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

Report of the Panel

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EC – Bed Linen (Article 21.5 – India)	Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report, WT/DS141/AB/RW, DSR 2003:IV, 1269
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EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
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EC – Tube or Pipe Fittings	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, 2613
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Korea – Resins	GATT Panel Report, *Panel on Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, ADP/92 and Corr.1, adopted 27 April 1993, BISD 40S/205
Mexico – Anti-Dumping Measures on Rice	Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, 10853
Mexico – Anti-Dumping Measures on Rice	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report, WT/DS295/AB/R, DSR 2005:XXIII, 11007
Mexico – Corn Syrup	Panel Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, and Corr.1, DSR 2000:III, 1345
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
Mexico – Steel Pipes and Tubes	Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007
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US – 1916 Act (EC)	Panel Report, *United States – Anti-Dumping Act of 1916, Complaint by the European Communities*, WT/DS136/R and Corr.1, adopted 26 September 2000, upheld by Appellate Body Report, WT/DS136/AB/R, WT/DS162/AB/R, DSR 2000:X, 4593
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US – Countervailing Duty Investigation on DRAMS	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report, WT/DS296/AB/R, DSR 2005:XVII, 8243
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US – Lead and Bismuth II	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595
US – Lead and Bismuth II	Panel Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R and Corr.2, adopted 7 June 2000, upheld by Appellate Body Report, WT/DS138/AB/R, DSR 2000:VI, 2623
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US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)	Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report, WT/DS268/AB/RW

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

I. INTRODUCTION

A. COMPLAINT OF THE EUROPEAN COMMUNITIES

1.1 On 31 March 2006, the European Communities ("the EC") requested consultations with Mexico pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*DSU*"), Article XXIII of the *General Agreement on Tariffs and Trade 1994* ("*GATT 1994*"), Article 30 of the *Agreement on Subsidies and Countervailing Measures* (*"SCM Agreement*") and Article 19 of the *Agreement on Agriculture*. The consultations concerned the definitive countervailing measures imposed by Mexico on imports of olive oil from the European Communities by the "Final Resolution in the investigation of price subsidization of imports of olive oil" published in the Official Journal of the United Mexican States ("Official Journal") on 1 August 2005.[1] The European Communities and Mexico held consultations on 5 May 2006. These consultations failed to resolve the dispute.

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

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

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

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

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

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

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

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

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[1] WT/DS341/1.
[2] WT/DS341/2.
[3] WT/DS341/3.

II. FACTUAL ASPECTS

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

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

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

2.4 On 4 July 2003, Mexico invited the European Communities to consultations pursuant to Article 13.1 of the *SCM Agreement*.[5] On 11 July 2003, the European Communities sent a letter accepting the invitation.[6] The consultations took place in Mexico City on 17 July 2003.[7]

2.5 The Initiation Resolution was published in the Official Journal on 16 July 2003.[8] The investigation covered virgin olive oil, including the categories of extra virgin, fine virgin and ordinary virgin; refined, including first-class refined and second-class refined; and blended oil, including first-class blends and second-class blends. These goods were classified in tariff sub-headings 1509.10.01, 1509.10.99, 1509.90.01, 1509.90.02 and 1509.90.99 of the Mexican Tariff Schedule.[9]

2.6 The investigation covered the period April-December 2002[10] ("Period of Investigation" or "POI"). The examination of "trends" in the context of the injury analysis covered the periods 1 April-31 December of 2000, 2001 and 2002 [11] ("Injury Investigation Period" or "Injury POI").

2.7 During the course of the investigation, there were numerous communications and exchanges, including questionnaires, comments and submissions between the Mexican investigating authority, the Ministry of Economy ("Economía") and the parties to the investigation: Fortuny, the European Commission, the governments of the exporting EC Member States, importers, and exporters. Mexico and the European Communities also held consultations on 17 November 2003 and 2 December 2004.[12]

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

[4] Exhibit EC-13, para. 2.
[5] Exhibit EC-22, para. 22.
[6] Exhibit EC-14.
[7] Exhibit EC-22, para. 23.
[8] Exhibit EC-13.
[9] The Initiation Resolution (Exhibit EC-13) refers to tariff sub-headings 1509.10.99 and 1509.90.02. Subheadings 1509.10.01, 1509.90.01 and 1509.99.00 were added in the Preliminary Resolution (Exhibit EC-22, paras. 6-20) and maintained in the Final Resolution (Exhibit EC-1, paras. 15-24).
[10] Exhibit EC-1, para. 3.
[11] Ibid.
[12] Ibid., para. 65.

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

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

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. THE EUROPEAN COMMUNITIES

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

1. Articles 11.4 and 16 of the *SCM Agreement* by initiating the investigation in the absence a determination that the application was made by or on behalf of the domestic industry;

2. Article 11.11 of the *SCM Agreement* by failing to conclude the investigation within one year, and in no case more than 18 months, after its initiation;

3. Article 12.4.1 of the *SCM Agreement* by failing to require interested parties to provide non-confidential summaries of confidential information in sufficient detail to permit a reasonable understanding of the substance of the information;

4. Articles 12.8, 22.3, and 22.5[16] of the *SCM Agreement* by failing to properly inform the interested parties and to a provide reasonable and adequate explanation of the existence of subsidisation, notably as regards pass-through of any benefit;

5. Article 13.1 of the *SCM Agreement* by failing to grant an opportunity for consultations before the initiation of the investigation with the aim of clarifying the situation as to matters referred to in Article 11.2 of the *SCM Agreement* and arriving at a mutually agreed solution;

6. Articles 1.1 and 14 of the *SCM Agreement* by failing to calculate the benefit conferred on the recipient pursuant to Article 1.1 of the *SCM Agreement* and to apply the method used to each particular case in a transparent way which is adequately explained as required by Article 14 of the *SCM Agreement*;

7. Article VI:6 of the *GATT 1994* and Articles 15.4, 15.5 and 16 of the *SCM Agreement* by failing to correctly define the domestic industry;

[13] Exhibit EC-22, paras. 346-360.
[14] Exhibit EC-1, paras. 446-454.
[15] WT/DS341/2.
[16] In its First Written Submission, the European Communities alleges a violation only of Article 12.8, and not Articles 22.3 or 22.5, of the *SCM Agreement*.

8. Article VI:6 of the *GATT 1994* and Articles 15.1 and 15.4 of the *SCM Agreement* by failing to make a determination of injury based on positive evidence involving an examination of all relevant economic factors and indices having a bearing on the state of the industry and to provide reasoned and adequate explanation;

9. Article 15.5 of the *SCM Agreement* by failing to examine any known factors other than the allegedly subsidized imports which were causing injury to the domestic industry; and

10. Articles 13(b)(i) and 21.1 of the *Agreement on Agriculture* by initiating a countervailing duty investigation on imports of an agricultural product (olive oil) outside the circumstances contemplated in Article 13(b)(i) of the *Agreement on Agriculture* and in violation of Article 21.1[17] of the *Agreement on Agriculture*.

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

B. MEXICO

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

1. with regard to initiation, that Mexico acted in a manner consistent with Articles 11.4 and 16.1 of the *SCM Agreement* because Economía properly determined, based on sufficient facts in the application, that Fortuny was the sole domestic producer and was representative of the Mexican domestic industry[19];

2. with regard to the duration of the investigation, that Mexico acted consistently with the provisions of Article 11.11 of the *SCM Agreement* because although the investigation lasted more than 18 months, there were "exceptional circumstances": the delays resulted from Economía's acceptance of requests for extensions by interested exporters, so the rights of interested parties were not adversely affected[20];

3. with regard to the non-confidential summaries of confidential information, that Mexico acted in a manner consistent with Article 12.4.1 of the *SCM Agreement* because there were sufficiently detailed public summaries of all confidential information, and because of Mexico's regime for access to the confidential information on the record[21];

4. with regard to the disclosure of the essential facts that served as a basis for the decision to apply definitive measures, that Mexico acted in a manner consistent with Article 12.8 of the *SCM Agreement* because interested parties may be informed of the essential facts in a number of ways. The essential facts were disclosed in the Preliminary Resolution, which

[17] In its First Written Submission, the European Communities alleges a violation only of Article 13(b)(i), and not Article 21.1, of the *Agreement on Agriculture*.
[18] European Communities - First Written Submission, paras. 229-230.
[19] Mexico - First Written Submission, paras. 19, 34 and 43-44.
[20] Ibid., paras. 99, 105-106.
[21] Ibid., paras. 80-90.

described in detail the treatment of information, arguments and evidence furnished by the parties, and the reasons for information having been taken into account or rejected[22];

5. with regard to the invitation for consultations prior to initiation of the investigation, that Mexico acted consistently with Article 13.1 of the *SCM Agreement* because Economía invited the European Communities for consultations prior to the date of initiation[23];

6. with regard to the alleged failure to calculate the benefit conferred on the recipient pursuant to Article 1.1 of the *SCM Agreement* and to apply the method used to each particular case in a transparent way which is adequately explained, in violation of Article 14 of the *SCM Agreement*, that: (a) there is no provision in the *SCM Agreement* to indicate that a "pass-through" analysis is required, (b) as Economía correctly found that the subsidy was contingent on the production of olive oil, there was no need to analyze the transfer of the subsidy from olive growers to the producers of the olive oil; and (c) the methodology to calculate the subsidy margin used by Economía was correct[24];

7. with regard to Economía's definition of the domestic industry, that Mexico acted consistently with Article 16 of the *SCM Agreement* and did not violate Article VI:6 of the *GATT 1994*, because the European Communities failed to present a *prima facie* case of violation; and that, in any case, Economía made an exhaustive examination of all matters that might have been relevant to the evaluation of injury to the domestic industry and all the evidence reviewed pointed to the conclusion that the domestic industry was composed of Fortuny[25];

8. with regard to Economía's determination of injury, that Economía undertook its analysis of injury consistently with Article 15.1 and 15.4 of the *SCM Agreement*, and did not violate Article VI:6 of the *GATT 1994*, because Economía complied with Article 15.1 and 15.2 of the *SCM Agreement* by undertaking an objective examination based on positive evidence of the effect of the subsidized imports on prices, and Economía did examine all of the relevant factors listed in Article 15.4 of the *SCM Agreement* in its examination of the impact of the subsidized imports on the domestic industry[26];

9. with regard to Economía's consideration of "other known factors", that the European Communities has failed to present a *prima facie* case and that, in any event, Economía properly considered, as required by Article 15.5 of the *SCM Agreement*, any known factors, other than the allegedly subsidized imports, which were causing injury to the domestic industry[27]; and

10. with regard to the investigation on imports of an agricultural product outside the circumstances contemplated in Article 13(b)(i) of the *Agreement on Agriculture*, that the European Communities has not presented a *prima facie* case and, in any event, that Economía exercised due restraint in the initiation of the investigation; that the obligation to show "due restraint" did not apply to any action in the investigation other than the initiation, and that the obligations contained in Article 13(b)(i) only applied to the initiation and not to any other aspects of the investigation on olive oil given that the Article expired on 31 December 2003 and thus was not applicable after the initiation of the investigation.[28]

[22] Ibid., paras. 93 and 94.
[23] Ibid., paras. 2-12.
[24] Ibid., paras. 116,120-123 and 130.
[25] Ibid., paras. 157-158, 203-204.
[26] Ibid., paras. 249-276.
[27] Ibid., paras. 281 and 295.
[28] Ibid., paras. 48-49, 60-62 and 66, 74.

IV. ARGUMENTS OF THE PARTIES

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

V. ARGUMENTS OF THE THIRD PARTIES

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

VI. INTERIM REVIEW

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

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

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

A. TECHNICAL CORRECTIONS AND ADJUSTMENTS

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

B. REQUESTS FROM THE EUROPEAN COMMUNITIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

VII. FINDINGS

A. GENERAL ISSUES

1. Standard of Review

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

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

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

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

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

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

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

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[30] *See*, e.g., Appellate Body Report, *US – Cotton Yarn*, para. 74.
[31] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.
[32] Ibid., para. 188.
[33] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada*), para 93.
[34] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*; Appellate Body Report, *Argentina – Footwear (EC)*, paras. 119-121; Appellate Body Report, *US – Cotton Yarn*, paras. 74-78; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 183, and 186-188; Appellate Body Report, *US – Hot-Rolled Steel*, para. 55; Appellate Body Report, *US – Lamb*, paras. 101 and 105-108; Appellate Body Report, *US – Steel Safeguards*, para. 299; and Appellate Body Report, *US – Wheat Gluten*, paras. 160-161.

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

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

2. Burden of Proof

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

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

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

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

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

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[35] [footnote original] Appellate Body Report, *US – Lamb*, para. 106. (original emphasis)
[36] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[37] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14
[38] Appellate Body Report on *Canada – Dairy (Article 21.5 New Zealand and US II)*, para. 66.
[39] Appellate Body Report on *EC – Hormones*, para. 104.

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

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

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

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

3. Treaty Interpretation

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

Article 31: General rule of interpretation

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

[40] Appellate Body Report on *US – Gambling*, para. 140.
[41] Appellate Body Report on *US – Wool Shirts and Blouses*, p. 14.
[42] Appellate Body Report on *EC – Hormones*, para. 98.
[43] Appellate Body Report on *Japan – Apples*, para. 154.
[44] See, *inter alia*, Appellate Body Report on *US – Gasoline*, p. 17; Appellate Body Report on *India – Patents (US)*, para. 45; and Appellate Body Report on *US – Shrimp*, para. 114.

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

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

Article 32: Supplementary means of interpretation

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

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

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

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

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

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

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

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

B. ARTICLE 13.1 OF THE *SCM AGREEMENT*

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

1. Arguments of the Parties

7.15 The European Communities asserts that Economía initiated its investigation on 2 July 2003[45], that Mexico only invited the European Communities for consultations on 4 July 2003, and that the first consultations were held only on 17 July 2003. According to the European Communities, because of its failure to hold consultations before the initiation, Mexico is "in outright breach of its obligations under Article 13.1".[46]

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

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

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

2. Reasoning of the Panel

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

[45] The date on which the Minister signed the Initiation Resolution.
[46] European Communities - First written submission, para. 88.
[47] Mexico – First written submission, para. 3.
[48] Ibid., paras. 4-10; Mexico – Second written submission, paras. 5-6.
[49] Mexico – First written submission, paras. 11-12.
[50] European Communities - Second written submission, paras. 8-11.
[51] European Communities - Response to Panel question 99; European Communities – Second written submission, para. 10.
[52] European Communities - Second written submission, para. 9.
[53] Mexico – Second written submission, para. 14; Mexico – Response to Panel question 98.
[54] Mexico – Response to Panel question 98.

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

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

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

7.21 The parties disagree on the actual date of initiation of the olive oil investigation, and thus on whether the invitation to consultations was issued by Mexico prior to that date as required by Article 13.1.[55] The European Communities contends that the investigation was initiated on 2 July 2003, the date on which the Minister signed the Initiation Resolution, and that Mexico only issued the invitation to consultations thereafter, on 4 July 2003, thereby breaching Article 13.1 of the *SCM Agreement*.[56] Mexico counters that the investigation was initiated on 16 July 2003, the day the Initiation Resolution was published in the *Official Journal* of Mexico.[57] This disagreement raises two questions. First, what does the term "initiation" mean for the purposes of the *SCM Agreement*? Second, applying the definition of "initiation" in the *SCM Agreement*, what is the date on which Economía initiated the countervailing duty investigation into olive oil from the European Communities? Once both questions are resolved, we can examine whether Economía's 4 July 2003 invitation to consultations occurred prior to or after initiation.

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

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

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

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

[55] See, e.g., European Communities – First oral statement, para. 14.
[56] European Communities – First written submission, para. 88.
[57] Mexico – First written submission, para. 3.
[58] European Communities – First oral statement, paras. 15-29.
[59] Mexico – Second written submission, paras. 5-6.

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

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

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

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

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

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

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

[62] *Ibid.*, p. 458.

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

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

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

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

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

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

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

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

> "Article 85 [FTL].- In the absence of an express provision in this Law concerning the administrative proceedings relating to unfair international trade practices and safeguard measures, the Federal Tax Code shall be alternatively applied, insofar as consistent with the nature of these proceedings. This provision shall not apply to notifications and verification visits.
> "Article 7 [FTC]. - Tax laws, their regulations and general administrative provisions shall enter into force throughout the Republic on the day following their publication in the *Diario Oficial de la Federación* [Official Journal], unless a later date is stipulated therein."

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

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

(b) The nature of the obligations in Article 13.1

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

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

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

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

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

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

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

[68] *The New Shorter Oxford Dictionary*, 1993.

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

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

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

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

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

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

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

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

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

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

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

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

1. Arguments of the Parties

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

[71] European Communities - Second written submission, para. 12.
[72] European Communities – First written submission, para. 97.

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

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

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

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

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

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

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[73] Ibid., para. 99.
[74] Ibid., para. 100.
[75] Ibid., para. 99.
[76] European Communities – First oral statement, para. 48.
[77] European Communities – First written submission, para. 101.
[78] *Id.*; European Communities – first oral statement, para. 52. The Panel notes that in its response to Panel question 101 the European Communities stated that:

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

[79] European Communities – Second written submission, para. 24.
[80] European Communities – Second oral statement, para. 24.
[81] Mexico – First written submission, paras. 48, 52; Mexico – First oral statement, para. 9; Mexico – Response to Panel Question 22; Mexico – Second written submission, para. 55.
[82] Mexico – First written submission, paras. 46-49.

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

2. Reasoning of the Panel

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

> *Due Restraint*
>
> During the implementation period, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (referred to in this Article as the "Subsidies Agreement"):
>
> (b) domestic support measures that conform fully to the provisions of Article 6 of this Agreement including direct payments that conform to the requirements of paragraph 5 thereof, as reflected in each Member's Schedule, as well as domestic support within *de minimis* levels and in conformity with paragraph 2 of Article 6, shall be:
>
> > (i) exempt from the imposition of countervailing duties unless a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations; . . .

(a) Applicability of the Provision

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

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

7.53 Both parties agree that the "implementation period" ran at least until the end of 2003.[86] The European Communities indicated, in response to a question from the Panel, that depending on whether 'years' are defined as financial or marketing years, the date of expiry of the implementation period might have been some point during 2004.[87]

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

[83] Mexico – First written submission, paras. 55-56.
[84] Ibid., para. 56.
[85] Mexico – First written submission, para. 61.
[86] European Communities – First written submission, para. 47; Mexico – First written submission, para. 49.
[87] European Communities – Response to Panel question 20.

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

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

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

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

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

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

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

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

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

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

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

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

[92] Mexico - Response to Panel question 111

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[102] The New Shorter OED.

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

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

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

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

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

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

7.70 The European Communities provides three reasons why, in its view, Economía failed to exercise "due restraint" within the meaning of Article 13(b)(i).[108] These are that: (1) Economía did not wait to hold consultations with the European Communities prior to initiation, but plunged into the investigation at the first possible moment[109]; (2) Economía did not spend adequate time investigating, prior to initiation, whether there were domestic producers other than Fortuny, but paused only to take account of Fortuny's position; and (3) Economía accepted an application which was clearly based on "material retardation" and converted it into one of "material injury."[110]

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

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

7.73 With respect to the lack of investigation into other possible domestic producers besides Fortuny we note, as described in Section VII.I, that in its application Fortuny asserted that it accounted for 100 per cent of the olive oil production on the commercial market in Mexico and that there were no other domestic producers other than those operating on a "local" or "experimental" basis.[111] Fortuny also provided a table of monthly production for 2000, 2001, and 2002.[112] Economía sent a "prevención" or supplemental questionnaire to Fortuny asking for, *inter alia*, additional data on injury indicators, annual capacity and capacity utilization as well as information on any government support programmes that may have been affected by the increase of subsidized imports, information on the world olive oil market, including European production and exports, and audited financial statements for 2000, for the 2001 separation of Formex-Ybarra, and for 2002 for Fortuny and an

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

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

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

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

[112] Exhibit MEX-51A, Annex 5.

income statement for the like product for 2000-2002.[113] Fortuny responded with additional data, some based on simple worksheets that were in its possession rather than audited financial records that were in the possession of Distribuidora Ybarra.[114]

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

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

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

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

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

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

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

[113] Exhibit MEX-45.
[114] Exhibit MEX-46.
[115] Mexico – First written submission, paras. 58-60.
[116] Exhibit MEX-45.
[117] Mexico – First written submission, paras. 58-60.
[118] Mexico – First written submission, paras. 59-60; see also Initiation Resolution (Exhibit EC-13), para. 54.

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

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

D. ARTICLE 12.4.1 OF THE *SCM AGREEMENT*

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

1. Arguments of the Parties

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

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

2. Reasoning of the Panel

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

7.95 In its submissions before us, Mexico argued that the panel report in *Mexico – Steel Pipes and Tubes* supports its position that Mexico's access regime fulfils its obligations in Article 12.4.1.[125] On

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[121] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.382.
[122] Mexico – First written submission, para. 86.
[123] Again, in the context of an examination of the equivalent provision of the *Anti-dumping Agreement.*
[124] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.398.
[125] For example at paragraph 81(a) of its Second written submission Mexico says:

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

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

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

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

7.98 We do not accept Mexico's characterisation of the public versions in question. While in certain instances it may be possible to glean a reasonable understanding of the deleted information by considering the non-confidential information surrounding it, this is often not the case. For example, in responding to a request for additional information[129], Fortuny removed significant information regarding: Fortuny's operations (including details in respect of equipment, purchasing and sourcing of raw materials, yields, and distribution); the virgin olive oil production process; the nature of the alleged injury; and plans and attempts to restart production. No summaries were provided in respect of the deleted information, and we do not find it possible to obtain a reasonable understanding of the *deleted information* by reading the public version of the document.[130] Given the extensive deletions

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

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

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

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

[129] Exhibit MEX-42 A.

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

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

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

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

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

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

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

E. ARTICLE 12.8 OF THE *SCM AGREEMENT*

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

1. Arguments of the Parties

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

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

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

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

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

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

2. Reasoning of the Panel

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

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

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

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

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[132] European Communities – First written submission, paras. 108-109.
[133] Mexico – First written submission, paras. 92-94.
[134] Mexico – Response to Panel question 35; Mexico – Second written submission, para. 93 citing Mexico – Response to Panel question 32.
[135] Mexico – Response to Panel questions 32 and 35.
[136] European Communities – First oral statement, para. 64.
[137] Ibid., paras. 64-68; European Communities – Response to Panel question 33..
[138] European Communities – Response to Panel question 33.

European Communities does not assert that a preliminary determination can *never*, as a legal matter, satisfy the disclosure requirement in Article 12.8, but it argues that in the olive oil investigation, Economía committed a legal error by not informing the parties that the Preliminary Resolution was serving this purpose, thereby denying them the opportunity to "defend their interests" as required by Article 12.8.[139] Mexico argues that previous panels, particularly the panel in *Argentina – Ceramic Tiles*, have made clear that Article 12.8 disclosure can be made via preliminary determinations, and that in the olive oil investigation this was sufficient because none of the essential facts changed between the preliminary and final determinations. Thus, the precise question raised by this claim is whether the European Communities has established that the Preliminary Resolution in the olive oil investigation did not satisfy the disclosure obligation in Article 12.8.

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

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

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

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

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

[142] Ibid., para. 35.

[143] Ibid., para. 37.

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

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

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

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

[144] Ibid., para. 33.

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

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

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

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

F. ARTICLE 11.11 OF THE *SCM AGREEMENT*

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

1. Arguments of the Parties

7.118 The European Communities asserts that Mexico has acted inconsistently with its obligations in Article 11.11 of the *SCM Agreement*, because the investigation lasted more than 24 months. In particular, the European Communities argues that the investigation was initiated on 2 July 2003[147] and was concluded on 1 August 2005. It is the position of the European Communities that Article 11.11 contains an absolute limit (18 months) on the length of an investigation, and that Mexico exceeded this limit.[148]

7.119 Mexico does not deny that its investigation lasted more than 18 months. It argues that the purpose of Article 11.11 is "to protect the interested parties from any unjustified delay or inaction" and that delays were caused by requests for extensions from the interested parties and requests that Economía consider additional information at late stages in the investigation. Consequently, any delay in the investigation did not subvert the purpose of Article 11.11.[149]

2. Reasoning of the Panel

7.120 Article 11.11 reads as follows:

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

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

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

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

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

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

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

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

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

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

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

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

1. Arguments of the parties

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

[150] WT/DS341/2, at tiret 6.

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

[152] European Communities - Response to Panel question 43.

[153] Ibid.

[154] European Communities - Response to Panel question 121.

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

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

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

[155] European Communities - First written submission, paras. 123-124.
[156] Ibid., para. 125.
[157] Ibid.
[158] Ibid., para. 127.
[159] European Communities - Response to Panel question 46.
[160] Ibid.
[161] Ibid.
[162] European Communities - First written submission, para. 128.
[163] Ibid. paras. 130-131, citing Panel report in *US – Canadian Pork* and Appellate Body report in *US – Countervailing Measures on Certain EC Products*.
[164] Mexico - First written submission, paras. 119 *et. seq.*; Mexico - Second written submission, paras. 105 *et seq*.
[165] Mexico - Response to Panel question 43.

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

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

2. Reasoning of the Panel

(a) "Pass-through" of Subsidy Benefits

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

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

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

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[166] Mexico - Response to Panel questions 122 and 123.
[167] Ibid.
[168] Mexico - Response to Panel question 57.
[169] Mexico - Second written submission, para. 120.
[170] Ibid., citing the response of the European Communities to Panel question 47.
[171] Mexico - Second written submission, para. 121.
[172] Panel Report, *US - Softwood Lumber III* (not appealed), which concerned the United States' preliminary countervailing duty determinations, came to essentially the same conclusion in respect of the pass-through analysis.

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

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

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

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

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

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

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[173] Panel Report, *US – Canadian Pork*, para. 4.6
[174] Panel Report, *US – Canadian Pork*, paras. 4.8-4.10.

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

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

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

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

[175] Appellate Body Report, *US - Softwood Lumber IV*, para. 141.
[176] Ibid.
[177] Ibid., para. 143.
[178] Ibid., para. 145.
[179] Ibid., paras. 140-147; 156-159.

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

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

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

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

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

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

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

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

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

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

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

[183] Ibid., para. 163.

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

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

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

> *Article 1*
>
> *Definition of a Subsidy*
>
> 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government") ...
>
> and
>
> (b) a benefit is thereby conferred.

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

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

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

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

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

[187] European Communities - Response to Panel question 46.

[188] Ibid.

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

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

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

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

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

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

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[190] European Communities - Response to Panel question 126.

[191] Ibid.

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

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

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

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

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

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

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

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

7.155 Article 14 reads, in relevant part:

> *Article 14*
> *Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient*
>
> For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member

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

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

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

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

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

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

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

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

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

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

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

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

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

> "100. In this stage of the investigation, the Ministry confirms its preliminary determination that the subsidy provided by the European Community is olive oil and only a small proportion is destined to olives. From a reading of Regulation 136/66/EEC the purpose and the benefited product are clear. We cite the following paragraphs (the underlining is ours):
>
> > 'Whereas olive growing and the production of olive oil are particularly important to the economies of certain regions of the Community ... that for many consumers, olive oil is the most important source of oils and fats ... it is necessary to support this productions through appropriate actions.
> >
> > 'Whereas, to this end, the marketing of the crops must assure fair remuneration to Community producers, the level of which can be defined by a production target price for olive oil ...
> >
> > Title II
> >
> > Olive Oil
> >
> > Article 4.
> >
> > 1. A production target price shall be set for the Community.
> >
> > This price shall be fixed at the wholesale marketing stage for ordinary virgin olive oil with a free fatty acid content expressed as oleic acid of 3.3g / 100g.

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

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

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

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

Article 5

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

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

...

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

...

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

...

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

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

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

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

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

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

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

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

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

7.168 We further recall that we see no obligation in respect of pass-through analysis in the cited language of Article 14. Even if there were such an obligation, moreover, we would find no basis on which to conclude that Economía had acted inconsistently with it. In particular, bearing in mind the standard of review, we have considered carefully the evidence on the record made available to us as to the nature and operation of the subsidy programme, and have examined the conclusions that Economía drew on the basis of that evidence as presented in the Final Resolution. We consider that Economía's conclusion that the subsidy programme under investigation in this case consisted of aid to olive growers for the production of olive oil was one that could be reasonably reached on the basis of the record evidence. In this regard, we note, first, the language of the Regulation itself, which stipulates that the olive grower receives aid only to the extent that it can prove that it has converted its olives into olive oil[201], and is paid only for the actual kilograms of olive oil that its olives produce.

[200] Final Resolution (Exhibit EC-1), para. 116.
[201] Except for the small fraction provided for as aid to the production of table olives.

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

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

(b) Article 14 – Other Calculation Issues

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

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

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

[204] Ibid., paras. 106-108.

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

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

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

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

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

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

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

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

[209] Ibid., paras. 122-123.

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

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

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

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

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

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

H. DEFINITION OF "DOMESTIC INDUSTRY"

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

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

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

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

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[213] European Communities - First written submission, para. 152.
[214] Mexico – First written submission, paras. 137-146.
[215] WT/DS341/2, tiret 1.
[216] European Communities – First written submission, para. 188.
[217] Ibid., para.189.

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

1. Arguments of the Parties

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

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

[219] European Communities – Response to Panel question 63.

Question 63 from the Panel asked:

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

The European Communities responded:

> The European Communities has identified in Article VI:6(a) of GATT 1994 the clearest expression of the *obligation* imposed on Members in respect of injury findings in anti-dumping and countervailing duty proceedings. Infringements of this obligation can arise from behaviour by national investigating authorities that is inconsistent with individual provisions of the *SCM Agreement*.
>
> In its contentions in support of its claim under this heading the EC has sought to identify particular provisions in Articles 15 and 16 with which the actions of Economía was inconsistent. In each case where the EC has alleged inconsistency it has identified the particular provision in Article 15 or 16 where that inconsistency arises. The EC believes that it has also made clear that the inconsistencies are linked to the obligation in Article VI:6. Usually this link is stated explicitly, as reflected in the terms of the Panel's Question.

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

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

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

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

2. Reasoning of the Panel

(a) Introduction

7.184 The European Communities claims that by defining the domestic industry inconsistently with Article 16.1 of the *SCM Agreement*, Mexico acted inconsistently with that provision as well as, consequentially, with Article 11.4 of the *SCM Agreement* and Article VI:6(a) of the *GATT 1994*. Specifically, the European Communities argues that if an investigating authority does not properly identify the correct domestic industry consistent with Article 16.1, and imposes countervailing duties, it also acts inconsistently with Article VI:6(a) of the *GATT 1994*, which permits the imposition of countervailing duties only in the event that an investigating authority makes a determination of material injury or threat thereof to an established domestic industry. Likewise, the European Communities argues that because Fortuny was not the "domestic industry" as defined by Article 16.1, its application was not made "by or on behalf of the domestic industry" as required by Article 11.4.[225]

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

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

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

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

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

[225] WT/DS341/2, tiret 1.

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

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

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

(b) Definition of "domestic industry"

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

7.189 Article 16.1 reads as follows:

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

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

7.190 By its own terms, Article 16.1 provides a definition of the term "domestic industry" "for the purposes of this Agreement", i.e., the definition applies to the entire *SCM Agreement*.[227] As such, this term must be given a consistent meaning throughout the *SCM Agreement* including for the purposes of the term "domestic industry" as used in Article 11.4.[228] With respect to Article VI:6(a) of the *GATT 1994*, the Appellate Body and prior panels have found that the *SCM Agreement* provides context for the interpretation of Article VI of the *GATT 1994*,[229] Indeed, the panel in *Brazil – Desiccated Coconut* emphasized that "the meaning of Article VI of *GATT 1994* cannot be established without reference to the provisions of the SCM Agreement."[230] The definition in Article 16.1, therefore also informs the meaning of the term "domestic industry" as used in Article VI:6(a) of the *GATT 1994*,and an enterprise or group of enterprises that qualifies as a "domestic industry" within the meaning of Article 16.1 of the *SCM Agreement* will also constitute the domestic industry for the purposes of Article VI:6(a) of the *GATT 1994*.

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

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

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

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

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

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

[231] New Shorter Oxford English Dictionary, 1993 edition.

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

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

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

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

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

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

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

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

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

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

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

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

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

7.197 A number of provisions of the *SCM Agreement*, including Article 15, which sets forth how investigating authorities should conduct investigations into whether a domestic industry is injured as a result of subsidized imports, provide relevant context for interpreting the word "producer" in Article 16.1. First, Article 15.1 provides that the overarching obligations[235] pertaining to the determination of injury to a "domestic industry"[236] involve (a) an examination of the volume of the subsidized imports and their impact on prices in the domestic market for like products, and (b) an examination of the impact the subsidized imports on the "domestic producers" of those products. We note here that Article 15.1 refers to "domestic producers" without mentioning the existence of output at any specified points in time. Articles 15.2 or 15.4 which respectively provide the obligations for the examinations of the volume of the subsidized imports and their impact on domestic prices, and of the impact of the subsidized imports on the domestic producers, referred to in Article 15.1 provide further context for our interpretation of the terms "domestic industry" and "producer" as used in Article 16.1 of the *SCM Agreement*.

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

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

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

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

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

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

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

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

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

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

7.203 Most importantly, in our view, the European Communities' interpretation could lead to the result that an industry may be so badly injured by subsidized imports as to be forced to cease production for some period, but would be disqualified from obtaining the very remedy aimed at addressing such injury.[239] We believe that this outcome would be absurd and contrary to the intention of the drafters of the *SCM Agreement.* In this context, we are not persuaded by the European Communities' argument that the provisions on *ex officio* initiation in Article 11.6 address this problem.[240] In particular, we do not see how this form of initiation could resolve the substantive question at issue, as Article 11.6 itself indicates that *ex officio* initiations require the same evidentiary basis as application-based initiations.[241] Thus, if the European Communities is correct that, for the purposes of initiation, an applicant must have actual output at or near the time it presents an application, Article 11.6 would likewise indicate that "output" would be required at the time of initiation even if it was undertaken *ex officio*. In addition, as the European Communities recognizes[242], all investigations require the same evidentiary basis, whatever the basis of their initiations. Thus, we fail to see how, if we were to follow the European Communities' interpretation of Article 16.1, initiating an investigation *ex officio* could provide a solution for an industry that had been forced to cease production – and thus was not producing at or near the time of initiation or during the subsidy POI – due to competition from subsidized imports. We see no indication in the

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

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

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

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

[242] European Communities - Response to Panel question 16.

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

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

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

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

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

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

[244] European Communities – First oral statement, para. 33.

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

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

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

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

7.207 The European Communities contends that Fortuny[248] had ceased production for the entirety of the investigation period and for that reason "no reasonable investigating authority could have determined that it was an existing industry".[249]

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

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

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

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

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

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

[249] European Communities - Response to Panel question 143.

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

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

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

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

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

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

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

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

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

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

I. ARTICLE 11.4 OF THE *SCM AGREEMENT*

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

1. Arguments of the Parties

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

[252] *See*, para. 7.184, *supra*.
[253] European Communities – First written submission, paras. 75 *et seq.*

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

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

2. Reasoning of the Panel

7.221 Article 11.4 reads as follows:

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

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

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

[254] European Communities - Second oral statement, para 12.
[255] Ibid., paras 37-45; European Communities - Second written submission, paras. 17-22.
[256] Mexico – First written submission, paras. 38-44.

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

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

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

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

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

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

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

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

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

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

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

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

(a) statements made by Fortuny concerning the state of the domestic industry;

(b) letters dated 3 October 2002, and 27 and 28 January 2003, from the state of Baja California in respect of Fortuny's productive capacity (these were attached to the application); and

(c) information contained in the article "El Olivo, Eco del Mediterraneo" in the journal *Claridades Agropecuarias* ("*Claridades* article"), published June 2001 by the Government Agency the "Agricultural Marketing Support and Services" ("ASERCA") of the Federal Ministry of Agriculture, Livestock, Rural Development and Food (this article was also attached to the application).

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

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

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

[260] Mexico – Response to Panel question 103.
[261] Initiation Resolution (Exhibit EC-13), paras. 4, 19.
[262] Exhibit MEX – 41A (proprietary version at Exhibit MEX – 51A), para. 30.
[263] Ibid.

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

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

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

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

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

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

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

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

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

[265] Exhibit MEX- 39 .

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

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

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

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

producers of olive oil other than Fortuny (except for small artisanal producers) operating in Mexico. Furthermore, we consider that the information was credible. In particular, although all of the material was provided by Fortuny, it included documents from external, government sources, in particular a government publication dedicated to an examination of the Mexican olive and olive oil industry. Upon examining the totality of the evidence that was before Economía at the time of initiation[270], we find that Economía reasonably and adequately could have concluded, for purposes of the standing determination, that there were no other domestic producers of olive oil and that Fortuny thus constituted the entire domestic industry.

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

J. ARTICLE I6.1 OF THE *SCM AGREEMENT* AND ARTICLE VI:6(a) OF THE *GATT 1994*

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

1. Arguments of the Parties

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

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

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

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

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

2. Reasoning of the Panel

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

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

> First, Economía contacted a Mexican firm, Maprinsa, alleged by the exporters to be producing olive oil. Economía reported that Maprinsa explained that it was engaged solely in bottling and packaging olive oil, and not in producing it. However, the Ministry apparently made no attempt to discover from Maprinsa whether the oil that it bought was of Mexican or foreign origin.
>
> Second, Economía showed a similar lack of initiative when investigating two other firms that were revealed to be engaged in bottling only, and in regard to yet two more firms that were named as possible producers, Economía either relied on a third party's view or did nothing at all to determine the nature of their activities.[277] In addition, Economía simply dismissed artisanal production as irrelevant because it was not distributed through the same channels as imports.
>
> Third, Economía contacted a national association of oil and edible fat industries, but this association merely confirmed that Fortuny was the only olive oil producer registered with it and that it had no registrations of any domestic producer other than Fortuny. This carefully

[272] Mexico – First written submission, para. 157-204, citing Final Resolution (Exhibit EC-1), paras. 212 – 255.
[273] Mexico – Second written submission, para. 136.
[274] Ibid., para. 151.
[275] Ibid., para. 154.
[276] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 188.
[277] (footnote original) Final Resolution (Exhibit EC-1), para. 241.

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

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

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

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

(a) Economía sent a letter to Maprinsa on 15 December 2003, asking *inter alia* whether it knew of any other domestic producers of olive oil and whether the olives it used were of Mexican origin and who its suppliers were.[281] Maprinsa's reply of 5 January 2004 indicated that it knew of three other domestic olive oil manufacturers (Olivos de California, Olivarera Tulyehualco, and Conservas Vermex). It also indicated that it did not buy olives, but olive oil which it bottled. Maprinsa also provided the trade names under which it sold its olive oil (San Lucas and El Olivo).[282]

(b) In response to assertions by Fortuny that Maprinsa's product was not olive oil, Economía contacted on 8 December 2003 a laboratory company, Bufete Químico, which had been provided a sample of Maprinsa's oil by Fortuny. Economía asked for a copy of the laboratory report as well as assurances that the sample bore Maprinsa's trade name and had not been tampered with.[283] Bufete Químico confirmed on _17 December 2003 that it had received a properly closed bottle with a label bearing Maprinsa's trade name "San Lucas, Aceite de Oliva, Gourmet" which it determined was not olive oil, but rather canola (rapeseed) oil.[284]

(c) Economía on 8 December 2003 sent a request to the Mexican Industrial Property Institute ("IMPI") seeking information on Maprinsa's brand names and whether IMPI's database indicated if Maprinsa's products were manufactured in Mexico or only packaged there. Economía also requested information on the number of olive oil brands registered with IMPI and if their nationality could be discerned.[285] IMPI responded on 19 January 2004 that San Lucas was registered to Maprinsa and that El Olivo was registered in the name of C. Luis Fernando Peniche Gallareta. IMPI also noted that there were 13,915 marks in international class 29, which includes edible

[278] European Communities – First written submission, paras. 168-171.
[279] European Communities - First written submission, para. 172.
[280] Ibid., para. 105.
[281] Exhibit MEX-9
[282] Exhibit MEX-10. See also, Preliminary Resolution (Exhibit EC-22), paras. 193-194.
[283] Exhibit MEX-11.
[284] Exhibit MEX-12.
[285] Exhibit MEX-13

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

(d) Economía also sent letters to Conservas Vermex and Olivarera Tulyehualco, dated 15 October 2004, asking them to explain their products, whether they produced olive oil or imported and bottled it or both. Economía also asked them to explain their brands and distribution channels and to explain the inputs utilized in the production of olive oil and whether these inputs were of national origin or imported. Economía also asked them to indicate from where they acquired the inputs.[287] Both companies, in replies dated 21 October 2004 and 1 November 2004 respectively, stated that they did not produce olive oil, but only bottled it.[288] Conservas Vermex explicitly stated that it imported its olive oil from Spain and other Mediterranean countries which it purchased in bulk at the port of Veracruz.[289] Olivarera Tulyehualco indicated that it only bottled olive oil which it purchased from a supplier in Baja California Norte. Additionally, Olivarera Tulyehualco provided labels for its oil products. One referred to "Aceite Vegetal" the other to "Aceite Puro de Oliva". Both labels indicated that the product was bottled by Olivarera Tulyehualco which was a registered import export company. There was no reference to the origin of the oil on either label.[290]

(e) Economía sent a letter on 8 December 2003 to the National Association of Oil and Edible Fat Industries ("ANIAME") asking for information on domestic companies that produced olive oil: their number, names, and addresses as well as the brands under which they distributed. Economía also asked for information on the volume of domestic production in the years 1998-2003 and whether ANIAME had information on the current state of the olive oil industry. [291] ANIAME replied on 8 January 2004 that Fortuny was the sole olive oil producer registered with the association.[292]

(f) Economía sent a letter on 8 December 2003 to the National Association of Self-Service and Department Stores ("ANTAD"), a group of some of the major self-service and commercial distribution stores in Mexico, requesting information on any domestic olive oil producer known to them.[293] The ANTAD transmitted the request to two of its associates, Grupo Gigante and Comercial Mexicana.[294] Grupo Gigante did not respond, but Comercial Mexicana responded on 17 December 2003 that it imported its olive oil from Italy and Spain and that it had not received any offers to market oil from any Mexican company.[295] Economía also sent independent letters to those two companies, on 4 October 2004.[296]

(g) Economía on 4 October 2004 sent requests for information to major self-service and department stores who were not members of ANTAD. These included Nueva Wal Mart, Grupo Corvi, Servicio Comercial Garis and La Europea Mexico.[297] La Europea responded on 15 October 2004 that it purchased imported olive oil and that it had received offers from Maprinsa.[298] Grupo Corvi replied on 11 October 2004 that it had

[286] Exhibit MEX-40.
[287] Exhibits MEX-14, 15.
[288] Exhibit MEX-16, 17.
[289] Exhibit MEX-16.
[290] Exhibit MEX-17.
[291] Exhibit MEX-18.
[292] Exhibit MEX-19.
[293] Exhibit MEX-22.
[294] Exhibit MEX-23.
[295] Exhibit MEX-26.
[296] Exhibits MEX-24, MEX-25
[297] Exhibits MEX-27, 28, 29, and 30.
[298] Exhibit MEX-31.

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

(h) Economía sent letters to the government of the state of Baja California Norte, to SAGARPA (the federal authority for the agriculture and livestock sector), and to ASERCA a sub-division of SAGARPA, on 8 December 2003[301] These letters asked for information (1) about the harvest of olive trees in the years 2000 through 2003 as well as the volume of table olives obtained and those destined for olive oil (as well as the conversion factor of olives necessary to produce one litre of olive oil); (2) information on olive tree plantations in Mexico; and (3) information, if possible statistical, bibliographic and/or hemerographic explaining the situation of the national productive industry for olive oil.[302] ASERCA responded to Economía on 19 January 2004 by indicating that the National System of Information for Rural Sustainable Development would have any relevant statistics and geographic information of the agriculture and fisheries sector.[303]

(i) Based on its request mentioned in paragraph (h) above, Economía engaged in correspondence with the government of Baja California Norte. The Government of Baja California responded on 15 December 2003 to the initial request with a letter explaining the total available hectares in the Coastal Zone as well as the percentage of the hectarage (40 per cent) that was destined for oil production. It also annexed a table listing plantations in Baja by hectare, variety and capacity.[304] Fortuny is listed in the table as having a plantation, but so are a variety of other companies. Economía then sent an additional request on 18 December 2003 to the Government of Baja California asking it about its specific knowledge of Fortuny as well as to indicate the addresses of the companies listed in the table and which ones other than Fortuny were then producing, had produced, or would produce olive oil.[305] The Government of Baja California responded on 9 January 2004 with more information about Fortuny and again attached the same table from its earlier letter, which was now titled "Agroindustries of Olive Trees in Baja, CA". The third column, entitled "capacity" now had indicators for specific companies separating "olives" and "oil".[306]

(j) Economía on 8 December 2003 also requested information from the Office of the Federal Attorney-General for Consumer Affairs and the Directorate General of Standards.[307] The Directorate General of Standards on 29 January 2004 provided a copy of the Official Journal entry for the norm NMX-F-109-1982 Foods-Olive Oil, which set quality specifications for olive oil, and noted that compliance with these specifications was voluntary.[308]

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[299] Exhibit MEX-32.
[300] Exhibit MEX-33.
[301] Exhibits MEX-49A, 49B, and 49C
[302] Ibid.
[303] Exhibit MEX-49G.
[304] Exhibit MEX-49D.
[305] Exhibit MEX-49E.
[306] Exhibit MEX-49F.
[307] Exhibits MEX-20, 21. See also Preliminary Resolution (Exhibit EC-22), paras. 193-195; Final Resolution (Exhibit EC-1), paras. 231-232.
[308] Exhibit MEX-49H

(k) Economía consulted the magazine *Claridades Agropecuarias*, which is published by SAGARPA, for information about the company Llanos de San Francisco as well as the possibility of olive oil production in the state of Sonora.[309]

(l) The European Communities, on 9 January 2004 submitted a letter, containing a table comparing purported figures for Mexican olive oil production from the International Olive Oil Council ("IOOC") and from the United Nations Food and Agriculture Organization ("FAO"). The data from the IOOC listed Mexican production of olive oil in 1999/2000 as 1,000 tons; 2000/2001 as 1,500 tons; and 2001/2002 as 2,000 tons. The figures from the FAO listed domestic production in all three years as 200 tons. This was consistent with Fortuny's production data set forth in Table 9 of the Preliminary Resolution.[310]

(m) Economía described the arguments and evidence submitted by the parties to the investigation in respect of this question, the efforts that it undertook and the evidence it obtained thereby in pursuing this issue, and its reasoning and conclusions with respect to the non-existence of other producers, at paragraphs 212-255 of the Final Resolution.

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

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

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

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

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

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

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

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

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

1. Arguments of the Parties

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

7.251 First, the European Communities argues that there was confusion as to whether Economía's injury determination was based on a finding of material retardation or material injury and that a simultaneous finding of both types of injury was inconsistent with Article VI:6.[312]

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

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

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

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

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

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

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

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

[317] Ibid., para. 211-213.

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

7.255 Finally, the European Communities also alleges that the use of successive nine-month investigation periods constantly undermines the injury analysis, and that "the use of 9-month periods for collecting data, overlapping with some data extending over 12 months, added a major element of unreliability while at the same time introducing needless complexity."[319] The European Communities maintains that the data from the three months excluded from each year could have significantly affected the results of the investigation.[320] The European Communities argues that Economía's use of the nine-month periods is inconsistent with the obligation to conduct an "objective examination" in Article 15.1 which governs all aspects of the injury determination including the analysis of relevant economic factors having a bearing on the state of the industry pursuant to Article 15.4.[321] The European Communities also notes that in two recent disputes, the same practice by Mexico was found not to provide an accurate and unbiased picture of what was being examined.[322]

7.256 Mexico argues that its final determination was based on a finding of "material injury" to the domestic industry, not material retardation.[323] With respect to the determination of the effect of subsidized imports on prices of the domestic like product, Mexico argues that it made its price undercutting analysis properly and that the data it used for Fortuny's prices during the time it was not producing were consistent with the concept of "positive evidence" in Article 15.1.[324]

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

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

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

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[318] European Communities – Second oral statement, para. 63.
[319] European Communities – Second written submission, para. 53.
[320] European Communities – First oral statement, paras. 115 – 117; European Communities – Second written submission, para. 53.
[321] European Communities – First oral statement, para. 117 citing Appellate Body Report, *US – Hot Rolled Steel*, para. 193.
[322] Ibid., citing Appellate Body Report, *Mexico – Rice*, para. 180; Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.252.
[323] Mexico – First written submission, para. 219-223 *citing* Preliminary Resolution (Exhibit EC-22), para. 219 and Final Resolution (Exhibit EC-1), para. 279.
[324] Mexico – First written submission, paras. 236-237.
[325] Mexico – First written submission, paras. 248-277.
[326] Ibid., at para. 260.
[327] Ibid., at para. 261.
[328] Ibid., para. 253.

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

2. Reasoning of the Panel

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

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

(a) Article 15 of the *SCM Agreement*

7.262 Article 15.1 reads as follows:

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

7.263 Article 15.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation with respect to the determination of injury. Moreover, paragraph 1 informs the more specific obligations in the succeeding paragraphs of Article 15. [331]

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

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

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[329] Mexico – First oral statement (executive summary), para. 37.
[330] European Communities – Request for establishment of a panel (WT/DS341/2).
[331] Appellate Body Report, *Thailand – H-Beams*, para. 106.
[332] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.
[333] Ibid.
[334] Appellate Body Report, *US – Hot-Rolled Steel*, para 193.

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

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

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

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

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

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

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

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[335] Ibid.
[336] Ibid.
[337] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.214.
[338] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.77.
[339] Ibid., para. 7.79 upheld by Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 180.
[340] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.249.

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

7.270 In conducting the analysis, an investigating authority must examine all of the listed factors and must also evaluate any other relevant economic factors affecting the condition of the industry.[341] However, an investigating authority may conclude that a particular factor is not probative in the circumstances of the domestic industry in a particular case, and therefore is not relevant in the actual determination.[342] Additionally, there is no requirement that each and every injury factor, individually, must be indicative of injury.[343] Furthermore, as noted by the Appellate Body, an investigating authority conducting the examination required in Article 15.4 is obligated to do so objectively, and to base its determinations on positive evidence, as set forth in Article 15.1.[344]

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

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

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

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

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

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

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

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

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

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

[345] Mexico – First written submission, para. 271.

analyses, Economía used data from April – December 2000, 2001, and 2002.[346] With respect to import prices, Economía examined monthly data from January 2000 through November 2003, as well as monthly data showing the percentage price differences compared with the same month of the previous year.[347] With respect to domestic prices, Economía calculated a margin of price undercutting using domestic prices from the period from April – December 2000 as well as the same period in 2001, the results of which were displayed in Table 6 of the Final Resolution as follows:

Table 6. Undercutting

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

Source: SIC-FP and Fortuny.

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

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

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

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

[346] Final Resolution (Exhibit EC-1), paras. 305-306; 313 – 315.
[347] Ibid., paras. 307-310.
[348] Ibid., para. 324.
[349] Ibid.
[350] Ibid., paras. 335, 368-414.
[351] Ibid., para. 333.
[352] Ibid., paras. 339 -340.

expenses, and sales cost.[353] Specifically, Economía found that Fortuny experienced significant operating losses, which ultimately resulted in an operating loss of 53 per cent in 2002.[354] Economía found, with respect to Fortuny's productivity, that operating costs fell by 32 per cent in 2001 and the operating margin recovered by 19 percentage points, rising from minus 15 per cent in 2000 to plus 4 per cent in 2001. However, in 2002 production was suspended.[355] With respect to return on investment, Economía found that for 2000, it was minus 11 per cent; whereas for 2001, it was minus 0.5 per cent; and in 2002, it fell to minus 21 per cent.[356] With respect to Fortuny's utilization of capacity, Economía found that the figures for use of installed capacity showed a close correlation between the large share of the domestic market held by imports at subsidized prices and the significant levels of underutilization of installed capacity to the point where, according to the applicant, it led to the closure of production. Economía also found that utilization of capacity would increase with the imposition of countervailing duties.[357]

7.278 Based on the analysis and findings in the Preliminary and Final Resolutions, as well as Mexico's clarifications in its submissions[358], we find, as a matter of fact, that the period of investigation for subsidy was April to December 2002, and that the period of investigation for injury was the months from April to December in 2000, 2001, and 2002.

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

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

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

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

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

[353] We note that it is not clear from the Final Resolution whether the periods referred to in the discussion of financial indicators are calendar years or the April-December periods of the referenced years.
[354] Final Resolution (Exhibit EC-1), paras. 345 – 360.
[355] Ibid., para. 354.
[356] Ibid., para 352
[357] Ibid., paras. 341-342.
[358] Mexico – First written submission, para. 271-273; Mexico – Response to Panel question 84.
[359] Preliminary Resolution (Exhibit EC-22), para. 343.
[360] Final Resolution (Exhibit EC-1), para. 438.

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

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

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

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

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

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

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[361] Ibid., para. 3.
[362] European Communities – First oral statement, para. 115.
[363] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.79 upheld by Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 180.
[364] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.249.
[365] See, e.g., Final Resolution (Exhibit - EC 1), para. 9.
[366] Exhibit – MEX 49D.
[367] Exhibit – EC 30.
[368] Exhibit – MEX 48A (showing a production season of January – June in 1999, January – April in 2000, January – June in 2001, and January – March in 2002); see also Mexico – Response to Panel question 17; Final Resolution (Exhibit EC-1), para. 9.

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

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

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

7.289 We find that with respect to Economía's investigation into imports of olive oil, an examination of data relating to the entirety of the years analyzed would have produced a more accurate and representative picture of the effect of the subsidized imports on domestic prices and the consequent impact on the domestic producers of the like product than the temporally limited examination conducted by Economía. While we do not believe that it would be impossible, as a legal matter, to justify a truncated injury analysis period under any circumstances[374], in this case, given the particular circumstances of the domestic olive oil industry, it is evident that Economía would have had more reliable data and a fuller picture of the state of the industry if it had not excluded from its analysis the periods in time when the industry was actually producing the product under investigation. We note, in particular, that Mexico did not provide any substantive rationale for having chosen to limit its examination to the three nine-month periods, and instead simply indicated that April-December 2002 was the period of investigation for subsidy proposed by the applicant, and that Economía had analyzed the same periods in the injury analysis years to maintain structural symmetry. We thus find that Mexico has not provided a sufficient justification for Economía's use of the successive nine-month periods for its injury investigation in this case.

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

[369] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.252.
[370] Mexico – Response to Panel question 78 (footnote 8); Final Resolution (Exhibit EC-1), paras. 307-310.
[371] Mexico – Response to Panel question 85.
[372] Mexico – First written submission, paras. 272-273.
[373] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 183.
[374] We note that in some instances "seasonal" periods of investigation may indeed have utility.

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

(ii) Other claims and arguments

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

L. ARTICLE 15.5 OF THE *SCM AGREEMENT*

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

1. Arguments of the Parties

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

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

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

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

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

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

[378] Ibid., para. 217.

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

[380] Mexico – First written submission, paras. 282-283.

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

2. Reasoning of the Panel

7.296 Article 15.5 of the *SCM Agreement* states:

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

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

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

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

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

> other 'known' factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an AD investigation. We are of the view that there is no express requirement in Article 3.5 AD that investigating authorities seek out and examine in each case *on their own initiative* the

[381] Mexico – First written submission, paras. 284-295; Mexico – First oral statement, paras. 39-43; Mexico - response to Panel question 96; Mexico – Second written submission, paras. 92-96; Mexico - Response to Panel questions 148 and 149.

[382] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 175.

[383] Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

> effects of *all* possible factors other than imports that may be causing injury to the domestic industry under investigation.[384] … We note that there may be cases where, at the time of the investigation, a certain factor may be 'known' to the investigating authorities without being known to the interested parties. In such a case, an issue might arise as to whether the authorities would be compelled to examine such a known factor that is affecting the state of the domestic industry. However, it has not been argued that such factors are present in this case.[385]

7.301 Concerning the nature of the required examination of the "other known factors", the Appellate Body in *US – Hot Rolled Steel* held that:

> … to comply with the non-attribution language in that provision, investigating authorities must make an appropriate assessment of the injury caused to the domestic industry by the other known factors, and they must separate and distinguish the injurious effects of the dumped imports from the injurious effects of those other factors. This requires a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports.[386]

7.302 In that case, the Appellate Body also explained that an investigating authority should not dismiss the other factors on the basis of qualitative assertions.[387] The Appellate Body acknowledged in this context the practical difficulty of separating and distinguishing the injurious effects of different causal factors, but indicated that "although this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remain lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors." [388] Non-attribution therefore requires the effects of other causal factors to be separated and distinguished from those of the dumped imports so that injuries caused by the dumped imports and those caused by other factors are not "lumped together" and made "indistinguishable".[389]

7.303 In *EC – Tube or Pipe Fittings*, the Appellate Body explained that the non-attribution obligation does not require investigating authorities to use any particular methodology. Specifically, the Appellate Body found that as long as an investigating authority does not attribute the injuries from other known causal factors to the dumped imports, it is free to choose the methodology it will use in examining the causal relationship between the dumped imports and the injury to the domestic industry.[390]

7.304 In the same appeal, the Appellate Body also considered whether the non-attribution provision requires, in every case, an assessment of the *collective* effects of other causal factors. The Appellate Body noted, in this regard, that there was no requirement in every case to make such a collective assessment, but that "there may be cases where because of the specific factual circumstances therein

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[384] *(footnote original)* The panel in *US – Norwegian Salmon AD*, para. 550 stated: "there is no express requirement that investigating authorities examine in each case on their own initiative the effects of all other possible factors other than imports under investigation." That panel was examining Article 3.4 of the Tokyo Round Anti-Dumping Code, which contained different language than Article 3.5 of the WTO *AD Agreement*.

[385] Panel Report, *Thailand – H-Beams*, para. 7.273.

[386] Appellate Body Report, *US – Hot-Rolled Steel*, para. 226; *followed by* Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras. 7.404-7.405.

[387] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 223 et seq; See also Panel Report, *US – Softwood Lumber VI*, para. 7.129.

[388] Appellate Body Report, *US – Hot-Rolled Steel*, para. 228.

[389] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 188.

[390] Ibid., para. 189.

the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports"[391] In that regard, the Appellate Body concurred with the statement of the panel that there might be "multiple 'insignificant factors'" that collectively were sufficiently significant as to break the link between the dumped imports under investigation and the injury.[392] The Appellate Body did not ultimately find that such an analysis was required on the facts of that case, because there were a number of factors that had made only an insignificant contribution to the injury, and the complaining party had not adduced any evidence demonstrating that a collective analysis of those factors was necessary.[393] As a result, it did not elaborate further on the types of circumstances that might give rise to such a requirement. We recall that in the dispute before us, the European Communities has not made any allegation in relation to collective versus individual consideration by Economía of the "other known factors" that are the subject of this claim.

7.305 We find that the obligation in the third sentence of Article 15.5 in the *SCM Agreement* can be synthesized into two basic components. First, Economía was required to consider other factors known to it either as a result of its own investigation or because they were raised by the interested parties. Second, Economía was required to analyze each of these factors separately and to explain the nature and extent of the injurious effects of these other factors, separating and distinguishing them from the injurious effects of the subsidized imports. If the facts of the case so warranted, Economía might also have needed to consider the collective impact of the "other known factors".

7.306 With respect to the European Communities' claim that Economía's analysis under Article 15.5 suffered insuperable difficulties that negated its causation analysis because the domestic industry did not exist, we refer to our finding in section VII.H.2(c) that Economía made a reasoned and adequate determination that Fortuny constituted the domestic industry within the meaning of Article 16.1 of the *SCM Agreement*. Given our finding on that issue, we do not need to consider it further here. However, the European Communities also argues that Economía failed to adequately analyze other known factors causing injury, contrary to the requirements of Article 15.5 of the *SCM Agreement*. We will examine Economía's treatment of each of these alleged "other factors" in turn.

7.307 The six specific 'other factors' raised by the European Communities are: (1) the loss of the previous distribution network; (2) the loss of the ability to use a leading Spanish brand name on its olive oil; (3) the loss of the guaranty of supply that the market demanded; (4) the lack of a guaranty of a product of the quality demanded by purchasers of olive oil; (5) the status, prior to 2002, of the relationship between Fortuny's predecessor and its distributor which was importing increasing amounts from the European Communities; and (6) the high level of Fortuny's costs.[394]

7.308 Economía addressed each of these factors in its Preliminary Resolution and Final Resolution, and concluded that there were no injurious effects from any of them, as distinguished from the effects of the subsidized imports. The European Communities argues that Economía's analysis and findings were inadequate, with the result that the determination of causation infringed Article 15.5.[395] Because the European Communities' claim focuses on the *adequacy* of Economía's causation analysis, we will first examine, factually, the actual nature of that analysis. Second, we will determine whether Economía 's analysis was consistent with the requirements of Article 15.5, of the *SCM Agreement.*

[391] Ibid., para. 192.
[392] Ibid., fn. 232 *citing* Panel Report, *EC – Tube or Pipe Fittings*, para. 7.369.
[393] Ibid., paras. 193-194.
[394] European Communities - First written submission, para. 221; European Communities – Response to Panel question 90.
[395] European Communities – First written submission, paras. 215-227; European Communities - Second oral statement, para. 67.

7.309 Economía devoted specific sections in its Preliminary and Final Resolutions to the discussion of other injury factors (paragraphs 319 through 342 of the Preliminary Resolution and paragraphs 415 through 437 of the Final Resolution). In addition, Economía noted, in paragraph 415 of the Final Resolution, that "it is important to point out that an assessment of the possible effect of factors other than those imports on the domestic industry's performance has been carried out throughout this Resolution, so that those factors may not necessarily be repeated in this section or else they may be described in more detail."[396] In response to a specific question from the Panel, Mexico identified other paragraphs in the Preliminary and Final Resolutions that referred to the other injury factors identified by the European Communities. Mexico provided the following table[397]:

Issue	**Preliminary Resolution (relevant paragraphs)**	**Final Resolution (relevant paragraphs)**	**Some of the documentary evidence**
Distribution channels, and loss of mark	¶57, ¶178 to ¶180, ¶189, ¶216, ¶323 to 327, ¶344(J).¶	¶197 to ¶199, ¶213, ¶294 to ¶327, ¶427, ¶434, ¶435, ¶437 (which refers to ¶323 to ¶327 of the Preliminary Resolution).	In the reply to the request for information (MEX-55), Fortuny stated that the distribution network is a group of independent companies that handle various brands in the corresponding States and are dedicated to stocking, managing and representing the brand or brands with which they work. The information on new Spanish and Italian brands can be found in Appendix 30 *Consumer prices VC* to the investigation application. The market survey was submitted by various importers, including Bodega La Negrita, in MEX-47.
Supply of olives	¶54, ¶302, ¶318, ¶339 to ¶341.	¶42, ¶44, ¶58, ¶370 to ¶385, ¶391, ¶411, ¶427, ¶432	Reply of Government of Baja California. The information for calculating the possibilities of producing olives and oil was taken from the tables on page 10 of *Claridades Agropecuarias* on *Harvested Area (ha.)* and *Olive Yield (tons/ha)*.
Buyers' guarantee of quality, and quality demanded by the market.	¶54(L), ¶57, ¶178 to ¶180, ¶323, ¶324, ¶329.	(Paras on the quality of the oil: ¶182 to 190); ¶197 to ¶199, ¶202, ¶434¶.	Reply to request for information (page 7 of MEX- 51C). Table: *Prices of Olive Oil on Retail Markets* in *Claridades Agropecuarias*, page 19.

[396] Final Resolution (Exhibit EC-1), para. 415.
[397] Mexico – Response to Panel question 149.

Issue	Preliminary Resolution (relevant paragraphs)	Final Resolution (relevant paragraphs)	Some of the documentary evidence
Fortuny's production costs.	¶213, ¶241, ¶242, ¶243, ¶244, ¶250, ¶252, ¶269, ¶275 to ¶278, ¶281, ¶287, ¶307, ¶308, ¶313, ¶314, ¶36, ¶317, ¶344(E).	¶58(D), ¶218(E), ¶244, ¶273, ¶275, ¶276, ¶302, ¶311, ¶313 to ¶316, ¶324, ¶325 to ¶327, ¶331, ¶345 to ¶351, ¶353, ¶354, ¶356, ¶362, ¶363, ¶389, ¶407, ¶408, ¶409, ¶411, ¶437, ¶439(D), ¶441, ¶442.	Prices of imports calculated from information taken from SIC-VR: Olive Oil Base 1993-2005. The cost information was taken from the applicant: Appendix 34 Costs, sales, profits VC. Cost of goods sold. Domestic prices were calculated on the basis of sales information (value and volume) from the applicant plus freight charges for sales (MEX-48A).

7.310 We have reviewed the paragraphs identified by Mexico in its response to our questions. These passages of the Preliminary and Final Resolutions indicate that Economía asked questions of Fortuny, other interested parties, and independent sources on all of the points identified by the European Communities as "other factors" causing injury. We also recall that the nature of the injury that Economía found to exist was Fortuny's inability to resume operations. As described in the paragraphs below, the cited passages indicate that Economía provided analysis of its reasons for reaching the conclusions that it did.

7.311 First, with respect to the evidence presented by the exporters regarding the loss of the Ybarra brand, Economía reviewed the market study that was submitted to it, and concluded, as a matter of fact, that the study did not say that a significant portion of Mexican consumers *preferred* the Ybarra brand, but rather that they *were aware of* the Ybarra brand. Economía also noted that other unknown brands had been successful in penetrating the Mexican market. For those reasons, Economía did not accept the argument by the exporters that Fortuny's inability to use the Ybarra brand was causing it injury[398] in the sense of preventing Fortuny from resuming operations. In other words, Economía found that this factor made no contribution to the injury experienced by Fortuny.

7.312 With respect to the loss of the distribution network of Distribuidora Ybarra, Economía noted that Fortuny had indicated that it had access to a distribution network, which it planned to use when it resumed operations.[399] Economía asked further questions of Fortuny with respect to this issue, and verified the information on its visit to Fortuny.[400] Additionally, Economía took into account the freight and transportation costs of Fortuny when it calculated the price at which Fortuny's olive oil could compete against the Spanish and Italian imports if Fortuny were to resume production.[401] Economía concluded that the loss of the distribution network was not contributing to Fortuny's inability to resume operations, and, thus, was not contributing to the injury experienced by Fortuny.

7.313 The exporters also argued that Fortuny would not be able to obtain a sufficient supply of olives in order to restart production as planned, because most olive growers had begun to devote their crops to table olives. Economía examined the information from the Government of the State of Baja California with respect to the quantities of olives that were available to Fortuny. Economía relied on information from the State of Baja California about available hectares as well as the article in

[398] Preliminary Resolution (Exhibit EC-22), para. 327; Final Resolution (Exhibit EC-1), para. 437.
[399] Preliminary Resolution (Exhibit EC-22),para. 325; Final Resolution (Exhibit EC-1), para. 437.
[400] Final Resolution (Exhibit EC-1) para. 67.
[401] Final Resolution (Exhibit EC-1), para. 324.

Claridades Agropecuarias to determine that a reasonable assumption would be that 40 per cent of the hectares of planted olive trees could be dedicated to olive oil production.[402] Economía therefore reasonably found that Fortuny did not face a problem of insufficient olive supply, and concluded that this was not a factor standing in the way of Fortuny resuming operations.

7.314 With respect to the issue of quality, Economía asked Fortuny specific questions about any quality differences between the Mexican olive oil marketed under the Ybarra brand and the imported olive oil marketed under the same brand. Fortuny responded that it was unlikely that the Spanish holder of the mark would have let Formex-Ybarra market olive oil under the Ybarra brand if there were significant differences in quality between the Spanish and Mexican products. Economía also asked ANTAD and some of its members if they were aware of any segmentation in the olive oil market based on quality. ASOLIVA and ASITOL confirmed that while various types of olive oil were sold for different purposes, there was no clear segmentation in the market according to the type of olive oil. Economía concluded that there were no objective data on which it could reasonably conclude that there were any significant quality problems with olive oil manufactured domestically compared to imported oil of the Ybarra brand, and that, in fact, both had been marketed under the same brand.[403] Thus, Economía reasonably found that this factor also did not contribute to Fortuny's inability to restart its operations.

7.315 Regarding Fortuny's relationship with Distribuidora Ybarra prior to 2002, Economía analyzed the effects of the changes in that relationship on domestic production, including effects in the years 2000 and 2001, in paragraphs 328 -- 367 of the Final Resolution. Economía utilized data for 2000 and 2001 that it had received from Distribuidora Ybarra with respect to inventories, sales, operating costs, etc. It observed from those data that Distribuidora Ybarra had steadily decreased the volume of its purchases from Fortuny over the course of 2001 and 2002, while nearly doubling its purchases from foreign suppliers. Economía recognized that the relationship between Distribuidora Ybarra and Fortuny was significant, and that the decision by Distribuidora Ybarra to replace purchases of olive oil from Fortuny with purchases of imported olive oil caused considerable injury to Fortuny.[404] However, Economía reached the conclusion that this meant that the subsidized imported olive oil, the product competing against Fortuny's olive oil for sales, was causing injury to Fortuny. That is, Economía's conclusion was that the change in the relationship of Distribuidora Ybarra and Fortuny was not an "other factor", but, in fact, was a demonstration of how the subsidized imports were injuring Fortuny.

7.316 Economía addressed Fortuny's production costs extensively throughout the Preliminary and Final Resolutions. It concluded that, according to the premises established in Fortuny's business plan, the project to resume production would be financially viable if countervailing duties were imposed on the subsidised imports and financially non-viable if they were not.[405] That is, the business plan's viability was not dependent on Fortuny's production costs, as these were already taken into account in the plan. Thus, Fortuny's cost of production was found not to be a factor contributing to the injury it was experiencing.

7.317 In sum, Economía made determinations based on an evaluation of the evidence before it that none of the other known factors were causing injury, in fact, to Fortuny. Economía did not dismiss these factors with qualitative assertions. Rather it carefully examined, separated and distinguished the effects of each factor from the effects of the subsidized imports, and reasonably concluded that these factors were not contributing to the injury suffered by Fortuny.

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[402] Preliminary Resolution (Exhibit EC-22), paras. 338-342; Final Resolution (Exhibit EC-1), paras. 370-385.

[403] Final Resolution (Exhibit EC-1), paras. 200-202.

[404] Ibid., para. 360.

[405] Ibid., para. 414.

7.318 Concerning any possible obligation on Economía also to examine the collective impact of the factors identified by the European Communities in this claim, we recall that the Appellate Body has ruled that such a collective examination is not obligatory in every case, but that there might be factual circumstances in which this could be necessary in order to satisfy the non-attribution obligation of Article 15.5. While the Appellate Body has not specified what such circumstances might be, we note that in the dispute on *EC – Tube or Pipe Fittings*, where this issue was first raised, the Appellate Body found that the European Communities had not erred by not conducting an examination of the collective impact of the "other known factors" that it examined. We recall that, in that case, the European Communities had found that the other known factors had contributed to the injury, but that their individual contributions were "insignificant", or in one case "not so much as to break the causal link" between the dumped imports and the injury. In the present case, by contrast, Economía reasonably concluded that none of the alleged "other factors" made any contribution to the injury experienced by Fortuny. In such circumstances, we do not consider that a collective examination of those factors could have led to any different conclusion in respect of their impact. Thus, we do not find that the facts in the olive oil investigation by Economía were such as to necessitate an assessment of the collective impact of the "other factors" referred to by the European Communities in this claim.

7.319 We recall that our task is not to conduct a *de novo* review of the evidence on the record of the investigation and reach our own conclusions, or to substitute our judgment for Economía's. Instead, pursuant to Article 11 of the DSU, our task is to examine whether Economía provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings, and how those factual findings supported its determination.[406]

7.320 Based upon our review of the information on the record before Economía as well as its examination of that evidence and its explanation of its conclusions in the Preliminary and Final Resolutions, we find, that Economía provided reasoned and adequate explanations of its conclusions with respect to causation, in particular that the evidence relied upon and explanations provided by Economía reasonably and adequately support its conclusions that the other known factors did not contribute to injury experienced by Fortuny.[407]

7.321 On the basis of the foregoing, we find that Economía considered the other known factors that could be causing injury to the domestic industry, separated and distinguished each of these factors from the effects of the subsidized imports, and determined that none of them was causing injury. It also provided reasoned and adequate explanations of its conclusions. For these reasons, we find that the European Communities has not established that Mexico acted inconsistently with its obligations under Article 15.5 of the *SCM Agreement*.

VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 For the reasons set out above, we conclude that Mexico's definitive countervailing measures on olive oil from the European Communities are inconsistent with the requirements of the *SCM Agreement*, in that:

(a) Mexico acted inconsistently with Article 11.11 of the *SCM Agreement* because Economía's investigation in this case was concluded more than 18 months after the date of its initiation, and Article 11.11 does not permit such prolongation under any circumstances;

(b) Mexico acted inconsistently with Article 12.4.1 of the *SCM Agreement* because Economía failed to require non-confidential summaries of confidential information in

[406] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186 - 187.
[407] Ibid., para. 188.

sufficient detail to permit a reasonable understanding of the information submitted in confidence, in the absence of sufficient explanations of the existence of exceptional circumstances and of the reasons why summarization was not possible; and

(c) Mexico acted inconsistently with the obligation in Article 15.1 of the *SCM Agreement* to base the injury determination on positive evidence and pursuant to an objective examination because Economía limited its injury analysis to the periods from April to December of 2000, 2001 and 2002.

8.2 For the reasons set out above, we further conclude that:

(a) the European Communities did not establish that Mexico acted inconsistently with its obligations in Article 13.1 of the *SCM Agreement* by failing to invite the European Communities for consultations before the initiation of the investigation;

(b) The European Communities did not establish that Mexico failed to comply with the requirement in Article 13(b)(i) of the *Agreement on Agriculture* to exempt olive oil from imposition of countervailing duties "unless a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement", and did not establish that Economía failed to show due restraint in initiating the countervailing duty investigation on olive oil;

(c) the European Communities did not establish that Mexico acted inconsistently with its obligations under Article 12.8 of the *SCM Agreement* by failing to inform the interested Members and interested parties of the essential facts under consideration which formed the basis for the decision to apply definitive measures;

(d) the European Communities did not establish that Mexico acted inconsistently with its obligations under Articles 1 and 14 of the *SCM Agreement* by failing to calculate the benefit conferred on the recipient pursuant to paragraph 1 of Article 1 of the *SCM Agreement* and to apply the method used to each particular case in a transparent way which is adequately explained as required by Article 14 of the *SCM Agreement*;

(e) the European Communities did not establish that Mexico acted inconsistently with its obligation under Article 16.1 of the *SCM Agreement* by failing to properly define the domestic industry during the countervailing duty investigation consequently the European Communities also failed to establish that:

(1) Mexico acted inconsistently with the obligation in Article VI:6(a) of the *GATT 1994* to not impose countervailing duties on a product unless a determination had been made that there was material injury or threat thereof to an established domestic industry;

(2) Mexico acted inconsistently with its obligations in Article 11.4 of the *SCM Agreement* by failing to properly examine whether the application by Fortuny was made "by or on behalf of the domestic industry"; and

(3) Because there was no existing domestic industry the injury analysis conducted pursuant to the obligations in Articles 15.1, 15.4 and 15.5 was inconsistent with the requirements of those provisions.

(f) the European Communities did not establish that Mexico acted inconsistently with its obligations under Article 15.5 of the *SCM Agreement* by failing to properly examine

> any known factors other than the alleged subsidized imports that were causing injury to the domestic industry.

8.3 In the light of our findings, it was not necessary for us to address, and we have exercised judicial economy in respect of, the European Communities' claims under Articles 15.1 and 15.4 of the *SCM Agreement* in respect of Economía's analysis of the volume of subsidized imports and the impact of these imports on prices in the domestic market for the like product and on the domestic industry.

8.4 Under Article 3.8 of the *DSU*, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent that Mexico has acted inconsistently with certain provisions of the *SCM Agreement*, it has nullified or impaired benefits accruing to the European Communities under that *Agreement*.

8.5 Article 19.1 of the *DSU* reads:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations.

8.6 The European Communities has requested that we accompany our recommendation in this case with a suggestion, pursuant to the second sentence of Article 19.1 of the *DSU*, that a complete repeal would be the most appropriate means of bringing the measures into conformity with Mexico's WTO obligations. We decline to make a suggestion as to how Mexico should bring its measures into conformity with its obligations.

8.7 Pursuant to Article 19.1 of the *DSU*, having found that Mexico has acted inconsistently with provisions of the *SCM Agreement* as set out above, we recommend that Mexico bring its measures into conformity with that *Agreement.*

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