ANNEX B

THIRD PARTY SUBMISSIONS

ANNEX B-1

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF CANADA

(21 June 2007)

I. INTRODUCTION

1. Canada considers that these proceedings raise significant systemic issues regarding countervailing investigations conducted under the WTO *Agreement on Subsidies and Countervailing Measures* (SCM Agreement). Canada's submission focuses on two issues. The first issue concerns the necessity for investigating authorities to ensure that the procedural rights of parties to the investigations are respected. The second issue relates to the necessity for a Member to demonstrate the pass through of a subsidy. That is, in circumstances where an input subsidy is received by someone other than the producer or exporter of the product under investigation, investigating authorities may not impose countervailing measures on the product unless they have demonstrated that the subsidy was passed through to the producer or exporter of the product under investigation.

II. ARGUMENT

1. Procedural Claims

2. Canada notes that, among its specific claims of violation, the European Communities (the EC) alleges several procedural violations by the Mexican investigating authority both before and during the course of the investigation. These include the failure: to afford the EC an opportunity for consultations prior to the initiation of the investigation, contrary to Article 13.1 of the SCM Agreement; to require the complainant to provide non-confidential summaries of confidential information, contrary to Article 12.4.1 of the SCM Agreement; to disclose essential facts, contrary to Article 12.8 of the SCM Agreement; and to provide a reasoned and adequate explanation of key determinations underpinning the imposition of countervailing duties.

3. Canada, and indeed the broader WTO Membership, has an overarching systemic interest in ensuring that the investigating authorities of all Members adhere to the basic requirements of due process (procedural fairness) as prescribed in the covered agreements, including the SCM Agreement. In this regard, while Canada does not intend to opine on the merits of the EC's individual claims of procedural violation, it feels compelled to raise certain concerns about the potential broader ramifications of the denial of due process in trade remedy investigations.

4. Each party to a countervail investigation (or, for that matter, an anti-dumping or safeguard investigation) is entitled to a reasonable opportunity to defend its interests. This ability depends directly upon the party having adequate knowledge of the opposing case (i.e., of the specific allegations and supporting evidence of parties adverse in interest), and being afforded a reasonable opportunity to present its own case (i.e., to present arguments and evidence in support of its own position and to rebut opposing positions). Clearly, the EC's claims of violation – if borne out – would constitute critical breaches of the basic due process requirements set out in the SCM Agreement. In this regard, if substantiated, the failure of the Mexican investigating authority to provide an opportunity for pre-initiation consultations would have deprived the EC of any prospect of influencing the initiation decision, while the authority's failures in respect of the disclosure of information in the

record would have deprived the EC of adequate knowledge of the case against it. Likewise, if demonstrated, the absence of reasoned and adequate explanations of key determinations would have compromised the ability of the EC to identify and assess all potential grounds for the invocation of further related proceedings (e.g., administrative or judicial review).

2. Pass-Through

5. Canada would like to stress the importance of, when dealing with input products, conducting a pass-through analysis where circumstances require it. The necessity of a pass-through analysis flows from the GATT 1994 and the SCM Agreement and has been acknowledged by panels and the Appellate Body.

6. When conducting an investigation concerning allegedly subsidized products, a Member must establish that a subsidy exists before it may impose countervailing duties, and it may not impose such duties in an amount greater than the amount of the subsidy demonstrated to exist. Article VI:3 of the GATT 1994 sets out this fundamental obligation. The obligation to not impose countervailing measures in excess of any subsidy demonstrated to exist is reaffirmed in Article 10 of the SCM Agreement.

7. Finally, Article 32.1 of the SCM Agreement confirms that the imposition of duties is unlawful where a Member fails in this obligation. It provides that "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

8. Nothing in the context or object and purpose of these provisions alters the fundamental obligation to demonstrate the existence and the amount of a subsidy with respect to a product before imposing countervailing duties on that product. This includes, in the context of an investigation concerning allegedly subsidized input products, the requirement to demonstrate that an input subsidy to an upstream recipient has been passed through to the downstream producers or exporters of the product under investigation.

9. Article 1.1 of the SCM Agreement sets out an exhaustive definition of "subsidy" that applies to this obligation. Under this provision, there is no "subsidy" when a "benefit" has not been conferred upon a recipient. The panel in *US – Softwood Lumber IV*, referring to the findings of the Appellate Body in *Canada – Aircraft*, found that the term "benefit" "implies some kind of comparison" and that the "marketplace" provides a basis for this comparison.

10. In a pass-through context, the obligation on Members is to compare the transactions in question to the marketplace to determine whether, and to what extent, a benefit under Article 1.1(b) of the SCM Agreement is conferred. As explained by the panel in *US – Softwood Lumber IV*, the results of such analysis may not be presumed:

> The heart of the pass-through issue is whether, where a subsidy is received by someone other than the producer or exporter of the product under investigation, the subsidy nevertheless can be said to have conferred benefits in respect of that product. If it is not demonstrated that there has been such a pass-through of subsidies from the subsidy recipient to the producer or exporter of the product, then it cannot be said that subsidization in respect of that product, in the sense of Article 10, footnote 36, and Article VI:3 of GATT 1994, has been found. Thus, we find that a pass-through analysis is required by these provisions … where there are such upstream transactions.

11. Accordingly, where a subsidy is received by "someone other than the producer or exporter of the product under investigation", a Member must establish whether and to what extent the benefit to an upstream recipient passes to a downstream entity through the purchase of an input product.

12. In *US – Softwood Lumber IV*, the Appellate Body agreed with the panel's interpretation. Drawing on the text of Article VI:3 of the GATT 1994, the Appellate Body found that a Member may not presume that a subsidy passes through transactions where "the producer of the input is not the same entity as the producer of the processed product". The Appellate Body also explained in no uncertain terms that analysis under Article 1.1(b) of the SCM Agreement is required:

> Where a subsidy is conferred on input products, and the countervailing duty is imposed on processed products, the initial recipient of the subsidy and the producer of the eventually countervailed product, may not be the same. In such a case, there is a *direct recipient* of the benefit – the producer of the *input* product. When the input is subsequently processed, the producer of the *processed product* is an *indirect recipient* of the benefit – provided it can be established that the benefit flowing from the input subsidy is passed through, at least in part, to the processed product. Where the input producers and producers of the processed products operate at *arm's length*, the pass-through of input subsidy benefits from the direct recipients to the indirect recipients downstream cannot simply be presumed; it must be established by the investigating authority. In the absence of such analysis, it cannot be shown that the essential elements of the subsidy definition in Article 1 are present in respect of the processed product.

13. Thus, the Appellate Body and panels have stressed the importance of demonstrating that a product is subsidized before imposing countervailing duties.

14. In this case, the different steps that led from the production of olives to the exportation of olive oil and the relationships between the entities involved are not entirely clear to Canada. However, Canada observes that the EC Regulation that established the production aid scheme indicated that the subsidy was granted to olive growers, albeit on the basis of the olive oil produced from their olives. In these circumstances, it would appear to Canada that olives constitute an input product in relation to the processed product, olive oil, that is exported from the EC to Mexico.

15. Moreover, Canada notes the EC argument that the great majority of exporting EC companies had no involvement with olive growing and that their dealings were carried out entirely at arm's length.

16. Therefore, under the circumstances of this case, it appears to Canada that the subsidy was received by someone other than the producer or exporter. Accordingly, the requirement to demonstrate the pass through of a subsidy under Article VI of the GATT and Articles 10 and 32.1 of the SCM Agreement applies. So too does the reasoning of the Appellate Body in *US – Softwood Lumber IV*, where it stated that in such circumstances a Member may not presume that the product under investigation was subsidized; rather, a Member must demonstrate subsidization by means of a pass-through analysis.

17. Where input producers, here olive growers, and producers and/or exporters of the processed product, olive oil, operate at arm's length, the SCM Agreement requires clear evidence that input subsidy passed through to the producers of the processed product, so that there is a clear demonstration that the product against which countervailing measures are imposed is in fact subsidized.

18. Accordingly, under the circumstances of this case, the investigating authority was required to conduct a pass-through analysis to determine whether the subsidy that was granted to the olive

growers benefited the producers and/or exporters of the olive oil subject to the investigation before it imposed countervailing measures to offset any such subsidization.

ANNEX B-2

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF CHINA

(21 June 2007)

EXECUTIVE SUMMARY

China participates, as a third party, in this panel proceeding concerning the Mexico's imposition of definitive countervailing measures on imports of olive oil originating in EC. In this submission, China will briefly address three issues:

(1) Whether a Petitioner Must Have Actual Output When It Files a Petition for a Countervailing Duty Investigation?

China believes that this question requires a careful interpretation of the term *producer*. While EC does not explicitly state so, its argument in this proceeding is to narrow the term to *actual producers* who have live output. Broader reading of the term, however, may also include *potential producers* who are substantially committed to the production of like product.

The ordinary meaning of the text in Article 11.4 of the *SCM Agreement* does not provide definitive answer. The textual analysis does not either support a reading that *producers* may include *potential producers* or preclude it.

The context of the text of Article 11.4, however, warrants a broader reading of the term *producer*. If EC's narrow reading of the term *producer* were supported, no petition alleging injury in the form of retardation would have been permissible. This would undermine footnote 45 of the *SCM Agreement* and make the injury in the form of "retardation of the establishment of such an industry" meaningless. Accordingly, China believes that EC's narrow reading of the term *producer* is not warranted.

EC's own practice does not support such a narrow reading of the term *producer* as EC suggested in this case. In an antidumping investigation on *Imports of DRAMs from Japan* conducted by EC, the European investigating authority did not adopt such a narrow reading. In that proceeding, the Commission found that the community industry comprises four producers. None of them, however, had actual output when the application for investigation was filed.

(2) Whether the Domestic Industry Cannot Be "Injured" When the Petitioner Has No Actual Output during the POI-Subsidy But Had Output during the POI-Injury?

Obviously, EC's claim 2 and claim 7 are closely related. Both of them are based upon an allegation that no *domestic industry* of olive oil existed in Mexico. However, the time point and period for assessment of whether a domestic industry exists are different. For claim 2 (standing issue), such time point, as EC put it, is "at the time of the application." On the other hand, for claim 7 (injury issue), such time period is "during the period of investigation used for the determination of the existence and amount of subsidy."

China agrees that for different issues, e.g. standing issue and injury issue, the time point and time period, within which the production and output of domestic producers are measured, may be different. China disagrees, however, that for injury issue the appropriate time period, against which

the existence of domestic industry is evaluated is *only* the POI-Subsidy. China believes that whether or not a domestic industry exists shall be examined against the POI-Injury rather than the POI-Subsidy. China has assumed as a fact that, during the POI-Injury, a domestic industry existed in Mexico, and such an industry can be injured by the subsidized imports.

(3) Whether a "Pass-Through" Analysis Is Required Given the Facts Found in the Underlying Investigation?

Pass-through is a unique concept under the *SCM Agreement*. It arises from the context that subsidy is bestowed *indirectly* upon producers of product subject to the investigation. The issue is confusing in this case because, under the EC production aid program, the aid was provided to *olive growers* while EC, in its various regulations, states that the aid was bestowed upon *olive oil*. The Ministry found in paragraph 116 of its *Final Resolution* that pass-through analysis is unnecessary because the subsidy is provided upon olive oil which is both the product subject to investigation and, in this case, the processed product.

China disagrees with Mexico, who relies heavily on the statement in relevant EC regulations that the production aid is provided upon *olive oil* but elects to ignore the fact that the production aid is provided to *olive growers* rather than manufacturers of *olive oil*. These complexities in factual situations require special caution in ascertaining benefits and their recipients.

As concluding remarks, China believes that certain aspects of Mexico's countervailing duty investigation raise systemic issues. Mexico shall bring its measure in conformity with its obligation in case the Panel finds any inconsistence. However, it is also China's view that some of EC's arguments have driven the treaty interpretation to an extent beyond the expressed intent of the treaty negotiators; and, therefore, should not be supported.

ANNEX B-3

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF JAPAN

(21 June 2007)

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I. INTRODUCTION

1. As a third party to this dispute, Japan would like to address, from a systemic viewpoint to ensure objective and consistent interpretation of the WTO Agreement, the following issues:

- Mexico's handling of the investigation raises serious systemic concerns;
- The Panel should examine whether Mexico's determination concerning the domestic industry was appropriate; and
- Mexico did not properly address the issue of subsidization.

II. ARGUMENT

A. MEXICO'S HANDLING OF THE INVESTIGATION RAISES SERIOUS SYSTEMIC CONCERNS

2. Japan is of the view that the integrity of the dispute settlement process is compromised whenever a Member conducts a domestic countervailing duty investigation that does not comply with the procedural rules set forth in the ASCM. Japan will focus on two procedural issues that the EC raised.

1. By Failing to Complete the Investigation within 18 Months, Mexico Did Not Comply with the Deadline Set Forth in Article 11.11 of the Agreement on Subsidies and Countervailing Measures

3. Mexico's investigation lasted more than 24 months from initiation to adoption of definitive measures.[1] The EC contends that, by virtue of this lengthy timeframe, Mexico's actions were inconsistent with Article 11.11 of the ASCM, which stipulates that the duration of the investigation shall be "in no case more than 18 months".

4. Japan sympathizes with the position of the EC on this issue. Although Japan understands the need for Mexico to accept the parties' reasonable requests for extension and verification, a Member's approval of such extension requests does not free it from the obligation to complete an investigation within the time limit set forth in Article 11.11.

5. Similarly, we need not address Mexico's questionable assertion of the object of Article 11.11. Here, Article 11.11 states that investigations shall be concluded "*in no case* more than 18 months" (emphasis added): the text is completely clear and allows for only one interpretation. The Article 11.11 prohibition against extending investigations beyond 18 months does not allow for any exception.

6. For these reasons, Japan is of the view that Mexico's investigation was inconsistent with Article 11.11 of the ASCM.

2. Mexico's Failure to Provide Non-Confidential Summaries Was Inconsistent with Article 12.4.1 of the Agreement on Subsidies and Countervailing Measures

7. The EC argues that Mexico committed another procedural violation of the ASCM by failing to provide, or to require private parties to provide, non-confidential summaries of confidential

[1] EC First Written Submission, para. 113.

information submitted during the course of the investigation.[2] The relevant obligations are set forth in Article 12.4.1 of the ASCM.

8. Mexico claims that all parties provided both confidential and non-confidential versions of their submissions.[3] Further, Mexico alleges that it fulfilled the object of Article 12.4.1 by allowing counsel to all parties to the investigation access to the entire investigation file, including both confidential and non-confidential data.[4]

9. In Japan's view, if Mexico failed, as the EC claims, to require non-confidential summaries of the information listed by the EC, then Mexico acted inconsistently with Article 12.4.1. Mexico's provision of access to the investigation files does not by itself fulfil Mexico's obligation under Article 12.4.1.

10. Moreover, Mexico did not assert or seek to explain that it was faced with "exceptional circumstances" such that the information provided could not be summarized, as is permitted by Article 12.4.1.

3. Conclusion

11. It is the obligation of all Members to strengthen and uphold the WTO system on all levels, and to abide by all rules, both procedural and substantive. Nowhere is this more important than in the rules area, where Members are granted the right to impose trade remedy measures only as long as they comply with the disciplines set forth in the relevant agreements. The failure to comply with procedural obligations compromises due process and fairness, which leads to systemic weakness and a lack of predictability that damages both Members and private parties. For these reasons, the procedural errors in Mexico's investigation are of concern to Japan.

B. THE PANEL SHOULD EXAMINE WHETHER MEXICO'S DETERMINATION CONCERNING THE DOMESTIC INDUSTRY WAS APPROPRIATE

12. Japan is of the view that a critical issue of general interest raised in this dispute is the proper determination of the existence of a domestic industry. The specific, very narrow, question Japan wishes to address is as follows: must the domestic industry exist and be producing during the time that an investigation takes place?

13. First, Japan agrees with the EC that in general some level of domestic production must exist during the period of investigation for the purpose of making an injury determination. The EC seems to argue that the relevant period for the production of olive oil is "the investigation period of the product subject to the investigation".[5] Japan understands this to be, by definition, a time period separate from that during which the investigation is actually conducted.

14. However, the EC also appears to argue that the domestic industry must have produced during the time that the investigation was conducted.[6] The EC interprets words such as "causing injury" in Article 15.5 of the ASCM to refer clearly to the present, "to what is happening <u>when the investigation is carried out</u>".[7] In addition, the EC refers to the factors listed in Article 15.4 as requiring

[2] *Id*., paras. 103-107.
[3] *Id*., para. 89.
[4] Mexico's First Submission, paras. 82-87.
[5] EC First Written Submission, para. 183.
[6] *Id*., paras. 174-189.
[7] *Id*., para. 180 (emphasis added).

consideration concerning "the condition of an existing industry".[8] The EC concludes that "there must be an industry presently in existence; in other words, there must be existing producers".[9]

15. In Japan's view, the EC's apparent reading of the ASCM would preclude a countervailing measure in precisely the situation where the subsidy was most pernicious - where it knocked the domestic producers out of the market. There is nothing in the ASCM indicating that the Members intended to create this type of exception to the coverage of the ASCM.

16. Article VI:6 of the GATT 1994 and Articles 10 and 15 of the ASCM clearly require a finding of injury during the period of investigation. Without any production during that period there can be no evidence of injury as a result of an overall evaluation of the elements listed in Article 15.4 of the ASCM. However, this does not mean that domestic production needs to occur throughout the period of investigation or the time period during which investigation is being conducted.

17. In Japan's view, if a company produces the subject merchandise even for a limited period of time during the period of investigation, the company should be qualified as a part of the domestic industry for the purpose of injury determination.

18. Mexico's determination states, "[f]or the purpose of evaluating injury, comparable periods of three years, including the period investigated were used, i.e. April to December 2000, 2001, and 2002."[10] Although Fortuny stopped production of olive oil in March 2002, it did engage in production in 2000 and 2001.

19. The Panel might find that Mexico appropriately set a longer period of investigation for the injury analysis (one that included 2000 and 2001) than for the subsidy determination. Such a finding would support a further finding that Mexico did not err when it conducted an assessment of injury based on information related to this period, since it would mean that there was some production during the period of investigation.

C. MEXICO DID NOT PROPERLY ADDRESS THE ISSUE OF SUBSIDIZATION

20. Mexico failed to properly analyze the subsidy issue by declining to engage in a pass-through analysis to determine whether and to what extent the subsidy given to olive growers benefited olive oil producers and exporters.[11]

21. Mexico bluntly rejects the need for a pass-through analysis. Apparently, the Mexican authority found that a *purpose* of the EC subsidy scheme was to promote olive oil production, and therefore concluded that a pass-through analysis was not required.

22. Mexico is correct that the ASCM does not expressly require a pass-through analysis. However, in light of the provisions under Article 1.1(b) of the ASCM as well as Article VI:3 of GATT 1994, where the direct recipients of the alleged subsidy are not those who produce or export the product subject to the investigation, as in this case, the authority shall determine whether the producers or exporters concerned have actually indirectly received any benefit from the subsidy. Article 14 of the ASCM also requires that an investigating authority, before imposing countervailing duties, calculate the amount of a subsidy in terms of the benefit conferred.

23. Well-established WTO practice shows that the investigating authority must perform an analysis to determine the link between a subsidy and its alleged recipient. In *United States - Softwood*

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[8] EC First Written Submission, para. 178.
[9] *Id.*, para. 182.
[10] Final Resolution, para. 3.
[11] Mexico's First Submission, para. 116.

Lumber IV, the Appellate Body noted that "the pass-through of input subsidy benefits from the direct recipients to the indirect recipients downstream cannot simply be presumed; it must be established by the investigating authority".[12]Moreover, guidance on how to assess the impact of a subsidy granted to raw material producers on the price which processors of that material have to pay was provided under the earlier GATT regime. (See, *United States - Canadian Pork*, a GATT panel interpreting the obligations under GATT Article VI.).[13]

24. Mexico's argument is also flawed in that it mischaracterizes the purpose of countervailing duties. Mexico contends that "countervailing duties are not a mechanism to offset either a benefit or a subsidy"; according to Mexico, "[t]heir purpose is to offset the injury caused by an actionable subsidy".[14]

25. Article VI:3 of the GATT 1994 as well as footnote 36 to the ASCM clarifies the definition of the countervailing duty as "a special duty levied for the purpose of offsetting any subsidy bestowed…." Article 19.4 of the ASCM provides that countervailing duties may be levied only up to the amount of the subsidy found to exist. In addition to this "capping" of the duty amount at the "full amount of the subsidy", Article 19.2 of the ASCM leaves to the discretion of the authority whether or not to set the duty at a lesser amount that would be adequate to remove the injury.

26. Furthermore, in *U.S. – Softwood Lumber IV*, the Appellate Body suggested that, for processed products in particular, the use of a pass-through analysis may be necessary to preserve the connection between the countervailing duty to be imposed and the subsidy determined to have been granted.[15] In this way the authority can measure the extent to which a subsidy granted on an input may be included in the determination of the amount of the subsidy on the processed product.[16]

27. Japan does not consider that, in light of the significance of a pass-through analysis, Mexico's reference to the *purpose* of the subsidy or its assertion that countervailing duties are designed to offset *injury* (not the subsidy), justifies its rejection of a pass-through analysis. Therefore, in the view of Japan, Mexico erred in its determination that benefits were conferred to the exporters concerned.

III. CONCLUSION

28. Japan respectfully requests the Panel to examine carefully the facts and arguments presented by the EC and Mexico in light of the comments above, in order to ensure objective and consistent interpretation of the WTO agreements, particularly the ASCM and the DSU. We welcome any questions that the Panel may have regarding this submission.

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[12] *United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada (US – Softwood Lumber IV*), WT/DS257/AB/R (17 February 2004), para. 143.

[13] See *United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada*, adopted 11 July 1991, BISD 38S/30, para. 4.10.

[14] Mexico's First Written Submission, para. 122.

[15] *US – Softwood Lumber IV*, para.140.

[16] *See Id.*

ANNEX B-4

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF NORWAY

(21 June 2007)

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I. INTRODUCTION

1. As a third party to this dispute, Norway would like to address the following issues discussed in the First Written Submissions of the EC and Mexico:

- whether Mexico correctly defined the domestic industry as required by the GATT 1994 and the *Agreement on Subsidies and Countervailing Measures (ASCM)* (Section II);
- whether Mexico fulfilled certain procedural requirements in the *ASCM* (Section III); and
- the appropriate Standard of Review (Section IV).

II. DEFINITION OF THE DOMESTIC INDUSTRY

2.1 Introduction

2. The EC contends that Mexico failed to define domestic industry in a manner that is consistent with the GATT 1994 and the *ASCM*.[1] According to the EC, the wrongful determination of the domestic industry lead to both a wrongful injury determination and a failure by Mexico to determine that there was sufficient industry support for the initiation of the investigation.[2]

3. The present case concerns an investigation where the Investigating Authority found injury to an established industry. Norway understands the Final Resolution (imposing the definitive measures) to be based on "material injury to the domestic industry".[3] The case does not concern "material retardation to the establishment of such an industry", as also confirmed by Mexico.[4]

2.2 Whether injury was caused to an established industry

4. Article VI.6 (a) of the GATT 1994 requires that injury must be to an "established domestic industry". The definition of "domestic industry" in *ASCM* Article 16.1 provides that "domestic industry" must be understood as referring to: "the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total production of those products." This provision defines the domestic industry in relation to two elements, "producers" and the "products" they produce. The ordinary meaning of the words "producers" and "product" indicate in Norway's view that there must exist a certain domestic production for there to be a "domestic industry".

5. Relevant context for the interpretation of the definition of "domestic industry" is found in *ASCM* Article 15.4 and Article 15.5, and the conclusion to be drawn from these provisions supports the view that "domestic industry" must be understood to mean an existing industry with on-going production.

6. The object and purpose of the rules on countervailing duties in the *ASCM* is to provide a right for Member to impose such measures under certain conditions. However, those rights have to be balanced against the right to use subsidies under certain conditions.[5] The necessity to find the right

[1] EC's First Written Submission, paras. 158 *ff*.
[2] EC's First Written Submission, paras. 93 – 94.
[3] Norway refers in this respect to the translation provided in EC's First Written Submission, para. 199, where the EC cites the Final Resolution, para. 438.
[4] Mexico's First Written Submission, paras. 227 and 229.
[5] Appellate Body Report, *US – Softwood Lumber IV*, para. 64 and Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 115.

balance in this equation suggests a narrow interpretation of "domestic industry" when it comes who should be protected. An industry that does not produce the like product should, therefore, not be afforded a protection as envisaged in the *ASCM* under the provisions relating to injury to an established industry.

7. In the present case, the Investigating Authority found that the domestic industry was constituted of only one company – Fortuny de Mexico, SA de CV (Fortuny). Mexico admits that Fortuny ceased production before the IP, in March 2002, just before the investigating period started.[6] The question for the Panel is thus whether a company having ceased to produce before the IP, can still be considered to form (part of) the established domestic industry, in an investigation into injury to an established industry. Based on the facts as presented by the parties to the dispute so far, it would seem that Fortuny, having ceased production, cannot be considered part of the domestic industry producing the like product.

8. Norway notes that Mexico employs the term "suspensión de actividades de Fortuny".[7] Norway does not pronounce itself on the proper connotations to be given to this Spanish term, or the factual situation of Fortuny and its possible plans for any resumption of production after the investigation period. Norway only notes that, to the extent that the Panel considers it necessary to also evaluate whether a "suspension" of production has different implications upon which companies may be considered part of an established industry, the Panel must take into account that its interpretation must not undermine the distinction between investigations into injury caused to an *established industry* as opposed to an investigation into subsidization causing *material retardation* of the establishment of an industry.

2.3 Industry support for the initiation

9. To the extent that the Panel finds that Fortuny could not be considered part of the domestic industry for purposes of the contested investigation, the initiation itself is vitiated, and the investigation as such should never have been initiated.

III. PROCEDURAL ISSUES

10. In this section, Norway will discuss the allegations by the EC that Mexico violated procedural rules in *ASCM* Articles 12.4.1 and 12.8. Rather than go into the factual details of the case, Norway will outline how to interpret the mentioned provisions.

3.1 The duty to ensure non-confidential summaries of confidential information

11. The EC contends that Mexico failed to require the complainant to provide non-confidential summaries of confidential information, inconsistent with *ASCM* Article 12.4, and likewise that Mexico did not ensure that such summaries contained sufficient detail.[8]

12. Mexico argues, *amongst others*, that its system provides opportunity for a legal representative of any interested party to see confidential information through its system of "protected access".[9] Mexico also argues that all interested parties did actually present non-confidential summaries of all confidential information presented to the Mexican investigating authority.[10]

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[6] Mexico's First Written Submission, paras. 222 and 226.
[7] Mexico's First Written Submission, para. 226.
[8] EC's First Written Submission, paras 103 – 108.
[9] Mexico's First Written Submission, paras 84 – 85.
[10] Mexico's First Written Submission, para. 89.

13. Norway will not discuss the factual aspects here, but point to two issues raised by the parties to the dispute: (i) The relationship between a system of "protected access" to the obligation to provide non-confidential summaries; and (ii) the need to refer, in the preliminary or final resolution, to whether non-confidential summaries were requested or provided.

14. In cases where a Member has set up a system of "protected access" allowing interested parties access to all confidential information (provided their legal representative meets certain requirements), due process concerns may be safeguarded. However, the interested party will only be incited to go through that process if it knows that there is confidential information there to see. The submission of non-confidential summaries of confidential information, or statements explaining why such information cannot be summarized, being placed in the non-confidential file, serves as a marker for the interested party to have its legal representative go through the process of gaining access to the confidential file. Norway, therefore, believes that the existence of a system of "protected access" to the confidential file does not in itself absolve the Investigating Authority of its duty to request the provision of non-confidential summaries of confidential information submitted to it.

15. As to the second issue, Norway believes that the reference to whether Mexico required, and interested parties provided, certain non-confidential summaries, is not an issue that revolves around whether there is a "statement" or "reference" to this effect in the final or preliminary resolution. The question for this Panel is whether Mexico actually required the provision of such summaries from interested parties, whether access to such information was provided, whether any reliance upon such information was disclosed in accordance with *ASCM* Article 12.8, and whether sufficiently detailed information was provided in the relevant reports or notices under *ASCM* Article 22.

3.2 The duty to disclose essential facts

16. The EC claims that Mexico is in breach of the requirement to disclose essential facts before a final determination is made, as the investigating authority did not (as the EC is aware) communicate a disclosure within the meaning of *ASCM* Article 12.8.[11] Mexico, on the other hand, argues that it provided disclosure through the "Resolución Preliminar" (RP) of 10 June 2004.[12]

17. This issue raises *first* substantive issues as to what information was actually provided in any disclosure provided by the Investigating Authority of Mexico, and *second* whether the provision of such information in the RP allowed interested parties sufficient time and opportunity to defend their interests.

18. Absent the factual record, Norway will not address the substantive issue of whether any disclosure of Mexico actually provided the required information. Norway will only high-light certain arguments that may be of importance to the Panel when interpreting the requirements of *ASCM* Article 12.8 and applying that interpretation to the facts of this particular case.

19. WTO Panels and the Appellate Body have, in the anti-dumping context, interpreted the parallel provision in Article 6.9 of the *Anti-Dumping Agreement* on several occasions. Panels have found that the aim of disclosure is to "actually disclose to the interested parties the essential facts which, being under consideration, are anticipated by the authorities as being those which will form the basis for the decision whether to apply definitive measures."[13] Article 12.8 is meant to place interested parties in a position where they can properly understand, verify, and challenge the facts that are likely to lead the investigating authority to impose definitive measures.

[11] EC's First Written Submission, para. 109.
[12] Mexico's First Written Submission, paras. 93 – 94.
[13] Panel Report, *Argentina – Ceramic Tiles*, para. 6.125.

20. The Panel will have to assess whether the RP contained the required information, and whether Mexico provided interested parties with the opportunity to comment and defend their interests based on this document. Norway notes that – according to the time-line of events presented by the EC in its First Written Submission[14] - a number of new questionnaires were sent out, and new submissions and verification visits took place after 10 June 2004. The Panel will thus also have to assess whether, based on the evidence presented by the EC, there are any new facts submitted after the RP that fall within the scope of essential facts subject to disclosure, and that were not disclosed.

IV. STANDARD OF REVIEW: THE DUTY TO PROVIDE A REASONED AND ADEQUATE EXPLANATION IN SUPPORT OF THE AUTHORITY'S CONCLUSIONS

21. The EC claims that Mexico violated *ASCM* Articles 22.3 and 22.5 because the investigating authority failed to provide a reasoned and adequate explanation for many of its findings.[15] Under these provisions the investigating authority is given a comprehensive obligation to provide a transparent statement of the reasons for the imposition of definitive countervailing duties. Thus, the authority must set forth the relevant facts in the record, and must explain "in sufficient detail" the factual and legal determinations made on the basis of the evidence in the record that led to the imposition of measures. The Appellate Body and panels have consistently ruled that the investigating authorities are required to provide a *reasoned and adequate explanation*, among others, of how the evidence in the record supports the authority's determination.[16] The authority's explanation must demonstrate in a "clear and unambiguous" manner that the substantive conditions for imposition of trade remedy measures have been satisfied.[17] If an authority fails to explain itself adequately, it cannot demonstrate that it has respected the substantive requirements of the *ASCM* governing those determinations.

22. In concluding, Norway submits that the Appellate Body – with regard to the standard of review – has stated that a panel must examine whether the authority has provided a "reasoned and adequate explanation" of "how individual pieces of evidence can be reasonably relied on in support of particular inferences, and how the evidence in the record supports its factual findings".[18]

V. CONCLUSION

23. Norway respectfully requests the Panel to examine carefully the facts presented by the parties to this case in light of our arguments, in order to ensure a proper and consistent interpretation of the *ASCM*.

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[14] EC's First Written Submission, paras. 59 – 70.
[15] EC's First Written Submission paras. 77 – 85.
[16] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada*), para. 99.
[17] Appellate Body Report, *US – Line Pipe*, para 217.
[18] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada*), para. 99.

ANNEX B-5

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION OF THE UNITED STATES

(21 June 2007)

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Table of Reports Cited

EC– Pipe Fittings (Panel)	Panel Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report, WT/DS219/AB/R
EC – Pipe Fittings (AB)	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
EC – DRAMS	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
Mexico – Rice (Panel)	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report, WT/DS295/AB/R
Mexico – Rice (AB)	Appellate Body Report, *Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/R, adopted 20 December 2005
US – DRAMS (Panel)	Panel Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/R, adopted 20 July 2005, as modified by Appellate Body Report, WT/DS296/AB/R

I. INTRODUCTION

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

II. THE PERIOD OF INVESTIGATION FOR DETERMINING INJURY MAY BE LONGER THAN THE PERIOD EXAMINED FOR DETERMINING A SUBSIDY

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

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

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

4. In *EC – Pipe Fittings*, the EC's investigating authority had examined a longer period for its injury determination than for its dumping determination. The panel found that the EC's approach was not inconsistent with the EC's obligations under Articles 3.1 and 3.2 of the *Agreement on Implementation of Article VI of GATT 1994* ("AD Agreement"), the provisions that mirror the obligations of Articles 15.1 and 15.2 of the SCM Agreement.[4] In its finding, the panel noted that the *Recommendation Concerning Period of Data Collection for Anti-Dumping Investigations* of the WTO Committee on Anti-Dumping Practices recommends that the period of investigation in an injury investigation be longer than the period of investigation in a dumping investigation.[5]

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[1] First Written Submission of the European Communities, paras. 204-07.
[2] *US – DRAMS (Panel)*, paras. 2.2, 7.243.
[3] *US – DRAMS (Panel)*, para. 7.245.
[4] *EC – Pipe Fittings (Panel)*, para. 7.321.
[5] *EC – Pipe Fittings (Panel)*, para. 7.321 (noting that the EC's period of investigation for the dumping investigation covered one year, while the period of investigation for injury covered three years).

III. THE TEXT OF ARTICLE 15 OF THE SCM AGREEMENT DOES NOT REQUIRE THE INVESTIGATING AUTHORITY TO BASE ITS INJURY DETERMINATION ON THE TYPE OF INJURY ALLEGED BY THE PETITIONER OR APPLICANT

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

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

IV. THE PANEL SHOULD DETERMINE WHETHER MEXICO'S INJURY ANALYSIS BASED ON AN EXAMINATION OF CERTAIN MONTHS OF EACH YEAR IS CONSISTENT WITH THE "OBJECTIVE EXAMINATION" REQUIREMENT IN ARTICLE 15.1 OF THE SCM AGREEMENT

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

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

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

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

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

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

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

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

[9] *Mexico – Rice (AB)*, para. 176.

[10] *Mexico – Rice (AB)*, para. 183.

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

V. ARTICLE 15.5 OF THE SCM AGREEMENT DOES NOT REQUIRE AN INVESTIGATING AUTHORITY'S NON-ATTRIBUTION ANALYSIS TO BE PERFORMED ON A QUANTITATIVE BASIS

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

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

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

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

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

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

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

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

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

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

[17] *EC – DRAMS*, para. 7.405.

quantify the injury caused by other factors in order to perform the non-attribution analysis required by Article 15.5 of the SCM Agreement.[18]

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

ANNEX B-6

THIRD PARTY ORAL STATEMENT OF CANADA

(26 June 2007)

1. Madam Chair, Members of the Panel, Canada first thanks you for your service on this panel. Canada's written submission, filed at the end of last week, addressed two of the issues raised by this case, two issues that Canada believes are of fundamental systemic importance to WTO Members. I would like to briefly recall those issues without repeating our submissions.

2. First, Canada emphasized the importance of a Member's investigating authority respecting the principles of due process contained in the SCM Agreement. A further example of the concerns that motivated Canada's decision to intervene regarding the importance of respecting the principles of due process is Mexico's assertion that it would act consistently with Article 13.1 of the SCM Agreement if it sent an invitation for consultations anytime up to the day before the investigation was formally initiated. In Canada's view, such an approach is inconsistent with the object and purpose of this provision, which is aimed at affording a reasonable opportunity for meaningful consultations between the exporting Member and importing Member, with a view to reaching a mutually agreed solution before an investigation is launched. The fact that Article 13.1 requires that the timing of the invitation allow for consultations before the investigation is formally initiated is confirmed by Article 13.2 of the Agreement, which speaks of the opportunity to "continue" the consultations "throughout the period of investigation."

3. Second, with respect to the issue of pass-through, although the facts of this case are not entirely clear, it seems that the subsidy at issue is granted to the European producers of olives. It further appears that a number of arm's length transactions take place before the exportation of the actual product subject to the investigation of the Mexican investigating authority. In these circumstances, based on the relevant provisions we have cited in our brief and a line of cases up through the Appellate Body's decision in *Softwood Lumber IV*, it is Canada's submission that the Mexican investigating authority should have conducted a pass-through analysis to determine whether and to what extent the subsidy granted to the olive growers had passed through to the producer and/or exporter of the olive oil subject to the investigation.

4. This concludes Canada's oral statement. We would be glad to answer any questions the panel members may have concerning our written submission or oral statement.

ANNEX B-7

THIRD PARTY ORAL STATEMENT OF THE UNITED STATES

(26 June 2007)

1. Madame Chair and members of the Panel, the United States is pleased to present its views as a third party in this dispute. As the Panel will recall, the United States has already filed a written submission, and we will not repeat the discussion contained therein. Since that submission, we have had an opportunity to review all of the other third party submissions filed, and we wanted to raise one matter today for the Panel's attention. We would like to comment on the discussion by Norway in its third party submission regarding Article 12.8 of the SCM Agreement.

2. Norway suggests that Mexico did not satisfy the requirements of Article 12.8 because Mexico failed to identify "which facts in the file [are] likely to lead the authority to impose final duties." However, the claim advanced by the EC regarding Article 12.8 of the SCM Agreement is that there was no disclosure of any kind under Article 12.8 of the SCM Agreement, and not that Mexico did not disclose a particular fact, or that Mexico breached Article 12.8 by failing to identify particular facts. Thus, the question presented by Norway is not implicated by the EC's claim, and it would therefore be inappropriate for the Panel to reach it.

3. It is well-established that the burden of establishing a breach of an obligation under a covered agreement lies with the complaining party. Further, the burden of establishing a fact lies with the party asserting that fact.[1] For the EC to establish a breach of Article 12.8, it is the EC that would need to identify which facts were "essential" and to demonstrate that Mexico did not inform Members and interested parties of such facts in sufficient time.

4. In light of this, it would be inappropriate for the Panel to identify particular facts that need to be disclosed under Article 12.8, as Norway suggests, because it is not the role of panels to establish a claim for a party where the burden for establishing that claim lies with the party. As the Appellate Body has stated, **"panels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it."**[2]

5. This concludes my presentation. Thank you for your attention.

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[1] Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, p. 14. *See also*, Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 97.

[2] Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, para. 129.