of the DSU provides that the DSB shall administer the rules and procedures for the settlement of disputes, but shall only "have the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements". Article 2 does not give the DSB the authority to issue decisions or interpret provisions of the covered Agreements cited by the parties to the dispute. A panel is established to examine a specific dispute, it is composed of three members selected in accordance with Article 8 of the DSU on the basis of their personal qualities, and is a more appropriate body than the approximately 130 members of the DSB for dealing with complex preliminary aspects. Guatemala asserts that preliminary objections by the parties have been examined by many panels established under the GATT and the WTO, particularly for the purpose of determining whether the claims or measures are properly included within the panel's scope of competence, i.e., are within the panel's terms of reference.<sup>14</sup> A panel established to settle a dispute is thus the appropriate forum for examining preliminary objections raised under the ADP Agreement.

4.30 Guatemala notes that the DSB only authorizes the establishment of panels with either uniform terms of reference or, if applicable, special terms of reference. The uniform terms of reference only refer to the matter brought up by the complaining Member, but do not refer to the arguments of the defending Member. The latter is therefore not obliged to submit its arguments or preliminary objections in advance to the DSB. At this stage in the proceeding, the DSB has no interest in arguments raised by the respondent Member. The latter need only raise its arguments and preliminary objections in its first submission to the panel.

4.31 Guatemala states that Article 6.1 of the DSU was adopted to ensure that if there is a claim against a Member, the latter may not unilaterally prevent the establishment of a panel. According to Article 6.1, a panel "shall be established at the latest at the DSB meeting following that at which the request first appears as an item on the DSB's agenda, unless at that meeting the DSB decides by consensus not to establish a panel". Consequently, the reverse consensus rule did not allow Guatemala to object on the basis of Article 17.4 of the ADP Agreement, and Guatemala was thus obliged to wait and put forward its objection in its first written submission. In any event, Article 17.4 provides that proving the existence of "a significant impact" is a necessary prerequisite for determining whether a panel is competent or not to examine the provisional measure. Guatemala expected that Mexico's first submission in the procedure would try to prove the significant impact. Since Mexico did not put forward any argument much less fulfil this prerequisite, Guatemala made its objections in its first written submission to the Panel. According to Guatemala, there is no provision either in the ADP Agreement or the DSU obliging Guatemala to make its preliminary objections to the DSB. Moreover, in line with the traditional principles applicable to "waivers", there is no obligation to raise the claim in one particular forum in order to retain the right to raise it in another forum, if raising it in the first forum would have been meaningless. As already indicated, Guatemala did not raise the preliminary objection in the DSB because the DSB is not the appropriate forum for taking decisions in this respect, and because raising the objection would have served no purpose in

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<sup>14</sup> Guatemala notes that the Appellate Body has established that the terms of reference are important because "they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute." (Report of the Appellate Body, Brazil - Measures Affecting Desiccated Coconut, WT/DS22/AB/R, page 22 of the English text (21 February 1997)). In the case Japan - Taxes on Alcoholic Beverages, the WTO Panel concluded that its terms of reference did not permit it to entertain the claim of the United States (WT/DS8/R, WT/DS10/R, WT/DS11/R, paragraph 6.5 (11 July 1996)). According to Guatemala many panels under the Tokyo Round Anti-Dumping Code also defined their scope by identifying the measures that were properly included in their terms of reference. For example, in the case United States - Measures Affecting Alcoholic and Malt Beverages, the Panel took a preliminary decision to the effect that it would only examine the specific United States measures and that its terms of reference did not permit it to examine other measures (DS/23R, paragraph 3.5 (19 June 1992)).

view of the rule of reverse consensus in Article 6.1 of the DSU. Moreover, Guatemala notes that no panel has ever refused to examine a preliminary argument on the grounds that it was not brought before the DSB.

4.32 **Mexico** suggests that Guatemala's arguments are contradictory. In order to justify not having challenged this matter at the two meetings of the DSB when it could have done so, Guatemala maintains that it was up to the Panel, and not the DSB, to examine the matter. Mexico suggests that if this were the case, it would be incorrect to infer, as Guatemala apparently has done, that Mexico would have had to demonstrate significant impact to the DSB in order to be entitled to the establishment of a panel. Pursuing this line of reasoning, Mexico argues that both the complainant and the respondent should have the same opportunity before the Panel, above all if one considers that the complainant cannot, by definition, submit a claim concerning lack of significant impact, while the respondent could have raised the matter before the DSB.

4.33 Mexico asserts that the notion of significant impact usually includes effects, both qualitative and quantitative, at various levels (federal, subfederal, state) and in various sectors (public, private), according to the circumstances. Mexico submits that the dispute with Guatemala involves concerns of a systemic nature which go beyond Mexico's interests as an exporter to the Guatemalan market alone. A ruling in favour of Guatemala would create a precedent that could affect Mexican exports of any product to any market. In particular, the dispute would imperil Mexico's exports to Central America, since the other countries of the subregion, which apply the same anti-dumping regulations as Guatemala, would have noted that the initiation and conduct of an anti-dumping investigation with serious flaws could be endorsed by a WTO panel despite such flaws and that, even if a ruling were obtained against them, the worst that could happen would be for a panel to recommend a *post facto* adjustment of the violations committed.

4.34 **Guatemala** asserts that the systemic concerns invoked by Mexico and the alleged adverse effect on Mexican exports of any product to any market are not consistent with Article 17.4 of the ADP Agreement. On the contrary, the true systemic interest lies in not allowing a complainant to justify or provide excuses for failing to observe legal requirements on the grounds of alleged systemic considerations.

4.35 According to **Mexico**, Guatemala's anti-dumping investigation has affected a significant proportion of Mexico's total exports to that country. Moreover, because of the uncertainties that arose in Guatemala with respect to the enterprises and the product subject to investigation, the investigation affected the exports not only of Cruz Azul but also of all the other Mexican cement companies which were exporting or planning to export to Guatemala. Mexico submits that, as a result of practical difficulties incurred in Guatemala, sureties or cash deposits could not be used for Cruz Azul's exports, and actual provisional duties were therefore paid by the importers.

4.36 **Guatemala** notes that its preliminary determination did not give rise to any "uncertainty" as to the enterprise or the product under investigation. Without conceding that there was any uncertainty, it would have been totally inappropriate for Mexico to refer to an alleged uncertainty created by the "investigation" to demonstrate significant impact as required by Article 17.4 when what is required is for Mexico to demonstrate the impact caused by the provisional measure. Nor is it right to say that the measure affected all of the other Mexican cement firms that have exported or that had planned to export to Guatemala. On the contrary, since the measure was imposed only on Cruz Azul, firms such as Apasco and even a new exporter, Cemex, are competing with Cementos Progreso in a healthy market.

4.37 **Mexico** considers that, from a practical point of view, it is logical to assume that no exporting Member would seek dispute settlement involving a provisional measure under the second sentence of Article 17.4 of the ADP Agreement if the measure had no significant impact on that Member. What would be the point of initiating a dispute in the WTO if the investigation in question was not having a

significant impact? No Member, least of all Mexico, would allocate economic and human resources to something which was not worth the trouble.

4.38 **Guatemala** replies that if one were to accept that every claim is in itself necessarily evidence of significant impact, the second sentence of Article 17.4 of the ADP Agreement would be meaningless.

4.39 **Mexico** suggests that if it were to accept - simply to illustrate the importance of anti-dumping duties on Mexico's cement exports to Guatemala - that significant impact had to be linked with the volume of the trade affected by the measure, the following figures would be worth noting: the exports affected by anti-dumping duties accounted for more than 5% of Mexico's total exports to Guatemala in 1996; Cruz Azul's exports represented almost 91% of Mexico's total cement exports to Guatemala, and Cruz Azul's cement exports to Guatemala accounted for more than 72% of the firm's total exports worldwide.

4.40 **Guatemala** argues that the share of exports that Guatemala allegedly represents for Cruz Azul does not provide an appropriate or reasonable evaluation because Cruz Azul's total exports are insignificant when compared to the firm's overall operations. For example, in 1996, Cruz Azul's exports of grey portland cement to Guatemala amounted to 261,378 metric tonnes, which represents only 4.7% of its installed capacity of 5,560,000 metric tonnes. Moreover, if the same comparison is made in respect of exports of grey portland cement from Cruz Azul to all countries, Guatemala notes that they represent only 6.6% of the firm's installed capacity. In other words, Cruz Azul's exports, be it to Guatemala or to all countries, could never have a significant impact on that single firm's trading interests, much less on the Mexican cement industry or Mexico's trading interests as a whole.

4.41 In response to a request by the Panel<sup>15</sup>, **Mexico** also provided data concerning the percentage of affected exports in relation to total Cruz Azul domestic production in 1995 and 1996, where "Production" refers to production by the Lagunas plant in the State of Oaxaca (which was the sole plant to export to Guatemala in the relevant period) in metric tonnes, and "Total production" refers to the total production of both of Cruz Azul's Mexican plants in metric tonnes, including the plant in the State of Hidalgo that never exported to Guatemala. Mexico suggests that, because the plant in the State of Hidalgo did not export to Guatemala, the Panel should focus on the data concerning the Lagunas plant.

	1995 (June-Dec.)	1996 (Jan.-Aug.)	1996 (Sep.-Dec.)
Production	721,967 mt	1,066,664 mt	533,332 mt
Total production	1,776,153mt	2,620,000 mt	1,325,000 mt
Exports	82,385 mt	227,903 mt	46,195 mt
% Exports of Production	11.41%	21.4%	8.7%
% Exports of Total Production	4.6%	8.6%	3.39%

<sup>15</sup> The request was made (in Spanish) three days before the Panel's second meeting with the parties.

4.42 Mexico notes that the period June-December has been included for the year 1995 because it was the period under investigation. Before that there were no imports from Mexico. The year 1996 has been broken down into two parts to highlight the fact that the preliminary determination, with anti-dumping duties of 38.72%, was made in August of that year. Mexico emphasises that the provisional determination, with the application of anti-dumping duties, produced a more than significant fall in the Cruz Azul plant's export/production percentage, i.e. 59.5%.

4.43 **Guatemala** submits that according to the data provided by Mexico, Cruz Azul produced 293,077 tonnes per month during January 1995-August 1996. Its production increased to 331,250 tonnes per month during September-December 1996 when the provisional duties were in effect. In other words, based on Mexico's own data, production jumped 38,173 tonnes per month, or 13%, at the very time that Mexico claims that Cruz Azul suffered a significant impact. Furthermore, the exports of Cruz Azul to Guatemala averaged 20,686 tonnes per month during January 1995-August 1996 and decreased to 11,549 tonnes per month during September-December 1996. The alleged drop in monthly exports from 20,686 tonnes to 11,549 tonnes would suggest that Cruz Azul lost exports of only 36,548 tonnes while the provisional duties were in effect. That alleged loss equals less than 2% of the capacity of Cruz Azul to produce grey portland cement during those four months.

4.44 Guatemala submits that, according to the annual report of Cruz Azul, the Lagunas plant produces about 37% of total production, and the Hidalgo plant produces the remaining 63%. Guatemala suggests that is why Mexico asked the Panel to discount data concerning the Hidalgo plant. Guatemala queries how a Member can claim to have suffered a significant impact on its trading interests based on data for only one minor plant of one minor producer of grey portland cement in Mexico, especially when cement is not a significant export product for Mexico in the first place.

4.45 Guatemala objects to the untimely submission of new factual information by Mexico on the last scheduled day of the second meeting of the Panel. Guatemala submits that Mexico had an obligation to demonstrate significant impact in its request for the establishment of a panel, or at the very least, in its first written submission to the Panel. Guatemala also objects to the failure by Mexico to submit any evidence to substantiate its simple assertions of significant impact. Guatemala argues that, as the data was presented by Mexico at the second meeting with the Panel, it has had no opportunity to evaluate the accuracy of the data submitted by Mexico against any source documents and has had no opportunity to present rebuttal data for other time periods from the same sources. In other words, Mexico has been able to pick and choose from data allegedly obtained from Cruz Azul that best supports its position, but Guatemala has had no opportunity to review other data from Cruz Azul that would detract from the claims of Mexico.

4.46 **Mexico** asserts that significant impact cannot be used as a condition for establishing a panel or as a determining factor in deciding whether the panel may examine a dispute under the second sentence of Article 17.4 of the ADP Agreement. The concept of significant impact cannot be a determining factor in deciding whether the dispute may be examined because the timetables set forth in the DSU and the ADP Agreement imply that the second sentence of Article 17.4 of the ADP Agreement would be rendered void, which is not possible. According to Mexico, for the complainant to be able to demonstrate significant impact (assuming that it is necessary to do so) in purely quantitative terms (a view which it does not share), it would take longer than the actual duration of the provisional measure and, in the end, the complainant would lose the right to challenge the provisional measure under the second sentence of Article 17.4 of the ADP Agreement. Indeed, according to Article 7.4 of the ADP Agreement, the application of provisional measures cannot exceed four months (with one exception that does not apply to this case), whereas the complainant would require approximately five months to demonstrate significant impact (one and a half months to obtain the export statistics, two months to hold consultations, one month for the DSB to establish a panel and one month for the panel to begin its work).

4.47 **Guatemala** also submits that in order to make a claim relating to a provisional measure pursuant to Article 17.4 of the ADP Agreement, the complainant Member must claim "... that the measure was taken contrary to the provisions of paragraph 1 of Article 7 ...". In the introduction to its first written submission, Mexico states that "in the anti-dumping investigation in question actions were taken that are inconsistent with, at least, Articles 2, 3, 4, 5, 6 and 7 and Annex I of the ADP Agreement". Guatemala recalls that Mexico makes no reference to Article 7 in any other part of its submission, and does not cite paragraph 1 of Article 7 in any part of its submission. At no time did Mexico argue that Guatemala had violated paragraph 1 of Article 7. Nor did Mexico mention Article 7.1 of the ADP Agreement in its oral submission. Indeed, Guatemala notes that Mexico, in its request for the establishment of a panel, did not claim that paragraph 1 of Article 7 had been violated. In failing to invoke Article 7.1, Guatemala submits that Mexico also failed to meet the second requirement for the Panel to have competence to examine the provisional measure pursuant to Article 17.4 of the ADP Agreement.

4.48 **Mexico** notes Guatemala's argument concerning Article 7.1 of the ADP Agreement, and recalls that it clearly cited Article 7 in its request for the establishment of a panel, and subsequently in its submissions to the Panel. Consequently, Guatemala's second objection with respect to the provisional measure is entirely unfounded. Furthermore, since the violations of Article 7.1 occurred at the initiation of the investigation and subsequently in the affirmative preliminary resolution, Mexico suggests that it is logical that the proof of such violations should be supplied in respect of the articles concerning the initiation and the preliminary determination and not only in respect of Article 7.1, as Guatemala apparently suggests.

#### 4. Whether the initiation is before the Panel

4.49 **Guatemala** considers that Mexico is precluded from raising claims against the initiation of the investigation because: (1) it did not contest the final measure; (2) it did not claim that the provisional measure had been applied as a result of an investigation initiated in violation of Article 1 of the ADP Agreement; and (3) it did not claim that the provisional measure had been applied in violation of Article 7.1(i) of the ADP Agreement following the initiation of an investigation not in accordance with Article 5. According to Guatemala, to be able to bring the initiation of an investigation before the Panel, the complaining Member must either contest the final measure pursuant to Article 1 of the ADP Agreement, or contest the provisional measure pursuant to Articles 1 or 7.1 of the ADP Agreement. Initiation does not of itself constitute a "measure" within the meaning of Article 19 of the DSU. If the initiation were a "measure", Article 17.4 would indicate the necessary conditions for referring the "initiation measure" (as part of the "matter" on which the consultations were held) to the DSB.<sup>16</sup>

4.50 With the exception of the elimination of the conciliation phase, Guatemala considers that Article 17 of the ADP Agreement is virtually identical to Article 15 of the Tokyo Round Anti-Dumping Code. Guatemala argues that a panel was never established under Article 15 of the Tokyo Round Anti-Dumping Code just to examine the initiation of an anti-dumping investigation or the investigation itself. Indeed, a panel set up under the Tokyo Round Anti-Dumping Code was never asked to restrict itself to examining a provisional measure without the complainant party also submitting a claim regarding the final measure. For example, in EC - Imposition of Anti-Dumping Duties on Cotton Yarn from Brazil<sup>17</sup>, Brazil held consultations with the EC on 11 November 1991 after it had imposed the provisional measure on 23 September 1991. Guatemala notes that the EC imposed the final measure on 23 March 1992, and that the parties held consultations on this measure on 27 October 1993. In other words, after imposition of the provisional measure, Brazil held

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<sup>16</sup> Guatemala notes that the EC stated in a meeting of the GATT Anti-Dumping Committee that the initiation of an investigation is not equivalent to a "measure". ADP/M/40, para 242 (15 September 1993).

<sup>17</sup> EC - Imposition of Anti-Dumping Duties on Cotton Yarn from Brazil, ADP/137, paras. 1 and 6, adopted on 30 October 1995.

consultations for the purpose of dealing with the claims relating to the provisional measure. When the final measure had been imposed, Brazil held consultations for the purpose of dealing with the claims relating to the final measure and, subsequently, a panel was established.

4.51 Guatemala recalls that during the Uruguay Round negotiations, several countries proposed to amend Article 15 of the Tokyo Round Anti-Dumping Code to allow Members to contest the initiation of an investigation before a provisional or final measure was imposed. The delegation of Singapore stated that "[p]rocedures should be established which would allow the exporting country to challenge the initiation of an anti-dumping proceeding, if the initiation was frivolous and not consistent with the Code requirements."<sup>18</sup> Singapore explained that:

"Present dispute settlement procedures provide for the exporting country to seek conciliation only after the imposition of provisional duties. However, trade damage would already have been caused and code obligations violated at the stage of initiation of the anti-dumping investigation. Therefore dispute settlement procedures should be available at all stages of the anti-dumping proceedings."<sup>19</sup>

4.52 Guatemala notes that the Nordic countries similarly proposed an amendment to Article 15 of the Tokyo Round Anti-Dumping Code, to allow Members " ... to invoke the dispute settlement mechanism already in the course of an anti-dumping investigation ... ." <sup>20</sup> The Nordic countries proposed that the phrase "and final action has been taken by the administering authorities of the importing country to levy definitive duties or to accept price undertakings" should be deleted from Article 15.3.<sup>21</sup> During the Uruguay Round, at a meeting of the Negotiating Group on anti-dumping, one delegation commented that "[d]ispute settlement procedures should be available at all stages of the anti-dumping proceedings, and procedures should also allow exporting countries to challenge the initiation of a proceeding."<sup>22</sup>

4.53 Guatemala states that the signatories to the Uruguay Round rejected proposals that would have allowed Members to make a claim against the initiation of an investigation without contesting the provisional or final measures in their complaints. Guatemala asserts that the text eventually agreed upon, Article 17.4 of the ADP Agreement, is virtually the same as Article 15.3 of the Tokyo Round Anti-Dumping Code. According to Guatemala, under Article 17.4, in order to bring the initiation of an investigation before a panel, the Member must respect the same procedures (with the exception of conciliation) as under Article 15.3 of the Tokyo Round Anti-Dumping Code. The Member must await imposition of the final measure (unless it can show that the provisional measure was having a significant impact), hold consultations on the final measure and allow the specified time-limit to elapse before requesting the establishment of a panel to examine the final measure directly. According to Guatemala, when the Signatories rejected proposals to allow Members to make a claim against the initiation of an investigation without also contesting the provisional or final measure, they had very good reason for doing so. Firstly, for a panel to examine the decision to initiate an investigation whose final outcome might be negative would violate the fundamental GATT principle of judicial economy. Members should not be obliged to dissipate their resources in defending a decision on initiation or on the conduct of an investigation that does not lead to the imposition of a provisional or final measure. Secondly, restricting the dispute settlement procedure to claims against provisional or final measures prevents an exporting country from utilizing the dispute settlement mechanism to intimidate the investigating country or to obtain termination of the investigation or a negative preliminary or final determination. Guatemala suggests that the risk of

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<sup>18</sup> MTN.GNG/NG8/W/55, page 10 of the English text (13 October 1989).

<sup>19</sup> *Ibid*, pages 10-11 of the English text.

<sup>20</sup> MTN.GNG/NG8/W/64, page 10 of the English text (22 December 1989).

<sup>21</sup> MTN.GNG/NG8/W/76, page 5 of the English text (11 April 1990).

<sup>22</sup> MTN.GNG/NG8/15, page 55 of the English text (19 March 1990).

intimidation is greater when the country conducting the investigation is much less developed and considerably less experienced in anti-dumping investigations than the exporting country.

4.54 Guatemala notes that Article 19.1 of the DSU is consistent with Guatemala's interpretation of the words "matter" and "measure" under the ADP Agreement and the DSU. The only "measures" imposed under the ADP Agreement are provisional measures, final measures, or price undertakings. In the present procedure, Mexico has agreed that the final measure is outside the Panel's terms of reference. There has never been a price undertaking. Consequently, the provisional measure is the only measure on which the Panel may make a recommendation, in accordance with Article 19.1 of the DSU. According to Article 7.1 of the ADP Agreement, a provisional measure may only be imposed if an investigation has been initiated properly. The Panel could recommend, therefore, that Guatemala bring the provisional measure into conformity with the Agreement, but only if it is determined that (a) the provisional measure has a significant impact, in accordance with the provisions of Article 17.4, and (b) the initiation of the investigation is not consistent with Guatemala's obligations under Article 7.1. Mexico does not claim that Guatemala has violated paragraph 1 of Article 7.

4.55 According to Guatemala, even on the remote hypothesis that the Panel concludes that Guatemala improperly initiated the investigation, it would be legally inadmissible and an open violation of its terms of reference for the Panel to recommend that Guatemala bring the final measure into conformity with the Agreement. Mexico could have made its request for consultations and for the establishment of a panel in relation to the final measure, basing its claim on Article 1 of the ADP Agreement and arguing that the final measure had been applied following an investigation that had not been initiated in accordance with the provisions of the Agreement. This was the approach adopted by Mexico in 1990 when it challenged the measure imposed by the United States against grey portland cement. In the present case, however, Mexico did not request consultations or the establishment of a panel to examine the final measure and did not allege that the final measure violated Article 1 of the ADP Agreement. Article 17 of the ADP Agreement does not regulate the question of recommendations by panels. The Panel should, therefore, interpret the ADP Agreement in light of Article 19 of the DSU. Neither the "investigation" nor the "initiation" constitutes a "measure" that can be brought into conformity with the ADP Agreement, as provided in Article 19 of the DSU.

4.56 Guatemala submits that if a Member wishes to bring a case against the initiation of an anti-dumping investigation, it must either demonstrate that the provisional measure had a significant impact, or await the imposition of the final measure.<sup>23</sup> If the Member considers that the provisional and final measures were not imposed in accordance with the ADP Agreement, then, during the consultations, in its request for the establishment of a panel and in its first submission, it must claim that the provisional measure was imposed in violation of Article 7.1 or Article 1 of the ADP Agreement, and that the final measure was imposed in violation of Article 1 of the ADP Agreement. According to Guatemala, Article 7.1 provides that the provisional measure may only be imposed if an investigation has been initiated in accordance with the provisions of Article 5 of the ADP Agreement. Article 1, on the other hand, states that an anti-dumping measure may only be applied pursuant to an investigation initiated and conducted in accordance with the ADP Agreement. A claim made under Article 1 may relate to the final anti-dumping measure imposed pursuant to an investigation initiated in a manner inconsistent with the Agreement. Guatemala submits that Mexico did not claim or allege violation of Article 1, did not make any claim about the final measure, did not show that the provisional measure had a significant impact, and did not claim or allege violation of Article 7.1. Consequently, Guatemala requests the Panel to reject Mexico's claims relating to the initiation of the investigation.

4.57 **Mexico** notes that according to Guatemala, Article 17.4 of the ADP Agreement provides that only three types of measure may be challenged in the anti-dumping context: (a) a provisional

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<sup>23</sup> Guatemala notes that Members may hold informal consultations at any time on any aspect of the anti-dumping procedure.

measure; (b) a final measure; or (c) a price undertaking. Mexico submits that this assertion is based on two totally incorrect assumptions: (1) that what is referred to the DSB is the measure (not the matter) and (2) that Mexico's claim was based on the first sentence of Article 17.4 when in fact it was based on the second sentence of Article 17.4. Following the same logic as Guatemala, though on a correct basis (i.e. that Mexico lodged its claim under the second sentence of Article 17.4), Mexico submits that the initiation of an anti-dumping investigation constitutes a measure for the purposes of Article 19.1 of the DSU. In the second sentence of Article 17.4 (unlike the first sentence, which mentions two of the three measures referred to by Guatemala), it is established that when a Member "considers that the [provisional] measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB". Since Article 7.1(i) of the ADP Agreement refers explicitly to the initiation of an investigation, Mexico argues that initiation constitutes a part of the matter referred to the DSB. According to Mexico, the only difference between the first and the second sentences is that, for the matter to be submitted to the DSB, the first sentence requires the application of either of the two measures stated (final measure or price undertaking), whereas the second requires only application of the provisional measure. However, in both cases the matter may include any violation of the ADP Agreement, including those related to the initiation of an investigation.

4.58 Mexico suggests that, from a practical point of view, it is illogical to assume that the initiation of an investigation may not be the subject of the remedy provided for in Article 19.1 of the DSU. Such an assumption would imply that the initiation of any investigation would be exempt from the WTO's dispute settlement mechanism and that the second sentence of Article 17.4 of the ADP Agreement is totally inoperative. If the initiation of an investigation is not regarded as a measure, then it could never be submitted to a panel since the latter would be unable to make any recommendations thereon, even though Article 17.4 of the ADP Agreement allows any Member to refer such a matter to the DSB. Furthermore, if the second sentence of Article 17.4 referred only to provisional measures, it would be inoperative because the time needed for consultations, the establishment of a panel and the panel report would in all cases exceed the maximum period allowed between the preliminary and final determinations in an anti-dumping investigation. In other words, by the time the panel's findings on a provisional measure were issued, the measure would have been replaced by a definitive measure which could not have been examined by the panel because it was issued after the panel was established. Mexico submits that both Article 17 of the ADP Agreement and Appendix 2 and Article 7.1 of the DSU refer to the "matter", and not the "measures", as in cases other than anti-dumping. Although the initiation of an anti-dumping investigation constitutes a "measure" for the purposes of Article 19.1, it remains a "matter" for the purposes of Article 17.4 of the ADP Agreement and Article 7.1 of the DSU. "Matter" is a broader concept than "measure", and includes the latter without coming into contradiction with it. Accordingly, Mexico submits that Article 19.1 of the DSU applies to the case under examination.

4.59 **Guatemala** notes that Mexico's complaint was brought by virtue of the second sentence of Article 17.4 of the ADP Agreement, because the "matter" (i.e. the "claims" referring to the measure specified in the application) mentioned in Article 17.4 is the same as the "matter" that was the subject of the request for consultations under Article 17.3. Mexico admits that the "matter" on which the consultations were held did not include the claims concerning the final measure, because at the time the final measure had not been issued. As long as the final measure had not been issued, there was no way to comply with the requirements in Article 17.4 whereby the Member that requested consultations in respect of that matter should consider that the consultations "have failed to achieve a mutually agreed solution," simply because the final measure was not part of the consultations and is not one of the claims included in the matter submitted to the Panel for examination. In short, only the claims which challenge the provisional measure constitute the matter at issue in this case, and consequently, only the second sentence of Article 17.4 is relevant to the request for the establishment of this Panel.

4.60 Guatemala also argues that it is not true that the initiation of the investigation and the provisional measure could not be the subject of consultations or could not properly be examined by a panel. Guatemala considers both to be possible, provided the complaining Member meets the prerequisites laid down in the second sentence of Article 17.4 of the ADP Agreement. In other words, once significant impact has been established, if the complaining party invokes the violation of Article 7.1 (concerning the initiation), it is possible to hold consultations under Article 17.3 and then to request the establishment of a panel to examine the provisional measure. If the examination is favourable to the complainant, the panel may recommend that the provisional measure be brought into conformity with the Agreement; in short, this would be the means by which to remedy the significant impact claimed by the complainant. In fact, the panel may remedy the repercussion caused by a provisional measure even where a Member has not challenged the final measure, and may also do so when the Member has challenged both the provisional measure and the final measure and the panel concludes that the final measure was issued in conformity with the Agreement.

4.61 Guatemala argues that while Mexico is concerned that the examination of the provisional measure might be inoperative when the Panel produces its report, and is therefore insisting that the initiation of the investigation should be given the status of a measure that can be challenged in itself, the fact is that the ADP Agreement does provide for the examination of a provisional measure when its trade impact so justifies. In this particular case, Mexico was somewhat hasty in bringing the dispute when the provisional measure was not causing an impact that justified such premature action, undoubtedly in an unsuccessful attempt to prevent Guatemala from imposing the final measure. Moreover, Mexico's concern confirms that the challenge of a provisional measure is exceptional and that the exporting Member should only challenge a provisional measure when its impact is such that it simply cannot await the final measure. If Mexico, in these proceedings, had invoked and demonstrated significant impact, and it did not, the way would be clear for it to invoke and demonstrate the violations allegedly committed by the investigating authority under Article 7, paragraph 1.

4.62 Guatemala maintains that Article 17.4 of the ADP Agreement identifies in a concrete and exhaustive manner the measures that can be subject to examination: the provisional measure, the price undertaking and the final measure. Guatemala submits that Article 1 of the ADP Agreement supports its position that the initiation of the investigation is not a measure. Indeed, within the same sentence Article 1 of the ADP Agreement speaks of the "anti-dumping measure" and stipulates that the said measure shall be applied pursuant to investigations initiated. What is more, if the initiation were a "measure," Article 17.4 would clearly indicate the necessary conditions for referring the "initiation measure" (as part of the "matter" on which the consultations were held) to the DSB. The fact is, Article 17.4 does not in any way provide for the establishment of a panel to examine the initiation of an investigation.

4.63 **Mexico** also notes that Article 17.3 of the Spanish version of the ADP Agreement establishes clearly that if a Member considers that an "*acción*", not a "measure", by another Member nullifies or impairs any benefit accruing to it directly or indirectly under the ADP Agreement or that the achievement of any objective is being impeded, that Member may request consultations with a view to reaching a mutually satisfactory resolution of the matter. Mexico states that it is plain from this text that nowhere does the ADP Agreement establish that only measures may be the subject of consultations. The ADP Agreement establishes that consultations may concern any action by another party which violates the rights of the exporting party, i.e. actions both at the initiation stage and in the course of the investigation. Consequently, in the present dispute and for the purposes of Article 17 of the ADP Agreement and Article 7.1 of the DSU, Mexico submits that the term "action"/"*acción*" should be used instead of the "measures" used by Guatemala. According to Mexico, to do otherwise would be to distort the intent of the authors of both these instruments in drafting the above Articles.

4.64 **Guatemala**, in noting Mexico's argument concerning the word "*acción*", observes that the terminological difference pointed out by Mexico is simply a superficial difference without substantive

effect. In any case, for the purposes of interpretation Guatemala refers to Article 33.1 of the Vienna Convention, which stipulates that 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. The Marrakesh Agreement Establishing the WTO and the Multilateral Agreements in Annex thereto were produced in Spanish, French and English, with the indication that each text was equally authentic. Thus, in order to interpret the meaning, or rather the lack of meaning, of the word "*acción*", the Panel may, in its examination of Article 17.3 of the ADP Agreement, refer to the English and French versions. In this regard, Guatemala cites United States - Procurement of a Sonar Mapping System<sup>24</sup>, in which the panel used the French and Spanish texts of the Tokyo Round Code on Government Procurement to interpret the English version. Moreover, Article 33.3 of the Vienna Convention stipulates that "the terms of the Treaty are presumed to have the same meaning in each authentic text". Thus, the word "*acción*" used in the Spanish version, which does not appear in the English and French versions, is a mere anomaly without relevance to the case at issue. Without prejudice to this fact, it is possible that the translator may have included the word "*acción*" as a way of rounding out the concept without actually contradicting the other language versions since the "action" of the investigating authority will ultimately acquire concrete form or expression in the adoption of measures. According to Guatemala, the three language versions refer to measures of the ADP Agreement. This conclusion is supported by Article 33.4 of the Vienna Convention, which stipulates that the meaning which best reconciles the texts, having regard to the object and purpose of the Treaty, shall be adopted. Article 31 of the Vienna Convention also stipulates that 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. Guatemala notes that Article 17.3 of the ADP Agreement and Article 4.4 of the DSU establish that only the "measure" identified in the application and the claims relating to that measure which make up the "matter at issue" may be the subject of consultations. According to Guatemala, therefore, the word "*acción*" in the Spanish version is meaningless.

4.65 **Mexico** notes Guatemala's argument that to be able to bring the initiation of an investigation before a panel, the complaining Member must either contest the final measure pursuant to Article 1, or contest the provisional measure pursuant to Articles 1 or 7.1. According to Mexico, this argument is unjustified from the point of view of both the substance and the accuracy of the reasoning. As regards substance, Mexico contends that claims concerning the initiation of an investigation must be made in respect of the provisions of the ADP Agreement concerning the initiation of investigations, and not in respect of Article 7. Article 7, paragraph 1(i) simply recalls that one of the conditions for applying provisional measures is the initiation of the investigation in accordance with the provisions of Article 5 of the Agreement. According to Mexico, Article 7.1(i) does not itself contain the substantive provisions which define a challenge to the initiation of an investigation. Mexico submits that the accuracy of Guatemala's argument is also faulty, since Mexico did indeed cite Article 7 of the ADP Agreement in the request for the establishment of a panel, as well as in the other documents submitted by Mexico to the Panel.

4.66 **Guatemala** contends that Mexico's request for establishment of a panel does not cite either the first or second sentences of Article 17.4 of the ADP Agreement, and does not cite paragraph 1 of Article 7. The ordinary meaning of the text clearly indicates that in the case of a final measure or a price undertaking, the drafter is not imposing, as a prerequisite, either a trade impact or the violation of Article 7.1, while any dispute concerning a provisional measure is, by its exceptional character, subject to those two requirements. In its request for establishment of a panel, Mexico did not bring any claim based on paragraph 1 of Article 7 of the ADP Agreement, and this omission cannot be corrected in its written submissions to the Panel. Because it failed to cite these legal provisions or invoke the violation of Article 7.1 in compliance with the prerequisites laid down in Article 17.4 of the ADP Agreement, Guatemala requests that the Panel reject Mexico's complaint.

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<sup>24</sup> United States - Procurement of a Sonar Mapping System, GPR.DS1/R, not adopted, para. 4.18, dated 23 April 1992.

4.67 Guatemala further states that Mexico recognized in its rebuttal that "the final measure was not included in the request for the establishment of a panel" and also recognized that the final measure "in itself is not challenged."<sup>25</sup> Consequently, even if Mexico had invoked the violation of Article 1 on the grounds that the initiation did not comply with the legal requirements, the Panel would not have the mandate to examine the final measure. Moreover, Guatemala notes that Mexico's oral submission at the First Meeting stated that "Mexico did not in any way request that the final determination of Guatemala's anti-dumping investigation should be considered by this Panel. The reason being that the final determination was not a topic discussed in the consultations held with Guatemala." In other words, if this Panel were to rule on the final measure, it would be violating its obligation to examine only those measures in respect of which there has been an opportunity to achieve a mutually agreed solution.

5. Whether certain claims were in the request for establishment and are before the Panel.

4.68 Guatemala asserts that seven claims were not included in Mexico's request for the establishment of a panel, and therefore fall outside the Panel's terms of reference. Guatemala's objections relate to Mexico's claims:

- that Guatemala failed to give adequate consideration to the increase in imports from Cruz Azul;
- that Guatemala failed to give adequate consideration to the fall in the price of the domestic product;
- that Guatemala failed to give adequate consideration to the loss of customers;
- that Guatemala failed to give adequate consideration to the likelihood of an imminent increase in Mexican exports to Guatemala;
- that Guatemala violated Articles 6.1, 6.2 and 6.8 of the ADP Agreement by not accepting the technical accounting evidence regarding the normal value and the export price charged by the exporter during the original investigation;
- that Guatemala violated Articles 6.5.1 and 6.5.2 of the ADP Agreement by accepting confidential information from Cementos Progreso without demanding a public version thereof, or the reasons why confidential treatment was required; and
- that Guatemala violated Articles 6.1 and 6.2 of the ADP Agreement by failing to establish specific time-limits for Cruz Azul to submit information in defence of its interests.

4.69 According to Guatemala, the ADP Agreement contains special provisions for the settlement of disputes which are applicable solely to anti-dumping cases. The rules of the Tokyo Round Anti-Dumping Code - which preceded the ADP Agreement, and which contained similar provisions on this subject - were interpreted by panels to mean that, in the request for the establishment of a panel in a dispute concerning anti-dumping, the complainant was obliged to describe the individual claims in more specific detail than was normally required under the general provisions of the GATT dispute settlement system. Thus, Guatemala recalls that the Appellate Body relied on the following interpretation adopted by panels under the Tokyo Round Anti-Dumping Code:

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<sup>25</sup> As originally submitted, Mexico's rebuttal stated that "the final measure was not included in the request for the establishment of a panel", and "the final measure in itself is not challenged". Mexico submitted a corrigendum to its rebuttal, correcting its argument to read "the final determination was not included in the request for the establishment of a panel", and "the final determination in itself is not challenged".

"The "matter" referred to a panel for consideration consists of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference. We agree with the approach taken in previous adopted panel reports that a matter, which includes the claims composing that matter, does not fall within a panel's terms of reference unless the claims are identified in the documents referred to or contained in the terms of reference."<sup>26</sup>

4.70 Guatemala argues that under the Tokyo Round Anti-Dumping Code, panels established a three-step process of dispute settlement in which panel examination of a matter, and the individual claims of which a matter is composed, would be preceded by consultations concerning that same matter and conciliation concerning that same matter.<sup>27</sup> In accordance with the decision of the Appellate Body in Brazil - Measures Affecting Desiccated Coconut<sup>28</sup>, Guatemala maintains that the "matter" referred to a panel is the sum total of all the "claims" raised in the document in which the establishment of a panel was requested.<sup>29</sup> Moreover, Guatemala asserts that a "claim" is defined as "the specification of the particular legal and factual basis upon which it was alleged that a provision of the Agreement had been breached ... there could be more than one legal basis for alleging a breach of the same provision of the Agreement and ... a claim in respect of one of these would not also constitute a claim in respect of the other".<sup>30</sup>

4.71 According to Guatemala, panels convened to deal with anti-dumping cases have considered that under the Tokyo Round Anti-Dumping Code, the terms of reference of a panel must satisfy two objectives: "[1] definition of the scope of a panel proceeding, and [2] provision of notice to the defending Party and other Parties that could be affected by the panel decision and the outcome of the

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<sup>26</sup> Report of the Appellate Body, Brazil - Measures Affecting Desiccated Coconut, DS22/AB/R, page 22, adopted on 21 February 1997.

<sup>27</sup> Guatemala refers to United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87, paragraph 332, adopted on 27 April 1994. See also EC - Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan, ADP/136, paragraph 295, not adopted, dated 28 April 1995.

<sup>28</sup> Report of the Appellate Body, Brazil - Measures Affecting Desiccated Coconut, DS22/AB/R, page 22, adopted on 21 February 1997.

<sup>29</sup> In support of its argument, Guatemala refers to United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87, paragraph 332, adopted on 27 April 1994; United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, SCM/153, paragraph 212, adopted on 28 April 1994; EC - Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan, ADP/136, paragraph 295, not adopted, dated 28 April 1995. Guatemala particularly points to the decision of the panel in United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, rejecting Norway's definition of the "matter" in dispute as "the imposition of anti-dumping duties by the United States on imports of Atlantic salmon". According to the panel (para. 342):

"The logical implication of the definition advanced by Norway of the 'matter' before the Panel was that whenever a panel was established in a dispute concerning the imposition of anti-dumping duties, such a panel could examine any aspect of the procedures followed and determinations made by the investigating authorities of the party which had imposed the anti-dumping duties, regardless of whether that aspect had been referred to in the complaining party's request for the establishment of a panel. There would therefore be practically no limit to the claims which could be raised before a panel without any advance notice to the defending party or to third parties."

<sup>30</sup> EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, ADP/137, paragraphs 444-445, adopted on 30 October 1995.

dispute."<sup>31</sup> In order to satisfy those objectives, each individual claim composing the matter must be identified in the written communication(s) referred to or contained in the terms of reference of the panel. In other words, individual claims would have to be specified in the document requesting the establishment of a panel.<sup>32</sup> In support of this position, Guatemala stresses that the document defining the terms of reference is prepared by the complainant.<sup>33</sup> Thus, in order for an individual claim to be examined by a panel, it must fall within the latter's terms of reference and to that end must have been specifically identified in the request for the establishment of a panel.

4.72 Guatemala submits that, for a claim to be specifically identified, the complaining party "should ... have identified during conciliation and in its request for establishment of a panel the action or factual situation allegedly giving rise to an inconsistency with the Agreement and the obligation under the Agreement that allegedly was violated."<sup>34</sup> It is not enough for a panel to say that the matter "can reasonably be interpreted" as amounting to a claim covered by the written request for consultations or the request for the establishment of a panel.<sup>35</sup> Guatemala recalls EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, in which the panel:

"considered that it was not sufficient that a contention simply 'can reasonably be interpreted' as amounting to a claim, as that implied that there could be indeterminacy or ambiguity regarding the ambit of a claim. This would, in the view of the Panel, run counter to the fundamental purpose of the terms of reference, which was to give advance notice to the defendant and to third parties of the claim at issue. This purpose could only be effectively served if there was no ambiguity regarding the ambit of the claim at issue. The Panel considered that, in order to ensure this, a claim had to be expressly referred to in [the document in which the establishment of a panel was requested] in order to be within its terms of reference. The Panel accordingly dismissed Brazil's argument on this point."<sup>36</sup>

4.73 Guatemala asserts that, in EC - Imposition of Anti-Dumping Duties on Audio Tapes and Cassettes originating in Japan, the panel similarly rejected the complaining party's argument that consideration should be given to "how its interests might be affected" by the panel's failure to refer to specific claims. Guatemala notes that the panel "did not consider that such an assessment would be either appropriate or feasible", and stated that it could not understand the basis on which a panel could after the fact consider whether certain claims might have been resolved in previous stages of the

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<sup>31</sup> United States Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87, paragraph 336, adopted on 27 April 1994; United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, SCM/153, paragraph 208, adopted on 28 April 1994; EC - Anti-Dumping Duties on Audio Tapes and Cassettes Originating in Japan, ADP/136, paragraph 297, not adopted, dated 28 April 1995. The panel in EC - Anti-Dumping Duties on Audio Tapes and Cassettes Originating in Japan found that "the notice function of terms of reference was particularly important in providing the basis for each Party to determine how its interests might be affected and whether it would wish to exercise its right to participate in a dispute as an interested third party."

<sup>32</sup> EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, ADP/137, paragraph 450, adopted on 30 October 1995; United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87, paragraph 336, adopted on 27 April 1994; United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, SCM/153, paragraph 208, adopted on 28 April 1994; EC - Anti-Dumping Duties on Audio Tapes and Cassettes Originating in Japan, ADP/136, paragraph 303, not adopted, dated 28 April 1995.

<sup>33</sup> United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87, paragraph 336, adopted on 27 April 1994.

<sup>34</sup> EC - Anti-Dumping Duties on Audio Tapes and Cassettes Originating in Japan, ADP/136, paragraph 303, not adopted, dated 28 April 1995. Guatemala also refers to EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, ADP/137, paragraph 450, adopted on 30 October 1995.

<sup>35</sup> EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, ADP/137, paragraph 456, adopted on 30 October 1995.

<sup>36</sup> *Ibid.*

dispute settlement process had those claims been raised during those stages of the process. Nor did that panel consider that, after the fact, a panel would have a basis on which to consider whether the rights of third parties to protect their interests through participation in the panel process were jeopardized by the failure of a complainant to raise a claim at the time it requested the establishment of a panel.<sup>37</sup>

4.74 Guatemala considers that in EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, the panel found that nowhere in the request for the establishment of a panel submitted by Brazil was there any reference to the EC having made an incorrect determination that certain domestic sales were not in the ordinary course of trade, and on that basis the panel rejected Brazil's argument concerning the ordinary course of trade.<sup>38</sup> Guatemala recalls that the panel also rejected Brazil's argument that the ordinary course of trade claim could "reasonably" be interpreted as being covered by the document in which the establishment of a panel was requested.<sup>39</sup>

4.75 According to Guatemala, in United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, the panel considered that its terms of reference did not extend to Norway's claim that the United States was denying Norway national treatment in accordance with Article III of the GATT 1947.<sup>40</sup> Guatemala recalls that the panel pointed out that Norway "did not refer to this claim, however characterized" in its request for the establishment of a panel.<sup>41</sup> According to Guatemala, Norway argued that its claim was included in the request for the establishment of a panel through a reference to the denial by the United States of "equitable and open procedures".<sup>42</sup> The panel found that, while Norway's request identified four specific aspects of the claim regarding the lack of "equitable and open procedures", these did not include denial of national treatment.<sup>43</sup> The panel therefore considered that "the claim in question was not identified in [Norway's request for the establishment of a panel], and thus reasonable notice had not been provided to the defending party nor to third parties that the claim would be raised in this dispute".<sup>44</sup> Guatemala notes that the panel also rejected Norway's argument that the "matter" before the panel consisted of the imposition of anti-dumping duties. On the contrary, the "matter" consisted of the specific claims stated by Norway in those documents. Consequently, Guatemala notes that the panel concluded that it could not examine the merits of Norway's claim regarding the denial of national treatment because that claim was not within its terms of reference.<sup>45</sup>

4.76 Guatemala argues that, in EC - Anti-Dumping Duties on Audio Tapes and Cassettes Originating in Japan, the panel rejected the claim by Japan that the EC's methodology for selecting the

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<sup>37</sup> EC - Imposition of Anti-Dumping Duties on Audio Tapes and Cassettes, ADP/136, paragraph 301, not adopted, dated 28 April 1995.

<sup>38</sup> EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, ADP/137, paragraph 453, adopted on 30 October 1995.

<sup>39</sup> *Ibid.*, paragraph 456.

<sup>40</sup> United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87 paragraph 341, adopted on 27 April 1994.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, paragraph 342. Similarly, in United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway (SCM/153, paragraph 207, adopted on 28 April 1994), the United States expressed preliminary objections to panel consideration of two Norwegian claims regarding the United States' failure to carry out an "upstream subsidy analysis", and regarding continued application of the countervailing duty order under Article 4:9 of the Tokyo Round Subsidies Code. At para. 209 of its report, the panel reviewed Norway's request for the establishment of a panel and found that it included no reference to the alleged failure by the United States to carry out an upstream subsidy analysis or to the continued application of the countervailing duty order under Article 4:9. Consequently, at para. 215 the panel concluded that its terms of reference did not include the Norwegian claims.

export models to be used in performing a comparison of price undercutting was within the terms of reference of the panel<sup>46</sup>:

"In the view of the Panel, a statement that the EC's undercutting methodology was 'defective' and contained 'arbitrary and prejudicial elements', without any identification of the element or elements of the EC's methodology deemed to be inconsistent with the Agreement, did not identify the action or factual situation allegedly giving rise to an inconsistency with the Agreement with sufficient particularity to allow a potential third party to decide whether its interests might be affected such that it would exercise its right to participate in the proceeding."<sup>47</sup>

4.77 Guatemala submits that, by virtue of Article 31 of the Vienna Convention and the 1994 Marrakesh Agreement, a panel must be guided by the interpretation adopted by previous panels established under the Tokyo Round Anti-Dumping Code when interpreting the degree of specificity required in a request for the establishment of a panel under Article 17 of the ADP Agreement. Guatemala states that this is especially so given that the dispute settlement provisions of the Tokyo Round Anti-Dumping Code are virtually identical to those contained in the ADP Agreement. As was stated by the panel in EC - Regime for the Importation, Sale and Distribution of Bananas, Guatemala argues that the cases dealt with under the Tokyo Round Anti-Dumping Code are "of limited relevance in the interpretation of the terms of Article 6.2 of the DSU [because] the Tokyo Round Anti-Dumping Code had different rules for the initiation of panel procedures than were applicable in the case of GATT 1947 panels".<sup>48</sup>

4.78 Guatemala asserts that the panel in EC - Regime for the Importation, Sale and Distribution of Bananas<sup>49</sup>, and the Appellate Body in earlier decisions found that, under Article 3.2 of the DSU, the starting point for the interpretation of the provisions of international treaties is Articles 31 and 32 of the Vienna Convention.

4.79 Guatemala recalls in addition that Article XVI of the Marrakesh Agreement establishing the World Trade Organization provides that:

"Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947".

4.80 According to Guatemala, the panel in EC - Regime for the Importation, Sale and Distribution of Bananas also observed that "the nature of anti-dumping cases is different from this case".<sup>50</sup> In disputes relating to anti-dumping measures, panels are required to review the factual and legal determinations of investigations carried out by the domestic authorities as opposed to the laws or regulations implemented by the national legislative authorities or administrative bodies. Claims under the GATT 1947 (or the GATT 1994) and other covered agreements may refer to any number of measures potentially inconsistent with a Member's obligations. On the other hand, Guatemala submits that anti-dumping cases involve only three possible measures: provisional measures, price undertakings, or a final measure. In accordance with the interpretations given by panels set up under the Tokyo Round Anti-Dumping Code, when interpreting rules similar to those contained in Article

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<sup>46</sup> EC - Anti-Dumping Duties on Audio Tapes and Cassettes Originating in Japan, ADP/136, paragraph 311, not adopted, dated 28 April 1995.

<sup>47</sup> *Ibid.*, paragraph 310.

<sup>48</sup> EC - Regime for the Importation, Sale and Distribution of Bananas, DS27/R/GTM, paragraph 7.42, adopted 25 September 1997.

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

17 of the ADP Agreement, Guatemala therefore submits that a panel must require a greater degree of specificity in the identification of claims in a request for the establishment of a panel under the ADP Agreement.

4.81 Guatemala notes that in its request for the establishment of a panel, Mexico cited the following inconsistencies with the ADP Agreement in connection with the threat of injury:

- (i) affirmative determination of the threat of injury in violation of the guidelines laid down in the ADP Agreement;
- (ii) attempt to equate the accumulation of inventories of raw material (clinker) with inventories of the product under investigation (cement) for the purpose of determining the threat of injury;
- (iii) attributing the threat of injury to the Guatemalan domestic industry to imports from Mexico when it was caused by other factors (e.g. increase in inventories, decline in sales, kiln stoppages, *inter alia*).

4.82 Guatemala asserts that it might be argued that Mexico did not make any proper claim concerning these alleged inconsistencies because it did not assert the alleged violation of any specific provision or article of the ADP Agreement. If, for the sake of argument, it is assumed that the request made by Mexico for the establishment of a panel could be interpreted in the broadest sense to include an alleged violation of Article 3, Guatemala suggests that Mexico would have had to identify the following hypothetical claims relating to the preliminary determination of threat of injury in order to bring the issue before a panel:

- Claim 1: Guatemala's action is inconsistent with Article 3 because it made a preliminary affirmative determination of threat of injury after attempting to compare the accumulation of inventories of raw material (clinker) with inventories of the product investigated (cement);
- Claim 2: Guatemala's action is inconsistent with Article 3 because it made a preliminary affirmative determination of threat of injury by improperly considering that the increase in inventories was caused by imports from Mexico and not by other factors;
- Claim 3: Guatemala's action is inconsistent with Article 3 because it made a preliminary affirmative determination of threat of injury by improperly considering that the decline in sales was caused by imports from Mexico and not by other factors; and
- Claim 4: Guatemala's action is inconsistent with Article 3 because it made a preliminary affirmative determination of threat of injury by improperly considering that the stoppage of the kilns was caused by imports from Mexico and not by other factors.

4.83 Guatemala notes that Mexico made six claims in its first submission to the Panel because, in Mexico's view, Guatemala did not consider properly the factors listed in Article 3.7 of the ADP Agreement when making a preliminary determination of threat of injury. The six claims refer to:

- Claim (a): Increase in imports;
- Claim (b): Accumulation of inventories and underutilization of plant capacity;

- Claim (c): Decrease in sales;
- Claim (d): Decrease in the domestic producer's prices;
- Claim (e): Loss of customers; and
- Claim (f): Excess plant capacity in the exporting firm and demand conditions in the Mexican market.

4.84 Guatemala asserts that claim (b) in Mexico's first submission corresponds to hypothetical claims 1, 2 and 4 in the request for the establishment of a panel; claim (c) corresponds to hypothetical claim 3 in the request for the establishment of a panel. Thus, according to Guatemala, claims (a), (d), (e) and (f) in Mexico's first submission do not correspond to any of the claims raised directly or indirectly in its request for the establishment of a panel and should therefore be rejected because they are outside the Panel's terms of reference. The claims relating to the final stage also fall outside the Panel's terms of reference because in its request for the establishment of a panel Mexico did not directly or indirectly identify any claim concerning the utilization of the technical accounting evidence, the use of confidential information, or the failure to establish specific time-limits. Guatemala considers that the reasons for which Mexico did not identify these claims in its request for the establishment are not relevant to the determination to be made by this Panel concerning their inclusion in the terms of reference. The ADP Agreement, the DSU and the practice followed by panels established under the GATT and the WTO (including the Appellate Body) do not make any reference to reasons that might justify the examination of claims that are not duly identified in the terms of reference of a panel.

4.85 **Mexico** considers that it is not possible - nor is it a requirement of the ADP Agreement or the DSU - to list the arguments of the dispute one by one in the request for establishment, and even less possible to relate each and every such argument to the provision with which it is allegedly inconsistent. That would imply going far beyond what is required by Article 6.2 of the DSU. This Article only requires the applicant to "identify the specific measures at issue", and to provide "a brief summary of the legal basis of the claim sufficient to present the problem clearly".

4.86 Mexico argues that it submitted its request for the establishment of a panel in conformity with Article 6.2 of the DSU, since the request indicated how the benefits accruing to Mexico had been nullified and impaired by Guatemala, and that consultations had been held without reaching a mutually satisfactory resolution. At the same time, the request identified the specific matters at issue and provided a brief summary of the legal basis of the claims in order to present the problem clearly.

4.87 Mexico submits that, in the case in question, the reference to "specific measures at issue" in Article 6.2 of the DSU does not apply since, according to Article 17.4 of the ADP Agreement and Appendix 2 of the DSU, what is important is the "matter" referred to the DSB and not the measures as such. Since Mexico's request for the establishment of a panel not only refers to all the matters at issue (initiation, preliminary determination, and final stage of the proceeding) but also includes a brief summary of the legal basis of the claim that is sufficiently clear to present the problem clearly, Mexico notes that the request was accepted and approved by the DSB.

4.88 **Guatemala** suggests that Mexico's argument concerning the non-application of parts of Article 6.2 of the DSU is the result of Mexico's repeated confusion of the words "matter" and "measures", a confusion which is avoidable given the clarity of the ADP Agreement and the conclusions of the Appellate Body. Contrary to what Mexico claims, the initiation, the preliminary determination and the final stage of the proceedings mentioned in its request for the establishment of a panel are not the "matters at issue". According to Guatemala, the only "matter" at issue is the matter consisting of the individual claims addressing the provisional measure, since this was the only measure that Mexico identified in its request. Moreover, Guatemala suggests that Mexico's arguments

are irrelevant for the purpose of determining whether Mexico identified the individual claims specifically enough in its request for establishment. Article 6.2 of the DSU requires the complaining Member to include in its request for the establishment of a panel the specific identification of the anti-dumping measure at issue and of the claims making up the legal basis of the challenge against that measure. In other words, the requirement for the complainant in an anti-dumping case to present its claims specifically has nothing to do with the requirement in Article 6.2, which refers to the obligation to identify the measure at issue.

4.89 According to **Mexico**, it follows from the request for the establishment of a panel that Mexico's claim specifically covers the fact that the initiation and conduct of the investigation, like the preliminary determination of threat of injury, contravened the relevant provisions of the ADP Agreement (WT/DS60/2, paragraph (b)(ii)), and that in the final stage of the proceeding there were various violations of the Mexican exporter's rights of defence in contravention of Article 6 of the ADP Agreement (WT/DS60/2, paragraph (c)(i) to (iv)). Mexico argues that detailing and developing each of the paragraphs and subparagraphs of the request for the establishment of a panel would have meant going far beyond the "brief summary of the legal basis of the complaint" required by Article 6.2 of the DSU. Mexico notes that in each case details were developed in Mexico's first submission to the Panel.

4.90 Mexico asserts that, according to Article 7 of the DSU, the Panel's terms of reference are to examine "the matter referred to the DSB", which goes beyond the limited interpretation which Guatemala is endeavouring to give to the Panel's terms of reference.

6. Whether certain claims were raised in the request for consultations and are before the Panel

4.91 **Guatemala** submits that two of Mexico's claims should be rejected by the Panel because they were not raised either directly or indirectly in Mexico's request for consultations. These claims are that:

- Guatemala violated Article 5.2 of the ADP Agreement by initiating the investigation without having received information on imports from the Directorate-General of Customs; and
- Guatemala violated Article 6.1.3 of the ADP Agreement by failing to provide either Cruz Azul or Mexico with a copy of the full text of the application as soon as Guatemala initiated the investigation.

4.92 Guatemala relies on its earlier argument that panels under the Tokyo Round Anti-Dumping Code established a three-step process for the settlement of disputes in anti-dumping cases concerning "the individual claims of which a matter is composed, in which panel examination of a matter would be preceded by consultations concerning that same matter and conciliation concerning that same matter". Although the conciliation phase requirement was eliminated during the Uruguay Round, Guatemala asserts that "the justification for this approach was not limited to the conciliation issue".<sup>51</sup>

4.93 According to Guatemala, anti-dumping cases have unique characteristics and are subject to special dispute settlement rules under Article 17 of the Agreement. In its interpretation of similar rules under Article 15 of the Tokyo Round Anti-Dumping Code, the panel in United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, observed that:

"The parties to a dispute were required to consult and thereby provide at least an opportunity for reaching a mutually satisfactory resolution of the matter in dispute.

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<sup>51</sup> Edmond McGovern, International Trade Regulation, 12.143 (1995).

At the conciliation phase, during the Committee's review of the matter, the parties to the dispute were required to go further and make their best efforts to reach a mutually satisfactory solution throughout the period of conciliation. The Panel therefore considered that the Agreement provided that before a party to a dispute could request a panel concerning a matter, the parties to the dispute had to have been given an opportunity to reach a mutually satisfactory resolution of the matter. This condition would not be meaningful unless the matter had been raised in consultations and conciliation."<sup>52</sup>

Guatemala recalls that the panel stated that these conclusions:

"were particularly appropriate in view of the nature of disputes concerning anti-dumping actions" ... The requirement to engage in consultations and conciliation served an essential purpose in clarifying the facts and arguments in dispute, and framing the dispute concerning the matter in terms which a panel would be best equipped to resolve.<sup>53</sup>

4.94 Guatemala argues that, in accordance with the interpretations given by panels under the similar rules of the Tokyo Round Anti-Dumping Code, individual claims must be presented at the consultation stage in order to provide the prospect of "reaching a mutually satisfactory solution" in accordance with Article 17.3 of the ADP Agreement. Accordingly, the Panel should reject the two claims that Mexico failed to raise either in its request for consultations, dated 15 October 1996, or in its arguments relating to the consultations dated 30 October 1996, or in its list of questions dated 9 January 1997.

4.95 According to **Mexico**, Guatemala's argument is entirely without validity since the Panel's terms of reference are determined not by the scope of the consultations but by the request for the establishment of a panel. Since both claims are contained in paragraph (a) of document WT/DS60/2, it is clear that they form an integral part of the Panel process. Furthermore, Mexico submits that the consultations with Guatemala concerned all the issues that Mexico raised in the request for the establishment of a panel. Mexico asserts that, in the consultations, it explained point by point to Guatemala why Mexico considered that the investigation should never have been initiated, and pointed out other weaknesses that had emerged in the course of the investigation up until the date of the consultations (9 January 1997).

7. Whether certain new claims were raised during course of Panel proceedings and are before the Panel

4.96 **Guatemala** asserts that only at the first substantive meeting Mexico claimed for the first time that the Ministry had improperly made the preliminary affirmative determination of threat of injury because it did not take into account the fact that from 1994 to 1995 the value of Cementos Progreso's sales increased by 21.9% and its net profits rose by 22.8% in nominal Quetzales, not adjusted for inflation. Guatemala submits that the Panel has no mandate to examine Mexico's claim concerning the increase in the value of sales and profits because it is outside the Panel's terms of reference. Mexico did not make this claim in its request for the establishment of a panel, nor in its first written submission, nor in the written text of its oral submission. Guatemala suggests that, in conformity with the practice followed in the GATT and the WTO, the complainant Member is prevented from making

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<sup>52</sup> ADP/87, paragraph 333, adopted on 27 April 1994. Guatemala also refers to United States - Anti-Dumping Duties on Grey Portland Cement and Cement Clinker from Mexico, ADP/82, paragraph 5.12, not adopted, dated 7 September 1992 ("The Panel considered that a party should have the opportunity to consult bilaterally on a matter before having it submitted to multilateral conciliation.")

<sup>53</sup> United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87, paragraph 337, adopted on 27 April 1994.

new claims other than those included in its first written submission. Consequently, the Panel has no mandate to consider this claim because Mexico did not include it in its first written submission.

4.97 Guatemala surmises that Mexico may respond that its "claim" regarding the increase in the value of sales and profits could more accurately be called an "argument", and that a Member is not obliged to identify all its "arguments" in its request for the establishment of a panel or in its first submission. Nevertheless, Guatemala submits that Mexico's assertion concerning the increase in the volume of sales and profits should be considered a claim and not an argument. According to Guatemala, Mexico cannot simply "claim" in its request for establishment that Guatemala violated the ADP Agreement by making a preliminary affirmative determination of threat of injury and then put forward any plausible "argument" at any stage of the procedure in order to substantiate the alleged violation. Mexico must explain the legal and factual grounds for the alleged violation. In this particular case, Mexico claims that Guatemala violated the ADP Agreement by making a preliminary affirmative determination of threat of injury when the value of Cementos Progreso's sales and profits from 1994 to 1995 had increased. Guatemala suggests that for systemic reasons, other Members would be interested in the issue whether, according to Article 3.7 of the ADP Agreement, the investigating authority must take into account the value of sales and profits, because Article 3.7 does not make any reference to these. Mexico's failure to make its claim properly deprives interested third Members of the opportunity to examine such a claim.

4.98 **Mexico** disputes Guatemala's argument that Mexico cannot simply claim a violation in the request for establishment and then put forward any plausible argument to substantiate the allegation, and that Mexico must explain the legal and factual grounds for the alleged violation in the request for the establishment of a panel. Mexico argues that according to established procedures, claims are submitted in the request for the establishment of a panel and the arguments are submitted to the panel. Mexico submits that the Report of the Appellate Body in the EC - Regime for the Importation, Sale and Distribution of Bananas is clear in this respect:

"We accept the Panel's view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements. In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties."<sup>54</sup>

4.99 **Guatemala** claims that Mexico raised another new claim in its second submission to the Panel, i.e. that the Ministry made a preliminary determination using partial data that extended beyond the investigation period. Guatemala states that Mexico did not raise any claim regarding the extension of the period of investigation in connection with the preliminary determination in its request for establishment. The request only refers to the extension of the investigation period, investigated firms and investigated product ten months after the initiation of the investigation. According to Guatemala, the timing of this claim excludes it from the terms of reference of this Panel.

4.100 Guatemala also notes that Mexico relies on Article 1 of the ADP Agreement in its second submission to the Panel in order to demonstrate that revocation of anti-dumping duties constitutes an appropriate remedy in the present case. Guatemala states that since Mexico did not raise a claim under Article 1 either during the consultations or when requesting the establishment of a panel, any claim relating to Article 1 is outside the Panel's terms of reference. The Panel therefore does not have

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<sup>54</sup> EC - Regime for the Importation, Sale and Distribution of Bananas, DS27/AB/R, para. 141, adopted on 25 September 1997.

the authority to verify whether the initiation of the investigation or the application of an anti-dumping measure was inconsistent with Article 1 of the ADP Agreement.

B. Standard of Review

4.101 Guatemala submits that the Panel's examination of the present dispute is circumscribed by the standard of review set forth in Article 17.6 of the ADP Agreement.<sup>55</sup> Guatemala notes that during the final stages of the Uruguay Round negotiations, it was decided to include a provision in the ADP Agreement establishing a standard to be applied by panels in examining the facts of a case and interpreting the relevant legal provisions applied by the investigating authorities of the Members. This standard of review applicable to anti-dumping cases is set forth in Article 17.6 of the ADP Agreement. Guatemala notes that the ADP Agreement is the first legal instrument which provides specifically for a standard of review. Article 17.6(i) establishes the standard of review applicable to a panel's examination of the investigating authorities' evaluation of the facts in an anti-dumping investigation. Guatemala argues that, according to one commentator, Article 17.6(i):

"encapsulates a notion developed in several panel reports that when a panel examines the factual conclusions of national investigating authorities it should act as a "review" body and should not substitute its own factual assessment for that of the authorities unless the latter is seriously flawed".<sup>56</sup>

4.102 According to Guatemala, the same commentator considered that the standard of review of the establishment of facts as set forth in Article 17.6(i) was consistent with the panel reports delivered during the closing stages of the Uruguay Round.<sup>57</sup> Guatemala recalls for example, that in United States - Measures Affecting Imports of Softwood Lumber from Canada the panel ruled that:

"It was the role of the national investigating authority in the importing country, not that of the Panel, to make the necessary determinations in connection with the initiation of a countervailing duty case. ... The role of the Panel was thus not to determine whether there was sufficient evidence for initiation but to review whether the national authorities in the importing country had made the initiation determination in accordance with relevant provisions of the Agreement."<sup>58</sup>

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<sup>55</sup> Article 17.6 provides that:

"In examining the matter referred to [the panel]:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

<sup>56</sup> Edmond McGovern, International Trade Regulation, 12.141 (1995). Guatemala suggests that, as regards the implementation of the ADP Agreement, the main proponent of Article 17.6 stated that a WTO panel should not reassess the facts presented by the national authorities if the authorities' conclusion was objective and impartial, even though the panel might have reached a different conclusion. Article 17.6 ensured that WTO panels did not call the factual conclusions of the authorities into question, even in situations where the panel might have reached a conclusion different from that of the authorities (Statement of Administrative Action for the Uruguay Round Agreements Act, HR Document No. 103316, at 818 (1994)).

<sup>57</sup> Edmond McGovern, International Trade Regulation, 12.143 (1995).

<sup>58</sup> United States - Measures Affecting Imports of Softwood Lumber from Canada, BISD 40S/358, paragraph 334, adopted on 27 October 1993.

4.103 Guatemala considers that Article 17.6(ii) of the ADP Agreement establishes the standard of review applicable to the examination by the panel of an investigating authority's interpretation of the Agreement. According to Guatemala, Article 17.6(ii) establishes that the Panel must respect the investigating authority's interpretation of the ADP Agreement, provided such interpretation is permissible under the customary rules of interpretation of public international law.

4.104 According to Guatemala, the main purpose of the standard of review contained in Article 17.6 is to ensure that panels do not go beyond the role assigned to them by international law of reviewing the evaluation of facts by a Member or that Member's interpretation of the provisions of the ADP Agreement, to the detriment of the sovereignty of that Member or its expectations as to conformity with the ADP Agreement. Guatemala suggests that preservation of the sovereignty of a Member and maintenance of that Member's expectations are all the more important now that the WTO dispute settlement system is effectively binding for the parties. Thus, Guatemala submits that the Panel must respect the evaluation of facts contained in the Ministry's determinations, even though the Panel might have reached a different conclusion. The Panel must also respect Guatemala's permissible interpretations of the ADP Agreement in accordance with the customary rules of interpretation of public international law.

4.105 Guatemala notes that Mexico has alleged that Guatemala carried out "a partial and subjective" establishment of the facts relating to the factors set out in Article 3.7 of the ADP Agreement. Mexico has not, however, cited Article 17.6(i) of the ADP Agreement, and has failed to provide any proof of its allegations. Guatemala endorses the United States' argument that a party attempting to prove that an investigating authority's determination is not 'unbiased' within the meaning of Article 17.6(i) must present positive evidence showing that the decision was influenced by bias or prejudice; mere allegations and conjecture cannot discharge the challenging party's burden on this issue. Guatemala suggests that the United States' position is consistent with the findings of the panel in EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil in the sense that, in the absence of other evidence, it cannot be stated that a decision to base a determination on one set of data rather than on other, different, data signifies that there is bias or lack of objectivity.<sup>59</sup>

4.106 Guatemala endorses the United States' view that the factual evidence before the Ministry is described at length in Guatemala's preliminary determination and first submission to this Panel. According to Guatemala, Mexico's claims regarding the threat of injury factors reveal that Mexico has only offered an alternative reading of the evidence or, in some cases, only suggested that an alternative reading might be possible. Mexico has not demonstrated that an alternative finding is necessitated by the factual record.

4.107 According to Guatemala, even assuming that Mexico had claimed that the Ministry's preliminary determination was not "unbiased and objective" as required by Article 17.6(i) of the ADP Agreement, Mexico did not provide any proof to substantiate its claim. On the contrary, it simply asked the Panel to review once again Guatemala's establishment of the facts and to arrive at a different finding, which is contrary to the text and the intention of Article 17.6(i) of the ADP Agreement.

4.108 Guatemala submits that Mexico provides a tendentiously incorrect analysis of the matter by not drawing a proper distinction between the standard of review for the establishment of the facts (Article 17.6(i)) and the standard of review applicable to the interpretation of the legal provisions of the Agreement (Article 17.6(ii)). The standard of review applicable to the facts and the standard of review for the interpretation of the law are quite different. Guatemala suggests that Mexico tries to ignore the distinction between subparagraph (i) and subparagraph (ii), and tries to convince the Panel that the "permissible interpretations" mentioned in Article 17.6(ii) of the ADP Agreement refer to the evaluation of the evidence, when they clearly refer to the interpretation of the legal provisions.

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<sup>59</sup> EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, ADP/137, paragraphs 512-13, adopted on 30 October 1995.

Guatemala states that the Ministry's establishment of the facts was unbiased and objective, and only facts that had been properly established were accepted; in no case was any other material used. Guatemala requests that the Panel should not invalidate Guatemala's evaluation of the facts. As regards the separate subject of the interpretation of the ADP Agreement, Guatemala submits that it complied with the provisions of the ADP Agreement, and where various interpretations were possible, it always took special care to ensure that its interpretations were permissible. Thus, Guatemala requests that the Panel applies the customary rules of public international law and, given the existence of various permissible interpretations of a legal provision, declares that Guatemala's interpretation is consistent with the ADP Agreement.

4.109 Guatemala submits that, in a further attempt to undermine the standard of review by requesting the Panel to replace the Ministry's evaluation, Mexico infers that Article 17.6 of the ADP Agreement and Article 11 of the DSU are complimentary. Guatemala suggests that this position is in conflict with the actual text of these provisions since Appendix 2 to the DSU contains a list of rules, including Article 17.6 of the ADP Agreement, that are special or additional. In describing the ordinary terms of reference of panels, Guatemala notes that Article 7.1 of the DSU stipulates that panels must conduct their examination in the light of the relevant provisions of the covered agreement. In cases of anti-dumping, Guatemala submits that a relevant provision is Article 17.6 of the ADP Agreement. Thus, Guatemala asserts that a panel dealing with an anti-dumping case is not authorized to carry out any evaluation of the facts, since Article 17.6 reserves this function for the investigating authority.

4.110 **Mexico** considers that Guatemala's anti-dumping investigation is inconsistent with the ADP Agreement on several scores, and that these inconsistencies show that the Ministry: (i) failed to establish the facts properly; (ii) did not conduct an unbiased and objective evaluation of the facts; and (iii) placed a number of inadmissible constructions on the ADP Agreement.

4.111 Mexico argues that, with regard to the initiation of the investigation, Guatemala did not properly establish the facts because:

- (i) Guatemala accepted as valid two alleged invoices (for one load of cement each) without ensuring that the invoices were actually valid;
- (ii) Guatemala assumed, wrongly, that the volume of cement recorded in the two alleged invoices was equal to the volume of the sacks sold in Guatemala;
- (iii) Guatemala confused the submission of two import certificates for transactions that took place on two consecutive days in the same month, and that were used as evidence of the export price, with information on the trend in the volume of dumped imports;
- (iv) Guatemala considered that the investigation had been initiated when the import certificates for the preceding year were requested from the Directorate of Customs, whereas in reality it was initiated when the notice of initiation was published in the Official Journal;
- (v) Guatemala initiated the investigation without any evidence as to the volume of cement exports; and
- (vi) Guatemala did not adequately examine the causal link.

4.112 Mexico argues that, with regard to the initiation of the investigation, Guatemala did not make an unbiased and objective evaluation of the facts because:

- (i) under Guatemalan law the Ministry must accept evidence submitted by the applicant as valid and leave it to the other interested parties to prove the contrary;
- (ii) the Ministry tried to make good the deficiencies of Cementos Progreso's initial application by requesting the submission of a supplementary application which would correct the defects of the first, particularly those relating to injury;
- (iii) the Ministry wrongly accepted the application for the initiation of an investigation despite the fact that, even taking the supplementary application into account, it contained the defects identified by Mexico, in particular a lack of evidence or information concerning threat of injury and causal link; and
- (iv) the Ministry not only assumed the role of applicant by requesting from the Directorate of Customs information on the import certificates for the last year which should have been obtained and submitted by Cementos Progreso, but also decided to initiate the investigation without waiting for the results of its request for information.

4.113 With regard to the conduct of the investigation, Mexico submits that the Ministry conducted a biased and non-objective evaluation of the facts on which the preliminary affirmative finding of threat of injury was based. Mexico argues that Guatemala's preliminary determination of threat of injury does not fulfil the relevant requirements of the ADP Agreement. The preliminary determination, for example, does not indicate whether due account was taken of other factors which may have influenced the situation of the domestic industry; there is no causal link between the factors considered and the alleged threat of injury; data subsequent to the investigation period set by the Ministry have been used; the evolution of imports does not demonstrate any inverse correlation between the increase in imports and Cementos Progreso's sales trends (at times they both increased or fell simultaneously); inventories of a product (clinker) other than the product under investigation (grey portland cement) have been used; it is asserted, with no evidence or explanation, that the drop in Cementos Progreso's sales is due to imports; prices which, according to Guatemala, were recorded in some Guatemalan cities were used as if the investigation had been a regional one and despite the fact that the prices supplied by Cementos Progreso (which rose) were available; a loss of customers is mentioned without the accuracy of this claim having been ascertained; there was no under-utilization of installed capacity as claimed by Cementos Progreso, considering in particular that in spite of the closure of its kilns, it continued to produce cement subsequent to the investigation period at close to 100% of its real production capacity; and it is considered on the basis of a number of estimates supplied by a firm of consultants that Cruz Azul's available capacity can cause an imminent and substantial increase in its exports to Guatemala when, even if the total estimated excess capacity (360,000 tonnes per year) were directed solely at the Guatemalan market, the increase could not be more than 30,000 tonnes a month.

C. Violations Alleged Regarding the First Stage of the Investigation

1. Initiation

4.114 Mexico submits that, by initiating the investigation on the basis of information contained in Cementos Progreso's application, Guatemala violated Articles 2.1, 2.4, 3.7, 5.2, 5.3 and 5.8 of the ADP Agreement. Mexico asserts that, as a result of deficiencies in the information submitted by Cementos Progreso concerning dumping, injury and causal link, the Ministry did not have sufficient evidence to justify initiation and should have rejected the application.

4.115 **Guatemala** notes that the level of evidence "sufficient" to justify initiation is significantly less than the level of evidence required for a preliminary or final affirmative determination. According to the Chairman of the panel in United States - Measures Affecting Imports of Softwood Lumber from Canada:

"A number of substantive concerns have been raised by the parties in this case. The Panel saw considerable merit in many of Canada's criticisms with respect to the United States' initiation of a countervailing duty investigation on imports of softwood lumber from Canada. In particular, the Panel recognized that the data and methodologies used by the United States contained shortcomings, in some cases of a serious nature. A number of questions arose regarding particular aspects of the evidence addressed by the US Department of Commerce. Moreover, certain facts available to the United States, for example on the impact of the recession, were, but arguably should not have been, ignored. Such information might have had an important bearing on this case, even at the initiation stage. However, the Panel had to take into account that it was not reviewing a determination of the existence of subsidy, injury and causality, but a finding that sufficient evidence of these elements existed to warrant an investigation. Moreover, in reviewing this matter, which necessarily involved a large range of issues of fact, the Panel had to take into account that the matter was not before it on a de novo basis. The Panel was also aware, despite its rigorous application of the criteria established in paragraphs 29, 30, 31, and 33 of its report, of concerns that the threshold for initiation as it applied in customary practice in several countries was relatively low. Nonetheless, the panel was of the view that the threshold required by Article 2:1 of the Agreement for initiation of a countervailing duty investigation was such that the Panel could not properly find that the United States initiation in this case was inconsistent with that Article, having regard to the standard of review."<sup>60</sup>

4.116 Guatemala does not agree with the theory put forward to the effect that an authority can determine that an application contains sufficient information and evidence reasonably available to the applicant, thus complying with Article 5.2 of the ADP Agreement, can examine the accuracy and adequacy of the information and evidence provided in the application, thus complying with Article 5.3 of the ADP Agreement, and despite all this can reach the conclusion that there is not sufficient evidence to initiate an investigation. Such an interpretation would oblige the investigating authorities to carry out an investigation that goes beyond the examination required to determine the accuracy and adequacy of the evidence provided in the application, pursuant to Article 5.3. Article 5 of the ADP Agreement does not contain an obligation to carry out a - non-official - investigation prior to initiation and such an investigation is not governed by any of the procedural safeguards under the ADP Agreement. Consequently, the Panel should respect Guatemala's permissible interpretation of Articles 5.2 and 5.3 of the ADP Agreement.

4.117 Guatemala also argues that Mexico ignored the new standard of review contained in Article 17.6(i) of the ADP Agreement. Mexico is urging the Panel to carry out a new examination of the evidence evaluated by the Ministry pursuant to Article 5 of the ADP Agreement. Mexico wants the Panel to reach a conclusion that differs from that reached by the Ministry concerning whether or not the application complied with Article 5.2 and whether the Ministry determined properly that the application included accurate and adequate evidence in compliance with Article 5.3. Article 17.6(i) was included in the ADP Agreement to prevent panels from casting doubt on decisions by authorities, unless the facts were established improperly or only evaluated partially. Mexico has not put forward any argument saying that the Ministry did not establish the facts properly because it did not follow the required procedures or that the Ministry evaluated the facts in a partial manner. Consequently, the Panel should respect the decision to initiate an investigation taken by the Guatemalan Ministry of the Economy, pursuant to Guatemala's obligations under Articles 5.2 and 5.3 of the ADP Agreement.

(a) Articles 2.1/2.4

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<sup>60</sup> Letter from the Chairman of the panel to the Chairman of the GATT Committee on Subsidies and Countervailing Measures, SCM/163, 19 February 1993.

4.118 **Mexico** submits that investigating authorities must apply Articles 2.1 and 2.4 of the ADP Agreement when determining whether there is sufficient evidence of dumping to justify initiation under Article 5.3 of the ADP Agreement. Article 2.1 defines the term "dumping", whereas Article 2.4 governs the comparison that must be made between normal value and export price in order to determine whether dumping exists.

4.119 With regard to the evidence of dumping submitted by Cementos Progreso, Mexico argues that the prices recorded in the alleged invoices and used as evidence of the normal value, and those recorded in the import certificates and used as evidence of the export price, cannot be considered as comparable within the meaning of Articles 2.1 and 2.4 of the ADP Agreement unless due allowance is made in each case for differences which affect price comparability. The Ministry failed to make a fair comparison between the normal value and the export price, and failed to make due allowance for differences in levels of trade, quantities, form of payment and exchange rate. In particular, the Ministry failed to consider the following:

- (i) the transactions compared were carried out at different levels of trade, since the normal value was calculated at the retail level, while the export price was calculated at the wholesale level<sup>61</sup>;
- (ii) the conditions and terms of sale for these transactions were different in that:
  - the prices in the alleged invoices used to calculate normal value referred to 50 kg. sacks, while the prices in the import certificates used to calculate the export price referred to 42.5 kg. sacks;
  - the prices used for normal value were spot prices (including the distributor's share), while those used for the export price were credit sale prices; and
- (iii) the dollar-peso exchange rate claimed by Cementos Progreso has not been properly documented, and is based on a mere statement by the claimant for which no proper evidence has been provided.

4.120 Mexico suggests that in a communication dated 26 July 1996, the Guatemalan authorities themselves acknowledged that they had not adjusted the prices recorded in the alleged invoices and in the import certificates to ensure that they were at a comparable level, claiming that it was up to the exporting firm to prove that there had not been any dumping.

4.121 **Guatemala** rejects Mexico's reasons for considering that the prices were not comparable. Firstly, the Ministry had no reason or obligation to ask the applicant to provide evidence of the levels of trade in Mexico or in Guatemala. The identification of different levels of trade requires an investigation in which numerous facts must be obtained and depends on detailed and substantive information from the exporter, information which is not available to the applicant prior to the initiation of the investigation. Secondly, as discussed elsewhere, the Ministry did not have any reason or obligation to ask the applicant to provide evidence of the terms and conditions of sale in each market. Thirdly, if, as Mexico claims, the sales on the domestic market were cash sales and the export sales were credit sales, these facts would serve simply to increase the amount of the margin of dumping. The failure to make the adjustment for credit sale benefitted Cruz Azul in that the margin was underestimated. Moreover, Guatemala objects to the reference made by Mexico to a communication between the Ministry and Mexico on 26 July 1996. This communication is not part of the file that is being examined by the Panel, but is a communication made in the course of informal

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<sup>61</sup> Mexico submits that these differences inevitably increase the margin of dumping artificially, since different volumes are being compared: the normal value has been calculated for only 50 kg. of cement, while the export price has been calculated for two transactions involving 4,000 and 7,000 sacks respectively.

consultations preceding formal consultations. In any case, the said communication correctly states that the information needed to adjust the exporter's domestic market prices and the export prices for a fair comparison under Article 2.4 of the ADP Agreement in the preliminary or final determination is not information that is available to the applicant.

4.122 Guatemala submits that Article 2 of the ADP Agreement does not apply to the decision to initiate an investigation. As Article 2 is entitled "Determination of Dumping", this Article applies only to the preliminary and final determinations of dumping, and not to the decision to initiate an investigation. According to Article 2.4, precise adjustments of the export price and the normal value can only be made during an investigation, when the investigating authority has access to the detailed information in the possession of the exporting firms needed to calculate the adjustments. Neither Articles 5.2 nor 5.3 refer to Article 2. In view of the express reference to specific paragraphs of Article 3 in Article 5.2(iv), the absence of references to other provisions of the ADP Agreement such as Article 2 shows that Article 2 does not apply. The first sentence of Article 5.2 does not contain any reference to Article 2. The reference is to "... within the meaning of Article VI of GATT 1994 as interpreted by this Agreement.." and applies solely to "injury" and not to dumping. The third sentence of Article 5.2 describes the evidence and information to be included in the application, provided that such information is reasonably available to the applicant. Article 5.2(iii) describes the evidence and information that must be included in the application to substantiate the allegation of dumping. Article 5.2(iii) does not contain any reference to Article 2. Article 5.2 clearly establishes that no paragraph in Article 2 applies to the decision to initiate an investigation.

4.123 **Mexico** asserts that Article 2 applies to the whole of the ADP Agreement and hence to the decision to initiate an investigation. This follows from the text of Article 2, and from the very logic of the ADP Agreement. Mexico notes there is no provision in the ADP Agreement that supports Guatemala's argument to the contrary.

4.124 Mexico argues that a legal provision cannot be applied outside of a general legal framework. In other words, the law as a whole applies and no legal system considers the law to be a dictionary in which the concepts apply in isolation. Article 5 of the ADP Agreement should apply together with the other relevant provisions, which as a whole constitute the legal framework of the anti-dumping mechanism. Article 2 is the technical explanation of the meaning of the word "dumping" as used throughout the ADP Agreement. Thus, Guatemala's argument that this concept applies only for the preliminary and final determinations of dumping cannot be sustained.

4.125 According to Mexico, Article 5.2 specifically includes the concept laid down in Article 2 by requiring "... evidence of (a) dumping". Having explained the meaning of the word "dumping" for the purpose of the ADP Agreement in Article 2 thereof, it would have been absurd for the negotiators to use any other definition of dumping and injury in Article 5.2. Article 2 defines the term "dumping" and Article 5.2, by using the term, incorporates this definition. Furthermore, Article 5.2(i) refers to the "volume and value of the domestic production of the like product". In this case, one must consider Article 2.6 of the ADP Agreement in order to understand the concept of like product. Likewise, in order to be able to identify the domestic industry, it is necessary to turn to the definition of domestic industry provided in Article 4 of the ADP Agreement. In the same way, Article 5.2(iii) states "... where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product ...". In this case, it is necessary to turn to some of the wording in Article 2 in order to determine in which cases it is "appropriate" to apply the concepts of third country normal value and constructed normal value, and also to determine the way in which the value of the product under investigation is constructed. The last part of Article 5.2(iii) refers to the concept of related parties. The Article does not repeat what is meant by a relationship between the exporter and the importer as this is already explained in Article 2.3 of the ADP Agreement. It would be absurd to claim that Article 5 should repeat what is meant by this concept. Mexico notes that, in general, Article 5 states what is required to prove the existence of dumping for the purpose of initiation, but does not indicate the way in which

the comparison between the normal value and the export price should be made. This is logical because the methodology is laid down in Article 2. In order to avoid the interpretation proposed by Guatemala, Article 2.1 starts with the words "For the purposes of the Agreement".

4.126 **Guatemala** argues that the obligation to meet the numerous requirements set forth in Article 2, which concerns the determination of dumping, and Article 3, which concerns the determination of injury, is only applicable to the preliminary determination and the final determination of dumping and injury, but not to the decision to initiate the investigation. Otherwise, the third sentence of Article 5.2 would be pointless, since the requirements for determining dumping, injury and causal link are set forth in Articles 2 and 3 of the Agreement.

(b) Article 3.7

4.127 **Mexico** submits that investigating authorities must apply Article 3.7 of the ADP Agreement when determining within the context of Article 5.3 whether there is sufficient evidence of threat of injury to justify initiation of an investigation: Mexico suggests that Cementos Progreso cannot be considered to have provided adequate evidence for the investigating authorities to determine that exports from Cruz Azul threatened to cause material injury as claimed by the claimant, since the information contained in the two import certificates submitted by the claimant cannot lead one to conclude or even to suppose that any of the conditions listed in 3.7 of the ADP Agreement, or in Article 3.2, obtained in the Guatemalan market. Article 3.7 sets forth an illustrative list of factors to be considered in determining whether there is threat of material injury. Article 3.2 sets forth factors to be considered in determining if there is present material injury.

4.128 **Guatemala** considers that Article 3 does not apply to the decision to initiate an investigation. Article 3 is entitled "Determination of Injury". Strictly speaking, this Article applies only to the preliminary and final determinations of dumping and injury, and not to the decision to initiate an investigation. While Article 5.2(iv) states that the factors listed in paragraphs 2 and 4 of Article 3 as evidence of injury may be used as a general guideline as to the of information to be included in the application, neither Articles 5.2 nor 5.3 incorporate Article 3. In view of the express reference to specific paragraphs of Article 3 in Article 5.2(iv), the absence of any references to the remainder of Article 3 shows that Article 3 does not apply in any other way. Thus, Article 3 is not relevant to the initiation of an investigation, except with respect to paragraphs 2 and 4.

4.129 Guatemala notes that the first sentence of Article 5.2 does not contain any reference to Article 3. The reference in Article 5.2 is only to "... injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement ...". The third sentence of Article 5.2 describes the evidence and information to be included in the application, provided that such information is reasonably available to the applicant. Article 5.2(iv) describes the evidence and information that must be contained in the application in order to prove injury and a causal link. Article 5.2(iv) only contains a cross-reference to paragraphs 2 and 4 of Article 3 and not to the other paragraphs of Article 3. Consequently, Article 5.2 clearly establishes that only two of the eight paragraphs in Article 3 apply to the decision to initiate an investigation.

4.130 Without prejudice to its argument that Article 3 does not apply to the initiation decision, Guatemala notes that, at the time of initiating the investigation, the Ministry had the following evidence and information concerning the factors listed in Article 3.7(i) (threat of injury) and relating to a significant rate of increase of dumped imports into Guatemala which indicated the likelihood of substantially increased importation. The Ministry knew that for approximately one century Cementos Progreso had supplied virtually 100% of the Guatemalan cement market and there had been scarcely any imports. Consequently, starting from a zero base, the imports from Cruz Azul demonstrated in the two import certificates attached to the application necessarily showed "a significant rate of increase", as provided in Article 3.7(i), both in absolute terms and in relation to apparent consumption and domestic production in Guatemala. The application contained evidence that the imports had

started before the application was submitted and that at least two separate importers had started to sell Cruz Azul cement in Guatemala. The applicant's assertion of "massive imports" was considered to be plausible because: (1) two fully documented import shipments are indeed massive in relation to a zero base, taking into account the relatively small size of the Guatemalan market; (2) the sales of such imports were probably concentrated in a small area of Guatemala, close to the point of entry, and were likely to take up a large share of the market in that area, replacing sales by Cementos Progreso at a time when the firm was planning to modernize and expand its production capacity; (3) the margin of dumping was very large, the margin of price undercutting was substantial, Cruz Azul's export prices were lower than Cementos Progreso's production costs, and it could reasonably be assumed that the dumped imports from Cruz Azul were likely to increase substantially (relative to a zero starting-point).

4.131 Guatemala argues that, at the time of initiating the investigation, the Ministry had the following evidence and information concerning the factors listed in Article 3.7(ii) and relating to excess capacity in Mexico which indicated the likelihood of substantially increased dumped exports to Guatemala, taking into account the doubtful availability of other export markets to absorb any additional exports. When the investigation was initiated, it was public knowledge that the Mexican economy was going through a severe recession, particularly in the construction sector. The "Tequila" effect and its impact on the construction sector was widely publicized throughout the world, not only in Guatemala. According to Guatemala therefore, it was public knowledge that, following the devaluation of the peso in December 1994, the Mexican economy was suffering from a serious depression, that a substantial part of the capacity of Mexican producers was not being utilized because of a fall in demand for their products in Mexico, and that Mexican producers were aggressively seeking export markets, including Guatemalan markets. In January 1996 in particular, several Guatemalan companies had already ceased operating because they were unable to compete with the increase in Mexican exports. The competition caused by Mexican exports was particularly severe in western Guatemala close to the border with Mexico. It was also public knowledge that the Mexican building industry, the source of cement demand, was particularly affected by Mexico's economic recession. It could therefore be reasonably assumed that the Mexican cement industry had substantial excess capacity available for export and that Cruz Azul had started to export to Guatemala in 1995 because of the recession in Mexico. This presumption was confirmed by the evidence submitted in the application that Cruz Azul imports started in June 1995 and were massive, in two shipments alone, in August 1995. The Ministry also knew that Cruz Azul's exports were entering Guatemala by land and not by sea. Because of the high cost of transporting grey portland cement by land and the location of Cruz Azul's production facilities in the south east part of Mexico, from a practical point of view, no export market other than Guatemala was available to absorb Cruz Azul's excess capacity. Moreover, the market in the United States was not available to absorb Cruz Azul's export capacity because the United States applied anti-dumping duties of over 60% on Cruz Azul's exports. To summarize, the only potential outlet for Cruz Azul's export capacity was Guatemala due to its proximity and because Guatemala's normal import tariff was only 1%.

(c) Article 5.2

(i) Dumping

4.132 **Mexico** submits that Cementos Progreso's application did not contain sufficient evidence of dumping to meet the requirements of Article 5.2 of the ADP Agreement. Mexico contends that the only evidence of the normal value provided by the applicant was two alleged invoices, dated 25 and 26 August 1995, each for one sack of cement. The only evidence of the export price was photocopies of two import certificates for 7,035 and 4,221 sacks respectively, dated 14 and 15 August 1995. The claimant therefore did not supply evidence of the export price, the normal value or the evolution of imports as required by Article 5.2 of the ADP Agreement. Even though Article 5.2 does not provide for evidence concerning a minimum number of transactions to be contained in the application, the number must be sufficient to determine the existence of the unfair dumping practice. Moreover,

Mexico argues that the documents relied on by the applicant did not adequately identify the product in question.

4.133 **Guatemala** notes that Article 5.2 of the ADP Agreement stipulates that an applicant may not simply assert that dumping and consequent injury has taken place. The application must also include relevant evidence in support of the assertion according to criteria set forth in that Article provided such evidence "is reasonably available to the applicant". Evidence is "relevant" and "sufficient" within the meaning of Article 5.3 if the investigating authorities find that the application contains information that is reasonably available to the applicant in respect of the types of information and evidence described in subparagraphs (i) to (iv) of Article 5.2. During the Uruguay Round, the Parties rejected proposals by Hong Kong and the Nordic countries for applications to include "information sufficient to permit the authorities concerned to establish a *prima facie* case of dumping, of injury and of causality . . .".<sup>62</sup> According to Hong Kong, the intention of the proposed text was: "To clarify the circumstances under which an anti-dumping investigation shall be initiated and to introduce a more definitive requirement of evidence sufficient to establish a *prima facie* case. That the investigating authorities have particular responsibility in the vetting of complaints is emphasized".<sup>63</sup>

4.134 Guatemala states that, according to Article 5.2(i), the application must contain information reasonably available to the applicant on: (1) the identity of the applicant; (2) domestic production of the like product; and (3) the domestic industry on whose behalf the application is being made. The application of 21 September 1995 identified Cementos Progreso as the applicant. The supplementary application dated 9 October 1995 stated that Cementos Progreso accounted for 100% of cement production in Guatemala, that its production capacity was 1.6 million tonnes and that it utilized 100% of its capacity. Guatemala notes that in its third party submission, the United States asserted that the application met the requirements of Article 5.2(i), and Guatemala suggests that Mexico did not contest this position.

4.135 Guatemala notes that, according to Article 5.2(ii), the application must contain information reasonably available to the applicant on: (1) a complete description of the allegedly dumped product; (2) the name of the country of origin or export in question; (3) the identity of each known exporter or foreign producer; and (4) a list of known persons importing the product in question. In its application of 21 September 1995, Cementos Progreso identified the product investigated as grey portland cement; it explained briefly how grey portland cement was manufactured; it identified Mexico as the country of export; it identified Cruz Azul as the producer and the exporter shipping allegedly dumped products; it also identified Distribuidora De León and Distribuidora Comercial Molina as the known importers of the product in question. Consequently, the application met the requirements of Article 5.2(ii). Guatemala suggests that Mexico did not contest this.

4.136 Guatemala argues that, pursuant to Article 5.2(iii), the application must contain information reasonably available to the applicant on: (1) information on prices at which the product in question is sold when destined for consumption in the domestic market of the country or countries of origin or export; and (2) export prices. Cementos Progreso's application dated 21 September 1995 provided information and evidence regarding the prices at which Cruz Azul sold grey portland cement in Mexico and the prices at which it exported cement to Guatemala. In its supplementary application dated 9 October 1995, Cementos Progreso stated that in the month of August 1995 the price in Mexico was Q 27.62 per sack and the export price to Guatemala was Q 14.77 per sack. The dumping

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<sup>62</sup> Document MTN.GNG/NG8/W/83/Add.5 (23 July 1990). According to Guatemala sufficient evidence to establish a "*prima facie* case" essentially means evidence that would support a finding if proof of the contrary were not considered. However, Guatemala suggests that the standard of "sufficient evidence" establishes a much less rigid framework.

<sup>63</sup> English version of document MTN.GNG/NG8/W/51,4 (12 September 1989)]. Guatemala notes that this "more definitive requirement" was rejected during the negotiation, and the Tokyo Round standard was maintained.

margin was therefore Q 11.23 per sack. Cementos Progreso provided documentary evidence of these prices in its application. Evidence of the price in Mexico was substantiated by two invoices showing the prices for two separate sales in Tapachula, Mexico, in August 1995. One invoice was from Cruz Azul dated 26 August 1995, and the other dated 25 August 1995 identified the make of cement as Cruz Azul. The price for the first invoice was Mex. pes. 28; for the second it was Mex. pes. 27. The information on prices for both sales was thus consistent. The Cruz Azul invoice identified the product as grey cement. The other invoice identified it as Cruz Azul cement. Evidence of the export price was substantiated by two export sales by Cruz Azul to two different importers in Tecún Umán, Guatemala, in August 1995. The applicant provided import certificates, invoices and bills of lading for both sales. The product was described variously in the documentation as grey cement, grey portland cement, or Type II grey portland cement with pozzolana. This indicated that according to trade practice the words "grey cement" properly identify the product in dispute. Guatemala asserts that if the two invoices used to determine normal value had concerned a special type of cement, not generic grey portland cement, it is clear that they would have stated this. The Ministry examined the information and the evidence provided in the application concerning the prices in Mexico and the export prices and, on the basis of all the information and evidence, determined that all the documents referred to grey portland cement. Furthermore, the documentary evidence provided pursuant to Article 5.2(iii) was relevant because it showed the price of Cruz Azul cement in Mexico and its export price to Guatemala for the same month and the same places - Tapachula, Mexico, and Tecún Umán, Guatemala - which are not very far apart (45 kilometres). The application thus included relevant information and evidence on prices in Mexico and export prices. Guatemala considers it significant that Mexico recognizes that Article 5.2 does not require that the evidence of dumping submitted in the application should cover a minimum number of transactions in either Mexico or Guatemala. Nor does it require that the applicant should supply information on any adjustments to the gross price as stipulated in Article 2.4 of the ADP Agreement. This is logical, in that the type of information referred to in Article 2.4 is the exclusive property of the exporting company and is not available except through questionnaires issued once the investigation has been initiated. Thus, Article 5.2(iii) grants the investigating authority the discretion to decide what, with respect to the exporter's price data, is reasonably available to the domestic producer.

4.137 In response to a question from the Panel, Guatemala stated that the Ministry had asked Cementos Progreso for more information than that provided in the applications. For that reason, although the application was received on 21 September 1995, for four months the Ministry refrained from initiating the investigation, in a genuine effort to obtain more information from Cementos Progreso. However, on more than one occasion Cementos Progreso said that there was simply no way of obtaining further information and that the information supplied was the only information reasonably available. Ultimately, the Ministry accepted this argument for two reasons. First, it was not reasonable to expect a Guatemalan firm to have access to more information on a competitor's prices in Mexico. Second, because the decision to initiate the investigation was still pending at the time, Cementos Progreso was the party with the greatest interest in providing additional information. It is therefore logical to suppose that Cementos Progreso was perfectly willing to provide additional information on Cruz Azul prices in Mexico and in Guatemala, to the extent that such information was available. In addition, the Ministry did not consider that it was appropriate - and still less required under the ADP Agreement - for the Ministry to conduct an investigation to determine whether Cementos Progreso actually did or did not have access to further information. Lastly, even if it had been possible to receive more information, the Ministry considered that the information contained in the application and the supplementary application fulfilled the minimum requirements of Article 5.

4.138 **Mexico** asserted that if the Ministry considered that the information supplied by Cementos Progreso did not suffice to initiate the investigation and Cementos Progreso did not supply any further information, the Ministry must surely have continued to consider that the information did not suffice to initiate the investigation. Nor was it easy to understand why the Ministry waited until after the initiation of the investigation to request information from the Directorate-General of Customs instead of doing so during the four months during which Guatemala claimed to have been waiting for

Cementos Progreso to obtain further information. In the meantime, Cementos Progreso could also have requested a study such as the one conducted by Arthur D. Little after the initiation of the investigation. Mexico further noted that Guatemala's suggestion that Mexico had accepted certain arguments by the United States or by Guatemala because it did not refute them was unacceptable. For such a claim to be valid, Mexico would have to have explicitly accepted or agreed with the said arguments.

(ii) Threat of injury

4.139 Mexico submits that Cementos Progreso's application did not contain sufficient, relevant evidence of threat of injury to meet the requirements of Article 5.2 of the ADP Agreement. Mexico argues that, for the Ministry to accept an application for the initiation of an investigation referring to a threat of injury, Cementos Progreso had at least to provide evidence of a significant rate of increase of imports, of sufficient freely disposable, or an imminent substantial increase in, capacity of the exporter, of the fact that the expected increase in exports from the exporting firm to the Guatemalan market would be due to that freely disposable capacity, or of the effect that the exports and inventories of the product under investigation could have on their prices, as set forth in Article 3.7 of the ADP Agreement.

4.140 Mexico notes that on 9 October 1995 the claimant presented a supplementary application in which it argued that it was threatened by massive imports of cement from Mexico, a claim which it tried to substantiate with photocopies of the two import certificates submitted with the application, and also claiming that the threat of injury was due to the fact that the cement entering by land at prices lower than its normal value directly affected the firm's investments, essentially with respect to planned improvements and expansion of facilities. However, further on the claimant stated that it was claiming threat of injury on the grounds that it was impossible to provide evidence of the enormous volume of actual imports entering Guatemala every day, and requested the investigating authority to ask the Directorate of Customs to provide the import certificates for the last year in order to determine the volume of imports of the product under investigation. Mexico points out that the Ministry asked the Directorate of Customs for the above information only on 20 February 1996, i.e. 39 days after it had initiated the investigation, which proves that it did not possess the information before initiating the investigation as stipulated in Article 5.2, paragraph (iv) of the ADP Agreement. Mexico also notes that the applicant stated it had an installed capacity of 1.6 million metric tonnes and was using 100% of that capacity, which is inconsistent with the argument of injury or threat of injury.

4.141 Mexico considers that, since the only evidence to accompany the application was two invoices (for one sack of cement each) and two import certificates, the rest of the application consists of simple assertions unsubstantiated by the "relevant evidence" required by Article 5.2.

4.142 **Guatemala** notes that Article 5.2(iv) of the ADP Agreement provides that an application must contain information reasonably available to the applicant on: (1) the evolution of the volume of the allegedly dumped imports; (2) the effect of these imports on prices of the like product in the domestic market; and (3) the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3. According to Guatemala, the application clearly met the requirements of Article 5.2(iv). Firstly, with respect to the evolution of imports, Cementos Progreso stated that for more than three months at least, Cruz Azul had been selling cement in Guatemala. Cementos Progreso provided import certificates to support its claim of massive imports. The documentary evidence showed that on 14 August 1995, Guatemala received substantial imports of Mexican cement from Cruz Azul through the customs post at Tecún Umán, Guatemala. One of the shipments was for 7,035 sacks of grey portland cement for an amount of US\$18,112.54, and the other was for 4,221 sacks of grey portland cement for a value of US\$10,941.25. These shipments were substantial given that the Guatemalan market is relatively small, and they represented a significant share of domestic consumption and a very large share of consumption in western

Guatemala. The imports were massive in comparison with previous levels of imports from Cruz Azul, because there had been no such imports. According to the bills of lading, the product entered through Tecún Umán and was delivered to two consignees on 14 August 1995. The two shipments amounted to a total of 480 tonnes. In 1995, average daily consumption in Guatemala as a whole was 3,836 tonnes, so the cement imported on 14 August 1995, through a single point of entry, represented 13% of average daily consumption in Guatemala as a whole. The two shipments also represented 15% of average daily shipments by Cementos Progreso to Guatemala as a whole in 1995.

4.143 Guatemala submits that Cruz Azul's imports represented 11% of Cementos Progreso's daily production capacity. With an annual capacity of 1,600,000 tonnes specified in the application, Cementos Progreso's daily capacity was 4,383.6 tonnes, assuming the plant was never halted for maintenance. Accordingly, the volume of imports on 14 August 1995, 480 tonnes, represented 11% of Cementos Progreso's daily capacity. Bearing in mind the Ministry's knowledge that no imports had been made in the past, such a high volume of imports on 14 August 1995 was evidence of massive imports. Guatemala does not consider that any volume of imports is necessarily "massive" simply because the previous level was zero. However, if the proportion of daily production capacity represented by imports is 11% compared with a previous proportion that was zero, that does constitute a massive volume of imports, especially in view of the fact that the imports started only three months before 14 August 1995.

4.144 **Mexico** submits that it is impossible to draw these conclusions from the data contained in the application and supplementary application. Cementos Progreso did not provide any information concerning either annual cement consumption or the volume of shipments to Guatemala. Thus, at the time of initiation, the Ministry did not have the information relied on by Guatemala before the Panel.

4.145 **Guatemala** notes that, because of the low value-to-weight ratio and the high cost of land transport, the two shipments reported by the applicant went to a very small area in Guatemala. During the investigation, the Ministry established that Cruz Azul had concentrated its marketing efforts on the west of Guatemala, close to the border between Mexico and Guatemala, no doubt to minimize transport costs. Consequently, the two shipments must be evaluated in comparison with consumption in the areas where they were sold and not in comparison with consumption in Guatemala as a whole. At that time, Cruz Azul's penetration of the Guatemalan market with dumped exports was incipient. Cruz Azul's sales in that period were concentrated on the border areas, owing to high transport costs. If the sales were concentrated in those areas, when it came to examine the information contained in Cementos Progreso's application, which related to a threat of injury, the Ministry had no alternative but to assess the potential impact of shipments in the areas close to the border. As confirmed in the preliminary determination, Cruz Azul's exports to Guatemala held 23% of the domestic market.

4.146 According to Guatemala, the applicant suspected that other imports had entered through the customs posts of El Carmen and La Mesilla. The applicant requested the investigating authority to obtain import certificates for the past year in order to determine the real volume of imports of cement from Mexico that had caused injury to the domestic industry. In Guatemala, it is very difficult for a private company to obtain information on imports of a particular product. A private company needing such information would have to request that it be obtained as part of an official government investigation. Thus, when Cementos Progreso submitted its application, it did not have information relating to the total volume of imports of cement from Mexico. Guatemala accepted Cementos Progreso's claim that it had not been able to prove the huge volume of cement entering the country daily at discriminatory prices, because at that time the Ministry itself did not have access to any specific information on the evolution of the volume of imports of grey portland cement or any other product. For this reason the Ministry accepted that Cementos Progreso did not have additional information on the evolution of the volume of imports reasonably available to it. Two *asesores* orally requested Cementos Progreso to provide further evidence of the evolution of imports. Cementos Progreso replied that it was not possible to obtain further copies of import certificates for cement entering Guatemala, but that perhaps the *asesores* could obtain further information from the customs

officials at the border posts. The *asesores* consulted the customs authorities at the border post of Tecún Umán, who confirmed that indeed, Cruz Azul imports were increasing, but that they still did not have any written reports confirming the volume of imports. The *asesores* then asked the Director-General of Customs if he had any written reports and were told that his department did not have any reports, that it would first be necessary to collect the import certificates from the customs authorities at Tecún Umán, La Mesilla and El Carmen, and that the data concerning imports of grey portland cement would have to be compiled manually from the relevant individual import certificates. The Director-General said that this task would take several months. Thus, the *asesores* concluded that there was no further information reasonably available to the applicant.

4.147 In reply to a question from the Panel as to whether a mere suspicion that imports had also entered through the customs posts of El Carmen and La Mesilla constituted evidence for the purpose of applying Articles 3 and 5 of the ADP Agreement, Guatemala stated that the application contained evidence that the domestic producer, Cementos Progreso, had good reason to suspect that cement from Mexico was being imported through the frontier posts at El Carmen and La Mesilla. The Ministry examined the accuracy and adequacy of all the evidence submitted in the application; a presumption or inference based on circumstantial evidence is a legitimate form of proof, as is the case with the information from Cementos Progreso that cement was coming in through other customs posts. After examining all of the information and evidence supplied, the Ministry concluded that there was sufficient evidence to initiate. In any event, Guatemala states that the Ministry did not base its decision to initiate solely on the information about imports at other customs posts, because the other evidence in the application was sufficient for initiation.

4.148 Guatemala notes that, as regards the effect of the imports on prices of the like product in the domestic market, Cementos Progreso based its information on a list containing the prices of cement in Guatemala and two import certificates to demonstrate that the prices of the dumped imports were much lower than the prices of Cementos Progreso in Guatemala. The prices of the dumped imports averaged only Q13.96 per sack, 50% lower than the average price of Q26.00 at which Cementos Progreso sells its cement in Guatemala. Thus, the application contained irrefutable evidence of "significant price undercutting" within the meaning of Article 3.2 of the ADP Agreement, proving that there was an adverse effect on the price.

4.149 Concerning Mexico's argument that the Ministry should have obtained information on imports from the Directorate-General of Customs before initiating the investigation, Guatemala asserts that Article 5 of the ADP Agreement does not require the investigating authority to obtain information before beginning the investigation. If the information obtained from the Directorate of Customs after the initiation of the investigation had demonstrated that imports had not increased or that import prices were higher than Cruz Azul's domestic market prices, then the Ministry would have terminated the investigation in conformity with Article 5.8. However, the information from the Directorate of Customs confirmed and strengthened the evidence of dumping and the threat of injury claimed by the applicant.

(iii) Causal link

4.150 **Mexico** submits that Cementos Progreso's application did not contain sufficient evidence of causal link between the dumped imports and the threat of injury to meet the requirements of Article 5.2 of the ADP Agreement. Mexico contends that all applications must contain evidence of dumping, injury and a causal link between the dumped imports and the injury or the threat of injury, failing which they should be rejected by the investigating authority. Mexico recalls its arguments that the application submitted by Cementos Progreso did not contain adequate evidence of either dumping or threat of injury to the domestic industry. It follows that it cannot demonstrate a causal link either. Technically speaking, it might be possible to have dumping and threat of injury without a causal link, but there can never be a causal link without either dumping or injury, much less in the absence of both, as in this case.

4.151 According to Mexico, the absence of evidence on causal link is clearly demonstrated by the application and by the initiation of the investigation. An examination of the application and the supplementary application, submitted by the claimant on 21 September and 9 October 1995 respectively, does not reveal the slightest trace of adequate evidence on causal link, as required by Article 5.2 of the ADP Agreement. The text of the resolution for the initiation of the investigation confirms this, in that the Ministry did not include any explicit reference to causal link.

4.152 **Guatemala** notes that, by virtue of Article 5.2 of the ADP Agreement, an application must contain evidence of a causal link between dumped imports and alleged injury. The second sentence states that assertions of dumping, injury and a causal link must be substantiated by "relevant evidence" that is "sufficient" to meet the requirements of Article 5.2. The concept of "relevant" evidence sufficient to meet the requirements of Article 5.2 is defined in the third sentence as "such information as is reasonably available to the applicant" with regard to the factors listed in subparagraphs (i) to (iv). Contrary to what Mexico has argued, Article 5.2 does not require that the evidence substantiating an assertion must necessarily be documentary evidence. Documentary evidence can consist of factual declarations contained in the application itself.<sup>64</sup> Article 5.2 does not, however, specify any evidence of causal link other than the factors listed in subparagraphs (iii) and (iv). It makes no reference to Article 3.5, which concerns the evidence of causal link required for a preliminary or definitive determination of injury. Article 5.2 clearly indicates that there is sufficient evidence of a causal link if the application provides evidence of dumping in accordance with Article 5.2(iii) and evidence of consequent injury or threat of injury in accordance with Article 5.2(iv). Article 5.2(iv) only contains a cross-reference to paragraphs 2 and 4 of Article 3 and not to the other paragraphs of Article 3. Consequently, Article 5.2 clearly establishes that no paragraph in Article 2 and only two of the eight paragraphs in Article 3 apply to the decision to initiate an investigation. Article 5.2(iv) does not require that the application should provide information on the four factors listed in Article 3.7 relating to threat of injury. Those drafting Article 5.2(iv) only included a cross-reference to paragraphs 2 and 4 of Article 3.

4.153 Guatemala submits that Cementos Progreso's application did contain evidence and information of the type described in paragraphs 2 and 4 of Article 3. In particular, it contained evidence of "a significant increase in dumped imports" and of "significant price undercutting" as referred to in Article 3.2. It also contained evidence of a "potential decline" in "return on investments"; "factors affecting domestic prices; the magnitude of the margin of dumping; ... potential negative effects on ... employment ... growth ... or investments", within the meaning of Article 3.4. The application contained information and evidence to the effect that massive imports at prices substantially lower than those in Mexico, substantially lower than prices in Guatemala, and substantially lower than Cementos Progreso's production costs threatened Cementos Progreso with imminent material injury, in particular by (1) having a negative effect on its market share; (2) having a negative effect on its plans for investment to allow it to modernize and improve its production facilities by expanding the raw material grinding facilities, building a third kiln at the San Miguel plant and converting the kilns to use a different fuel; (3) having a negative effect on its capacity to recruit 400 new employees, who would no longer be needed if the expansion plans were cancelled; (4) obliging it to cease production and become an importer instead of investing in additional capacity because doing so would only mean selling cement at prices below production costs; (5) obliging Cementos Progreso, if it became an importer, to dismiss 1,052 employees; and (6) causing Guatemala

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<sup>64</sup> In response to a Panel question, Guatemala argued that this statement was intended to make it clear that the evidence substantiating mere assertions of dumping, threat of injury and causal link contained in the application can consist of factual declarations included in the application itself. For example, Cementos Progreso's assertion that it was facing a threat of material injury was substantiated by the factual declaration that, if the dumped imports continued to be sold at those prices, Cementos Progreso would have to cancel plans to expand and modernize its production plant, which were detailed in Section VI of the supplementary application, and close down its present production plant, with a consequent loss of jobs. The ADP Agreement does not require the application to include documentary evidence of the threat of injury.

to lose its cement technology. The information and evidence on the significant threat to Cementos Progreso's labour force was extremely important for the Ministry because of Guatemala's high unemployment rate (42%) and the fact that these were relatively highly paid posts for skilled and semi-skilled workers. Thus, Cementos Progreso submitted evidence and information that it was planning to modernize and expand its production capacity, but that the onset of dumped imports from Cruz Azul seriously jeopardized its investment plans. Cementos Progreso described the projects to modernize and expand production capacity in its application. They included: increased grinding capacity at the same plant, optimization of the plant, construction of a third kiln at the San Miguel Sanarate plant and reconversion of the electricity system by transforming the plant that used bunker fuel. Cementos Progreso also provided information that such expansion would require at least 400 people more, who could no longer be used when the work stopped. Cement production requires a large amount of capital and fixed costs are high in comparison with variable costs. Therefore, in order to be profitable a plant must use a large part of its capacity. One essential prerequisite for Cementos Progreso's plan to expand its capacity was that it should continue to have a large share of the Guatemalan market and be able to use its additional capacity. As reflected in the application, Cementos Progreso had no economic reason to make the planned investment if Cruz Azul was allowed to sell cement in Guatemala at prices substantially lower than the normal value, substantially lower than Cementos Progreso's prices in Guatemala, and substantially lower than Cementos Progreso's production costs. The fact that Cementos Progreso was operating at full capacity in October 1995 does not contradict this statement, nor does it contradict the evidence substantiating its claim that it was facing a threat of material injury.

4.154 **Mexico** rejects Guatemala's argument that, according to Article 5.2 of the ADP Agreement, there is sufficient evidence of causal link if the applicant provides evidence of dumping in accordance with Article 5.2(iii) and evidence of injury in accordance with Article 5.2(iv). The references in the first paragraph of Article 5.2, which state that the application shall include evidence of "a causal link between the dumped imports and the alleged injury", should be interpreted as referring implicitly to those parts of Article 3 that explain the meaning of the causal link requirements. The purpose of identifying or clearly showing the meaning of the words dumping, injury and causal link in Articles 2 and 3 is to provide clarity and a basis for understanding the rest of the ADP Agreement. Attempting to avoid the aforementioned obligation by arguing that Article 5.2 does not specify what evidence of a causal link must be given would make the ADP Agreement inapplicable. The reason why Article 5.2 does not specify the evidence to substantiate a causal link is because it is necessary to turn to the provision that does, namely paragraphs 4, 5 and 6 of Article 3 of the ADP Agreement. It is not necessary for each article of the ADP Agreement to repeat what is stated in the other articles of the ADP Agreement. In order to apply the ADP Agreement, it has to be interpreted as a whole. Guatemala's argument is untenable also because the information requirements in Article 5.2, including subparagraph (iv), state that "the effects of [allegedly dumped] imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry" shall be demonstrated "by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3". This explicit reference in Article 5.2(iv) to Articles 3.2 and 3.4 should dissipate any doubts on the kind of information to be included in an application for the purpose of establishing a causal link between the imports and the state of the domestic industry. This cross-reference is particularly relevant to the case under consideration because the domestic industry comprises one single producer. Article 5.2(iv), with its illustrative references to Articles 3.2 and 3.4, requires the applicant to provide information on whether there has been "significant price undercutting" or "whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred", and on "relevant economic factors and indices" including "actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacities; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments". The applicant is the only producer and so is in a privileged position to provide information on these factors. It would be absurd if the signatories in the Uruguay Round, having indicated in Article 3 the

elements to be used to prove a causal link, would not then be able to analyze these elements because Article 5.2 does not specifically mention the way in which they must be analyzed.

4.155 Mexico rejects Guatemala's argument that, under Article 5.2 of the ADP Agreement, an application need not contain information on the four factors listed in Article 3.7 relating to threat of injury. Article 5.2 requires that the application include evidence of "injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement". Article VI of GATT 1994 in turn consistently refers to the injury requirement in terms of material injury or threat of injury, and provides that "no contracting party shall levy anti-dumping duties on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping is such as to cause or threaten material injury to an established domestic industry."<sup>65</sup> Consequently, "injury within the meaning of Article VI of GATT 1994" should be interpreted as material injury or threat of material injury. Moreover, the explicit reference in Article 5.2 to the phrase "injury ... as interpreted by this Agreement" concerns ADP Agreement definitions of material injury and threat of material injury, the latter being specified in Article 3.7. In the same way as Article 2 explains the technical meaning of dumping and certain provisions in Article 3 give the technical meaning of material injury, Article 3.7 establishes what the negotiators defined as "threat of material injury", together with the factors to be taken into account by the authorities when making a determination of threat of injury. It is in the interests of all Members of the WTO, as expressed in the report of the panel in United States - Measures Affecting Imports of Softwood Lumber from Canada to avoid "the potentially burdensome consequences of an anti-dumping investigation initiated on an unmeritorious basis".<sup>66</sup> The interest becomes even more important in cases that proceed on the basis of a threat of material injury. It would be strange if the ADP Agreement was interpreted in the sense that applicants in cases of threat of material injury were subject to less stringent requirements than those in cases of present material injury.

4.156 Mexico concludes from the wording of Article 5.2 that for an application to have been properly submitted, in addition to providing evidence of dumping and injury it must also contain evidence of a causal link, and for its part Article 5.2(iv) clearly establishes the information which must be provided in this respect by making it clear that what is required is not only information on the volume of imports but also on the evolution of the volume of imports, to show that there has in fact been a significant increase. Article 5.2 also requires not just information on prices but also information on the effect of the imports on prices in the domestic market in order to confirm that this has been to depress them to a significant degree or prevent increases which otherwise would have occurred. Article 5.2 calls for the submission of not just information on the indicators for the domestic industry but also on the consequent impact of the imports on the latter, for the purpose of determining how the industry has been affected by the imports. Thus, it is not possible to arrive at the conclusion reached by Guatemala, namely that to comply with the provisions of Article 5.2 it is sufficient to show that there is sufficient evidence of a causal link if the application provides evidence of dumping and evidence of injury.

4.157 Mexico states that, according to Article 5.2, the application for the initiation of an investigation must contain such information as is reasonably available to the applicant. Article 5.2 consists of three sentences and four subparagraphs. The first sentence relates to the evidence which must be submitted. The second stipulates that simple assertions are not sufficient, and the third describes the information which must be provided. It is in the third sentence (information), not in the first (evidence), that the words "reasonably available to the applicant" occur. Mexico notes that, according to Guatemala, the words "reasonably available to the applicant" apply to the evidence (first sentence) rather than the information (third sentence). On the basis of this inadmissible interpretation of Article 5.2, Guatemala also concludes that the words "reasonably available to the applicant" mean

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<sup>65</sup> Article VI.6(a) of GATT 1994.

<sup>66</sup> United States - Measures Affecting Imports of Softwood Lumber from Canada, BISD 40S/358, paragraph 331, adopted on 27 October 1993.

that there is no obligation upon the latter to meet any of the requirements of this paragraph, or that the applicant need only submit two invoices and two import certificates for an investigation to be initiated.

4.158 **Guatemala** maintains that Article 5.2 does not require the complainant to provide documentary evidence or testimony in the form of sworn statements to support the factual information contained in the application. Mexico is simply disputing the probative value ascribed to the evidence without presenting any evidence of bias or lack of objectivity. The terms "evidence" and "information" are used interchangeably in Articles 5.2 and 5.3 of the ADP Agreement and in the corresponding Articles - 11.2 and 11.3 - of the SCM Agreement. Article 11.2(iv) of the SCM Agreement establishes that "[the] evidence includes information." The "evidence" referred to in the first sentence of Article 5.2 of the ADP Agreement consists of the categories of "information" described in subparagraphs (i) to (v) of the third sentence of the same Article. Cementos Progreso's application contained "assertions" of dumping, threat of material injury and causal relationship. All the information included in the application and its annexes and the supplement to the application concerning the categories of information described in subparagraphs (i) to (iv) of the third sentence of Article 5.2 constitutes the evidence or information substantiating the assertions. Moreover, Guatemala states that Article 5.2 does not require documentary evidence. For example, according to the interpretation made by the United States of Article 5.2 which Guatemala submitted to the Panel, in an anti-dumping application it is necessary to include "all factual information" substantiating the assertions of dumping, injury, and causal relationship. According to the definition given by the United States of "factual information," such information includes "data or statements of fact in support of allegations" as well as "documentary evidence."<sup>67</sup>

(d) Article 5.3

4.159 **Mexico** recalls that Article 5.3 of the ADP Agreement requires an investigating authority to "examine the accuracy and adequacy of the evidence provided" in the application, in order to determine whether there is sufficient evidence to justify the initiation of an investigation. According to Mexico, the word "accuracy" refers to the exactitude of the evidence provided, and the word "adequacy" refers to the relevance of the evidence to the case in question. Evidence that the sky is blue may be accurate but is not relevant to the initiation of an anti-dumping investigation. Likewise, inaccurate evidence may not be very exact, but may still be relevant to the initiation of an investigation. In the present case, for example, the two alleged invoices for one sack of cement each, submitted by Cementos Progreso to substantiate its claim of dumping, are inaccurate because they do not contain any data on the content and type of cement, but they are relevant because they refer, albeit inadequately, to market prices in the exporting Member. Furthermore, the two import certificates also submitted by Cementos Progreso to substantiate its claim of injury and subsequently threat of injury are accurate, but are not relevant to prove injury or threat of injury.

4.160 Mexico stresses that the words "accuracy and adequacy" must be understood in the light of the standard of sufficient evidence mentioned in Article 5.3. In this respect, Mexico agrees with the explanation of the panel in United States - Measures Affecting Imports of Softwood Lumber from Canada:

"... the term 'sufficient evidence' in the context of initiation of a countervailing duty investigation was to be interpreted to mean 'evidence that provides a reason to believe that a subsidy exists and that the domestic industry is injured as a result of subsidized imports'."<sup>68</sup>

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<sup>67</sup> Federal Register, Vol. 62, p.27380, 27383 and 27384, 17 May 1997.

<sup>68</sup> *Ibid*, para. 333.

"... 'sufficient evidence' clearly had to mean more than mere allegation or conjecture, and could not be taken to mean just 'any evidence'. In particular, there had to be a factual basis to the decision of the national investigative authorities and this factual basis had to be susceptible to review under the Agreement. Whereas the quantum and quality of evidence required at the time of initiation was less than that required to establish, pursuant to investigation, the required Agreement elements of subsidy, subsidized imports, injury and causal linkage between subsidized imports and injury, the Panel was of the view that the evidence required at the time of initiation nonetheless had to be relevant to establishing these same Agreement elements."<sup>69</sup>

4.161 Mexico considers that the panel in United States - Measures Affecting Imports of Softwood Lumber from Canada correctly expressed the intention of the drafters of Article 5.3 of the ADP Agreement, who later included in the ADP Agreement the requirement that the authorities "... shall examine the accuracy and adequacy of the evidence provided ...". Taken together, the accuracy and adequacy requirements mean that no one type of evidence is sufficient. The evidence must be "adequate" in the sense that it must be "relevant" and "appropriate" to the substantive matters claimed in the application, i.e. the evidence must be relevant to the issue of whether dumping or injury exist and whether the injury is caused by the dumping. Information that is not relevant to such determination shall not be adequate in accordance with Article 5.3. The requirement that the information should also be "accurate" is similar to the view expressed by the panel in United States - Measures Affecting Imports of Softwood Lumber from Canada, when it stated that "... this factual basis had to be susceptible to review under the Agreement".<sup>70</sup>

4.162 In Mexico's opinion, the word "accuracy" in Article 5.3 of the ADP Agreement shows that it was the negotiators' intention that the information should be true and correct and that the national authorities should be obliged to establish the truth and relevance of the information prior to initiation.

4.163 Mexico also considers that evidence may be relevant to the initiation of an investigation without being sufficient to justify the initiation of an investigation.

4.164 According to **Guatemala**, Article 5.3 provides that the investigating authorities must examine the evidence provided in the application to determine whether it is sufficient within the meaning of Article 5.2 to justify the initiation of an investigation. The investigating authorities may decide that the evidence is sufficient after examining the accuracy and adequacy of the evidence. Article 5.3 does not require the investigating authority to carry out an investigation or to confirm or verify the claims contained in the application. Thus, the Panel must accept the decision of an investigating authority to initiate the investigation provided the authority has carried out the required examination to determine whether there is sufficient evidence. In the present case, the Ministry determined that the application included "adequate" evidence because it contained information and evidence that was reasonably available to the applicant relating to the categories of evidence described in subparagraphs (i) to (iv) of Article 5.2. The Ministry also determined that the application included "accurate" evidence because it contained reasonable, consistent and plausible information and evidence and did not include any declarations contradicting the facts known to the Ministry at that time. Guatemala notes that during the Uruguay Round, a draft anti-dumping text was discussed which would have required the authorities to verify the evidence provided in the application for the initiation of an investigation against any information readily available to the authorities.<sup>71</sup> However, this proposal was rejected at the time in favour of Article 5.3, which requires only that the investigating authority should examine the accuracy and adequacy of the evidence provided in the application, but does not require them to verify the information against other sources.

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<sup>69</sup> *Ibid*, para. 332.

<sup>70</sup> *Ibid*.

<sup>71</sup> Carlisle II Draft Anti-Dumping Text (14 August 1990), Inside US Trade, 21 August 1990, in Special Report.

4.165 Guatemala states that the file clearly shows that the Ministry examined the accuracy and adequacy of the evidence submitted in the application in order to determine whether there was sufficient evidence to justify the initiation of an investigation. On 6 November 1995 the Ministry ordered the Directorate of Economic Integration to examine the application and its accompanying documentation. On 17 November 1995, two *asesores* from the Directorate of Economic Integration submitted opinions to the Director in which they presented their assessment of the application and the accompanying evidence and expressed the opinion that there was sufficient evidence to justify the initiation of an investigation. On 15 December 1995, the Directorate of Economic Integration approved these opinions and concluded that there was sufficient evidence to initiate an investigation.

4.166 Guatemala maintains that it complied with its obligation under Article 5.3 to examine the evidence. Mexico, or the Panel, could engage in a *de novo* review and arrive at a different conclusion. However, Guatemala submits that this is not the Panel's function. According to Article 17.6, the Panel must accept the investigating authorities' establishment of the fact that there was sufficient evidence - reasonably available to the applicant - to justify the initiation of an investigation. Otherwise, the Panel would be assuming the role of the investigating authority.

(i) Dumping

4.167 **Mexico** submits that the Ministry did not have sufficient evidence of dumping to justify the initiation of the investigation. Mexico submits that, by initiating the investigation on the basis of the evidence submitted by Cementos Progreso on normal value and export price, and by conducting the examination of dumping on the basis of that evidence in spite of the shortcomings mentioned, the Ministry violated Article 5.3 of the ADP Agreement. Furthermore, Mexico alleges that the investigating authority failed to examine the accuracy and adequacy of the evidence provided, also contrary to Article 5.3. Mexico argues the documents submitted by the claimant as evidence of normal value do not qualify as adequate and accurate evidence because:

- (a) neither of the alleged invoices indicates the type of cement concerned (in other words, the Ministry could not be sure whether the product concerned was "like" the product under investigation, within the meaning of Article 2.1 of the ADP Agreement), the brand name of the cement under investigation, or the size of the sacks (Mexico sells cement in 50 kg. sacks, while Guatemala sells cement in 42.5 kg. sacks, a point which the applicant failed to mention despite the fact that the sacks clearly indicate their contents). Thus, the Ministry could not be certain that the product mentioned in the alleged invoices was in fact the product under investigation and not another, higher-priced product. Furthermore, on the basis of this kind of evidence the investigating authority could not ascertain the quantity of the product sold or establish that the product in fact came from Cruz Azul rather than another firm;
- (b) the transactions recorded in the two alleged invoices cannot be considered as representative since they only apply to the sale of one sack of cement each, and they both took place in the course of two days (25 and 26) of one of the months (August) of the investigation period (1 June to 30 November 1995). Trying to compare a one-tenth part of a tonne with the total sales of the domestic producer on the Mexican market during the investigation period (six months) cannot be considered a fair, impartial, objective or reasonable comparison; and
- (c) the price indicated in the alleged invoices for the sale of cement in Mexico cannot be considered as representative for the determination of the normal value since, although the invoices record commercial transactions which allegedly took place, the sales in question reflect an insignificant share of the operations of Cruz Azul in the Mexican market.

4.168 According to Mexico, the import certificates used by Cementos Progreso as proof of the export price also cannot be considered as relevant evidence, because:

- (a) it cannot be maintained that two transactions consisting in the sale of 299 and 179 tonnes respectively are representative of a market which, at the beginning of the period under investigation, was estimated at approximately 95,000 tonnes per month; and
- (b) as in the case of the normal value, the two transactions were conducted over two days (14 and 15) of one of the six months of the investigation period (August).

4.169 **Guatemala** states that the application of 21 September 1995 clearly identified the product imported from Mexico as grey portland cement classified under heading No. 2523.29.00 of the Central American Harmonized System. Heading No. 2523.29.00 covers all portland cement with the exception of white portland cement and portland cement with artificial colouring; in other words, it covers grey portland cement with or without the addition of pozzolana.<sup>72</sup> The documents proving the imports - two import certificates (with their invoices) and two bills of lading - also refer to grey portland cement. One of the import certificates attached to the application identifies the product as "grey portland cement, tariff heading No. 2523.29.00". The other import certificate identifies the product as "Type II Grey Portland cement with pozzolana, tariff heading 2523.29.00". Both invoices from Cruz Azul identify the product as "Type II Grey Portland cement with pozzolana". Both bills of lading identify the product as "grey portland cement". Likewise, Section 1 of the supplementary application identifies the product as "grey portland cement". In short, close examination of both the application and the supplementary application makes it quite clear that, for the Ministry, the imported product mentioned in the application was grey portland cement. In the course of the meetings held prior to initiation, Cementos Progreso only mentioned grey portland cement to the Ministry. The penultimate sentence in Section IV of the supplementary application indicates that the manufacturing process used in Mexico must be very similar to that used by Cementos Progreso in Guatemala because it concerns the same product. All types of grey portland cement, with or without pozzolana, come under tariff heading 2523.29.00. Consequently, Types I and II grey portland cement are both classified under the same heading of the Guatemalan tariff.

4.170 Guatemala submits that the absence of any reference to a particular type of cement on the invoices relied on as evidence of normal value indicates that in Mexico the price of cement does not vary according to the type. The same raw materials and the same production process are used to manufacture the various types of grey portland cement, which is used to make concrete or concrete products. There are slight differences in the chemical composition and physical characteristics of the different types of cement. Although Cruz Azul's reply to the original questionnaire sought an adjustment of the normal value in order to take into account the difference between the cement sold in Mexico (Type II Pz) and one of the types sold in Guatemala (Type 1 PM), in its subsequent reply to the supplementary questionnaire it stated that price adjustment was not necessary. Neither Cruz Azul nor any other party has submitted any evidence to suggest that there is a price variation among the different types of grey portland cement. Nor has Cruz Azul argued that any of the documents attached to the application did not refer to grey portland cement. In any event, the application mentioned the export price for Cruz Azul's sales of Type II grey portland cement with pozzolana. In its submission to the Ministry of 13 May 1996, Cruz Azul acknowledged that the cement sold in Tapachula, Mexico, was type II grey portland cement with pozzolana. The evidence on Cruz Azul prices in Tapachula, Mexico, and on the export price to Guatemala shown in the application therefore refer to the same product - Type II grey portland cement with pozzolana (Type II Pz). The evidence on the export price contained in the application only refers to Type II Pz cement, in other words the same cement that Cruz Azul later acknowledged that it sells in Tapachula.

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<sup>72</sup> Guatemala notes that white portland cement is covered by tariff heading No. 2523.21.00.

4.171 **Mexico** disputes Guatemala's statement that the price of cement does not vary according to type. The Mexican official standard for the manufacture of portland cement indicates the various types of chemical specifications for different kinds and qualities of cement, i.e. higher quality cement has a lower proportion of tricalcium aluminate. This component has to be catalyzed with ferrous oxide in order to be reduced. For example, up to 15% of pozzolana may be added to Type I PM pozzolanic cement. If pozzolanic cement is manufactured, between 15-40% of pozzolana has to be added, and this implies additional costs so the price is higher. In short, the price necessarily varies according to the quality and type of cement.

4.172 **Guatemala** argues that if the price did vary according to the type of cement as alleged by Mexico, it is reasonable to assume that the type of cement would appear on the invoice. Had an invoice covered white cement, for example, the price shown would have been two or three times higher, since it is common knowledge that white cement sells at two or three times the price of grey cement. Furthermore, if one assumes that the price of cement in Mexico varies according to the type, this price difference is not information that is reasonably available to Cementos Progreso because the various types of cement are not mentioned on the invoices for cement sold in Mexico. In view of the meetings held between representatives of the Ministry and Cementos Progreso for the purpose of discussing the price information, and given the fact that the Ministry was already familiar with the Guatemalan cement industry and the price mechanism for this product because of the Guatemala's price control programme, the Ministry did not seek additional information from Cementos Progreso on the prices in Mexico or on the export prices. The fact that the Ministry was familiar with the cement market and the price mechanism was very useful in examining the accuracy and adequacy of the evidence provided in connection with prices. The Ministry realizes that it is extremely difficult to obtain more precise information on any Mexican product - not simply cement - and accordingly the Ministry was of the view that the evidence concerning Cruz Azul's domestic prices submitted by Cementos Progreso was the only evidence reasonably available.

4.173 **Mexico** stated that the assumption by the Ministry that sacks of cement in Mexico were of the same weight as sacks of cement in Guatemala provided irrefutable proof that the Ministry had not examined the accuracy of the evidence. Otherwise, the difference in weight would have been detected prior to the initiation of the investigation.

4.174 **Guatemala** states that the fact that the Ministry assumed that the sacks sold in Mexico were not different in size from those sold in Guatemala does not mean that the Ministry did not conduct an examination of the adequacy and accuracy of the evidence. In fact, it was reasonable to assume that the exporter would not go to the additional expense of using sacks of different sizes for each market. Moreover, had this fact been known - that packaging the cement for export to Guatemala did incur extra costs for Cruz Azul - it would have added substance to the applicant's assertion of threat of material injury, since it shows that Cruz Azul was making investments in order to increase its exports to Guatemala. In any case, adjustments in price information to take account of minor differences in weight would not have made any difference to the conclusion that there was a high margin of dumping.

4.175 **Guatemala** asserts that Mexico tried to focus the Panel's attention on certain documents, taken in isolation and outside the context in which they had been evaluated by the investigating authorities. However, the Ministry did not evaluate each piece of documentary evidence or any other form of evidence in isolation. The Ministry took into account all the evidence when drawing up its conclusions. It did not therefore consider in isolation any of the eight documents in the application that substantiated the allegation of dumping. The Ministry examined all the documentation as a whole, found that the documents were consistent and decided that they constituted accurate and relevant proof of dumping. Documentary evidence is regarded as authentic, subject to the right of the opposing party to prove that it is null and false, which in no way implies that mere assertions are assumed to be valid. As the ADP Agreement does not impose any obligation to collect documentary

evidence, establish any mechanism to verify the accuracy of the evidence, or impose any system for the evaluation of evidence, the Government of Guatemala was legally entitled to proceed as it did.

4.176 According to **Mexico**, this argument by Guatemala reveals that it failed to comply with its obligation under Article 5.3 to examine the accuracy and adequacy of each and every piece of evidence provided by the claimant. Article 5.3 states that the examination concerns the accuracy and adequacy of the evidence (*pruebas* in the Spanish version) in the plural, meaning the accuracy and adequacy of different pieces of evidence. Mexico asks how it is possible to conduct a collective or overall examination of evidence when, by definition, accuracy must pertain to each individual piece of evidence. Otherwise, it is impossible for the examination of each piece of evidence to be accurate. How is it possible, moreover, to assert that the documentary evidence is considered reliable without prejudice to the right of the exporter to demonstrate that the said evidence is not reliable, not forgetting that the exporter is not yet involved in the process since the investigation has not yet been initiated.

4.177 In response to a question from the Panel, **Guatemala** notes that it consulted with the officials responsible for the case during the previous administration and established that when the representatives of Cementos Progreso brought the case before the Ministry - as indicated in section IV of the original application, these meetings took place before the written application was submitted - they said that they had purchased grey portland cement as per the two invoices in Tapachula, Mexico, and that they had been able to establish that Cruz Azul's prices for grey portland cement were considerably higher than the prices of the grey portland cement exported by Cruz Azul to Guatemala. This additional evidence helped the Ministry verify the accuracy and adequacy of the evidence contained in the written application.

(ii) Threat of injury

4.178 **Mexico** submits that the Ministry did not have sufficient evidence of injury or threat of injury to justify the initiation of the investigation. Mexico asserts that, in order for an investigating authority to initiate an anti-dumping investigation, the existence of injury or threat of injury must be demonstrated by producing accurate and adequate evidence, and not merely on the basis of allegation, conjecture or remote possibility.

4.179 According to Mexico, the only evidence available to the Ministry at the time of initiation of the investigation concerning the alleged threat of injury claimed by Cementos Progreso was two import certificates. Mexico argues that these import certificates cannot be considered as adequate or accurate evidence of threat of injury within the meaning of Articles 3.7, 5.2 and 5.3 of the ADP Agreement, since they do not provide proof of any of the factors listed in Article 3.7. It is not possible to arrive at a positive conclusion about the existence of massive imports on the basis of the evidence provided by Cementos Progreso in its application. The Ministry assumed the applicant's statements concerning threat of injury to be valid even though they were clearly no more than simple assertions unsubstantiated by relevant or positive evidence.<sup>73</sup>

4.180 Mexico argues that further proof that the Ministry did not have adequate evidence of the threat of injury claimed by Cementos Progreso when it decided to initiate the investigation lies in the fact that on 22 January 1996 (after the resolution to initiate the investigation), the investigating authority sent a questionnaire to the claimant asking for information on: (1) production process and technical standards; (2) production; (3) sales; (4) customers; (5) inventories; (6) cost structure; (7) installed capacity; (8) labour force; (9) evolution of domestic prices; (10) imports; (11) threat of

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<sup>73</sup> Mexico suggests that, to obtain a clearer idea of what should be understood by positive evidence, reference should be made to the report of the panel in United States - Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden, ADP/117, para. 276, not adopted, dated 24 February 1994 ("... such information as would persuade an objective, unprejudiced mind ...").

injury and causality; and (12) accounting statements. This information was submitted by Cementos Progreso on 17 May 1996, eight months after the submission of its application and four months after the initiation of the investigation.

4.181 **Guatemala** refers to a report by two *asesores* who reviewed Cemeto Progreso's application. Guatemala refers to a summary of the examination of the evidence of threat of material injury by the *asesores*, who comment that massive imports from Mexico at dumped prices "would prejudice investment in improvements and expansion of the Guatemalan cement industry" and that "because of the extremely low prices at which the product is imported from Mexico, the Guatemalan firm would become an importer and would be obliged to dismiss 1,052 employees with the consequent negative impact on Guatemala's level of employment and related social and economic problems". Guatemala notes that, in addition to the summaries provided in the report, the Ministry held several meetings with representatives of Cementos Progreso in order to determine whether the evidence contained in the application was relevant and accurate and to raise questions concerning the evidence and information submitted. The Ministry drew Cementos Progreso's attention to the fact that the original application dated 21 September 1995 did not contain sufficient evidence to justify the initiation of an investigation because there was not enough information to substantiate the assertion of consequent threat of material injury. In the supplementary application dated 9 October 1995, Cementos Progreso provided additional evidence and information which, in the opinion of the Ministry, showed a consequent threat of material injury. According to Guatemala, the investigation confirmed Cementos Progreso's claims. In only six months, the rapid inflow of imports at unfair prices took over 25% of the market, causing Cementos Progreso to suffer the corresponding loss in market share, reduction in sales, loss of customers, decrease in production, higher fixed costs per production unit, lower prices, fall in profits, and negative cash flows.

4.182 **Mexico** noted that the report by the *asesores* simply repeated what Cementos Progreso had stated in its supplementary application.

4.183 **Guatemala** states that other highly significant information and evidence was that on the threat to Cementos Progreso's continued existence as a portland cement producer. It was obvious to the Ministry that, if Cementos Progreso was obliged to compete with imports from Cruz Azul (whose prices were much lower than Cementos Progreso's production costs and much lower than the prices in Guatemala authorized by the Government), Cementos Progreso would have no economic incentive to continue producing cement and still less to invest in modernization and expansion. For the Ministry, this real and imminent possibility that Guatemala would lose its cement industry was a genuine source of concern. Cement is an essential raw material in the building industry. It is the binding agent used to manufacture concrete. Concrete is required for infrastructure projects (highways, bridges, etc.) that are essential for Guatemala's continued economic development. Concrete is also an essential construction material for commercial and residential buildings. The Ministry felt compelled to initiate an investigation to determine whether the assertions, evidence and information provided by Cementos Progreso justified the anti-dumping protection before the injury claimed became irreparable.

4.184 Concerning Mexico's argument that the fact the Ministry sent Cementos Progreso a questionnaire after the initiation of the investigation shows that the Ministry did not provide sufficient evidence of threat of injury at the time of initiation, Guatemala notes that routine questionnaires have been sent to domestic producers in practically all anti-dumping investigations, including those conducted in Mexico.

4.185 Guatemala notes that Mexico introduces the concept of "positive evidence". This concept is only applicable to the preliminary or definitive determination of injury under Article 3.1 of the Agreement. It does not apply to consideration of threat of injury in the context of the decision to initiate the investigation. Mexico is mistaken in trying to support the concept of "positive evidence" with the panel report in United States - Imposition of Anti-Dumping Duties on Seamless Stainless Steel Hollow Products from Sweden. That report cannot provide any guidance in the application of

"positive evidence" since in that case, the discussion concerned the standard of "positive information" necessary for the review of an anti-dumping measure under Article 9, paragraph 2 of the Tokyo Round Anti-Dumping Code. That entire discussion is irrelevant to the standard of evidence required for the initiation of an anti-dumping investigation under the ADP Agreement.

4.186 **Mexico** refers to a 1997 publication from Cementos Progreso<sup>74</sup>, in which it is stated that only a few months after the completion of the Ministry's investigation, Cementos Progreso concluded its expansion project at the San Miguel plant. Mexico recalls the Ministry's statement that this project had been delayed owing to unfair competition from Mexican imports. Mexico also argues that the Ministry of the Economy did not have any evidence at all, much less relevant evidence, of the existence of threat of injury, as shown by Guatemala's rebuttal which referred to statements by Cementos Progreso that had been accepted as valid in spite of the fact that they were mere assertions, such as the claim that the applicant was threatened by massive imports of cement from Mexico and that the threat of injury arose from the fact that cement sold at prices below normal value directly affected the investments of the enterprise, or the complaint by Cementos Progreso of threat of injury lodged because it was impossible to demonstrate the enormous volume of imports that entered Guatemala daily - hence the request that the investigating authority should ask the Directorate of Customs for the import certificates for the past year in order to determine the volume of imports of the product under investigation.

4.187 **Guatemala** argues that Cementos Progreso's expansion programme is on-going, and comprises three phases. The first phase should be completed by the end of 1997. The second phase should be completed by the end of 1998.

(iii) Causal link

4.188 **Mexico** submits that the Ministry did not have sufficient evidence of causal link between the dumped imports and threat of injury to justify the initiation of the investigation. Mexico asserts that the Ministry was not able to examine the accuracy or adequacy of evidence concerning causal link because Cementos Progreso did not produce a single piece of evidence to demonstrate causal link in its application.

4.189 **Guatemala** argues that the applicant's claim of causal link was substantiated by adequate evidence because the application contained such evidence as was reasonably available to the applicant in relation to the items contained in Articles 5.2(iii) and (iv) of the ADP Agreement. Article 5.2 clearly indicates that there is sufficient evidence of a causal link if the application provides evidence of dumping in accordance with Article 5.2(iii) and evidence of consequent threat of injury in accordance with Article 5.2(iv). Guatemala notes that the application specifically claimed that the imports were causing a threat of injury. The supplement to the application established that Cementos Progreso was threatened by massive imports of cement from Mexico and explained why the dumped imports directly affected the company's investments. The applications provided evidence (a) that the dumped imports were massive in relation to a zero base, i.e. that the dumped imports had increased rapidly; (b) that the dumped imports were being sold in Guatemala at prices much lower than the normal value, that the prices were much lower than Cementos Progreso's prices in Guatemala and also that they were lower than Cementos Progreso's production costs; (c) that the increase in imports at such low prices jeopardized the investment planned to modernize and expand Cementos Progreso's production capacity because it made no economic sense to invest if Cementos Progreso could not compete with dumped prices; and (d) that the increase in imports at such low prices jeopardized Cementos Progreso's capacity to maintain its position as a domestic producer of grey portland cement because it did not make any economic sense to continue producing cement if the production costs were higher than the price of dumped imports. In addition to the written application, the Ministry also took account of details obtained in the course of meetings with Cementos Progreso regarding the price

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<sup>74</sup> Nuestro Progreso da un paso más, undated.

information contained in the applications and the effect of the dumped imports on Cementos Progreso's planned investments. As mentioned in the first sentence of section IV of the application of 21 September 1995, the application repeats information that the representatives of Cementos Progreso had already given to the Ministry. Thus, when they received the applications, the Vice-Minister of the Economy, Mr. Luis Noriega Morales, and the Director of Economic Integration, Ms. Iliana Polanco, had already received detailed reports of the injury due to dumping that threatened Cementos Progreso's planned investments. On several occasions the Ministry discussed the evidence contained in the application with representatives and consultants from Cementos Progreso, who duly explained each item of evidence regarding the threat to planned investments, the concern that imports would increase as a result of excess installed capacity in Mexico in the wake of the devaluation of the peso, and the documentary evidence of Cruz Azul's prices in Mexico and of the prices for Guatemala. No written reports document these meetings. In response to a question from the Panel, Guatemala stated that the applicant's oral information would not, in itself, have been enough if Cementos Progreso had not provided in its application so many details and specifics of the nature of its investment plans.

4.190 In response to a question from the Panel as to what specific evidence contained in the file Guatemala did have at its disposal at the time of initiation to substantiate the simple assertion of causal link, Guatemala stated that the supplementary application of 9 October 1995 contained a simple assertion that Cementos Progreso was "threatened by" massive imports of dumped cement from Cruz Azul in Mexico. The supplemental application also contained evidence of dumping and threat of injury. That evidence showed that the dumping was the cause of the threat of injury. The fact that the imports were increasing meant that Cementos Progreso, as the only producer in Guatemala, was inevitably losing sales and market share to Cruz Azul. The price undercutting by the dumped imports was so considerable that it was highly possible that Cruz Azul imports would increase and that Cementos Progreso would be required to reduce its prices to match the import prices, with the resulting losses, or that they would lose sales and market share to Cruz Azul. Either option, lowering sales prices or losing sales, would have an adverse effect on Cementos Progreso. In any case, by introducing a degree of uncertainty in the forecasts for the domestic industry, it is clear that this situation was jeopardizing Cementos Progreso's investment plans for expansion and modernization of its production capacity.

4.191 **Mexico** states that contrary to Guatemala's claim, it is clear from Article 5.2 of the ADP Agreement that a properly submitted application, in addition to containing evidence of dumping and injury, must also contain evidence of a causal link (otherwise, asks Mexico, why would this element have been included in Article 5.2?). Article 5.2(iv) sets forth in clear terms the information to be provided in that respect: not only is it necessary to provide information on the volume of imports, but also on the evolution of imports in order to show that there has in fact been a significant increase. It also requires the inclusion not only of information on prices, but on the effect of imports on domestic prices as well, in order to show that they have indeed been made to fall significantly or prevented from rising where they would otherwise have risen. Finally, it requires the inclusion not only of information on domestic industry indicators, but also on the impact of the imports on the domestic industry in order to determine what the actual effect had been. Thus, one could not possibly arrive at Guatemala's conclusion that compliance with the said provision requires no more than establishing "that there is sufficient evidence of a causal link if the application provides evidence of dumping ... and evidence of injury ...". In fact, Cementos Progreso's application did not contain any evidence, nor indeed any information or arguments, regarding the causal link between the alleged dumping and the alleged threat of injury. The members of the Panel could not but share Mexico's opinion that it was materially impossible to try to establish a causal link between two elements if, as in the case at point, the existence of either one, much less both, had not been properly demonstrated.

4.192 According to **Guatemala**, the Ministry considered the totality of this evidence and information to be sufficient to justify the initiation of an investigation into the threat of injury caused by dumping. The alternative solution was to wait and see whether the material injury expected in fact occurred. It would then be too late, however, to prevent the injury. As Article 3.7 of the ADP

Agreement clearly states, the investigating authorities have the right to impose anti-dumping measures to prevent threatened injury. Consequently, the Ministry had the right to initiate an investigation into threat of material injury without requiring Cementos Progreso to provide evidence that the firm had actually suffered material injury. Guatemala states that the Ministry informed Cementos Progreso that the application of 21 September 1995 did not contain sufficient information on the impact of the imports from Mexico. It asked Cementos Progreso to provide this information in a supplement to its original application. Cementos Progreso did so on 9 October 1995.

4.193 Guatemala states that there is no inconsistency in the fact that the Ministry (a) accepted the evidence provided by Cementos Progreso at the initiation of the investigation to the effect that the planned investment might be prejudiced; and (b) left out of its preliminary determination the evidence provided by Cementos Progreso to the effect that it had postponed investment decisions. Guatemala states that the Ministry simply sought more detailed evidence at the preliminary determination stage than at the initiation stage, as any investigating authority should do when carrying out an anti-dumping investigation.

4.194 In response to a question from the Panel as to what specific evidence the Ministry had in the record at the time of initiation concerning Cementos Progreso's inventories of grey portland cement, Guatemala stated that as the dumped imports had started a few months earlier, the Ministry did not consider it relevant - or indispensable - to establish whether those imports had already led to a build-up in Cementos Progreso's inventories, above all because the case under examination related to a threat of injury and not to present injury. Moreover, Article 5.2 permits a degree of discretion regarding the factors the Ministry may take into account in making its analysis.

4.195 Guatemala argues that the Ministry did not examine the original application and the supplementary application in a vacuum. On the contrary, the two *asesores* and the other officials from the Ministry examined the accuracy and adequacy of the evidence on the basis of the Ministry's close familiarity with Cementos Progreso, with grey portland cement, and with Mexico's prevailing economic conditions. The Government of Guatemala was already very familiar with Cementos Progreso, a firm which had been operating in the country for many years and the largest firm in the heavy industry sector. On the basis of its experience in purchasing cement for public works and owing to the existence of ceiling prices both for cement itself and for the transport of cement, the Government already knew (1) the prices of grey portland cement in Guatemala; (2) the production cost of grey portland cement in Guatemala which determined the periodic adjustments in the authorized ceiling; and (3) the high cost of land transport for grey portland cement. The Ministry, through its various functions, also knew that (1) ever since it was founded, Cementos Progreso had supplied practically 100% of the Guatemalan market; (2) before the middle of 1995, Guatemala had not received cement imports; (3) the devaluation of the Mexican peso in December 1994 had caused a serious recession in Mexico; (4) in 1995, owing to the recession, Mexican producers of various different types of products were looking for export outlets, including the Guatemalan border market; (5) during 1995, various Guatemalan firms producing products other than cement had ceased to operate because they were unable to compete with growing imports from Mexico; (6) in Mexico the construction industry, which generated demand for cement, had suffered a considerable setback in 1995; (7) Cruz Azul's cement plants were located in south-eastern Mexico, far from the sea ports but very close to the land border with Guatemala; and (8) the United States market was not accessible to cement imports from Cruz Azul because they were subject to anti-dumping duties exceeding 60% and because of the high cost of land transport to the United States border. On the basis of these facts, together with the facts submitted by Cementos Progreso in its application as clarified and supplemented during meetings with representatives of Cementos Progreso, the Ministry had reasonable grounds to assume that as a result of the fall in demand for cement in Mexico - linked with the considerable drop in construction activity - Cruz Azul had an excess capacity, and would consequently increase its exports to Guatemala. The use of inferences does not mean that anything was simply "assumed," since all inferences were substantiated by facts (evidence) already available to the Government *ex officio*. Guatemala submits that the Ministry did not initiate the investigation on

the basis of these inferences alone; rather, the inferences were of valuable assistance in helping to confirm the accuracy and adequacy of the evidence submitted in the written application.

(e) Article 5.8

4.196 **Mexico** submits that Guatemala should have rejected Cementos Progreso's application, in conformity with Article 5.8 of the ADP Agreement. The first sentence of Article 5.8 provides that "[a]n application ... shall be rejected ... as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case".

4.197 **Guatemala** asserts that Article 5.8 is not applicable before the initiation of an investigation. Article 5.8 applies only to an investigation that has already been initiated. The heading of Article 5 is "Initiation and Subsequent Investigation". Article 5.8 provides that "[a]n application under paragraph 1 shall be rejected **and** an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case" (Emphasis added). The remainder of the paragraph identifies some situations that require "immediate termination". In Guatemala's view, the meaning of this provision is quite clear: Article 5.8 only applies after the initiation of an investigation. It is contrary to the ordinary meaning of this provision for Mexico to try to interpret it as an obligation to reject the application *in limine*, i.e. as of the initiation. In fact, under Article 5.8 the application may be rejected in the course of the investigation, and the investigation terminated as soon as it is established that there is not sufficient evidence of dumping or of injury, or when the margin of dumping is *de minimis* or the volume of dumped imports is negligible. It is not possible to terminate an investigation unless the investigation has already been initiated. According to Guatemala, the background and origin of Article 5.8 of the ADP Agreement is to be found in Article 5© of the Kennedy Round Anti-Dumping Code, whose title is the same as that of the current Article 5: "Initiation and Subsequent Investigation". During the Kennedy Round negotiations, however, this text was included in Article 7 of the draft Anti-Dumping Code under the title "Subsequent Consideration". This background to the negotiations makes it clear that Article 5.8 of the ADP Agreement does not apply to the initiation.

4.198 **Mexico** considers that the text of Article 5.8 is very clear as regards its applicability to the initiation of an investigation. Article 5.8 clearly states that "an application under paragraph 1 shall be rejected ...". What could be clearer, asks Mexico. Guatemala's argument ignores the explicit meaning of the words used in the first sentence of Article 5.8. This Article specifically refers to the initiation of an investigation when it states that "an application under paragraph 1 shall be rejected...". In view of such an explicit statement, Guatemala's argument that Article 5.8 applies exclusively after initiation is clearly inadmissible and unacceptable.

4.199 **Guatemala** notes that Article 5.8 confirms that Guatemala made an admissible interpretation of the ADP Agreement when it concluded that the level of proof required for the initiation of an investigation is lower than the level required for the imposition of the provisional measure or the final measure, since if at any moment following the initiation it is established that there is not sufficient evidence, the investigation must be terminated.

2. Failure to notify

4.200 **Mexico** submits that Guatemala violated Article 5.5 of the ADP Agreement, which it argues requires Members of the WTO to notify the government of the exporting Member of their intention to initiate an anti-dumping investigation. Mexico submits that the Ministry not only failed to provide prior notice of the initiation of the anti-dumping investigation, but did not in fact notify Mexico until 11 days after the publication of the decision to initiate. This is confirmed by a Ministry communication to Mexico apologising for the delay in notification. Mexico suggests that the failure to provide timely notification to the Government of Mexico is of particular importance, in that if

Guatemala had complied with the obligation laid down in Article 5.5 of the ADP Agreement, Mexico would have had sufficient time to defend its interests.

4.201 **Guatemala** considers that it complied with Article 5.5 of the ADP Agreement by refraining from publicizing the application and by notifying Mexico before proceeding to initiate the investigation. Article 5.5 does not require that the exporting government should be notified prior to the publication of the notice of initiation of the investigation; it requires that the notification should be made before proceeding to initiate an investigation. Guatemala submits that this is what the Ministry did. After publishing the decision to initiate the investigation on 11 January 1996, the Ministry was careful to avoid proceeding to the initiation of the investigation itself until all of the interested parties, including Mexico, had received an official notification. Guatemala argues that the Ministry did not take any measure or action to initiate the investigation until after Mexico had been notified on 22 January. Guatemala further argues that Cruz Azul admitted, in its reply to the original questionnaire, that the investigation was not initiated on 11 January 1996, but on 22 January 1996. In fact, the investigation began on 23 January 1996, when the Ministry asked the Directorate-General of Customs to provide information on imports of cement from Mexico. Guatemala states that it informed Mexico's Department of Trade and Industrial Development ("SECOFI") of the initiation of the investigation by fax, probably on 19 January 1996, although it does not have any documentary evidence to this effect. Guatemala suggests that Cruz Azul acknowledged this fact in its written submission of 7 February 1996.

4.202 Guatemala does not agree with Mexico's argument that Article 5.5 requires notification prior to the publication of the notice of initiation rather than prior to the actual initiation of the investigation. Mexico's interpretation of this Article cannot be justified by either the spirit or the letter of the Agreement. In the case of the investigation conducted by Guatemala with respect to cement from Mexico, the investigation was "initiated" when Guatemala carried out the first actual step in the investigation, i.e. when Guatemala requested information from Customs on 23 January 1997. This way of proceeding is admissible under Article 5.5, according to which it is enough for the investigating authorities to carry out the required notification "before" proceeding to initiate the investigation rather than before publishing the notice of the initiation of the investigation. Unlike Article 12.1, Article 5.5 makes no mention of public notice. In fact, it stipulates that the investigating authority should avoid any publicizing of the application. Thus, according to Guatemala, the date of publication is clearly not the central element of Article 5.5. Similarly, Mexico's interpretation is devoid of any logical justification, since it implies that Guatemala would have complied with Article 5.5 by notifying Mexico by midnight on 10 January and then publishing the notice on 11 January. What purpose would this serve, asks Guatemala, since Mexico has no right under the Agreement to delay or prevent the initiation of an investigation, or to present any kind of submission before the initiation. Notification on the eve of publication would not have provided the interested parties with additional time to defend their interests, since under Guatemalan law, the time-limit would be calculated as from the date following the day of the notification. Guatemala argues that even if the Ministry had notified Mexico before 11 January, there would have been no difference in the ability of Mexico and its exporter to defend their interests. Similarly, notification on 10 January would not have provided additional time. Contrary to Mexico's claim, Guatemala did provide the Mexican exporter with sufficient time to defend its interests. Under Guatemalan law, the time-limit for answering the questionnaire is calculated from the day following receipt. Moreover, Guatemala notes that the exporter was given 30 working days to reply to the questionnaire although this was not required by the Agreement. The Ministry also granted Cruz Azul an extension until 17 May to reply to the questionnaire. Without prejudice to the argument above, Guatemala submits that if Cruz Azul at one point felt disadvantaged by the 11 days that elapsed between the date of publication, on 11 January, and the official notification received by Mexico on 22 January, the situation has now been corrected, since:

1. the Ministry did not begin the investigation until after 22 January; and

2. the Ministry granted Cruz Azul an extension of more than two months to reply to the questionnaire, from 11 March to 17 May 1996.

4.203 Guatemala suggests that since the ADP Agreement was adopted recently and no GATT panel has had the opportunity to interpret Article 5.5, Guatemala had no guidelines in that respect. Thus, it interpreted and applied the provision in good faith by avoiding the initiation of the investigation until after Mexico had received official notification. Guatemala submits that its procedures strictly comply with Guatemala's legislation on notification, in particular the time at which the decision stating when an investigation can be initiated legally comes into effect. Article 12 of the Constitution of the Republic of Guatemala is the highest-ranking text guaranteeing due process and it states that notification is a *sine qua non* requirement for the initiation of any procedure. The constitutional guarantee concerning the mandatory nature of notification is to be found in Article 66 of the Code of Civil and Commercial Procedure and in Article 45, paragraph (e) of the Law on the Organization of Justice, and according to Article 26 of the Law on Administrative Appeals, these provisions apply to administrative acts. Guatemala states that pursuant to these provisions, even though the published decision itself fixed a particular date for the initiation of the investigation, i.e. the date of publication, the initiation had to be deferred until the day following the date on which Mexico was notified of the decision to initiate an investigation.

4.204 Guatemala argues that the facts concerning the notification were deemed to be undisputed because throughout the Ministry's investigation the Government of Mexico did not contest the date on which it had been notified in a timely manner or in the appropriate form and Cruz Azul did not contest it either. The first time that Mexico complained about the alleged delay in notification was in a letter sent by fax on 6 June 1996 in connection with the informal consultations. According to Article 9 of the Guatemala's Law on Administrative Appeals, applicable to the administrative file on the anti-dumping investigation conducted by the Ministry, any violation of procedure - such as the alleged failure to notify in time - must be claimed within five working days of the notification; the effect of such a complaint is to make any acts retroactive to the time at which the violation occurred. Mexico's letter dated 6 June 1996 did not meet the requirements for such complaints and was outside the time-limit. Cruz Azul acknowledged in its reply to the questionnaire that the investigation was not initiated on 11 January as Mexico alleges; Cruz Azul indicates that the investigation began on 22 January 1996.

4.205 Guatemala refers to Paragraph 3 of Resolution 42 of 9 January 1996, which stated that the initiation "shall take effect as from the day on which the notice is published in the Official Journal". Guatemala states that this paragraph identifies the "date of initiation" as the day on which the notice is published in the Official Journal. Likewise, paragraph 9 of Resolution No. 2-95 of 15 December 1995 states that "the date of the initiation of the investigation shall be considered to be the date on which such notice is published in the Official Journal." Guatemala states that the words "date of initiation" have a special meaning in the ADP Agreement. For example, Article 7.3 and Article 12.1.1 specifically refer to "the date of initiation". Article 7.3 provides that the investigating authorities shall not apply provisional measures sooner than 60 days from the "date of initiation". Article 12.1.1 requires the investigating authority to give public notice of "the date of initiation", and the Ministry complied with this. Unlike Articles 7.3 and 12.1.1, Article 5.5 does not provide that the notification must be made prior to "the date of initiation". Article 5.5 does not stipulate either that notification must be made prior to the date of publication of notice of the initiation. According to Guatemala, Article 5.5 specifies that notification must be made "before proceeding to initiate an investigation".

4.206 Guatemala submits that there is no reason to take the apology to Mexico dated 26 July 1996 into account because it is not included in the administrative file on the investigation. Guatemala sent this letter to Mexico as a gesture of good faith, due to its concern at not having observed the courtesy of notifying before publication of the resolution on initiation of the investigation, but this letter does not in any way include an apology or recognition of violation of Article 5.5 of the Agreement. According to Guatemala, this act of courtesy reflects the fact that Guatemala and Mexico have a very

complex bilateral relationship and frequent informal contacts because of their geographical proximity, that they are presently negotiating a Free Trade Agreement and it was hoped that the trade dispute on cement could be resolved through informal contacts without sacrificing Guatemala's interests. Nevertheless, the courtesy of more prompt notification or notification prior to publication of the notice of initiation is not required under the ADP Agreement. Guatemala refers to Article 7.3, where it is stated that 60 days must elapse before the application of provisional measures. Guatemala notes that in the present case the Ministry did not impose provisional measures until almost 200 days had elapsed from the date of initiation. Guatemala argues that the apology therefore does not have any bearing on Guatemala's position concerning its obligations pursuant to the ADP Agreement.

4.207 **Mexico** rejects Guatemala's argument that there is no reason to take the apology of 26 July 1996 into account because it is not included in the administrative file on the investigation. According to Mexico, the fact that the apology does not form part of the administrative file of the investigation does not mean that it should not be taken into account as part of the documentation submitted to the Panel by Mexico to show that Guatemala had recognized its violation of Article 5.5 of the ADP Agreement even if, in defending itself before the Panel, it claims the contrary.

4.208 **Guatemala** notes that Mexico claims that the alleged violation of Article 5.5 impaired its rights because no opportunity was given to settle the dispute before the investigation was initiated. Guatemala suggests that Article 5.5 is a very different rule to Article 13.1 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") which applies to the initiation of an investigation for the imposition of countervailing measures. Article 13.1 requires the investigating Member to invite the Members whose products may be subject to investigation for consultations before the initiation of any investigation. Guatemala argues that Article 5.5 of the ADP Agreement, on the other hand, does not give the exporting Member the right to hold consultations before initiation of an investigation. A Member may notify that it has accepted an application and initiate an investigation forthwith, thereby complying with Article 5.5 of the ADP Agreement. In the present case, Guatemala suggests that Mexico and Cruz Azul were not in any way prejudiced by the alleged delay, and consequently that the Panel should reject Mexico's claim.

4.209 **Mexico** notes that, according to footnote 1 of the ADP Agreement, "the term 'initiated' means the procedural action by which a Member formally commences an investigation as provided in Article 5". Moreover, in the initiating resolution and the preliminary determination of the Guatemalan investigating authority itself it is clearly and expressly indicated that the investigation was initiated on 11 January 1997, the date of publication of the notice. Consequently, Mexico suggests that Guatemala's argument is not only inconsistent with the formal and official statements made by the Ministry itself, but also inconsistent with the requirements of the ADP Agreement concerning the moment of initiation of an anti-dumping investigation.

4.210 **Guatemala** submits that its interpretation of Article 5.5 is not inconsistent with footnote 1 of the Agreement, which simply defines the term "initiated". Footnote 1 does not contain any reference to Article 12.1.1 of the ADP Agreement, which regulates public notice of the initiation of an investigation and is therefore not applicable for establishing the time of initiation of an investigation.

4.211 Guatemala argues that Mexico's position in this respect is entirely different from Mexico's own application of Article 5.5. According to Guatemala, Mexico's practice is relevant in this respect because Article 17.6 of the ADP Agreement stipulates that the Panel shall interpret the ADP Agreement in accordance with customary rules of interpretation of public international law. To that end, it has been GATT practice to apply the rules set forth in the Vienna Convention. According to Article 31 of the Vienna Convention, for the purpose of the interpretation of a treaty there shall be taken into account, together with the context, "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation". Guatemala notes that on 4 September 1997, the United States requested consultations with Mexico in respect of a Mexican anti-dumping investigation against imports of corn syrup. These consultations were requested, *inter*

*alia*, because Mexico had allegedly failed to notify the United States before proceeding to initiate the investigation, and according to the United States this procedure violated Article 5.5. Guatemala argues that the record of the corn syrup investigation shows that the Mexican investigating authority issued the resolution of initiation on 17 February 1997, and published it on 27 February 1997. Guatemala asserts that Mexico did not notify the United States until 9.48 p.m. on 27 February, the notice of initiation having been published at 6.00 a.m. on the same day. To support its assertion, Guatemala provided a copy of SECOFI's notification letter to the United States indicating that it was faxed at 9.48 p.m. on 27 February. Thus, Mexico did not notify the Government of the United States before issuing the resolution of initiation on 17 February, or before publishing the notice of initiation. According to Guatemala, this subsequent practice by Mexico in its anti-dumping investigation against the importation of corn syrup shows that Mexico's interpretation of Article 5.5 is exactly the same as the interpretation made by Guatemala. The fact that Mexico did not notify the United States until ten days after it had issued the resolution of initiation is in blatant contradiction with Mexico's position in the present case, in which it claims that every Member has the right to be notified of an investigation before it is initiated, as soon as a properly documented application has been received in accordance with Article 5.2 and the evidence has been found to be adequate and sufficient in accordance with Article 5.3. Furthermore, Guatemala suggests that since Mexico published the notice of initiation before notifying the United States, its own subsequent practice serves to refute its claim that only if the notification is made before the publication of the initiation of the investigation will the exporting country have the opportunity to defend its interests and those of its exporters in good time. In other words, Mexico's subsequent practice supports Guatemala's interpretation of Article 5.5, according to which notification should only take place before proceeding to initiate the investigation, and not before publishing the notice of initiation.

4.212 **Mexico** dismisses Guatemala's argument concerning Mexican practice in the corn syrup case. Mexico argues that in that case it notified the United States before the date of initiation, i.e. before the date on which the published notice specified that the initiation would take effect. That is not the situation in the present case.

4.213 **Guatemala** argues, without acknowledging any violation of Article 5.5 of the ADP Agreement, that under the generally accepted principles of international law, any alleged delay in notification under Article 5.5 of the Agreement was harmless and without adverse effects on Mexico's rights in the process. Article 17.6(ii) of the Agreement stipulates that "the Panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law ...". Guatemala notes that some WTO panels have recognized that "the customary rules of interpretation of public international law" are those embodied in the Vienna Convention. Thus, "the customary rules of interpretation of public international law" under Article 17.6(ii) of the ADP Agreement also refer to the rules embodied in the Vienna Convention. Article 31 of the Vienna Convention, governing the interpretation of treaties, stipulates that "the context ... of a treaty shall comprise, in addition to the text ... any relevant rules of international law applicable in relations between the parties". Thus, according to Guatemala, a WTO panel must apply the relevant rules of international law in reaching its decision. According to Article 38(1) of the Statute of the International Court of Justice ("ICJ"), Guatemala notes that the sources of international law are (1) "international conventions, whether general or particular, establishing rules expressly recognized by the contesting States"; (2) "international custom, as evidence of a general practice accepted as law"; (3) "the general principles of law recognized by civilized nations"; and (4) "... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law".

4.214 Guatemala argues that, pursuant to the ICJ definition of the sources of international law, a resolution adopted in a bilateral dispute under the North American Free Trade Agreement ("NAFTA") constitutes a source of international law. Guatemala argues that NAFTA is an international convention that establishes rules that Mexico, as a party to NAFTA, has recognized. In Fresh-Cut Flowers from Mexico, a NAFTA panel applied the principle of "harmless error" to excuse the failure

to observe a procedural time-limit.<sup>75</sup> The panel, composed of three members from Mexico and two from the United States, recognized that application of the principle of "harmless error" was allowed under the rules of NAFTA. Guatemala also submits that a decision by a NAFTA panel constitutes international custom, and that the decision taken in the aforementioned NAFTA case endorses the international custom of applying the international law principle of "harmless error" to procedural irregularities that do not have any prejudicial effect. Guatemala further alleges that a decision by a NAFTA panel can also demonstrate that a particular legal principle constitutes a "general principle of law recognized by civilized nations". For example, the NAFTA panel's application of the principle of "harmless error" in Fresh-Cut Flowers from Mexico<sup>76</sup> and several legal decisions in national courts<sup>77</sup> show that it is a principle of international law recognized by nations (and Members of the WTO) all over the world. Guatemala refers to a commentator in this regard:

"The response to a breach of a substantive rule is straightforward: the Panel condemns the national measure and calls for its withdrawal. Breaches of procedural rules can also be condemned, but should the Panel also be able to declare that the associated decision is vitiated? Retroactively setting aside administrative decisions can give rise to immense confusion, and to avoid this most national legal systems are prepared to accept that at least minor procedural errors do not invalidate a decision."<sup>78</sup>

4.215 Guatemala also suggests that a decision by a NAFTA panel is a "judicial decision" that provides an additional means of identifying legal principles applicable under international law. Guatemala states that, in keeping with an international treaty to which Mexico is a party and with the general principles of international law recognized by civilized nations, the Panel should apply the concept of harmless error to the alleged procedural delay under Article 5.5 of the ADP Agreement, and should reject the claim.<sup>79</sup>

4.216 Guatemala states that a panel set up under the Tokyo Anti-Dumping Code recognized the principle of "harmless error", but considered that it did not apply to the facts in that particular dispute.<sup>80</sup> That panel found that the investigating authority notified the importers of the initiation of the investigation 22 days after public notice of the initiation and one day before imposing the provisional measure<sup>81</sup>, and that the exporting Government was notified more than two months after publication of the notice and one month after imposition of the provisional measure.<sup>82</sup> According to Guatemala, the panel did not accept the argument that these delays in making the notification constituted a "harmless error" because it considered that the delays clearly deprived the interested parties of the opportunity to defend their interests.<sup>83</sup> Guatemala argues that, unlike the circumstances in Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community<sup>84</sup>, Guatemala's alleged delay in giving the notification was only 11 days; and that during the period between the initiation and the notification no activity relating to the investigation was carried out, and that all the interested parties

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<sup>75</sup> File No. USA-95-1904-05 (16 December 1996) in English.

<sup>76</sup> *Ibid.*

<sup>77</sup> Guatemala refers to C.A. Ford v. Comptroller-General of Customs, Fed. No. 854 (D.N.S.W.24 Nov. 1993) (Australia) (which determined that a delay of two weeks was harmless because it was unlikely that it would prejudice the defendants, the Australian industry or the importers); Intercargo Ins. Co. v. United States, 83 F. 3d 391 (Fed. Cir. 1996) (United States) (which states that it has been clearly established that principles of harmless error apply to the examination of an agency's procedures).

<sup>78</sup> Edmond McGovern, International Trade Regulation, 1.133 (1995).

<sup>79</sup> According to Guatemala, "equity" as a general principle of international law also includes the notion of "harmless error".

<sup>80</sup> Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community, SCM/179, paragraph 271, adopted on 28 April 1994.

<sup>81</sup> *Ibid.*, paragraph 240.

<sup>82</sup> *Ibid.*, paragraph 228.

<sup>83</sup> *Ibid.*, paragraph 271.

<sup>84</sup> *Ibid.*

had sufficient time and opportunity to take part in the procedures after notification. Consequently, the alleged delay in notifying Mexico of the initiation constituted a "harmless error" because it did not impair Mexico's rights under the ADP Agreement.

4.217 Guatemala states that Mexico codified the principle of "harmless error" in Article 338 of its Fiscal Code, which stipulates that an administrative decision shall be illegal only if its errors of procedure are harmful to the protection of individuals. Guatemala asserts that it has demonstrated that the principle of "harmless error" is recognized in international law as a principle which applies to all countries and, without admitting that Guatemala has violated any provision, it maintains that the Panel should apply this principle to the alleged violation of Article 5.5.

4.218 Guatemala considers furthermore that, according to the generally accepted principles of international law, Mexico accepted the alleged delay in notification. Mexico gave cause for estoppel by delaying its Article 5.5 claim regarding the alleged delay in notification. Guatemala points out that Mexico failed to mention the alleged violation of Article 5.5 until 6 June 1996, almost six months after the date of publication of the notice of initiation. It did not even claim the alleged violation when it presented a submission to the Ministry on the procedure in question. Guatemala argues that Mexico only mentioned the alleged violation in the context of informal consultations. By 6 June 1996, Guatemala and the interested parties had invested considerable resources in the investigation. If Mexico had formally objected to the alleged violation of Article 5.5 immediately after the initiation of the investigation, Guatemala suggests that the Ministry would have reinitiated the investigation after providing Mexico with the notification which it claimed was required under Article 5.5. Instead, Guatemala notes that Mexico waited until Guatemala had been investigating for six months, when it was very late to correct the error, and when Guatemala had already expended substantial resources in conducting the investigation and was about to issue its preliminary determination. Thus, Guatemala submits that the Panel should reject Mexico's claim on the basis of the principle of estoppel.

4.219 Guatemala states that the alleged delay did not nullify or impair Mexico's rights under the ADP Agreement. Under Article 3.8 of the DSU, the presumption of nullification or impairment is rebuttable. Guatemala did not take any action to initiate the investigation until Mexico had been notified. Moreover, Guatemala granted Cruz Azul an extension of two months to reply to its questionnaire. Any alleged delay in notification under Article 5.5 did not adversely affect Mexico's opportunity to defend its interests, nor did it affect Mexico's rights under the ADP Agreement in any other way. Thus, Guatemala submits that the Panel should reject Mexico's claim under Article 5.5 of the ADP Agreement because Guatemala has rebutted any presumption of nullification or impairment.<sup>85</sup>

4.220 **Mexico** suggests that the principle of "harmless error" invoked by Guatemala is not recognized by the WTO. The sources quoted by Guatemala in support of this argument are not applicable to the present dispute. The provisions of the Vienna Convention and the Statute of the ICJ quoted by Guatemala concern rules "applicable in relations between the parties" and "rules expressly recognized by the contesting States". The principle of harmless error has not been recognized by Guatemala and Mexico, either in their bilateral trade relations or through the WTO. Mexico submits that Guatemala's reference to NAFTA has no relevance in the present case. On the one hand, Guatemala is not party to NAFTA and, on the other, NAFTA cannot impose any obligation on Members of the WTO, including Members who are parties to the NAFTA. As regards the "general

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<sup>85</sup> Guatemala emphasizes that notification under Article 5.5 of the ADP Agreement is unique in the WTO context. It is unrelated to the concept of notification of national laws implementing WTO agreements. This notification applies only to an isolated stage in anti-dumping proceedings, and unlike Article 13.1 of the SCM Agreement, it does not establish any obligation to consult following notification. Finally, it is the only notification provision that does not necessarily become a significant prior notice under the ADP Agreement. For example, the investigating authority could provide the representative of an exporting government with a notification under Article 5.5, and immediately provide notification of initiation.

principles of law recognized by civilized nations", Mexico considers that it is not sufficient to quote a commentator, as Guatemala does, to validate the argument. Furthermore, Guatemala's assertion in its submission that the non-fulfilment of the obligation imposed on it by the ADP Agreement can be excused as a "harmless error" is unacceptable to Mexico because it considers the ADP Agreement to be an agreement with rights and obligations that is the result of years of negotiations. According to Mexico, each Member must fulfil its obligations to other countries, or face the possibility of its trading partners defending their rights when they are infringed, in accordance with the provisions of the ADP Agreement itself.

4.221 Mexico maintains that there is no place for the concept of "harmless error" in the ADP Agreement, which incorporates principles of public international law that govern the responsibilities of governments. The view of the ICJ and the jurisprudence is that, as a general principle, any act or omission by a State that constitutes the non-fulfilment of an international obligation, whether that obligation derives from a treaty, custom or some other source, carries with it a responsibility under international law, without it being possible to argue that the injury caused is insignificant.<sup>86</sup> The ICJ has used the following language to emphasize this point: "It can be said that a legal right or interest is not necessarily related with something material or "tangible" and can be infringed regardless of the injury or material damage suffered".<sup>87</sup> According to Mexico, the only excuse which might be accepted for not fulfilling an international legal obligation is contributory negligence on the part of the petitioning country or the impossibility of fulfilling the obligation.<sup>88</sup> There is no defence when a country fails to fulfil an obligation which it has the power to fulfil. Mexico submits that a State cannot evade its international responsibilities simply by arguing that its infringement did not result in material injury.

4.222 According to Mexico, the non-fulfilment of an obligation under a treaty is the non-fulfilment of a legal obligation entailing international responsibility. According to one author:

"There are certain obligations which merely stipulate that a party should do or abstain from doing certain acts. This is so as regards most treaty obligations as well as most contractual obligations in the municipal sphere. The mere failure to comply with such obligations, unless it is the result of *vis major*, constitutes a failure to perform an obligation and a fault entailing responsibilities. In such instances, there is no need to consider whether the failure is accompanied by malice or is due to negligence".<sup>89</sup>

Thus, under the principles of international law, when a State fails to fulfil its obligations, Mexico argues that it fails to fulfil an obligation established by treaty and exposes itself to legal action. The obligation either exists, or does not exist, and the State must, or must not, fulfil it. Mexico suggests that if the obligation to notify the exporting Member before publication of the initiation were not important, the authors of the ADP Agreement would not have codified it in Article 5.5, and still less defined in footnote 1 of the ADP Agreement the very moment at which an investigation is initiated.

4.223 Mexico denies Guatemala's assertion that the delayed notification, even though a violation of the ADP Agreement, constitutes a "harmless error". Mexico argues that the purpose of Article 5.5 of the ADP Agreement, as far as notifications are concerned, is simple: every Member has the right to

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<sup>86</sup> Ian Brownlie, Principles of International Law 436 (4th edition 1990); Cheng, General Principles of Law as Applied by International Courts and Tribunals 219 (1987).

<sup>87</sup> South West Africa (Eth. vs S. Afr.; Liber. vs S. Afr.), 1996 I.C.J. 6, 32-33 (18 July); Mexico also refers to Brownlie, *supra*, 473 ("There is no limitation inherent in the concept of legal interest to 'material' interest").

<sup>88</sup> Brownlie, *supra*, 465 ("Tribunals accept defences of assumption of risk of the particular harm and contributory negligence"); Cheng, *supra*, 223 ("There is no unlawful act if the event takes place independently of his will and in a manner uncontrollable by him, in short if it results from *vis major*; for the obligation, the violation of which constitutes an unlawful act, ceases when its observance becomes impossible").

<sup>89</sup> Cheng, *supra*, 226.

be notified of an investigation before it is initiated as soon as a properly documented application has been received in accordance with Article 5.2 of the ADP Agreement and the evidence has been found to be adequate and sufficient in accordance with Article 5.3 of the Agreement. Only if the notification is made before the publication of the initiation of the investigation will the exporting country have the opportunity to defend its interests and those of its exporters in good time. Once the investigation has been initiated, the right of defence will be restricted and, in the worst case, impossible to exercise before the trade flows have been affected. Mexico states, therefore, that Guatemala's delay in notifying Mexico of the initiation is anything but "harmless".

4.224 Mexico asserts that the lack of timely notification is not Mexico's principal claim, since the violations relating to other aspects of the initiation of the investigation are more than sufficient for the investigation to be declared inconsistent with Guatemala's obligations under the ADP Agreement. However, thinking beyond the present dispute, Mexico considers that one should keep in mind that a ruling which treated the lack of timely notification as a "harmless error" would create an extremely negative precedent for the ADP Agreement by making Article 5.5 practically toothless. If such a decision was taken, any WTO Member could initiate an investigation without notifying the interested parties concerned because, in the end, the failure to notify would simply be a "harmless error". Mexico contends that if that had been the intention, it would have been better to delete the whole of Article 5.5 from the ADP Agreement.

4.225 Mexico disputes Guatemala's argument concerning estoppel. Mexico considers that the ADP Agreement does not lay down any particular time-limit for submitting a claim against delays in notification. There is no provision in the ADP Agreement obliging the country affected to submit its claim at a particular moment, which is in fact a right and not a duty. Mexico submits that it was GATT practice, and consequently is WTO practice, that the absence of or delay in a claim does not lead to loss of rights.

4.226 **Guatemala** notes that applying the principle of "harmless error" means examining the acts of the party and deciding whether the failure to fulfil a particular obligation should be excused on the grounds that the omission did not prejudice the rights of other parties to the dispute. Guatemala maintains that there are other sources of international law applicable to the relations between Mexico and Guatemala, such as customary international law, as evidenced by a general practice accepted as law; the general principles of law recognized by civilized nations; judicial decisions; and the teachings of highly qualified academic experts from different nations. Guatemala has shown that the principle of "harmless error" can be found in many different sources of international law, citing, *inter alia*, the conclusions of a panel established under NAFTA, judicial rulings made under the laws of Australia and the United States, and a study by a well-known jurist.

### 3. Full text of written application

4.227 **Mexico** argues that Guatemala violated Article 6.1.3 of the ADP Agreement by failing to provide the full text of the written applications to the exporter, Cruz Azul, and to Mexico, as soon as it initiated the investigation. Mexico submits that it is clear from Article 6.1.3. that the Ministry was under an obligation to send, both to the single Mexican exporter subject of the investigation and to the Mexican Government, the full text of the applications for initiation of the investigation submitted by Cementos Progreso. According to Mexico, this matter acquires particular importance if one bears in mind that the purpose of sending the full text of the application is to allow the exporter subject of the investigation and the exporting government to examine the full text in detail, thus giving them a timely opportunity to defend their interests. Mexico notes that, as of the date of the second submission to the Panel, neither it nor Cruz Azul had officially received the text of the applications from the Ministry. Although Cruz Azul did not complain that it had not received the applications during the investigation and only informed Mexico when the latter sought consultations with Guatemala, the fact that Cruz Azul did not complain earlier does not absolve Guatemala from the obligation under the ADP Agreement.

4.228 **Guatemala** submits that Mexico is mistaken as to the facts. Guatemala asserts that the Ministry sent the full text of the applications together with the notice of initiation of the investigation to Mexico on 22 January 1996. The Ministry provided Cruz Azul with the full text of the written application at the same time as it sent Cruz Azul the notice of initiation of the investigation and the questionnaire. Cruz Azul received all of these documents via DHL on 29 January, although DHL's waybill does not indicate the contents of the package. Guatemala suggests that it is clear from the file that Cruz Azul received the application and had sufficient opportunity to defend its interests. For example, in its submission of 13 May 1996, Cruz Azul argued extensively that the Ministry should not have initiated the investigation based on the evidence contained in the applications. Guatemala notes that Cruz Azul did not at any time during the procedure claim that it had not received the full text of the applications. Mexico has not submitted to the Panel any document showing that Cruz Azul had requested Guatemala to provide it with the full text of the applications. Guatemala notes that the communication of the applications to Cruz Azul is confirmed in the Ministry's preliminary determination and again in its final determination.

4.229 **Mexico** states that the references in the previous section to the moment at which the investigation was really initiated (i.e. 11 January 1996) are more than sufficient to show that Guatemala did not send the full text of the applications as soon as the investigation was initiated. In any event, Mexico emphasises that Guatemala's contention is false. For corroboration, it is sufficient to analyze the facts as set out by Guatemala in its submissions to the Panel. Guatemala says that it notified both Mexico and Cruz Azul on 22 and 29 January 1996 respectively and that it attached to these notifications the documents relating to the investigation (official investigation form and published version of the application for initiation), and that this is confirmed by the copy of the delivery note of the courier service which delivered the notification to the Mexican exporter. Mexico notes that the courier service's delivery note does not include a description of the documents delivered and therefore cannot be regarded as evidence. At the same time, Guatemala claims that it is clear from the file that Cruz Azul received the application, giving as the basis for its assertion the fact that in Cruz Azul's submission of 13 May 1996 there is a mention of the application. Mexico suggests that Guatemala's assertions do not properly take into account the fact that:

- (a) Cruz Azul came across the full text of the applications for the initiation of an investigation for the first time by looking up the file itself and not, as Guatemala alleges, as a result of having received it on 29 January 1996; and
- (b) Cruz Azul's action in gaining access to the applications in the file does not relieve Guatemala of its obligation to provide the exporters of which it is aware and the authorities of the exporting country with the full text of a written application submitted in accordance with Article 5.1 of the ADP Agreement, nor does it mean that because the exporter applied to the investigating authority to request access to the administrative file in order to acquaint itself with the allegations against it there are sufficient grounds for considering that Guatemala fulfilled its obligation under Article 6.1.3 of the ADP Agreement.

4.230 **Guatemala** notes that the Ministry sent the full text of the application to Mexico on 22 January 1996 and to Cruz Azul on 26 January 1996, because under Guatemalan law, all notifications must be accompanied by a copy of the relevant application and resolution. Even assuming that Mexico or Cruz Azul did not receive the full text of the application, Mexico only submitted its complaint under Article 6.1.3 of the ADP Agreement in its request for the establishment of a panel, more than one year after public notification of the initiation, and Cruz Azul never raised an objection during the proceedings. Mexico's significant delay in submitting any complaint supports Guatemala's contention that the full text of the applications was transmitted on 22 January 1996. If Guatemala had not communicated the applications in time, Mexico would undoubtedly have objected to Guatemala. Assuming for the sake of discussion that Mexico did not receive the full text of the application with the notification of 29 January 1996, Guatemala claims that Mexico has recognized

that Cruz Azul received the said text from the administrative file. For that reason, and because an extension of two months was granted to answer the questionnaire, this alleged procedural fault did not nullify or impair the benefits accruing to Mexico under the ADP Agreement.

D. Violations in Connection with the Provisional Measure

1. Article 3.7

4.231 **Mexico** argues that Guatemala's preliminary affirmative finding of threat of injury is not consistent with Article 3.7 of the ADP Agreement. Pursuant to Article 3.7 of the ADP Agreement, the preliminary determination of threat of material injury must be based on facts and not merely on allegation, conjecture or remote possibility, and in making such a determination, account must be taken, *inter alia*, of such factors as a significant rate of increase of imports, freely disposable capacity of the exporter (taking into account the availability of other export markets to absorb any additional exports), the effect on domestic prices of exports and inventories of the product.

4.232 **Guatemala** contends that it complied with Articles 3.7 and 7 of the ADP Agreement in the preliminary determination of the existence of threat of injury and that Mexico's challenge to the Ministry's determination constitutes an erroneous application of the standard of review under Article 17.6(i) of the ADP Agreement, under which the Panel is not empowered to review the factual conclusions of the Ministry.

4.233 Guatemala argues that Article 7 of the ADP Agreement establishes only limited procedural requirements for the application of provisional measures. Article 7 contemplates only a very limited preliminary investigation in which the investigating authorities, before imposing a provisional measure, are only required to give adequate and timely notice of the initiation of the investigation, and to allow the parties concerned adequate opportunities to submit information and make comments for consideration by the authorities. Guatemala suggests that the limited nature of this investigation is further demonstrated by the fact that although Article 5.10 of the ADP Agreement stipulates that the investigation must be concluded within one year after its initiation (or 18 months in special circumstances), Article 7.3 states that "[p]rovisional measures shall not be applied sooner than 60 days from the date of the initiation of the investigation". It is therefore clearly admissible to apply provisional measures immediately upon expiry of the 60 days following the initiation of the investigation. Considering that provisional measures may be imposed so early in an investigation lasting 12 or 18 months, Guatemala argues that the ADP Agreement foresees that the investigating authorities may impose such measures based on an investigation much less exhaustive and on documentary evidence much less detailed than would be needed to justify the imposition of a final measure.<sup>90</sup>

4.234 **Mexico** asserts that such an argument by Guatemala demonstrates that, for Guatemala, the fact that the ADP Agreement provides for a minimum period to elapse before provisional measures can be applied means that the measures can be applied without adhering rigorously to the corresponding provisions or by setting a relatively low standard of proof. According to Mexico, the minimum period of 60 days is only applicable in those cases in which the existence of dumping, injury or imminent threat of injury and a causal link between the two is extraordinarily clear.

4.235 According to **Guatemala**, the limited requirements for a preliminary determination are further indicated by the fact that the ADP Agreement does not impose definitive standards for the

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<sup>90</sup> According to Guatemala, Article 7.4 of the ADP Agreement, which limits the application of provisional measures "to as short a period as possible", ordinarily not exceeding four months, also supports the conclusion that the ADP Agreement requires a less exhaustive investigation for the preliminary stage than for the final stage. This provision ensures that any provisional measure which is based on documentary evidence less complete than that for a definitive anti-dumping duty, will be of limited duration only.

preliminary determination by the investigating authorities. Article 7.1(ii) of the ADP Agreement only requires that a preliminary affirmative determination be made of dumping and consequent injury, and Article 7.1(iii) merely requires that the authorities concerned judge such measures necessary to prevent injury being caused during the investigation, without offering any additional guidance as to the nature of the decision to be taken or the sufficiency of the quality of evidence. Guatemala argues that the absence of definitive standards in the ADP Agreement concerning preliminary affirmative determinations in anti-dumping cases should be contrasted with the standard laid down in Article 6 of the Agreement on Safeguards, whereby a Member "may [only] take a provisional safeguard measure pursuant to a preliminary determination that there is clear evidence that increased imports have caused or are threatening to cause serious injury ...".

4.236 Guatemala submits that the panel in Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community<sup>91</sup>, which dealt with similar rules concerning provisional measures contained in Article 5.1 of the Tokyo Round Subsidies Code, clarified the requirements for the imposition of provisional measures. That panel found that, consistent with the Subsidies Code, a preliminary affirmative determination must be preceded by an investigation, that is, the determination "could be made only at some point in time after the initiation of an investigation, when interested signatories and interested parties have been afforded an opportunity to submit their views to the investigating authorities and to have access to the information used by the investigating authorities".<sup>92</sup> Guatemala recalls that Brazil failed to comply with these requirements by not providing the interested parties with timely and adequate notice of the initiation of the investigation and by not sending the questionnaire before making the preliminary determinations. The parties therefore had no way of making their views known or supplying information before the imposition of provisional duties by Brazil.<sup>93</sup> This, according to Guatemala, demonstrates the limited obligations on investigating authorities during the investigation leading up to preliminary determinations, where the focus is on the exporter's right to submit information and defend its interests.

4.237 Guatemala argues that it is not true that the resolution imposing a provisional measure was made superficially, nor is it true that the minimum period provided for by law was interpreted by Guatemala as a licence not to observe the relevant provisions of Article 7.1 of the ADP Agreement. This reference simply supports Guatemala's position that under Article 7.1(ii), the affirmative determination of dumping and consequent injury to a domestic industry that must be made by the investigating authority is only preliminary. According to Guatemala, the standard for arriving at a preliminary determination is not as strict as the standard for arriving at a final affirmative determination for the imposition of definitive duties.

4.238 According to Guatemala, the anti-dumping investigation in issue went beyond the requirements for a preliminary determination set out in Article 7 and in the findings of the panel in Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community.<sup>94</sup> The Ministry published the decision to initiate the investigation on 11 January 1996, and notified the Government of Mexico and supplied it with a full text of the application on 22 January 1996. Once Mexico had been notified, the Ministry sent to Cruz Azul via DHL the notice of the initiation of the investigation, the full text of the application by Cementos Progreso and the questionnaire, on 26 January 1996. Cruz Azul subsequently requested and obtained an extension of the deadline for replying to the questionnaire to 17 May 1996. According to Guatemala, Cruz Azul had adequate opportunity to defend its interests. On 9 May 1996, Cruz Azul presented a lengthy submission and a partial reply to the questionnaire.

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<sup>91</sup> Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community, SCM/179, adopted on 28 April 1994.

<sup>92</sup> *Ibid.*, para. 223.

<sup>93</sup> *Ibid.*, see paras. 251-53.

<sup>94</sup> *Ibid.*

Guatemala argues that the Ministry's preliminary affirmative determination of dumping and threat of material injury was made on 16 August 1996 and was published on 28 August 1996, much later than the 60-day period allowed under Article 7.3 for the application of provisional measures. Guatemala suggests that the Ministry's preliminary determination was based on a detailed analysis which reflected the views of the parties, including Cruz Azul, and examined all the proof collected in the preliminary investigation, including the information submitted by Cruz Azul. The Ministry judged the measure necessary to prevent injury being caused during the investigation. Guatemala states that it complied with Article 7.4 by applying the provisional measure for a short period, namely four months. Guatemala applied the provisional measure from 28 August to 28 December 1996 and did not impose the final measure until 17 January 1997.

4.239 With reference to the standard of review contained in Article 17.6(i) of the ADP Agreement, Guatemala submits that there are no adequate grounds for a panel to review Mexico's objections to the preliminary determination. Mexico's objections to the affirmative determination of injury are no more than interpretations to the effect that the Ministry did not properly evaluate the importance of various pieces of evidence and therefore established the facts inaccurately. Guatemala submits that it is not the role of the Panel to make an independent evaluation of the evidence and determine whether provisional measures are justified. On the contrary, Article 17.6(i) requires the Panel to respect the sovereignty of Guatemala and the authority of the Ministry, under Guatemalan law, as the investigator in the anti-dumping procedure responsible for evaluating the relevant facts and drawing the appropriate conclusions. Under Article 17.6(i), the Panel may only "determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective". According to Guatemala, the text of this Article leaves no doubt that the Panel may only reject the national authority's establishment of the facts in special cases where the conclusions reached by the authorities are simply not based on the evidence or there is clear proof of bias in the authorities' evaluation of the facts. Contrary to Mexico's endeavours to get the Panel to review the Ministry's factual conclusions, Guatemala suggests that the Panel is specifically instructed, under Article 17.6(i), to respect the Ministry's conclusion and not to overturn it, even if the Panel might have reached a different conclusion based on its own assessment of the facts.

4.240 Guatemala argues that Mexico inappropriately suggests that the Panel should make an independent evaluation of the evidence, instead of simply determining whether the Ministry's evaluation of the facts was unbiased and objective. Guatemala asserts that Mexico is really asking the Panel to make a *de novo* evaluation of the evidence in regard to each of the factual elements supporting the preliminary determination of the threat of injury and of material injury.

4.241 **Mexico** denies that it has requested the Panel to replace the investigating authority or make a *de novo* investigation. The substance of Mexico's claim is that in the preliminary determination and, moreover, in relation to the initiation of the investigation, the Ministry on several occasions:

- (a) did not properly establish the facts;
- (b) did not make an unbiased and objective assessment of the facts; and
- (c) did not make an admissible interpretation of the relevant provisions of the ADP Agreement.

4.242 **Guatemala** submits that the Ministry carried out a careful and detailed examination of adequate evidence in regard to all the factors of injury set out in Article 3.7 of the ADP Agreement. What is more, Cruz Azul had sufficient opportunity to consult the evidence available to the Ministry when its preliminary determination of injury was made. Guatemala argues that Mexico has not demonstrated that the Ministry's determination was based on anything but a careful and objective analysis of the facts, nor is there any indication that this was the case. If the review standard is

properly applied, the Panel should confirm the preliminary affirmative determination of threat of injury.

4.243 With regard to the substance of Guatemala's preliminary determination, **Mexico** notes that the Ministry concluded that there was threat of injury on the basis of the following factors: increased imports, accumulation of inventories and under-utilization of plant capacity, contracting sales, falling prices of the domestic product, loss of clients and excess plant capacity in export companies and the situation of demand on the Mexican market. According to Mexico, it is clear from the preliminary determination that the Ministry did not properly consider any of the factors set out in Article 3.7 of the ADP Agreement, since the factors that it considered do not lead to a positive conclusion of threat of injury.

(a) Increased imports

4.244 Mexico submits that, even though the period under investigation (June to November 1995) apparently saw a significant increase in exports from Cruz Azul, allegedly accounting for 23.45% of Guatemala's apparent national consumption<sup>95</sup>, the following should not be overlooked:

- (i) the figures used by the Ministry to determine the performance of exports from Mexico are by no means accurate, as they do not take account of the existence of at least one other exporter of the product under investigation.<sup>96</sup> According to Mexico, therefore, the figures used by the Ministry as pertaining to Cruz Azul are not correct and therefore should be considered as inadmissible. Otherwise - as occurred in the investigation - Cruz Azul would be treated as though accounting for 100% of imports from Mexico;
- (ii) Mexico argues that not only should the Ministry have broken down total imports to identify those corresponding exclusively to Cruz Azul, but it should also have subtracted from the total all those imports that entered by sea rather than by land, as they were not covered by the investigation; and
- (iii) according to Mexico, Cementos Progreso alleged from the time it requested the initiation of an investigation that exports from Cruz Azul were threatening to cause it material injury. Nevertheless, in the corresponding paragraph of the preliminary determination, the Ministry does not refer to any increase in the rate of exports by the company under investigation. According to Mexico, such consideration would have indicated the likelihood, based on facts rather than simply on allegations, of a substantial increase in imports, as required by Article 3.7(i) of the ADP Agreement.

4.245 Mexico concludes from the foregoing that the Ministry's determination with regard to increased imports by Cruz Azul disregards the principles of Article 3.7(i) of the ADP Agreement, and would suggest a partial and subjective evaluation of the facts that were available to the Ministry in issuing its provisional determination.

4.246 **Guatemala** recalls that the Ministry found that imports from Cruz Azul had increased from 140 tonnes to 25,740 tonnes between June and November 1995. Cruz Azul's market share therefore increased from 0.15% in June to 23.54% in November. According to Guatemala, this meant that the

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<sup>95</sup> Subparagraph 2.1, section F of the preliminary determination.

<sup>96</sup> Mexico submits that the other Mexican company that exports the product being investigated sells it exclusively to Cementos Progreso, through the import company Matinsa (a company that is related to the national producer, whose relationship with Cementos Progreso is public knowledge, this having been mentioned from the start of the investigation by several parties involved in the investigation) and the Ministry was aware of this situation from the beginning of the investigation.

market share of Cementos Progreso fell from 99.85% to 75.42% over the same period. Contrary to Mexico's claim, in assessing the upward trend in imports the Ministry considered only imports from Cruz Azul and did not attribute imports from any other Mexican exporter to that company.

4.247 Guatemala states that, in order to determine Cruz Azul's market share for grey portland cement, it divided its imports by apparent consumption in Guatemala for the months in question. Apparent consumption is the total of domestic shipments from Cementos Progreso and imports from all countries. The volume of imports is based on official information compiled by the Directorate-General of Customs at the request of the Ministry. The figures for domestic shipments from Cementos Progreso are taken from the replies to the original questionnaire and the supplementary questionnaire. Guatemala states that Cruz Azul did not question the accuracy of this information during the investigation, and nor did Mexico in its first written submission to the Panel.

4.248 **Mexico** suggests that the percentage increase in Cruz Azul's exports may seem very high because these exports started from zero at the beginning of 1995, which is why its exports for January 1995 were so low. According to Mexico, what is important is whether these exports really affected Guatemala's domestic industry. An unbiased and objective evaluation of the facts shows that there is no negative correlation between the increase in Cruz Azul exports and Cementos Progreso production. Taking as a basis the information in the file, Mexico argues that:

- there was a severe shortage on the Guatemalan market, as acknowledged in a letter drafted by the Ministry. Mexico notes that, as a result, Guatemala's Government Agreement No. 708-94 of 30 November 1994 reduced the customs tariff on grey portland cement to 1%;
- in June and July 1995, both Cementos Progreso's imports and its production increased;
- in August 1995, imports increased by 6,601 tonnes and Cementos Progreso's production fell by 22,289 tonnes, but its sales rose to a record 104,826 tonnes;
- in September 1995, Cementos Progreso's imports, production and sales fell;
- from October to November 1995, imports increased by 34.90%, but without any effect on Cementos Progreso's production which was maintained at approximately 78,900 tonnes, although sales increased by 4.74%; and
- imports did not prevent Cementos Progreso from reducing its cement inventories by 62,575 tonnes during the investigation period.

4.249 Mexico submits that, for these reasons, Guatemala should not blame Cruz Azul's exports for Cementos Progreso's loss of domestic market share.

4.250 **Guatemala** repeats that the rapid increase in dumped imports from Cruz Azul and the corresponding reduction in the market share of Cementos Progreso is an appropriate indicator for establishing threat of injury. When Mexico argues that the Guatemalan cement market shows a deficit, Guatemala asks whether this is justification for a neighbouring country to engage in dumping. Reverting to the question of the correlation between Cementos Progreso's performance and Cruz Azul's participation in the Guatemalan market, Guatemala's position is that the fall in production, sales and market share of Cementos Progreso coincides with the significant increase in imports from Cruz Azul. If Cementos Progreso cannot blame exports from Cruz Azul for its loss in Guatemalan market share, who is Cementos Progreso to blame, asks Guatemala. The fact is that Cruz Azul and Cementos Progreso were the only participants in the market. Every sale gained for Cruz Azul was a sale lost for Cementos Progreso. Moreover, the final cement inventories of Cementos Progreso

increased substantially during the period from June to November 1995 as compared to the same period during the previous year.

4.251 Guatemala states that Mexico's month-to-month comparisons are misleading, because they do not take account of seasonal factors in the demand for cement in Guatemala. To eliminate distortions caused by these seasonal factors, Guatemala states that the Ministry compared the information for each month with information for the same month during successive years, and determined that during the period from January to June 1996, cement production was 14% lower than during the same period in 1995. In order to eliminate inflation-related distortions, the Ministry evaluated the sales trends on the basis of quantity instead of value. According to Guatemala, during the period September to December 1994, the volume of Cementos Progreso's sales decreased by 17% as compared with the same period in 1995.

(b) Accumulation of inventories and under-utilization of plant capacity

4.252 **Mexico** submits that Guatemala's findings regarding the alleged increase in stocks of grey clinker<sup>97</sup> and the consequent shutdown of the kilns in which this raw material is produced were recorded after the period of investigation and, indeed, almost two months following the initiation of the investigation. The period of investigation set by the investigating authority spanned June to November 1995, yet, as stated by the Ministry, the facts alleged by Cementos Progreso were ascertained only on 29 February 1996. Mexico submits that it is not possible to attribute these alleged adverse effects on the domestic industry to the imports from Cruz Azul without violating Article 3.7 of the ADP Agreement, which requires affirmative preliminary determinations of threat of injury to be based on more than mere conjecture.

4.253 **Guatemala** notes that Mexico does not cite any provision in the ADP Agreement which prevents the investigating authority from considering recent information. Article 3.7 of the ADP Agreement contains no such restriction. With particular reference to the analysis of the threat of injury, Guatemala suggests that it is highly desirable for the investigating authority to use as much recent information as is available.

4.254 **Mexico** asserts that, pursuant to Article 3.6 of the ADP Agreement, the effect of imports is to be evaluated in relation to national output of a like product when the available data makes it possible to pinpoint such effect, based on criteria such as the production process, producer sales and profits. Mexico notes, however, that the Ministry affirmed that total imports from Mexico (not only those of Cruz Azul) had an effect on a product other than the one under investigation. Indeed, the Ministry determined that there was an accumulation of inventories of a raw material (grey clinker) which is not necessarily used in the manufacture of the product under investigation (grey portland cement), and which can be used to manufacture other products. Because these products are not "like" within the meaning of Article 2.6 of the ADP Agreement, the analysis of the build-up of inventories of this product is inconsistent with Guatemala's obligations under the ADP Agreement, particularly with Article 3.6 thereof.

4.255 **Guatemala** submits that grey portland cement is produced by grinding grey portland clinker with approximately 5% of hydrated calcium sulphate and, in some cases, with varying percentages of pozzolana and/or limestone. Grinding the clinker is a minimal finishing operation. The production of clinker, a semi-finished raw material, accounts for up to 80% of the cost of producing grey portland cement. The production of clinker involves the processing of limestone and other raw materials; the materials are crushed, ground and mixed into a "raw mixture" or "kiln feed", and the mixture is heated in a rotary kiln that produces chemical reactions which convert the mixture into clinker. The

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<sup>97</sup> According to Mexico, clinker is produced by incipient fusion of limestone, bauxite, hematite and silica at 1380°C, and used in the manufacture both of the product under investigation and of any other type of cement (grey, white or any other hydraulic cement).

production of clinker requires a large investment of capital. Grey portland clinker has only one end use: the production of grey portland cement. Guatemala states that grey clinker cannot be used to manufacture white cement and, as recorded in the file, Cementos Progreso produced only grey portland cement. Grey portland cement is a dry powder which has to be stored in watertight silos. Clinker, on the other hand, can be stored in unlimited quantities under a cover or even in the open air with no protection against the weather. Levels of cement inventories are very restricted owing to specialized storage limitations. Clinker inventory levels are not restricted by such limitations. A plant's capacity to produce cement is usually measured in terms of its capacity to produce clinker (for example, cement capacity equals clinker capacity times 1.1). In light of the foregoing: the fact that Cementos Progreso had a surplus of clinker stocks was evidence of the adverse effect of the dumped imports. In addition, the Ministry converted the clinker inventory levels into cement equivalents. In view of the fact that grinding the clinker into cement is a minimal finishing operation, the best way of indicating the current level of cement inventories is to multiply the level of clinker inventories by a factor to convert clinker into cement. Guatemala submits that this is exactly what the Ministry did. Guatemala submits that the Ministry correctly determined that 51,875 tonnes of grey clinker were equivalent to 65,665 tonnes of finished grey portland cement.

4.256 Guatemala states that in substance, the Ministry did consider the levels of Cementos Progreso's cement stocks, but it measured them using the levels of clinker stocks as the best indicator. The Ministry also considered a chart presented to the Ministry during the inspection of Cementos Progreso's plant on 29 March 1996 as evidence of the build-up of surplus stocks of cement and clinker. The chart shows the extent to which clinker stocks vary while cement stocks remain more or less constant.

4.257 Guatemala notes that the Ministry found that the increase in imports from Cruz Azul led to a build-up of grey clinker inventories by the domestic producer, causing the latter to suspend the operation of three clinker-producing kilns (two at the La Pedrera plant and one at the San Miguel plant). Based on an analysis of sales and production data for 1993-1995, the Ministry also observed that the shutdown of the kilns took place at a time of peak demand for cement, which is normally also the period of maximum production. Guatemala recalls that a notary certified that there were 76,252 tonnes of grey clinker in stock on the day following the closure of the kilns. The Directorate of Economic Integration verified the closure of the kilns and inventories of 51,875 tonnes of grey clinker at the San Miguel plant. The estimates regarding the volume of grey clinker accumulated in Cementos Progreso's plants were confirmed by the computerized reports prepared by the firm's Production Department. As clinker is ground together with hydraulic calcium sulphate and other additives and then milled to make cement, the Ministry found that 51,875 tonnes of clinker inventories were equivalent to 65,665 tonnes of cement. Guatemala submits that Mexico's objections to the Ministry's findings are therefore unfounded.

4.258 **Mexico** notes that the Ministry made no reference to inventories of cement (the subject of the investigation), despite the fact that information on cement inventories was provided by Cementos Progreso. Mexico contends that the data on cement inventories provided by Cementos Progreso do not correspond with the Ministry's figures. According to Mexico, the Ministry did not "prove" the existence of 51,875 tonnes of grey clinker but accepted as valid the estimates given by the representative of Cementos Progreso during the inspection of the plants. Assuming that the estimates were accurate, Mexico suggests that they would represent an inventory level equivalent to only half the output in March 1995, i.e. stocks for 15 days production, which is normal in the cement industry.

4.259 Mexico asserts that the foregoing shows that the study of the facts carried out by the Ministry concerning the accumulation of inventories was also subjective and partial, in that it referred to a product which was not the one being investigated, contrary to Article 3.7(iv) of the ADP Agreement, which refers to "inventories of the product being investigated". Mexico submits that Guatemala considered that the inventories of an input (grey clinker) into the product being investigated (grey

cement) were more appropriate for a preliminary determination of threat of injury than inventories of the product specified by the ADP Agreement.

4.260 **Guatemala** states that the Ministry was always clear as regards the subject of the investigation and acted in full compliance with Article 3.7 of the ADP Agreement. Under that Article, the Ministry was entitled to consider a great variety of factors and decided to use the accumulation of inventories of grey clinker as a suitable indication of the accumulation of inventories because during the investigation they had become familiar with the production process, in which grey clinker is a fundamental element in the production of the product under investigation. Since Cementos Progreso produced practically no other types of grey cement, the accumulated grey clinker was relevant to an investigation on grey portland cement. Guatemala further notes that the final average stocks of cement held by Cementos Progreso increased by 85% from September-December 1994 to September-December 1995 because the imports from Cruz Azul took up shares of the market. There is no legal basis for Mexico's argument that the inventories of the product under investigation mentioned in Article 3.7(iv) relate exclusively to the exporter's inventories of the finished product (i.e. of cement), as opposed to semi-finished materials used to make the finished product. Unlike Article 3.7(ii), which specifically mentions the exporter, in the case of inventories the drafters did not make this specification. Guatemala correctly interpreted Article 3.7(iv) to refer to the inventories of domestic producers (i.e. including inventories of clinker), importers and exporters.

4.261 Guatemala argues that under the terms of Article 3.7 of the ADP Agreement, the Ministry could consider other factors not enumerated in subparagraphs 7(i) to (iv) of Article 3. Excess clinker inventories were a valid factor to take into account in considering all of the factors relating to the threat of injury.

4.262 **Mexico** states that, as of the publication of the notice of initiation on 11 January 1996, imports from Cruz Azul remained constant, a fact which was not analyzed at any stage by the Ministry and which, from the standpoint of Mexico, calls into question the causal link between the imports and the closure of the kilns. Mexico submits that this is particularly so because the Ministry, during bilateral consultations with Mexico, itself agreed that even after the closure of the kilns, Cementos Progreso continued to manufacture the product under investigation.

4.263 **Guatemala** rejects Mexico's argument that imports from Cruz Azul remained constant as from January 1996, arguing that imports continued to increase and reached 45,859 tonnes in March 1996.

4.264 **Mexico** submits that the increase took place during the shut-down of the Cementos Progreso kilns, so that it was due more to a shortage of supply in the Guatemalan market than to dumping. Mexico asserts that Cruz Azul's exports dropped back to previous levels (approximately 25,000 tonnes) once those kilns went back into operation.

4.265 According to Mexico, there is no certainty that the material accumulated at the industrial plant of Cementos Progreso actually was grey clinker, as neither the notary who certified the existence of material nor the Director of Economic Integration of the Ministry who conducted the on-the-spot investigation have the technical and scientific capacity to vouch that the material they observed was in fact grey clinker, that what they saw represented a surplus of that material, and that the product in question would be used for the manufacture of the product being investigated and not for some other type of cement.

4.266 **Guatemala** notes that Mexico does not suggest what other material similar to grey clinker could be stocked at a plant producing grey portland cement. Guatemala suggests that in any case, by virtue of Article 17.6(i) of the ADP Agreement, it is not the role of the Panel to assess the validity of the evidence which the Ministry considered in determining that the material examined was grey clinker.

4.267 **Mexico** asserts that, in the preliminary determination of threat of injury, the Ministry admitted as proof several statements and documents that are not adequate for the purposes of demonstrating the existence of stocks and the consequent shutdown of the kilns. These include:

- the administrative inspection carried out by two officials of the Ministry; and
- the notarial deed and the eight colour pictures and graph showing alleged inventories of clinker and cement.

4.268 Mexico argues that these documents cannot be considered adequate since, in order to ascertain the existence of stocks and the shutdown of the kilns, technical inspections need to be made which, as emerges from the text of the preliminary determination itself, were not carried out.<sup>98</sup> Mexico suggests that the mere observation of heaps of material is not enough to prove either the existence of stocks of grey clinker, or the volume or use to which they will be put, and neither is it therefore possible to deduce from the observation that the supposed accumulation of material was the result of imports from Cruz Azul. To illustrate the flaws in the analysis made by the Ministry, Mexico points out that in the cement industry, the accumulation of clinker is not such an important fact in itself as it may be attributable to a variety of reasons, as Cruz Azul informed the Ministry during the investigation. Mexico suggests that such reasons may include:

- buffer stocks consisting of 14 days output from the principal kiln;
- seasonality of demand;
- imbalances within the production plant, as between clinker production and final milling;
- strikes, power cuts and lack of fuel; and
- rain (climatic factors).

4.269 According to Mexico, the Ministry should have ascertained whether the alleged inventories were related to any of the foregoing factors, or whether they were caused wholly or partly by imports of cement from Cruz Azul.

4.270 **Guatemala** repeats that it is not the function of the Panel to assess the admissibility and validity of the evidence examined by the Ministry. Moreover, the Ministry confirmed that the build-up of grey clinker was the result of an increase in imports from Cruz Azul and not the result of other factors such as seasonal demand, strikes or rain. Guatemala also notes that Cruz Azul did not communicate any arguments concerning alternative reasons for grey clinker inventories to the Ministry prior to the preliminary determination of threat of material injury dated 16 August 1996.

4.271 According to **Mexico**, the arguments concerning alternative reasons for accumulation of grey clinker were raised by Cruz Azul on pages 13-16 of its submission to the Ministry dated 30 October 1996. Mexico states that these arguments were also put to Guatemala during bilateral consultations on 9 January 1997, as shown by the questions prepared by Mexico at that time.

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<sup>98</sup> Mexico suggests that the decision to shut down the kilns could have been planned or may have resulted from a very critical situation within the industry. In any case, the Ministry does not explain how the shutdown of the kilns came to result from alleged imports and how this effect came to be a case of threat of injury.

4.272 Mexico notes that the Ministry's preliminary determination of threat of injury makes no mention of the under-utilization of plant capacity, even though this is expressly included in the title of the corresponding section.<sup>99</sup>

4.273 **Guatemala** submits that the underutilization of capacity is clearly demonstrated by the shutdown of the three kilns.

4.274 **Mexico** submits that, as indicated in the report on the inspection carried out at the Cementos Progreso plant, during the period subsequent to that investigated Cementos Progreso's production increased substantially from 1,687,024 sacks (71,697 tonnes) in January 1996 to an estimated 2,286,000 sacks (97,152 tonnes) in March 1996; that is to say, during the period when the Cementos Progreso kilns were closed, estimated production for the month of March 1996 was very close to 100% of the plant's effective production capacity.<sup>100</sup> Mexico recalls that, despite closing kilns, Cementos Progreso continued to produce cement, and was expecting a high output in the month of March.<sup>101</sup> In these circumstances, Mexico asks the following questions:

- Is it possible to consider that a company is actually confronted by a threat of injury caused by imports when during the months following the period investigated its output was increasing and when, in fact, Cementos Progreso itself was anticipating a record output in the month in which it was supposed to be so affected by imports from Cruz Azul that it even had to shut down its kilns?<sup>102</sup>
- How was it possible to build up such large stocks of clinker while recording such a high utilization of installed cement grinding capacity in the months subsequent to the investigation period?
- Why did the Ministry not analyze the information on cement production subsequent to the period investigated if it was in the same document as that used to conclude that, because of imports from Cruz Azul, there had been a substantial increase in inventories of the raw material for the cement?

4.275 **Guatemala** states that based on its comparisons of information for each month with information for the same month during successive years (to account for the seasonal factors in the demand for cement in Guatemala), the Ministry determined that during the period from January to June 1996, cement production was 14% lower than during the same period in 1995. In order to eliminate inflation-related distortions, the Ministry evaluated the sales trends on the basis of quantity instead of value. According to Guatemala, during the period September to December 1995, the volume of Cementos Progreso's sales increased by 17% as compared with the same period in 1994.

4.276 **Mexico** noted that as its comparisons had been made on a month-to-month basis, there was no need to make seasonal adjustments.

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<sup>99</sup> Mexico recalls that in the application for initiation of the investigation, Cementos Progreso stated that its utilization of plant capacity was 100%.

<sup>100</sup> With reference to a report attached to Guatemala's first submission to the Panel, Mexico asserts that the installed capacity of Cementos Progreso was 1,400,000 tonnes per year and the effective capacity approximately 85% thereof (that is, 1,190,000 tonnes per year). Thus, the plant had an effective installed capacity of approximately 99,167 tonnes per month.

<sup>101</sup> Mexico notes that the inspection in question was carried out at the end of March (29 March) so that the Ministry cannot claim that these were estimates made at the beginning of the investigation period.

<sup>102</sup> Mexico notes that the kilns were shut down in February, although in that month Cementos Progreso's production increased by more than 10% relative to the previous month, rising from 1,687,024 sacks to 1,967,175 sacks, i.e. from 71,697 to 83,603 tonnes.

4.277 The Panel asked Guatemala to explain its remarks that three of Cementos Progreso's four kilns had been closed down, whereas Cementos Progreso stated at the time of the verification visit that its actual capacity was about 85% of the installed capacity, despite an alleged increase in imports from Mexico of 45,859 tonnes during the same month. **Guatemala** explained that installed capacity refers to the theoretical maximum capacity of a cement plant assuming that work continues every day of the year. Real capacity reflects a downward adjustment of installed capacity to take into account the fact that a cement plant will be closed for regular maintenance and during the year will only operate for less than 365 days. Cementos Progreso thus declared that its installed capacity was 1.5 million metric tonnes, but that its real capacity, taking into account stoppages for maintenance, was 85% of 1.4 million metric tonnes. According to Guatemala, if three of the four kilns had been stopped for stock control purposes, the plant could not have been using all its actual capacity at the time of the visit. Guatemala emphasizes that, at the time of verification of Cementos Progreso on 27-29 November 1996, the Ministry confirmed that Cementos Progreso had not produced clinker at La Pedrera plant from March to May 1996 and had reduced clinker production by half at the San Miguel plant in March and April 1996.

4.278 Guatemala also notes that the evidence concerning the build-up of inventories and the underutilization of capacity includes the Ministry's inspection at the La Pedrera and San Miguel plants on 29 March 1996. In the course of the inspection of the La Pedrera plant, Cementos Progreso provided evidence demonstrating that, as a result of Cruz Azul imports, Cementos Progreso's sales had declined by 22% despite the fact that March is a peak month for demand; that Cementos Progreso had accumulated 99,500 tonnes of clinker stocks by 28 February 1996; that this build-up of surplus clinker stocks made it necessary to suspend the operation of two kilns at the La Pedrera plant on that date and one kiln at the San Miguel plant on 2 March; that although the kilns were shut down, on 29 March the San Miguel and La Pedrera plants still had clinker stocks of 51,875 tonnes and 10,530 tonnes respectively. During the inspection of the San Miguel plant, Cementos Progreso provided a computerized report by the Production Department substantiating its estimate of 51,875 tonnes of clinker stocks, which was the equivalent of approximately 65,665 tonnes of cement. The Ministry saw for itself that the two kilns at the La Pedrera plant and one of the kilns at the San Miguel plant were shut down. It also saw the large quantity of clinker in stock at the San Miguel plant. In addition, a notary recorded that there were 76,252 tonnes of clinker one day after the kilns had stopped operating.

(c) Reduced sales

4.279 **Mexico** raises several issues concerning the Ministry's preliminary determination that imports from Cruz Azul caused a reduction in sales by Cementos Progreso during the month of September 1995 and in the first three months of 1996:

- (i) Mexico notes that according to the preliminary determination, sales by Cementos Progreso fell during September 1995. Nevertheless, as the preliminary determination itself recognizes, that fall could not be attributed to imports from Cruz Azul, since that month saw a contraction of demand on the preceding month on the Guatemalan market, which meant that the fall in Cementos Progreso's sales was parallel to a decline in Mexican exports, itself the result of a contraction in domestic demand, and not of other factors related to exports by Cruz Azul;
- (ii) as regards the pattern of sales for the first quarter of 1996, Mexico argues that the said sales do not fall within the period of investigation and should therefore not be considered. What is more, Mexico asserts that the Ministry failed to collect information on the increase in imports during the first quarter of 1996. Therefore, information on reduced sales outside the period of investigation cannot be validly included in an examination of the link between Cementos Progreso's sales and imports from Cruz Azul, because of failure to mention other factors (i.e. imports

outside the period of investigation) that should also have been taken into account; and

- (iii) imports from Cruz Azul cannot be linked to the downturn in sales for the first quarter of 1996 since such imports remained constant as from January of that year.

4.280 Mexico concludes from the foregoing that the reduced sales identified by the Ministry were not caused by imports from Cruz Azul, but by other factors, as expressly recognized by the Ministry in its own preliminary determination. Therefore, the determination in question does not reflect an objective and impartial analysis of the factual elements which were at the disposal of the Ministry when issuing the preliminary determination. Mexico submits that Guatemala therefore violated its obligations under Article 3.7 of the ADP Agreement.

4.281 According to **Guatemala**, the Ministry found that as a result of increased imports, sales of the like domestic product declined as of September 1995 by comparison with the preceding year. They continued to decline over the first quarter of 1996. Guatemala submits that Mexico's objections to these findings are unfounded.

4.282 Guatemala recalls Mexico's assertion that the reduction in sales was caused by a contraction of demand in September and not by increased imports. Guatemala suggests that, while it is true that demand did contract in September 1995, the Ministry observed that there was a steady decline in sales from July 1995 to March 1996 by comparison with sales for the preceding year.

4.283 With regard to Mexico's argument that the Ministry should not have considered sales for the first quarter of 1996 as those sales fell outside of the investigation period, Guatemala states that the ADP Agreement does not prohibit the investigating authority from considering the most recent information available. According to Guatemala, this is in fact a better practice, especially in analysing the threat of material injury.

4.284 Guatemala suggests that Mexico contradicts itself by alleging that imports from Cruz Azul cannot be related to the downturn in sales for the first quarter of 1996 because those imports remained constant from January of that year. Guatemala submits that imports continued to increase through 1996 and peaked at 45,859 tonnes in March. Guatemala submits that the increase in imports is even more significant when the comparison is made with the first quarter of 1995, when there were no imports from Cruz Azul.

4.285 **Mexico** asserts that, according to the information provided by Cementos Progreso in its questionnaire response, despite the fall in demand for the product investigated during the month of September 1995, during the investigation period its sales increased by 12.37% in value and 0.01% in volume as compared with the same period in the previous year. Furthermore, according to Cementos Progreso's income statement, net sales increased by 21.90% over 1994 and net profits increased by 22.80%.

4.286 **Guatemala** submits that the ADP Agreement does not require the investigating authorities to take into account the value of sales and profits when making a preliminary determination of threat of consequent injury. Article 3.7 of the ADP Agreement does not refer to the producer's sales and profits when determining a threat of material injury. According to Guatemala, the only reference to profits is that in Article 3.4 of the ADP Agreement, which concerns a determination of present injury.

4.287 Guatemala recalls that the Ministry stated in its preliminary determination of threat of injury that the volume of " ... sales of the domestic product fell from September 1995 onwards in comparison with sales during the previous year and this situation continued throughout the first quarter of [1996] ... ". According to Cementos Progreso's questionnaire response, the volume of its domestic sales fell by 17% from September-December 1994 to September-December 1995. The fact that the value of

sales increased from 1994 to 1995 in nominal Quetzales, not adjusted for inflation, does not contradict this fact. Guatemala notes that during the first half of 1996, the company's sales fell by 14% compared with the same period in 1995, while growth in demand over the same period was 15%. Guatemala submits that the 17% decrease in Cementos Progreso's sales corresponds to 67,099 metric tonnes. Cruz Azul imports rose from zero in June-November 1994 to 61,279 metric tonnes in June-November 1995. Guatemala alleges that Cementos Progreso's sales fell at the same time as the rapid increase in Cruz Azul imports and the rise in consumption in Guatemala. From June 1995 to November 1995 the share of Cruz Azul imports on the Guatemalan market rose from 0.15% to 23.54%, while Cementos Progreso's market share fell from 99.85% to 75.42%. As further evidence of the causal link between increased dumped imports and threat of injury, Guatemala recalls that the Ministry took into account evidence that Cementos Progreso lost customers to Cruz Azul, that there was significant price undercutting by dumped imports and that, in the towns and cities where the dumped product was marketed, the price of Cementos Progreso's cement fell despite increased energy prices, which are the greatest cost factor in cement production.

4.288 Guatemala submits that, according to Cementos Progreso's financial statements, Cementos Progreso's net profits after tax in fact rose by 22.8% from 1994 to 1995 in nominal Quetzales, not adjusted for inflation. It is important to note, however, that in 1995 Cementos Progreso's net profits after tax only amounted to 2.6% of sales. Guatemala suggests that this profit margin is not sufficient for an industry like the cement industry which has such substantial capital needs. Moreover, as explained in the final determination, Cementos Progreso made no profits during the second half of 1993 and all 1994 because, as a result of plant expansion at San Miguel, it had to import clinker instead of using its own clinker. Guatemala argues that, in 1995, the San Miguel plant replaced imported clinker by the clinker it produced. The reduced cost of clinker allowed profits to increase. According to Guatemala, the comparison of profits in 1994 and 1995 made by Mexico was thus distorted by the high cost of production (and therefore lower net profit) in 1994 during the expansion of the San Miguel plant.

4.289 Guatemala submits that, because Cementos Progreso is the only producer of grey portland cement in Guatemala, each tonne of cement imported from Cruz Azul took the place of one tonne of cement that would have been sold by Cementos Progreso. Moreover, Guatemala notes that Cementos Progreso's 17 May 1996 questionnaire response shows that sales of Cementos Progreso cement in Guatemala fell in October, November and December 1995 by 10.5%, 16.0%, and 11.7% respectively, in relation to the same months in the previous year.

4.290 **Mexico** states that the information available to the Ministry in conducting its analysis of threat of injury reveals no correlation between the volume of imports and the volume of sales, and that each tonne of cement from Cruz Azul cannot have taken the place of a tonne that would have been sold by Cementos Progreso.

4.291 Mexico refers to Guatemala's argument that Cementos Progreso's sales fell by 14% in the first half of 1996, compared with the same period in 1995. Mexico notes that this is a period subsequent to the period under investigation, and secondly, that according to the information supplied by Cementos Progreso (which is the only information available to Mexico and to the members of this Panel) during the first quarter of 1996 production increased by 11% with respect to the preceding year and, at the time of the alleged closing down of the kilns, cement production was expected to reach a record of approximately 97,152 tonnes. Mexico notes that this figure comes very close to the real production capacity of Cementos Progreso, according to the statement of the company's General Manager in the record of the inspection visit to Cementos Progreso.

4.292 Mexico refers to Guatemala's argument that the ADP Agreement does not require the investigating authorities to take into account the value of sales when making a preliminary determination of threat of injury under Article 3.7 of the ADP Agreement. Mexico considers this argument odd, since it was Guatemala itself that introduced sales in its analysis of threat of injury.

Nor should it be forgotten that under Article 3.5, the demonstration of a causal link between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. In this regard, Mexico notes that the information on both sales and profits was in the file and available to the authorities in question.

(d) Depressed domestic producer prices

4.293 Mexico asserts that, pursuant to Article 3.7(iii) of the ADP Agreement, in order to determine the existence of a threat of injury the investigating authority should have considered, *inter alia*, whether imports were being made at prices that would depress or significantly suppress domestic prices and whether this would perhaps lead to increased demand for further imports. Instead, the Ministry simply asserted that "as a consequence of dumped imports, there was a fall in the price of cement in those cities where ... [it] ... is sold", stating that this had been borne out by an investigation by Guatemala's Directorate of Economic Integration ("DIACO"), information supplied by Cementos Progreso, and "the relationship between these prices and those that might have been established in keeping with the Government formula for setting a maximum sale price". According to Mexico, the Ministry's conclusion contains the following inconsistencies:

- (i) the preliminary determination does not explain the procedure (i.e. the methodological steps and the circumstances) followed in establishing that the fall in prices was caused by dumped imports, but simply asserts that this was so;
- (ii) the conclusion and the study by DIACO refer only to some Guatemalan cities, as though the anti-dumping investigation had been conducted on the basis of a regional investigation under Article 4.2 of the ADP Agreement, when in fact it was a national investigation;
- (iii) the preliminary determination fails to indicate how the comparison was made between the price of imported cement from the exporting company and Cementos Progreso's sales price, nor does it state whether the prices are compared at the same level of trade, whether the transactions were under the same commercial terms, if the products involved were comparable, the dates of the comparisons, and whether the prices were the result of simple or weighted, moving or progressive averages;
- (iv) the comparison with the prices that might have been established in keeping with the Government formula for setting the sale price ceiling is completely irrelevant from the standpoint of the ADP Agreement. The formula could furthermore distort the entire exercise, because it does not correspond to the market prices that would result in a situation of free competition. In any case it is a price ceiling, and not a price that must necessarily be reached; and
- (v) the prices of the type I (PM) grey portland cement under investigation were not significantly lower than those of the cement produced by Cementos Progreso. According to Mexico, the likelihood that they increased the demand for further imports was also therefore negligible. Mexico recalls that exports from Cruz Azul remained stable as from the first quarter of 1996.

4.294 **Guatemala** suggests that Mexico is requesting the Panel to conduct a *de novo* review of the Ministry's findings. The Ministry found that as a result of the dumped imports, the price of domestic cement fell in those cities where cement from Cruz Azul was being sold, in spite of an increase in Cementos Progreso's production costs. The Ministry referred to the findings of the study done by DIACO showing that the imported product consistently undercut the domestic product. The Ministry also referred to the evidence submitted by Cementos Progreso of the widening gap between the government-regulated price ceiling and the actual prices received by Cementos Progreso.

4.295 Guatemala notes that Article 12.2.1 of the ADP Agreement regulating the information that must be contained in the public notice of a provisional measure does not require the investigating authority to describe the methodology used to arrive at a factual conclusion. Article 12.2.1 only requires that the notice should contain the findings, conclusions and "sufficiently detailed explanations for the preliminary determinations ...". Guatemala recalls that Mexico does not claim a breach of Article 12.2.1. Guatemala suggests that, in any case, the methodology used by the Ministry emerges clearly from a reading of the preliminary determination. The Ministry found that Cruz Azul imports were undercutting cement from Cementos Progreso, thereby forcing Cementos Progreso to reduce its prices in those cities where cement from Cruz Azul was being sold. This led to a widening gap between the maximum prices authorized by the Government and the prices actually charged by Cementos Progreso.

4.296 Guatemala states that, because of the low price-weight ratio and high transport costs of cement, Cruz Azul concentrated its sales efforts on the western part of Guatemala closest to the border. DIACO therefore focused its attention on the towns nearest to the Mexican border where Cruz Azul sales were concentrated. The existence of price undercutting in the most affected area in Guatemala clearly pointed to a threat of injury to Cementos Progreso, Guatemala's only cement producer. Guatemala asserts that the Ministry did not investigate injury on a regional basis.

4.297 Guatemala states that the price comparison is explained in detail in the DIACO reports. DIACO officials visited businesses selling cement in several towns and identified those selling cement from Cruz Azul and from Cementos Progreso. This allowed a direct comparison of selling prices at the same level of trade, under the same sales conditions, on the same date and with the same buyers. Guatemala suggests that in almost all instances, Cruz Azul cement undercut cement from Cementos Progreso. Moreover, several such businesses stated that cement from Cruz Azul had brought down the price of cement in Guatemala.

4.298 Guatemala asserts that Article 3.7 of the ADP Agreement requires investigating authorities to consider whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices. The evidence showed that before the influx of imports from Cruz Azul, Cementos Progreso's prices were generally as high as permitted under the Government formula. During the investigation period, Cementos Progreso was unable to charge the maximum price allowed in those towns where cement from Cruz Azul was being sold, but could in fact do so in cities far away from the Mexican border where Cruz Azul cement was not present. According to Guatemala, this is strong evidence that imports from Cruz Azul were entering at prices that were depressing and suppressing the prices of the like domestic product.

4.299 Guatemala recalls Mexico's argument that because the prices of the type I (PM) grey portland cement produced by Cruz Azul were not significantly lower than those of the cement produced by Cementos Progreso, the lower prices could not significantly increase the demand for further imports. Guatemala emphasises that Mexico thereby recognizes that the imports were undercutting the prices of the domestic product. According to Guatemala, because cement is a fungible item, even a small margin of undercutting can lead to a significant loss in market share. In this case there is, according to Guatemala, no doubt that the imported cement undercut the local cement, capturing 23% of the market share of the domestic industry in only six months. Guatemala suggests that proof of undercutting was therefore powerful evidence that the demand for cheap imports would increase, at the expense of the domestic producer.

4.300 **Mexico** maintains that, according to the information provided by Cementos Progreso, the prices charged by Cementos Progreso (the only producer of cement in Guatemala and hence the best reference point for exploring the general behaviour of prices across Guatemala, outside of a few cities) reveal a situation completely different from that described by the Ministry in its preliminary determination, since prices increased by almost 8% as compared with the previous half-year, and by 18% as compared with the same period during the previous year.

4.301 **Guatemala** notes that Mexico ignores the fact that cement demand in Guatemala is seasonal. The demand is higher during the dry season (October-May) than in the rainy season (June-September). The Ministry therefore properly evaluated the trend in Cementos Progreso's sales by comparing the sales volume to that for the same month the previous year. This comparison showed that Cementos Progreso's sales fell at the end of 1995 and during the first half of 1996 in comparison with the same period the previous year. Guatemala submits that according to Cruz Azul's own submission of 13 May 1996, the import of Cruz Azul cement caused prices in Guatemala to drop by between Q 6.00 and Q 8.00 per sack. This submission also provided that the price of Cementos Progreso cement fell by 22% in the south-west of the country. Moreover, the data cited by Mexico neither contradicts, nor detracts from the value of the evidence presented, which clearly demonstrates that dumped imports from Cruz Azul had a depressing effect on Cementos Progreso's prices. The prices shown in the information provided by Cementos Progreso were not adjusted for inflation, and represent an average for all of Guatemala. Evidence has shown that Cementos Progreso's prices decreased in the cities where Cruz Azul's cement was sold and that their prices in those cities were lower than the ceiling prices authorized by the Government.

(e) Loss of customers

4.302 **Mexico** recalls that the Ministry made a preliminary determination that Cementos Progreso lost some of its customers, without ascertaining the accuracy of the claim or the accuracy of the list of alleged lost customers submitted by the claimant. Thus, Mexico argues that the Ministry accepted that the alleged customers switched from domestic to imported cement, though it did not ascertain the existence of these clients and the effect of substitution of the domestic product by the imported product. The list in question shows only the names of alleged customers and no further data supporting the claimant's affirmations. According to Mexico, the Ministry should also have considered that the list might have contained customers who had been driven out of Cementos Progreso's market as a result of its own intimidatory, exclusive and monopolistic policy, as was found by the Ministry itself through DIACO studies of the grey portland cement market.

4.303 **Guatemala** notes that the Ministry found that, even though Cementos Progreso dropped its prices to compete with Cruz Azul, it lost customers to the Mexican producer. Mexico is challenging this finding on the basis that the Ministry did not verify the accuracy of the evidence submitted by Cementos Progreso to substantiate its loss of customers to Cruz Azul. Guatemala submits that there is no doubt that in just six months, Cruz Azul increased its market share from 0.15% to 23.54%, and that the market share of Cementos Progreso declined from 99.85% to 75.42% over that same period. Guatemala also recalls that Mexico admits that cement from Cruz Azul was priced lower than that of Cementos Progreso. It is therefore logical to conclude that Cementos Progreso lost customers to Cruz Azul.

4.304 **Mexico** recalls that, according to Guatemala, the loss of customers determined by the Ministry was based, on the one hand, on information supplied by Cementos Progreso and, on the other, on the fact that Mexican imports had increased their share of the Guatemalan market, whence the Ministry concludes that Cementos Progreso lost customers to Cruz Azul. This confirms Mexico's argument that the Ministry did not verify the accuracy of the evidence submitted by Cementos Progreso, since otherwise the Ministry would not have found it necessary to merely conclude that customers had been lost on the basis of circumstantial evidence.

4.305 **Guatemala** states that it is logical to conclude that the fact that Cementos Progreso lost almost a quarter of its market in six months supports the evidence submitted by Cementos Progreso of the loss of customers to Cruz Azul. Moreover, Cruz Azul never objected to the evidence submitted by Cementos Progreso concerning the loss of customers.

- (f) Excess plant capacity in the exporting company and the situation of demand on the Mexican market

4.306 **Mexico** notes that the Ministry considered in its preliminary determination that Cruz Azul had freely available capacity for manufacturing approximately 360,000 tonnes of cement, which together with the negative growth of the Mexican economy and resultant lower domestic demand, point to the likelihood of increased dumped exports. In this regard, Mexico notes that:

- (i) as regards available capacity at Cruz Azul, the Ministry ignored the fact that the Mexican producer manufactures several types of cement at its plant, other than the grey portland cement under investigation, and that therefore excess cement capacity cannot be treated as adequate or accurate evidence for reaching a positive determination of the existence of the threat of material injury with regard to grey portland cement; and
- (ii) as regards the likelihood of increased exports by Cruz Azul, it is clear from the preliminary determination that the Ministry arrived at this conclusion on the basis of mere conjecture, as the text does not show that any analysis was carried out based on adequate evidence of the real possibility of increased exports from Cruz Azul in the near future. Mexico recalls that under Article 3.7 of the ADP Agreement, the "change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent", and determinations of a threat cannot be based on "allegation, conjecture or remote possibility". Furthermore, Mexico notes that imports from Cruz Azul remained stable as from January 1996.

4.307 Mexico submits that the Ministry's preliminary determination of Cruz Azul's excess capacity was based on an estimate made by the consultants Arthur D. Little<sup>103</sup>, who did not necessarily have the elements needed to make that estimate properly. According to the estimate, Cruz Azul had excess capacity equivalent to 360,000 tonnes a year. Assuming, without conceding the fact, that the estimate was accurate, Mexico suggests that Guatemala did not take into account the fact that 360,000 tonnes per year corresponds, on average, to 30,000 tonnes per month, which could also have been used for sales on the Mexican market or shipped to at least seven export markets other than Guatemala. Nor did Guatemala take into account the fact that the estimated excess capacity related to different kinds of cement. Mexico recalls that this excess capacity could be used to manufacture at least ten different kinds of cement and that if the Ministry had made an objective and unbiased study of the facts it would have understood the flexibility of the production process involved, i.e., that the plant is so designed that different kinds of cement can be manufactured on a single production line.<sup>104</sup>

4.308 Mexico alleges a lack of objectivity and impartiality of the analysis made by the Ministry since, to arrive at a preliminary affirmative determination of threat of injury, it used information from the first quarter of 1996 for the purpose of determining whether the prices of the domestic producer had decreased, whereas it used information from 1994 to determine whether the Mexican construction sector was depressed, although according to the official Mexican figures for the same year (1996) the construction sector grew by approximately 23%.<sup>105</sup> Thus, Mexico submits that the conclusion reached

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<sup>103</sup> Mexico recalls that Guatemala argues that the information provided by Cementos Progreso in support of its application was all that was reasonably available to it. However, Mexico suggests that if this type of study could be commissioned by the applicant halfway through the investigation, it could also have been commissioned at the beginning, which again shows the applicant's assertion concerning reasonable availability to be untrue.

<sup>104</sup> According to Mexico, not only should this have been known to the Ministry, but even Cementos Progreso itself was aware of this because, when it decided to start on its plans for modernization, it first approached Cruz Azul in order to profit from the latter's experience.

<sup>105</sup> Mexico submits that this data was available to the public, since it can be consulted at the Internet site of Mexico's National Institute of Statistics, Geography and Information Technology.

by the Ministry to the effect that there was the possibility of increased imports of cement from Cruz Azul was based merely on conjecture and remote possibility resting upon erroneous premises.

4.309 Mexico concludes from the foregoing that the determination reached by the Ministry concerning the possibility of a substantial increase in exports from Cruz Azul to the Guatemalan market represents a serious violation of Article 3.7 of the ADP Agreement, and betrays the lack of seriousness, bias and subjectivity of the Ministry's analysis.

4.310 **Guatemala** recalls the Ministry's observation that, on account of the high-fixed costs involved in the production of cement, the profitability of a cement producer is contingent upon maintaining high capacity utilization. Guatemala submits that, if demand contracts, new markets must be found for the product. In this case, the Mexican economy was experiencing negative growth following the devaluation of the peso in December 1994, and expenditure in the building sector had dwindled by 22%. The consulting firm Arthur D. Little Mexicana found that Cruz Azul had an excess capacity of some 360,000 tonnes. The Ministry was of the opinion that the evidence of excess capacity and depressed domestic demand supported the conclusion that there was the possibility of increased imports of cement from Cruz Azul.

4.311 Guatemala refers to Mexico's assertion that the finding in regard to excess capacity ignores the fact that Cruz Azul manufactures several types of cement other than grey portland cement. According to Guatemala, Mexico fails to state that the same production facilities cannot be used to produce different types of cement. Therefore, affirming that Cruz Azul can produce different types of cement does not change the fact that Cruz Azul had 360,000 tonnes of excess capacity available for the production of grey portland cement. Cruz Azul could have used all of that excess capacity to produce grey portland cement for export to Guatemala.

4.312 Guatemala notes that Cruz Azul did not provide any evidence to dispute the estimate of Arthur D. Little, or any other information to show that Cruz Azul's capacity was actually lower. Guatemala notes Mexico's argument that Cruz Azul's excess capacity of 360,000 tonnes per year (or 30,000 tonnes per month) could also have been used for sales on the Mexican market, or for exports to at least seven markets other than Guatemala. Guatemala recalls, however, that the total excess capacity could be used to produce grey portland cement for export to Guatemala and that, as Cruz Azul had gained a market share of almost 25% within a period of six months, it was highly probable that the excess capacity would, in fact, be exported to Guatemala. Guatemala also notes that Mexico argues that the Ministry should not have used information from the first quarter of 1996 for the purpose of determining whether the prices of the domestic producer had decreased while using information from the first quarter of 1994 to determine whether the Mexican construction sector was depressed. According to Guatemala, the most recent price information was clearly the most suitable for determining whether the dumped products were threatening injury to the domestic industry as a result of depressed prices. The most recent information available regarding the Mexican construction sector was for the year ending in 1995. Information on that sector for the end of 1996 did not exist. Guatemala denies Mexico's assertion that the Ministry used data for the year ending 1994. Moreover, Cruz Azul did not provide any evidence to dispute the information regarding the construction sector in Mexico in 1995. Thus, the use of this information by the Ministry is not evidence of bias or lack of objectivity.

## 2. Article 3.5

4.313 **Mexico** asserts that Guatemala violated Article 3.5 of the ADP Agreement by making a preliminary affirmative determination of threat of injury without demonstrating the causal link between allegedly dumped imports and the alleged threat of injury to Guatemala's domestic industry. The first sentence of Article 3.5 provides that "[i]t must be demonstrated that the dumped imports are ... causing injury ...". Mexico asserts that, despite a passing reference to the causal link in the heading of the relevant section of the preliminary determination, there is no explicit reference to the form or

procedure followed by the investigating authority to illustrate that the imports under investigation were at the root of the supposed threat of injury. Even if the investigating authority believed that a causal link could be inferred from the factors set forth in the relevant section of the preliminary determination, Mexico submits that it has demonstrated that the factors relating to the increase in imports, accumulation of inventories and under-utilization of plant capacity, contracting sales, falling domestic producer prices, loss of clients and plant capacity of the exporting company were not properly examined. Without attempting to be exhaustive, Mexico recalls in this regard that the results of the preliminary determination are either incorrect for various reasons (imports), or do not refer to the product under investigation, but to an input thereof (accumulation of inventories), or are non-existent (under-utilization of plant capacity of the claimant), or result from factors other than dumping as in the case of the fall in demand (contracting sales), or have methodological flaws and refer to regional investigations or to maximum prices set by the investigating authority which in any case are meaningless (falling prices), or are based on unsubstantiated evidence submitted by the claimant (loss of customers), or are based on mere allegation, conjecture or remote possibility which have been contradicted by the facts (threat of increased imports on account of plant capacity of the exporter). Mexico submits that the Ministry has not adequately established the facts in finding that, for Cementos Progreso, the increase in imports meant a significant loss of market share, falling sales, loss of customers, a build-up of excess inventories prompting the closure of kilns, and a drop in its prices. Mexico suggests it has already shown that, although Mexican imports certainly increased their share of the Guatemalan market, there is no correlation between the trend in imports and sales of the Guatemalan product. Furthermore, Mexico states that Cementos Progreso's sales, far from declining, actually increased, as did its prices. Mexico also states that the build-up of grey clinker inventories in the period subsequent to that investigated is offset by the increase in the production of grey portland cement during the same period, and that the supposed analysis of the increase in exports to Guatemala did not take into account the fact that the Mexican construction industry recorded considerable growth in the period subsequent to that investigated, or that there existed other export markets that could have absorbed Cruz Azul's surplus installed capacity.

4.314 **Guatemala** states that Article 3.5 of the ADP Agreement deals with the causal relationship in the context of determining actual material injury. Article 3.5 sets out the factors that the investigating authorities should consider in assessing whether dumped imports are currently causing injury to the domestic industry. Guatemala suggests that, because the Ministry made a preliminary determination of threat of injury, it referred to causal link within the meaning of Article 3.7 of the ADP Agreement. Article 3.7 makes express reference to causal link in the event of threat of injury. It refers to a change in circumstances which would create a situation in which "the dumping would cause injury ...". According to Guatemala, a provisional measure may be imposed if all factors considered lead to the conclusion that further dumped imports are imminent and that unless protective measures are taken, material injury would result. That was precisely the preliminary determination made by the Ministry in this case. In its final determination, however, Guatemala recalls that the Ministry referred to causal link within the meaning of Article 3.5, having ascertained that dumped imports were causing current injury.

4.315 Guatemala asserts that, in any event the Ministry made clear reference to the causal link in point F of Section VI of the preliminary determination entitled "Threat of Injury to the Domestic Industry and Causal Link between Dumping and Threat of Injury". The Ministry found that for the domestic producer, the increase in imports had meant a significant loss of market share, falling sales, loss of customers, a build-up of excess inventories prompting the closure of kilns, and a drop in its prices. Guatemala recalls that the Ministry also found that there was a possibility of increased imports. On the basis of those findings, the Ministry concluded that it was necessary to impose a provisional measure in order to avoid injury to the domestic industry. According to Guatemala, there is no doubt therefore that the Ministry demonstrated a causal link between the dumped imports and the threat of injury.

4.316 **Mexico** denies that the Ministry's preliminary determination establishes any causal link between the alleged dumping and the alleged threat of injury. Mexico suggests that, in fact, there are only two references to causal link in the preliminary determination, one in the heading of section VI, F and the other in section VI, G. In the first case Mexico suggests that the reference is merely used as a heading. In the second, Mexico recalls that it is merely stated that "the facts set out in the section on the threat of injury ... show a causal relationship between the dumped imports and the injury caused to domestic industry".

4.317 Mexico submits that Guatemala disregards the text of the ADP Agreement when it argues that in the case of an investigation of threat of injury it is not necessary to make a determination of a causal link within the meaning of Article 3.5 of the ADP Agreement, since the latter applies only to investigations for present injury. In this connection, Mexico recalls footnote 9 to the heading of Article 3 of the ADP Agreement which reads:

"Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or ...".

4.318 Mexico suggests that, when the ADP Agreement refers to "injury", it is actually referring to any of the three possible types of "injury" listed in footnote 9, thus undermining Guatemala's argument. The reference to "injury" in Article 3.5 does therefore apply in cases involving threat of injury. Accordingly, Mexico argues that the Ministry should have made a specific determination of the existence of a causal link between the dumped imports and the alleged threat of injury, since several of the factors relied on by the Ministry were caused by factors other than imports from Mexico.

4.319 **Guatemala** notes that although the preliminary determination did not refer explicitly to Article 3.5 of the ADP Agreement, the Ministry did comply with the criteria of that provision. For example, in accordance with Article 3.5, the Ministry demonstrated a causal relationship between the dumped imports and the threat of material injury to the domestic industry on the basis of an examination of all the relevant evidence available. The Ministry found that, during the period of investigation, the demand for grey portland cement in Guatemala increased from 92,449 tonnes in June to 109,326 tonnes in November. Then, in accordance with the criteria in Article 3.5, the Ministry considered the possibility that the injury to Cementos Progreso may have been caused by a contraction in demand rather than dumped imports, but it rejected that possibility because the demand for cement was registering substantial increases on a monthly basis, except for September 1996 when there was a drop in demand as compared to August. This is normal market behaviour given that it rains in September and construction activity is reduced. Cruz Azul did not contend that any of the other factors in Article 3.5 - such as volume and prices of imports not sold at dumped prices and export performance of the domestic industry - were a cause of injury to Cementos Progreso. The evaluation of all the facts under consideration led the Ministry to the conclusion that further dumped exports were imminent, and unless protective action was taken, material injury would occur.

#### E. Violations Subsequent to the Preliminary Determination

4.320 **Mexico** submits that Guatemala infringed Articles 6.1, 6.2, 6.4, 6.5, 6.7, 6.8, 6.9, and Annexes I(2), I(7), I(8), II(1) of the ADP Agreement at various stages of the investigation after the preliminary determination and the imposition of a provisional measure.

##### 1. Extension of period of investigation

4.321 Mexico alleges that the Ministry violated Article 6.1 and Annex II, paragraph 1, of the ADP Agreement by extending the period of investigation by six months, some nine months after

publication of the decision initiating the investigation and some two months after the preliminary determination.

4.322 Mexico recalls that the Ministry set the period of investigation as 1 June to 30 November 1995, as stated in the decision dated 4 October 1996 and in the resolution initiating the investigation published in the Official Journal on 11 January 1996, and as notified to Cruz Azul. In the provisional determination, the Ministry imposed provisional anti-dumping duties based on the information and evidence collected over the period 1 June to 30 November 1995. Mexico notes that on 4 October 1996, the Ministry extended the period of investigation to include 1 December 1995 to 31 May 1996, and this was communicated to Cruz Azul by means of the additional questionnaire which it received on 19 October 1996. In that same questionnaire, the Ministry requested Cruz Azul to submit information corresponding to both the original and extended period of investigation.

4.323 Mexico states that in response to the decision to extend the investigation period, Cruz Azul asked the Ministry to explain the reasons and legal basis for both its decision to extend the investigation period only at this stage of the procedure, and for the content of the additional questionnaire, considering its enormous scope and complexity. These requests were submitted orally and in writing on 30 October 1996 and 12 November 1996. As the Ministry did not respond to these inquiries, and considering that the Ministry had imposed an excessive and unreasonable burden on the exporting firm, the latter was not in a position to meet the request for data concerning the extended period of investigation. Instead, Mexico argues that Cruz Azul provided a full response to the questionnaire covering the original period under investigation, (i.e. 1 June to 30 November 1995).

4.324 Mexico submits that the ADP Agreement does not empower investigating authorities to change the investigation period, and even less so after making a preliminary determination, as this means changing the facts that were used as the basis for deciding on the appropriateness of provisional measures. Mexico submits that such extension of the investigation period infringes Article 6.1 and paragraph 1 of Annex II of the ADP Agreement, as in the resolution initiating the investigation and in the preliminary determination the Ministry had set the investigation period as 1 June to 30 November 1995. Requesting information corresponding to the additional period of investigation undermines the rights of defence and the legal guarantees that should exist in all anti-dumping investigations by virtue of the aforementioned provisions of the ADP Agreement.

4.325 Mexico suggests that changing the investigation period is also inconsistent with the logic of the ADP Agreement, depending upon how and when it was changed. Changing the investigation period between the preliminary and final determinations could completely distort the investigation, since the basis used for determining the existence of dumping, injury or threat of injury and the causal link between dumping and injury or threat of injury might no longer be the same. Mexico suggests that, as is the case for any statistical analysis, the investigation period is of great importance for the results of the analysis. If the authority has established a period of investigation, it is inadmissible that for no reason or without any prior notice that period should be changed. Mexico asserts that an arbitrary change in the period of investigation not only runs counter to the original period of investigation established by the Ministry itself, but also puts the exporting firm at a serious disadvantage.

4.326 According to Mexico, in the present case the problem goes beyond a simple change in the investigation period. In this case, the Ministry made a preliminary determination using partial data that extended beyond the investigation period, without making any formal change or notifying interested parties of the situation (Mexico notes from the preliminary determination that the only party to provide information for the period following the investigation period was Cementos Progreso, again highlighting the bias displayed by the Ministry in conducting the investigation). In this case, Mexico suggests that the problem is not the change itself (though this is an unorthodox situation and is not envisaged in the ADP Agreement), but the fact that without making the change formally (as it subsequently did with the final determination), the Ministry included in the preliminary determination

various data (whose reliability and accuracy are questioned by Mexico) on facts that occurred after the investigation period applicable at that time.

4.327 Mexico states that the decision published by the Ministry on 4 October 1996 never mentions the legal basis for extending the investigation period. Nor is there any mention of the reasons or motives which led it to its decision, showing that the Ministry was simply responding to a request from Cementos Progreso, with the possible objective of defending the interests of the latter. Mexico submits that the fact that the Ministry extended the period of investigation without explaining or justifying its decision suggests that when issuing its preliminary determination the Ministry lacked sufficient evidence to determine the existence of the threat of injury. It therefore found itself having to extend the period of investigation in order to justify the protection of its domestic industry, albeit at the cost of violating the principles and rules laid down in Article 6.1 and Annex II of the ADP Agreement.

4.328 **Guatemala** contends that Mexico's argument is without foundation, since Guatemala did not violate Article 6.1 or Annex II of the ADP Agreement by extending the investigation period. Neither Article 6.1, nor Annex II, nor any other provision in the ADP Agreement imposes any requirement on the investigating authority regarding the period to be investigated. Guatemala asserts that the appropriate investigation period will vary according to the specific case, and the establishment of the period is left to the discretion of the investigating authority. Nor does the ADP Agreement prohibit the investigating authority from using a different investigation period for the preliminary determination and the final determination. Guatemala understands that it is common practice for investigating authorities in other countries to extend the investigation period during the final phase of the investigation, to enable the final determination to be based on more up-to-date information.<sup>106</sup>

4.329 Guatemala recalls that, in the present case, the Ministry initially established 1 June to 30 November 1995 as the investigation period. This was the period investigated for the preliminary determination. In a submission dated 18 September 1996, Cementos Progreso requested the Ministry to extend the investigation for the final determination so as to include the period from 1 January to 30 June 1996, in order to enable the final determination to be based on more recent evidence of dumping and injury. Guatemala submits that, with regard to dumping, Cementos Progreso presented evidence that the margin of dumping had increased from the period June to November 1995 examined in the preliminary investigation. Specifically, prices in Mexico had increased substantially in 1996, while export prices to Guatemala had remained unchanged. With regard to the consequent injury, Cementos Progreso stated that the massive imports in 1996 - after the preliminary investigation period of June to November 1995 - were causing it material injury. In other words, the threat of material injury identified in the request had become present material injury in 1996.

4.330 Guatemala states that, in reply to the application by Cementos Progreso, the Ministry requested additional information for the period from 1 December 1995 to 31 May 1996. Guatemala denies that the supplement to the questionnaire requesting information for the additional period of investigation placed an excessive and unreasonable burden on Cruz Azul. According to Guatemala, Cruz Azul made no such claim at the time and did not request any extension of the deadline for responding to the questionnaire. The Ministry granted Cruz Azul, at its request, an extended period of almost two months to reply to the original questionnaire. Far from requesting an extension to respond to the supplementary questionnaire, Cruz Azul merely objected to supplying the information requested.

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<sup>106</sup> Guatemala states that Article 76 of the Mexican regulations under the Foreign Trade Act provides that "the period of investigation to which the foregoing paragraph refers may be modified at the discretion of the Ministry to cover a period which includes imports made subsequent to the commencement of the investigation". (G/ADP/N/1/MEX/1 (18 May 1995)). Guatemala notes that Mexico subsequently confirmed that "Article 76 of the Regulations empowers the investigating authority to extend the period of time of the investigation, where deemed necessary." (G/ADP/W/66 (25 October 1995)).

4.331 Guatemala submits that there is nothing in the ADP Agreement to prevent an investigating authority from using recent information on injury that falls outside the period of investigation. Article 3.7 of the ADP Agreement applies to the determination of threat of injury and does not contain any limitations on the period of time to be covered in the information considered when taking a decision on the determination of threat of injury. Furthermore, Mexico does not cite any provision of the ADP Agreement that imposes such a time-limit. Indeed, in view of the wording of Article 3.7, Guatemala suggests that it is highly desirable that an investigating authority should use the most recent information available.

4.332 **Mexico** submits that, in response to the decision to extend the investigation period, Cruz Azul asked the Ministry for an explanation of the reasons and the legal basis for its decision and of the content of the supplementary questionnaire. In view of the fact that the investigating authority did not respond to the exporter's inquiries, Cruz Azul found it impossible to comply with the request, which is why it proceeded to answer in full the parts of the questionnaire relating to only the original investigation period. According to Mexico, this shows that Cruz Azul was ready to cooperate provided that its rights were respected. Guatemala neglects to mention that the Ministry never replied to the questions raised by the exporter in connection with the supplementary questionnaire.

4.333 Mexico stresses that, in this type of proceeding, the periods and time-limits are fundamental to enable the parties concerned to exercise their right of defence. It is therefore paradoxical that Guatemala should attempt to justify the arbitrary extension of the investigation period on the grounds that it did so in order to enable the final determination to be based on more recent evidence of dumping and injury while, at the same time, before the Panel Guatemala strongly opposes consideration of the final determination because it is outside the Panel's terms of reference. Mexico queries why Guatemala considers that in one case it is right to bring the information up-to-date while in the other there is no need to proceed in this way.

4.334 **Guatemala** notes that Mexico did not provide any legal basis for its argument that the Ministry was required to state the reasons or motives which led to its decision to extend the period of investigation. Guatemala suggests that Mexico accepts that there is no provision in the ADP Agreement that prohibits the said extension. Moreover, Guatemala rejects Mexico's argument that before taking a decision to extend the period of investigation, Guatemala should have first consulted with Cruz Azul. In Guatemala's view, the decision to extend the period of investigation is up to the investigating authorities, and the claim that prior consultation is required with the exporter under investigation is totally unfounded.

## 2. Non-governmental experts

4.335 **Mexico** asserts that the Ministry violated Article 6.7 and subparagraph 2 of Annex I of the ADP Agreement by failing to notify Mexico of its intention to verify the information supplied by Cruz Azul with "non-governmental experts", and by not communicating the exceptional circumstances that required the advice of non-governmental experts during the verification visit.

4.336 According to Mexico, the above consideration was one of the reasons for which Mexico, on the basis of Article 6.7 and subparagraph 2 of Annex I quoted above, objected to the verification visit on the terms sought by the Ministry. Furthermore, both in the written communication of 25 November 1996, which was submitted before Mexico was notified of the verification visit, and at the time of the visit by the investigating authority, Cruz Azul informed the Ministry that non-governmental experts Daniel Joseph Cannistra and Joanna Schlesinger had conflicts of interest because they had been advisors to the United States cement companies that had filed claims against Mexican exporting companies in an anti-dumping investigation. Mexico asserts that these individuals were still advisors to those companies at the time when the Ministry decided to carry out the verification visit, as is clear from the documents that were attached to the written communication mentioned above.

4.337 Mexico states that both it and Cruz Azul considered that the participation of non-governmental experts who had been advising United States cement companies against Mexican companies, including Cruz Azul, constituted a conflict of interest, bearing in mind that their participation in the verification and analysis of information from that company could be biased against the exporting company. According to Mexico, concern on the part of Mexico and Cruz Azul increased when, during the verification visit one of the non-governmental experts, Mr. Daniel Joseph Cannistra, told the representative of Mexico that the objection to their participation would be penalized by using the most adverse information available.

4.338 Mexico contends that both in the written communication of 25 November 1996 and in the record of the verification visit, Mexico and Cruz Azul proposed to the verification team that the verification should be based on the information on the normal value and export price corresponding to the period 1 June to 30 November 1995, in keeping with Article 6.7 and Annex I of the ADP Agreement. Furthermore, Cruz Azul and Mexico offered to carry out the verification visit with the participation of two officials from the Ministry, Edith Flores de Molina and Gabriela Montenegro, together with the only non-governmental expert who had no conflict of interest. Mexico notes that the verification team nevertheless cancelled the visit altogether, and used the most adverse information available.

4.339 **Guatemala** submits that the Ministry did notify Mexico of its intention to bring in non-governmental experts. In a letter dated 26 November 1996, the Ministry advised Cruz Azul and SECOFI who the non-governmental experts participating in the verification would be. The letter was addressed to Cruz Azul with an indication that a copy had been sent to SECOFI. As the verification was to take place in Mexico and not in Guatemala, the Ministry considered it more important to notify the Mexican Government of the names of the non-governmental experts through SECOFI in Mexico City than through the Mexican Embassy in Guatemala. In a document attached to the letter, the Ministry informed Cruz Azul that the verification would take place from 3 to 6 December 1996, and stated that the purpose of the visit would be to verify the information already provided and obtain more information; that the period to be verified was 1 June 1995 to 31 May 1996; that the Ministry, as investigating authority, was responsible for deciding whether non-governmental experts should be called in; and that if Cruz Azul refused to cooperate the Ministry would be obliged to use the best information available. In the first paragraph of its letter to the Ministry dated 2 December 1996, Mexico acknowledged that it had received that notification on 26 November 1996. According to Guatemala, Mexico therefore admits that it was informed of this, i.e. of the inclusion of the said experts, which is all that paragraph 2 of Annex I of the ADP Agreement requires. According to Guatemala, Mexico's 2 December letter also indicates that it had an opportunity to respond to the inclusion of non-governmental experts before the date set for the verification visit, although neither the government of the exporting country nor the exporting enterprise has a right to present a "reply".

4.340 **Mexico** denies that it was informed of the Ministry's intention to bring in non-governmental experts, or that Mexico acknowledged that it had received notification of the use of non-governmental experts on 26 November 1996. SECOFI never received the letter dated 26 November 1996. Furthermore, contrary to what Guatemala says, that letter does not mention the intention to include non-governmental experts, much less the exceptional circumstances that warranted their participation. According to Mexico, this suggests that it was not in Guatemala's interest that Mexico should receive due notice of the visit of the non-governmental experts. Mexico also argues that the reason given for sending the second letter to Cruz Azul with a copy to SECOFI instead of the Mexican Embassy in Guatemala, as was the case with an earlier letter concerning the verification that did arrive, is not satisfactory given that the two letters dealt with the same verification visit in Mexico. As Mexico informed the Ministry in its letter of 2 December 1996, the Mexican Government became aware of Guatemala's intention to include non-governmental experts through Cruz Azul, and never as a result of any official communication from Guatemala. To date, Mexico has not officially received any copy of the letter from the Guatemalan authorities to Cruz Azul containing the names of the non-governmental experts participating in the verification visit, even though this document mentions that a

copy should have been sent to the Government of Mexico. Mexico notes that in the same letter it told the Ministry that it was opposed to the verification visit being carried out under the proposed conditions. Mexico acknowledges that it did not request information from Guatemala relating to the "exceptional circumstances" allegedly justifying recourse to non-governmental experts, but states that it did not do so because the onus was on Guatemala to provide this type of information. Mexico also observes that Cruz Azul, in its letter of 25 November 1996, had requested the Ministry of the Economy to comply with the obligation laid down in the ADP Agreement of justifying the inclusion of non-governmental experts. The Guatemalan authority had not given this request due attention and had decided to send its verification team, including non-governmental experts.

4.341 **Guatemala** submits that it was not obliged under the ADP Agreement to explain the exceptional circumstances that warranted the participation of non-governmental experts. Article 6.2 of the ADP Agreement does not refer to non-governmental experts. Paragraph 2 of Annex I to the ADP Agreement merely requires that the exporting firm and its government should be informed of the intention to include non-governmental experts in the investigating team. Article 6.2 and Paragraph 2 of Annex I do not impose any obligation to explain the exceptional circumstances, nor do they state that the consent of the exporting Member must be obtained in order to utilize such experts. By the time of the notification required by paragraph 2 of Annex I, Guatemala asserts that it had already decided that there were exceptional circumstances requiring the use of non-governmental experts. The decision to include non-governmental experts is left to the discretion of the Member. Consequently, there would be no purpose in informing the exporting Member of the reasons for their inclusion. Guatemala suggests, for example, that the reasons might be confidential and to disclose them might compromise the effectiveness of the verification. In any event, Guatemala asserts that Mexico knew that this was the first anti-dumping investigation ever carried out in Guatemala. The exceptional circumstance which required Guatemala to obtain the assistance of consultant experts on anti-dumping was the fact that the Ministry had never before carried out a verification and was not familiar with the methods used to verify adjustments to the normal value and the export price by the foreign exporter and was not conversant with the GAAP standards used by Mexico. The firm Economic Consulting Services was appointed to assist in the verification and to train the Ministry staff to carry out future verifications.

4.342 **Mexico** notes that Guatemala argues that it was not obliged to explain the exceptional circumstances that led it to include non-governmental experts in the investigating team, while at the same time claiming that Mexico had to "demonstrate significant impact" in order to be able to resort to Article 17.4 of the ADP Agreement. Mexico submits that on the one hand, there is failure to comply with the provisions of the ADP Agreement while, on the other, non-existent obligations are added. Paragraph 2 of Annex I to the ADP Agreement clearly establishes the obligation to "so inform" the firms and the authorities of the exporting Member (i.e. to inform them of the exceptional circumstances and the intention to include non-governmental experts in the investigating team).

4.343 Mexico submits that it is wrong to justify the presence of the non-governmental experts on the grounds that this was Guatemala's first investigation. In principle, Mexico accepts that it was important for Guatemala to take the advice of non-governmental experts, particularly as this was its first investigation. However, this does not provide a valid reason for disregarding the obligation imposed on Guatemala by paragraph 2 of Annex I to the ADP Agreement.

4.344 Concerning Mexico's allegation that the non-governmental experts had a conflict of interest, **Guatemala** submits that the Ministry's letter of 26 November 1996 specifically stated that the persons who would act as non-governmental experts had signed an agreement to protect the confidentiality of all the information to which they had access. Moreover, in its submission to the Panel, Mexico supplied copies of administrative protective orders from the United States applicable to ongoing administrative reviews connected with the anti-dumping order concerning grey portland cement from Mexico, in which the persons concerned undertook not to divulge any information obtained in those proceedings, which was the exclusive property of the party under investigation. Consequently,

Guatemala submits that the persons concerned could use none of the information obtained in the United States anti-dumping case during the verification at Cruz Azul. In accordance with the agreement on confidentiality, under the section "sanctions for violation of the conditions of the preventive order", the non-governmental experts agreed that "if it is determined that a person has violated the obligation of confidentiality, this person shall be subject to all Guatemalan and Mexican laws and regulations". In addition, the agreement indicated that sanctions under the laws of one or other of the countries would be left to the discretion of the party owning the information. As far as Guatemalan legislation is concerned, Article 355 of the Criminal Code provides that any person who discloses or utilizes an industrial or trade secret or any other secret of economic importance not freely available to him, either for his own purposes or on behalf of a third party, shall be liable to imprisonment for a period of six months to two years and to a fine of Q 200 to Q 2,000.

4.345 Guatemala stresses that, contrary to Mexico's submission, Cruz Azul was not an interested party in any of the administrative reviews in which Mr. Daniel Joseph Cannistra and Ms. Joanna Schlesinger participated on behalf of the cement producers of the United States. Guatemala notes that Cruz Azul made no claim to the effect that the United States clients of Mr. Cannistra and Ms. Schlesinger had any interest in the results of the anti-dumping proceeding in Guatemala.<sup>107</sup> The Mexican claims regarding the existence of a conflict of interest are therefore without foundation, and in any event the alleged conflict was irrelevant since Cruz Azul declined to allow the information specified by the Ministry to be verified.

4.346 **Mexico** emphasises that it has never alleged that the non-governmental experts (in particular, Mr Cannistra and Ms. Schlesinger) did not sign agreements to protect the confidentiality of the information to which they had access during the visit or that there was any possibility of their disclosing it, but argued that since they had participated in investigations carried out by the United States against Mexican cement companies<sup>108</sup>, it was questionable whether they would show the impartiality and objectivity expected of any adviser, in particular considering that they represented the interests of their country's cement companies and were predisposed to believe that Mexican exports were being dumped. According to Mexico, it is particularly noteworthy that Mexico's concerns about some of the non-governmental experts selected by Guatemala being in a situation of conflict of interest have not been given proper consideration by Guatemala, whereas in the present dispute Guatemala considered that one of the original Panel members might have had a conflict of interest because of an event that was not even definitely going to take place.

4.347 **Guatemala** notes that Mexico accepted that it was important for Guatemala to take the advice of non-governmental experts, particularly as this was its first investigation, but nevertheless objects to the participation of such experts at verification. Firstly, the fact that an expert has participated in a verification does not mean that the expert represents the interests of a particular enterprise, since one of the prerequisites for participating as a professional expert is objectivity and impartiality; moreover, there is no provision in the ADP Agreement that prevents an investigating authority from seeking the advice of non-governmental experts that have participated in verifications in other countries. The rules governing verification stipulate only that the non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements. Guatemala's legislation provides for such sanctions and Mexico admitted that Guatemala had fulfilled that obligation.

4.348 Guatemala states that any alleged procedural omission did not cause nullification or impairment of the benefits accruing to Mexico under the ADP Agreement. Guatemala has provided

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<sup>107</sup> Guatemala suggests that there is no reason to believe that the United States cement producers would favour the imposition of an anti-dumping order in Guatemala against Mexican cement. On the contrary, the United States producers might prefer Mexico to export cement to Guatemala rather than to the United States. Consequently, it is likely that those producers would oppose the imposition of anti-dumping measures in Guatemala.

<sup>108</sup> Mexico asserts that Cruz Azul was covered by the residual duty imposed by the United States.

sufficient arguments to refute the claim of nullification or impairment, and has also pointed out that any alleged error was harmless.

3. Scope of verification

4.349 **Mexico** submits that the Ministry violated Article 6.7 and paragraphs 7 and 8 of Annex I of the ADP Agreement by seeking to verify information that was not part of the reply to the questionnaire submitted by Cruz Azul, and by failing to respond to Cruz Azul's requests for information essential to the verification.

4.350 Mexico asserts that the investigating authority notified Cruz Azul on 6 November 1996 of the procedure to be followed for the verification of data on sales and costs both for the original period of investigation and for the extended investigation period, and of the presence of non-governmental experts. The Ministry did not request information on costs either in the initial questionnaire or in the additional one, but only at the time of notification of the visit on 6 November 1996. In the light of this situation, Cruz Azul requested the Ministry by written correspondence of 25 November 1996 to provide an explanation of the content and scope of the verification procedure, and the reasons and legal grounds for which it had been decided to verify information neither submitted nor requested during the course of the investigation. According to Mexico, questions were asked specifically as to the reason for including the company's production costs, for extending the investigation period, and concerning the legal status of the non-governmental experts. Cruz Azul also informed the Ministry that it would agree to the verification if it were based on the information actually submitted for the period 1 June to 30 November 1995<sup>109</sup> and in the presence of non-governmental experts without conflict of interests. In that correspondence, Cruz Azul stated that its position should in no way be construed as opposition to or obstruction of the visit. The Ministry never replied to that correspondence, although it was essential to the conduct of the verification visit in accordance with paragraph 8 of Annex I of the ADP Agreement.

4.351 According to Mexico, the conduct of the verification visit under the terms indicated by the Ministry would have been in breach of the provisions of Article 6.7 and Annex I, paragraph 7 of the ADP Agreement, as it would have included the review of information not submitted by the exporting firm in its questionnaire response. According to Mexico, Annex I, paragraph 7 of the ADP Agreement states that the object of the verification is the information provided in the exporting firm's questionnaire response<sup>110</sup>, and the collection of further details relating to that information. Under no circumstance is the authority empowered to request further, completely new information (whether as regards time or substance), as the Ministry had intended to do.

4.352 Mexico submits that the term "verify" means that the investigating authority is entitled to confirm for itself whether the information provided by the company involved corresponds to the actual facts. In other words, the object of on-the-spot verification is to confirm that the information provided by the company in its questionnaire response is true and accurate. This is apparent from the text of paragraph 7 of Annex I to the ADP Agreement, the beginning of which states that "... the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details". According to Mexico, paragraph 7 of Annex I is also clear as regards the extent of the verification, which relates only to the "information provided" or the obtaining of "further details". The text does not justify extending the investigation period, or changing the basis of calculation of the normal value from domestic selling prices to a constructed normal value. This goes far beyond obtaining further details, which by definition relates to the information provided in the questionnaire response, and not to new information. Mexico submits that a detail cannot extend beyond the matter being detailed. A

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<sup>109</sup> According to Mexico, this information had been requested by the Ministry in accordance with Article 6.1 of the ADP Agreement.

<sup>110</sup> Mexico also refers to Article 6.1 and Annex II, paragraph 1 of the ADP Agreement.

detail must always be a subset of the set that is being analyzed, otherwise it would no longer be a detail.

4.353 Mexico emphasises that the words "any further information which needs to be provided" used subsequently in paragraph 7 of Annex I to the ADP Agreement should not be used to extend the scope of the verification. These words are limited to the context of the second part of the first sentence of paragraph 7 of Annex I to the ADP Agreement; that is to say, they serve as a reminder of what is "standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified". According to Mexico, these words do not apply to the paragraph as a whole. Moreover, from the language of this part of paragraph 7 of Annex I, Mexico suggests that the words "further information which needs to be provided" are intended to make it clear that it is not a question of the investigating authority merely indicating "the general nature of the information to be verified". This expression cannot, however, be taken to extend the scope of the verification which is, as established at the beginning of paragraph 7, "to verify information provided or to obtain further details".

4.354 Mexico argues that despite the manifest willingness of Cruz Azul and Mexico to carry out the verification visit in keeping with the provisions of the ADP Agreement, the Ministry cancelled the verification when they were already at the firm's domicile, stating that they would use "the most adverse information available". Mexico submits that if the Ministry had carried out the verification of Cruz Azul sales for the investigation period considered in the preliminary determination, it would have arrived at a negative margin of dumping.

4.355 **Guatemala** submits that it was entitled to verify the information relating to Cruz Azul's production costs and sales. Article 6.7 of the ADP Agreement says nothing about the scope of the verification, and paragraphs 7 and 8 of Annex I do not support Mexico's claims. Guatemala recalls that the premise of Mexico's argument is that the Ministry sought to verify information which Cruz Azul had not furnished. However, Mexico fails to state - and expressly argues the contrary - that the Ministry had requested the information in question and that Cruz Azul had failed to provide that information. Specifically, the Ministry asked Cruz Azul for information on production costs in Section C2, part 3.5 of the original questionnaire issued on 26 January, and in Section 2(f) of the supplementary questionnaire issued on 14 October. Cruz Azul failed to provide information on its production costs in its reply to the original questionnaire, and only gave a partial response (relating to one of two plants) in its reply to the supplementary questionnaire. Cruz Azul also declined to supply any information about sales for the period 1 December 1995 to 30 May 1996 (i.e. the extended investigation period), as requested in Section 2(g) of the supplementary questionnaire. Guatemala submits that the Ministry advised Cruz Azul of its intention to conduct a verification of, *inter alia*, the information on sales and costs for the original period and the extended period of investigation which had been requested in the original and supplementary questionnaires respectively. Thus, Cruz Azul knew that Guatemala would verify both the information actually supplied in the replies to its questionnaires and the additional information which Guatemala had requested in its original questionnaire and its supplementary questionnaire. Furthermore, Guatemala submits that the reference in paragraph 7 of Annex I to the standard practice of advising the exporter of "any further information which needs to be provided" clearly means that the investigating authority is entitled to verify information that has not been supplied by the exporter. This reference to "further information" would be rendered meaningless if the investigating authority was entitled to advise the exporter of the need to provide the said "further information", but was not allowed to verify the information when it was supplied.

4.356 Guatemala asserts that the refusal by Cruz Azul to provide complete information on production costs for both plants prevented the Ministry from estimating whether Cruz Azul's sales on the domestic market were below cost, and from calculating any adjustment for the recognized difference in physical characteristics between the product sold in Mexico and the product exported to Guatemala. According to Guatemala, Cruz Azul's refusal to provide information on its sales for the

period from 1 December 1995 to 30 May 1996 prevented the Ministry from calculating a final dumping margin based on the most recent information. Cruz Azul's failure to provide the necessary information could have led the investigating authority to cancel the verification and given grounds for the Ministry to proceed on the basis of the facts available. Instead, acting in good faith and giving Cruz Azul a last chance, Guatemala notes that the Ministry endeavoured to obtain the outstanding information during the verification visit. Paragraph 7 of Annex I expressly provides that "prior to the visit" the investigating authority should "advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided ...". Guatemala asserts that the Ministry complied with this provision by notifying Cruz Azul of the additional information that it was required to provide. Guatemala denies not replying to the letter from Cruz Azul of 25 November 1996. In accordance with paragraph 8 of Annex I to the ADP Agreement, the Ministry replied on 26 November 1996, and agreed to state its conditions for the verification visit. Guatemala submits that although the Ministry tried in good faith to accommodate Cruz Azul to the best of its ability, Cruz Azul denied the Ministry the opportunity to verify the information in its possession. As a result, given the fact that the information from Cruz Azul was not verifiable in accordance with paragraph 3 of Annex II to the ADP Agreement, and since Cruz Azul did not provide other necessary information in accordance with Article 6.8 of the ADP Agreement, the Ministry cancelled the verification and used the best information available.

4.357 **Mexico** states that Article 2.2 (and by extension Article 2.2.1) of the ADP Agreement is applicable only "when there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison ..." Since in this instance the Ministry established that, in accordance with the ADP Agreement, Cruz Azul's sales in Mexico "are representative and can thus be used as a basis to calculate the normal value", Mexico submits that there was no need to resort to the alternative normal values contained in Article 2.2 (exports to third countries or constructed normal value). According to Mexico, this is confirmed in section C ("Normal Value") of the questionnaire sent by the Ministry to Cruz Azul, in which it is stated that the dumping application can be presented in two ways. The first way allows the applicant to argue that the export price is lower than the domestic selling price in the country of origin, using the domestic selling price as the normal value. Mexico asserts that if an applicant adopts this approach, data on normal value must be provided in accordance with section C.1 of the questionnaire. Mexico recalls that the questionnaire stated "... in cases of constructed normal value please submit the information corresponding to sections C.1 and C.2." Thus, whereas an applicant using domestic selling prices as the basis of normal value is required to complete only Section C.1 of the questionnaire, an applicant using a constructed normal value must complete both Sections C.1 and C.2 thereof. Mexico notes from Cementos Progreso's application, and from the Ministry's preliminary determination, that the Ministry initiated the investigation using domestic selling prices as the basis of normal value, without recourse to a constructed normal value. According to Mexico therefore, it was only necessary for Cruz Azul to reply to section C.1 of the questionnaire.

4.358 Mexico suggests that recourse to the two alternative normal values indicated in Article 2.2 of the ADP Agreement is not optional for the investigating authority, but depends directly on the provisions of that Article. Therefore, Mexico submits that the information requested by the Ministry should have been limited to the information required to determine the normal value on the basis of domestic market prices, without the inclusion of cost data which might be necessary to determine a constructed normal value. According to Mexico, the fact that it is a question of mutually exclusive alternatives also means that the importing Member has no right arbitrarily to change the basis of calculation of normal value from domestic selling prices to constructed normal value. For this reason, Mexico submits that the request for cost information in section 2(f) of the supplementary questionnaire was inappropriate.

4.359 **Guatemala** submits that the Ministry requested the information on costs in order to determine whether the sales of a like product in the domestic market of the exporting country were at prices

below per unit (fixed and variable) costs of production, as stipulated in Article 2.2.1 of the ADP Agreement. According to Article 2.2.1 and footnote 5 to the ADP Agreement, an investigating authority may reject sales at prices below cost and treat them as not being in the ordinary course of trade if such sales are made within an extended period of time in substantial quantities. Since Cruz Azul did not provide information on costs, Guatemala could not determine which sales may have been made below cost, and therefore to be excluded, when calculating the margin of dumping on the basis of domestic selling prices. Moreover, under Article 2.4 of the ADP Agreement the investigating authority is required to make due allowance for differences in physical characteristics which affect price comparability. Guatemala submits that the Ministry requested the information on Cruz Azul's variable costs in order to make due allowance for the differences in physical characteristics affecting price comparability. Guatemala suggests that Mexico has failed to take account of these reasons justifying the Ministry's request for cost data.

#### 4. Technical accounting evidence

4.360 **Mexico** submits that the Ministry violated Articles 6.1, 6.2 and 6.8 of the ADP Agreement by refusing to accept technical accounting evidence submitted by Cruz Azul after cancellation of the verification visit.

4.361 Mexico states that in a letter dated 18 November 1996, Cruz Azul provided the investigating authority with technical accounting evidence, so that it would have objective and reasonable information concerning the firm's normal value and the export prices for the original period of the investigation (1 June to 30 November 1995). This technical accounting evidence was formally submitted by Cruz Azul in exercise of its right of defence as provided for in Articles 6.1 and 6.2 of the ADP Agreement. The purpose of the technical accounting evidence was to provide the Ministry with further data on which to base its conclusions before making a final determination. When appearing before the Ministry on 18 December 1996, Cruz Azul explained clearly and precisely the nature of the technical accounting evidence and its importance to the investigation, adding that a firm of accountants specialized in the field and independent of Cruz Azul had been entrusted with its preparation. Mexico notes that, nevertheless, in the final determination of 17 January 1997, the Ministry resolved "... that the technical evidence submitted by the exporting firm on 18 December 1996 (confidential information) cannot replace verification of the information by the Guatemalan investigating authority, as indicated under Article 6.6 of the ADP Agreement." According to Mexico, the Ministry rejected the evidence without assessing its content or its relevance, which meant that the Ministry was unable to ascertain the accuracy or adequacy of the evidence submitted by Cruz Azul concerning normal value and export price.

4.362 Mexico notes that, with reference to Article 6.8 (and Annex II, paragraph 6) of the ADP Agreement, Cruz Azul neither denied access to nor withheld necessary information, nor significantly obstructed the investigation. Cruz Azul participated actively in the whole of the investigation. For this reason and in the face of the Ministry's threat during the verification visit to use the best information available, Cruz Azul tried to do everything in its power not to be characterized as uncooperative, in order that the margin of dumping should not be determined on the basis of the most adverse information. Mexico recalls that the Ministry, when it issued its final determination, nevertheless carried out its threats and rejected all the information provided by Cruz Azul in the course of the investigation, characterizing it as uncooperative and determining a dumping margin on the basis of the information most detrimental to its interests, even though the technical accounting evidence would have enabled it to check Cruz Azul's information, inasmuch as it came from another independent source as provided in paragraph 7 of Annex II to the ADP Agreement. According to Mexico, the Ministry should not have disallowed the technical accounting evidence and, at all events, should have immediately informed Cruz Azul of its reasons for rejecting the technical accounting evidence and allowed an opportunity for new explanations to be provided within a reasonable time-frame. Mexico asserts that the Ministry did not do any of this.

4.363 **Guatemala** denies that Cruz Azul cooperated during the investigation. Cruz Azul refused to provide the information on costs and sales requested by the Ministry and refused to permit a verification. Hence, in accordance with Article 6.8 and Annex II.7 of the ADP Agreement, Guatemala proceeded, as was appropriate, to use the best information available.

4.364 Guatemala asserts that there is no foundation to Mexico's claim that Guatemala violated Articles 6.1, 6.2 and 6.8 of the ADP Agreement by rejecting the self-verification report by Cruz Azul, submitted after Cruz Azul had prevented the Ministry from carrying out the verification. The technical accounting evidence of Cruz Azul was not verifiable, was not appropriately submitted and was not supplied in a timely fashion, as required by paragraph 3 of Annex II to the ADP Agreement. Guatemala recalls that, according to Mexico, Cruz Azul provided its technical accounting evidence to the Ministry on 18 November 1996. However, that information was actually dated and received by the Ministry on 18 December 1996, the day before the public hearing. Guatemala argues that the information was not submitted prior to the planned verification visit, and was not therefore amenable to verification by the Ministry. Guatemala suggests that the only reason why Cruz Azul had the information prepared for the Ministry was that it had previously prevented the Ministry from carrying out the verification. Nor was the technical accounting evidence appropriately submitted. It was neither requested by the Ministry nor supplied in a timely fashion. The technical accounting "evidence" was submitted one day before the date on which the final arguments of the parties were to be made at the public hearing. In its notice of 6 December, the Ministry had already informed Cruz Azul that the final determination would be made on the basis of the facts available in the file on that date. According to Guatemala, the submission by Cruz Azul on the eve of the cut-off date of 19 December for the presentation of final arguments effectively denied other interested parties the opportunity of expressing their views on that new information. Guatemala suggests that, in accordance with the ADP Agreement, the appropriate and timely juncture for the presentation of evidence in support of the information submitted by Cruz Azul was during the verification visit which the Ministry was prevented from carrying out. Consequently, Guatemala submits that pursuant to Article 6.8 and paragraph 3 of Annex II to the ADP Agreement, the decision by the Ministry not to accept the technical accounting evidence of Cruz Azul was correct.

4.365 Guatemala argues that because the submission by Cruz Azul was presented the day before the public hearing, and in view of the "time-limits of the investigation", the Ministry was unable to give the reasons for the rejection of the technical accounting evidence as required by paragraph 6 of Annex II to the ADP Agreement. While Mexico asserts that during the hearing on 19 December Cruz Azul explained clearly and precisely the nature of the technical accounting evidence and its importance to the investigation, the explanations provided by Cruz Azul were not considered satisfactory by the Ministry. Guatemala submits that consequently, pursuant to paragraph 6 of Annex II to the ADP Agreement, the Ministry set forth the grounds for its rejection of the explanations by Cruz Azul in the final determination of 17 January 1997:

"This Ministry considers that the information supplied by the exporting firm cannot be taken into account for the calculation of the normal value of the product under investigation, in view of the fact that the information could not be verified and that the technical evidence submitted by the exporting firm on 18 December 1996 (confidential information) cannot be a substitute for such verification of the information by the Guatemalan investigating authority."

4.366 Guatemala notes that the Ministry did not allow Cruz Azul to take on the role of investigating authority and did not allow Cruz Azul to dictate to it how the verification was to be carried out. When the Ministry was prevented from carrying out the verification, it did not accept the self-verification report by Cruz Azul. According to Guatemala, the rejection of the technical accounting evidence is in keeping with Articles 6.1 and 6.2 of the ADP Agreement. In accordance with the terms of Article 6.1, Cruz Azul was given "ample opportunity", throughout the investigation, to present

evidence which it considered relevant to the investigation. As provided by Article 6.2, Cruz Azul was given "a full opportunity for the defence of [its] interests".

4.367 Guatemala recalls that paragraph 7 of Annex II of the ADP Agreement stipulates that if the authorities have to base their findings on information that was not provided by the exporter, they should "check the information from other independent sources at their disposal, such as published price-lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation". The technical accounting evidence was not prepared by an "independent source", but by a private enterprise hired to verify the information that Cruz Azul considered relevant to the investigation. Nor was the technical accounting evidence obtained from "other" interested parties, i.e. parties other than the party that is unwilling to supply the information. Thus Guatemala submits that the Ministry was under no obligation to take the technical accounting evidence into consideration.

4.368 **Mexico** asserts that the technical accounting evidence forms the basis of the facts available as mentioned in Article 6 of the ADP Agreement, as well as being part of the best information available within the meaning of Article 6.8. Mexico submits that the technical accounting evidence constitutes the type of information from independent sources envisaged by Annex II(7) of the ADP Agreement, which is to be used for checking information from secondary sources (such as applications). Mexico recalls that the evidence, including a detailed explanation of the methodology used in its compilation, was presented in writing, as required by Article 6.1 of the ADP Agreement. Mexico submits that the ADP Agreement does not establish any other condition for determining whether the technical accounting evidence was presented properly or was not presented in time. Mexico recalls that after the presentation of this evidence by Cruz Azul, Cementos Progreso submitted in writing a document requesting the Ministry to change the investigation from threat of injury to present injury (Mexico contends that the date of Cementos Progreso's document may be inferred from the fact that the claim concerning present injury did not appear in the file before 6 December 1996). According to Mexico, these are all reasons why the technical accounting evidence should have been taken into account by the Ministry.

4.369 Mexico notes Guatemala's argument that the evidence presented by Cruz Azul was not timely because it was submitted only one day before the final arguments of the parties were to be put forward in public, and that in its notice of 6 December 1996 the Ministry had informed Cruz Azul that the final determination would be made on the basis of the facts available in the file on that date. In this respect, Mexico argues that the Ministry took a biased and inconsistent position since, on the one hand, it gave the reasons mentioned above as valid grounds for not taking Cruz Azul's evidence into account and, on the other hand, it allowed Cementos Progreso to submit arguments and information during the public hearing. Mexico submits that the Ministry took a decision of the utmost importance on the basis of the information submitted by Cementos Progreso at the hearing, namely to change from a finding of threat of injury to a finding of present injury. According to Mexico, this shows that the Ministry modified its criteria in favour of the interests of its domestic industry. The Ministry cannot, on the one hand, consider evidence presented before the hearing not to be in time and, on the other, accept information submitted during the hearing.

4.370 **Guatemala** notes Mexico's argument that the fact of having accepted the report submitted by Cementos Progreso for the hearing and rejected the technical accounting evidence of Cruz Azul was evidence that the Ministry was biased. Guatemala suggests that, in making the above argument, Mexico is referring to two different moments in the investigation: the public hearing of 19 December 1996, and Cementos Progreso's earlier allegation of present injury. Guatemala recalls that Cruz Azul's technical accounting evidence was submitted one day before the hearing, when the period for the submission of evidence had ended and the file was closed, with only the arguments to be presented on the day of the hearing still pending. According to the instructions of the Ministry dated 6 December 1996, and in strict compliance with Guatemalan law governing hearings, this hearing was not to be a forum for discussion between the parties or for the examination of new evidence; it was to

be confined, rather, to providing the last opportunity for the parties to present their conclusions. According to Guatemala, therefore, the Ministry neither accepted nor requested the presentation of additional facts at the hearing. Cementos Progreso presented its conclusions on the basis of the said instructions and the relevant legal provisions. Guatemala denies that Cementos Progreso changed its claim from threat of injury to present injury at the hearing. Cementos Progreso had already alleged that it suffered present injury caused by Cruz Azul's dumped imports before the hearing, as shown by the evidence of present injury supplied by Cementos Progreso on 17 May 1996 in its questionnaire response. In short, Guatemala asserts that there has been no bias: on the basis of the instructions given to all interested parties in accordance with the law, the Ministry rejected the technical accounting evidence.

4.371 **Mexico** notes Guatemala's argument that the technical accounting evidence was not admissible because, *inter alia*, it was not requested by the Ministry. Mexico considers this to be unacceptable since it seeks to disregard the provisions of Article 6.1 of the ADP Agreement. According to Mexico, this argument would mean that only evidence requested by an investigating authority can be taken into account during an anti-dumping investigation, thereby imposing unacceptable limits on the right of all parties to have ample opportunity to defend their interests.

## 5. Essential facts

4.372 Mexico submits that the Ministry violated Article 6.9 of the ADP Agreement by failing to inform Cruz Azul of the essential facts that would form the basis for the final injury determination, thus undermining its rights of defence. In its submission of 30 October 1995, Cruz Azul requested the Ministry to comply with Article 6.9 of the ADP Agreement by making the essential facts available. As the investigating authority failed to respond to that request, Cruz Azul repeated its request in a letter of 6 November 1996, and in the public hearing of 19 December of that same year. Mexico recalls that on 6 December 1996 the Ministry replied that the essential facts referred to in Article 6.9 of the ADP Agreement would be determined in a technical study to be prepared and made available to Cruz Azul, although the Ministry did not specify when the firm would receive that technical report. Cruz Azul did not receive the technical report until 30 January 1997, 17 days after the final determination was issued.<sup>111</sup> Therefore, Mexico concludes that the Ministry did not comply with the provisions of Article 6.9 of the ADP Agreement.<sup>112</sup>

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<sup>111</sup> Mexico refers to United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products originating in France, Germany and the United Kingdom (SCM/185, not adopted, dated 15 November 1994), stating that the panel concluded that the United States had acted inconsistently with Article 1 when the DOC allocated subsidies to Usinor Sacilor over domestic production only without providing the respondents, in the investigation preceding the imposition of countervailing duties, an adequate opportunity to provide relevant evidence in the countervailing duty investigation.

<sup>112</sup> Mexico refers to Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States, ADP/92, para. 209, adopted 26 April 1993:

"In analysing this question, the Panel was guided by the provisions in Articles 3 and 8:5 of the Agreement. Article 3 of the Agreement required investigating authorities to consider certain factors and to make a determination based on positive evidence with regard to these factors. In the view of the Panel, effective review under Article 15 of an injury determination against the standards set forth in Article 3 required an adequate explanation by the investigating authorities of how they had considered and evaluated the evidence with regard to the factors provided for in that Article. Interpreted in conjunction with Article 8:5, such an explanation had to be provided in a public notice. An explanation of how in a given case investigating authorities had evaluated the factual evidence before them pertaining to the factors to be considered under Article 3 clearly fell within the scope of the requirement in Article 8:5 that authorities articulate in a public notice "the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and basis therefor." This provision served the important purpose of transparency by requiring duly motivated public decisions as the basis for the imposition of anti-dumping duties. In the view of

4.373 **Guatemala** considers that it complied with Article 6.9 of the ADP Agreement by informing all interested parties of the essential facts under consideration which would form the basis for the imposition of definitive duties by Guatemala. According to Guatemala, in a decision of 6 December 1996 the Ministry notified all the parties that DIACO would carry out a technical study of the evidence in the file and that certified copies of the file itself, which was to be used for the study in question, would be made available to the parties upon request. In other words, the essential facts on which the final determination was to be based were those contained in the file at 6 December, and the file was available to parties wishing to obtain copies. Guatemala asserts that the parties had the opportunity to present their final arguments regarding those essential facts at the hearing on 19 December 1996. Consequently, Guatemala submits that the Ministry complied with Article 6.9 of the ADP Agreement by informing the parties of the essential facts under consideration in sufficient time for the parties to defend their interests. Guatemala notes that Cruz Azul did not request a certified copy before the final determination was made. Moreover, the Ministry had given the parties notice of its preliminary determination. Following a practice similar to that of Mexico when making determinations, Guatemala asserts that the preliminary determination contained the essential facts forming the basis for the Ministry's decision to impose definitive anti-dumping duties. According to Guatemala, therefore, the Ministry complied with Article 6.9 of the ADP Agreement.

4.374 **Mexico** notes Guatemala's statement that it intended to carry out a technical study of the evidence in the file and that certified copies of the file itself, which was to be used for the study in question, were available to the parties upon request. Mexico suggests that two possible conclusions can be drawn from this. First, the essential facts to which the Ministry referred were in a technical study which would be made available to the parties before the final determination was published. Second, the Ministry considered that the essential facts were already in the file and that by granting access to the file, it was complying with the provisions of Article 6.9 of the ADP Agreement. The first hypothesis is not tenable since it was not until 30 January 1997, i.e. 17 days after the final determination, that the exporter obtained the technical study to which the Ministry referred in its decision of 6 December 1996. Mexico also rejects the second hypothesis, since the Ministry appears to be in some confusion with respect to the text of Article 6.9.

4.375 Mexico argues that the aim of Article 6.9 of the ADP Agreement is that the investigating authority should make known the specific facts which it is going to take into account in drawing up its determination, and that this should be more than merely granting access to the administrative file of the investigation, since this might otherwise be confused with the obligation in Article 6.4 of the ADP Agreement to grant access to all information that is relevant to the presentation of a party's case. Notwithstanding Guatemala's argument, and assuming, without conceding the fact, that Guatemala's assertions were true and that the essential facts were those contained in the administrative file at 6 December 1996, Mexico asks how it was possible - on the basis of the essential facts as at 6 December 1996 - to change the finding from threat of injury to present injury in the final determination when this argument had not been made by any party before the public hearing on 19 December 1996.

4.376 Mexico contends that the Ministry's failure to notify Cruz Azul of the essential facts denied the latter an adequate defence of its interests, since it is not possible to defend against something of which you are not aware. Not having made known the essential facts also meant denying the opportunity to present counter-evidence, which constitutes a violation not only of Article 6.4 of the

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the Panel, the purpose of this provision would be frustrated if in a dispute settlement proceeding under Article 15 of the Agreement a Party were allowed to defend a challenged injury determination by reference to alleged reasons for such determination which were not part of a public statement of reasons accompanying that determination. The Panel therefore did not accept Korea's argument that the Agreement did not limit an investigating authority's ability to demonstrate that it considered all of the required factors, and to demonstrate that dumped imports caused material injury, to the text of the public notice which announced its determination."

ADP Agreement but also of the rules of evidence and due process which should govern any proceeding.

4.377 **Guatemala** notes that Article 6.9 of the ADP Agreement requires investigating authorities to supply the "essential" facts and not the "specific" facts, as alluded to by Mexico. In the case of a complex investigation involving a large number of domestic producers, several foreign exporters and foreign like products or domestic like products, or involving collection of facts that are not easily available when consulting the file of the investigation or facts that are not relevant and are not therefore taken into consideration, Guatemala agrees that the investigating authorities should identify the essential facts in a separate document. However, Guatemala suggests that the investigation in question was not complex. It only involved one domestic producer, one foreign exporter, one foreign like product and one domestic like product. The essential facts considered were confined to those provided in the responses to the questionnaires and in the investigation reports by DIACO and the Ministry. According to Guatemala, all the facts collected were relevant. Consequently, in the present case, the file of the investigation at 6 December 1996 was the best indicator of the essential facts under consideration at that time. A separate list of the facts was thus not required. According to Guatemala, to the extent that Article 6.9 requires a separate document identifying the essential facts, the Ministry observed this requirement by listing the essential facts under consideration in its preliminary determination and by providing the parties with copies of this determination, a procedure that Mexico also applies in its own investigations.

4.378 Guatemala states that the "technical study" that was completed on 15 January 1997 is referred to in the decision of 6 December 1996, and is not identical to the investigation file. The Ministry intended the "technical study" to be the final determination of the investigation. The study is almost identical to the final determination issued on 17 January 1997. The Ministry gave Cruz Azul a copy of the "technical study" on 30 January 1997. Guatemala submits that, according to Article 6.9 of the ADP Agreement, the "essential facts", on which the technical study and final determination were based, were the facts contained in the administrative file, including the facts established in the preliminary determination which were made available to the parties. Guatemala argues that on 6 December 1996 the Ministry informed the interested parties that authenticated copies of the administrative file were available. The final arguments of the parties were submitted on 19 December 1996. According to Guatemala, the interested parties were therefore informed of the "essential facts" studied, and had sufficient time to defend their interests pursuant to Article 6.9 of the ADP Agreement.

4.379 Guatemala notes that Mexico cites United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom<sup>113</sup> to support its argument that Cruz Azul was denied an adequate opportunity to provide relevant evidence during the investigation. According to Guatemala, this citation shows that Mexico is making another claim relating to the final stage of the investigation, without challenging the final determination itself. In the above-mentioned steel products case, the Panel concluded that the investigating authority had not given the respondents an adequate opportunity to submit factual information "relevant to the issue of whether or not the subsidies should be allocated over domestic production only".<sup>114</sup> Guatemala notes, however, that Mexico does not raise specific questions concerning its claim that it was not given an adequate opportunity to submit factual information. Moreover, Mexico could not in fact raise such questions, since it failed to challenge the final determination where such questions were definitively settled. In any event, Guatemala submits that Cruz Azul was given ample opportunity to present relevant evidence concerning all matters essential to the issuance of the final determination. Accordingly, Guatemala asserts that United States -

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<sup>113</sup> SCM/185, not adopted, dated 15 November 1994.

<sup>114</sup> *Ibid.*, para. 600.

Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom<sup>115</sup> is irrelevant in the present case.

4.380 **Mexico** restated its position that the United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France, Germany and the United Kingdom report should be taken into account since it is further proof that in any investigation concerning unfair international trade practices, the respondents should be given an adequate opportunity to provide relevant evidence.

F. Violations in the Course of the Investigation

1. Access to file

4.381 Mexico asserts that the Ministry violated Articles 6.1.2, 6.2 and 6.4 of the ADP Agreement by denying Cruz Azul total or partial access to the administrative file during the course of the investigation. Mexico submits that it does not claim that the Ministry refused or definitively prevented access to the file, but that access to the file was not timely or adequate. According to Mexico, on 28 September 1996 Cruz Azul requested the investigating authority to be allowed to review the case file. However, the file was provided only partially, as it was lacking *inter alia* several documents and much essential information such as decisions, spreadsheets for the calculation of the margin of dumping, the public version of the complainant's information and the summary of its confidential information. Moreover, on several occasions Cruz Azul requested access to the complete file, but this was denied by the Ministry under the pretext that there was only one copy available and that was being used by Ministry officials. According to Mexico, the many occasions when the file was withheld from Cruz Azul, despite numerous requests, included 4 November 1996, when a notary appeared before the Ministry to place on record the fact that access to the file was being denied. At the same time a request was made for a date on which to examine the file, and this was denied on the grounds that it was first necessary to evaluate and review the documents presented. According to Mexico, the requests for access to information and to the file, which were either not entertained or at best granted with considerable delays, are contained in Cruz Azul's written communications of 14 November 1996, 12 December 1996, the record of the public hearing of 19 December 1996, and in communications of 20 and 27 December 1996. Mexico also refers to several oral requests for access that, it states, were not acted upon.

4.382 Mexico states that an interested party should have access to the file at all times during an investigation, consistent with Articles 6.2 and 6.4 of the ADP Agreement, which concern the rights of defence of interested parties. According to Mexico, interested parties can only defend their interests if they receive the information that should be found in the file in time to allow them to put forward their arguments. Failing to act in conformity with this procedure would be the same as denying interested parties an opportunity to defend themselves, contrary to all the principles laid down in the ADP Agreement.

4.383 **Guatemala** denies that Article 6.4 of the ADP Agreement requires access to the file at all times. Guatemala stresses that Article 6.4 requires access "whenever practicable", and not at all times during the investigation.

4.384 **Mexico** argues that in the public hearing of 19 December 1996, the Ministry denied the right of Cruz Azul to review the final pleadings submitted in writing on that same day by Cementos Progreso, under the pretext that it did not know whether the content of the document was confidential. Mexico submits that this argument makes no sense, considering the hearing was public. Assuming purely for the sake of argument that the information may have been confidential, Mexico asserts that under Articles 6.5 and 6.5.1 of the ADP Agreement the complainant should have made a reasoned

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<sup>115</sup> *Ibid.*

request to the authorities to treat it as such, at the same time supplying non-confidential summaries of the information. This was not the case, as recorded in the record of the public hearing drawn up by the investigating authority itself. According to Mexico, it was only on 8 January 1997 (seven days before the publication of the final determination) that Cruz Azul gained access to the final written submission presented by Cementos Progreso at the public hearing. Mexico notes that the submission did not contain any confidential information. According to Mexico, it is not reasonable to attempt to justify the refusal of access to that submission on the pretext that the Ministry had reason to think that Cementos Progreso's written submission might have contained confidential information which should not be disclosed to Cruz Azul. If this submission had contained confidential information, Mexico submits that it would have been Cementos Progreso's responsibility (and not that of the Ministry) to have made this known and, where appropriate, to have provided a non-confidential summary of information contained therein. The fact is that the above-mentioned written submission was never classified as confidential information by Cementos Progreso. This assumes special importance when it is considered that it was in this submission (a copy of which was delivered to Mexico one week after the final determination) that Cementos Progreso alleged for the first time the existence of present injury, and that on the basis of this argument the Ministry decided to change its determination from threat of injury to present injury.

4.385 **Guatemala** denies that Cementos Progreso invoked present (as opposed to threat of) injury for the first time on 19 December 1996. According to Guatemala, the file shows that the first time Cementos Progreso complained of present injury was in its reply to the original questionnaire of 17 May 1996. Question 14 of Guatemala's original questionnaire asked whether Cementos Progreso considered that "it had suffered injury in any form during the period under examination". Cementos Progreso answered "yes", and provided information on present injury, including data on prices, profitability, decrease in sales and market share, and other negative factors. Although for the purposes of the preliminary determination Guatemala did not consider that there was sufficient evidence of present injury, when it issued the final determination it concluded that the additional information supplied after the preliminary determination was sufficient to show present injury. According to Guatemala, Mexico had ample opportunity to refute the claims made by Cementos Progreso concerning present injury. Thus, Guatemala submits that the Panel should reject Mexico's complaint.

4.386 **Mexico** suggests that throughout the investigation the Ministry failed to keep the file available or in complete form. As of May 1997, Cruz Azul has not had access to the complete file, even though this was requested in good time. Furthermore, on the day the final determination was published (17 January 1997), Cruz Azul requested a certified copy of the complete administrative file. Mexico asserts that, as of May 1997, this certified copy has not been received.

4.387 Mexico states that the failure to obtain full access to the file of the investigation, and the fact that the Ministry did not number each page on the file, has been and continues to be a source of concern to Cruz Azul, as it has no assurance that the file will not be tampered with or that documents unknown to Cruz Azul or Mexico, and potentially harmful to their interests, may not be added to it. Mexico considers that the shortcomings it has identified harm and impair its own interests and those of Cruz Azul, as they were not given an opportunity to familiarize themselves with all the information, the arguments and the alleged evidence submitted by Cementos Progreso, so as to be able to respond adequately to Cementos Progreso and to the Ministry.

4.388 **Guatemala** maintains that it complied with Articles 6.1.2, 6.2 and 6.4 of the ADP Agreement by giving Cruz Azul and all interested parties an opportunity to review the information, arguments and evidence put forward during the course of the investigation. Guatemala submits that Mexico's claims regarding shortcomings in the access to the administrative file are without foundation.

4.389 Guatemala submits that it was only obliged to allow interested parties sufficient access to the administrative file to satisfy its obligations under the ADP Agreement, including *inter alia* the

obligation to provide the parties with a full opportunity to defend their interests. Guatemala gave both Cruz Azul and Mexico sufficient access to the file to meet all its obligations under the ADP Agreement. Cruz Azul was allowed timely access to the public documents in the administrative file during the investigation. Guatemala notes that, in Guatemala, neither the law nor administrative practice require that there should be an entry in the file whenever a particular document is consulted by the parties. For that reason, in the present case no record was made of instances of consultation by the interested parties. However, the many submissions made by Cruz Azul referring to the evidence in the file show that it had ample access to the file and was granted ample opportunity to refer to the relevant information, arguments and evidence at the corresponding stages of the proceedings. Guatemala submits that in a decision dated 6 December 1996, the Ministry informed all interested parties that they could obtain copies of all the documents in the file. However, Cruz Azul did not request a certified copy of any document. Furthermore, in its last submission of 19 December 1996, Cruz Azul did not claim that it had been denied access to any document in the file. Guatemala suggests that, on the contrary, Cruz Azul put forward its arguments relating to the evidence that had been provided, indicating that Cruz Azul had access to all the information needed to defend its case.

4.390 Guatemala suggests that even if, on 4 November 1996 or on any other date, the Ministry had been prevented from making the file available (*quod non*), Cruz Azul had ample access to the file on many other occasions. On 6 December the Ministry notified Cruz Azul of its final opportunity to request copies of any documents in the file which it did not yet have in its possession. However, Cruz Azul requested no copies of any document. Guatemala contends that the reason why Cruz Azul requested no copies at that stage of the proceeding was that it had already inspected the file and had also been provided with separate copies of individual documents contained in the file throughout the investigation.

4.391 Guatemala notes Mexico's argument that, at the public hearing of 19 December 1996, the Ministry unfairly denied Cruz Azul the opportunity to review the written presentation made that same day by Cementos Progreso. According to Guatemala, the Ministry had good reason not to allow Cruz Azul immediate access to that document. Indeed, in its determination of 6 December 1996, the Ministry laid down the rules for public scrutiny. Specifically, the Ministry stated that "the hearing is not envisaged as a debate between the parties, nor will additional evidence be dealt with or received, so that it will be confined to giving an opportunity to each of the parties to set forth its conclusions concerning the facts investigated, and no additional information will be requested by the investigating authority". Even if Guatemala had supplied Cruz Azul with a copy of Cementos Progreso's submission, replies to the conclusions presented would have been neither requested nor accepted at the hearing. Thus, Guatemala suggests that Mexico is unable to refute the justification offered by Guatemala for the alleged delay in supplying a copy of Cementos Progreso's submission of 19 December 1996. According to Guatemala, the instructions for the public hearing also authorized written presentations, but did not specify whether such presentations would be made public or whether they could include confidential information. However, written presentations were necessarily the only means available to the parties to present their final arguments on confidential information previously supplied. Thus, the Ministry had evidence to support the reasonable conclusion that the written presentation by Cementos Progreso of 19 December 1996 could have contained confidential information that should not be revealed to Cruz Azul. Moreover, Guatemala asserts that the fact that Cruz Azul had no access to the written presentation by Cementos Progreso of 19 December 1996 did not deprive it of the opportunity to give its opinion on the factual information in the file. As was stated in the notice of 6 December 1996, the purpose of the pleadings to be presented by the parties in preparation for 19 December 1996 was merely to summarize the arguments of the parties, not to provide new information. In accordance with the Ministry's instructions, the final written pleadings of Cementos Progreso, dated 19 December 1996, contained no new information. The Ministry informed Cruz Azul at the hearing that it would supply it with a copy of Cementos Progreso's submission after it had checked whether it contained confidential information. Mexico has not provided any legal basis for considering that it is necessary for the interested party to justify requiring an additional confidential treatment request for information already treated as confidential by the investigating

authority, either at the time of the submission or subsequently. Mexico received a copy of Cementos Progreso's submission one week after the final determination. Guatemala recalls that neither Cementos Progreso nor Cruz Azul were allowed replies to the final arguments submitted at the hearing of 19 December 1996 since, with reference to Article 6.4 of the ADP Agreement, such presentations were not "practicable" in the context of the investigation.

4.392 Guatemala notes Mexico's claim that Cruz Azul has been denied access to the file up to May 1997. During the investigation, the Ministry provided the interested parties with individual copies of documents included in the file, and prior to the date on which the parties were to present their final arguments it reminded them that they were entitled to request copies of any other document in the administrative file. Guatemala recalls that Cruz Azul requested no copies of any document until 19 December 1996. Cruz Azul's request of 17 January 1997 for a certified copy of the entire file was not denied. The only reason why such a copy has not been supplied to Cruz Azul is because it has not paid the fee required for its dispatch in accordance with Guatemalan legislation.

4.393 Guatemala states that the file was given page numbering (foliated), and that the Ministry did not tamper with the contents thereof.

4.394 **Mexico** insists that in various stages of the proceeding pages of the file were not properly numbered. This is evidenced by certain copies of information in the file obtained by Cruz Azul, including copies of Cementos Progreso's application and the decisions of the Ministry.

## 2. Confidential information

4.395 Mexico submits that the Ministry violated Articles 6.5.1 and 6.5.2. of the ADP Agreement by accepting confidential information from Cementos Progreso without the latter providing an accompanying non-confidential summary or a justification of confidentiality, contrary to the Ministry's instructions. According to Mexico, the fact that the Ministry requested Cementos Progreso to comply with these obligations may be seen from the communication of 14 October 1996. In view of this non-compliance, Mexico suggests that the Ministry should have disregarded the information submitted by Cementos Progreso, bearing in mind that the aforementioned communication itself states that this would be the consequence of non-compliance. Cruz Azul itself informed the Ministry of this situation in its letter of 27 December 1996. Mexico notes that the Ministry nevertheless failed to renew its request to Cementos Progreso to comply with this obligation.

4.396 Mexico asserts that the lack of access to the confidential information in issue not only seriously impaired Cruz Azul's defence of its interests, but also invalidated the procedure because, in accordance with Guatemala's obligations under the ADP Agreement, this information should have been rejected by the Ministry. Mexico suggests that it is paradoxical that the information submitted by Cruz Azul (i.e. the technical accounting evidence) was rejected, while that submitted by Cementos Progreso was admitted, despite warnings by the Ministry as to the consequences of non-compliance with the aforementioned confidentiality requirements.

4.397 **Guatemala** considers that Mexico's claims regarding confidential treatment are directed at Cementos Progreso's reply to the supplementary questionnaire of 30 October 1996. Guatemala argues that the Ministry carefully specified its requirements with regard to confidential information in the supplementary questionnaire, in accordance with Articles 6.5.1 and 6.5.2 of the ADP Agreement. Paragraph 7 of the supplementary questionnaire, which was applicable to the information supplied by all interested parties, provided that:

"If confidential data are supplied with the information, a public version of such information should be included. Otherwise, the information in question will not be taken into consideration for the issuance of the final determination and this Directorate will reach a decision based on the best information available."

4.398 Guatemala argues that Cementos Progreso did not request confidential treatment for the information provided in its reply to the supplementary questionnaire of 30 October 1996. Cruz Azul received a full copy of that reply, and presented its comments on the information contained therein. Guatemala submits, therefore, that Mexico's claim is without foundation. Guatemala also notes that Mexico identified no other presentation by Cementos Progreso in respect of which the Ministry allegedly violated Articles 6.5.1 and 6.5.2 of the ADP Agreement in its handling of confidential information.

### 3. Time-frame

4.399 **Mexico** alleges that Guatemala violated Articles 6.1 and 6.2 of the ADP Agreement by failing to set a specific time-frame for the submission of information, arguments and evidence by Cruz Azul. This omission created uncertainty for Cruz Azul's defence of its interests, as the Ministry gave no assurance that information and evidence submitted subsequent to the preliminary determination would be considered.

4.400 **Guatemala** denies that Articles 6.1 and 6.2 of the ADP Agreement require the investigating authority to set a specific time-frame for the exporting firm to submit relevant information and evidence. Article 5.10 of the ADP Agreement itself establishes the time-frame for the provision of information by requiring that the authorities should normally conclude anti-dumping investigations within one year after their initiation. The Ministry complied with Article 5.10 inasmuch as it initiated the investigation on 23 January 1996 and issued the final determination on 17 January 1997.

4.401 Guatemala suggests that, without prejudice to the foregoing argument, in the course of the investigation the Ministry established specific time-limits for the presentation of information in order to ensure that it would receive information from all interested parties in sufficient time for it to be taken into consideration. For example, the Ministry set 17 May 1996 as the deadline for the reply to the original questionnaire, 30 October 1996 for the reply to the supplementary questionnaire, and 19 December 1996 for the presentation of final pleadings. Guatemala notes that in some cases, the time-limits were extended in order to give the parties additional time to prepare their replies and defend their interests.<sup>116</sup> Consequently, and in accordance with the provisions of Articles 6.1 and 6.2 of the ADP Agreement, Cruz Azul was given notice of the information required, and was afforded ample opportunity to present relevant evidence in writing for the defence of its interests at each of the critical stages of the investigation.

### G. Revocation of Anti-Dumping Duties

4.402 **Mexico** requests the Panel to recommend that Guatemala revoke the anti-dumping measure imposed on imports of grey portland cement from Cruz Azul, and refund those anti-dumping duties already collected. Mexico suggests that the Panel should do so because the failure to fulfil the requirements of the ADP Agreement concerning initiation cannot be remedied by measures taken after the start of the investigation in dispute. According to Mexico, the very purpose of the submission of adequate evidence in the application, and its examination by the investigating authority, is to ensure compliance with certain minimum conditions before deciding to initiate an investigation.

4.403 Mexico states that in accordance with Article 19.1 of the DSU, where a panel concludes that a measure is inconsistent with a covered agreement, the panel "shall recommend that the Member concerned bring the measure into conformity with that agreement". Moreover, the panel "may suggest ways in which the Member concerned could implement the recommendations". Article 19.1 of the DSU applies to the present dispute since there is nothing in Appendix 2 to the DSU to the contrary. Assuming that the Panel concludes that Guatemala did not comply with the provisions of

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<sup>116</sup> Guatemala notes that Cruz Azul was granted an extension of over two months to reply to the original questionnaire.

the ADP Agreement as regards the initiation of the investigation, Mexico suggests that the only way of bringing the measure into conformity with the ADP Agreement would be to recommend the annulment of the investigation and the refunding of the corresponding anti-dumping duties. Otherwise, according to Mexico, it would mean failing to recommend that the measure (i.e. the initiation of the investigation) be brought into conformity with the provisions of the ADP Agreement. According to Mexico, any other kind of recommendation would necessarily relate to aspects of the investigation other than initiation. Mexico suggests that an inconsistency concerning the initiation of an investigation can only be resolved at source, i.e. at the initiation itself. This is because the initiation of an investigation, unlike other provisions of the ADP Agreement, is the very foundation for the remainder of the investigation. When that foundation is vitiated from the outset, the rest of the investigation is also vitiated. It is an investigation that should never have been initiated. Mexico submits that an investigation which has been initiated without fulfilling the relevant provisions of the ADP Agreement is like a building without a ground floor to stand on.

4.404 Mexico considers that it is not possible to consider that an investigation which has been initiated without fulfilling the initiation requirements of the ADP Agreement can be remedied or corrected at subsequent stages of the procedure. This might be feasible with regard to other elements of the ADP Agreement, but not as far as initiation is concerned. Pursuing the image of a building, Mexico suggests that mistakes made on the first floor can be avoided on the second, but a first floor without a ground floor or a ground floor built only after the first floor has been completed is inconceivable. Mexico submits that a panel ruling that corrects violations concerning initiation through recommending remedial action in respect of the latter stages of the investigation would, *ipso facto*, render the provisions governing initiation completely inoperative, since they would no longer have any meaning. All WTO Members could initiate investigations without complying with the appropriate disciplines, in the knowledge that they can be "remedied" *ex post facto*. Moreover, since there would be no criteria to determine when such an *ex post facto* remedy could or could not be carried out, such a ruling would be generally inapplicable and, hence, inconsistent with Articles 5 and 4 of the ADP Agreement. In this connection, Mexico notes Article 19.2 of the DSU whereby, in its "findings and recommendations, the panel ... cannot add to or diminish the rights and obligations provided in the covered agreements".

4.405 According to Mexico, the revocation and refunding of the anti-dumping duties would also be consistent with Article 1 of the ADP Agreement and Article 3.7 of the DSU. Mexico notes that Article 1 of the ADP Agreement provides that: "an anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." Mexico asserts that the fact that it has not invoked Article 1 of the ADP Agreement directly, but rather Article 5, which refers specifically to "initiation and subsequent investigation", does not mean that Article 1 is not applicable or that Mexico loses its rights under Article 1 with respect to the initiation of the investigation. In order to invoke Article 1 of the ADP Agreement, Mexico submits that it would have had to wait until the publication of the final determination, which is illogical and would render the second sentence of Article 17.4 of the ADP Agreement ineffective. Mexico recalls that in accordance with Article 3.7 of the DSU: "the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements". Mexico asserts that the only way to secure withdrawal of the offending measure in the present case is to annul the investigation as a whole.

4.406 **Guatemala** notes that Article 19.1 of the DSU stipulates that the proper role of a panel established to settle a dispute in the WTO is to recommend that the Member concerned bring the measure into conformity with its obligations under the covered agreement. The recommendation of the panel is not the "solution" to the dispute mentioned in Articles 3.5 and 3.7 of the DSU: the solution can only be reached by the Members. Article 3.5 merely offers general guidelines according to which a solution eventually reached between the parties must be compatible with the covered agreements and must not nullify or impair the benefits accruing to any WTO Member, not just the

parties to a particular dispute, or impede the attainment of any objective of those agreements. Mexico does not explain how it would be contrary to that principle for the Panel not to recommend a specific or retroactive remedy.

4.407 **Mexico** submits that there is no provision in the ADP Agreement that prevents anti-dumping duties being refunded. On the contrary, refunding anti-dumping duties is consistent with and provided for in the ADP Agreement. Refunding anti-dumping duties is a logical outcome of annulling the investigation. Since anti-dumping duties may only be imposed on the basis of an investigation, if the investigation is annulled, so are the duties. Mexico argues that it is inconceivable that the duties should remain when the investigation has ceased to exist. Articles 7.1 and Article 1 of the ADP Agreement confirm this by stating that: "[p]rovisional measures may be applied only if ... an investigation has been initiated in accordance with ..." (Article 7.1) and "[a]n anti-dumping measure shall be applied only ... pursuant to investigations" in conformity with the Agreement (Article 1). Mexico submits, therefore, that anti-dumping duties cannot be applied without an anti-dumping investigation to warrant them.

4.408 Mexico notes that refunding anti-dumping duties is not a new concept, alien to the ADP Agreement. Refunding anti-dumping duties is not only consistent with provisions of the ADP Agreement but, in particular circumstances, it is obligatory. Article 9, for example, provides for "refund ... of any duty paid in excess of the margin of dumping". In keeping with the logic of Article 9, it may be affirmed that annulment of an investigation means that there is no actual dumping margin and, consequently, all the anti-dumping duties are necessarily in excess of the actual dumping margin. Mexico suggests that the same is true of Article 10 of the ADP Agreement, which states, for instance, that "[i]f the definitive duty is lower than the provisional duty paid ... the difference shall be reimbursed", and that "[w]here a final determination is negative, any cash ... shall be refunded ... in an expeditious manner". Hence, Mexico asserts that the appropriate course in the present case is to refund all of the anti-dumping duties levied by Guatemala.

4.409 Mexico suggests that the annulment of an investigation without the refund of duties collected would create a major incentive for WTO Members to try and prolong anti-dumping investigations - and their defence before a panel and then the Appellate Body - to the utmost because, in addition to improperly continuing to protect their domestic industry, they would also obtain income, sometimes amounting to several million dollars, every day that anti-dumping duties remain in force.

4.410 According to Mexico, both the annulment of investigations and a corresponding refund of anti-dumping or countervailing duties have been recommended in both adopted and unadopted panel reports. Furthermore, Mexico states that there is no case in which a panel has ruled against the refund of duties. Panel reports in support of Mexico's position include New Zealand - Import of Electrical Transformers from Finland<sup>117</sup>; Canada - Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC<sup>118</sup>; United States - Measures Affecting Imports of Softwood Lumber from Canada<sup>119</sup>; United States - Anti-Dumping Duties on Grey Portland Cement and Clinker from Mexico<sup>120</sup>; and United States - Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden.<sup>121</sup>

4.411 **Guatemala** submits that if the Panel determines that a particular aspect of the investigation in the present case is inconsistent with the ADP Agreement, it may only recommend that Guatemala bring the provisional measure into conformity with the ADP Agreement. Although the Panel may suggest the way in which Guatemala should implement its recommendations, Guatemala ultimately

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<sup>117</sup> BISD 32S/55, adopted on 18 July 1985.

<sup>118</sup> SCM 85, not adopted, dated 13 October 1987.

<sup>119</sup> BISD 40S/358, adopted on 27 October 1993.

<sup>120</sup> ADP/82, not adopted, dated 7 September 1992.

<sup>121</sup> ADP/117, not adopted, dated 24 February 1994.

has the sovereign right to implement the recommendation in accordance with its domestic laws. In particular, Guatemala submits that the Panel should not recommend the retroactive annulment of the provisional measure in this case.

4.412 Guatemala notes that Mexico has requested the Panel to recommend that Guatemala revoke the anti-dumping duties imposed on imports of grey portland cement from Cruz Azul and refund any anti-dumping duties levied. Guatemala suggests that any claim by Mexico for refund of the final anti-dumping duties does not make sense since the final measure is outside the Panel's terms of reference. Since the provisional measure is the only measure that falls within the Panel's terms of reference, Mexico is essentially requesting that the provisional measure should be annulled, and that Guatemala's importers should be repaid their money deposits or released from their sureties in respect of imports from Cruz Azul. Guatemala notes that according to Article 7.1 of the ADP Agreement, a provisional measure may only be imposed if an investigation has been initiated properly. The Panel could recommend, therefore, that Guatemala bring the provisional measure into conformity with the ADP Agreement, but only if it is determined that (a) the provisional measure had a significant impact within the meaning of Article 17.4 of the ADP Agreement, and (b) the initiation of the investigation is not consistent with Guatemala's obligations under Article 7.1. Guatemala recalls that Mexico does not claim that Guatemala violated Article 7.1 in respect of the provisional measure.

4.413 Guatemala suggests that Mexico's request that the Panel should recommend a specific remedy is contrary to the explicit provisions of Article 19.1 of the DSU, is inconsistent with substantially all adopted panel reports, and runs counter to the recommendations contained in adopted reports issued by panels established under the Tokyo Round Anti-Dumping Code, the predecessor to the ADP Agreement. Guatemala submits that Article 19.1 of the DSU contains the first provision expressly designed to guide panels as to the nature of the recommendations they should issue. Instead of adopting a provision which authorized the panels to recommend specific remedies, the Contracting Parties during the Uruguay Round maintained the previous practice of respecting the sovereignty of Members in deciding how to bring a particular measure into conformity with their WTO obligations. According to Article 19.1 of the DSU, when a panel or the Appellate Body considers that a Member has imposed a measure that is inconsistent with its WTO obligations, its report will always include a recommendation to the effect that the Member in question should bring the measure into conformity with the relevant agreement. The Panel cannot make any recommendation in respect of the final measure, because the final measure is not within its terms of reference. No GATT or WTO panel has issued recommendations in respect of a measure that is not within its terms of reference. As stated by the Appellate Body in Brazil - Measures Affecting Desiccated Coconut<sup>122</sup>, the terms of reference of the panel serve the purpose of establishing the jurisdiction of the panel by defining the precise claims at issue. Mexico does not explain how it is possible under Article 19.1 of the DSU for a panel to have the authority to recommend that a Member bring a measure into conformity if the measure is not the subject of the complaint that is under the jurisdiction of the panel. If Mexico's position were accepted, any panel would be free to ignore its terms of reference and to issue recommendations in respect of any measure which was challenged by the complainant after the consultations had been held and the request for the establishment of a panel submitted. Arguably, the only "measure" subject to review by the Panel in this case is the provisional measure. Thus, if the Panel finds that a particular aspect of the Ministry's investigation is inconsistent with Guatemala's obligations under the ADP Agreement, according to Article 19.1 of the DSU it may only recommend that Guatemala bring the provisional measure into conformity with its obligations. Neither the "investigation" nor the "initiation" constitute "measures" that can be brought into conformity with the ADP Agreement in the sense of Article 19 of the DSU.

4.414 Guatemala notes that Mexico cites New Zealand - Imports of Electrical Transformers from Finland<sup>123</sup> to support its request that the Panel should recommend a specific remedy against

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<sup>122</sup> Report of the Appellate Body, WT/DS22/AB/R, page 22.

<sup>123</sup> BISD 32S/55, adopted on 18 July 1985.

Guatemala.<sup>124</sup> Guatemala recalls, however, that it is unusual and against the weight of GATT precedent for this type of recommendation issued in the framework of the GATT dispute settlement system to be adopted. Mexico fails to point out that New Zealand was not opposed to the adoption of the report because it apparently considered that this would best serve its sovereign interests. However, Guatemala states that in every case conducted under the Tokyo Round Anti-Dumping Code in which a specific remedy was recommended, the party against whom the complaint had been made unilaterally blocked the adoption of the recommendations, and frequently adopted that position on the grounds that the report included a recommendation for a specific remedy.<sup>125</sup> According to the DSU, a Member no longer has the right to unilaterally prevent the adoption of panel recommendations that do not reflect its expectations under the covered agreements. However, Guatemala argues that this modification of the DSU does not alter the Member's expectations according to which panels do not have the authority to recommend specific remedies. According to Guatemala, Article 19.1 of the DSU now makes it clear that the authority of a panel is restricted to recommending that a Member should bring the measure into conformity with the relevant agreement. Guatemala also agrees with the reasoning of the United States in its submission as a third party that, in conformity with the DSU, the Panel should not recommend a specific or retroactive remedy.

4.415 Guatemala submits that Mexico has not cited a single WTO panel or Appellate Body report recommending a specific remedy - such as the revocation of a measure - that goes beyond the powers granted by Article 19.1 of the DSU. Thus, Guatemala submits that even if the cases cited by Mexico provide examples of previous practice in certain cases dealt with under the GATT, they cannot serve as a precedent for the Panel to exceed its powers under the DSU.

4.416 Guatemala submits that the second sentence of Article 19.1 of the DSU stipulates that a panel, in addition to making recommendations, may suggest ways in which the Member concerned could implement the recommendations. However, a panel should not suggest any retroactive remedies for the implementation of its recommendation. In practice, the reports adopted by panels both before and after the DSU have, with few exceptions, recommended only non-retroactive remedies.

4.417 According to Guatemala, a retroactive remedy could wrongly imply a right of private action under the WTO. In anti-dumping cases, duties are reimbursed to the importer located in the territory of the Member against whom the complaint is made. A retroactive remedy could give rise to domestic grounds for action, particularly in countries where the WTO agreements have direct effect. Thus, if a panel were to suggest a retroactive remedy, this could interfere directly with the sovereignty of a Member by establishing a domestic right of action where there had been none previously.

4.418 Guatemala submits that the suggestion that the provisional measure should be annulled and the money deposit reimbursed is particularly inappropriate in the present case. Unlike the case submitted for consideration by the panel in United States - Anti-Dumping Duties on Imports of Grey Portland Cement and Cement Clinker from Mexico<sup>126</sup>, in the present case Mexico has not claimed that the imposition of a provisional measure (or the definitive measure) by Guatemala violates Article 1 of the ADP Agreement.<sup>127</sup> The panel which examined United States - Anti-Dumping Duties on Imports of Grey Portland Cement and Cement Clinker from Mexico under the Tokyo Round Anti-Dumping

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<sup>124</sup> In this case, Guatemala notes that Finland challenged the anti-dumping measure imposed by New-Zealand in conformity with Article VI of GATT 1947, and not with the Tokyo Round Anti-Dumping Code.

<sup>125</sup> Guatemala refers, for example, to ADP/M/45 (17 October 1994).

<sup>126</sup> ADP/82, not adopted, dated 7 September 1992.

<sup>127</sup> According to Guatemala, Article 1 of the ADP Agreement contains a provision similar to Article 1 of the Tokyo Round Anti-Dumping Code:

"An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated [footnote omitted] and conducted in accordance with the provisions of this Agreement".

Code expressly based its recommendations on Article 1 to justify the retroactive remedy.<sup>128</sup> Since Mexico did not submit a request under Article 1 during the consultations or when requesting the establishment of a panel, any claim relating to Article 1 is outside the terms of reference of this Panel, and the Panel does not have the authority to verify whether the initiation of the investigation or the application of an anti-dumping measure was inconsistent with Article 1. Given that Mexico has not claimed violation of Article 1 of the ADP Agreement, Guatemala asserts that the Panel should not recommend the retroactive annulment and revocation of the provisional measure (much less the definitive measure, which was not challenged).

4.419 **Mexico** suggests that Guatemala acknowledges the existence of adopted panel reports recommending the revocation and subsequent refunding of anti-dumping duties. However, Mexico notes that Guatemala considers that such examples should not be the rule since in various similar cases the party which lost the dispute simply blocked the adoption of the report. In Guatemala's opinion, the impossibility of blocking panel reports under the DSU does not alter a Member's expectations that panels do not have the authority to recommend a specific remedy. According to Mexico, Guatemala never makes clear where such expectations come from, although they appear to Mexico to flow only from the possibility open to some parties to the Tokyo Round Anti-Dumping Code to block reports which did not suit them.

4.420 Mexico refers to Guatemala's argument that a retroactive remedy could give rise to domestic grounds for action, in particular in countries where the WTO Agreements have direct effect, and that a panel suggesting a retroactive remedy could interfere directly with the sovereignty of a Member by establishing a domestic right of action where there had been none previously. According to Mexico, this argument has no basis in the ADP Agreement or in the DSU. Moreover, Mexico suggests that when Guatemala subscribed to the results of the Uruguay Round, it was aware of the domestic legal implications of its decision. According to Mexico, for Guatemala to now argue that the obligations deriving from the Uruguay Round Agreements might have domestic consequences is inconsistent with Guatemala's sovereign commitments under those Agreements, especially if Guatemala is thereby attempting to justify the maintenance of measures inconsistent with the covered agreements, in this case the ADP Agreement.

## V. ARGUMENTS PRESENTED BY THIRD PARTIES

### A. Canada

5.1 **Canada** did not make any oral or written submissions to the Panel.

### B. El Salvador

5.2 **El Salvador** considers that, given this is the first time a Central American country has carried out an anti-dumping investigation, Guatemala has done its utmost to ensure that the measures adopted are consistent with the ADP Agreement. El Salvador considers that the Panel does not have jurisdiction to examine or make recommendations concerning the final measure adopted by Guatemala since Mexico, in its request for establishment, sought the establishment of a panel solely to examine the provisional anti-dumping measure. Furthermore, it would be wrong for the Panel to consider and rule on the definitive anti-dumping measure in the absence of the prior consultations required by the ADP Agreement.

5.3 El Salvador regards the DSB, upon which the credibility and reputation of the multilateral trading system mainly rests, as the most important organ of the WTO, and as the ultimate means of safeguarding the trade interests of all its Members. Accordingly, El Salvador suggests that the Panel

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<sup>128</sup> ADP/82, Paragraphs 5.37 and 5.38, not adopted, dated 7 September 1992.

should be extremely cautious in making its recommendations, since they will set a precedent in an area highly sensitive to the interests of all Members.

5.4 El Salvador requests the Panel to take the following considerations into account:

1. the Panel has no mandate to consider or make recommendations concerning the definitive anti-dumping measure applied by Guatemala;
2. if there is good cause, the Panel should limit itself to recommending that Guatemala bring its provisional measure into conformity with its obligations under the ADP Agreement; and
3. the Panel should refrain from recommending that Guatemala suspend its anti-dumping measures and refund the corresponding duties.

C. Honduras

5.5 **Honduras** submits that the Panel should reject Mexico's complaint because Mexico's request for establishment did not specify the final measure. Accordingly, the Panel does not have a mandate to examine the definitive measure adopted on 17 January 1997. According to Article 17 of the ADP Agreement, there are only three specific measures that may be examined by a panel, namely: a provisional measure imposed on the basis of Article 7, a price undertaking given in accordance with Article 8, or a definitive anti-dumping duty imposed in accordance with Article 9. According to Honduras, the ordinary meaning of Article 17.4 of the ADP Agreement leaves no doubt that no other measure may be examined. In other words, neither the anti-dumping investigation itself, nor an action or decision taken during the course of the investigation, constitutes a "measure". Honduras also notes that Article 19.1 of the DSU specifies that the competence of a panel relates to examining and making recommendations with respect to measures. According to Honduras, in anti-dumping cases this requirement must refer to Article 1 of the ADP Agreement, whereby "[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated [footnote omitted] and conducted in accordance with the provisions of this Agreement."

5.6 Honduras states that Article 6.2 of the DSU requires a request for the establishment of a panel to be made in writing, and to identify the specific measures at issue. Thus, as Mexico failed to mention the final measure in its request for the establishment of a panel, and did not expressly invoke Articles 1 or 9 of the ADP Agreement, the definitive measure falls outside the Panel's terms of reference. The latter may neither examine the final measure, nor refer to the final measure in its report.

5.7 Honduras submits that the Panel should take due account of the fact that the anti-dumping procedure is essentially a dynamic process and, consequently, only those stages that have already taken place can form the subject of consultations or be examined by a panel. Honduras suggests that in the present case, with complete disregard for the principle of procedural due process, which should apply in any proceedings, Mexico has incorporated stages of the investigation on which there have been no consultations, or which were not expressly challenged in its request for the establishment of a panel.

5.8 Honduras submits that the provisional measure did not have a significant impact on Mexico's trade interests. In accordance with Article 17.4 of the ADP Agreement, when a provisional measure has had a significant impact, and the Member that requested consultations considers that the measure was taken contrary to the provisions of Article 7.1 of the ADP Agreement, that Member may refer such matter to the DSB. The WTO dispute settlement system enters into action only exceptionally in cases relating to a provisional measure, it being necessary for both the provisional measure to have

had a significant impact on the trade interests of the exporting Member and for the adoption of the measure to have been contrary to the provisions of the Agreement concerning the application of provisional measures. According to Honduras, if Mexico intends to challenge the provisional measure by arguing non-fulfilment of the requirements laid down in Article 7.1 of the ADP Agreement, it must also show how that measure has had a "significant impact" on its trade interests. Honduras' analysis of the provisional measure reveals that it has the following characteristics:

1. it was in force for only four months;
2. it only affected one exporter of grey portland cement; and
3. the exports affected by the provisional measure accounted for only a small percentage of Mexico's exports during that four-month period.

5.9 Honduras submits that Mexico has not even attempted to explain how a provisional measure with the above characteristics could have a significant impact on its trade interests. Honduras therefore argues that Mexico has no right to challenge the provisional measure, and that a developing country such as Guatemala should not be placed in a position in which it is obliged to devote scarce resources to defending that provisional measure.

5.10 According to Honduras, Cementos Progreso's application not only included evidence of dumping and threat of injury, but also satisfied the causal link condition since it contained the information required by Articles 5.2(iii) and 5.2(iv) of the ADP Agreement. The application included evidence substantiating the assertions of the domestic producer which, in the opinion of the Ministry, constituted sufficient evidence for the initiation of an investigation.

5.11 Honduras submits that the information "reasonably available to the applicant", in accordance with Article 5.2 of the ADP Agreement, varies according to the specific case, the country and the industry concerned. As a Central American country, Honduras considers it essential that in this and future cases proper account be taken of the fact that the information reasonably available in Central America is not comparable with that available in more developed countries such as the United States, Canada or Mexico itself. Accordingly, Honduras requests that the Panel should recognize the right of Central American investigating authorities to decide whether the information provided by the applicant is that reasonably available to it, in accordance with the conditions of availability of information in each country. In support of its position Honduras relies on Article 5.3 of the ADP Agreement, according to which Honduras considers that the investigating authority alone is competent to determine whether the applicant has fulfilled the requirements of Article 5.2 of the ADP Agreement.

5.12 Honduras recognizes that the requirements for initiating an anti-dumping investigation contained in Article 5 of the ADP Agreement were established as a safeguard to prevent a Member of the WTO from initiating frivolous and unjustified anti-dumping investigations that impose unfair costs on foreign exporters and impede free trade. However, Honduras also points out that the requirements of Article 5 are in no way intended to frustrate legitimate anti-dumping investigations. According to Honduras, it cannot be said that Guatemala resorts frequently and arbitrarily to anti-dumping measures, since this is the first and only anti-dumping investigation that Guatemala has initiated.

5.13 Honduras submits that the ADP Agreement does not permit a panel to conduct a *de novo* review of an investigating authority's decision to initiate an anti-dumping investigation, especially as the investigation was initiated on the basis of evidence sufficient to have led a reasonable and impartial person to initiate.

5.14 Honduras suggests that if Guatemala's interpretation of Article 5.5 of the ADP Agreement is correct, the investigating authority should not commence its investigation until the exporting country has received official notification of the initiation of the investigation. Honduras notes that in the present case, Guatemala refrained from carrying out any actual investigation, issuing questionnaires or taking any other measure until Mexico had been notified of the initiation. According to Honduras, one of the purposes of any notification is to make the parties aware of the existence of a legal proceeding in order that they may have a proper opportunity to defend their interests. In the present case, both Mexico and Cruz Azul had sufficient time to defend their interests. If the Panel finds that Guatemala infringed Article 5.5 of the ADP Agreement, Honduras suggests that it take account of the fact that, in any event, the alleged delay in notification did not do Mexico and Cruz Azul any harm, since during the investigation they always had sufficient time to defend their interests. According to Honduras, this is shown by the fact that Guatemala gave Cruz Azul a two-month extension to answer the questionnaire and that, without being obliged to do so, Guatemala waited more than six months before imposing a provisional measure.

5.15 Honduras asserts that the Ministry took into account the provisions of Article 7.1 of the ADP Agreement in making a preliminary determination of threat of injury. Moreover, under the ADP Agreement the Ministry had the right to examine and assess the evidence gathered in the preliminary investigation and arrive at preliminary factual findings based on the evidence gathered up to that point. Accordingly, the Panel is not competent to review the case *de novo*. Honduras submits that the extent of the Panel's examination is defined by the provisions of Article 17.6 of the ADP Agreement.

5.16 Honduras suggests that even if the Panel does conclude that Guatemala infringed certain provisions of the ADP Agreement, it should not recommend a retroactive remedy, but should simply recommend that Guatemala bring the measure into conformity with the ADP Agreement, in accordance with Article 19.1 of the DSU. Although the Panel may suggest ways in which Guatemala could implement its recommendations, it is for Guatemala to decide how the Panel's recommendations should be implemented. According to Honduras, the recommendations referred to in Article 19.1 of the DSU are prospective and not retroactive.

5.17 Honduras requests the Panel to find that:

1. the Panel does not have a mandate to examine the final measure because such examination lies outside its terms of reference. Moreover, for the same reason the Panel should reject the entire spectrum of claims put forward by Mexico in its first submission concerning the final stage of the investigation;
2. Mexico has not shown how the provisional measure has had or is having any significant impact on its trade interests. Honduras points out that, in view of the special characteristics of the case, there has been no such significant impact;
3. without prejudice to the argument put forward under 1 above, Guatemala initiated and conducted the anti-dumping investigation and imposed the provisional measure in strict compliance with the provisions of the ADP Agreement; and
4. the Panel is only authorized to suggest ways in which Guatemala could implement its recommendations. The Panel is not authorized to recommend a retroactive remedy, since the remedy must be prospective.

D. United States

5.18 The **United States** submits that this dispute raises admissibility considerations that go to the core of fundamental fairness. Mexico has requested the establishment of a panel in respect of one measure, Guatemala's provisional anti-dumping measure, in order to seek findings and a panel

recommendation that go to an entirely different measure, Guatemala's final action to levy definitive anti-dumping duties, on which Mexico never requested consultations with Guatemala. Mexico also did not identify Guatemala's final action as a measure in its request for the establishment of a panel. Therefore, Mexico cannot challenge Guatemala's final anti-dumping measure before this Panel. Mexico has neither claimed nor demonstrated that Guatemala's provisional measure has a "significant impact" as required by Article 17.4 of the ADP Agreement. Consequently, according to the United States, this dispute is not properly before the Panel.

5.19 The United States asserts that Articles 4 and 6 of the DSU and Article 17 of the ADP Agreement define when a dispute can be referred to a panel to review the actions of parties under the Anti-dumping Agreement.<sup>129</sup> These rules require that WTO Members adhere to particular standards when making requests for consultations and requests for panels to be established in respect of the anti-dumping measures of other Members. According to the United States, they lay out three basic tenets to be followed. First, these rules require a complainant to request consultations and the establishment of a panel in respect of an anti-dumping measure. Article 17.3 of the ADP Agreement, which provides for consultations, is not a special or additional rule or procedure identified in Annex 2 of the DSU. Therefore, Article 17.3 is subject to Article 4 of the DSU. Article 4 of the DSU requires that a complainant identify the measures at issue in its consultation request (Article 4.4), and also requires the respondent "to accord sympathetic consideration and afford adequate opportunity for consultation . . . concerning measures . . ." (Article 4.2). For the United States, it is therefore clear that a party requesting consultations under Article 17.3 of the ADP Agreement "with a view to reaching a mutually satisfactory resolution of the matter . . ." must do so by identifying the measure(s) at issue in accordance with Article 4 of the DSU. Likewise, Article 17.4 of the ADP Agreement (which is a special or additional rule or procedure under the DSU) is to be read, as it can be, consistently with Article 6 of the DSU, to require that parties must refer matters to the DSB about which they have consulted by "identifying the specific measures at issue" (Article 6.2 of the DSU). It can therefore be concluded that the commencement of dispute settlement under the ADP Agreement is directly dependent upon the identification by the complainant of the anti-dumping measure(s) in respect of which the complainant intends to make claims.<sup>130</sup> Moreover, the United States submits that Article 17.4 of the ADP Agreement identifies three measures which can be referred to a panel: provisional measures (under limited circumstances), or a final action to levy definitive anti-dumping duties, or a final action to accept price undertakings.<sup>131</sup>

5.20 According to the United States, therefore, a Member alleging that the initiation of an anti-dumping investigation was improper must do so as part of a challenge to the imposition of a measure (here, either the imposition of a provisional measure or final measure or the acceptance of an undertaking). For the United States, this means that a complaining Member must wait until the measure is imposed, engage in consultations in order to seek a mutually agreed solution, and, where required, wait the necessary period of time before seeking establishment of a panel. In addition, in the case of provisional measures, the complaining Member must allege and demonstrate that the provisional measure has a "significant impact" and was taken contrary to the provisions of paragraph

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<sup>129</sup> Article 17.1 states "[e]xcept as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement."

<sup>130</sup> In this context the United States suggests that it is also relevant to note that Article 1 of the ADP Agreement does not equate an anti-dumping measure with an anti-dumping investigation. Article 1 states, "[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated (footnote omitted) and conducted in accordance with the provisions of this Agreement." Further, in Brazil - Measures Affecting Desiccated Coconut, the Appellate Body stated, "[w]e see a decision to impose a definitive countervailing duty as the culminating act . . ." Report of the Appellate Body, AB 1996-4 (adopted 20 March 1997), p. 11. The United States suggests that this same view should likewise be applicable to an anti-dumping duty.

<sup>131</sup> The United States notes that, in its submission, the terms "final action to levy definitive anti-dumping duties" and "final action to accept price undertakings" are collectively referred to as "final anti-dumping measure(s)" or "final measure(s)."

1 of Article 7 of the ADP Agreement. The United States believes that “pre-measure” disputes are precluded, and that this conclusion is supported by the text of the agreements, their negotiating history, precedent, and sound legal policy considerations.

5.21 The United States submits that under Article 31.1 of the Vienna Convention, one must begin an interpretative analysis with the actual terms of a treaty. In the case of Articles 17.3 and 17.4 of the ADP Agreement, the text of those provisions, when read in conjunction with provisions of the DSU, precludes “pre-measure” disputes. Article 17.3, which provides for consultations, is not a special or additional rule or procedure identified in Annex 2 of the DSU. Therefore, Article 17.3 is subject to the DSU, which, among other things, requires in Article 4.4 that a complainant identify “the measures at issue” in its consultation request. Thus, according to the United States, a complainant seeking consultations under Article 17.3 of the ADP Agreement “with a view to reaching a mutually satisfactory resolution of the matter” must do so by identifying the measure(s) at issue in accordance with Article 4.4 of the DSU. The United States asserts that this conclusion is not affected by the fact that Article 17.3 uses the term “matter”, because a “matter” consists of two elements: (1) a measure(s); and (2) legal claims regarding the measure(s). According to the United States, this follows from several provisions of the DSU. First, Article 6.2, which spells out the requirements for requesting the establishment of a panel, requires that a complainant (1) identify the specific measures at issue; and (2) provide a brief summary of the legal basis of the complaint (i.e., the claim(s)). These two elements form the “matter” that is referred to the DSB within the meaning of Article 7.1 of the DSU, and with respect to which a panel must make an objective assessment within the meaning of Article 11 of the DSU. The United States suggests that Article 4 of the DSU takes a similar approach. Under Article 4.4, a complainant requesting consultations must (1) identify “the measures at issue”; and (2) must give “an indication of the legal basis for the complaint” (i.e., the claim(s)). Again, these two elements form the “matter” with respect to which the disputants “should attempt to obtain satisfactory adjustment” within the meaning of Article 4.5. Thus, when Articles 17.3 and 17.4 are read in harmony with the DSU (which they must be), it is clear to the United States that an anti-dumping complainant is not relieved of the obligation to challenge a “measure.” Because the initiation of an anti-dumping investigation is not a “measure,” a complainant making a claim that an initiation violated the ADP Agreement must wait until a challengeable measure has been imposed.

5.22 The United States argues that in addition to the terms of a treaty, Article 31.1 of the Vienna Convention calls for a consideration of the context of treaty terms. In this case, Article 13 of the ADP Agreement supports the conclusion that the drafters did not intend to permit “pre-measure” disputes in anti-dumping cases. Article 13 obliges Members to provide for judicial or quasi-judicial review of anti-dumping actions, but only with respect to “final” anti-dumping actions. Article 13 does not require Members to provide for review of pre-final actions, such as the initiation of an investigation. According to the United States, if the drafters had thought that pre-measure review was a critical due process element of any anti-dumping regime, they would have required that Members provide for such review in their domestic systems. The fact that the drafters did not impose such a requirement reinforces the conclusion that they also did not contemplate “pre-measure” WTO dispute settlement with respect to anti-dumping cases.<sup>132</sup>

5.23 According to the United States, the negotiating history of the ADP Agreement confirms the conclusion that “pre-measure” disputes are not permitted. Under Article 32 of the Vienna Convention, this material may be considered to confirm the meaning of a provision of a treaty.

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<sup>132</sup> The United States suggests that Article 13 and Article 17.4 of the ADP Agreement do differ in one respect. Article 17.4 provides for dispute settlement with respect to provisional measures, whereas Article 13 does not require Members to provide for judicial review of provisional measures. However, Article 17.4 requires that the complainant allege and prove that the provisional measure has a “significant impact” and was taken contrary to the provisions in paragraph 1 of Article 7 of the ADP Agreement as a prerequisite for dispute settlement regarding a provisional measure. Neither Article 17.4 nor Article 13 goes so far as to provide for dispute settlement or judicial review with respect to the initiation of an investigation.

During the Uruguay Round negotiations on anti-dumping, several proposals were made that would have allowed for "pre-measure" challenges to decisions to initiate anti-dumping investigations. At a meeting of the anti-dumping negotiating group, an unnamed delegation opined that "[d]ispute settlement procedures should be available at all stages of the anti-dumping proceedings and procedures should also allow exporting countries to challenge the initiation of a proceeding."<sup>133</sup> More specifically, the United States recalls that Hong Kong made a proposal which would have added the following new paragraph 3 to Article 15 of the Tokyo Round Anti-Dumping Code:<sup>134</sup>

"3. When a Party considers that there is no sufficient evidence of either dumping or of injury to justify proceeding with the case, the Party may refer such matter to the Committee for conciliation or, in derogation of paragraphs 4 and 6 of Article 15, may request for immediate establishment of a panel to examine the matter."

Similarly, the United States notes that Singapore proposed that "[p]rocedures should be established which would allow the exporting country to challenge the initiation of an anti-dumping proceeding, if the initiation was frivolous and not consistent with the Code requirements."<sup>135</sup> According to Singapore:<sup>136</sup>

"Present dispute settlement procedures provide for the exporting country to seek conciliation only after the imposition of provisional duties. However, trade damage would have already been caused and code obligations violated at the stage of initiation of the antidumping investigation. Therefore, dispute settlement procedures should be available at all stages of the antidumping proceedings."

In a similar vein, the Nordic countries proposed eliminating from what was then Article 15.3 of the Tokyo Round Anti-Dumping Code the language "and final action has been taken by the administering authorities of the importing country to levy definitive duties or to accept price undertakings ...".<sup>137</sup> According to the Nordic countries, Members should be allowed "to invoke the dispute settlement mechanism already in the course of an anti-dumping investigation."<sup>138</sup>

5.24 The United States emphasises that none of these proposals was adopted. According to the United States, no clearer evidence can be provided that the drafters of the ADP Agreement did not intend to permit "pre-measure" disputes.

5.25 The United States submits that sound legal policy considerations support the preclusion of "pre-measure" disputes. If such disputes were permitted they would undermine the right of Members to take anti-dumping measures and would wreak havoc with the WTO dispute settlement system. It is fashionable in some quarters to view Article VI of GATT 1994 and the ADP Agreement as only imposing obligations on anti-dumping users. From this perspective, anything that hinders the use of anti-dumping measures, such as the ability of an exporting Member to bring a "pre-measure" dispute, is a desirable thing. However, the United States argues this view ignores the fact that, in addition to obligations, Article VI and the ADP Agreement also confer "rights" on anti-dumping users. Any doubt on this score was eliminated in Brazil - Measures Affecting Desiccated Coconut.<sup>139</sup> In that

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<sup>133</sup> MTN.GNG/NG8/15 (19 March 1990), page 66.

<sup>134</sup> MTN.GNG/NG8/W/83/Add.5 (23 July 1990), page 157. The United States notes that Article 15 eventually became Article 17 of the ADP Agreement.

<sup>135</sup> MTN.GNG/NG8/W/55, page 10.

<sup>136</sup> *Ibid.*, pages 10-11.

<sup>137</sup> MTN.GNG/NG8/W/76 (11 April 1990), page 5.

<sup>138</sup> MTN.GNG/NG8/W/64 (22 December 1989), page 10.

<sup>139</sup> Brazil - Measures Affecting Desiccated Coconut, Report of the Appellate Body, WT/DS22/AB/R, adopted 20 March 1997.

case, which dealt with countervailing duties, the Appellate Body underscored the fact that Article VI, and the agreements interpreting it, confer “rights” as well as “obligations”:<sup>140</sup>

"Article VI of GATT 1947 and the Tokyo Round SCM Code represent, as among Code signatories, a package of rights and obligations regarding the use of countervailing measures, and Article VI of GATT 1994 and the SCM Agreement represent a new and different package of rights and obligations, as among WTO Members, regarding the use of countervailing duties. Thus, Article VI and the respective SCM Agreements impose obligations on a potential user of countervailing duties, in the form of conditions that have to be fulfilled in order to impose a duty, but they also confer the right to impose a countervailing duty when those conditions are satisfied. The SCM Agreements do not merely impose additional substantive and procedural obligations on a potential user of countervailing measures. Rather, the SCM Agreements and Article VI together define, clarify and in some cases modify the whole package of rights and obligations of a potential user of countervailing measures." (Underscoring in original).

The United States submits that when viewed from the balanced perspective articulated by the Appellate Body, the objectionable nature of “pre-measure” disputes becomes apparent. An anti-dumping determination is the product of hundreds, if not thousands, of individual substantive and procedural decisions made during the course of an investigation, each of which may be subject to one or more provisions of the ADP Agreement.<sup>141</sup> The United States considers, for example, certain provisions in Article 6 of the ADP Agreement:

- o Article 6.1 - “All interested parties in an anti-dumping investigation shall be given ... ample opportunity to present in writing all evidence which they consider relevant ... .”;
- o Article 6.1.1 - “Due consideration should be given to any request for an extension of the 30-day [questionnaire reply] period ... .”;
- o Article 6.1.2 - “[E]vidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation”;
- o Article 6.1.3, note 16 - “[W]here the number of exporters involved is particularly high, the full text of the written application should instead be provided only to the authorities of the exporting Member or to the relevant trade association”; and
- o Article 6.2 - “Provision of such opportunities [to meet those parties with adverse interests] must take account of ... the convenience to the parties.”

According to the United States, each of these provisions imposes an obligation that, depending on the facts of a case, could be the subject of a dispute. For example:

- o Where an investigating authority imposes a deadline for written submissions of Day X, but an exporter requests a deadline of Day Y, has the investigating authority failed to provide “ample opportunity” within the meaning of Article 6.1?

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<sup>140</sup> *Ibid.*, page 18, quoting with approval from Brazil - Measures Affecting Desiccated Coconut, Report of the Panel, WT/DS22/R, para. 246, adopted 20 March 1997.

<sup>141</sup> *Cf.*, Brazil - Measures Affecting Desiccated Coconut Report of the Appellate Body, WT/DS22/AB/R, page 11 (“[w]e see a decision to impose a definitive countervailing duty as the culminating act of a domestic legal process which starts with the filing of an application by the domestic industry, includes the initiation and conduct of an investigation by an investigating authority, and normally leads to a preliminary and a final determination.”).

- o Where an investigating authority denies a request for an extension, has it failed to give “due consideration” within the meaning of Article 6.1.1?
- o Where an investigating authority takes 2 days instead of 1 day to make evidence available, has it failed to make evidence available “promptly”?
- o Where, because the number of exporters is 25, an investigating authority provides a copy of the written application only to the authorities of the exporting Member, has the investigating authority complied with the “particularly high” standard of Article 6.1.3, note 16?
- o Where an investigating authority schedules a hearing on Day X and an exporter would have preferred Day Y, has the investigating authority taken account of “the convenience to the parties” within the meaning of Article 6.2?

5.26 The United States argues that if a Member whose exports are the subject of an anti-dumping investigation were free to request, during the pendency of the investigation, separate dispute settlement consultations and (potentially) the establishment of separate panels with respect to any or all of these decisions, this would interfere drastically with the ability of the investigating authorities to carry out their investigation. Resources would have to be diverted to the dispute settlement process, thereby impairing the ability of the authorities to make a fair, objective and timely determination. Moreover, from a systemic standpoint, such a result would adversely affect the operation of the WTO dispute settlement system and, thus, the operation of the WTO itself. The number of disputes would multiply and the system would become bogged down in what, in the United States, is known as “piecemeal litigation.” The United States suggests that one could take the view that no honourable Member would ever engage in such tactics. However, the United States suggests that experience teaches that once a procedural “door” is opened, sooner or later someone will go through it. And once one goes through, others are certain to follow. Thus, according to the United States, if the initiation of an anti-dumping investigation may be challenged under dispute settlement procedures before a final measure (or, in certain cases, a provisional measure) is imposed, there is no principled basis for distinguishing the decision to initiate an investigation from any other of the hundreds of decisions that must be made in the course of an anti-dumping investigation.

5.27 The United States submits that the initiation of an anti-dumping investigation does not constitute a “measure” within the meaning of Article 19.1 or of any other provision in the DSU. First, the DSU does not itself contain a definition of the term “measure.” However, in the absence of such a definition, it is appropriate to look to the provisions of the WTO agreement in question. In this case, Article 1 of the ADP Agreement makes it clear that the initiation of an anti-dumping investigation does not constitute a “measure.” Article 1 provides that “[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.” (Footnote omitted). Thus, it is clear to the United States that under the ADP Agreement, a “measure” is something that *results from* an “investigation,” and that an “investigation” itself cannot be a “measure.” The United States suggests that a contrary interpretation (*i.e.*, that an investigation is a “measure”) would produce the absurd and circular result that “an antidumping investigation shall be applied [initiated] only . . . pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement.” In addition, Article 18.3 of the ADP Agreement makes clear that an investigation is not a “measure.” Article 18.3, which is a transition rule, provides that “the provisions of this Agreement shall apply to investigations, and reviews of existing measures, initiated pursuant to applications which have been made on or after the date of entry into force for a Member of the WTO Agreement.” The United States suggests that, as in the case of Article 1, Article 18.3 draws a clear distinction between “investigations” and “measures.”

5.28 The United States argues that putting aside the language of the ADP Agreement, the Appellate Body already has ruled that procedural actions that result in a “measure” do not themselves constitute “measures.” In United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India,<sup>142</sup> India challenged a transitional safeguard action taken by the United States under the Agreement on Textiles and Clothing (“ATC”). The panel in that case found that the safeguard action violated the ATC because of deficiencies in the United States’ determination of serious damage. Having found the measure in question (the safeguard action) to be inconsistent with certain provisions of the ATC, the panel, for reasons of judicial economy, declined to address other claims raised by India.<sup>143</sup> India appealed the panel’s decision to refrain from making findings on two claims, one of which was the alleged failure of the United States to specify in its request for consultations whether the proposed transitional safeguard action related to serious damage or the actual threat of serious damage.<sup>144</sup> Under Article 6.7 of the ATC, consultations are a procedural step that must occur prior to the imposition of a transitional safeguard action. The United States notes that although the panel obviously had regarded the “measure” at issue to be the transitional safeguard action itself, and not the procedural steps leading up to the safeguard action, India argued on appeal that under the ATC, the request for consultations “must be regarded as [a] distinct measure[] that can be contested separately.”<sup>145</sup> According to India, because the request for consultations constituted a “measure,” the panel could not refrain from addressing India’s arguments relating to the request for consultations. The United States recalls that the Appellate Body affirmed the panel in this regard. The Appellate Body cited with approval prior GATT 1947 and WTO panel practice under which:<sup>146</sup>

"if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated. In recent WTO practice, panels likewise have refrained from examining each and every claim made by the complaining party and have made findings only on those claims that such panels concluded were necessary to resolve the particular matter."

According to the United States, the Appellate Body was essentially saying that while a panel must examine all measures, it need not examine all claims regarding a measure. Although the Appellate Body did not expressly state that a request for consultations under the ATC is not a measure, such a conclusion is implicit in the report. Because the Appellate Body held only that a panel is free to disregard certain claims, the actions of the panel in United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India would have been proper *only if* the request for consultations were perceived as a “claim” and not an independent “measure.” For purposes of this case, what the Appellate Body’s report in United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India teaches is that there is a distinction between a “measure” and the procedural steps taken in advance of a “measure.” In the context of this case, the United States submits that Guatemala’s decision to initiate an anti-dumping investigation, like the US determination of serious damage and the request for consultations in United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, was a procedural step that ultimately resulted in the imposition of a “measure.” However, it was not a “measure” in itself.

5.29 The United States argues that once a panel is established under Article 17.4 of the ADP Agreement and Article 6 of the DSU, the panel may only address claims raised in respect of the

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<sup>142</sup> United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/R, Report of the Panel, adopted 23 May 1997.

<sup>143</sup> *Ibid.*, para. 6.6.

<sup>144</sup> United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, Report of the Appellate Body, pages 5-6, adopted 23 May 1997.

<sup>145</sup> *Ibid.*, page 7.

<sup>146</sup> *Ibid.*, page 22 (footnotes omitted).

particular measure on which the corresponding consultations were requested. Thus, if consultations were requested only in respect of a provisional anti-dumping measure, the panel, once established, may make findings only in respect of claims related to the provisional measure which had been the subject of the request for consultations (i.e., claims related to any actions up to and including the provisional measure). According to the United States, this also means that when a party that requested consultations on a provisional measure, before final action has been taken, determines thereafter that it also wants to challenge the respondent's final anti-dumping measure, it must request additional consultations on that final measure - subsequent to its adoption - before requesting the establishment of a panel to review that final measure. A complainant may not rely upon the earlier consultations on the provisional anti-dumping measure as a sort of "standing-consultation-in-reserve" that entitles a complainant to request a panel with respect to a later measure, such as a final anti-dumping measure.<sup>147</sup>

5.30 According to the United States, the primary focus of Article 17.4 of the ADP Agreement is on final anti-dumping measures. Challenges to provisional measures are contemplated only in certain limited situations. Specifically, to challenge a provisional measure, a complainant must show that the provisional measure has a significant impact and was taken contrary to Article 7.1 of the ADP Agreement.<sup>148</sup> These requirements were also contained in Article 15.3 of the Tokyo Round Anti-Dumping Code, a predecessor provision to Article 17.4 of the ADP Agreement.

5.31 The United States submits that these strict requirements which must be met by complainants in order to challenge a provisional measure establish an important balance between the rights of complainants to bring such challenges, and the burden on respondents to defend against them. In most cases, the underlying anti-dumping investigation is near completion and, therefore, the provisional measure will be replaced with a final measure in a short number of months.<sup>149</sup> In fact, the ADP Agreement does not even require Members to impose provisional measures at all in order ultimately to impose final measures. Moreover, in situations where the final anti-dumping measure has already been put into place and, for whatever reason, a complainant still decides to challenge the provisional measure, the United States has difficulty imagining how, in such a circumstance, it would be possible for the complainant to show that the provisional measure has a continuing significant impact.

5.32 The United States argues that the approach taken by Mexico in this dispute is procedurally flawed. In a nutshell, Mexico seeks to have this Panel make its recommendation under Article 19 of the DSU in respect of a measure - Guatemala's final measure imposing anti-dumping duties - that

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<sup>147</sup> According to the United States, at the actual consultations concerning a provisional anti-dumping measure specified in the complainant's consultation request, the respondent need only consult within the meaning of the DSU on claims in respect of actions that have occurred up to and including that provisional measure. Of course, that would not preclude the possibility of informal discussions between the parties on other aspects of mutual interest.

<sup>148</sup> Article 7.1 provides the following:

"Provisional measures may be applied only if:

- (1) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;
- (2) a preliminary determination has been made of dumping and consequent injury to a domestic industry; and
- (3) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation."

<sup>149</sup> Article 7.4 of the ADP Agreement states that "[t]he application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively."

Mexico itself never identified as a challenged measure and on which it never consulted, as it was required to do by Articles 4 and 6 of the DSU. The United States fundamentally disagrees with Mexico's approach. Mexico would have this Panel make findings on Guatemala's final anti-dumping measure when Mexico did not request (and could not have requested) consultations on this measure as it was not existent at that time, and when Mexico did not identify this measure in its request for the establishment of a panel.<sup>150</sup> The United States suggests that both of these actions are mandatory prerequisites under applicable dispute settlement rules for Mexico to proceed to a panel and for a panel to make a recommendation with respect to Guatemala's final anti-dumping measure. Mexico satisfied neither. Consequently, Guatemala's final measure is not properly before the Panel and the Panel's findings should not address or affect this measure. In addition to applicable rules, the United States suggests that an important underpinning of the dispute settlement system is at stake. Mexico's failure to seek consultations on Guatemala's final anti-dumping measure, the measure on which Mexico seeks a recommendation, would result in a short-circuiting of the dispute settlement process contrary to the goal of Article 3.7 of the DSU. Based on this Article, the parties are directed to do their utmost to work toward a mutually acceptable solution. If, as is the case here, one Member elects not even to request consultations on the measure which is the true object of that Member's concern, a key objective of the DSU is wholly undermined. According to the United States, the Panel should not allow Mexico to bootstrap Guatemala's final anti-dumping measure into the Panel's terms of reference, and should conclude that Guatemala's final anti-dumping measure is not properly before it in this dispute.

5.33 The United States considers that under Article 17.4 of the ADP Agreement, a complainant may challenge a provisional measure if it demonstrates the significant impact of the respondent's provisional measure and that such measure was taken contrary to the provisions of paragraph 1 of Article 7. Mexico failed to allege the requisite significant impact of Guatemala's provisional measure required under Article 17.4 of the ADP Agreement. Under such circumstances, the United States submits that Guatemala's provisional measure is not properly before the Panel. Furthermore, even if Mexico's panel request were not procedurally flawed in this way, Mexico has not demonstrated any significant impact of the Guatemalan provisional measure.

5.34 In the view of the United States, the language of Article 5 of the ADP Agreement is very precise with respect to the information that must be included in an anti-dumping application. The informational requirements are plainly set forth in Article 5.2 and, more specifically, Article 5.2(i) through (iv). Article 5.2 provides that a written application submitted by or on behalf of a domestic industry shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by the ADP Agreement and (c) a causal link between the dumped imports and the alleged injury. Article 5.2 emphasizes, moreover, that simple assertions, unsubstantiated by relevant evidence cannot be considered a sufficient basis for initiation of an investigation. Instead, a domestic industry's application must contain information reasonably available to the applicant respecting the subject matter identified in subparagraphs (i) through (iv) of Article 5.2. Article 5.2(iii), for example, directs that reasonably available data relating to the existence of dumping be submitted. Article 5.2(iv) specifies that for purposes of demonstrating the consequent impact of dumped imports on the domestic industry, relevant factors having a bearing on the industry, such as those listed in paragraphs

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<sup>150</sup> The United States suggests that the flaws in Mexico's approach are evident when Mexico states that Guatemala's preliminary determination is a measure which does not justify its imposition of anti-dumping duties. *Id.* Provisional measures can never justify the levying of anti-dumping duties. It is precisely for this reason that the ADP Agreement in conjunction with the DSU establishes a system that discourages Members from requesting panels prior to the imposition of final anti-dumping measures. Mexico's panel request and its first submission are carefully crafted so as not to take issue with Guatemala's final anti-dumping measure.

2 and 4 of Article 3, should be offered as evidence in the application.<sup>151</sup> The United States notes that Article 5.3 then directs investigating authorities “to examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.”<sup>152</sup>

5.35 The United States notes that the requirement that the application contain information on dumping, injury, and causation is not new, although the ADP Agreement now significantly states that only that information “reasonably available” to the applicant domestic industry is necessary. Otherwise, the United States recalls that Article 5.1 of the Tokyo Round Anti-Dumping Code contained very similar language regarding the three essential categories of information necessary to an application. Furthermore, the non-exhaustive list of injury factors contained in paragraphs 2 and 4 of Article 3 of the Tokyo Round Anti-Dumping Code were the precursors to the lists now contained in paragraphs 2 and 4 of Article 3 of the ADP Agreement, and are almost identically worded. The United States suggests that there are other similarities between the language contained in the ADP Agreement and that contained in the Tokyo Round Anti-Dumping Code. Most importantly, both the Tokyo Round Anti-Dumping Code and the ADP Agreement simply state that an anti-dumping application must contain sufficient evidence to justify the initiation of an investigation. What constitutes “sufficient evidence” is not further defined. However, the United States submits that logic directs that the quantum and quality of information required for the initiation of an investigation must be less than that necessary for a preliminary or final determination that is reached after a full investigation is conducted.

5.36 According to the United States, the report of the panel in United States - Measures Affecting Imports of Softwood Lumber From Canada is instructive respecting the sufficiency of information for initiation.<sup>153</sup> That panel made the following observations:<sup>154</sup>

"In analyzing further what was meant by the term “sufficient evidence,” the Panel noted that the quantum and quality of evidence to be required of an investigating authority prior to initiation of an investigation would necessarily have to be less than that required of that authority at the time of making a final determination. At the same time, it appeared to the Panel that “sufficient evidence” clearly had to mean more than mere allegation or conjecture, and could not be taken to mean just “any evidence”. In particular, there had to be a factual basis to the decision of the national investigative authorities and this factual basis had to be susceptible to review under the Agreement. Whereas the quantum and quality of evidence required at the time of initiation was less than that required to establish, pursuant to investigation, the required Agreement elements of subsidy, subsidized imports, injury and causal link

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<sup>151</sup> The United States recalls that Article 3.2 directs consideration to significant volume and price effects on the domestic industry, including whether there have been significant increases in import volume or significant price undercutting by dumped imports. Article 3.4 lists the following factors: “actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity, the magnitude of the dumping margin, factors affecting domestic prices, actual and negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital and investments.”

<sup>152</sup> According to the United States, the initiation requirements in Article 5 reflect a careful balancing of the interest of the domestic industry in the country of importation in securing the initiation of an anti-dumping investigation and the interest of the exporting country in avoiding the potentially burdensome consequences of an anti-dumping investigation initiated on an unmeritorious basis. The Panel in United States - Measures Affecting Softwood Lumber from Canada, BISD 40S/358, adopted 27 October 1993, para. 331, shared the same concerns and considered this delicate balance under comparable provisions of the Tokyo Round Subsidies Code. Precisely the same considerations are germane in the instant dispute and investigation.

<sup>153</sup> BISD 40S/358, adopted 27 October 1993. According to the United States, while the panel's report analyzed the sufficiency of evidence for the initiation of a countervailing duty investigation, the aspects of the report pertinent to injury matters are equally applicable to anti-dumping investigations.

<sup>154</sup> *Ibid.*, para. 332.

between subsidized imports and injury, the Panel was of the view that the evidence required at the time of initiation nonetheless had to be relevant to establishing these same Agreement elements."

5.37 The United States notes that the panel then proceeded to define the appropriate role of a panel in reviewing whether a decision of national authorities to initiate an investigation was consistent with its legal obligations under the Tokyo Round Subsidies Code. In doing so, the panel articulated the standard that it would use to assess the sufficiency of the application:<sup>155</sup>

"The Panel considered that in reviewing the action of the United States authorities in respect of determining the existence of sufficient evidence to initiate, the Panel was not to conduct a *de novo* review of the evidence relied upon by the United States authorities or otherwise to substitute its judgment as to the sufficiency of the particular evidence considered by the United States authorities. Rather, in the view of the Panel, the review to be applied in the present case required consideration of whether a reasonable, unprejudiced person could have found, based upon the evidence relied upon by the United States at the time of initiation, that sufficient evidence existed of subsidy, injury and causal link to justify initiation of the investigation."

5.38 In the view of the United States, the statements of the panel in United States - Measures Affecting Imports of Softwood Lumber From Canada respecting the requirements for initiation under the Tokyo Round Subsidies Code are equally applicable to the initiation requirements under the ADP Agreement. Thus, in the dispute before this Panel, it is submitted that consistent with the standard of review generally applicable under Article 17.6(i) of the ADP Agreement, the Panel's role is not to reweigh the evidence before the Ministry to determine whether the application contained information sufficient for initiation, but is instead to consider whether the information relied on by the investigating authorities and reasonably available to the applicant was sufficient to persuade an unprejudiced person that sufficient evidence of dumping, injury, and causal link existed to initiate the investigation.

5.39 The United States notes that Mexico's challenge to the initiation of the investigation depends in substantial part on its argument that the limited price and volume data provided by the applicant industry was inadequate to satisfy the requirements of Article 5 of the ADP Agreement.<sup>156</sup> The United States recalls Guatemala's response that the information supplied in the application was all that was reasonably available to the applicant industry and, therefore, all that was required by Article 5.2. The adequacy of the information provided in the application and on which the initiation was based, thus, largely depends on the meaning to be ascribed to the terms "reasonably available to the applicant." In this regard, the language in Article 5.2 directing that an "application shall contain such information as is reasonably available to the applicant" is intended to prevent the imposition of

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<sup>155</sup> *Ibid.*, para. 335.

<sup>156</sup> The United States notes Mexico's claims that the initiation violated the ADP Agreement because the application did not contain information pertinent to the threat of injury factors set forth in Article 3.7 and Guatemala's response that Article 5 "does not require that the application provide information on the four factors set forth in Article 3.7." The United States agrees that there is no specific reference in Article 5 to the factors enumerated in Article 3.7 regarding threat of injury. This is in contrast to the specific reference in Article 5.2(iv) to paragraphs 2 and 4 of Article 3. The United States does not understand Guatemala, however, to argue that no information regarding threat of injury was required from the applicant. Certainly neither Article 3 nor Article 5 support such an interpretation. Thus, for example, Article 3.2 is expressly referenced in Article 5.2. Article 3.2, in turn, elaborates on the consideration of possible volume and price effects associated with injury and the term "injury" is defined in Article 3, note 9, to include not only present injury, but threat of injury, as well as material retardation of the establishment of an industry. In a case such as this, where only threat of injury has been alleged, information regarding "threat" is unquestionably required for a sufficient application.

unreasonable information requirements that go beyond not only the normal capacity of a private entity to develop, but also beyond those of a particular applicant in a given case. Thus, the United States notes for example, confidential pricing, cost of production, and profitability information pertaining to foreign producers or domestic competitors are not normally obtainable by legal means and would not normally be considered to be "reasonably available" to an applicant so as to require such information for initiation. Similarly, there may be aggregate information regarding the volume and value of imports or industry production and capacity that is available in some countries, but which may be legally or simply practically unavailable in others or to other applicants. In circumstances where a practical or legal bar exists to the acquisition of information otherwise required by the ADP Agreement, such information in that instance also should not be considered to be "reasonably available" to an applicant. According to the United States, because the "reasonably available" language in Article 5.2 was not intended to excuse any inadequacy in an application that could have been avoided or cured by reasonable efforts on the part of the domestic industry, where an applicant asserts the unavailability of critical data as a reason for not fulfilling information requirements imposed by the ADP Agreement, some explanation of the basis for the unavailability may be required. The United States considers that such explanation appears particularly appropriate when missing information pertains to the domestic entities making the application and which normally would be expected to be within their possession.

5.40 The United States suggests that the Panel must consider both (1) whether the information relied on by Guatemala in initiating its investigation of cement from Mexico was sufficient for an unprejudiced person to conclude that the initiation of an investigation was justified, and (2) whether an unprejudiced person would have reason to believe that the indicated information was not reasonably available to the applicant. The United States submits that without any explanation why the data was not reasonably available, the latter question cannot be answered. The United States submits that Article 5.3 of the ADP Agreement required Guatemala to consider these issues in examining "the accuracy and adequacy of the evidence provided in the application..." However, the United States suggests that information sufficient to prove the existence of dumping or to conclude that the domestic industry in Guatemala was threatened with injury by reason of the imports from Mexico was certainly not required for purposes of initiation.

5.41 The United States notes that the factors considered by the Ministry in deciding whether to initiate the cement investigation are reflected in the Ministry's Recommendation Memorandum. With respect to the requirements of Article 5.2(i), the applicant stated that it accounted for 100% of cement production in Guatemala, that its production capacity equalled 1.6 million metric tonnes, and that it was operating at 100% capacity utilization. The requirements of Article 5.2(i), thus, appear to have been fully satisfied. The requirements of Article 5.2(ii) also appear to have been fulfilled as the applicant described the product to be investigated and provided the identity of the producer/exporter whose shipments were alleged to be dumped and also to threaten injury to the domestic industry in Guatemala.

5.42 The United States recalls that Article 5.2(iii) requires that information be provided supporting the allegations of dumping. Based on the materials reviewed by the United States, it would appear that the application for initiation did not identify the type of grey portland cement upon which the Guatemalan industry based its evidence of normal value. The evidence of normal value consisted of two invoices reflecting the price of two separate sales of Mexican cement in Tapachula, Mexico in August 1995. However, both the invoices and the application for initiation merely identified the cement sold in Mexico as grey cement. According to the United States, a question is thus presented whether this information was all that was reasonably available to the applicant and whether the Guatemalan authorities, given the limited nature of the pricing information offered in the application, queried the industry applicant regarding the reasonable availability of other data. The United States suggests that there is no indication in either the notice of initiation of the investigation or the memorandum recommending initiation from the Ministry that these matters were addressed.

5.43 The United States suggests that with respect to information on the evolution of the volume of the allegedly dumped imports required by Article 5.2(iv) of the ADP Agreement, the investigating authority relied on two shipments of cement from Mexico which occurred on consecutive days and statements that other imports were being made during a three month period. The United States recalls that these import volumes were described as massive, but were not quantified. The applicant explained that the dearth of import volume data was due to its lack of access to official import data and, therefore, requested the investigating authority to develop this information. However, no explanation was offered as to why more complete volume data was unavailable. Moreover, the United States considers that Guatemala did not fully explain precisely why the volume data was not reasonably available to the applicant and how Guatemala's domestic law prevented the applicant from obtaining the data. On the other hand, Mexico has not offered reasons why it believes that such data was reasonably available to the applicant. The basis for the assertions respecting the reasonable availability of data pertaining to both dumping and import volume are critical to the application and to the initiation and should be pursued by the Panel. With respect to injurious pricing, the information that accompanied the application indicated that the prices of the two import shipments for which volume data was available were significantly below the reported prevailing prices for domestically produced cement in Guatemala. Further, it was alleged that the cement from Mexico sold in Guatemala at prices that were below the production cost of the domestic producer in Guatemala. The applicant contended that if the massive imports of cement continued to be sold at the indicated prices, both the domestic industry's planned expansion and capital improvements would have to be cancelled and existing production facilities would be closed with a concomitant loss in employment. According to the United States, this information, while limited in scope, appears to minimally satisfy the requirements of Article 5.2(iv) relating to injurious price data and threat of injury. The United States considers it important to note, moreover, that the applicant alleged a threat of injury by virtue of the imports from Mexico, and did not assert the existence of present injury. The nature of information relevant for a threat case may be substantially different from that which is pertinent in a present injury case. Article 3.7 acknowledges this distinction in connection with determinations involving threat of injury. For the United States, it is only logical that the same distinction be recognized in terms of the information that is considered to be "reasonably available" to an applicant in requesting the initiation of an anti-dumping investigation. An applicant must still provide information, and not mere speculation, to support allegations of threat of injury. However, the United States suggests that the information may be different in kind than that which would be considered "reasonably available" in the context of an application involving present injury, if for no other reason than that threat of injury involves an incipient event.

5.44 In the view of the United States, the question that the Panel must have answered by the parties is whether the application contained the information reasonably available to the applicant respecting dumping and import volume. While more information certainly would have been useful in the application, this is likely to always be the case, and is not the issue here. For the United States, the issue is whether the applicant provided the information reasonably available to it as required by Article 5.2 (iii) and (iv) of the ADP Agreement.

5.45 The United States recalls that Mexico asserts as a factual matter that it was not provided with notification of the filing of an application prior to initiation of the investigation as required by Article 5.5 of the ADP Agreement. Articles 5.5 and 12.1 of the ADP Agreement contain language germane to the timing of notification to exporting Members and interested parties in respect of initiation of an investigation.

5.46 The United States notes Guatemala's argument that its interpretation of the requirements contained in Article 5.5 of the ADP Agreement is entitled to deference pursuant to Article 17.6(ii) of the ADP Agreement as a permissible construction of the cited language. The United States agrees that the standard of review enunciated in Article 17.6(ii) requires a panel to uphold an interpretation of the ADP Agreement by an investigating authority when the language in the ADP Agreement is susceptible to more than one permissible interpretation and the challenged interpretation is a

permissible construction. In the instant circumstances, however, the United States considers that the documents before the Panel suggest that the Guatemalan authorities may not have entertained their current reading of the requirements of Article 5.5 when the events at issue transpired. In fact, a memorandum from the Director for Economic Integration to the Ministry specifically states that the date of the initiation of the investigation shall be considered to be the date on which such notice is published in the Official Journal. Furthermore, in a facsimile communication between the Ministry and SECOFI, dated 26 July 1996, an official of the Ministry expresses her apologies for the belated notification to Mexico relating to initiation of the investigation. Specifically, the United States recalls that the Ministry states that the delayed notice was due to a mistake on the part of the responsible official who was said to be unfamiliar with the applicable notification provision in anti-dumping investigations. Additionally, the actual published notice makes no mention of the fact that the investigation would not commence until some later date, but instead, for example, notifies interested parties that they will have thirty days from the date of publication of the notice to submit any supplementary arguments and evidence that they may consider relevant. According to the United States, all three documents indicate that the Ministry and the Director of Economic Integration deemed the investigation to have commenced with the publication of the notice of initiation on 11 January 1996. Accordingly, there appears to be no actual dispute that, as Guatemala interpreted its own procedures, Guatemala failed to provide notice to Mexico before it initiated its investigation. The United States notes that the parties are in agreement that such a failure would violate Article 5.5. The Panel, thus, need not reach the question presented by Guatemala of whether, if a country issues a pre-initiation notice of intent to initiate an investigation, notices to affected exporting Members must precede such publication. Guatemala did not regard itself as following such procedure.

5.47 With regard to Guatemala's arguments concerning harmless error, the United States recalls that Article 17.6 of the ADP Agreement provides that the ADP Agreement is to be interpreted "in accordance with customary rules of interpretation of public international law", a reference which has (in the context of DSU Article 3.2) been interpreted to refer to the Vienna Convention. Article 31.3 of the Vienna Convention provides that "[t]here shall be taken into account, together with the context: (c) any relevant rules of international law applicable in the relations between the parties." According to the United States, the most widely recognized list of the sources of the "rules of international law" is Article 38(1) of the Statute of the ICJ. Article 38(1) lists the sources of international law to be applied by the ICJ; one of the items on that list is "judicial decisions ... as subsidiary means for the determination of rules of law." Such "judicial decisions" are generally recognized to include decisions of international arbitral tribunals, mixed claims tribunals and other tribunals which may have quite limited membership, as well as the decisions of the Court itself.<sup>157</sup> Thus, the United States submits that decisions of NAFTA panels are not necessarily irrelevant to WTO panel proceedings simply because the NAFTA forum is one which only involves three of the Members of the WTO. The decision of a NAFTA panel may constitute a subsidiary means for the determination of the rules of international law which the NAFTA panel has interpreted or applied; it is for the Panel to evaluate whether the interpretation or application of international law by the NAFTA panel in question is relevant, useful or persuasive. For instance, since Article 301.1 of the NAFTA incorporates Article III of the GATT into the NAFTA, a NAFTA panel may interpret Article III, and a WTO panel could find that interpretation useful and relevant, just as WTO panels and the Appellate Body have found decisions of the ICJ useful and relevant.<sup>158</sup>

5.48 The United States notes that the particular NAFTA decision cited by Guatemala was the panel decision on Fresh-Cut Flowers from Mexico (File No. USA-95-1904-05). The panel in question was convened under Chapter 19 of NAFTA to review a United States anti-dumping review determination. Chapter 19 panels apply and interpret domestic law of the NAFTA Parties, not international law. NAFTA Chapter 19 provides that a Party may request that a panel review an anti-dumping or

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<sup>157</sup> The United States notes that the decisions of the ICJ may involve only two States, and the ICJ has an extremely restrictive practice with respect to third party intervention.

<sup>158</sup> The United States refers, for example, to the citations to ICJ cases at WT/DS8/AB/R pp. 10, 11, 12.

countervailing duty determination to determine whether the determination was in accordance with the anti-dumping or countervailing duty law of the importing Party. Such panels are required to apply the standard of review under the domestic law of the importing Party and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority. Thus, the panel in Fresh-Cut Flowers from Mexico was applying United States domestic anti-dumping law and the United States standard of review set out in section 516A(b) of the Tariff Act of 1930, as amended, as well as the rules of procedure applicable to Chapter 19 reviews and the underlying provisions of Chapter 19 itself. The United States submits that to the extent that a NAFTA Chapter 19 panel or domestic court has based its findings on rules that are relevant solely to domestic law, its findings are not relevant in a WTO context. However, if a Chapter 19 panel or a domestic court has interpreted or applied rules of law that are common to both domestic and international law, or has addressed the meaning of a rule of international law in evaluating the validity of a domestic determination, its findings could be relevant in a WTO context.

5.49 The United States notes that the particular finding cited by Guatemala interpreted the Rules of Procedure for panels under Chapter 19. The Department of Commerce had missed the deadline for filing a notice of appearance (a normal prerequisite to participation in a Chapter 19 review). While expressing its displeasure, the panel in Fresh-Cut Flowers from Mexico decided to permit late filing of a notice by the Department under Rule 20 of the Rules of Procedure, which expressly permits a panel to extend any time period fixed in the Rules, if adherence to the time period would result in unfairness or prejudice to a participant or the breach of a general legal principle in the country in which the final determination was made. The panel then, in *obiter dicta*, proceeded to analogize to precedents in United States domestic law concerning “harmless error”.<sup>159</sup> According to the United States, this finding is of limited relevance to the issues which face the present Panel. The most apposite analogy to the situation cited in Fresh-Cut Flowers from Mexico would be if a party to a DSU dispute were to miss a filing deadline for a submission and the panel in that dispute were then to extend the deadline using its discretionary authority under DSU Article 12 and Appendix 3. That is not the situation presented in the Guatemalan anti-dumping investigation at issue in the present dispute.

5.50 The United States is aware of two instances in which the concept of “harmless error” was raised by a party before a panel, Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community (adopted)<sup>160</sup> and United States - Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico (unadopted).<sup>161</sup> The United States recalls that in neither of these disputes did the panel address the merits of the line of “harmless error” argumentation presented to it. In Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community, the panel considered that the concept of harmless error “. . . was inapplicable under the circumstances of the case before it.”<sup>162</sup> In United States - Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico, the panel disposed of

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<sup>159</sup> Panel decision of Dec. 16, 1996 on “In the Matter of Fresh-Cut Flowers from Mexico: Final Results of Anti-Dumping Duty Administrative Review”, Secretariat File No. USA-95-1904-05, pp. 31-40.

<sup>160</sup> Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community, SCM/179, paras. 41-43 and para. 204, adopted 27 December 1993.

<sup>161</sup> United States - Anti-Dumping Duties on Grey Portland Cement and Cement Clinker from Mexico, ADP/82, para. 3.5.2, not adopted, dated 7 September 1992.

<sup>162</sup> Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community, SCM/179, para. 271, adopted 27 December 1993.

the dispute on other grounds. Thus, in neither of the cases in which “harmless error” arguments were presented to a panel did the panels in question squarely take up the issue.<sup>163</sup>

5.51 In the view of the United States, Mexico requests that the Panel adopt a standard of review for purposes of consideration of the preliminary injury determination by Guatemala that would require the Panel to impermissibly substitute its judgment for that of the investigating authority in Guatemala. Article 17.6 of the ADP Agreement unmistakably instructs panels to uphold factual decisions of an investigating authority when “the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion . . .” If such conditions are satisfied, the evaluation by the national investigating authority shall not be overturned, even though the panel might have reached a different conclusion.<sup>164</sup> According to the United States, the limited scope of review contained in Article 17.6 (i) thus means that: (1) panels are not to reweigh the evidence; and (2) a decision that considers the required factors set forth in Articles 2 and 3 of the ADP Agreement, and otherwise rests on properly established facts, and an unbiased and objective evaluation, shall be left undisturbed by a reviewing panel.

5.52 In the view of the United States, Guatemala's preliminary determination carefully discusses the relevant factors contained in Articles 3.4 and 3.7 of the ADP Agreement regarding threat of injury and identifies the basis for its conclusions respecting causation.<sup>165</sup> This is all that the ADP Agreement requires when the facts on which the Authority relies have been properly established and the analysis of those facts was unbiased and objective.<sup>166</sup> More specifically, the United States recalls that the Ministry cited several specific factors in its consideration of threat of injury in its preliminary determination, coincident with the imposition of the provisional measure. Guatemala relied on increased import volume, accumulated inventories, underutilized capacity, reduced domestic sale quantities and lower domestic sales prices, lost customers, and excess capacity and depressed demand

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<sup>163</sup> According to the United States, had these panels addressed the “harmless error” arguments, the Appellate Body’s findings in Japan - Taxes on Alcoholic Beverages, Report of the Appellate Body, WT/DS8/AB/R, pages 14-15, adopted 4 October 1996, regarding the relevance of GATT/WTO panel reports would have been important for the Panel’s consideration here.

<sup>164</sup> According to the United States, the panel in Korea - Anti-dumping Duties on Imports of Polyacetal Resins from the United States, BISD 40S/205, para. 227, adopted 27 April 1993, reached precisely this conclusion. That panel stated that:

"The Panel considered that a review of whether the KTC’s determination was based on positive evidence did not mean that the Panel should substitute its own judgment for that of the KTC as to the relative weight to be accorded to the facts before the KTC. To do so would ignore that the task of the Panel was not to make its own independent evaluation of the facts before the KTC to determine whether there was material injury to the industry in Korea but to review the determination as made by the KTC for consistency with the Agreement, bearing in mind that in a given case reasonable minds could differ as to the significance to be attached to certain facts. The Panel considered that a proper review of the KTC’s determination against requirement of positive evidence under Article 3:1 meant that it should examine whether the factual basis of the findings articulated in the determination was discernible from the text of the determination and reasonably supported those findings."

<sup>165</sup> The United States notes that, in its first submission, Mexico concedes that: “[t]he Ministry concluded that there was a threat of injury, on the basis of the following factors: increased imports, accumulation of inventories and under-utilization of plant capacity, contracting sales, falling prices of domestic product, loss of clients and excess plant capacity in export companies and the situation of demand on the Mexican Market.” Mexico, thus, apparently is not alleging that the Guatemalan authorities failed to consider the necessary factors, but that it evaluated such factors in an erroneous fashion.

<sup>166</sup> The United States notes that in United States - Woven Wool Shirts and Blouses from India, WT/DS/33R, Report of the Panel, adopted 23 May 1997, para. 7.21, the panel declared, in a dispute settlement involving an agreement that does not contain a special standard of review, that: “DSU panels do not reinvestigate the market situation but rather limit themselves to the evidence used by the importing Member in making its determination to impose the measure.”

in Mexico to support its preliminary affirmative determination of threat of injury. Each of the cited factors is set forth in either Article 3.4 or 3.7 as an appropriate element for consideration respecting threat of injury determinations. Thus, the United States considers it difficult to reconcile Mexico's assertions that Guatemala failed to give consideration to the factors in Articles 3.4 and 3.7 with the explicit discussion of these factors in the preliminary determination by Guatemala. Furthermore, while Guatemala's preliminary decision did not address all of the factors in Articles 3.4 and 3.7, the United States suggests that it was not necessary to do so. Neither of those Articles requires discussion of all of the listed factors in an injury or threat of injury determination. Moreover, the United States recalls that each Article also specifically includes the proviso that the lists are not exhaustive and no single factor or group of factors is decisive, recognizing the ability of national authorities to discern the relative importance of each factor in the particular circumstances of each investigation.

5.53 In the view of the United States, Mexico has not made the requisite showing under the pertinent standard of review that the factual findings reached by Guatemala were either not properly established or were biased. Although Mexico alleges that the factual determinations in issue were biased and not impartial, no evidence has been provided to support such claims. Nor, according to the United States, is bias indicated by the manner in which the evidence was interpreted by the authorities in Guatemala.<sup>167</sup> The factual evidence before the Guatemalan authorities is described at length in their preliminary determination and first submission to this Panel. A review of the first submission of Mexico on these threat of injury factors reveals that Mexico has only offered an alternative reading of the evidence or, in some cases, only suggested that an alternative reading might be possible, not that an alternative finding is necessitated by the factual record. Given this situation, the United States submits that there is no basis for the Panel to substitute its interpretation of the facts for those of the authorities in Guatemala, and to do so would contravene the clear standard of review adopted for anti-dumping cases in Article 17.6(i). Thus, it is evident that Mexico is actually asking this Panel to conduct a *de novo* examination and to reweigh the evidence respecting each factual finding by the Guatemalan authorities. Not only is the requested exercise unjustified given the Guatemalan authorities' express discussion of the applicable threat factors and causation, but it would substitute Mexico's suggested factual determinations for those of the Guatemalan investigating authorities, a process that would be unprecedented and in direct contravention of the standard of review established by Article 17.6(i).

5.54 The United States notes Mexico's argument that the Ministry contravened Article 6.1 and Annex II, Paragraph 1, of the ADP Agreement by extending the period of investigation in its anti-dumping investigation from June 1995 through November 1995, inclusive, to include the additional period of December 1995 through May 1996.

5.55 The United States recalls that Article 6 contains most of the ADP Agreement's provisions pertaining to the methodology for data collection by national investigating authorities and sets forth in considerable detail the procedural requirements that shall apply in the collection of information for purposes of determinations in anti-dumping investigations. These provisions include specific procedural protections for the parties participating in an investigation, such as minimum response times for information requests, and confidentiality safeguards for the information that interested parties submit. Article 6.1 provides that "[a]ll interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in

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<sup>167</sup> In EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil, ADP/137, Report of the Panel, paras. 512-513, adopted 30 October 1995, the panel determined that where an investigating authority had two sets of inconsistent data before it, neither of which was necessarily more accurate than the other, the authorities' decision to base its determination on one set of data as opposed to the other did not indicate bias or lack of objectivity. In the view of the United States, a party attempting to prove that an investigating authority's determination is not "unbiased" within the meaning of Article 17.6(i) of the ADP Agreement must present positive evidence that the decision was influenced by bias or prejudice; mere allegations and conjecture cannot possibly satisfy the challenging party's burden on this issue.

writing all evidence which they consider relevant . . . .” According to the United States, this paragraph does not specify when investigating authorities must provide such notice, nor does it preclude the investigating authorities from seeking additional information after any specific point in an investigation. Instead, Article 6.1.1 simply requires that “[e]xporters or foreign producers receiving questionnaires . . . shall be given at least 30 days for reply.” Thus, the emphasis is on ensuring a reasonable amount of time for preparation of responses to any information requests, not on when questionnaires are distributed. The United States submits that Article 6 is entirely silent on the question of when information requests shall be sent during an investigation and whether supplemental questionnaires may be sent to foreign producers and exporters. In the absence of such restrictions either in Article 6 or the other articles of the ADP Agreement, investigating authorities may issue questionnaires as frequently as necessitated by the particular circumstances of an investigation to elicit information necessary for a determination.<sup>168</sup> According to the United States, the ADP Agreement conditions the reasonable exercise of such investigative authority solely on an investigative authority’s provision of a reasonable opportunity for respondents to answer the information requests.

5.56 The United States submits that consideration of Paragraph 1, Annex II of the ADP Agreement, does not warrant a different result. This paragraph instructs investigating authorities to advise interested parties as soon as possible after the initiation of an investigation precisely what types of information will be required and how the information should be structured. In the opinion of the United States, by stating that such guidance will be provided as soon as possible, the paragraph anticipates that there will be circumstances in which an investigating authority will be unable to provide all of the precise specifications of the information to be required as soon as the investigation is initiated. According to the United States, the entire tenor of Annex II to the ADP Agreement in this regard is to ensure, to the greatest degree, that responding exporters or foreign producers possess advance notice of the information requirements, possess a reasonable opportunity to respond, and are able to submit information in a format and medium that is compatible with the resources available to them. The United States suggests that were Paragraph 1, Annex II, read to preclude an investigating authority from seeking additional information, including information respecting a more recent time period, it would undermine such other provisions of the ADP Agreement as Articles 7.4 and 9.1 (information necessary to determine whether a duty lower than the margin of dumping would be sufficient to remove injury) and Article 10.2 (post-provisional information necessary to determine effect of imports). The United States considers that the implementation of these provisions certainly would be more difficult, if not impossible, if the investigating authorities could not seek additional information to make those determinations.<sup>169</sup> Furthermore, the ADP Agreement, particularly with respect to the subject of threat of injury, recognizes the importance of using as much current

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<sup>168</sup> The United States notes that, in the conduct of anti-dumping investigations, investigating authorities are routinely confronted with complex factual situations. It would be impossible to state with complete confidence at the outset of an investigation precisely all of the information that will be necessary to reach a final determination. That would presume a level of prescience that neither the investigating authorities nor the parties themselves can legitimately claim.

<sup>169</sup> The United States recalls that Article 76 of Mexico’s Regulations under the Foreign Trade Act passed on 27 July 1993 provides SECOFI with similar authority:

"[t]he period of investigation to which the foregoing paragraph refers may be modified at the discretion of the Ministry to cover a period which includes imports made subsequent to the commencement of an investigation. In that case, decisions to impose provisional or final countervailing duties shall refer both to the original period and the extended period."

ADP/1/Add.27/Rev.2 (14 Feb.1994).

information as possible.<sup>170</sup> The United States submits that an interpretation of Paragraph 1, Annex II, that makes it impossible for investigating authorities to collect current data would certainly be incompatible with the intent of the Agreement.<sup>171</sup>

5.57 The United States recalls that Mexico also asserts that the Ministry of the Economy in Guatemala failed to use a technical accounting study provided to it by the Mexican exporter in lieu of verification. The United States does not concur with the Government of Mexico's argument that the Ministry was required to base its final determination, in whole or in part, upon unverified "technical accounting evidence" regarding the exporting company's normal value and export prices which was limited to the original period of investigation. Similarly, the United States does not concur with Mexico's view that the Guatemalan authorities violated the ADP Agreement when the Ministry of the Economy based its final determination upon the facts available pursuant to Article 6.8. Mexico's claims incorrectly ignore the exporting firm's failure to provide the investigating authority with timely and complete information regarding its sales during the extended period of investigation. According to the United States, reasonable extensions of the investigatory period are not contrary to the ADP Agreement, especially, where as here the exporting firm was given additional time to respond.

5.58 The United States submits that the remaining disputes concerning the procedural aspects of the investigation involve questions of fact on which the United States is generally not in a position to comment given the limited documents available to it, but which obviously the Panel must resolve. Importantly, both Mexico and Guatemala acknowledge the legal requirements in the pertinent provisions that they have identified in Article 6, and Paragraphs 2 and 7 of Annex I of the ADP Agreement relating to these matters. Moreover, Mexico and Guatemala do not appear to have different interpretations of those procedural requirements. According to the United States, their dispute is confined to whether and when certain actions occurred and, therefore, in deciding these factual disputes it is unnecessary for this Panel to address the precise legal requirements imposed by the pertinent provisions of the Agreement that the parties have identified. The United States suggests that all that the Panel need decide is whether, based on the record, the rights provided by the ADP Agreement were accorded to Mexico.

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<sup>170</sup> According to the United States, in United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Salmon From Norway, ADP/87, Report of the panel, adopted 27 April 1994, para. 580, the panel considered a related issue. There the panel considered whether Article 3.4 of the Tokyo Round Anti-Dumping Code required that a present injury finding be based on injury as of the time of the final determination. The language considered by that panel is virtually verbatim with language now contained in Article 3.5 of the ADP Agreement. The panel concluded that the language "are ... causing material injury" could not be read to require that an investigating authority collect information regarding injury right up to the time of its final determination without undermining other provisions of the Tokyo Round Anti-Dumping Code, including those provisions relating to parties' rights to comment on record information. The panel's report, however, evidences the importance of incorporating data regarding injury that is current within the constraints of practicality and procedural protections afforded interested parties.

<sup>171</sup> Alternatively, if the ADP Agreement were interpreted as allowing authorities to make only a single request for information, the United States suggests that authorities would make unduly broad requests for information. Such a result could not be in anyone's interests.

5.59 The United States submits that the specific remedies<sup>172</sup> of revocation and duty refunds requested by Mexico go far beyond the types of remedies recommended by the overwhelming preponderance of prior GATT 1947 and WTO panels. In virtually every case in which a panel has found a measure to be inconsistent with a GATT obligation, panels have issued the general recommendation that the country “bring its measures . . . into conformity with GATT.”<sup>173</sup> The United States submits that this is true not only for GATT disputes in general, but for disputes involving the imposition of anti-dumping or countervailing duty measures.<sup>174</sup>

5.60 The United States recalls that this well-established practice is codified in Article 19.1 of the DSU, which provides:

"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." (footnotes omitted).

Indeed, in the first case to work its way through the new dispute settlement system, the United States submits that the recommendations of both the panel and the Appellate Body carefully adhered to Article 19.1.<sup>175</sup>

5.61 The United States submits that the requirement that panels make general recommendations reflects the purpose and role of dispute settlement in the WTO, and before it the GATT 1947. Article 3.4 of the DSU provides that “[r]ecommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter,” and Article 3.7 provides that “[a] solution mutually acceptable to the parties to a dispute . . . is clearly to be preferred.” To this end, Article 11 of the DSU directs panels to “consult regularly with the parties to the dispute and give them adequate

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<sup>172</sup> By “specific” remedy, the United States means a remedy that requires a party to take a particular, specific action in order to cure a WTO-inconsistency found by a panel. By “retroactive” remedy, the United States means a remedy that requires a party to take a particular, specific action relating to transactions that occurred prior to the adoption of a panel report. In other words, retroactive remedies are a subset of specific remedies.

In the context of this case, revocation would be a specific, but not a retroactive, remedy, because a revocation would apply prospectively to future imports. A duty refund, on the other hand, would be both a specific and a retroactive remedy, because it would apply to imports that occurred prior to the adoption of a panel report.

<sup>173</sup> The United States refers, for example, to Canada - Measures Affecting Exports of Unprocessed Herring and Salmon, BISD 35S/98, 115, para. 5.1, adopted 22 March 1988. The United States avoids a lengthy citation of all other panel reports in which panels have made recommendations using similar language; the number of such reports is well in excess of 100.

<sup>174</sup> The United States refers, for example, to Canadian Countervailing Duties on Grain Corn from the United States, BISD 39S/411, 432, para. 6.2, adopted 28 April 1992; Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States, ADP/92, adopted 2 April 1993, para. 302.

<sup>175</sup> The United States recalls that in its report on United States - Standards for Reformulated and Conventional Gasoline, adopted 20 May 1996, WT/DS2/AB/R, the Appellate Body recommended “that the Dispute Settlement Body request the United States to bring the baseline establishment rules contained in Part 80 of Title 40 of the Code of Federal Regulations into conformity with its obligations under the *General Agreement*.” The panel in that case issued a virtually identical recommendation. WT/DS2/R, adopted 20 May 1996, para 8.2.

The United States argues that even more noteworthy is Japan - Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 34, in which the Appellate Body recommended “that the Dispute Settlement Body request Japan to bring the Liquor Tax Law into conformity with its obligations under the General Agreement on Tariffs and Trade 1994.” Significantly, in that case, which involved the imposition of a tax that discriminated against imported alcoholic beverages, the Appellate Body did not recommend that Japan refund all of the taxes that it had collected in violation of its GATT 1994 obligations.

opportunity to develop a mutually satisfactory solution.” Ideally, a mutually agreed solution will be achieved before a panel issues its report. However, if this does not occur, the United States submits that a general panel recommendation that directs a party to conform with its obligations still leaves parties with the necessary room to cooperate in arriving at a mutually agreed solution.<sup>176</sup> Indeed, a Member generally has many options available to it to bring a measure into conformity with its WTO obligations. According to the United States a panel cannot and should not prejudge by its recommendation the solution to be arrived at by the parties to the dispute after the DSB adopts the panel’s report.

5.62 The United States notes in addition that the requirement that panels issue general recommendations comports with the nature of a panel’s expertise, which lies in the interpretation of covered agreements. Panels generally lack expertise in the domestic law of a defending party.<sup>177</sup> Thus, the United States argues that while it is appropriate for a panel to determine in a particular case that a Member’s legislation was applied in a manner inconsistent with that country’s obligations under a WTO agreement, it is not appropriate for a panel to dictate which of the available options a party must take to bring its actions into conformity with its international obligations. The compliance process under the DSU makes the precise manner of implementation a matter to be determined in the first instance by the Member concerned, subject to limited rights to compensation or retaliation by parties that have successfully invoked the dispute settlement procedures. The United States submits that in Article 19 of the DSU, the drafters precluded a panel from prejudging the outcome of this process in their recommendations.

5.63 According to the United States, retroactive remedies, such as a duty refund, suffer from all of the defects described above regarding specific remedies. In addition, however, retroactive remedies are inconsistent with the established practice of panels of refraining from recommending remedies that attempt somehow to restore the *status quo ante* or otherwise compensate the prevailing party for WTO-inconsistent actions taken by the defending party. The United States suggests that this established practice was best demonstrated in Norway - Procurement of Toll Collection Equipment for the City of Trondheim.<sup>178</sup> This case involved a procurement conducted by Norway for electronic toll collection equipment for the city of Trondheim. The United States alleged that Norway had violated its obligations under the Tokyo Round Agreement on Government Procurement, and the panel agreed. However, the United States also requested that the panel recommend that Norway bring its practices into compliance with regard to the Trondheim procurement itself, a transaction completed prior to the panel ruling. In other words, the United States requested a retroactive remedy. The panel’s rejection of the United States’ request was unequivocal:

"[T]he Panel noted that all the acts of non-compliance alleged by the United States were acts that had taken place in the past. The only way mentioned during the Panel’s proceedings that Norway could bring the Trondheim procurement into line with its obligations under the Agreement would be by annulling the contract and recommencing the procurement process. The Panel did not consider it appropriate to

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<sup>176</sup> The United States refers to a statement by Prof. Jackson:

"One of the basic objectives of any dispute procedure in GATT has been the effective resolution of the dispute rather than “punishment” or imposing a “sanction” or obtaining “compensation.” This objective has been recognized explicitly by GATT committees. The prime objective has been stated to be the “withdrawal” of a measure inconsistent with the General Agreement. "

John H. Jackson, *World Trade and the Law of the GATT* 184 (1969) (citations omitted).

<sup>177</sup> The United States recalls that Article 8.3 of the DSU provides that citizens of Members whose governments are parties to a dispute normally shall not serve on a panel concerned with that dispute, absent agreement by the parties.

<sup>178</sup> Norway - Procurement of Toll Collection Equipment for the City of Trondheim, GPR/DS2/R, adopted 13 May 1992.

make such a recommendation. Recommendations of this nature had not been within customary practice in dispute settlement under the GATT system and the drafters of the Agreement on Government Procurement had not made specific provision that such recommendations be within the task assigned to panels under standard terms of reference."<sup>179</sup>

In addition, the panel stated that:

"[U]nder the GATT, it was customary for panels to make findings regarding conformity with the General Agreement and to recommend that any measures found inconsistent with the General Agreement be terminated or brought into conformity *from the time that the recommendation was adopted.*"<sup>180</sup>

5.64 The United States submits that this rejection of retroactive remedies was firmly grounded in GATT 1947, and now WTO, practice. Retroactive remedies, such as a duty refund, are seen as a mechanism for undoing the consequences of an illegal act. In contrast, GATT 1947/WTO rules generally are considered as protecting "expectations on the competitive relationship between imported and domestic products," rather than "expectations on export volumes."<sup>181</sup> Thus, the United States notes for instance, that no GATT 1947 or WTO panel ever has awarded monetary compensation to an exporting country for lost trade, even when blatantly-illegal quantitative restrictions had been imposed. According to the United States, moreover, even if GATT 1947/WTO rules were intended to restore lost trade volumes, the retroactive remedy of a duty refund requested by Mexico would not accomplish this objective, because the repayment of duties to individual importers would not reestablish the competitive conditions that a prevailing country could have expected in the absence of a WTO-inconsistent action by a party.

5.65 According to the United States, panels have recommended specific and/or retroactive remedies in only three adopted panel reports, all involving anti-dumping or countervailing duties. However, these cases constitute aberrations from established GATT 1947 practice, as described above and as now codified in Article 19.1 of the DSU. Moreover, the reports in these cases offer *no* explanation as to why remedies recommended in anti-dumping and countervailing duty disputes should be different from those recommended in other types of disputes, and, in fact, the DSU itself indicates that remedies in anti-dumping and countervailing duty disputes should be no different from those recommended in other types of disputes. The United States submits that, essentially, these reports are the "exceptions that prove the rule," and this Panel should refrain from following them.<sup>182</sup>

5.66 The United States submits that the WTO established an integrated dispute settlement system through the DSU, which applies to all covered agreements.<sup>183</sup> However, where appropriate, the negotiators included in certain covered agreements special or additional rules and procedures on dispute settlement.<sup>184</sup> To the extent there is a difference between the rules and procedures of the DSU

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<sup>179</sup> *Ibid.*, para. 4.17.

<sup>180</sup> *Ibid.*, para. 4.21 (emphasis added).

<sup>181</sup> The United States refers, for example, to United States - US Taxes on Petroleum and Certain Imported Substances, BISD 34S/136, at para. 5.1.9., adopted 17 June 1987.

<sup>182</sup> According to the United States, GATT panel reports are not *stare decisis*, panels do not legislate, and one panel is not bound by the reasoning of another. These points were underscored in Japan - Taxes on Alcoholic Beverages, WT/DS/8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, report of the Appellate Body, adopted 1 November 1996, p. 15, where the Appellate Body stated that panel reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute. In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*." (Footnote omitted).

<sup>183</sup> The United States refers to Article 1.1, DSU.

<sup>184</sup> The United States refers to Article 1.2, DSU. These special or additional rules are listed in Appendix 2 to the DSU.

and the “special or additional” rules and procedures in Appendix 2, the latter are to prevail.<sup>185</sup> Significantly for the United States, several of these special or additional rules relate to the types of recommendations that a panel or other body may recommend. For example, Article 4.7 of the SCM Agreement provides that in a dispute involving a prohibited subsidy, “the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the Panel shall specify in its recommendation the time period within which the measure must be withdrawn.”<sup>186</sup> Article XIII:3 of the General Agreement on Trade in Services provides: “If the measure is determined by the DSB to have nullified or impaired such a benefit, the Member affected shall be entitled to a mutually satisfactory adjustment on the basis of paragraph 2 of Article XXI, which may include the modification or withdrawal of the measure.” According to the United States, the DSU itself indicates that where the drafters intended a departure from the standard remedy provided for in Article 19.1, they expressed this intent clearly. Thus, Article 26.1(a) of the DSU provides that if a panel or the Appellate Body should find non-violation nullification or impairment under Article XXIII:1(b) of GATT 1994, “the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment.”

5.67 The United States suggests that these various provisions demonstrate that when the Uruguay Round negotiators wanted to clarify or elaborate on the types of remedies that a panel should recommend or to which a prevailing party should be entitled, they drafted a special or additional rule or otherwise expressly stated their intent. However, notwithstanding the fact that both the ADP Agreement and the SCM Agreement contain special or additional dispute settlement rules,<sup>187</sup> the negotiators did not provide special or additional rules regarding the remedies to be recommended in anti-dumping or countervailing duty disputes. The United States submits that there can be no clearer indication that, in so far as remedies are concerned, the drafters did not intend that anti-dumping and countervailing duty disputes be treated differently from other types of disputes. Put differently, the drafters intended that Article 19.1 of the DSU apply to anti-dumping and countervailing duty disputes, and that panels refrain from recommending specific, retroactive remedies in such disputes.

5.68 The United States submits that the DSU is dispositive of the question as to whether there should be an exception in anti-dumping and countervailing duty disputes in favour of specific or retroactive remedies. However, even if *arguendo* the DSU were not dispositive of this issue, the fact remains that under the pre-WTO regime, there was no consensus that retroactive remedies were appropriate in anti-dumping and countervailing duty disputes. To the contrary, the United States suggests that the issue of remedies was an extremely contentious one. The first adopted panel report to contain a specific and retroactive remedy recommendation was New Zealand - Imports of Electrical Transformers from Finland.<sup>188</sup> In that case, the panel, as an afterthought, recommended that New Zealand revoke the anti-dumping determination in question and reimburse any anti-dumping duties paid.<sup>189</sup> The panel offered no explanation, legal justification or discussion regarding this radical departure from established GATT practice. Indeed, according to the panel report, the complaining party had not in fact requested this remedy and the parties had not presented any arguments in this connection. Instead, the United States considers that this unprecedented remedy appears to have been an independent, and unjustified, initiative on the part of the panel. The next

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<sup>185</sup> *Ibid.*

<sup>186</sup> Similarly, the United States recalls that Article 7.8 of the SCM Agreement provides: “[w]here a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy *shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy*” (emphasis added). Although not couched in terms of panel recommendations, Article 7.8 clearly deals with the question of remedies.

<sup>187</sup> The United States refers to Annex 2, DSU.

<sup>188</sup> New Zealand - Imports of Electrical Transformers from Finland, BISD 32S/55, adopted 18 July 1985. The United States notes that this is the only authority that Mexico cites in support of its request for the revocation and refund of anti-dumping duties.

<sup>189</sup> *Ibid.*, BISD 32S/70, para. 4:11.

adopted panel report containing a specific and retroactive remedy recommendation was United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, in which the panel recommended that the United States reimburse countervailing duties either in whole or in part.<sup>190</sup> However, the only justifications offered by the panel for its recommendation were a citation to New Zealand - Imports of Electrical Transformers from Finland<sup>191</sup> (which, as discussed, itself provided no legal justification) and a citation to an unadopted panel report.<sup>192</sup> The final adopted panel report was United States - Measures Affecting Imports of Softwood Lumber from Canada.<sup>193</sup> That case involved, in part, the imposition by the United States of interim measures under section 304 of the Trade Act of 1974 in connection with a countervailing duty investigation on softwood lumber from Canada. The panel concluded that the interim measures were not justified under the Tokyo Round Subsidies Code, and recommended that the United States terminate the measures and refund any cash deposits collected. However, the United States recalls that in justifying its recommendation of a specific and retroactive remedy, the panel merely cited to New Zealand - Imports of Electrical Transformers from Finland<sup>194</sup> (which itself contained no justification) and United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada<sup>195</sup> (which simply cited New Zealand - Imports of Electrical Transformers from Finland).

5.69 The United States notes that while three adopted panel reports involving anti-dumping or countervailing duties contain specific and retroactive remedy recommendations, none of these reports contains *any* justification (let alone a persuasive justification) for remedies that were so at odds with established GATT 1947, and now WTO, practice. Moreover, the United States submits that this Panel should not attribute significance to the fact that the reports were adopted.<sup>196</sup> In the case of New Zealand - Imports of Electrical Transformers from Finland<sup>197</sup>, the minutes of the GATT Council meeting at which the report was adopted make clear that the United States and other countries simply did not focus on the nature of the remedy that the Panel had proposed.<sup>198</sup> In the case of United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada<sup>199</sup>, the United States made clear that it objected to the recommended remedy, and that it agreed to adoption only because United States courts already had overturned the countervailing duty order on pork and duties would be refunded in any event pursuant to domestic procedures. Therefore, as far as the United States was concerned, the case was moot, and there were no recommendations to be implemented by the United States.<sup>200</sup> Finally, in United States - Measures Affecting Imports of Softwood Lumber from Canada<sup>201</sup>, the United States agreed to adoption only because of the unusual circumstances presented by the case. The United States made clear that it did not accept the panel's recommended

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<sup>190</sup> United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, BISD 38S/30, paras. 4.11, 5.2, adopted 11 July 1991.

<sup>191</sup> New Zealand - Imports of Electrical Transformers from Finland, BISD 32S/55, adopted 18 July 1985.

<sup>192</sup> The United States notes that the unadopted report in question was Canada - Imposition of Countervailing Duties on Imports of Manufactured Beef from the EEC, SCM/85, issued on 13 October 1987, which also contained no explanation for recommending a refund of countervailing duties.

<sup>193</sup> United States - Measures Affecting Imports of Softwood Lumber from Canada, BISD 40S/358, adopted 27-28 October 1993.

<sup>194</sup> New Zealand - Imports of Electrical Transformers from Finland, BISD 32S/55, adopted 18 July 1985.

<sup>195</sup> United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, BISD 38S/30, adopted 11 July 1991.

<sup>196</sup> The United States suggests that adopted panel reports are not binding on subsequent panels.

<sup>197</sup> New Zealand - Imports of Electrical Transformers from Finland, BISD 32S/55, adopted 18 July 1985.

<sup>198</sup> The United States refers to C/M/191, p. 34-35.

<sup>199</sup> United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, BISD 38S/30, adopted 11 July 1991.

<sup>200</sup> The United States refers to C/M/251, p. 15-16.

<sup>201</sup> United States - Measures Affecting Imports of Softwood Lumber from Canada, BISD 40S/358, adopted 27-28 October 1993.

remedy, and that it did not view the panel's recommendation as having any precedential value.<sup>202</sup> Indeed, according to the United States, the history of unadopted panel reports recommending specific and retroactive remedies demonstrates that there was no consensus under the GATT 1947 that such remedies were ever appropriate. In this regard, the United States contends that the leading case is United States - Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden, in which the panel recommended that an anti-dumping order be revoked and anti-dumping duties refunded.<sup>203</sup> In this case, the United States indicated before the Tokyo Round Committee on Anti-Dumping Practices that it could not agree to the adoption of the report *solely* because of the specific and retroactive nature of the remedy recommended by the panel.<sup>204</sup> Moreover, the United States was not alone in objecting to the remedy put forward by the panel. The representative of the EEC stated "that the remedy suggested by the panel went too far."<sup>205</sup> In a similar vein, the representative of Australia stated that "[i]f one applied the reasoning behind the suggestion made in United States - Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden more widely, the implications would be quite considerable," and that adoption of the panel report would "not necessarily imply acceptance of [the panel's] suggestion either in the current case or as a principle to be applied in future cases."<sup>206</sup>

5.70 The United States submits that notwithstanding that three adopted panel reports contained recommendations of specific and retroactive remedies, the fact remains that the propriety of such recommendations was an unsettled and contentious matter under the old GATT. Given this fact, and given the fact that the three adopted reports are devoid of any justification for treating anti-dumping and countervailing disputes differently from other disputes, the United States argues that this Panel should not accord these reports any weight in so far as the issue of remedies is concerned.<sup>207</sup> According to the United States, the overwhelming weight of GATT 1947 and WTO practice is that panels should issue general recommendations that call for a Member to bring an offending measure into conformity with its international obligations. This practice has now been codified in Article 19.1 of the DSU. Therefore, the United States submits that if this Panel should find that Guatemala acted inconsistently with its obligations under the ADP Agreement, the Panel should refrain from recommending that Guatemala revoke its anti-dumping duties and refund any duties collected. Instead, the Panel should adhere to Article 19.1 and recommend that Guatemala bring its anti-dumping measure on grey portland cement from Mexico into conformity with Guatemala's obligations under the ADP Agreement.

## VI. INTERIM REVIEW

6.1 On 3 April 1998, both Mexico and Guatemala requested the Panel to review, in accordance with Article 15.2 of the DSU, precise aspects of the interim report that had been issued to the parties on 23 March 1998. Guatemala requested that the Panel hold a meeting for that purpose. The Panel

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<sup>202</sup> The United States refers to SCM/M/67, para. 163. According to the United States, Australia stated that it had "strong reservations about the Panel's recommendation on remedies" and "also did not regard it as being of precedential value." *Ibid.*, para. 166.

<sup>203</sup> United States - Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden, ADP/47, issued 20 August 1990 (unadopted). The United States suggests that, in this case, too, the panel offered no justification for its recommendation other than a reference to New Zealand - Imports of Electrical Transformers from Finland.

<sup>204</sup> The United States refers to "Minutes of the Meeting Held on 30 April 1991," ADP/M/32 (28 June 1991), para. 105.

<sup>205</sup> *Ibid.*, para. 110.

<sup>206</sup> *Ibid.*, para. 113.

<sup>207</sup> The United States emphasizes that regardless of whatever precedential value the three adopted reports may have, the DSU indicates that there is no basis for carving out an exception in anti-dumping and countervailing duty disputes in favour of specific or retroactive remedies.

met with the parties on 16 April 1998 to hear their arguments concerning the interim report. The Panel carefully reviewed the arguments presented by the parties.

6.2 In approaching the interim review, the Panel drew guidance from Article 15.2 of the DSU, which states that "a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to Members". While the Panel approached the interim review stage with the broadest possible interpretation of Article 15.2 of the DSU, it was of the view that the purpose of the review meeting was not to provide the parties with an opportunity to introduce new legal issues and evidence, or to enter into a debate with the Panel. The purpose of the interim review, in the Panel's view, was to consider specific and particular aspects of the interim report. In this connection, the Panel noted that much of Guatemala's request for interim review consisted of proposed changes to the text of the findings insofar as they refer to Guatemala's arguments, asserting that the Panel "mischaracterized" its arguments. However, Guatemala did not explain in what respect the Panel's language was a "mischaracterization", and did not cite to any of its submissions or oral statements in support of its allegations. In these circumstances, the Panel found it difficult to evaluate the proposed textual changes. Nonetheless, the Panel considered the entire range of arguments presented by both parties in conducting the interim review.

6.3 Mexico reiterated its previously submitted amendments and additions to the descriptive part of the Report to the extent that such amendments had not been taken into account in the Interim Report. Guatemala repeated suggestions to revise certain aspects of the descriptive part it had previously submitted, and provided sources in support of some of those suggestions. The Panel accepted and introduced in its final report some of these proposed changes.

6.4 Mexico proposed changes to the text of paragraph 7.5. Mexico asserted that the first sentence did not correspond to what was stated by Mexico, but without any supporting reference to its previous submissions. Mexico made no argument in support of the proposed changes to the remainder of paragraph 7.5. The Panel has made some clarifying changes to the text of the paragraph.

6.5 Mexico proposed changes to the text of paragraph 7.39, without any supporting argument or references. The Panel did not accept Mexico's request on this point, concluding that the existing text of paragraph 7.39 reflected the Panel's views.

6.6 Mexico proposed changes to the text of paragraph 8.6. Mexico argued that, taking into account the "general sense" of the Panel's recommendation and its suggestion concerning implementation, certain changes should be made to the text. The Panel did not accept Mexico's request on this point, concluding that the existing text of paragraph 8.6 reflected the Panel's views.

6.7 Guatemala proposed changes to the text of paragraph 7.2 to reflect the fact that the consultations were concluded before the imposition of the definitive anti-dumping duty. The Panel has modified the paragraph accordingly.

6.8 Guatemala proposed changes to the text of paragraph 7.3 to reflect that Mexico's request for establishment of a panel did not identify the final definitive anti-dumping measure. As this fact is stated later, in paragraph 7.19 of the report, the Panel did not accept Guatemala's request.

6.9 Guatemala proposed changes to the text of paragraphs 7.4, 7.6, 7.11, 7.20, and 7.21. These proposals purported to "properly characterize" or "correct mischaracterizations of" Guatemala's arguments, without any stated justification or reference in support of its proposed changes. The Panel accepted in part Guatemala's requests, and has modified these paragraphs accordingly.

6.10 Guatemala proposed changes to the text of paragraphs 7.30 and 7.37 to delete references to the 26 July 1996 letter sent by telefax from the Guatemalan Ministry of Economy, and footnote 224. Guatemala argued that the letter was not transmitted in the course of Guatemala's domestic anti-

dumping procedures, and was not included in the administrative record of the investigation, but was part of informal WTO consultations between Guatemala and Mexico, and therefore should not be considered by the Panel in making its findings. Guatemala's arguments in support of the proposed deletion were made during the course of the panel proceedings and rejected by the Panel, as is reflected in footnote 224. Moreover, as the Panel stated in footnote 224, it did not consider this document determinative, but concluded it would not be appropriate to ignore the existence of a document which was transmitted by Guatemala to Mexico during the course of the anti-dumping investigation by one of the Guatemalan Ministry employees conducting the investigation, and which was submitted to the Panel during its proceedings. Therefore, the Panel did not accept Guatemala's request on this point.

6.11 Guatemala proposed changes to the text of paragraph 7.40. Guatemala argues that it provided the Panel with evidence that any delay in providing notice under Article 5.5 did not have any effect on the course of the investigation, and that this evidence was submitted to rebut the presumption of nullification and impairment under Article 3.8 of the DSU. Guatemala did not refer to Article 3.8 of the DSU in any of its submissions, and while it did assert that any delay in notification had no effect on the investigation, this assertion was made only in the context of its argument on the issue of harmless error. The Panel considered that Guatemala did not argue in a clear manner that it had rebutted the presumption of nullification and impairment under Article 3.8 of the DSU during the proceedings, and that it was too late to make this argument at the interim review stage. Accordingly, the Panel did not accept Guatemala's request on this point.

6.12 Guatemala proposed changes to paragraph 7.47, asserting that the Panel "completely mischaracterizes" Guatemala's position, and "ignores Guatemala's explanation of its position in response to the Panel's question cited in footnote [231]". Guatemala has not provided the Panel with any references to its earlier submissions or oral statements in support of its assertions. With regard to the proposed changes to the first two sentences of this paragraph, the Panel considered that the proposed changes altered Guatemala's position from what was argued previously, and the Panel did not accept the request. With respect to the proposal to delete the last sentence of the paragraph, and the text of footnote 231, the Panel notes that Guatemala's position is set out in its answer to the Panel's question 30, which is quoted **in full** in footnote 231. The Panel is unaware of any further "explanation" of this response, and Guatemala has cited to none. Consequently, the Panel did not accept Guatemala's request on the latter point.

6.13 Guatemala proposed changes to paragraph 7.65. The Panel accepted in part Guatemala's request, and has modified the paragraph accordingly.

6.14 Guatemala proposed a change to paragraph 7.68. The Panel accepted Guatemala's request, and has modified the paragraph accordingly.

## VII. FINDINGS

### A. Introduction

7.1 This dispute arises out of the initiation and subsequent conduct by the Guatemalan Ministry of Economy ("the Ministry") of an anti-dumping investigation concerning imports of portland cement from Mexico. On 21 September 1995, Cementos Progreso SA ("Cementos Progreso"), the sole Guatemalan producer of cement, filed a request for initiation of an anti-dumping investigation. A supplementary request was filed on 9 October 1995. On 11 January 1996, the Ministry published a notice of initiation of an anti-dumping investigation regarding allegedly dumped imports of grey portland cement from Cruz Azul of Mexico. The Ministry notified the Government of Mexico of the initiation of the investigation on 22 January 1996. The Ministry requested certain import data from Guatemala's Directorate-General of Customs by letter dated 23 January 1996. On 16 August 1996,

Guatemala imposed a provisional anti-dumping duty of 38.72% on imports of type I (PM) grey portland cement from Cruz Azul of Mexico. The provisional duty was imposed on the basis of a preliminary affirmative determination. On 17 January 1997, Guatemala imposed a definitive anti-dumping duty of 89.54% on imports of grey portland cement from Cruz Azul of Mexico.

7.2 On 15 October 1996, after the imposition of the provisional anti-dumping duty but before the imposition of the definitive anti-dumping duty, Mexico requested consultations with Guatemala under Article 4 of the DSU and Article 17.3 of the ADP Agreement. Consultations were concluded on 9 January 1997, before the imposition of the definitive anti-dumping duty, but the parties failed to reach a mutually satisfactory solution.

7.3 On 13 February 1997, after the imposition of the definitive anti-dumping duty, Mexico requested the establishment of a panel to examine the consistency of Guatemala's anti-dumping investigation with its obligations under the ADP Agreement.

B. Preliminary Issues

1. Whether this dispute is properly before the Panel

7.4 In its first submission, Guatemala raised a number of preliminary issues which we must consider before proceeding to the substantive elements of this dispute, since they relate to our authority to examine the various substantive claims made by Mexico. Guatemala argues, relying on Articles 1 and 17.4 of the ADP Agreement and Articles 4 (consultations), 6.2 (request for establishment), and 19.1 (recommendations) of the Dispute Settlement Understanding ("DSU"), that a Panel may be established only to examine the consistency with WTO obligations of a particular measure or measures, identified in a request for consultations and in the request for establishment of a panel, and to make recommendations concerning such measure or measures. In a dispute involving anti-dumping, Guatemala argues that the measure alleged to be inconsistent with the ADP Agreement must be either a final anti-dumping measure, a price undertaking, or a provisional measure having a significant impact within the meaning of Article 17.4 of the ADP Agreement. Guatemala argues that the final anti-dumping measure imposed on imports of cement from Cruz Azul is not before us, because Mexico did not identify that measure in its request for consultations or in its request for establishment of the Panel. The provisional measure imposed by Guatemala, which was identified in the request for consultations and the request for establishment, is argued not to be before us because Mexico did not assert and demonstrate that it had a "significant impact". There is no price undertaking at issue. Guatemala argues that, because none of these three types of identified "measure" is properly before us, we must reject Mexico's complaint.

7.5 Mexico acknowledges that it has not challenged the final determination *per se*, and that the consistency of that determination with the ADP Agreement is therefore not before us. However, Mexico asserts that having requested and held consultations concerning specific identified "matters" relating to the initiation of the anti-dumping investigation, the imposition of a provisional measure, and the conduct of the final stage of the investigation by Guatemala, its request for establishment of a panel was proper, and the Panel is therefore required to consider its claims and issue an appropriate recommendation.

7.6 The question we must decide is whether, in a dispute under the ADP Agreement, we are limited to an examination of the consistency with the ADP Agreement of one of the three specific types of "measure" identified by Guatemala - provisional anti-dumping measure, final anti-dumping measure, or price undertaking, or whether the consistency of particular aspects of the initiation and/or conduct of an anti-dumping investigation with the ADP Agreement may themselves constitute a matter susceptible of examination by a panel. In deciding this question, we must consider the provisions of the ADP Agreement concerning dispute settlement, and assess their relationship to the relevant provisions of the DSU.

7.7 In considering the meaning to be given to various provisions of the ADP Agreement, we bear in mind that Article 3.2 of the DSU requires panels to interpret "covered agreements", including the ADP Agreement, "in accordance with customary rules of interpretation of public international law". The rules of treaty interpretation set forth in Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), have "attained the status of a rule of customary or general international law".<sup>208</sup> Article 31.1 of the Vienna Convention provides:

"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".

Moreover, Article 31.2 of the Vienna Convention expressly defines the context of the treaty to include the text of the treaty. Thus, it is clear to us that the entire text of the ADP Agreement is relevant to a proper interpretation of any particular provision thereof.<sup>209</sup>

7.8 Our authority in this dispute is governed by the provisions of the ADP Agreement and the DSU. Article 1.2 of the DSU provides in pertinent part that:

"The rules and procedures of this Understanding [the DSU] shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail".

Appendix 2 identifies Articles 17.4 through 17.7 of the ADP Agreement as among the special or additional rules and procedures referred to in Article 1.2.

7.9 Thus, to the extent that there is a difference between the DSU and Article 17.4 of the ADP Agreement, Article 17.4 prevails. Article 17.4 provides that:

"If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the **matter** to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer **such matter** to the DSB". (emphasis added).

7.10 Article 17.4 on its face does not provide that a Panel can be sought with respect only to a specific type of identified "measure". It provides that **if** consultations under Article 17.3 have failed, **and if** a final action to levy definitive anti-dumping duties has been taken or a price undertaking

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<sup>208</sup> United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 29 April 1996, p. 17.

<sup>209</sup> We have also kept in mind that, while adopted panel reports are not binding on subsequent panels, they do "create legitimate expectations among WTO Members, and therefore, should be taken into account where they are relevant to any dispute". Japan - Taxes on Alcoholic Beverages WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, pg. 14. Unadopted panel reports, on the other hand, have no legal status in the WTO system, although a panel may find useful guidance in the reasoning of such a report to the extent it is considered relevant. Id. at 14-15.

accepted, the "matter" may be referred to the DSB under Article 17.4.<sup>210</sup> Similarly, if a provisional measure has a significant impact, and is considered to have been taken contrary to Article 7.1 of the ADP Agreement, "such matter" may be referred to the DSB.

7.11 The question before us thus is what constitutes the "matter" which may be referred to the DSB under Article 17.4. Guatemala's position is that the "matter" must relate to the consistency of a "measure" - provisional or final, or price undertaking - with the ADP Agreement. We cannot agree with this restrictive interpretation of the term "matter" in Article 17.4. In our view, the "matter" which may be referred to the DSB is that "matter" with respect to which a Member requested consultations under Article 17.3 of the ADP Agreement.

7.12 Article 17.3 itself is not limited to consultations with respect to a specific type of measure, but is much broader in scope. It provides that:

"If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the **matter**, request in writing consultations with the Member or Members in question". (emphasis added).

The text of Article 17.3 does not on its face require that there be a "measure" about which consultations are requested, but only that there be nullification or impairment of some benefit.<sup>211</sup> Such nullification or impairment of a benefit could plainly arise in a situation where a procedural obligation under the ADP Agreement is not respected by the investigating authorities of a Member.

7.13 We recognize that Article 17.3 is not identified as a special or additional rule or procedure on dispute settlement in Appendix 2 of the DSU. However, it is specifically referred to in Article 17.4, which as noted provides that if "the consultations pursuant to paragraph 3 [of Article 17] have failed to achieve a mutually agreed solution..." the matter may be referred to the DSB. In our view, this reference requires that Article 17.3 must be interpreted so as to give effect to the provisions of Article 17.4, which prevail over any inconsistent provisions of the DSU. Thus, if Article 17.3 requires something different from the corresponding Article 4 of the DSU, the provisions of Article 17.3 must prevail, otherwise Article 17.4 would not be given full effect. That is to say, to the extent that Article 17.4 may require different procedures than does the DSU, Article 17.3 must be read so as to give effect to such different procedures.

7.14 Article 17.3 allows consultations about "matters", without any requirement that a particular type of measure be the subject of consultations. Article 17.4 allows referral to the DSB (that is, a request for establishment of a panel) of any "matter" on which consultations were held under Article 17.3. While Article 17.4 clearly requires that an action to levy definitive anti-dumping duties **have been taken**, (or a provisional measure having significant impact be in place or a price undertaking have been accepted) before a request for establishment can be made to the DSB, it cannot reasonably be read to mean that the **only** "matter" that may be referred to the DSB is a challenge to a specific final or provisional measure or price undertaking.

7.15 Moreover, Article 17.5, which governs the establishment of panels in disputes under the ADP Agreement, does not require that the request for establishment "identify the specific measures at issue", as does its corollary, Article 6 of the DSU. Instead, Article 17.5, which is again a special and additional rule which takes precedence over conflicting provisions of the DSU, provides that:

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<sup>210</sup> Indeed, Article 17.4 does not refer to a "final measure" at all - it refers to whether "final action has been taken ... to levy definitive anti-dumping duties or accept price undertakings...". The only reference to "measure" in Article 17.4 is the reference to "provisional measures" in the second sentence of that Article.

<sup>211</sup> As discussed further below, this language echoes the provisions of Article XXIII of GATT 1994.

"The DSB shall, at the request of the complaining party, establish a panel to examine the **matter** based upon:

- (i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, ...". (emphasis added).

This provision is phrased in the same language as Article 17.3, supporting the conclusion that the "matter" consulted about under Article 17.3, the "matter" referred to the DSB under Article 17.4, and the "matter" to be examined by a panel under Article 17.5, is in each instance the same matter, and is not limited to provisional or final measures or price undertakings.

7.16 This interpretation of the provisions of Article 17 provides for a coherent set of rules for dispute settlement specific to anti-dumping cases, taking account of the peculiarities of challenges to anti-dumping investigations and determinations, that replaces the more general approach of the DSU. The ADP Agreement sets forth a series of procedural and substantive obligations on Members in initiating and conducting investigations and imposing measures. In anti-dumping cases, the matter in dispute may not be the final measure in and of itself (or the provisional measure or any price undertaking), but may rather be an action taken, or not taken, during the course of the investigation. Article 17.3 clearly provides for consultations regarding such concerns. Article 17.4 then establishes **when** a Panel may be sought with respect to those concerns - after a final action to levy definitive anti-dumping duties has been taken, after the imposition of a provisional measure having significant impact, or after the acceptance of an undertaking - that is, after there is an affirmative determination in the investigation, resulting in an action whose existence has ongoing trade consequences for the exporting Member.<sup>212</sup>

7.17 By contrast, if there is a negative determination in the investigation, such that no undertaking is accepted, no provisional measure is imposed, or no final action is taken to levy anti-dumping duties, there are no ongoing trade consequences for the exporting Member as a result of an action by the importing Member. Under Article 17.4, no panel can be requested with respect to the matter about which consultations were held. Again, this is logical in the context of anti-dumping proceedings, since the "matter" about which consultations were held will have become moot in the absence of one of these actions.

7.18 Thus, we read Article 17.4 as a **timing** provision, establishing **when** a panel may be requested, rather than a provision setting forth the appropriate subject of a request for establishment of a panel. In addition to the logic underlying this interpretation, this interpretation also avoids a meaningless and purely formal requirement that a Member seek consultations concerning the final action to levy definitive anti-dumping duties, and wait the requisite time period before requesting establishment of a panel, in those situations where the issues of concern have already been identified and consultations have been held. Of course, if the substance of the final action to levy definitive anti-dumping duties itself is a "matter" concerning the Member, then further or additional consultations would have to be requested and held, before a request for a panel could be made.

7.19 In this case, in its request for consultations, Mexico raised issues concerning the initiation of the investigation by Guatemala, the provisional measure, and various aspects of the investigative process. Certain of these issues were the subject of consultations under Article 17.3. After the consultations failed to achieve a mutually satisfactory result, **and after final action to levy definitive anti-dumping duties was taken** by Guatemala, Mexico referred the matter about which consultations had been held to the DSB, requesting the establishment of a Panel with respect to that matter. Mexico

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<sup>212</sup> Thus, the possibility of panel requests on a piecemeal basis, identified by Guatemala and the US as a problem, does not exist, since a Panel can only be sought **after** these specific triggering events.

acknowledges that the final determination underlying the definitive anti-dumping duty was itself not the subject of the request for consultations, or of the request for establishment of a panel, and thus is not before us *per se*. Indeed, Mexico indicated at the first hearing that if it wanted to challenge the final determination, it would request consultations regarding it, and request the establishment of a panel to examine that matter.

7.20 Guatemala relies on the references to "measures" in Articles 4 (consultations), 6.2 (request for establishment), and 19.1 (recommendations) of the DSU in support of its position that the "matter" referred to in Articles 1 and 17.4 must be a specific measure. However, the interpretation advocated by Guatemala would not give effect to the language of Articles 17.4 and 17.5 of the ADP Agreement, and thus would not be consistent with Article 1.2 of the DSU, which establishes that primacy must be given to special and additional rules of procedure identified in Article 1.2 and Appendix 2 of the DSU. In addition, if Guatemala were correct in the view that a measure must be in place before consultations leading to a request for establishment can be held, and that the consultations that were held in this dispute, under Article 17.3, could not support a request for establishment, then the specific provisions of Article 17.4 would be rendered meaningless. An interpretation which renders part of the ADP Agreement meaningless, and particularly a part of the Agreement which is identified as a special and additional rule for dispute settlement taking precedence over the DSU, is contrary to rules of customary or general international law of treaty interpretation and thus should be avoided.<sup>213</sup>

7.21 Guatemala asserts that the "matter" referred to a panel under Article 17.4 of the ADP Agreement must be a measure in order for a panel to be able to issue a recommendation under Article 19.1 of the DSU. Article 19.1 provides, in pertinent part:

"Where a panel ... 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".

Arguably, in the absence of a "measure" in the narrow sense, that is, a final or provisional duty or a price undertaking, before a panel, a panel cannot make a meaningful recommendation in the terms provided for in Article 19.1. Thus, Guatemala argues, in order for a panel to be able to issue a recommendation in terms of Article 19.1, there must be a measure before it, and that measure must have been identified in the request for establishment of a panel. This is clearly in conflict with our conclusion regarding the interpretation of the provisions of the ADP Agreement as **not** limited to disputes involving only specific "measures". A restrictive reading of Article 19.1 would mean that, while the ADP Agreement provides for consultations and establishment of a panel to consider a matter without limitation to a specific "measure", the panel so established is not empowered to make a recommendation with respect to that matter. This would clearly run counter to the intention of the drafters of the DSU to establish an effective dispute resolution system for the WTO. In addition, it would undermine the special or additional rules for dispute settlement in anti-dumping cases provided for in the ADP Agreement. A broader reading of Article 19.1, on the other hand, **would** give effect to the special or additional dispute settlement provisions of the ADP Agreement, by allowing panels in anti-dumping disputes to consider the "matter" referred to them, and issue a recommendation with respect to that matter. As discussed below, the DSU provisions relied on by Guatemala do not, in our view, limit panels to the consideration only of certain types of specified "measures" in disputes.

7.22 Even assuming that the dispute settlement provisions of the ADP Agreement (Articles 17.3, 17.4, and 17.5 in particular) did not represent a coherent dispute settlement scheme which replaces the more general provisions of the DSU, the DSU's references to "measures" do not require the narrow

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<sup>213</sup> "One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility". United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 29 April 1996, p. 23.

reading given them by Guatemala. The terms of the DSU and GATT 1994 itself, as well as past GATT practice and evolving WTO practice, support the conclusion that the DSU does not preclude a panel from examining whether a Member's initiation and conduct of an anti-dumping investigation is consistent with its WTO obligations.

7.23 Article XXIII of GATT 1994 is the core WTO provision governing dispute settlement. Article XXIII of GATT 1994 sets forth the types of causes of action for which WTO dispute settlement is available to Members. Under Article XXIII:1, a Member is entitled to seek dispute settlement where it considers that:

"any **benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired** or that the attainment of any objective of the Agreement is being impeded as the result of

- (a) **the failure of another Member to carry out its obligations under this Agreement,**  
or
- (b) the application by another Member of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation, ..." (emphasis added).<sup>214</sup>

Thus, Article XXIII creates a cause of action wherever the failure of a Member to carry out its obligations results in nullification or impairment of benefits. Nothing in Article XXIII suggests that there is any limitation on a Member's right to pursue dispute settlement in cases where there is a violation of GATT 1994 which gives rise to the nullification or impairment of benefits. Certainly, there is no suggestion in Article XXIII itself that a Member may only seek dispute settlement where a specified "measure", defined in the narrow sense urged by Guatemala, gives rise to nullification or impairment of benefits.

7.24 The question then is whether the references to the term "measure" in various provisions of the DSU should be interpreted as narrowing the rights and causes of action set forth in Article XXIII by limiting the range of alleged violations of the GATT 1994 (and of other WTO Agreements) that could be subject to dispute settlement to those based on specified "measures". There is nothing in the DSU to suggest that the negotiators intended any such narrowing of Members' right to seek dispute settlement. Rather, it seems more likely that the term "measure" should be interpreted broadly in order to give effect to the substantive provisions of the WTO Agreement. To read "measure" narrowly would mean that a variety of violations of obligations which do not involve specified or identifiable measures would be outside the scope of the dispute settlement system. This is not an approach to be taken lightly unless such an intention can be clearly ascertained from the text of the DSU. In our view, no such intention can be drawn from the text of the DSU.<sup>215</sup>

7.25 A broader interpretation of the term "measure" as used in the DSU is also consistent with WTO and GATT practice. Clearly, the WTO Agreements impose obligations on Members which govern "measures" traditionally defined (e.g., a tariff or quantitative restriction), but many other obligations imposed by the Agreements do not apply to or are not implemented in the context of "measures". Examples of the latter include affirmative obligations that require a Member to do something, such as enact domestic law or regulations, undertake some mandatory procedure, or

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<sup>214</sup> The introductory language of Article XXIII:1 is echoed in Articles 17.3 and 17.5(a) of the ADP Agreement.

<sup>215</sup> Indeed, Article 3.2 of the DSU, which provides that "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements" suggests the contrary - that the DSU must be available to resolve any and all disputes arising under the covered agreements, as otherwise, Members' rights might be diminished.

undertake some specified action such as submitting a notification to the WTO. In such cases of affirmative obligations on Members, the failure of a Member to effectuate the obligation by taking necessary action, such as the failure of a Member to enact certain intellectual property protections<sup>216</sup>, to open a procurement to public bidding<sup>217</sup>, or to make a required notification, can give rise to disputes. Such situations would not involve any type of "measure", and may not even involve any action by the Member. Rather, they would arise in the **absence** of some measure that is required, or the **failure of a Member to act** where required by a WTO Agreement to do so. It is difficult to imagine that the drafters chose to deliberately exclude disputes based on such situations merely by referring to "measures" in the DSU.

7.26 It thus seems clear to us that the use of the term "measure" in the DSU should be understood as a shorthand reference to the many and varied situations in which obligations under the WTO Agreements might not be fulfilled by a Member, giving rise to a dispute, for which a resolution process is provided in the DSU. This would comport with the overall intention of the drafters of the WTO Agreements to create an integrated system governing multilateral trade relations, including an effective system for the settlement of disputes. In this context, a recommendation under Article 19.1 of the DSU to "bring the measure into conformity" with the relevant agreement would be interpreted as referring to whatever actions the Member in question should undertake to ensure that it does fulfil its obligations.<sup>218</sup>

7.27 In view of the above, we reject the argument that a panel may only consider a specific identified "measure" in an anti-dumping dispute.<sup>219</sup> Thus, we conclude that a claim that a Member has acted in a manner inconsistent with its obligations under the ADP Agreement may be presented to a Panel for consideration, and therefore that the matters referred to in Mexico's request for establishment of a panel are properly before us.

## 2. Terms of reference

7.28 Before turning to the substantive aspects of this dispute, we consider Guatemala's arguments addressing whether certain claims are within the terms of reference of this Panel. Guatemala raises three different objections to certain of Mexico's claims: (1) that certain claims were not set forth in

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<sup>216</sup> India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/R, 5 September 1997, para. 8.1. In this case, the Panel determined that India had failed to comply with its obligation under Article 70.8 of the TRIPS Agreement to establish a mechanism that preserves the novelty of applications for pharmaceutical and agricultural chemical product patents during the TRIPS transition period.

<sup>217</sup> Agreement on Government Procurement, Article VII. See Norway - Procurement of Toll Collection Equipment for the City of Trondheim, GPR.DS2/R, adopted 13 May 1992, para. 5.1. In this case, the Panel concluded that the Government of Norway had not complied with its obligations under the Tokyo Round Agreement on Government Procurement in its conduct of the procurement in question in that the single tendering of the procurement in question was not justified under the Agreement.

<sup>218</sup> Thus, for instance, in the India Patents dispute, the Panel recommended that the DSB should "request India to bring its transitional regime for patent protection of pharmaceutical and agricultural chemical products into conformity with its obligations under the TRIPS Agreement". In the Trondheim Toll Equipment case, the Panel recommended that the Tokyo Round Committee on Government Procurement request Norway to "take the measures necessary to ensure that [the relevant Norwegian entities] conduct government procurement in accordance with" the findings of the Panel.

<sup>219</sup> In light of our decision regarding the issue of sufficient evidence to justify initiation, we consider it unnecessary to address the parties' arguments regarding whether the preliminary measure is properly before us, including the arguments concerning "significant impact", as we do not reach the consistency of the preliminary measure with the requirements of the ADP Agreement. As the Appellate Body remarked in United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, 25 April 1997, pg. 19, "A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."

the request for establishment and are therefore not properly before us<sup>220</sup>, (2) that certain claims were not raised in the request for consultations and are therefore not properly before us<sup>221</sup>, and (3) that certain new claims were raised during the course of the Panel proceedings and are not properly before us.<sup>222</sup>

7.29 In this case, we do not reach the substance of the challenged claims mentioned in the previous paragraph. We therefore do not consider it either necessary or appropriate to reach any conclusions regarding whether or not those claims are within our terms of reference.<sup>223</sup>

C. Failure to Notify the Exporting Government in Accordance with Article 5.5

7.30 The relevant facts regarding this issue are not in dispute. On 11 January 1996 the Ministry published a notice of initiation of an anti-dumping investigation regarding allegedly dumped imports of grey portland cement from Cruz Azul of Mexico. The notice provided, in pertinent part:

"An invitation is hereby issued to all importers, exporters, representatives of the Government of Mexico and any person claiming to have a legitimate interest in the outcome of this investigation, to appear before the Ministry of the Economy (8a, Avenida, 10-43 zona 1, Guatemala City) **to state their legal interest in the matter and to document same within 30 days as from the publication of this notice.** The same period is given to the interested parties to submit any supplementary arguments and evidence that they may consider relevant". (emphasis added).

The notice was published pursuant to a resolution of the Ministry, dated 9 January 1996, which stated in pertinent part that the Ministry:

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<sup>220</sup> Guatemala's objections in this regard relate to the following claims:

- that Guatemala failed to give adequate consideration to the increase in imports from Cruz Azul;
- that Guatemala failed to give adequate consideration to the fall in the price of the domestic product;
- that Guatemala failed to give adequate consideration to the loss of customers;
- that Guatemala failed to give adequate consideration to the likelihood of an imminent increase in Mexican exports to Guatemala;
- that Guatemala violated Articles 6.1, 6.2 and 6.8 of the ADP Agreement by not accepting the technical accounting evidence regarding the normal value and the export price charged by the exporter during the original investigation;
- that Guatemala violated Articles 6.5.1 and 6.5.2 of the ADP Agreement by accepting confidential information from Cementos Progreso without demanding a public version thereof, or the reasons why confidential treatment was required; and
- that Guatemala violated Articles 6.1 and 6.2 of the ADP Agreement by failing to establish specific time-limits for Cruz Azul to submit information in defence of its interests.

<sup>221</sup> Guatemala's objections in this regard relate to the following claims:

- Guatemala violated Article 5.2 of the ADP Agreement by initiating the investigation without having received information on imports from the Directorate-General of Customs; and
- Guatemala violated Article 6.1.3 of the ADP Agreement by failing to provide either Cruz Azul or Mexico with a copy of the full text of the application as soon as Guatemala initiated the investigation.

<sup>222</sup> Guatemala's objections in this regard relate to the following claim:

- that the Ministry had improperly made the preliminary affirmative determination of threat of injury because it did not take into account the fact that from 1994 to 1995 the value of Cementos Progreso's sales increased by 21.9% and its net profits rose by 22.8% in nominal Quetzales, not adjusted for inflation.

<sup>223</sup> United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, 25 April 1997, pg. 19.

"DECIDES: (1) To declare the initiation of the investigation of the complaint submitted; (2) To make the corresponding notifications through the appropriate channel to Cementos Progreso Sociedad Anónima, Distribuidora Comercial Molina and Distribuidora De Leon, as well as to the Mexican company Cruz Azul S.C.L. through the Ministry of External Relations, for these enterprises, within 30 days following the notification to exercise their rights and appear in the proceedings of the investigation; (3) To give public notice of **said initiation, which shall take effect as from the day on which the notice is published in the official journal**". (emphasis added).

The Ministry notified the Government of Mexico of the initiation of the investigation on 22 January 1996. The Ministry requested certain import data from Guatemala's Directorate-General of Customs by letter dated 23 January 1996. A telefax addressed to Mexico's Department of Trade and Industrial Development from the Ministry, dated 26 July 1996, stated:

"We sincerely regret that your country was not notified before the publication of the resolution for the initiation of the investigation, and we offer our sincere apologies in that regard. This was due to a slip on the part of the persons responsible for effecting the notifications, as they were not familiar with the provisions applicable to anti-dumping investigation procedures. Once again, please accept our apologies".<sup>224</sup>

7.31 Guatemala acknowledges that the notice of initiation in this case was published before the Government of Mexico was notified, and that the resolution of initiation stated that the initiation would take effect as from the date of publication of the notice. However, Guatemala argues that the date of publication of the notice does not determine the date of initiation in this case, because the Ministry did not undertake any activities in connection with the investigation, and therefore did not "proceed to initiate", until after Mexico had been notified. Guatemala argues that the investigation was not initiated until the first investigative action, the letter to the Directorate-General of Customs requesting certain import data, was taken on 23 January 1997. Moreover, Guatemala maintains that, under its domestic law, initiation cannot take place until after notification, irrespective of the actual date of the decision to initiate or provisions in the published notice.

7.32 Article 5.5 of the ADP Agreement provides:

"The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned".

7.33 In order to resolve this issue, we must determine what actions are required by the second sentence of Article 5.5, and when. The meaning of the second sentence of Article 5.5 of the ADP Agreement appears to us to be straightforward. After having received a "properly documented" application, and before proceeding to initiate an investigation, notice shall be provided to the government of the exporting Member. That is, at a point in time between two specified events, notice

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<sup>224</sup> Guatemala argues that we should not take this statement into account because it is not included in the administrative file of the investigation. While we accept that the telefax was sent as a gesture of good faith, due to Guatemala's concern at not having observed the courtesy of notifying before publication of the resolution on initiation of the investigation, we do not agree that the telefax has no bearing on the question of whether Guatemala's actions constituted a violation of Article 5.5 of the ADP Agreement. Therefore, while we do not consider it by any means determinative of whether or not there was a violation - it is conceivable that a Member might apologize for some legitimate action - we do not consider it appropriate to simply ignore the existence of a document of this nature.

must be given to the exporting Member.<sup>225</sup> The question that must be answered to resolve the dispute in this case is what is meant by "before proceeding to initiate".

7.34 In our view, footnote 1 to the ADP Agreement is helpful in this regard. Footnote 1 defines the term "initiated" as follows:

"The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5".

When combined with this definition of "initiated", Article 5.5 requires a Member to notify the government of the exporting Member before proceeding to the "procedural action by which it formally commences the investigation". Thus, our decision in this case requires us to determine the procedural action by which Guatemala formally commenced this investigation. In the circumstances of this case, we conclude that the action by which Guatemala formally commenced the investigation at issue was the publication of the notification on 11 January 1996.

7.35 The 15 December 1995 decision of the Director for Economic Integration underlying the Ministry's resolution to initiate the investigation specifically states that: "The date of the initiation of the investigation shall be considered to be the date on which such notice is published in the Official Journal". The Ministry's 9 January 1996 resolution set forth its decision to "give public notice of said initiation, which shall take effect as from the day on which the notice is published in the official journal". The notice published on 11 January 1996 invites interested parties to state their legal interest in the matter within 30 days of the date of publication of that notice, and to submit any supplementary arguments and evidence within that same period. These facts in our view can only lead to the conclusion that the date of initiation was the date of publication of the notice.

7.36 Guatemala's argument would require us to conclude that a letter from the Ministry to the Directorate-General of Customs requesting information on import volumes constitutes the "procedural action by which [Guatemala] formally commence[d]" the investigation in this case. In our view, this investigative action, taken by staff of the investigating authority, which in all likelihood was unknown to either the parties to the investigation, or to the public, cannot reasonably be interpreted to have been the formal commencement of an investigation. The notice requirements of the ADP Agreement make explicit the importance of **public** notice of the actions of investigating authorities, including initiation. We cannot accept that an event whose date is unknown to the public or the parties can be deemed the initiation of an investigation. Certainly, the Ministry's letter to the Directorate-General of Customs may have been the first step of the investigative process, but that is a different matter entirely from being the formal procedural action by which the investigation is commenced.

7.37 Moreover, there are a number of factors which suggest that Guatemala may not have always held the view that it argued before the Panel. As noted above, the 15 December 1995 decision of the Director for Economic Integration underlying the Ministry's resolution to initiate the investigation specifically states that the date of publication shall be considered the date of initiation. Second, the actual published notice does not state that the investigation would not commence until some point later in time, but rather gives interested parties 30 days from the date of publication to make their interest known and to submit arguments and evidence, which can only be interpreted as indicating that the formal commencement of the investigation was the date of publication of the notice. Finally, the telefax of 26 July 1996 apologises for the belated notification, and explains that the delay was caused by a mistake. Thus, the actions of the Ministry at the time of the initiation and shortly thereafter suggest that, at that time, it had a different view of the matter than has been argued before us. While

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<sup>225</sup> We note that the Agreement does not specify the contents of that notice. Mexico has not argued that the substance of the notice given by Guatemala was inadequate. Thus, we reach no conclusions concerning this issue.

we do not find this determinative, the apparent contemporaneous interpretation of Guatemala accords with that which we have reached here.

7.38 The argument that Guatemala could not have initiated the investigation until after it had notified Mexico, pursuant to provisions of its own Constitution and laws, does not affect our conclusion in this regard. In acceding to the WTO, Guatemala undertook to be bound by Article 5.5 when initiating anti-dumping investigations. Any failure to respect Article 5.5 may not be justified on the basis of inconsistent provisions of domestic law. Article XVI:4 of the WTO Agreement explicitly provides that each Member "shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". That Guatemala may have felt constrained to refrain from undertaking any investigative acts until after notification, in order to comply with domestic law, does not change the nature of the acts in question so as to render them the formal commencement of an investigation. As Guatemala acknowledges, the resolution to initiate itself fixed a particular date for the initiation of the investigation, i.e. the date of publication. There is in our view no other action which can reasonably be construed as the formal commencement of the investigation in this case.

7.39 Therefore, we conclude that the act by which Guatemala "formally commenced the investigation" in this case was the publication of the notice of initiation of the investigation. We note that we are not concluding that the date of publication of the notice of initiation is, in all cases, the date of the "procedural action by which a Member formally commences" an investigation, merely that it is in this case, in view of the specific facts before us, including statements contained in the resolution of initiation and the concurrent actions of the Ministry. Consequently, by failing to notify Mexico before the date of publication of the notice of initiation, in this case Guatemala failed to act consistently with the requirements of Article 5.5 of the ADP Agreement.

7.40 Guatemala argues that, even assuming there was a violation of Article 5.5, the Panel should conclude that any delay in notification under Article 5.5 was without adverse effects on Mexico's rights and thus constitutes harmless error under customary rules of public international law. Guatemala further argues that the alleged delay did not nullify or impair Mexico's rights under the ADP Agreement.

7.41 We have concluded, as discussed above, that Guatemala failed to carry out its obligation under Article 5.5 to notify the government of Mexico before proceeding to initiate this investigation. Article 3.8 of the DSU provides that there is a presumption that benefits are nullified or impaired when a Member fails to carry out an obligation under a WTO Agreement:

"In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Member parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge".

In other words, there is a presumption that a violation will entitle a Member to relief, because that violation nullified or impaired a benefit accruing to the complaining Member, that is, "harmed" the complaining Member. Article 17 of the ADP Agreement entitles a Member to relief when benefits accruing to that Member under the ADP Agreement are nullified or impaired. Moreover, while Article 3.8 of the DSU indicates that the presumption of nullification or impairment may be rebutted, GATT panels have consistently found that the presumption is not rebutted simply because the

particular violation in question had no or insignificant adverse effects on trade.<sup>226</sup> This approach is supported by the Appellate Body's decision in Japan Alcohol, in which it upheld the Panel's decision not to introduce a trade effects test into the first sentence of Article III:2 of GATT 1994.<sup>227</sup>

7.42 In our view, having found that Guatemala failed to notify the Government of Mexico in a timely fashion, we need not determine that the failure to carry out an obligation had particular or demonstrable adverse trade effects in order to find that the benefits accruing to Mexico under the ADP Agreement were nullified or impaired. Rather, to the extent that the presumption of nullification or impairment may be rebutted in the case of the breach of a procedural obligation, it would be incumbent on the Member that has breached the obligation to demonstrate that its failure to respect the obligation could not have had any effect on the course of the investigation in question. In this case, the procedural obligation breached was the requirement to notify the exporting Member prior to proceeding to initiate an anti-dumping investigation. A key function of the notification requirements of the ADP Agreement is to ensure that interested parties, including Members, are able to take whatever steps they deem appropriate to defend their interests. Where a required notification is not made in a timely fashion, the ability of the interested party to take such steps is vitiated. We cannot now speculate on what steps Mexico might have taken had it been timely notified, and how Guatemala might have responded to those steps.<sup>228</sup> Thus, while it is possible that the investigation would have proceeded in the same manner had Guatemala timely notified Mexico before proceeding to initiate the investigation, we cannot say with certainty that the course of the investigation would not have been different. Under these circumstances, we cannot conclude that Guatemala has rebutted the presumption that its failure to carry out its obligation under Article 5.5 consistent with the ADP Agreement nullified or impaired benefits accruing to Mexico under that Agreement.

7.43 With respect to Guatemala's arguments regarding harmless error, the precedents cited - assuming *arguendo* that they reflect customary rules of public international law - relate to the consequences of a violation of a procedural rule, rather than to the existence of a cause of action. Thus, we do not consider that the assertion that an error is "harmless" should prevent us from reaching the issue whether a violation of a provision of the ADP Agreement nullifies or impairs benefits under

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<sup>226</sup> In United States - Taxes on Petroleum and Certain Imported Substances, L/6175 (Adopted 17 June 1987), BISD 34S 136, 157-58, the Panel reviewed previous disputes in which parties had claimed that a measure inconsistent with the General Agreement had no adverse impact and therefore did not nullify or impair benefits accruing under the General Agreement to the contracting party that had brought the complaint. The Panel concluded from its review that,

"while the CONTRACTING PARTIES had not explicitly decided whether the presumption that illegal measures cause nullification or impairment could be rebutted, the presumption had in practice operated as an irrefutable presumption".

*Id.* at para 5.1.7

<sup>227</sup> Japan - Taxes on Alcoholic Beverages, WT/DS8, DS10, DS11/AB/R, 4 October 1997. We note also the decision of the Panel in Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community, SCM/179, adopted 28 April 1994 at para. 271:

"It was not incumbent upon a signatory whose procedural rights under Article 2 had been infringed by another signatory to demonstrate the harm caused by such an infringement. The Panel therefore rejected the position of Brazil that it was for the EEC to demonstrate that the results of this investigation would have been different had Brazil not committed its procedural errors. Without wishing to exclude that the concept of "harmless error" could be applicable in dispute settlement proceedings under the Agreement, the Panel considered that this concept was inapplicable under the circumstances of the case before it".

<sup>228</sup> We note Guatemala's argument that, unlike the Agreement on Subsidies and Countervailing Measures, the ADP Agreement does not require Members to afford an opportunity for consultations before initiating an investigation, and that therefore there is no action which would take place after notification but before initiation. Merely that the ADP Agreement does not **require** some action following notification of the exporting Member and before initiation does not mean that nothing useful can take place following a timely notification, or that the exporting Member therefore has no interest in timely notification.

that Agreement. However, we do not preclude that the notion of "harmless error" could be relevant to the question of what steps a Member should take in order to implement the recommendation of a panel in a particular dispute. Since we do not view the principle of harmless error as one which would prevent us from determining that there was a violation of the ADP Agreement which nullified or impaired benefits under that Agreement, we believe it would be improper for us to fail to make a recommendation under Article 19.1. However, the effects of a particular error may, we believe, be relevant in determining what remedial actions might be appropriate - that is, what if any suggestions a panel might make as to how its recommendation may be implemented.

D. Alleged Violations in the Initiation of the Investigation

7.44 In Resolution No. 2-95 of 15 December 1995, the Director for Economic Integration of the Guatemalan Ministry of Economy concluded that "there exists sufficient evidence to justify the initiation of the investigation into dumping and threat of injury", directed that public notice of the initiation of the investigation be given, and established the date of initiation of the investigation as the date on which such notice was published in the Official Journal. On 11 January 1996, the Ministry published the notice of initiation of the anti-dumping investigation regarding imports of grey portland cement from Cruz Azul of Mexico. Mexico claims that Guatemala violated, *inter alia*, Articles 5.2 and 5.3 of the ADP Agreement by initiating the anti-dumping investigation without sufficient evidence of dumping, threat of injury and causal link, to justify the initiation.

7.45 The ADP Agreement establishes requirements for the initiation of investigations in Article 5. Article 5.1 stipulates that, except as provided in Article 5.7, an investigation "shall be initiated upon a written application by or on behalf of the domestic industry".<sup>229</sup> Article 5.2 requires that:

"An application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph".

Article 5.2 further requires that the application "shall contain such information as is reasonably available to the applicant" regarding a detailed series of elements.<sup>230</sup> Article 5.3 then provides:

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<sup>229</sup> Article 5.7 allows the authorities, in special circumstances, to initiate an investigation without having received a written application by or on behalf of a domestic industry.

<sup>230</sup> The elements identified in Article 5.2 are:

- (i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;
- (ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;
- (iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;
- (iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact

"The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation".

7.46 Before proceeding to address the factual aspects of Mexico's claim, we must examine the relationship between Article 5.2 of the ADP Agreement, which requires that an application include evidence of dumping, injury, and a causal link, and sets forth in some detail the specific information regarding a series of factors which must be included, and Article 5.3 of the ADP Agreement, which governs the determination by the authorities as to whether the application contains sufficient evidence to justify initiation of an investigation. Specifically, we must determine whether Article 5.3 authorizes an investigating authority to initiate an anti-dumping investigation in any case where an application meets the requirements of Article 5.2 of the ADP Agreement, or whether, to the contrary, Article 5.3 imposes an independent obligation on the investigating authority to assess, once it has determined that the requirements of Article 5.2 are met, whether sufficient evidence exists to initiate an investigation.

7.47 Guatemala's position on this issue is clear: if the information supplied in the application is all that is reasonably available to the applicant as required by Article 5.2, the investigating authority is justified in initiating the investigation. That is, Guatemala conditions the sufficiency of the evidence to initiate on whether the information in the application was all the information reasonably available to the applicant. In response to a question from the Panel, Guatemala explicitly rejected the possibility that even if the evidence before the Ministry was all the information "reasonably available" to the applicant, it might nonetheless be insufficient to justify initiation within the meaning of Article 5.3.<sup>231</sup>

7.48 For Mexico, the fact that the evidence in the application is all the information that is reasonably available to an applicant does not necessarily mean that the evidence is sufficient to justify initiation. In Mexico's view, the evidence in an application may be insufficient to justify initiation, even though it is all that is reasonably available to the applicant. An unbiased and objective investigating authority would be justified in initiating the investigation only if it determines that the evidence is sufficient, regardless of whether or not the evidence was all that was reasonably available to the applicant.

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of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3".

<sup>231</sup> Specifically, the Panel had asked:

"Would the parties agree as a general matter with the proposition that evidence may be relevant to initiation of an investigation without being sufficient to justify initiation? Would they agree that it is possible to conclude, as a legal matter, that the evidence before the Guatemalan authorities was relevant to initiation, and may even have been all the information "reasonably available" to the applicant within the meaning of Article 5.2, third sentence, but that it was insufficient to justify initiation within the meaning of Article 5.3?"

Guatemala replied:

"Guatemala does not agree with these premises. The third sentence of Article 5.2 describes the evidence that must be included in the application. Article 5.3 requires an examination to determine whether the evidence provided in the application is sufficient. The evidence is "relevant" and "sufficient" if the investigating authorities consider that the application includes information reasonably available to the applicant regarding each of the categories of information described in subparagraphs (i) to (iv) of Article 5.2".

7.49 We cannot accept Guatemala's arguments in this regard.<sup>232</sup> In our view, the fact that the applicant has provided, in the application, all the information that is "reasonably available" to it on the factors set forth in Article 5.2(i) - (iv) is not determinative of whether there is sufficient evidence to justify initiation. Rather, Article 5.3 establishes an obligation that extends beyond a determination that the requirements of Article 5.2 are satisfied.

7.50 Article 5.2 sets forth what evidence and information must be in the application: evidence of dumping, injury, and a causal link, and such information as is reasonably available to the applicant on a series of factors. Thus, Article 5.2 is a requirement imposed on the **applicant**, which would, for instance, allow an investigating authority to reject an application on its face as not containing information that the authority judges is reasonably available to the applicant. Article 5.3 on the other hand sets forth what the investigating authority is to do when confronted with an application; it must examine the accuracy and adequacy of the evidence in the application "to determine whether there is sufficient evidence to justify the initiation of an investigation". Thus, Article 5.3 is a requirement imposed on the **investigating authority**: once it has accepted the application, that is, determined that it contains evidence on dumping, injury, and causal link, as well as "such information as is reasonably available to the applicant" on the factors set forth in Article 5.2 (i) - (iv), the investigating authority must undertake a further examination of the evidence and information in the application. If the investigating authority were to determine that the evidence and information in the application was not accurate, or that it was not adequate to support a conclusion that there was sufficient evidence to justify initiation of an investigation, the investigating authority would be precluded from initiating an investigation. Thus, the decision to initiate is made by reference to the objective sufficiency of the evidence in the application, and not by reference to whether the evidence and information provided in the application is all that is reasonably available to the applicant.<sup>233</sup>

7.51 That compliance with the requirements of Article 5.2 does not *ipso facto* mean that there is sufficient evidence to justify initiating an investigation under Article 5.3 can be readily demonstrated by consideration of the following example. With respect to dumping, Article 5.2(iii) requires that an application contain such information as is reasonably available to the applicant regarding "prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export ... and ... on export prices". Assume that the application contains all the information reasonably available to the applicant regarding these prices, and that the information is accurate. However, assume further that the information on its face demonstrates that the export price is equal to the normal value. It could be said that the requirements of Article 5.2(iii) are satisfied. Nevertheless, it could not reasonably be concluded that there was sufficient evidence to justify initiation of an investigation, as the evidence clearly shows no dumping.

7.52 The object and purpose of the initiation requirements of Article 5 as a whole, and of Article 5.3 in particular, is in our view to establish a balance between the competing interests of "the

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<sup>232</sup> We recognize the requirements of Article 17.6(ii) of the ADP Agreement, which provides in pertinent part:

"Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations".

As discussed in our decision, we do not believe that Articles 5.2 and 5.3 of the Agreement "admit of" the interpretation put forward by Guatemala. This is not to say that we consider that there is only one permissible interpretation of Articles 5.2 and 5.3, however, merely that the interpretation that would be required in order to give credence to Guatemala's position is not a permissible interpretation.

<sup>233</sup> We also note that the second sentence of Article 5.8 of the ADP Agreement requires an investigation to be terminated if the margin of dumping is *de minimis*, or if the volume of imports or the injury is negligible. If an investigation must be terminated if the margin of dumping is *de minimis*, or if the volume of imports or injury is negligible, how can an investigation be initiated when there is not sufficient evidence to justify investigating whether there is a margin of dumping greater than *de minimis*, or whether the volume of imports or injury is more than negligible?

import competing domestic industry in the importing country in securing the initiation of [an] investigation and the interest of the exporting country in avoiding the potentially burdensome consequences of [an] investigation initiated on an unmeritorious basis".<sup>234</sup> Considering the question in light of the object and purpose of these provisions, we conclude that Guatemala's interpretation would undermine the balancing of competing interests in initiation and non-initiation established in Article 5. This can be seen by considering the situation that would entail under Guatemala's interpretation in an extreme factual scenario. Assume a factual situation where an application contains no information on normal value. Under Guatemala's interpretation if the investigating authority concluded that the application contained the information on normal value reasonably available to the applicant, it could properly determine that there was sufficient evidence to justify initiation. However, in our view, in the absence of information on normal value, an investigating authority could not properly determine that there is sufficient evidence of dumping, and therefore an investigation should not be initiated.

7.53 We have concluded that the question whether there is "sufficient evidence" to justify initiation is not answered by a determination that the application contains all the information "reasonably available" to the applicant on the factors specified in Article 5.2 (i) - (iv). This does not, however, mean that investigations may not be initiated in cases where "sufficient evidence" is not "reasonably available" to the applicant. In particular, there is nothing in the Agreement to prevent an investigating authority from seeking evidence and information on its own, that would allow any gaps in the evidence set forth in the application to be filled. We do not suggest that such action by the investigating authority is in any case required by the ADP Agreement. However, if, as in this case, an authority chooses to refrain from such action, the "reasonably available" language in Article 5.2 does not permit the initiation of an investigation based on evidence and information which, while all that is "reasonably available" to the applicant is not, objectively judged, sufficient to justify initiation. Indeed, in this case the applicant requested that the Ministry obtain certain information on import volumes which it was unable to obtain itself. This the Ministry did not do, however, until **after** it had initiated the investigation based on the information in the application.

7.54 What constitutes "sufficient evidence" to justify the initiation of an anti-dumping investigation is not defined in the ADP Agreement. In this case, of course, we are bound by the requirements of Article 17.6(i) of the ADP Agreement as the standard of review applicable to our examination of the Ministry's decision to initiate. Article 17.6(i) provides:

"in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned".

7.55 The Panel in United States - Measures Affecting Imports of Softwood Lumber From Canada considered much the same question as faces us here in a dispute challenging the self-initiation of a countervailing duty investigation, on the basis, *inter alia*, of allegedly insufficient evidence to warrant initiation.<sup>235</sup> The Panel observed:

"In analyzing further what was meant by the term "sufficient evidence," the Panel noted that the quantum and quality of evidence to be required of an investigating authority prior to initiation of an investigation would necessarily have to be less than

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<sup>234</sup> United States - Measures Affecting Softwood Lumber from Canada, SCM/162, adopted 27 October 1993, BISD 40S/358, para 331.

<sup>235</sup> SCM/162. While the *Softwood Lumber* report analyzed the sufficiency of evidence for the initiation of a countervailing duty investigation, these aspects of the report are equally applicable to anti-dumping investigations.

that required of that authority at the time of making a final determination. At the same time, it appeared to the Panel that “sufficient evidence” clearly had to mean more than mere allegation or conjecture, and could not be taken to mean just “any evidence”. In particular, there had to be a factual basis to the decision of the national investigative authorities and this factual basis had to be susceptible to review under the Agreement. Whereas the quantum and quality of evidence required at the time of initiation was less than that required to establish, pursuant to investigation, the required Agreement elements of subsidy, subsidized imports, injury and causal link between subsidized imports and injury, the Panel was of the view that the evidence required at the time of initiation nonetheless had to be relevant to establishing these same Agreement elements”.<sup>236</sup>

7.56 The Panel then addressed the appropriate role of a panel in reviewing whether a decision to initiate an investigation was consistent with the requirements of the Tokyo Round Subsidies Code, and set out the standard it applied in evaluating the issue:

"The Panel considered that in reviewing the action of the United States authorities in respect of determining the existence of sufficient evidence to initiate, the Panel was not to conduct a *de novo* review of the evidence relied upon by the United States authorities or otherwise to substitute its judgment as to the sufficiency of the particular evidence considered by the United States authorities. Rather, in the view of the Panel, the review to be applied in the present case required consideration of whether a reasonable, unprejudiced person could have found, based upon the evidence relied upon by the United States at the time of initiation, that sufficient evidence existed of subsidy, injury and causal link to justify initiation of the investigation".<sup>237</sup>

7.57 We believe that the approach taken by the Panel in the Softwood Lumber dispute is a sensible one and is consistent with the standard of review under Article 17.6(i). Thus, we agree with the Panel in Softwood Lumber that our role is not to evaluate anew the evidence and information before the Ministry at the time it decided to initiate. Rather, we are to examine whether the evidence relied on by the Ministry<sup>238</sup> was sufficient, that is, whether an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury, and causal link existed to justify initiating the investigation. Moreover, we agree with the view expressed by the Panel in Softwood Lumber that the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation.<sup>239</sup> That is, evidence which would be insufficient, either in quantity or in quality, to justify a preliminary or final determination of dumping, injury or causal link, may well be sufficient to justify initiation of the investigation.

7.58 While the parties seem largely in accord that the application must contain evidence and information on the essential elements of dumping, injury, and causal link, they disagree on what types of evidence and information are required. Thus, Mexico argues that the substantive provisions governing determinations of dumping and injury in Articles 2.1, 2.4, and 3.7, must be taken into account in evaluating the evidence in an application to determine its sufficiency. Guatemala, on the other hand, argues that Article 2 does not apply to the decision whether to initiate an investigation, but only to the preliminary or final determination of dumping, and that while Articles 3.2 and 3.4 apply to

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<sup>236</sup> *Id.*, para. 332.

<sup>237</sup> *Id.*, para. 335.

<sup>238</sup> We note that we are not entirely persuaded that the information in the application was, in fact, all that was reasonably available to the applicant, particularly with respect to the question of threat of material injury. However, for the purposes of our analysis, we have assumed that this was the case.

<sup>239</sup> Softwood Lumber at para. 332.

the decision to initiate, by virtue of being referenced in Article 5.2(iv), Article 3.7 is not so referenced, and therefore does not apply to the decision whether to initiate. Thus, Guatemala argues that information of the type referred to in Articles 2 and 3.7 need not be included in the application, and is not relevant to the evaluation of whether there is sufficient evidence to justify initiation. These issues are discussed further below, in connection with our examination of the decision of the Ministry.

7.59 We also considered relevant the provisions of Article 5.8, which provides in pertinent part:

"An application under paragraph 1 [of Article 5] shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case".

We note Guatemala's argument that Article 5.8 applies only to investigations that have already been initiated. This argument is in stark contradiction to the text of Article 5.8 itself, which refers to the **rejection of an application** "as soon as" authorities conclude there is not sufficient evidence of dumping or injury to justify proceeding. In our view, there is no way to interpret this language other than as a statement of the requirement that an investigation may only be initiated if the application contains sufficient evidence of dumping and injury. If an application **shall** be rejected in the circumstances set forth in Article 5.8, how could an investigation be initiated - on the basis of a rejected application? The notion that Article 5.8 refers to the rejection of an application after initiation, in connection with the termination of an investigation, is in our view without support in the text of the Article. Merely that Article 5.8 continues to outline circumstances in which an investigation must be terminated, which presumes that it has been initiated, does not support the conclusion that the Article does not refer to rejection of an application prior to initiation if the authorities conclude that there is not sufficient evidence of dumping and injury.

7.60 Turning to the Ministry's decision that there was sufficient evidence to justify initiating the anti-dumping investigation in this case, we note that there is no discussion or analysis of the evidence and information before the Ministry in the Resolution or in the public notice. However, the 17 November 1995 recommendation of the advisors in the Ministry's Department of Economic Integration sets forth the analysis of the evidence and information presented, and concludes that it was sufficient to justify initiation. We have scrutinized all the information which was on the record before the Ministry at the time of initiation in examining whether an unbiased and objective investigating authority could properly have made the determination that was reached by the Ministry.

#### 1. Dumping

7.61 With regard to dumping, the application states that the retail price of grey portland cement in Mexico ranged between 27 and 28 Mexican new pesos, which was converted at then prevailing rates of exchange to Guatemalen Quetzales ("Q") Q 27.62 per 94-pound sack, and that the cash price of the product imported from Mexico was US\$2.57 per 94-pound sack, which was equivalent to Q 14.77 at the time. The price in Mexico was substantiated by two invoices showing the prices for two separate sales in Tapachula, Mexico, in August 1995. One invoice is labelled Cruz Azul, and reflects the sale of one "bto [bulto] cto [cemento] gris" on 26 August 1995 at 28 Mexican pesos. The other invoice is labelled Proveedora de Laminas, and reflects the sale of one "saco cemento Cruz Azul" on 25 August 1995 at 27 Mexican pesos. The price of imported Mexican cement in Guatemala was substantiated by import certificates, invoices and bills of lading for two transactions on the same date in August 1995.<sup>240</sup> There is no indication that any other information on dumping was available to or considered by the Ministry.

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<sup>240</sup> The first set of documents comprise an invoice reflecting the sale of 7,035 "bolsas" of "cemento portland gris" (also identified as "cemento portland gris tipo 11 compuzolana en bolsas de 94 libras") at a unit

7.62 The two invoices reflect two separate sales at the retail level of one sack of cement of unspecified weight each. The import documents reflect two separate import transactions at the distributor (or wholesale) level of several thousand sacks of cement, each sack weighing 94 pounds (42.6 kilograms). The alleged margin of dumping is calculated in the application by comparing the average retail price for the cement bought in Mexico (converted into Guatemalan Quetzales at then current rates) with the average c.i.f. value of the cement imported into Guatemala (converted into Guatemalan Quetzales at then current rates). The Ministry recommended initiation based on this information. In our view, this comparison ignores obvious problems with the data: (1) the transactions involve significantly different volumes; and (2) the transactions occurred at different levels of trade.

7.63 While in general we agree with Guatemala that there is not a "minimum" of documentation which must be submitted to substantiate an assertion of dumping, this does not mean that any documentation will be sufficient to justify initiation in a particular case. Guatemala also argues that the considerations outlined above are addressed only in Article 2 of the ADP Agreement, which is not referenced in Article 5.2, and are therefore irrelevant to the determination to initiate. We cannot accept Guatemala's interpretation of the ADP Agreement in this regard. In this case, we consider that based on an unbiased and objective evaluation of the information before it, the Ministry could not properly have determined that there was sufficient evidence of dumping to justify the initiation of the investigation.

7.64 In our view, in assessing whether there is sufficient evidence of dumping to justify initiation, an investigating authority may not ignore the provisions of Article 2 of the ADP Agreement. Article 5.2 of the Agreement requires an application to include evidence of "dumping" and Article 5.3 requires a determination that there is "sufficient" evidence to justify initiation. Article 2 of the ADP Agreement sets forth the technical elements of a calculation of dumping, including the requirements for determining normal value, export price, and adjustments required for a fair comparison. In our view, the reference in Article 5.2 to "dumping" must be read as a reference to dumping as it is defined in Article 2. This does not, of course, mean that the evidence provided in the application must be of the quantity and quality that would be necessary to make a preliminary or final determination of dumping. However, evidence of the relevant **type** is, in our view, required in a case such as this one where it is obvious on the face of the application that the normal value and export price alleged in the application will require adjustments in order to effectuate a fair comparison. At a minimum, there should be some recognition that a fair comparison will require such adjustments.

7.65 Guatemala argues that at the time of initiation, it was not possible to make adjustments, as the precise information needed is within the control of the exporting company, which bears the burden of showing that adjustments should be made. We do not accept this position. Article 2.4 provides, in pertinent part:

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price of US\$2.45, to Dist. Comercial Molina by Cruz Azul on 11 August 1995, a bill of lading dated 14 August 1995, and an import certificate dated 15 August 1995. The second set of documents comprise an invoice reflecting the sale of 4,221 "bolsas" of "cemento portland gris" (also identified as "cemento portland compuzolana gris 11 en bolsas de 94 libras") at a unit price of US\$2.45, to Distribuidora de Leon on 11 August 1995 by Cruz Azul, a bill of lading dated 14 August 1995, and an import certificate dated 15 August 1995.

"A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.<sup>7</sup>

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<sup>7</sup>It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision".

In our view, this provision establishes an obligation for investigating authorities to make a fair comparison. Investigating authorities can certainly expect that exporters will provide the information necessary to make adjustments, and demonstrate that particular differences for which adjustments are sought affect price comparability. However, the authorities cannot, in our view, ignore the question of a fair comparison in determining whether there is sufficient evidence of dumping to justify initiation, particularly when the need for adjustments is apparent on the face of the application. Moreover, the exporting country or company may not even be aware that an application has been filed and the initiation of an investigation is being considered, and is in any event generally not a participant in the initiation decision, and can therefore not provide this information prior to initiation. Thus, Guatemala's position would make it more likely that investigations will be initiated on the basis of insufficient or incorrect evidence of dumping.

7.66 In this case it is apparent on the face of the application that the alleged normal value and the alleged export price are not comparable for purposes of considering whether dumping exists without adjustment. The recommendation to the Director of the Department of Economic Integration reflects this lack of comparability when it states that the normal value is the average price "to the final consumer", and the export price is the average of "the c.i.f. values". However, there is no recognition of the need for any adjustments in either the recommendation or the notice of initiation. While we would not expect the authorities to have, at the initiation stage, precise information on the adjustments to be made, we find it particularly troubling that there is not even any recognition that the normal value and export price alleged in the application are not comparable, nor any indication that more information on this issue was requested from the applicant or otherwise sought by the Ministry. When, as in this case, it is evident from the information before the investigating authority that some form of adjustment will be required to make a fair comparison and establish a dumping margin, an unbiased and objective investigating authority could not, in our view, properly determine that there was sufficient evidence of dumping to justify initiation in the absence of such adjustment, or at least without acknowledging the need for such adjustment.<sup>241</sup>

7.67 As noted above, while there is clearly a different standard applicable to making a preliminary or final **determination** of dumping, than to determining whether there is sufficient evidence of dumping to justify initiation of an investigation, we cannot agree with Guatemala's position that Article 2 is irrelevant to the initiation determination. The subject matter, or **type**, of evidence needed to justify initiation is the same as that needed to make a preliminary or final determination of dumping, although the quality and quantity is less. Thus, in our view, based on an unbiased and objective evaluation of the evidence and information before it in this case, the Ministry could not

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<sup>241</sup> As discussed above, the fact that information necessary to consider such an adjustment might not have been reasonably available to the applicant does not transform a lack of information into sufficient evidence to justify initiation. For instance, the investigating authority might be able to look to the domestic industry's own experience for information on adjustments.

properly have determined that there was sufficient evidence of dumping to justify the initiation of the investigation.

2. Threat of material injury

7.68 The only information before the Ministry on the volume of the allegedly dumped imports consisted of the documentation concerning two importations of cement into Guatemala through a single customs post on the same date in August 1995 referred to above. There were statements in the application that the volume of imports was massive, and that imports may have been entering through other customs posts. In our view, these assertions are unsubstantiated by any relevant evidence in the application. Nor is there any indication in the evaluation prepared by the two advisors, or in the Resolution of the Director, that any evidence or information beyond that contained in the application was considered in making the determination to initiate.<sup>242</sup> Guatemala argued before the Panel that the two import certificates demonstrate that imports were massive in light of the average daily consumption of cement in Guatemala. However, there is no information in the application from which average daily consumption of cement in Guatemala can be determined. Nor is there any indication in the evaluation prepared by the two advisors, or in the Resolution of the Director, that the consumption of cement in Guatemala was either known, or considered, in making the determination to initiate.<sup>243</sup> Thus, there is no indication that the volume of imports represented by the two import certificates was compared to consumption in Guatemala, or that an assessment that those imports were "massive" was made at the time of initiation. Rather, the Ministry appears to have accepted the characterization of the applicant in this regard.

7.69 The remaining information contained in the application concerning the threat of material injury consists of the following:

"Cementos Progreso, S.A. is being threatened by massive imports of cement from Mexico. By way of evidence, the initial complaint contained two photocopies of import certificates showing imports at prices below the normal retail price in Mexico, and which therefore threatened the company with imminent material injury, as set out below:

"Cement entering Guatemala by land at prices lower than normal value is directly affecting investment planning by the company, specifically for plant improvements and expansion, which would entail:

- Expanding raw material milling facilities at the plant itself;
- maximizing the efficiency of the plant;
- building a third kiln at the San Miguel Sanarate plant;

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<sup>242</sup> We note that Guatemala asserted that the Ministry "knew" certain information, such as transport costs in Guatemala, information concerning Cementos Progreso and the market for cement in Guatemala, that Mexico was going through a severe recession, particularly in the construction sector, etc., and that such knowledge was brought to bear on its evaluation of the information in the application and together with that information constituted sufficient evidence to justify initiation. Thus, for instance, Guatemala asserted before the Panel that there was sufficient information to establish a presumption that there was excess capacity in Mexico, and a decline in demand for cement in Mexico, which caused Cruz Azul to start exporting to Guatemala in 1995, and indicated that exports would increase. While such facts may have been known to the Ministry, there is no reference to them in the application, in the evaluation prepared by the two advisors, or in the resolution itself. Indeed, there is no reference whatsoever to excess capacity in Mexico, or to a likelihood that imports would increase, in the resolution or the underlying recommendation. Thus, we cannot consider such facts in evaluating whether the Ministry properly concluded that there was sufficient evidence to justify initiation in this case.

<sup>243</sup> Notably, there is no information concerning the existence, or non-existence, of imports of cement from any source other than Cruz Azul. Consumption, of course, cannot be calculated without such information.

- restructuring the existing electricity system by converting the plant that presently runs on bunker;
- the foregoing expansions would call for at least an additional 400 workers, who would no longer be needed if the projects were stopped;
- rather than invest in cement at below-cost prices, the company would prefer to cease production and become an importer;
- loss of market shares;
- were the company to become an importer, it would be compelled to dismiss 1,052 workers, with all the attendant social problems;
- the plant would lose its expertise, or what is referred to as technology transfer".

7.70 There is nothing in the application to substantiate these statements. We find this to be particularly troublesome, given that the relevant information, such as information on employment levels and ability to finance expansions and other projects, is exclusively in the hands of the applicant, in whose interest it would be to provide such information to substantiate its claim of threat of injury. We conclude that an unbiased and objective investigating authority could not properly determine that the evidence of threat of injury before the Ministry was sufficient to justify initiation.

7.71 It was suggested that the concerns of domestic producers to keep sensitive business information confidential might explain the fact that the applicant did not provide more specific information concerning its own operations, i.e. sales, financial information, etc., which might substantiate the assertion of threat of material injury. However, both the ADP Agreement and Guatemalan law provide for confidential treatment of information where warranted. Thus, the fact that relevant information is considered confidential does not justify the failure to submit such relevant information with the application to substantiate the assertions therein. Guatemala argued before the panel that an applicant is not required to include "documentary evidence" of the threat of injury. In Guatemala's view, the assertion that Cementos Progreso was facing a threat of material injury was substantiated by the declaration that if dumped imports continued to be sold at dumped prices, Cementos Progreso would have to cancel plans to expand and modernize its production plant. In our view, however, this is not "substantiation" of the assertions, but merely statements of the applicant.<sup>244</sup> "Sufficient evidence to justify initiation" must, in our view, mean something whose "accuracy and adequacy" can be objectively evaluated as required by Article 5.3 of the ADP Agreement. Mere statements do not fall into this category of information. Moreover, there is no indication as to what evaluation was made of the "accuracy and adequacy" of these statements.

7.72 Relevant evidence might have included information on any increase in the volume of imports either in absolute terms or relative to production or consumption in Guatemala, as set forth in Article 3.2 of the ADP Agreement, referenced in Article 5.2(iv). As noted above, the only information on the volume of imports was the documentation reflecting two importations, and assertions concerning possible imports through other customs posts. There was no information in the application, or apparently otherwise available to the Ministry, concerning consumption in Guatemala. The only information in the application concerned the capacity of Cementos Progreso, which was stated to be 1.6 million metric tonnes, and the fact that Cementos Progreso was using 100 percent of its installed capacity operating 3 shifts per day, 24 hours per day. Thus, at the most, it could have been concluded from the face of the application that annual production was 1.6 million metric tonnes.<sup>245</sup> The two sales reflected in the import certificates were for a total of 480,000 kilograms, or 480 metric tonnes, of cement on one day in August 1995. Thus, assuming Guatemalan production

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<sup>244</sup> We note that we do not question the truth of these statements. However, that a statement may be true does not mean that it is substantiated by relevant evidence, or that it is evidence which substantiates other statements.

<sup>245</sup> There is a real question whether such an assumption would have been reasonable, but we are engaged here in evaluating the best possible case scenario for Guatemala's position.

equalled capacity, and that production was equal all days of the year 1995, the information in the application might have been interpreted as showing that the imports were equivalent to 11 percent of production (not consumption) for one day in August, or alternatively, that those imports were equivalent to 0.03 percent of annual production of cement in Guatemala. This calculation does not provide any information whether there had been any increase in imports, as there is no information in the application concerning the level of imports at any time other than one day in August 1995.<sup>246</sup> Moreover, as noted above, there is no indication that such a calculation was carried out at the time of initiation. Finally, we note the argument made by Guatemala that, in light of the fact that there were no imports prior to June 1995, any increase in imports from that zero level was massive. We do not accept this conclusion. Indeed, we note that the application does not state that imports were zero before June 1995, and there is no indication in the analysis underlying the decision to initiate that the Ministry knew or considered the volume of imports prior to June 1995 in making its determination.<sup>247</sup> While the application, which was filed in October 1995, did assert that Cementos Progreso had been "for at least three months now ... confronting the unfair business practice known as dumping", this is not the same as a statement that there were no imports before June of 1995. There is simply no discernible basis that was before the Ministry at the time of its initiation determination on which the volume of imports could properly have been characterized as "massive."

7.73 Other evidence might have included information regarding whether there had been significant price undercutting by the dumped imports, or whether the effect of such imports was otherwise to depress prices to a significant degree or prevent price increases which otherwise would have occurred as set forth in Article 3.2 of the ADP Agreement, referenced in Article 5.2(iv). The information on the price of Mexican cement in Guatemala in the application indicates that the c.i.f. price of the cement reflected in the import certificates was Q 14.77. The only information on the price of Guatemalan cement in the application indicates that the average retail price for Guatemalan cement was Q 24 in the capital city, and Q 32 in the Department of El Petén. In our view, these prices are not comparable, and therefore do not shed any light on the effect of dumped imports on prices. C.i.f. prices to distributors as shown in the import certificates cannot properly be compared with retail prices for Guatemalan cement, as the difference in level of sale may have a significant impact on the prices, and thus the comparison.

7.74 Moreover, evidence to substantiate the allegation of threat of material injury might have included information on the relevant economic factors and indices having a bearing on the state of the industry set forth in Article 3.4 of the ADP Agreement, that is, actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. Again, we are particularly troubled by the lack of information provided in this regard, as this information is uniquely within the control of the applicant. The application, as noted above, contains statements concerning some of these factors, but no specific or quantifiable information, except for the statement that the expansion plans called for an additional 400 workers, and should Cementos Progreso cease production entirely, it would be compelled to dismiss 1,052 workers. There is no information in the application concerning the level of sales enjoyed by Cementos Progreso, or its profits. While a statement is made that the allegedly dumped imports were directly affecting investment planning by the company, there is no information concerning ability to raise capital or otherwise fund investments, which might support the statement. In our view, the statements made by the applicant regarding the effects of allegedly dumped imports on investment planning for plant

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<sup>246</sup> Information on import volumes was requested by the Ministry from the Directorate-General of Customs **after** initiation.

<sup>247</sup> In this regard, we note that the fact that the recommendation was that an investigation of the Mexican company exporting cement to Guatemala **by land** be initiated might be understood to suggest that there were other imports entering Guatemala by sea.

improvements and expansion are unsupported by relevant evidence. We cannot agree that the statements quoted above constitute "evidence" substantiating the assertions in the application.

7.75 Finally, we note that there is no evidence or information in the application on the factors relevant to threat of material injury set forth in Article 3.7 of the ADP Agreement. Guatemala argues that Article 5.2 "does not require that the application provide information on the four factors set forth in Article 3.7." We recognize that there is no specific reference in Article 5.2 to the factors enumerated in Article 3.7 regarding threat of injury, such as there is to the factors set forth in Articles 3.2 and 3.4 regarding injury. However, we do not accept the view that the lack of a specific reference to Article 3.7 means that an applicant is not required to submit "such information as is reasonably available to the applicant" on the question of threat of material injury, if threat of material injury is alleged in the application. Such an interpretation of the Agreement would, in our view, be entirely impermissible, as it would be inconsistent with the text, as well as the object and purpose, of Article 5.2 as a whole.

7.76 Looking at the text, we note that the chapeau of Article 5.2 provides, in pertinent part:

"An application under paragraph 1 shall include evidence of ... (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement..."

Article 5.2(iv) explicitly refers to Article 3.2, which elaborates on certain factors to be considered in evaluating "injury". Footnote 9 to Article 3 of the Agreement specifies:

"Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such and industry and shall be interpreted in accordance with the provisions of this Article".

Thus, the requirements in Article 5.2 regarding "injury" must, in our view, be read to refer to threat of injury in a case where threat of injury is at issue.<sup>248</sup> Consequently, in this case, as the applicant alleged threat of injury, clearly the application must contain evidence of threat of material injury.

7.77 Moreover, while as noted above, there is clearly a different standard applicable to making a preliminary or final **determination** of material injury, including threat of material injury, than to determining whether there is sufficient evidence of material injury, including threat of material injury to justify initiation of an investigation, we cannot agree with Guatemala's apparent position that the factors set forth in Article 3.7 are irrelevant to the initiation determination. We cannot perceive how, in the absence of information pertaining to those factors, an unbiased and objective investigating authority could properly determine that there is sufficient evidence of threat of material injury to justify initiation in a case in which threat of material injury is alleged. In other words, the subject matter, or **type**, of evidence needed to justify initiation is the same as that needed to make a preliminary or final determination of threat of injury, although the quality and quantity is less. Thus, in our view, based on an unbiased and objective evaluation of the evidence and information before it in this case, the Ministry could not properly have determined that there was sufficient evidence of injury, that is threat of injury, to justify the initiation of the investigation.

### 3. Causal link

7.78 Finally, we conclude that an unbiased and objective investigating authority could not properly have determined that there was sufficient evidence of causal link to justify initiation if there was not sufficient evidence of dumping and threat of injury. In this case, having concluded that the evidence

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<sup>248</sup> Similarly, while Article 3.7 contains factors which must be specifically considered in determining threat of injury, the factors in Article 3.2 remain relevant.

of dumping and threat of material injury were insufficient to justify initiation, we also conclude that the evidence of causal link between the dumped imports and the alleged injury was, perforce, not sufficient to justify initiation. The ADP Agreement clearly requires sufficient evidence of all three elements before an investigation may be initiated.

#### 4. Conclusion

7.79 In sum, in our view, based on an unbiased and objective evaluation of the evidence and information that was before it at the time of initiation in this case, the Ministry could not properly have determined that there was sufficient evidence of dumping, threat of injury, and causal link, to justify the initiation of the investigation.

7.80 Therefore, we determine that Guatemala failed to comply with the requirements of Article 5.3 of the ADP Agreement by initiating the investigation on the basis of evidence of dumping, injury and causal link that was not "sufficient" to justify initiation.

### VIII. RECOMMENDATION

8.1 Mexico argues that the violations of the ADP Agreement in this case go to the foundations of the anti-dumping investigation conducted by Guatemala, and effectively render the investigation invalid from the outset. Consequently, Mexico argues that the consequences of the invalid initiation must be undone, and requests us to recommend that Guatemala (1) revoke the anti-dumping measure imposed on imports of grey portland cement from Cruz Azul, and (2) refund those anti-dumping duties already collected. This we decline to do.

8.2 Article 19.1 of the DSU is explicit concerning the recommendation a panel is to make in the event it determines that a measure, or in this case, action, is inconsistent with a covered agreement:

"it shall recommend that the Member concerned bring the measure into conformity with that agreement". (footnotes omitted).

Article 19.1 goes on to provide that:

"In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations".

Such suggestions on implementation, however, are not part of the recommendation, and are not binding on the affected Member.

8.3 Thus, in a dispute where a panel concludes that a Member has violated the provisions of the ADP Agreement, it is constrained by the language of Article 19.1 to recommend that the Member bring its actions, or its measure, as the case may be, into conformity with the provisions of the ADP Agreement. In addition, the panel could, **at most**, suggest ways in which it believes the Member could appropriately implement that recommendation. In the first instance, however, the modalities of implementation of a panel, or Appellate Body, recommendation are for the Member concerned to determine. This is confirmed by the language of Article 21.3 of the DSU, which provides:

"At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB". (footnote omitted).

In our view, this language clearly establishes a distinction between the **recommendation** of a panel, and the **means** by which that recommendation is to be implemented. The former is governed by

Article 19.1, and is limited to a particular form. The latter may be suggested by a panel, but the choice of means is decided, in the first instance, by the Member concerned. Of course, it is possible that the prevailing Member in the dispute may not be satisfied with the Member's implementation. The DSU recognizes this possibility, and provides for recourse to the dispute settlement procedures to resolve any such disagreements.

8.4 We have concluded in this case that Guatemala violated the provisions of the ADP Agreement by failing to notify the Government of Mexico before proceeding to initiate, as required by Article 5.5. We therefore recommend that the Dispute Settlement Body request Guatemala to bring its action into conformity with its obligations under Article 5.5 of the ADP Agreement. In this case, in view of our suggestion with respect to implementation of our second recommendation, we make no suggestion related to implementation of this recommendation.

8.5 We have also concluded that Guatemala violated the provisions of the ADP Agreement by initiating the investigation when there was not sufficient evidence to justify initiation, as required by Article 5.3. Therefore, we recommend that the Dispute Settlement Body request Guatemala to bring its action into conformity with its obligations under Article 5.3 of the Agreement.

8.6 We have determined that an unbiased and objective investigating authority could not properly have determined, based on the evidence and information available at the time of initiation, that there was sufficient evidence to justify initiation of the anti-dumping investigation conducted by the Guatemalan Ministry of Economy. Thus, the entire investigation rested on an insufficient basis, and therefore should never have been conducted. This is, in our view, a violation which cannot be corrected effectively by any actions during the course of the ensuing investigation.<sup>249</sup> Therefore, we suggest that Guatemala revoke the existing anti-dumping measure on imports of Mexican cement, because, in our view, this is the only appropriate means of implementing our recommendation.

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<sup>249</sup> By contrast, we can envision examples of errors during the course of an anti-dumping investigation which would constitute violations of the ADP Agreement when they occur, but which could effectively be corrected during the subsequent course of the investigation. However, this is not such a case.