

ANNEX A

FIRST WRITTEN SUBMISSIONS BY THE PARTIES

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ANNEX A-1

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

(30 March 2007)

I. FACTUAL BACKGROUND

1. With 98 per cent of the world's olive trees, the area around the Mediterranean accounts for the bulk of world olive oil production. Olive trees take as long as ten years to reach maturity. They produce an annual crop, which is harvested in the winter. The great majority of olives produced in the EC are used in the production of olive oil, though there is significant production of table olives and of olives for use in prepared foods.

2. The production of olive oil starts with the crushing of the fruit to produce a paste, which is then malaxated. Oil extracted by purely physical means qualifies as 'virgin'. The remaining pomace contains oil that can be extracted by mechanical and chemical means and it is called 'refined olive oil'. The last remaining oil can be removed from the pomace by chemicals, and is known as 'olive-pomace oil'.

3. The number of olive growers in the EC is 2.5 million, including in Italy 1.1 million, Spain 450,000 and Greece 850,000. Olive producer organisations (PO) administer the EC aid scheme, grouping and verifying aid applications and distributing the aid itself.

4. Like the growing of olives, their processing into oil is highly fragmented. In 2002 there were more than 10,000 mills in operation in the EC. The fragmentation of the sector applies also to bottling/canning firms. Regarding refining and olive pomace plants, the number of operators remains stable because of the minimum size required, the complexity of the plant and the machinery needed. The following table contains data collected by the EC Commission from Member States:

	Spain	Italy
Olive oil growers	450,000	1,100,000
Mills	1,715	6,076
Refineries	29	13
Olive pomace plants	53	45
Bottling /canning plants	440	300

5. In the great majority of cases the companies that are engaged in exporting are completely independent of those who grow olives and produce olive oil.

6. Wide fluctuations in production are a feature of olive growing. They are linked to the uncertainties of the climate (for example, drought in Spain in 1995/96 and frost in Greece in 2001/02 seriously affected the harvest, whereas the exceptional Spanish harvest in 2001/02 was so large as to

lead to a drop in world prices) and the phenomenon of alternate bearing. The EC is the dominant producer (2.464 thousand tonnes in 2001/2002, out of a world production of 2.826 thousand tonnes) in the international market for olive oil and the larger exporter (325 thousand tonnes in 2001/2002, out of world exports of 395 thousand tonnes).

7. Since the 1990s significant quantities of olive oil have been consumed outside the production areas. World consumption of olive oil has been progressing fairly steadily, without the fluctuations that are a feature of production. Between 1995/96 and 2002/03 the average annual increase in consumption was 6 per cent, with even higher relative growth in new markets, such as Mexico. The EC is also a considerable importer of olive oil, although up to 80 per cent of importing is done under inward processing arrangements.

8. The EC production aid scheme applicable during the investigation period (April – December 2002) used by Mexico in the olive oil investigation was set out in a series of EC Regulations. These measures are no longer in force, and a single payment scheme, not based on production, is applied to olive oil and table olives since 1 January 2006.

9. The functioning of the scheme was based on the establishment of National Guaranteed Quantities (NGQ) for each Member State: i.e., the maximum quantity (expressed in olive oil) produced by olive growers for which the aid would be provided. The maximum amount of aid per unit was fixed for the marketing years 1998/1999 to 2003/2004 at EUR 1,322.5 per tonne, but the rate actually paid to farmers was reduced to the extent that overall production in their Member State exceeded the NGQ. In years when the production of a Member State was below its NGQ, 80 per cent of the difference was added to its NGQ for the following year and the remaining 20 per cent was distributed among other Member States that had exceeded their NGQs in the current year.

10. The aid was paid to the growers only in respect of the eligible production. With certain exceptions, olive trees planted after 1 May 1998, and those not covered by a cultivation declaration, were not eligible for aid.

11. Before 1 December of each marketing year (November to October) olive growers had to submit to the local producer organization a 'crop declaration' giving data relating to the farm such as location, area and number of olive trees. The olives were handed over to an approved mill for extraction of the oil. The mill owner issued a certificate to the grower stating the amounts of olives received and of oil that they had produced. The grower had to present this certificate and an aid application to the producer organization before 1 July.

12. Member States collected the relevant information and passed it to the EC Commission, which determined the level of production and the advance payment (up to 90 per cent) that could be given (after 16 October). The final payment was not calculated until the following May, and might not be received by growers for another three months.

II. LEGAL ANALYSIS

A. STANDARD OF REVIEW

13. Regarding the review of 'factual components' of findings made by investigating authorities, the Appellate Body said in *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93, that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority and that a panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report. The Appellate Body stressed that a panel must examine whether, in the light of the evidence

on the record, the conclusions reached by the investigating authority are reasoned and adequate, and offered guidelines for determining when an authority's conclusions were 'adequate'.

14. In *US – Line Pipe* (para. 217), the Appellate Body said, in regard to the examination of 'other factors' causing injury, that the explanation must be clear and unambiguous, it must not merely imply or suggest an explanation, and it must be a straightforward explanation in express terms. Likewise, speaking of the term 'reasoned conclusion', the Appellate Body explained in *US – Steel Safeguards* that such a conclusion is "not one where the conclusion does not even refer to the facts that may support that conclusion" (para. 326).

15. In *US – Lamb* the Appellate Body said (para. 106) that "a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel [; p]anels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data". It concluded that "a panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation".

16. In these cases the Appellate Body has also enunciated the obligations that must be respected by investigating authorities. The EC places great emphasis on the duty to provide reasoned and adequate explanations because Mexico's failure to do so was a recurring feature of its Resolutions. The Ministry for the Economy of Mexico (the "Ministry") systematically failed to explain how the facts in the record supported its findings and conclusions, or even to refer to such facts when stating these conclusions. Furthermore, even when an explanation was provided it was often not clear what aspect of the rules the Ministry was applying.

B. CLAIMS AND LEGAL ARGUMENTS

17. The EC considers that the investigation carried out by the Ministry into alleged subsidized imports of olive oil from the EC was seriously defective in a number of ways.

18. The first claim is that Mexico failed to hold consultations under Article 13.1 of the SCM Agreement before the initiation of the investigation on 2 July 2003. The invitation to pre-initiation consultations was sent two days after the initiation and the first consultations took place only on 17 July 2003, a day after the initiation of the investigation was published.

19. The second claim is that Mexico initiated the investigation in the absence of an application made by or on behalf of the domestic industry as required by Article 11.4 of the *Agreement*.

20. In its investigation the Ministry accepted the applicant Fortuny's assertion that until the early months of 2002 it constituted the entire domestic industry for products like those imported, and furthermore that it ceased production of olive oil in March 2002. Thus, at the time of the application (12 March 2003), Fortuny was not a producer of the 'like product' and yet it was treated by the Ministry as constituting the Mexican domestic industry.

21. Article 11.4 requires that the investigating authorities' determination (that the application is made by or on behalf of the domestic industry) should be reached only 'on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product'. In the present case it is evident that the Ministry did not carry out a realistic investigation of this kind. In the Final Resolution the Ministry refers to enquiries that it made in the course of the investigation regarding the possible existence of other producers of olive oil (although even these enquiries were inadequate). At the time of the initiation of the investigation the Ministry

accepted a statement provided by Fortuny from a government department in one Mexican state that Fortuny was the sole Mexican producer, and attempted no investigation regarding the existence of other producers. This is confirmed by the Ministry's later resolutions, which indicate that the only checks which it made were ones concerning Fortuny's assertions about its own production.

22. The third claim is that Mexico failed to apply self-restraint in initiating the investigation, as required by Article 13(b)(i) of the *Agreement on Agriculture*. First, this provision prevented countervailing measures being imposed except when a determination was made of injury or threat thereof. Consequently, no action could be taken in respect of claims based on 'material retardation'. Nevertheless, although material retardation was the basis of Fortuny's claim, the investigation was initiated and countervailing measures were imposed.

23. Secondly, Article 13(b)(i) required the authorities to 'show due restraint' before initiating an investigation, whatever kind of injury was alleged. However, nothing indicates that the Ministry showed due restraint before initiating the investigation or gave even the least consideration to this issue. On the contrary, the Mexican authorities appear to have embarked on the investigation with exceptional haste. Thus, they did not wait to hold the consultations with the EC that they were obliged to, but plunged into the investigation at the first possible moment. Again, the Ministry clearly did not investigate the full extent of the domestic industry support, but only took account of Fortuny's position. Moreover, Mexico converted an application based on 'material retardation' to the establishment of a domestic industry it into one of 'material injury' of an industry.

24. The fourth claim is that Mexico failed to require the complainant to provide non-confidential summaries of confidential information, and failed to disclose essential facts, in breach of Articles 12.4.1 and 12.8 of the *SCM Agreement*.

25. Confidential information was presented by Fortuny, but that neither the Final nor the Preliminary Resolution contains any reference to non-confidential summaries being either required or provided. Although Article 12.4.1 has no explicit obligation for the investigating authority to require the production of appropriate non-confidential summaries, such a requirement is a necessary concomitant of the rules that it contains, as the Panel explained in *Guatemala – Cement II* (para. 8.213).

26. Mexico is in also breach of the specific requirement in Article 12.8 of the *SCM Agreement* to make disclosure to interested Members and parties before adopting definitive measures. Neither the EC nor the exporting EC companies nor their associations received any communication from the Ministry that constituted a disclosure of this kind.

27. The fifth claim is that Mexico failed to comply with the time limit set by Article 11.11 of the SCM Agreement regarding the completion of the investigation. The Mexican investigation into olive oil was initiated on 2 July 2003 and, consequently, it should have been concluded by 2 January 2005. However, the definitive measures were not adopted until 1 August 2005. Mexico is in clear breach of the obligation in Article 11.11: it gave no reasons why the circumstances were 'special' and would therefore have justified exceeding the one year limit, and it exceeded the absolute limit of 18 months.

28. The sixth claim is that Mexico failed to provide a reasoned and adequate explanation of the existence of subsidization, to calculate the benefit conferred on the recipient, and to apply the method used to each particular case as required by Articles 1.1 and 14 of the SCM Agreement.

29. The Ministry failed to provide a reasoned and adequate explanation for the imposition of countervailing duties on EC exports of olive oil in the light of Mexico's obligations under Articles 1.1 and 14 of the *SCM Agreement*. The EC will look first at the Ministry's conclusion that the EC aid in

question constituted a countervailable subsidy, and then at its application of this conclusion to the individual exporters.

30. The Ministry attempted to bridge the gap between the persons who received the subsidy (the olive growers) and the persons exporting the products to Mexico, by focusing on the product linked to the subsidy, and the question whether it was olives or olive oil.

31. As regards products, the term that one finds repeatedly in the *SCM Agreement's* provisions on countervailing duties is 'subsidized imports'. Article 15 makes clear that it is when subsidized imports are causing injury that countervailing duties may be imposed. The crucial issue therefore is whether the olive oil imported into Mexico from the EC can be described as 'subsidized'.

32. The *GATT 1994* addresses the issue of the relationship of the subsidy and the product in Article VI:3, which speaks of a 'bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product', where 'such product' is 'any product of the territory of any contracting party imported into the territory of another contracting party'. Two points should be noted. Firstly, the provision assumes that subsidies can be given 'indirectly'. Secondly, the conferring of the subsidy must be linked to some activity concerning the product.

33. The *Agreement* refers to the notion of benefit. Firstly, by Article 1 it is explicitly made an element of the notion of subsidy. Secondly, specifically in regard to the rules on countervailing duties, Article 14 addresses the 'calculation of the amount of a subsidy in terms of the benefit to the recipient'. The importance of identifying the beneficiary of the benefit that constitutes the subsidy was emphasized by the Appellate Body in *Canada – Aircraft* (para. 154).

34. Finally, reference should be made again to Article VI:3 of the *GATT 1994*, and in particular to the definition given there of the term 'countervailing duty': 'a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise'. Clearly, what is to be offset is the benefit conferred by the subsidy.

35. Where, as in the present case, the subsidy is given to one person, but it is another person that has exported the product to the Member claiming that injury has been caused, the authorities must establish that the subsidy has in some way 'passed through' to the second person. The issue is one that has arisen in *US – Softwood Lumber IV*. In that case the Appellate Body observed that (para. 140) that "the phrase "subsid[ies] bestowed ... *indirectly*", as used in Article VI:3, implies that financial contributions by the government to the production of *inputs* used in manufacturing products subject to an investigation are not, in principle, excluded from the amount of subsidies that may be offset through the imposition of countervailing duties on the *processed product*". However, "where the producer of the input is not the same entity as the producer of the processed product, it cannot be presumed [...] that the subsidy bestowed on the input passes through to the processed product", "in such case, it is necessary to analyze to what extent subsidies on inputs may be included in the determination of the total amount of subsidies bestowed upon processed products".

36. The nature of the enquiry that is necessary in order to determine whether and to what extent there is pass through of input subsidy benefits was indicated by the panel in a GATT Subsidies Code dispute (*US - Canadian Pork*). According to this panel the basic criterion was how much prices of the input product were lowered. The panel suggested that among the relevant considerations were the degree to which swine were internationally traded, and the per unit cost of producing the additional output of swine that the subsidies may have caused.

37. In *US – Countervailing Measures on Certain EC Products*, para. 127, the Appellate Body has also used the criteria of arm's-length sale and "fair market value" when considering whether a subsidy

given to a state-owned company can be taken to benefit the private body that emerges when that company is privatised (in this instance the term 'pass through' was not used).

38. In its Final Resolution, the Ministry asserted that the supply of olive oil and its prices were affected by the subsidy. Firstly, the supply increased because olive production was rendered more attractive than that of other crops. Secondly, the increased supply led to lower prices.

39. However, these propositions are mere assertions and, even if true, they would not explain how a subsidy could have passed through to the exporters. The Resolutions contain no indication of any attempt by the Ministry to support its statements with evidence. This cannot have been for lack of basic data. Much information regarding the production, prices and exports of olives and olive oil was available to it. The EC provided arguments to show the lack of connection between the levels of the production subsidy and those of prices over the period between 1992 and 2003.

40. The EC also explained how the arrangement of enterprises involved in the olive oil business meant that olive growers were quite distinct from olive oil exporters, and that prices were determined not by the production subsidies but by the operation of demand and supply. The EC criticised the failure of the Ministry not to extend its enquiries to olive growers, but to limit them to exporters and/or producers of olive oil.

41. In this context it is worth referring to an Australian investigation into imports of EC olive oil, which was virtually contemporaneous with the Mexican investigation. The report of the Australian investigating authority of 24 May 2004, which was known to the Ministry, shows the kind of enquiries that should be made in this context, as well as indicating the conclusions that would result from an objective investigation: that olive oil exporters were at arm length in the sales chain, that olive oil produced by the growers is an input product to the goods exported to Australia, that pass through of benefit could not be demonstrated and that market forces alone dictate the price of each transaction.

42. The second of the weaknesses affecting the Ministry's arguments about increased supply causing lower prices is that even if that were true it would not lead to the conclusion that the olive oil exported from the EC constituted 'subsidized imports'. A particular feature of the international market in olive oil is the dominant position of EC production and exports. Depending on the level of international demand, if the EC harvest is large prices may fall, but this effect will be felt immediately throughout the international market.

43. The Ministry also argued that 'because it is not an investigation on a subsidy on a consumable (olives) but on olive oil, which is the product itself exported to the United Mexican States for that reason, the investigating authority is not obliged to carry out an analysis of the system for pass through of the subsidy since Regulation 136/66/EEC establishes indisputably that the programme of aid is for olive oil.'

44. This attempt to exclude the issue of pass through because the subsidized product and the exported product were in some way the same is wrong or, even if correct, would be irrelevant.

45. The Ministry's argument is wrong because it assumes that the subsidy was given on the production of olive oil. In fact, the aid was given to those who (a) grew olives, and (b) had them crushed to produce olive oil. In concentrating on the second of these steps the Ministry completely overlooked the first. Thus, even if it could be established (which the Ministry does not try to do) that the olive oil that emerged after the second stage was the same as the oil that was exported to Mexico, the olive that was produced after the first stage certainly was not.

46. In this context further mention should be made to the contemporaneous Australian investigation into olive oil from the EC. In that case the investigating authority found that the oil produced by the crusher was not the same product as that imported into Australia because the imported oil had first been filtered and blended by the exporter. It concluded that the oil sold by the producer was an upstream product of the exported oil.

47. The Ministry's arguments regarding the sameness of the subsidized and the exported products are irrelevant because they are in effect an application of a test of 'likeness', and there is no WTO rule specifying such a test as between, on the one hand, the product on the production of which the aid is granted and, on the other, the product that is exported to the Member taking countervailing measures. The sole requirement of likeness that is found in WTO countervailing duty law is the one which exists as between the 'subsidized import' and the product being produced in the importing country. This requirement arises only in the context of injury causation, as defined in the *SCM Agreement*.

48. Even supposing that such a transfer of the subsidy had occurred, the Ministry failed to make appropriate adjustments to the value that the subsidy would have had for the exporters. The Ministry rejected several claims without giving a reasoned or adequate explanation for that rejection.

49. Firstly, the Ministry refused to make any adjustment for the fact that a proportion of the exports from the EC to Mexico consisted of oil that had not been in any way subject to the EC aid scheme. For the most part this consisted of oil on inward processing arrangements. This was oil that had been imported into the EC from non-EC countries (mostly from Tunisia) and blended with EC-origin oil before being exported to Mexico. Of course, such oil could in no way be said to have benefited from the EC's aid programme. Oil of this kind was estimated to be about 7 per cent of Spanish production and 10 per cent of Italian production.

50. Secondly, the Ministry calculated the margin of subsidy for each company by comparing the amount of the subsidy with the exporter's sales prices adjusted to an ex-factory level. The effect of such a comparison is to produce an artificially high margin.

51. The Ministry was also guilty of serious failings in the way in which it went about its investigations when it was making adjustments for costs incurred between the receipt of the subsidy and the export of the olive oil to Mexico. The Ministry abandoned its obligation to investigate the relevant facts. The Ministry undertook the task of investigating the costs incurred by companies engaged in bringing the olive oil to market with a view to making adjustments to the benefit derived from the aid. However, the Ministry also asked these companies to give an account of the costs of other companies that had been involved with the oil. An investigating authority cannot escape its responsibility to investigate and determine the level of subsidization by passing the task on to exporting companies.

52. Secondly, the Ministry continued addressing questions to the companies on this issue after the date when the investigation should have finished.

53. The seventh claim is that Mexico failed to give a reasoned and adequate explanation of the existence of a domestic industry and consequently acted inconsistently with Article VI:6 of the *GATT 1994* and Articles 15.4, 15.5 and 16 of the *SCM Agreement*.

54. Fortuny was the complainant in the Mexican proceedings that led to the imposition of countervailing duties against olive oil from the EC. It appears that a company named 'Formex Ybarra, SA de CV' ('Formex Ybarra') was engaged in both importing and producing olive oil until October 2001. In May 1999 it placed distribution of olive oil in the hands of a related company, Distribuidora Ybarra, SA de CV ('Distribuidora Ybarra'). In October 2001 Formex Ybarra underwent certain further changes. Fortuny took over the production activities of Formex Ybarra but, unlike its

predecessor, it did not import olive oil. Fortuny continued to rely on Distribuidora Ybarra for distribution of a large part of its olive oil, until it ceased production. Fortuny and Distribuidora Ybarra ceased to be related in December 2001, and Distribuidora Ybarra was purchasing increasing amounts of olive oil from foreign suppliers.

55. The Ministry accepted Fortuny's claim that it was the only olive oil producer in Mexico (until it ceased production in 2002), but it signally failed to provide a reasoned and adequate explanation for this conclusion. The Ministry failed to carry out a proper investigation of this matter.

56. Firstly, it contacted a Mexican firm, Maprinsa, alleged by the exporters to be producing olive oil. The Ministry reported that Maprinsa explained that it was engaged solely in bottling and packaging olive oil, and not in producing it. However, the Ministry apparently made no attempt to discover from Maprinsa whether the oil that it bought was of Mexican or foreign origin. Secondly, the Ministry showed a similar lack of initiative when investigating two other firms that were revealed to be engaged in bottling only, and in regard to yet two more firms that were named as possible producers the Ministry either relied on a third party's view or did nothing at all to determine the nature of their activities. In addition, the Ministry simply dismissed artisan production as irrelevant because it was not distributed through the same channels as imports. Thirdly, the Ministry contacted a national association of oil and edible fat industries, but this association merely confirmed that Fortuny was the only olive oil producer registered with it and that it had no registrations of any domestic producer other than Fortuny. Fourthly, it contacted several government organisations, but these proved unable to provide relevant information. Despite this failure the Ministry made no further efforts to gain information from government sources.

57. The Ministry's shortcomings in the determination of the existence or non-existence of producers should be seen in the light of the data produced by the International Olive Oil Council (IOOC), which, presumably relying on Mexican government sources, shows Mexican production levels of 1000 tonnes in 1999/2000, 1500 tonnes in 2000/01, and 2000 tonnes in 2001/02.

58. The failure to determine properly whether or not there were producers of olive oil in Mexico during the investigation period completely undermines the reliability of the injury finding made by the Ministry. As a consequence, the Ministry has failed to provide a reasoned and adequate explanation of its conclusions. More specifically, the failure to investigate properly the extent of the domestic industry means that the Ministry could not possibly comply with the stipulation in Article 15.1 that a determination of injury for the purposes of Article VI of *GATT 1994* must involve an objective examination of the impact of the subsidized imports on the domestic producers of the product. As a consequence, the obligation in Article VI:6 would necessarily be infringed.

59. The Ministry's finding on industry suffers fatally from the fact that it rests on a finding that there was no domestic production during the period of investigation used for the determination of the existence and amount of subsidy.

60. That some level of domestic production must exist is clear from the terms of Article 16.1 of the *Agreement*. Thus, the existence of domestic producers is essential, and those producers must have 'output'. Consequently, if, as the Ministry maintains, there was no output, there can have been no production, and if there was no production there can have been no industry.

61. This interpretation is reinforced by considering the context of Article 16. Article 15.4 lists the factors to be considered in examining the impact of the subsidized imports and the important feature of these factors (such as sales, market share, profits, and productivity) is that all refer to an activity that is ongoing and to the condition of an existing industry. The same conclusion follows from a consideration of Article 15.5, which speaks of subsidized imports that 'are ... causing injury'. The reference is clearly to the present, to what is happening when the investigation is carried out, not to

what might have happened in the past. Likewise, at another point Article 15.5 speaks of 'any known factors ... which at the same time *are* injuring the domestic industry'.

62. The Appellate Body has said in *US – Softwood Lumber IV* (para. 64) that the object and purpose of the *SCM Agreement* is to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while recognizing at the same time, the right of Members to impose such measures under certain conditions. In a similar vein it has described them as reflecting a 'delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures (*US – Countervailing Duty Investigations on DRAMS*, para. 115). These views suggest that it would be a mistake to look for particular economic theories as an aid to interpretation.

63. In conclusion, the investigation of injury is not an inquest into the causes of an industry's death, but an examination of its present condition and of the present causes of that condition. For that to be possible there must be an industry presently in existence; in other words, there must be existing producers.

64. In support of its argument that there need be no national production during the investigation period the Ministry invoked a decision of a Binational Panel established under the North American Free Trade Agreement, where the anti-dumping proceedings were found not to be affected by the fact that production at the only domestic producer had ceased.

65. However, that determination differs from the present investigation in a number of important particulars which serve to make its observations irrelevant. Firstly, the panel was interpreting Mexican law, whereas the present dispute is entirely governed by WTO rules. Secondly, the situation being considered by the Binational panel was not one where domestic production had ceased during the course of the investigation, but only after the end of the investigation period. In the present case, the applicant had no production at the time when the subsidy investigation was commenced or at any point in time during the investigation period.

66. The sole facts on which the Ministry relied for its acceptance of the applicant as constituting the domestic industry were (a) that it had previously produced olive oil, (b) that it allegedly had been forced to stop producing because of the imports of olive oil from the EC, and (c) that it intended to recommence production, and did indeed do so to some degree, following the investigation period.

67. None of these considerations, some of which were in any case unfounded, alter the basic inadequacy of the Ministry's findings. In particular, if the fact that there had previously been a domestic producer of olive oil was acknowledged to be sufficient, the concept of domestic industry would entirely lose its integrity. If other producers had existed during the investigation period then they would have constituted the domestic industry. However, because of the Ministry's failure to adequately investigate this possibility any consideration of the injury suffered by that industry would be purely speculative.

68. The eighth claim is that Mexico has failed to give a reasoned and adequate explanation of its injury determination, based on positive evidence, and involving an objective examination of all relevant economic factors and indices having a bearing on the state of the industry. As a consequence it has violated Article VI:6 of the *GATT 1994* and Articles 15.1 and 15.4 of the *SCM Agreement*.

69. The complaint by Fortuny alleged the existence of the third of the types of injury mentioned in Article VI:6 of *GATT 1994*: it alleged subsidization that was such as to 'retard materially the establishment of a domestic industry'.

70. However, in the Initiation Resolution the Ministry concluded that "there is evidence that the injury to the domestic industry is linked to the subsidies granted to imports from the European Union". In other words, it referred to injury that had already occurred. Furthermore, the factors listed in the Resolution were largely ones concerning alleged past harm to the domestic industry, although it also found that 'resumption of operations would be economically viable if the distortion caused by subsidized imports is eliminated.' This ambiguous approach continued throughout the investigation. The Ministry's ultimate conclusion came down in favour of 'material injury'.

71. In any case, a simultaneous finding of both 'material injury' and 'material retardation' on the same facts is not possible, as the GATT panel in *Korea – Resins* declared.

72. As a first step in the determination of injury Article 15.1(a) of the *SCM Agreement* requires investigating authorities to make an objective examination of 'the volume of the subsidized imports and the effect of the subsidized imports on prices in the domestic market for like products'.

73. As regards volume, the Ministry looked at imports from the EC and other countries in successive 9-month periods (April to December) in three years, 2000, 2001 and 2002 (the last of these periods being the subsidy investigation period). It found that there had been significant increases.

74. As regards 'the effect of the subsidized imports on prices in the domestic market for like products', the Ministry concluded that there was 'significant price undercutting' by EC olive oil of that of Fortuny in the years 2000 and 2001. Of course, because Fortuny ceased selling in March 2002, there were no data for undercutting for that year, the subsidy investigation period. However, the only calculations of subsidization that the Ministry had made were for the investigation period in 2002. Its determination of 26.5 per cent subsidization in 2002 was invoked to explain the level of undercutting for the years 2000 and 2001.

75. Such a disjunction cannot be reconciled with the obligation in Article 15.1 of the *Agreement* that determinations of injury must be 'based on positive evidence', and that they must 'involve an objective examination' of the effect of the subsidized imports on prices in the domestic market for like products. Likewise, it conflicts with the basic obligation on national authorities to give reasoned and adequate explanations of their decisions.

76. It is also worth noting that in making the undercutting calculation, the Ministry never explained the basis for the prices assigned to domestic (Fortuny's) olive oil. In fact, the efforts of the Ministry to identify buyers of Fortuny's oil, or even firms that had received offers from Fortuny, were wholly unsuccessful.

77. In relation to Article 15.4. (evaluation of all relevant economic factors and indices having a bearing on the state of the industry) the Ministry was faced with the problem that during the investigation period there was no production. That in itself would be sufficient to prevent any examination of injury that was compatible with Article 15.4, and this fundamental flaw may account for the confused state of the Ministry's presentation of data pertaining to injury. Furthermore, the time frame is repeatedly moved, sometimes the focus is on what happened in the investigation period and earlier, and sometimes on what Fortuny planned for the future. The objectiveness of the examination was also undermined by the choice of investigation periods of nine months in three successive years, of which the last period, although coinciding with the investigation period for subsidization, started only after the shut down of Fortuny's production.

78. In addition, some of the trends noted by the Ministry appear to contradict the notion that Fortuny was suffering injury in the period prior to its cessation of production. Thus, production, prices and employment actually increased at this time. The profit data also show a marked increase in performance in 2001, which is also reflected in return on investment.

79. The ninth claim is that Mexico has failed to properly consider, as required by Article 15.5 of the *SCM Agreement*, any known factors, other than the alleged subsidized imports, which were causing injury to the domestic industry.

80. The Ministry's failure to identify an industry that had suffered material injury has the consequence that its conclusions regarding causation in general, and the effect of 'other factors' in particular, were made in a vacuum, and have no significance. Moreover, the Ministry's analysis of 'other factors' was marked by failures that were sufficient in themselves to render that analysis ineffective.

81. The EC and the exporters raised a number of factors, other than exports from the EC, which they said were causes of any injury that was suffered by the alleged Mexican industry.

82. The Ministry's examination of these factors was cursory. Firstly, it said that there did not seem to be a problem with new brands since at least nine new brands (Spanish and Italian) had had no problems entering the domestic market in spite of their being previously unknown. Secondly, the Ministry said that one would expect higher relative prices in the market for products of recognised brands, whereas olive oil imported from the EC was systematically lower priced. As regards the loss of links with the distribution network, the Ministry ignored Fortuny's experience of the period from 2000 to 2002 in favour of comments regarding the future. Likewise, in regard to the issue of guaranty of supply, the Ministry looked only to the future in the form of Fortuny's expected levels of production. Regarding the alleged lack of a guaranty of product quality the Ministry confined itself to calling for more information. Finally, the Ministry gave no consideration to the high level of Fortuny's costs.

83. The Ministry's analysis fails completely to provide the reasoned and adequate explanation of the Ministry's conclusions that is required by WTO law, as elaborated in the jurisprudence.

84. Finally, according to Article 19.1, the EC requests that the Panel accompany its recommendation with a suggestion to Mexico that a complete repeal of the measure against EC olive oil would be the most appropriate and/or effective way of bringing the measure into conformity with its WTO obligations. In this respect two factors are of particular relevance. Firstly, the initiation of the investigation was accompanied by serious procedural defects, notably regarding the holding of consultations, the exercise of due restraint, the adequacy of the complaint, the provision of non-confidential summaries, and the time limit regarding the completion of the investigation. Secondly, the basis for imposing countervailing duties has disappeared because at the beginning of 2006 the system of EC production aids was replaced by an entirely different system.

ANNEX A-2

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF MEXICO

(18 May 2007)

LEGAL ARGUMENTS

A. CLAIMS CONCERNING PROCEDURAL VIOLATIONS ALLEGEDLY COMMITTED BEFORE OR DURING THE COURSE OF THE INVESTIGATION

1. **Mexico complied with Article 13.1 of the Agreement on Subsidies and Countervailing Measures (SCM) in inviting the European Communities (EC) to hold consultations before initiating its investigation**

1. In its first written submission (FWS), the EC appears to argue that the Ministry of the Economy (hereinafter "the Ministry") decided to initiate the investigation on 2 July 2003, that on 4 July it invited the EC for consultations in accordance with Article 13.1 of the SCM Agreement and, as a result, consultations were held only on 17 July, in violation of the above-mentioned article.

2. The EC's claim is unfounded since, in accordance with footnote 37 to the SCM Agreement, the investigation was initiated on 16 July, the date of publication of the Initiation Resolution (IR) in the *Diario Oficial de la Federación* or DOF (Official Journal). This footnote says that initiation is the formal action by which an investigation is commenced, which may vary according to the legal system of each Member of the World Trade Organization (WTO). Pursuant to Article 85 of the Mexican Foreign Trade Law (FTL) and Article 7 of the Federal Tax Code (FTC), any general administrative provision, such as the initiation of an investigation, shall enter into effect on the day following its publication in the DOF. This means that the investigation was initiated on 16 July 2003 and not 2 July.

3. Consequently, having invited the EC for consultations on 4 July, Mexico clearly complied with the requirements of Article 13.1 of the SCM Agreement, as it made this invitation before the initiation of the investigation. Therefore we request the Panel to find and conclude that there is no substance to the claim made by the EC.

2. **Mexico initiated its subsidy investigation on the basis of an application made by the domestic industry, in compliance with Article 11.4 of the SCM Agreement**

4. In its FWS, the EC wrongly maintains that Mexico violated Article 11.4 of the SCM Agreement, on two grounds: (a) During the investigation period Fortuny was not producing, an indispensable requirement under Articles 16.1 and 11.4 of the SCM Agreement; and (b) the degree of support or opposition among the rest of the domestic producers was not examined (it is also maintained that the measures taken in the course of the investigation to determine whether there were other domestic producers were inadequate).

- (a) The Ministry treated Fortuny as a domestic producer in a manner consistent with the SCM Agreement

5. The EC stresses that as Fortuny was not producing during the investigation period it cannot be regarded as a producer and claims to base this conclusion on Articles 16.1 and 11.4 of the SCM Agreement. We note that these are general provisions applicable to all, not just some, subsidy investigations.

6. If the EC's claim were correct, these articles could not be applied in matters concerning material retardation, since the domestic producers would not be producing. The same thing would happen if production were temporarily suspended because of planned or unforeseen stoppages, in cyclic or seasonal industries, or if production had been suspended and could not be resumed, despite everything being in place, because subsidized imports were preventing the domestic product from finding a market.

7. As pointed out in paragraph 7.147 of the final report of the panel in *Mexico – Corn Syrup*, Article 4.1 of the AD Agreement (and hence 16.1 of the SCM Agreement) is in fact applicable in the case of material retardation of the establishment of a domestic industry, and for this reason the EC's claim lacks substance. We therefore believe that Articles 16.1 and 11.4 of the SCM Agreement should be interpreted in a reasonable manner and not strictly, so that the fact that domestic producers were not producing at a particular moment would not prevent their being treated as producers.

- (b) Fortuny was a producer and represented the Mexican domestic industry

8. The investigating authority (IA) found that Fortuny was the legal and business successor of Formex Ybarra in its olive oil production activities, which had continued uninterrupted from the 1940s until 2002. Fortuny had, and has, the appropriate installations and qualified personnel for producing olive oil. The Ministry had evidence to show that Fortuny did produce the identical or like product during the determination of injury period. Moreover, Fortuny has never been involved in liquidation or insolvency proceedings, re-registration, change of corporate purpose or anything else that might imply the termination of its activities as an olive oil producer.

9. Thus, being an entity with a legal and commercial existence on the domestic market, it cannot be regarded as defunct because production was interrupted. The nature of the injury suffered is therefore not considered to be material retardation. We reiterate that Fortuny stopped producing olive oil after a period of more than 55 years of uninterrupted production, which is why it had information about the indicators needed to determine injury.

10. The fact that Fortuny requested the initiation for material retardation is irrelevant. We do not see why the IA should have to restrict itself strictly to the grounds mentioned by the applicant. There is no such provision in the SCM Agreement, which is why we refer to the argument in which we explained why it should be considered that if a WTO Agreement is silent on a particular point, there is a reason for it, since if a provision is to be applied in another context, the negotiators would have said so explicitly. Consequently, Mexico was under no obligation to initiate the investigation on grounds of material retardation. In fact, the Ministry, anxious not to make an incorrect assertion and proceeding with the utmost moderation, initiated the investigation on grounds of "injury" in the general sense as defined in footnote 45 to the SCM Agreement, switching to "material injury" in the light of the information provided by the parties in the course of the investigation. The Ministry initiated the investigation upon determining that the application included sufficient and relevant evidence of the existence of a subsidy, injury, and a causal link between both (paragraphs 54 to 121 of the IR).

11. Consequently, there was nothing to prevent the finding that the applicant did exist and was an olive oil producer and that it was therefore inappropriate to conclude that the injury caused was material retardation. This was confirmed by the exporters, who argued that the situation of the domestic industry was adjusting to material injury and not to material retardation since it was not a new industry (paragraphs 279 of the Final Resolution (FR) and 219 of the Preliminary Resolution (PR)).

12. With regard to the degree of support, the EC argues that the Ministry did not carry out a realistic investigation because it did not investigate whether there were other producers. We believe that in order to initiate an investigation, the evidence does not necessarily have to be of the quality of that required for a preliminary or definitive determination, since it does not have to be anything more than circumstantial evidence sufficient for the IA to decide to initiate an investigation, during which it will determine whether it is appropriate to apply a countervailing duty. Support for this position can be found in paragraphs 7.74 and 7.76 of the final panel report in *Mexico – Corn Syrup*, paragraph 8.35 of the final panel report in the *Guatemala – Cement II* dispute and paragraph 7.81 of the final panel report in *Argentina – Poultry*. In the olive oil investigation, the Ministry determined that there were sufficient facts to justify the assumption that Fortuny was indeed the only domestic producer and that these consisted of the statement from Fortuny (paragraphs 22 and 47 of the IR) to the effect that it represented 100 per cent of domestic production, corroborated by two important documents: (a) a specialist publication of the Ministry of Agriculture, Livestock, Rural Development, Fisheries and Food (SAGARPA), which is an authoritative source of agricultural information indicating that Formex Ybarra (Fortuny) was the only olive oil producer; and (b) a statement by the Agricultural Promotion Department of the State of Lower California confirming that the applicant had production-ready installed capacity. Thus, even where there was only one domestic producer, the Ministry determined that Fortuny constituted the entire domestic industry, as supported by the findings in paragraph 6.72 of the final panel report in *EC – Bed Linen*.

3. The investigating authority complied with its obligations under Article 13(b)(i) of the Agreement on Agriculture

13. In its FWS, the EC argues that Mexico violated Article 13(b)(i) of the Agreement on Agriculture by failing to observe the following two restrictions on the imposition of countervailing duties: (a) Countervailing measures may only be imposed if there is a determination of injury or threat of injury; and (b) due restraint should be shown in initiating any investigation.

14. First, it is important to point out that Article 13(b)(i) is applicable to the period preceding the initiation of an investigation, hence the EC's claim concerning the imposition of measures has no merit. Moreover, for a rule to be violated two elements must be present: (a) a rule in force; and (b) an action at variance with that rule. In the olive oil investigation, the due restraint clause was not applicable after initiation as it expired on 31 December 2003, in accordance with Article 1(f) of the Agreement on Agriculture. Consequently, no rule was in force after initiation.

15. Moreover, due restraint does not constitute a different standard for investigations of agricultural products. Even if it were so, we reiterate that it is only applicable at the time of initiation of the investigation, as acknowledged by the WTO itself, the United States (US) and the EC. Due restraint is not a prohibition on initiation, but an appropriate and reasonable standard for initiation. Thus, in addition to the fact that the Ministry did apply a reasonable standard (as demonstrated by the sending out of a request for supplementary information or "*prevención*"), it should be taken into account that the subsidy was first granted long before the investigation was initiated (1966), that injury to the domestic industry began long before the initiation, that Mexico waited almost to the end of the period of validity of the due restraint clause to initiate the investigation and that there was an ample interval between the application for and the initiation of the investigation.

16. Accordingly, we consider that the Ministry did not act in a manner inconsistent with Article 13(b)(i) of the Agreement on Agriculture.

17. With respect to the first restriction and the statement that Mexico unduly imposed countervailing measures because measures could not be adopted in response to complaints made by the applicant relating to material retardation, we note that there is no provision in the SCM Agreement to the effect that an IA must abide strictly by the terms of the initial application, which is why Mexico was not obliged to initiate the investigation on grounds of material retardation. Indeed, the Ministry initiated the investigation on grounds of "injury" in the general sense of footnote 45 to the SCM Agreement and issued its determination of "material injury" in the light of the information supplied by the interested parties during the investigation. We recall that, as explained in our FWS, if a WTO Agreement is silent on a particular point, there is a reason for it, since if the negotiators had intended the requirements of a provision to be applicable in another context, they would have said so explicitly.

18. Article 11.2 of the SCM Agreement states that the application is to include evidence of the existence of injury within the meaning of Article VI of GATT 1994, that is to say, in accordance with footnote 45 to the SCM Agreement, and not that the mode of injury alleged in the application is that which the IA has necessarily to investigate. Thus, having reviewed the information and evidence in the application, the IA sent the above-mentioned "*prevención*" in order to clarify and/or supplement data on the injury suffered. From the application and the applicant's reply, the IA decided to initiate an investigation for injury in general, as reflected in paragraph 54 of the IR, and then, during the investigation, determine the specific nature of the injury suffered by the domestic industry. This was because, in principle, it was not possible to initiate an investigation for retardation when the domestic industry had existed since the 1940s and still existed. The imposition of measures was based on the existence of material injury and not material retardation. Thus, the authority did not act in a manner inconsistent with the WTO Agreements.

19. As regards the second restriction, the EC maintains that the Ministry violated the Agreement on Agriculture for the following reasons: (a) The IA initiated the investigation with exceptional haste (as shown by the supposedly belated holding of consultations); (b) in examining the degree of support, it did not spend enough time on familiarizing itself with the domestic industry; and (c) it converted an application based on material retardation into one based on material injury. There is no basis for the EC's claims and we therefore request that the Panel reject them. We note that the lack of due restraint should be demonstrated positively, not merely by means of assertions.

20. Regarding the alleged "exceptional haste", it is not clear why initiating an investigation promptly is at variance with due restraint and how that could constitute a violation of Article 13(b)(i) of the Agreement on Agriculture. As regards the consultations under Article 13.1 of the SCM Agreement, we refer to the comments above. Even if initiating an investigation promptly is regarded as a violation of due restraint, a period of four months elapsed between the application for the initiation of an investigation and the publication of the IR, largely due to the "*prevención*" (request for supplementary information), which is why we do not consider there to have been the alleged haste mentioned by the EC.

21. With regard to the degree of support, the EC's argument is not based on the facts of the case. We refer to the paragraphs detailing the efforts made and the criteria used by the IA to determine the domestic industry, which demonstrate that the IA proceeded with due restraint.

22. Similarly, regarding the claim that the IA took an application based on material retardation and converted it into one based on material injury, we reiterate that nothing in the WTO Agreements prevents an IA, even if the application is based on retardation, from initiating an investigation for injury on the basis of footnote 45 to the SCM Agreement. The IA analysed the data in the application

and the reply to the request for supplementary information and on that basis decided to initiate an investigation for injury, in a manner consistent with Article 13(b)(i) of the Agreement on Agriculture.

23. The EC's assertions do not therefore constitute a prima facie presumption of a violation on Mexico's part, so we request that its claims be dismissed. In this regard, we refer to the Appellate Body (AB) report in *United States – Wool Shirts and Blouses*, paragraphs 99 and 100 of the AB report in *EC – Hormones*, and paragraph 129 of the AB report in *Japan – Agricultural Products II*.

24. Moreover, as a treaty must be interpreted in accordance with its text, and considering that if a WTO Agreement is silent, there is a reason for it to be so, it is impossible to make a valid case for the existence of obligations under the SCM Agreement which are not stipulated in that Agreement. Thus, we repeat, there has been no violation of the Agreement on Agriculture that could be imputed to Mexico.

4. Mexico acted in a manner consistent with Articles 12.4.1 and 12.8 of the SCM Agreement

25. We note that this EC argument can be divided basically into two parts. Firstly, it is maintained that the Ministry acted in a manner inconsistent with Article 12.4.1 of the SCM Agreement because, without any justification, it failed to ensure that the interested parties furnished non-confidential summaries of their confidential information and that these summaries contained sufficient detail, all of which prejudiced the opportunities for the EC and the exporters to defend their interests. Secondly, it is claimed that the essential facts that served as a basis for the decision to apply definitive measures were not disclosed, in breach of Article 12.8 of the SCM Agreement.

26. We do not consider the EC's assertions to constitute a prima facie presumption of a violation on Mexico's part. In this respect, we consider it impossible for a panel to rule in favour of a party that has not established such a presumption and we therefore request that the claim be dismissed and refer to the considerations set forth in paragraphs 66 to 70 of our FWS.

27. With respect to the EC's first premise, Mexico believes that all the provisions of the SCM Agreement have a *raison d'être* and that in this context, in accordance with the jurisprudence established in paragraph 6.38 of the final panel report in *Argentina – Ceramic Tiles*, the purpose of Article 12.4.1 of the SCM Agreement is to provide a mechanism which allows interested parties to become acquainted with the content of confidential information, while at the same time protecting the interests of the parties providing that information.

28. Thus, as the basic purpose of the relevant provisions of the SCM Agreement is to enable the parties to acquaint themselves with the confidential information they need to defend their interests, it would be best to focus on determining whether in this investigation the parties were acquainted with such information so as to be able to defend their interests properly. In order to be able to determine this, it is necessary to analyse both the legal framework applicable to that investigation and the questions of fact as reflected in the administrative file.

29. With regard to applicable standards, Mexican legislation concerning access to confidential information establishes a sufficient mechanism for the interested parties to acquaint themselves with that information, so it is quite wrong to suggest that the EC or the exporters would not have been able to acquaint themselves with that data. As stated in Articles 80 of the FTL and 147 of its Regulations, Mexico allows the legal representatives of all interested parties access to all the confidential information contained in the investigation file, provided that they comply with certain requirements. This, so that the parties are acquainted with it and, in full exercise of their right to defend themselves, may put forward their arguments relating to that information.

30. Thus, even if there are no public summaries, the parties may become acquainted with all the confidential information. We consider that such access undermines any claim that the parties' right to due process was adversely affected, since, we repeat, all the confidential information could have been consulted and not only the public summaries. Thus, the objective indicated in the final panel report in *Argentina – Ceramic Tiles* is entirely fulfilled by the Mexican legal regime. In fact, the record shows that the joint legal representative of the exporters did consult, on several occasions, the confidential information contained in the administrative file, as can be seen from the entries in the Access Control Register of the IA (Exhibit MEX-2), from which it is clear that the exporters were acquainted with the information which the EC claims they could not see.

31. In addition, it is important to note that the interested parties did furnish non-confidential summaries of all the confidential information with which they supplied the Ministry, in compliance with both the international rules and the IR notification and the IA's requests for information, since in all these it is stated that the parties are under an obligation to furnish all their information in public and confidential versions. Thus, all the interested parties furnished public summaries of all the documents they supplied that contained confidential information.

32. It is therefore untrue to say that the rights to due process of the EC and its exporters were undermined since, firstly, under the Mexican legislation they were always able to obtain access to all the confidential information in the administrative file on the investigation (which they in fact did) and, secondly, there actually were public summaries of all the confidential information.

33. With respect to the EC's claim regarding Article 12.8 of the SCM Agreement, it should be recalled that according to paragraph 6.125 of the final panel report in *Argentina – Ceramic Tiles*, as the manner in which an authority is to comply with the disclosure obligation is not prescribed, parties may be informed of the essential facts in a number of ways, for example, by issuing a special document, a verification report, a preliminary determination, etc. In this case, the Mexican IA disclosed the essential facts by making them available to the interested parties in the PR, which is consistent with the WTO Agreements. The PR describes in detail the treatment of the information, arguments and evidence furnished by the parties, what information was taken into account and what was rejected and why, which refutes the EC's assertion to the effect that the parties were not provided with this information. Consequently, the EC's arguments are completely unfounded.

5. Mexico complied with the provisions of Article 11.11 of the SCM Agreement

34. The EC argues that the investigation lasted more than 24 months, and that Mexico acted in breach of Article 11.11 of the SCM Agreement. It claims that: (i) Mexico did not explain why the circumstances were "special", thereby justifying the extension from 12 to 18 months; and (ii) it exceeded the absolute limit of 18 months for concluding the investigation.

35. The EC also tries to excuse the lack of cooperation on the part of both the interested parties and the EC itself, suggesting that they were "placed ... in the dilemma that if they wished to defend their interests they would have to condone the Ministry's failure to respect Article 11.11" and also arguing that even though this was their "only means of insisting on the importance of the rules of the [SCM] Agreement", the Ministry presumed that the points they were maintaining had not been established and that in effect they were penalized for the IA's own failures.

36. With regard to the publication of the reasons why the circumstances were special, we consider that the EC's interpretation of Article 11.11 of the SCM Agreement is incorrect, as this article does not establish an obligation to issue a notice explaining the special circumstances. It is certainly not possible to be accused of violating an obligation not specified in the SCM Agreement. What should

be examined is whether there were circumstances justifying an extension of the time limit rather than whether a formal explanation of those circumstances was offered.

37. With regard to the 18-month time-limit, it should be pointed out that, as can be seen from the various resolutions (initiation, preliminary and final), the volume of information involved represented a serious procedural burden for the parties, so that all the interested parties (exporters, importers, applicant and the EC itself) requested numerous extensions in the course of the proceeding (the corresponding list is annexed to our FWS). In most cases, the IA granted these extensions in order to observe due process and to gather as much information as possible so as to make a correct determination. These extensions, the verification visit to the applicant's premises, and the action taken by the IA in response to the questions put by the parties themselves all served to prolong the proceeding.

38. We consider that Article 11.11 of the SCM Agreement protects the parties from any unjustified delay or inaction, so that they are not left defenceless and so that the delay does not work in favour of one of the parties, which was not the case with this investigation. The IA was not inactive, biased or negligent, quite the opposite. Given the complexity of the case, there was no alternative but to extend the time limit so as to ensure a sound basis and a proper determination.

39. At the same time, the public hearing raised various concerns and questions that could not be ignored. The IA therefore asked for replies to these questions in writing and also requested the information necessary to clarify the significance of the data and the questions related thereto. In addition, during the hearing and subsequently, by written communication, the exporters asked the IA to carry out an on-the-spot investigation at Fortuny to verify, on its premises, the information that it had submitted. This investigation was carried out on 19 January 2005.

40. Thus, it is incongruous to assert that the rights of the interested parties were adversely affected because the extensions requested were granted and because their requests for various forms of administrative action (such as the on-the-spot investigation) were accepted. The Ministry considered it better to ensure the rights of the parties than to ignore these requests and conclude the investigation on time.

41. With regard to the EC's lack of cooperation, we consider its assertion completely unfounded. The EC admits that it did not provide the information requested, but also maintains that there were no valid grounds for requesting that data. In principle, there is no article to support its actions, since under no circumstances would it have been excused from submitting the information requested from it in the investigation. We see no reason why "the only way of stressing the importance of the rules of the SCM Agreement" was to refuse to provide information. The same applies to its assertion that providing this information would be tantamount to "condoning" the actions of the Ministry. Accepting the EC's assertion would be tantamount to handing over complete control of the investigation to the parties, which is unacceptable, as they could refuse to provide information under any pretext. It would be impossible to gather data during an investigation or make a proper determination. In addition, Article 12.7 of the SCM Agreement does not indicate any exceptions to the obligation upon the parties to provide the information requested, which means that the IA could validly use the "facts available" to make its determinations. Therefore, we respectfully request the Panel to reject the EC's arguments.

B. CLAIMS CONCERNING THE CONDUCT OF THE INVESTIGATION AND THE FINAL AFFIRMATIVE DETERMINATION

1. **Mexico did provide a reasoned and adequate explanation of the existence of subsidization, did calculate the benefit conferred on the exporters of the product investigated and did apply the method used to each particular case as required by Articles 1.1 and 14 of the SCM Agreement**

42. This claim can be divided into two parts: (a) subsidization in general; and (b) calculation of the subsidy margins.

(a) Subsidization in general

43. The EC argument has no basis in the SCM Agreement. Under the SCM Agreement there is no obligation to make the pass-through analysis claimed, which is why we request that the Panel reject this claim. Moreover, the subsidy programme is set out in Regulation 136/66/EEC and has been notified to the WTO Committee on Agriculture as a subsidy granting mechanism. Being regulated by a legal instrument, the programme exists and was in effect during the investigation period. In fact, the EC has never claimed otherwise. It is a subsidy whose existence, validity and application are beyond dispute.

44. Regulation 136/66/EEC indicates that: (a) Aid is expressly established for olive oil production; (b) for checking the quantity of olive oil eligible for the aid, oil yields are fixed for each marketing year; and (c) the reason for subsidizing olive oil is its economic importance in certain regions of the EC and the fact that it is the most important source of oil and fats.

45. Thus, the subsidy is intended to encourage the production of olive oil. The Regulation is categorical in this respect, which is why the IA assumed that the subsidy was being granted for the production of this product. The IA did not focus on a product linked to the subsidy, but on the subsidized product. We feel it is incorrect that the subsidy was granted to someone other than the exporter, since it is designed, regulated and implemented to aid olive oil production. In the light of this, we do not see why there should be any need to analyse the transfer of the subsidy.

46. In our opinion, countervailing duties are not designed to offset a benefit or a subsidy, but to offset the injury caused by an actionable subsidy. As we shall see, this is the reason why, rather than countervailing duties being imposed for the entire margin of subsidy, a reference price was established to offset the injury suffered by the domestic industry, thereby interfering as little as possible with imports of the European product.

47. In addition, Mexico notes that in order to interpret the SCM Agreement properly, and according to the AB report in *United States – Carbon Steel*, where a WTO agreement is silent on a specific issue, there is a reason for this inasmuch as when the negotiators intended that a provision be applied in another context, they did so expressly. Thus, it is impossible to make a valid argument for the existence of obligations under the SCM Agreement which are not mentioned in the Agreement itself. The SCM Agreement does not establish the duty to analyse the transfer of the subsidy, hence there is no obligation at all in this sense.

(b) Calculation of the subsidy margins

48. The EC states that even if there had been a pass-through analysis, the calculation of the subsidy margins would have been inconsistent with the SCM Agreement.

49. With respect to the claim concerning the pass-through analysis, we refer to the above considerations, which show that the methodology used by the IA was correct.

50. Concerning the adjustment for imported oil of non-Community origin, no adjustment was made because the interested parties did not propose a methodology or submit relevant documentary evidence that would have enabled the IA to quantify, for each exporting company, the percentage of olive oil that had not benefited from aid and then make the corresponding adjustment. The exporters repeatedly refused to provide relevant information that would have enabled the Ministry to make this adjustment. As is noted, the authority gave the interested parties ample opportunity to provide a methodology and documentary evidence in support of their request and asked that if this information was not specifically available, they propose an alternative calculation method. Despite this, the IA never received a reply from the exporters, which is why it decided to reject their request. Thus, the absence of the adjustment was for reasons imputable to the exporters and not the Ministry.

51. With regard to the comparison of the amount of the subsidy with the exporters' ex-factory sales prices, we consider that in order to clarify the situation, it is important to point out that an IA has at least two ways of establishing margins of dumping or subsidy: (i) *ad valorem*; and (ii) in specific or unit terms.

52. The Ministry established subsidy margins in unit terms (dollars/kg). When an IA calculates specific subsidy margins, the use of export prices at ex-factory level or at c.i.f. level does not affect the result, as shown below. For determining the subsidy margin two export prices are required, those that the IA determined using the method described in paragraph 150 of the FR. Thus, the Ministry calculated two export prices: (i) the ex-factory export price (subsidized price); and (ii) the constructed price (unsubsidized price), which was obtained by adding the unit amount of subsidy to the subsidized export price. The following example shows how the margin of subsidy in unit terms is unaffected by the use of ex-factory or c.i.f. prices:

- Scenario 1:

53. Suppose that the price at which the goods were exported to Mexico was 3 € per kg and that the unit amount of subsidy was 0.64 € per kg. By applying the method described, we obtain the following result:

Ex-factory export price or subsidized price (€/kg)	Unit amount of subsidy (€/kg)	Constructed export price or unsubsidized price (€/kg)	Margin of subsidy (€/kg)
A	B	C = A+B	D = C-A
3.00	0.64	3.64	0.64

- Scenario 2:

54. Suppose that the price at which the goods were exported to Mexico was 3 € per kg, that to obtain the price at c.i.f. level 1 € per kg is added (the additional cost to obtain the export price at the importing country frontier) and that the unit amount of subsidy was 0.64 € per kg. By applying the method described, we obtain the following result:

Ex-factory export price or subsidized price (€/kg)	C.i.f. export price or subsidized price (€/kg)	Unit amount of subsidy (€/kg)	Constructed export price or unsubsidized price (€/kg)	Margin of subsidy (€/kg)
A	$B = A + 1 \text{ €/kg}$	C	$D = B + C$	$E = D - B$
3.00	4.00	0.64	4.64	0.64

55. As can be seen, in both scenarios the margin of subsidy in specific terms was 0.64 €/per kg for each exporting company. As stated earlier, the margin of subsidy was not affected by considering ex-factory or c.i.f. export prices. Therefore, the EC's claim to the effect that Mexico artificially increased the margin of subsidy for each exporter by using the ex-factory sales prices in its calculations is incorrect.

56. With regard to the exporters being asked for cost information from other companies, it is important to note that these were not isolated requests sent out for no good reason. The purpose of the IA's requests was to obtain data and evidence to deal with a request by the exporting companies, the associations and the EC Delegation to the effect that the olive oil subsidy could not be passed through in its totality to the product exported to Mexico, since there were processes intermediate between the production of the oil and its exportation. In response, the Ministry tried to gather information to calculate the percentage represented by olive oil in the production cost structure for the oil from extraction to exportation, which proved to be impossible because this data was not provided. Aware of the difficulty of gathering data, the Ministry repeatedly asked for alternative calculation methods, as a much more accessible option, but still did not receive any reply.

57. If an interested party asks for certain adjustments, it has an obligation to provide the elements which make it possible for the proposed adjustment to be accepted. Even though this was not done, the Ministry decided to calculate an adjustment factor that reflected the percentage represented by subsidized olive oil in the production cost structure for the oil, using the facts available in accordance with Article 12.7 of the SCM Agreement.

58. Finally, with regard to the exporters' alleged dilemma when it came to providing information requested by the IA, because the time-limit for concluding the investigation had already expired, we refer to the considerations set out in the relevant paragraphs of our FWS.

59. It is therefore quite wrong to suggest that the Ministry acted in a manner inconsistent with the SCM Agreement and the Panel is therefore requested to reject the EC's claims.

2. Mexico did correctly define the domestic industry

60. The EC maintains that Mexico failed to identify its domestic industry on the basis of positive evidence and consequently acted inconsistently with Article 15.1 of the SCM Agreement.

(a) The Ministry properly determined that Fortuny was the sole domestic producer

61. Mexico considers it important to point out that, as stated in paragraphs 97 and 99 of the AB report in *United States – Softwood Lumber VI* (Article 21.5), the examination of the conclusions of the IA must be based on the information contained in the record and on the reasoning found in its resolutions. Accordingly, the work of the Panel does not consist of carrying out a *de novo* examination nor of replacing the judgement of the Ministry with its own reasoning, but only of

determining whether the IA could reasonably have arrived at the conclusions contained in its Resolution.

62. The EC relies on isolated sentences and paragraphs of the FR which do not constitute a prima facie presumption of violation, as explained in paragraphs 66 to 70 of our FWS, hence we request that the assertions be dismissed. Nevertheless, even if this presumption had been established, its argument would still be erroneous, since the Ministry's exhaustive efforts and the evidence available showed that the applicant was the sole domestic producer.

63. A comprehensive reading of paragraphs 212 to 255 of the FR clearly shows why it was concluded that Fortuny met the requirements of representativeness and legitimacy for the purposes of requesting and conducting the present anti-subsidy investigation, in terms of the provisions of Articles 11.4 and 16 of the SCM Agreement. This section describes the efforts made by the authority to inquire into the alleged existence of other domestic producers.

64. As for the EC's assertion that the IA made no attempt to obtain information on the origin of the oil marketed by Maprinsa, this is unfounded. The exporters declared that Maprinsa was a producer of olive oil and that it obtained this oil from a plant located in Mexico City. In response, Fortuny indicated that it had sent samples of the oil to the laboratory Bufete Químico, S.A. de C.V. for analysis and that it was not olive oil but canola oil.

65. In order to ascertain the accuracy of the contradictory information, the Ministry sent an information request to Bufete Químico and to Maprinsa. Bufete Químico confirmed the authenticity of the samples sent to it for analysis and that the oil sold by Maprinsa was not olive oil. As indicated in paragraphs 193 and 194 of the PR, in its reply Maprinsa stated the following: (i) It only bottled and packaged olive oil and other products; (ii) it did not produce olive oil but only bought it and packaged it for distribution; (iii) it did not belong to any industrial chamber; (iv) the olive oil manufacturers known to it were: Olivarera Tulyehualco, Olivos de California and Conservas Vermex; and (v) it bought oil from those offering the lowest price and then packaged it, and its most regular suppliers were Olivarera Tulyehualco, Olivos de California, Wal Mart and Importaciones Colombres.

66. Contrary to the statement by the EC, Maprinsa declared that the oil which it packaged could be Mexican or imported, as it bought oil either from these producers or from importers. Moreover, with regard to the alleged domestic producers, it should be noted that Wal Mart and Importaciones Colombres are marketing companies. The Ministry requested information from Conservas Vermex and Olivarera Tulyehualco and both companies replied that they did not produce olive oil but only packaged it. Consequently, in addition to the fact that neither of them were producers, the product they were marketing was not olive oil but canola oil.

67. Consequently, the ASOLIVA and ASSITOL associations subsequently claimed that by simply bottling the "imported product", Maprinsa could be deemed a domestic producer. Even though there was no obligation to examine this argument since the oil packaged by Maprinsa was not the product investigated, the Ministry examined it and determined that pursuant to the criteria laid down in the Free Trade Agreement between Mexico and the European Union, packaging is insufficient to confer the status of originating products, which is why Maprinsa cannot be considered a domestic producer. Furthermore, the Ministry sent various information requests to the Mexican Industrial Property Institute (IMPI) in order to verify the use and registration of trademarks and the existence of other possible brands registered by domestic producers of olive oil. From the replies given by the IMPI, it was not possible to identify any other domestic producers.

68. As regards other possible producers, both ASOLIVA and ASSITOL indicated that Aceites Navarra did not produce olive oil but only packaged it. Consequently, it could not be considered a domestic producer either. With regard to Llanos de San Francisco, it is clearly stated in a specialized

publication by SAGARPA, the specialized government authority in Mexico for the agricultural and livestock sector, that "Llanos de San Francisco is producing olive oil on an experimental basis". In this connection, we consider that an experimental producer cannot be considered a domestic producer as it is at the evaluation and sampling stage and is thus not really an economic agent in the industry inasmuch as, *inter alia*, its product is not yet involved in the market and the final specifications of the product to be sold have not been defined.

69. Regarding the EC's argument that the Ministry had dismissed artisanal production because it was not distributed through the same channels as the imports, it must be pointed out that, contrary to what may happen in some other countries, Mexico's production sector in general is largely made up of micro-enterprises or establishments that are little more than workshops with low technology and often composed of two or three people. Moreover, very few of them are organized in trade unions or similar groups and it is therefore extremely difficult to obtain information on their existence. In our case, information was requested from government institutions, the interested parties, and entities that were not interested parties but which could provide information.

70. Contrary to the claim by the EC, the Ministry did not dismiss artisanal production because it was not distributed through the same channels as the imports. It was Fortuny who alleged this, but the Ministry did not accept that. The IA did not dismiss artisanal production. Quite the contrary, it sent requests for information to various entities requesting them to identify any domestic producer of olive oil. The Ministry never limited its search to manufacturers whose production was marketed through the same channels as the imported product. The Ministry issued requests for information on any domestic producer of which the recipients were aware. All channels were exhausted in order to obtain this data; nevertheless, the efforts made were in vain.

71. The EC continued their claims by stating that the IA had contacted the ANIAME, which had only confirmed that Fortuny was the sole olive oil producer registered therewith, and that this reply "does not inspire confidence". In our view, this statement cannot constitute a prima facie case of violation by Mexico, so we request that it be rejected. In this regard, we reiterate what is stated in our FWS to the effect that an IA must take into account all the information provided by the parties or obtained by itself, as found by the AB in its report on the *United States – Softwood Lumber VI (Article 21.5)* case. With regard to the reliability of the reply by the ANIAME, two factors must be considered: (a) the ANIAME is the Mexican association of edible oils and fats manufacturers and, consequently, its information was important to the investigation; and (b) the information submitted by the ANIAME reaffirmed the other evidence indicating Fortuny as the only domestic producer.

72. The EC also claims that the Ministry contacted various government offices, which were unable to provide relevant information, and did not make further efforts to obtain more data. This information alone cannot be considered a prima facie case of violation by Mexico either, so we request that it also be rejected. Firstly, there were no other government bodies in addition to those from which information was requested which could provide information on the existence of domestic olive oil producers. The Ministry sent requests to all government offices that could provide information on the existence of domestic producers. The IA requested information from the Office of the Federal Attorney-General for Consumer Affairs, the IMPI, and the Directorate-General of Standards, which is responsible for official technical standards regarding commercial matters. None of them provided information suggesting the existence of other domestic producers of olive oil.

73. Moreover, in order to obtain further data on producers other than Fortuny, the Ministry requested information from the following non-party companies: the *Asociación Nacional de Tiendas de Autoservicio y Departamentales, A.C.* – ANTAD (National Association of Self-Service and Department Stores), which groups some of the major self-service and commercial distribution chains in Mexico, the Grupo Gigante and Comercial Mexicana, and companies which did not belong to the ANTAD, such as Nueva Wal Mart, Grupo Corvi, Servicio Comercial Garis and La Europea México,

asking them for information on any domestic olive oil producer known to them. In their replies (submitted as annexes to our FWS), most of the entities replied that the olive oil they marketed was imported and that they had not received any offers to market olive oil from Mexican companies. Despite these efforts, it was still not possible to obtain information on any producer other than the applicant.

74. The EC also claims that the Ministry's passivity can be seen from the fact that the information on which it based itself is inconsistent with that from the IOOC, which – "presumably" based on Mexican Government data – shows that production in Mexico was 1,000 tonnes in 1999/2000, 1,500 tonnes in 2000/2001 and 2,000 tonnes in 2001/2002. However, the EC itself presented a table in which, in contradiction to the data from the IOOC, the Food and Agriculture Organization of the United Nations (FAO) showed that Mexican production barely reached 200 tonnes. As can be seen in Table 9 of the PR, domestic production (by Fortuny) ranged from 254 to 310 tonnes between 2001 and 2002, which is consistent with the information from the FAO submitted by the EC. This indirectly confirmed that the applicant was the only Mexican producer as it produced 100 per cent of the production cited by the FAO and the EC. Furthermore, the information on the global market for olive oil taken into account by the Ministry was that presented by ASOLIVA and ASSITOL (annexed to our FWS), which does not mention Mexico as an olive oil producer. Thus, the parties could not demonstrate the existence of any other domestic producer either (except for Maprinsa, whose situation has already been explained).

75. Thus, the authority had information from the interested parties, government organizations and other entities not party to the investigation, and from all this information it was not possible to infer that other domestic producers existed. Moreover, despite the invitation issued through the initial and preliminary resolutions, no company came forward as a domestic producer. All the evidence led to the conclusion that the domestic industry was composed of Fortuny. Consequently, the IA conducted an objective examination of the information obtained as well as that furnished to it, acting consistently with Article 15 of the SCM Agreement. The Ministry was proactive and made an impartial and objective evaluation of all the information obtained. We therefore consider the EC's claims to have no basis whatsoever and we renew our request that they be rejected.

(b) The domestic industry exists and suffered material injury

76. The EC states that, as no olive oil was produced during the period investigated, it cannot be claimed that there was a domestic industry and that the investigation should focus on the present situation and not on what might have occurred in the past. According to the EC, the IA based itself on a decision by the Binational Panel established under the North American Free Trade Agreement (NAFTA). Furthermore, it claims that the Ministry did not take proper action to identify other domestic producers.

77. In relation to the claim concerning the identification of other domestic producers, we refer to the comments above. With regard to the Binational Panel (case MEX-USA-00-1904-01), the Ministry did not base its conclusions on the findings in this procedure but on the following: (a) if the mere absence of production sufficed to consider that there was no domestic industry, then the form of injury consisting of material retardation in the establishment of such an industry would lose all meaning; (b) cases in which production has been temporarily suspended because of planned or unforeseen stoppages would not be admissible; (c) material injury or threat of material injury could not be determined in the case of cyclic or seasonal industries; and (d) injury could not be determined in cases where a domestic industry had suspended its production and could not resume it, even though all the necessary means were available, because of the subsidized imports. The FR explains the reasons why the IA rejected the Binational Panel's decision.

78. Likewise, the IA did not focus on determining what happened to the domestic industry prior to the period investigated. The Ministry's conclusions are clear insofar as the material injury caused to the domestic industry consisted of the fact that the subsidized imports prevented it from resuming its activities.

79. Lastly, with regard to the relevance of the production element in determining the existence of a producer, we refer to the considerations in our FWS, which explain that Fortuny was a domestic producer as it had produced for many years and that there was sufficient documentary proof to consider that it represented 100 per cent of the domestic industry, which was subsequently confirmed during the course of the investigation.

3. Mexico made a proper determination of injury in accordance with Article 15 of the SCM Agreement

(a) Nature and existence of the alleged injury

80. Regarding the alleged ambiguity of the type of injury analysed, we refer to the paragraphs in which we explain why there is no obligation on the IA to confine itself to the type of injury alleged by the applicant. The investigation was initiated into injury in the general sense of footnote 45 to the SCM Agreement, which is totally valid. We see no reason for any confusion whatsoever. We consider that there is no violation of the SCM Agreement because the IA differs from the applicant's description of a situation prejudicial to domestic production. From a factual standpoint, it is an industry that cannot resume activities because of the unfavourable situation deriving from subsidized imports.

81. The PR and the FR determined that the situation faced by the domestic industry conformed to the concept of material injury as it was not a new industry (we recall that it had existed and produced for decades and was not the subject of procedures that implied the termination of its production activities) but had simply suspended its activities and could not resume them because of the subsidized imports. Even the exporters argued that the situation in the industry corresponded to material injury and not to retardation, and the IA agreed with this. The analysis of injury is clear in respect of the type of injury caused because the Ministry obtained relevant information to analyse the domestic industry during a sufficiently long and representative period. If that had not been the case, there would be no reason for the IA to request information from Fortuny on the indices mentioned in Articles 15.2 and 15.4 of the SCM Agreement concerning the company's prior activities over a period of at least three years. The statement by the EC therefore has no substance.

82. With regard to the argument that the factors taken into account by the IA concerned injury that had occurred before the period investigated, it appears that the EC assumes that the injury was the suspension of activities at Fortuny, which is incorrect. The Ministry determined that the material injury caused to Fortuny consisted of preventing the company from resuming its activities. The suspension of activities was only one element of the situation during the period analysed for the purposes of injury, which was impossible not to analyse, as it was also relevant for evaluating the viability of resumption of activities if the injury caused was offset. Consequently, it was relevant to include this information in the analysis of injury, and it was never considered to be an element supporting a determination of material retardation, contrary to the EC's claim.

83. We consider it important to emphasize that the Ministry never issued a simultaneous finding of both material injury and material retardation. We do not know the EC's basis for making such a statement, since the resolutions clearly establish that the measure was taken because of material injury.

(b) Examination of volumes and prices

84. Regarding the volumes of imports, the EC does not make a claim as such, so there is no prima facie case of violation. We therefore request that its assertion be rejected. Moreover, the FR contains a comprehensive analysis of the effects of these imports on prices on the Mexican market. Thus, we believe that this issue has been properly explained.

85. In the light of the above, the IA noted that the prices of the subsidized product fell during the first two years of the period of analysis of injury and that this trend was reversed when Fortuny suspended production. The IA complied with Articles 15.1(a) and 15.2 of the SCM Agreement by undertaking an objective examination based on positive evidence of the effect of the subsidized imports on prices, the results of which showed that the prices of the imports were even below domestic production costs. The IA based itself on concrete and potential information.

86. Regarding the alleged absence of data on the domestic industry's prices, it suffices to refer to paragraphs 312 to 316 of the FR, which clearly indicate the way in which the Ministry considered the prices of the domestic product and which include the effect of the imports on prices and the existence of undercutting in relation to both the domestic prices and production costs. In this respect, there was concrete information (historical data) and potential information (period of suspension of activities and their possible resumption). The undercutting margin in question was determined in comparison with the actual prices and costs recorded (not estimated). The subsidy largely explains the difference compared to the actual domestic costs and prices recorded for this period.

87. Moreover, it is wrong to say that the IA was not able to obtain information on Fortuny's prices through its buyers. In addition to the actual prices indicated, Distribuidora Ybarra provided information on prices that coincided with those submitted by Fortuny. This was verified by the Ministry itself. Therefore, the information on prices provided by Fortuny was confirmed by Distribuidora Ybarra (the main buyer of Fortuny) and verified by the IA. In addition, Distribuidora Ybarra declared that it had ceased to purchase from Fortuny for price reasons, which is proof of the existence of undercutting.

88. It is not clear to us why, according to the EC, a comparison between import prices and domestic costs is irrelevant when analysing injury. Any company sets up and operates in the hope of generating profits by selling a product at a price higher than its production cost. Consequently, it cannot be ignored if the price of the subsidized import is lower than the domestic producer's production costs. If a company is confronted by prices below its costs and cannot wage a "price war", it is logical that it will suspend its activities and find it difficult to resume them. If, in addition, the low prices of the competition are the result of an unfair practice that has an artificial impact on prices, then a small company such as Fortuny simply cannot compete, and much less with the financial resources of the EC, which is the major global producer.

89. The evidence available showed that there were significant margins of undercutting by the subsidized imports with respect to domestic prices and costs, and that the domestic industry incurred operating losses. Furthermore, the Ministry also took into account the comparison between the relative prices of the imports and the estimated prices and costs of the domestic industry during the period when activities were suspended and the resumption project.

(c) Determination of material injury

90. We consider it incorrect to state that the deterioration of Fortuny ceased to be of significance because the company was unable to resume operations. The examination by the IA to determine the existence of injury covered three years including the period investigated for the purposes of the subsidy. Moreover, its analysis of trends and performance relating to the relevant factors was not

limited to comparable periods of each year, but also took into account monthly or annual data so as to gain a more precise picture of the situation. Furthermore, in conformity with Article 15.4 of the SCM Agreement, the IA specifically examined the actual and potential effects of the imports on domestic production. In this respect, the FR reflects the growing trend in imports, together with the effects on prices and on the domestic industry.

91. With regard to the trend in domestic production, there was monthly information for the whole period from January 1999 to December 2002, which confirms that even taking into account the information in annual terms, there was a clear downward trend in domestic production. The analysis cannot concentrate on a single isolated indicator, nor can it only be based on comparison between one year and another. Accordingly, if we take into account production for the periods January-December of the various years analysed, there was apparently a recovery in April-December 2001 and 2000, but if 2001 is compared to 1999, there is a decrease of 60 per cent in production until operations were suspended in 2002. There must be a full-scale evaluation in this respect. There was a continual decrease in the applicant's production indices, which confirmed that the subsidized imports from the EC were worsening the situation of the domestic industry to the point of interrupting its operations and preventing their resumption.

92. With regard to the absence of production during the period investigated, reading the FR in full reveals the extremity of the situation faced by the domestic industry as a result of the effects of the subsidized imports. Furthermore, we reiterate that the Ministry determined that the material injury consisted of preventing the resumption of operations and not the suspension itself. It is not possible to claim that the analysis of injury caused by the subsidy should be limited to the period investigated, since it should include an examination of the relevant economic factors in the domestic industry over a broader and sufficiently representative period in order to reach a positive determination. For this reason, the statement on the alleged irrelevance of the deterioration at Fortuny has no substance.

93. Regarding the focus during the period investigated and Fortuny's future plans, we reiterate that the material injury caused to the applicant was the prevention of resumption of its operations. Thus, the analysis was based on the facts that had caused the domestic industry to suspend its activities and on the conditions that would allow it to resume operations, considering whether the elimination of the effects of the subsidy was a condition for such resumption. In this context, the analysis must take into account what occurred during the period investigated and in previous periods in order to discover what made Fortuny suspend operations, and the analysis of feasibility of its business plan in order to see whether it was possible to resume operations if the subsidy was offset. In fact, it is not possible to know with certainty what factors prevent the resumption of activities when the circumstances which led to the temporary shutdown of operations are not known. Consequently, the IA's exhaustive analysis is consistent with the SCM Agreement, which states that the indices for the domestic industry must be analysed both in actual and potential terms.

94. Regarding the use of nine-month periods for each year in the evidence of injury, the EC does not present a prima facie case for violation by Mexico and simply states that it undermined the objectivity of the analysis of injury. We therefore request that this assertion be rejected.

95. Furthermore, the SCM Agreement does not contain any directive on how the analysis of injury in a subsidies investigation should be conducted in terms of the period to be considered for each of the years analysed. In accordance with paragraphs 61, 65 and 69 of the AB report in *United States – Steel Products from Germany*, we consider that as there is no indication in the SCM Agreement as to how the analysis of injury should be conducted as regards the periods to be used, there is thus no violation of the Agreement when using nine-month periods for each year.

96. Nevertheless, the analysis of injury was conducted by comparing the periods April to December in 2002, 2001 and 2000, and the indices for April to December for one year were thus

compared with those for the same period in the other two years and not with those for any other period, irrespective of whether during each nine-month period the situation was better or worse than in the half-year January to June. In this way, if the Ministry had found that the indices for April to December in 2002, 2001 and 2000 had shown an extremely negative situation in the domestic industry but had been the same year after year, it would not have determined that injury had been caused, even when the period April to December was less favourable to the domestic industry than January to March.

97. The information used by Mexico therefore allowed a comparison of the relevant indices for the domestic industry with previous comparable similar periods, as a nine-month period in one year is structurally the same as the equivalent period in the preceding year. Consequently, by definition, the structure is the same. Thus, in order to avoid bias or fluctuations, the same periods of each year were compared. By using comparable periods for the analysis of injury, possible distortions were eliminated and it was possible to compare properly the information for the period investigated with that for prior comparable periods. Consequently, the objectivity of the analysis of injury was not affected.

98. With regard to the analysis of the factors provided in Article 15.4 of the SCM Agreement, paragraphs 328 and 367 of the FR show that the IA examined each and every one of them. It is necessary to clarify that when an index shows a variation it is not immediately reflected in the other factors. The economic situation of a company is not automatically and immediately affected by such a variation. Consequently, even when two or three of Fortuny's indices increased slightly prior to the suspension of activities, this does not mean that there was no material injury. We recall that the material injury caused to the domestic industry consists of not being able to resume operations. It is therefore Fortuny's actual situation during the period investigated that is relevant. In fact, even where the injury consists of the suspension of operations, the increase in these indices would not indicate absence of injury, as immediately after the improvement they deteriorated to the extent that operations were suspended.

99. As a result of the foregoing, Mexico requests the Panel to determine that the IA undertook its analysis of injury consistently with Article 15 of the SCM Agreement and Article VI.6 of the GATT 1994.

4. Mexico did properly consider, as required by Article 15.5 of the SCM Agreement, other factors which were causing injury to the domestic industry

100. The EC states that the analysis of non-attribution of injury must consist of more than listing other factors of injury and then dismissing them with mere qualitative assertions. It states that an IA must explain the nature and extent of the harmful effect of these other factors, preferably on a quantitative basis, and that the Ministry did not comply with this criterion.

101. It suffices in this regard to turn to paragraphs 415 to 437 of the FR to see that quantitative reasons were taken into account when determining that the other factors did not contribute to the injury suffered by the domestic industry. The EC's arguments are therefore mere assertions which do not constitute a prima facie case of violation by Mexico, and for this reason we request that the allegation be dismissed.

102. In fact, the IA analysed the factors mentioned in Article 15.5 of the SCM Agreement: (a) The analysis of the volume and price of non-subsidized imports is found in paragraphs 416 to 425 of the FR, where it is stated that the subsidized imports from the EC accounted for over 93 per cent of total imports and that the share of non-subsidized imports fell during the period analysed for the purposes of injury; (b) the analysis of the contraction in demand or changes in the pattern of consumption is to be found in paragraph 429 of the FR and paragraphs 330 to 332 of the PR, where it is explained that,

far from there being a contraction in demand, there was an increase; (c) restrictive trade practices by foreign and domestic producers and competition among them are referred to in paragraph 337 of the PR, which states that there are no indications of such practices; (d) developments in technology are mentioned in paragraph 337 of the PR, which states that there is no information on whether these are affecting the market; (e) export performance is referred to in paragraph 337 of the PR, which states that there are no indications of whether this was affecting the domestic industry (particularly as there were no exports throughout the period analysed for the purposes of injury); and (f) other known factors which might have caused the alleged injury such as those mentioned in the following paragraphs.

103. The EC claims that the factors listed in paragraph 221 of its FWS were not examined by the IA. We consider its argument to be without substance, as Mexico did analyse these factors. It should be noted that the fact that the EC mentioned a list of "possible" factors which, in its view, had affected the domestic industry does not mean that it submitted evidence that these factors did in fact have any effect on the domestic industry and still less that such evidence was sufficient to prove that.

104. In this regard, the importer, Distribuidora Ybarra provided elements to the Ministry in order to determine whether any of the factors mentioned by the EC were the cause of injury to the domestic producer. In this respect, Distribuidora Ybarra indicated that it had ceased to purchase products from Fortuny because of its prices. Thus, the problem was neither the alleged loss of a distribution network, problems of supply nor the quality of the product, but the low prices of European oil.

105. In addition, concerning the loss of the distribution network previously supplied by Distribuidora Ybarra, it is important to note that in the PR it was indicated that the applicant had the necessary distribution resources to carry out its activities (107 lorries, market stalls and vans, 217 supervisors, sales persons and promoters and 24,000 m² of warehouses). Consequently, there was no loss of distribution network and therefore this was not a cause of injury.

106. With regard to the loss of the Spanish brand Ybarra, both the importers and exporters submitted a "market survey" as proof of this claim. However, the survey did not show the alleged preference for the Spanish brand, only that it was known, and consequently, as there is no link between the content of this document and the claim, the Ministry did not consider the document a relevant element to prove that the injury caused to Fortuny derived from loss of the Ybarra brand. Moreover, even if the findings of the survey were those indicated by the importers and exporters, the preference for the Ybarra brand would also have affected the market share of Italian brands and of the other Spanish brands of olive oil, as well as that of other new brands. In contradiction to the statement by the importers and exporters, however, the volumes of these brands showed a marked increase. Consequently, the Ministry rejected the claim by these interested parties.

107. Regarding the consumers' alleged mistrust of the Fortuny product, it is important to point out that none of the interested parties indicated this as being a possible cause of injury. Nevertheless, bearing in mind that the reason put forward by Distribuidora Ybarra for ceasing to purchase Fortuny's oil was the price itself and not problems regarding consumer preferences related to aspects other than the price, it may be assumed that this was not a cause of injury for the applicant either.

108. Regarding Fortuny's allegedly high costs, the Ministry did not only analyse them but also took into account several additional factors. All this can be seen in paragraphs 368 to 414 of the FR, in which all the elements that would allow Fortuny to resume its production activities are considered. The way in which production costs were considered in order to determine whether it was economically feasible to resume operations is reflected throughout these paragraphs. The conclusion reached at the end of the feasibility analysis is that the subsidized imports from the EC were being sold in Mexico at low prices and that this did not allow Fortuny to resume operations, a conclusion that corresponds to the information provided by Distribuidora Ybarra and mentioned above.

109. In addition, it is important to bear in mind that olive oil production is given a subsidy in the EC, that this subsidy allows olive oil to enter the Mexican market at prices below the domestic price and even below the domestic production costs, thereby allowing new brands from unknown producers to emerge in Mexico. This allowed a traditional dealer such as Ybarra to dissociate itself from the domestic industry and devote itself entirely to imports, which led to an increase in imports in both absolute and relative terms.

110. The IA therefore did not only analyse the factors indicated by the EC but, in addition, examined all the aspects which it considered might have influenced the situation in the domestic industry, therefore, the EC's argument has no substance.
