ANNEX C

SECOND SUBMISSIONS BY THE PARTIES

ANNEX C-1

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF THE EUROPEAN COMMUNITIES

(17 August 2007)

1. The EC's Second Written Submission will address individually the responses that Mexico has made to the EC's claims, notably in the answers that it has given to Panel's questions.

2. In relation to the claim concerning Article 13.1 of the *SCM Agreement*, Mexico's answers confirm that the Mexican procedure for initiating investigations is entirely automatic once the Minister has signed the instrument. Consequently, for the purposes of the *SCM Agreement*, the investigation is 'initiated' once the Minister has performed that act.

3. Moreover, the timing obligations in Article 13.1 extend not merely to the invitation, but also include the consultation that follows from that invitation. The invitation must be made at a point when it is possible to hold the consultations referred to in the invitation before the investigation is initiated.

4. This interpretation is apparent from the text of Article 13.1 which does not simply state an obligation (to invite for consultations), but provides an aim. The aim is that of 'clarifying the situation as to the matters referred to in paragraph 2 of Article 11 and arriving at a mutually agreed solution'. The matters referred to in Article 11.2 are those concerning the application for an investigation. However, once the investigation has been commenced its scope is determined by the instrument of initiation, and the scope and nature of the application becomes a matter of historical interest only. There would be nothing to be gained at that stage in clarifying the details of the initial application. Consequently, such clarification can have meaning only if it takes place before initiation at a time when it is possible to influence the scope of that initiation, or indeed affect the decision whether there is to be an investigation. Thus, in accordance with the doctrine of 'effet utile' the only interpretation that gives meaning to Article 13.1 is one that requires the invitation to consultations to be made in time for those consultations to be held before the initiation decision is made.

5. This interpretation is reinforced by the final clause of Article 13.1. Whereas a mutually agreed solution can be reached at any stage of the investigation (as Article 13.2 makes clear), the interests of all parties and Members are best served by reaching such a solution sooner rather than later. In this respect, to reach that solution before companies are subjected to an investigation is obviously the most desirable goal.

6. This obligation is confirmed by the context of Article 13.1. Article 13.2 addresses the 'period of investigation', which begins with the initiation, and the opportunity to continue consultations during that period. Thus, the paragraphs distinguish two phases in the proceedings, one prior to initiation and one that follows initiation. The aim of the consultations specified in paragraph 2 is broader than that of those referred to in paragraph 1 since paragraph 2 makes no reference to what aspects of the 'situation' are to be clarified. This distinction serves to underline the specific nature of the clarification referred to in paragraph 1. Moreover, the use of the word "continue" in Article 13.2 confirms that consultations should have begun *before* the initiation of the investigation.

7. Finally, in referring to the consultations covered by paragraphs 1 and 2, Article 13.3 refers to the 'obligation to afford reasonable opportunity for consultation'. Thus, even if it had not already been implicit in the terms of paragraph 1, paragraph 3 makes clear that the obligation created by paragraph 1 is to afford a 'reasonable opportunity for consultation'. The only sense in which such a reasonable opportunity can be given in the context of paragraph 1 is if the consultation takes place prior to initiation.

8. The EC notes that neither Mexico's Foreign Trade Act nor its Regulation provide that the investigating authority shall invite the exporting country, whose products may be subject to investigation, to pre-initiation consultations. However, this regulatory lacuna does not justify Mexico's lack of compliance with its obligations under Article 13.1 of the *SCM Agreement*.

9. Regarding the failure of the Mexican authorities to ensure that the application for countervailing measures was made by or on behalf of the domestic industry, as required by Article 11.4 of the *SCM Agreement*, Mexico has still provided no satisfactory explanation of Economía's failure to examine the extent of the domestic industry and its acceptance, almost without questioning, of Fortuny's assertion that it comprised that entire industry.

10. The confidential information provided in Mexico's most recent exhibits is also significant. In its Preliminary and Final Resolution Mexico cited documents from the authorities in the state of Baja California in support of the proposition that Fortuny was the sole domestic entity with the capacity to produce olive oil. A letter from the authorities in Baja California of 28 January 2003, while urging Economía to take action against imports, gives no reason to believe that Fortuny was the only producer in the state. The letter states that Fortuny's action in ceasing production had a direct and significant impact in the agricultural areas where olives are grown for the production of oil. Had Fortuny been the only producer of olive oil the letter would surely have used terms rather more forceful than 'direct and significant impact'. On the basis of this information Mexico should have verified the accuracy and adequacy of the figures provided by Fortuny before initiating an investigation. The existence of other producers was indeed confirmed at a later stage during the investigation.

11. Mexico argues that Fortuny's claim that it represented 100 per cent of the domestic industry is supported by the fact that the figures for Fortuny's production and the figures for national production were the same. This argument relies on mere assertions made by the applicant in its own interest. Mexico should have verified the accuracy and adequacy of these figures before initiating an investigation on the basis of this information.

12. The EC sees nothing in the response of Mexico to the Panel's questions that adds to its previous statements on the due restraint obligation imposed by Article 13(b)(i) of the *Agreement on Agriculture*.

13. Mexico repeats its assertion that the 'due restraint' obligation consists merely of a 'reasonable minimum standard', and is no different from the standard applicable to investigations regarding non-agricultural productions. However, this is an interpretation which deprives the due restraint obligation of any meaning, and as such runs contrary to the interpretative principle of "*effet utile*", which is well established in WTO jurisprudence. 'Due restraint' is self-evidently a standard. If Mexico, by describing it as a *minimum* standard, seeks to imply that it is a *low* or *easily-satisfied* standard then it should attempt to justify that interpretation. However, the EC can see nothing in the text of the provision, or in its context or object and purpose, which would lead an interpreter to such a conclusion. Even without taking into account the notion of due restraint, the rules for initiating investigations could not be described as setting a low or easily-satisfied standard. And when the additional factor of due restraint is taken into account the applicable standard must be more demanding than the normal one. In identifying that standard in the present case the EC's approach has

been to describe the circumstances of the initiation of the investigation into olive oil and to show that they are incompatible with any notion of restraint.

14. In response to the EC's criticisms of Economía for failing to secure the provision of non-confidential summaries of confidential submissions Mexico pleads ignorance of how such summaries would have been possible. However, it is common practice in anti-dumping and countervailing duty investigations for numeric data to be presented in indexed rather than absolute terms in the non-confidential summary. Such a technique should have been used in regard to numerical data submitted to Economía in respect of which confidentiality was claimed. Mexico's argument is in any case patently inadequate since much of what was treated as confidential was textual rather than numeric in character.

15. Mexico concludes that interested parties and/or their legal representatives are entitled to have access to the confidential record. However, the relevant element in the Mexican legislation is that individuals or representatives of legal persons who are not counsels/lawyers (*abogados*) only have access to the confidential record if they are assisted by a counsel/lawyer (Article 159.II, second subparagraph of the Foreign Trade Regulation. The EC, therefore, considers that Mexico's legislation is similar to the US law that the panel considered in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* as not satisfying the obligation in Article 12.4.1 of the *SCM Agreement.*

16. In any case, the panel in *Mexico – Steel Pipes and Tubes* has also rejected that access to the confidential file under a protective order replaces the obligations of an investigating authority in relation to the treatment of confidential information, including the requirement to provide non-confidential summaries.

17. As regards the EC's claim under Article 12.8 and the requirement to disclose 'essential facts', Mexico's responses appear to be premised on the view that the disclosure of such facts can be achieved informally in the course of the investigation. The point that the EC wishes to emphasize is that, as found by the Panel in *Guatemala – Cement II*, an important aspect of the disclosure is that the interested party or Member receiving the disclosure should know what is taking place.

18. Thus, even if it were true, as Mexico alleges, that all the essential facts were stated in the Preliminary Resolution, the interested parties and Members were not informed of this. Moreover, since Economía was actively engaged in the investigation in the period following the Preliminary Resolution (by holding meetings with interested parties, requesting information and receiving data and submissions from them) there was every reason to think that additional essential facts were being obtained. Consequently, at no stage were the essential facts identified as such to interested parties and Members, and they were in consequence denied the right, guaranteed by Article 12.8, to defend their interests.

19. The exhibits presented by Mexico have now revealed the contents of some of communications to Economía. Thus, on 9 November 2004, many months after the Preliminary Resolution, Economía received from Fortuny substantial information in response to questions that it had posed. In the versions of the documents that Mexico has provided the confidential information has been blanked-out, however, even from these documents it is possible to see that the information concerned important aspects of Fortuny's financial and commercial circumstances.

20. Again, on 10 January 2005 Fortuny supplied information in response to a request from Economía. This information consisted of financial details of Fortuny's business plan for restarting production of olive oil, which was perceived by Economía as a vital part of the assessment of injury. In this document Fortuny acknowledged that the figures presented on 9 November 2004 (above) differed from that presented in the response to the 'Prevención' in May 2003 because in the intervening time some of the data had changed.

21. Finally, during the verification visit to Fortuny in January 2005 Economía obtained a large number of documents. Although no explanation is provided for the various tables and documents contained in this exhibit, it is apparent that they include substantial data regarding transactions of Formex Ybarra and Fortuny. It can hardly be imagined that among these there was not some information that would not qualify as 'essential facts'.

22. The EC cannot see that Mexico, in its answers to the Panel's questions, has added anything of substance to the arguments which it has previously presented in its attempt to answer the EC's claim under Article 11.11. The fact that various parties requested extensions for responding to Economía's questions is no excuse for exceeding the maximum period. Economía should have organized the investigation in such a way to avoid a breach of the limit. It should also be recalled that the main reason for the delay was that the only visit made to the complainant, Fortuny, took place after the 18-months deadline, whereas the verification of the situation of the domestic industry should be an early step in any investigation.

23. The notion of subsidization is addressed in a number of Mexico's responses to the Panel's questions. As the following examination will show, these responses do not provide answers to the EC's complaints. These complaints focus on the failure of Economía to investigate the pass-through of the subsidy, and on the calculation of the level of subsidy of the individual exporting companies.

24. In its response to the Panel's Question 41 regarding the product on which the subsidy is bestowed Mexico appears to attach importance to the fact that if the olive grower brings olives to a mill but obtains no oil then no aid will be paid. From this it deduces that the subsidy is paid on the oil rather than on the olives. Olive oil serves only as the basis to calculate the amount of aid granted. This is underlined by the fact that also the aid for table olives is expressed in terms of "olive oil equivalent".

25. As the EC has emphasized in its First Written Submission, the central question in this dispute is whether the olive oil imported into Mexico was a subsidized import. For that purpose it is necessary to establish a connection between the original subsidy and the import, and show that the benefit of the subsidy extends to that import. Economía did not carry out such an investigation.

26. Mexico goes on to assert that the oil is sold by exporters at a lower price that would be the case if there were no subsidy. But this, like Economía's arguments in the Resolutions, is mere assertion. Economía made no serious attempt to justify its assertion.

27. Mexico purports to correct the EC by saying that the situation is one of a subsidized product rather than of a subsidy linked to a product. However, the distinction that Mexico tries to introduce cannot be attributed to the EC and is in any event irrelevant. Question 57 only refers to the pass through analysis which the EC claims that Mexico failed to carry out. The EC used the term "link" in the sense of "pass through" between the imported product and the subsidy. The EC has repeatedly explained that the scheme under analysis grants an aid to olive growers which are upstream producers of the olive oil exported to Mexico and olive oil exporters are even further away from the actual beneficiary of the aid. The details of that reality must be taken into account in order for a determination to be made as to whether there have been 'subsidized imports'. A simple characterization of olive oil as a 'subsidized product' will hide this reality and lead to an oversimplified and mistaken conclusion.

28. Although the question of the 'subsidized product' is difficult to answer, that of the subsidized person, in the sense of the person to whom the subsidy is given in the first instance, is quite straightforward. And in this particular respect Mexico's error is equally obvious since it says that the exporter is the person receiving the subsidy. Clearly Mexico is referring to the person who it claims *benefits* from the subsidy. But the exporter is not that person, unless Mexico is implying the existence of a pass-through. The EC, both during the investigation in Mexico and during these proceedings, has

provided good reasons to conclude that no subsidy passed through to the imported olive oil. These arguments were also raised and substantiated by the exporters. However, as far as these proceedings are concerned, the issue is not whether pass-through occurred, but whether Economía was obliged to investigate the issue and if so whether it did so properly. The EC submits that Mexico should have done a pass-through analysis, and that it failed to do so.

29. Regarding the calculation of the level of subsidy and in particular the use of ex-factory or CIF prices the EC and the Panel remain in ignorance of whether Economía committed an error. The reason for this continuing ignorance is Mexico's failure to adequately explain its methodology, despite the Panel's questions.

30. Finally, with reference to the issue of the articles of the *SCM Agreement* with which the Panel may make findings, it should be noted that in the recent *Japan – DRAMS* case the panel upheld Korea's claim that Japan's measure was inconsistent with Articles 1.1(b) and 14 of the *Agreement*, without invoking any other articles.

31. The EC has already given several reasons why Economía failed to determine whether Fortuny constituted the entire domestic industry of olive oil.

32. The letters to Economía from the authorities of Baja California revealed the existence of other olive oil producers in that state which Economía entirely ignored. Apart from the letter received prior to initiation, which is discussed above, a further letter of 17 December 2003 (Exhibit MEX-49-D, page 3) contained a table that showed the existence of several such producers with significant levels of production. In a further letter of 9 January 2004 (Exhibit MEX-49-F) the state authorities provided a list of 12 producers. Data from these were arranged in a table, and they show that some producers had a capacity for oil and table olives, whereas others were identified with olives only.

33. Despite these clear indications that there were producers of olive oil in addition to Fortuny, Economía made no further efforts to find out about them. Mexico acknowledges this failure in its responses to Questions 72 and 73 from the Panel.

34. Further evidence for the existence of olive oil production distinct from Fortuny is to be found among the data provided by Fortuny during the verification visit by Economía in January 2005. These contain details of purchases of olive oil during the 1999 harvest.

35. In its questions to Mexico the Panel has sought to examine the adequacy of Economía's investigation of injury. The discussion of this subject during the first substantive meeting of the Panel demonstrated the extent of confusion that affected this investigation. In particular, the use of 9-month periods for collecting data, overlapping with some data extending over 12 months, added a major element of unreliability while at the same time introducing needless complexity.

36. The EC does not need to emphasize that these proceedings are not intended to provide an opportunity for Mexico to make good the defects of Economía's investigation. That investigation must stand or fall by what was done at the time. Mexico's explanations do nothing to detract from the conclusion that the investigation of injury was beset by errors that deprive its findings of all validity.

37. In its answer to Panel Question 79 the EC undertook to enlarge upon its comments on the particular aspects of Article 15 that it claims Mexico has violated. The EC has already addressed Economía's failure to respect Article 15.1 of the *SCM Agreement* as regards the objective examination of the effect of imports on prices in the domestic market. This conclusion has now been reinforced by Mexico's responses to the Questions posed by the Panel, and by the exhibits now made available by Mexico. In particular, Mexico's responses have failed to remove the confusion, mentioned above, regarding the periods for which data were collected and consequently as regards the findings on the prices of imported and domestic olive oil. The nature and extent of this confusion is further examined

below (paragraph 50). Moreover, Mexico's continued reference to comparisons with hypothetical domestic cost of production is out of place, since it is domestic prices alone that are recognized as relevant in this context by the *SCM Agreement*.

38. The other provision which the EC has invoked in this context is Article 15.4 of the *SCM Agreement*. The EC identified the various factors that should have been considered in accordance with Article 15.4, and showed how Economía had addressed them inadequately or not at all. Although provided by the Panel with an opportunity to make a response to this accusation, Mexico has merely repeated its previous arguments.

39. Finally, the EC would like to address the topic of the period of investigation for injury. It is well established that when considering injury the data will normally be taken from a longer period than is used in the determination of subsidization (or of dumping). Indeed, in the parallel case of anti-dumping investigations, the relevant WTO committee has recommended that it should normally be at least three years, unless a party from whom data are being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation.

40. As was stated in the Panel report *Mexico – Anti-Dumping Measures on Rice*, the purpose of looking at a longer period is to allow an analysis of trends over time of the various factors requiring investigation. Indeed, providing an indication of what the industry was capable of achieving in the absence of allegedly injurious imports would facilitate a finding that the industry was in an injured state at the time when the determination of subsidization was made – i.e., in the last of the three years.

41. It is thus the period of time when the injury and subsidy investigations overlap, that is crucial. Consequently, in the EC's view, unless there is output (allowing for temporary interruptions) during that overlapping period no finding of the existence of injury or domestic industry can be made.

42. Regarding the examination of "other factors" in injury causation, Mexico has on a number of occasions presented the *movements of the price of olive oil from the EC* in the form of a graph. The distinctive U shape of the graph is explicitly used to portray the EC exporters as having sharply lowered prices until the sole identified Mexican producer ceased its activities, and then raising their prices again. It would seem that Mexico is accusing the EC exporters of having engaged in a deliberate attempt to drive Fortuny out of business and then exploiting the absence of competition.

43. The fallacy of this argument lies in the notion that competition in the Mexican market for olive oil was maintained solely by the presence of Fortuny. However, oil from Mexican olives never constituted more than a minor part of the Mexican market, and the various EC exporters were engaged here, as elsewhere, in vigorous competition among themselves.

44. The overall price trends clearly show that Mexico's insinuations as to the deliberate lowering of prices of the EC exporters in order to attack the Mexican producers is without foundation. The olive oil price is influenced by a number of factors such as harvests, production volumes, supply and demand. Since the EC is the biggest producer and exporter, EC export prices to all third country markets follow the same trends as prices in the EC. Even though the EC had submitted detailed information on these issues since the beginning of the investigation, Mexico has not taken them into account. The prices in Italy and Spain show similar fluctuations as the export prices to Mexico, to the US and the average EC export prices: they all underwent a dip in the years 2000 and 2001, when the complainant reduced its production.

45. Moreover, a comparison of the exchange rate movements on a monthly basis with the price movements shown in Mexico's graph reveals even more clearly that much of the alteration in price can be attributed to the temporary increase in the value of the dollar.

46. Economía seems to have made no effort to examine the above described movements in world prices of olive oil which enhances the doubts as to the soundness of the causal link analysis.

47. The new exhibits provided by Mexico serve to confirm the EC's argument that Economía failed to adequately investigate the known 'other factor' constituted by *Fortuny's high prices*.

48. According to the Final Resolution, Distribuidora Ybarra explained that it had ceased to purchase products from Fortuny because of its prices. However, what Distribuidora Ybarra actually said in its submission of 9 January 2004 was that it had ceased to buy from Fortuny because Fortuny's prices were higher than those that had been charged by its predecessor Formex Ybarra. This comment was omitted from the 'non-confidential' version of the text. Furthermore, Mexico does not mention that Distribuidora Ybarra went on to say that, with (now) an unknown trademark, Fortuny's prices were too high to attract buyers.

49. The increase in Fortuny's prices is confirmed by Mexico's answers to the Panel's Question 86, in which it gives figures for national (i.e. Fortuny) prices in the nine-month periods (from April to December) in 2000 and 2001. In 2000 the figure is $5.51, in 2001 $7.41.

50. In any event, the data which Mexico has presented to the Panel throw considerable doubt on its calculation of prices of Mexican olive oil. Appendix 24 to Fortuny's response of 7 May 2003 to Economía's Prevención, which provided the basis for Economía's calculations, shows almost arbitrary monthly variations in prices. Prices apparently changed by a factor of up to three from one month to another. According to Economía these data were verified by comparing them with data covering the same transactions from Distribuidora Ybarra. The latter data are contained in Distribuidora Ybarra's submission of 9 January 2004. The Distribuidora Ybarra figures show a steady decline in prices between January and August 2000, but the monthly Fortuny figures show no overall trend, and the August figure is higher than that for January. However, it should be said that the exact nature of the data presented by Mexico in these documents is not clear. The EC requests the Panel to call on Mexico to explain fully what data they contain, and to provide the data supplied by Distribuidora Ybarra for the period after August 2000. For example, the table does not contain prices for the first three months of 2002, nor it seems to take into account the relation between Distribuidora Ybarra, on the one hand, and Formex and Fortuny, on the other, before and after the division of the group to which both Formex and Distribuidora used to belong.

51. The EC has also referred to the inadequacy of the way in which Economía dealt with the extent to which the *abandonment of the Ybarra trademark* had been the cause of its problems. During the course of the investigation the importance of marks in the selling of olive oil in Mexico was raised by the EC in its letter of 9 January 2004. In the same letter the EC provided details of the trademarks used by EC exporters.

52. The point was also brought to Economía's attention by Distribuidora Ybarra, first in its submission of 9 January 2004, and at greater length in its submission of 5 August 2004. There Distribuidora Ybarra described in detail the importance of marks, and the amounts which companies were prepared to pay in royalties for the use of marks. It went further by encouraging Economía to question the owners and licensees of marks pertaining to olive oil about their value.

53. It now appears that Fortuny itself acknowledged this problem. In its response to the Prevención Fortuny noted that the mark had remained with Distribuidora Ybarra, and that Fortuny could no longer sell its product with this mark, and had to go to the market with a new mark which, it said, was practically like going with a new product.

54. Furthermore, Mexico has now provided the market survey referred to in paragraph 327 of the Preliminary Resolution. Contrary to the impression created by Mexico, this document reveals the dominance of the Ybarra brand in the Mexican market: 78 per cent of olive oil buyers usually buy

this brand, and 91 per cent have bought it at one time or another. In addition, the survey shows that this popularity is strongly associated with the brand, and has very little to do with price since only a small minority of buyers regarded it as cheap and those who bought another brand were not put off Ybarra by the price.

55. Mexico failed to reply adequately to the Panel's questions with regard to the impact of *Fortuny's high costs*. In paragraph 350 of the Final Resolution the Ministry observed that in the period under analysis Fortuny had considerable operating losses throughout the company. This clearly suggests that the overall situation of the complainant was critical and the economic difficulties were not limited to its olive oil activity. Furthermore, Distribuidora Ybarra explains that it stopped buying from Fortuny because its prices were higher that those of Formex-Ybarra before the split. Distribuidora adds that Fortuny's high fixed and variable costs are due to an inefficient administration of this company.

56. This factor was not taken into account by Economía whereas it has an impact on the whole picture: as stated by Distribuidora, high costs caused the exclusion of Fortuny from the market since wholesalers and distributors did not accept to pay such high prices for an unknown brand.

ANNEX C-2

EXECUTIVE SUMMARY OF THE SECOND WRITTEN SUBMISSION OF MEXICO

(27 August 2007)

LEGAL ARGUMENTS

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

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

1. To avoid repeating previous arguments, Mexico reaffirms the claims it made in this connection in its First Written Submission (FWS), its first oral statement and its replies.

2. It appears that as stated by the EC during its oral statement and its reply to question 1, Mexico and the EC agree that the invitation to hold consultations under Article 13.1 of the SCM Agreement should be extended as soon as possible – that is to say, without wasting any time – once the application for the initiation has been accepted, as actually happened in the case of this investigation.

3. However, the two governments have different interpretations with respect to the moment of acceptance and the moment of initiation of an investigation. Judging from the EC's replies to questions 2, 3 and 4, under the EC system an application is accepted when submitted by the applicant and received by the investigating authority (IA), while the formal action initiating the investigation is publication in the Official Journal of the European Union, from which moment presumably the investigation clock begins to run.

4. In Mexico, the applicant files his application and the IA merely receives it and stamps it to acknowledge receipt, which does not imply that it has been accepted, only received for examination, since there has been no evaluation of its content. In fact, the application is often incomplete, and the authority has to ask the applicant for further data. Once the IA has analysed the information, it determines whether or not to draw up a draft acceptance of the document. If the authority considers the application pertinent, it sends this draft to the Minister for the Economy, who can decide whether or not to accept the application. If the Minister decides to accept the application, he signs the document which is then sent to the Official Journal (DOF) for publication as an Initiating Resolution (IR). If for some reason the document is not published, it will have no legal force whatsoever. In fact, under the laws in force, the investigation clock does not begin to run until the day following publication. The Minister's signature does not mean the initiation of the investigation. If this were the case, the periods would have to begin to run at that date, which is not what happens. As in the European system, if the document is not published, the periods do not begin to run.

5. The "formal action by which an investigation is initiated" means that the investigation process begins in every respect, especially with regard to the time-limits imposed on the interested parties and the authority and with regard to inquiries. In Mexico, the clock begins to run from the publication of the IR and never until then. Consequently, it is incongruous to consider that the signature of the

Minister is the formal act of initiation. We consider that in Mexico, as happens in the EC, the formal action by which the investigation is initiated is the publication of the notice of initiation in the Official Journal.

6. Moreover, we do not understand how the EC can consider that an application is accepted at the precise moment at which it is submitted to the IA without its having undergone any examination as to whether it is appropriate or not. In our opinion, the application needs to be examined to find out whether it contains sufficient information and hence whether it should be accepted or not. This is why the Mexican IA examines the application before accepting it. Thus, the mere submission of the petition only implies that the authority can begin examining the viability of the document, and does not imply that the application has been accepted.

7. As we indicated in our FWS, footnote 37 to the SCM Agreement states that initiation is the formal action by which an investigation is commenced, which, in our opinion, may vary according to the legal system of each WTO Member. We do not understand why at the first hearing the EC maintained that questions of this kind cannot be left to the legal systems of each country. In our opinion, each Member is free to define the requirements that must be met for the investigation to be considered to have been commenced. Nor do we understand why, if the invitation to hold consultations has to be issued as soon as possible after the application has been accepted, the EC takes between 15 and 20 days to extend the invitation to the Member concerned, as indicated in their reply to the Panel's question 3 (paragraph 10).

8. In Mexico, if an application is not accepted, then there are no grounds for holding consultations on initiation, as the application would have been rejected. For this reason, the invitation is issued once an application has been accepted by the Minister for the Economy through his signature. Hence the invitation was sent to the EC immediately after that signature.

9. We disagree with the interpretation in the EC's replies according to which the consultations under Article 13.1 of the SCM Agreement must be held before the investigation is initiated. This is contrary to what they said during the first hearing, namely that the obligation contained therein was limited to inviting a Member to hold consultations, since there is no way of forcing a Member to attend them. Accordingly, this new interpretation would imply the possibility of a Member invited to hold consultations being able to decline or ignore the invitation, and afterwards claim before a panel that the failure to hold consultations was a violation committed by the responding Member.

10. Thus, as an exporting Member cannot be forced to hold consultations, we consider that Article 13.2 of the SCM Agreement simply establishes that regardless of when those consultations may have been begun, the importing Member should afford a reasonable opportunity for them to be continued. In fact, Article 13.3 of the SCM Agreement states that the consultations are not intended to prevent the expeditious initiation of the investigation, which confirms that there cannot be any binding obligation to hold consultations before initiation, since that would obstruct initiation.

11. On the other hand, in its reply to question 6 the EC maintains: (a) that introducing a new concept (legal commencement of the investigation), not found in footnote 37 to the SCM Agreement, raises the question of whether the legal system applicable is that of Mexico or that of the WTO; (b) that the date on which the investigation legally commenced under Mexican law is not necessarily the same as the date of the procedural action by which the investigation is formally commenced and that Mexico contends that the "legal commencement" of the investigation occurs on the day following its publication, but no procedural action occurs on that day.

12. With regard to the first point, the EC appears erroneously to assume that the WTO has a completely self-sufficient legal system. There is no complete theory of the concept, nature and scope of the administrative action *per se* in the WTO legal system. Thus, the WTO only provides guidelines that are more or less general, depending on the case, concerning certain aspects, but it is necessary to

examine, case by case, whether the authority acted appropriately. Accordingly, the AB recognized that the SCM Agreement was silent on many aspects and that this had some meaning (paragraphs 65 and 74 of the AB report in *United States – Carbon Steel*). Likewise, it recognized that one of the objectives of the SCM Agreement was to establish a framework of rights and obligations and a set of rules that must be respected in the use of such rights. Among the rules applicable to the use of the rights established in the SCM Agreement, there are none that define the specific administrative action by which the investigation is commenced. On the contrary, what was established was merely a guideline.

13. The EC has merely repeated that the signature of the Minister for the Economy constitutes the formal act of commencement, without explaining why this is the case. Taken to the extreme, its argument would mean that the pre-initiation actions taken by the IA to determine whether or not an application is appropriate would have to be treated as part of the investigation, and that consequently the formal act of commencement would be receipt of the application, which we do not think that the EC itself accepts, given that it considers that an investigation commences with publication in its Official Journal. Therefore, there can be no confusion as to whether the Mexican or the WTO legal system should be used, since the SCM Agreement does not specifically establish what the act of commencement is; and as there are not two sets of rules applicable, there can be no conflict.

14. With regard to the EC's second point, there is no basis for the date on which the investigation legally commenced being different from the formal date of its commencement. Likewise, the presence or absence of procedural action has absolutely no effect on the moment at which the investigation should be regarded as having commenced. An administrative action does not necessarily produce its effects immediately. Thus, we refer to our previous plea to the effect that there is nothing in the SCM Agreement to support the EC's claim.

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

15. In its reply to question 13, the EC insists on arguing that the term "domestic industry" alludes exclusively to the producer that is producing at the time his application is filed, an interpretation with which we disagree. The EC refers only to an argument in its FWS based on a literal reading of Articles 11.4 and 16 of the SCM Agreement, an argument which Mexico rebutted in its own FWS. Mexico rejects the EC's interpretation of Articles 11 and 16 of the SCM Agreement. In its FWS, Mexico argued that these articles could not be interpreted so literally, since that would have unacceptable consequences. The fact that Fortuny was not producing at the time of initiation has no effect on whether it can be regarded as a domestic producer, inasmuch as it is an enterprise that has existed for decades, was actually producing, has all the material resources necessary to resume production and has the appropriate legal status. It had to suspend production because of the injury inflicted by subsidized imports from the EC, injury which was continuing to be caused insofar as the company was being prevented from recommencing production.

16. With respect to the EC's reply to question 14, Mexico considers that the notion of material retardation of the establishment of a domestic industry is important for the Panel's analysis in that Article 11.4 of the SCM Agreement applies to all modes of injury. The EC has not explained how the concept of "production" could be used as a factor to be analysed if the injury suffered by the domestic industry is the material retardation of its establishment. Therefore, we repeat that the literal interpretation it gives of this article is inappropriate. The EC does not go beyond the definition of "establishment" given in an English dictionary which, in our opinion, does not say much about the meaning of this word and even less about the scope of the expression "establishment of a domestic industry" used in the SCM Agreement. However, the EC concludes that "[t]*hus, when applied in a commercial context, the term does not refer to the point of starting up a business, but to the achievement of a level of maturity*." According to the dictionary of the Spanish Royal Academy of Language, "to establish" means "to found or institute. To open for one's own account a commercial or

industrial establishment", from which it is clear that "to establish" means founding or starting a commercial or industrial business. In other words, the establishment of an industry does relate to its being commenced. As distinct from the Oxford Dictionary, that of the Spanish Royal Academy contextualizes its definition by referring to commercial or industrial activities, which is why we prefer to use it. However, this dictionary provides no basis at all for the EC's interpretation.

17. Even supposing, for the sake of argument, that "to establish" means "to achieve a level of maturity", we do not see how a company which produced olive oil for many years could not be regarded as already being mature, and, being a mature company, it could not be assumed to be a new industry. Nor is it clear to us how a company that is producing could be regarded as not being established. The concept of "maturity" is not contemplated in the SCM Agreement and therefore its use could give rise to an infinity of interpretations. If it were the fundamental concept to be considered in the case of material retardation, then investigations for material retardation could be initiated even if the industry were already producing, since it may not have reached "maturity", a conclusion which seems to us untenable.

18. The EC claims to find justification for its reply to question 14 in paragraph 174 of its FWS. However, that paragraph cannot constitute a justification for its reply, as it is merely an assertion. The EC is attempting to base one assertion on another. Even so, we consider it important to point out once again that the analysis made by the IA and the criterion on which it based its final determination was material injury (being prevented from recommencing operations) and not material retardation.

19. In fact, the above is closely related with the EC's reply to question 16. It should be noted that Mexico's FWS explains why the fact that the domestic producers were not producing at a particular time does not mean that they cannot be regarded as producers.

20. In its replies, as at the first substantive meeting, the EC points out that regardless of whether an investigation is initiated as a result of an application or ex officio, domestic production must necessarily exist. We again find the EC ignoring those cases in which there is no domestic production. According to its interpretation, there would be no possibility of a new domestic industry being established, an argument which is untenable. If the EC's claim were valid, there would be no need for the material retardation requirement – material injury would suffice. The EC has not explained what treatment would have to be given to those cases where production is temporarily suspended for planned or unforeseen stoppages, or to a cyclical or seasonal industry, to cite a few examples.

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

21. With respect to its obligations under Article 13(b)(i) of the Agreement on Agriculture, Mexico reiterates the arguments contained in paragraphs 45 to 77 of its FWS and 8 to 11 of its oral statement at the first hearing, as well as in its replies to questions 20 to 22.

22. Judging from the EC's reply to question 20, both Members appear to agree that the due restraint clause applies only to the period prior to the initiation of the investigation and not to the imposition of countervailing duties. We therefore conclude that the EC has abandoned its claim to the effect that due restraint must be applied to the imposition of countervailing duties, and consequently we request the Panel to disregard this claim.

23. Nor do we believe that there is any foundation for the assertion that the imports were exempt from the imposition of countervailing measures. We can find no support in the SCM Agreement or in the Agreement on Agriculture for such an interpretation.

24. In the event that the EC is suggesting – as in its FWS – that the imposition of countervailing measures is incompatible with the Agreement on Agriculture because such measures could not be adopted on the basis of an application that claimed material retardation, we repeat that the investigation was not initiated for material retardation, but on the basis of injury in the general sense, and was concluded on the basis of material injury, namely prevention of the resumption of production. There is no provision in the SCM Agreement that says that an IA must adhere strictly to the terms of the application for initiation. In this connection, we refer to paragraphs 124 to 128 of our FWS.

25. The IA considered that it was not possible to initiate an investigation for material retardation with respect to a company which, as already mentioned in this dispute, had existed since the 1940s, was producing olive oil, had all the production facilities it needed to operate and had never been involved in any proceedings that might imply its being shut down or could affect its operations (liquidation or insolvency proceedings, re-registration, change of corporate purpose, etc). Thus, the IA determined that the most appropriate course of action would be to initiate the investigation without specifying the particular mode of injury suffered by the applicant. Consequently, there is no violation whatsoever of the SCM Agreement or the Agreement on Agriculture.

26. In its reply to question 22, the EC refuses to say what is meant by due restraint under the Agreement on Agriculture and merely argues that the actions of the IA lacked restraint. We do not understand how the EC can refuse to explain a concept and then claim that the IA acted in a manner contrary to that unexplained concept. At the same time, the EC argues that due restraint is "clearly" an additional obligation for Members, but, it should be emphasized, does not explain why it constitutes an obligation additional to that of maintaining a reasonable standard. It seems to us that these assertions do not constitute a prima facie presumption of a violation on the part of Mexico, and we therefore request that they be dismissed.

27. We repeat that, in our opinion, due restraint is a concept that relates to an appropriate and reasonable standard for allowing an investigation to be initiated. It does not involve doing anything differently in cases of agricultural, as compared with non-agricultural, products. Furthermore, the IA took measures which demonstrate the application of a reasonable standard (such as sending the applicant a request for information, so-called "*prevención*", before initiating the investigation). Here we refer to paragraphs 53 and 58 to 77 of our FWS.

28. In its reply to question 25 the EC states that if an investigation was initiated prior to the expiry of the implementation period, then Article 13(b)(i) of the Agreement on Agriculture applies to any determination, in the course of that investigation. Once again, we can find no support for this claim. As pointed out in paragraphs 47 and 48 of our FWS, for a rule to be violated two elements must be present: (a) a rule in force; and (b) an action at variance with that rule.

29. The due restraint was only applicable to the initiation because Article 13(b)(i) so provides and because after that it was no longer in effect. As regards initiation for retardation, we repeat that the investigation was not initiated for this mode of injury. Accordingly, we cannot see why the due restraint clause would have to be applied to the determinations issued during the olive oil investigation.

4. Argument relating to the claims concerning Article 12.4.1 and 12.8 of the SCM Agreement

(a) Mexico acted in conformity with Article 12.4 of the SCM Agreement

30. In paragraphs 56 and 57 of its first oral statement, the EC alleges that Mexico's argument concerning systematic access to all the confidential information was rejected in the panel reports in *United States – OCTG (Article 21.5 – Argentina)* and *Mexico – Steel Pipes and Tubes*. We do not agree.

31. With respect to *United States – OCTG (Article 21.5 – Argentina)*, the EC bases its argument on paragraph 7.137 of the Panel report, which mentions that the United States system is inadequate because access to confidential information is given exclusively to counsel, and it cannot be used by the parties themselves. This determination is not applicable to the Mexican legal system, which does not function that way. Under the Mexican system, a legal representative is not necessarily "counsel", but may be anyone legally authorized to act on behalf and as the representative of another.

32. Clearly, if an interested party is a company, the only way in which it can exercise a right is through a legal representative, who does not necessarily have to be counsel. Thus, the representative could be one of the members of the company's board of directors or its equivalent. In fact, this situation is recognized in Article 51 of the Foreign Trade Law (FTL). If an interested party is a natural person, then clearly he may appear for himself or through a representative. Thus, the interested party can have access to confidential information.

33. We refer in this connection to Article 80 of the FTL and Articles 147 and 159 of the Regulations thereto, which, taken together, state that: (a) interested parties and/or their representatives are granted access to the confidential information; (b) if the interested party is a company, it always acts through a representative, since a company is an association of capital and persons; (c) the representative of the company may be anyone legally authorized to represent it, including a member of the board of directors or its equivalent; (d) if the interested party is a natural person, he has every right to access the confidential information himself or through a representative; (e) if the one granted access to the confidential information (interested party or representative) is not a lawyer, he must be accompanied by a lawyer. Unlike what happens in other countries, under the Mexican legal system the interested parties and/or their legal representatives are always granted access to all the confidential information. Consequently, in the olive oil investigation the impairment of due process for the parties on which the panel focused in *United States – OCTG (Article 21.5 – Argentina)* did not exist.

34. On the other hand, the EC also argues that paragraph 7.398 of the panel report in *Mexico – Steel Pipes and Tubes* confirms the findings in paragraph 7.137 of the panel report in *United States – OCTG (Article 21.5 – Argentina)*. We consider this to be incorrect.

35. As can be seen in paragraphs 7.373, 7.382, and 7.391 to 7.398 of the panel report in *Mexico – Steel Pipes and Tubes*, the panel's findings concern two different aspects: first, whether or not the non-confidential summaries of some confidential documents permit a reasonable understanding of the confidential data; and second, the standard of review applicable to the decisions of the IA concerning the granting of confidential treatment to specific information and whether or not that information could be summarized, as well as the way in which the IA should have communicated these decisions.

36. In our view, the panel determined that the non-confidential summaries were inadequate, but as Mexico had acted in a manner consistent with Articles 6.5 and 6.5.1 of the AD Agreement as regards the evaluation and granting of confidential treatment, the evaluation of the assertions to the effect that it was not possible to make non-confidential summaries of certain confidential information, and maintaining a system of access to confidential information that permitted the effective legal representation of an interested party and could serve as a supplement to fulfilment of the provisions of Article 6.5 of the AD Agreement, there had been no violation of Mexico's obligations under the AD Agreement. Thus, it is necessary to take into account the panel's entire analysis and not just isolated findings. Mexico considers that the panel's determinations are not applicable to this particular case, in the way that the EC suggests. However, we note that even if they were, the report supports Mexico's position in the present dispute.

37. At the same time, we note that in paragraph 104 of its FWS, the EC makes the same claim as did Guatemala in *Mexico – Steel Pipes and Tubes*, to the effect that the AI did not evaluate whether

"good cause" had been demonstrated for certain information to be considered confidential. In this connection, we repeat that in the aforementioned dispute, the panel determined that this claim was unfounded (see paragraphs 7.382, 7.393 and 7.394) because there was no provision in the SCM Agreement establishing what process the IA should follow when it considered that a request for confidential treatment was justified, other than to treat the corresponding information as confidential. Therefore, we respectfully request the Panel to reject these claims by the EC.

38. In addition, there are other aspects that cannot be ignored, for example the difference between the documents about which Guatemala complained in *Mexico – Steel Pipes and Tubes* and those submitted in the olive oil investigation, and the fact that in the olive oil investigation, what happened was the same as indicated in footnote 451 to the final panel report in *Mexico – Steel Pipes and Tubes*, in the sense that both the applicant and the exporters and importers used exactly the same system for presenting their non-confidential summaries.

39. On the other hand, as already noted in our FWS, the EC alleged that its and its exporters' due process rights were prejudiced. With respect to its exporters, we repeat that they had every right to examine the confidential information, as in fact they did. In the case of the EC, even though it had the right to examine that information, for reasons unknown to us, it refrained from exercising that right and now maintains that this amounts to a Mexican violation of the SCM Agreement. This cannot be attributed to the IA. For the above reasons, we request that the Panel dismiss the EC's claims.

40. Likewise, in its reply to question 26, the EC states that its complaint relates to the non-existence of non-confidential summaries and not to their adequacy. We take this change of position to mean that the EC is waiving its claim concerning the adequacy of the non-confidential summaries contained in paragraph 104 of its FWS, and therefore request that the claim concerning the alleged inadequacy of the summaries be dismissed.

41. Now, assuming this new EC position, if Mexico can show that non-confidential summaries of the confidential information do exist, then it will necessarily follow that the EC's claim is unfounded. Moreover, the claim concerning the alleged inadequacy of the non-confidential summaries having been abandoned, it would be appropriate to dismiss all the EC's claims in this respect. Thus, as noted in Exhibit MEX 38 (Index), it is not true that there are no such summaries. These exhibits show that non-confidential summaries of all the documents in connection with which confidential treatment was accorded are contained in the record of the investigation. The fact that the non-confidential summaries do not take the form requested by the EC does not mean that they do not exist. The summaries are there and if there is any problem with them it clearly cannot be their non-existence.

42. We further recall that the SCM Agreement offers no guidance with regard to the form which a non-confidential summary should take. In any case, if the summaries do not satisfy the condition of permitting a reasonable understanding of the confidential information, the problem would be one of sufficiency and not of existence – a claim which the EC has withdrawn and which, even if they had maintained it, would have been without foundation. For all of the above reasons, we respectfully request this Panel to reject the EC's argument.

(b) Mexico acted in a manner consistent with Article 12.8 of the SCM Agreement

43. We repeat what was stated in paragraphs 91 to 95 of our FWS, where we explained why Mexico maintains that it complied with Article 12.8 of the SCM Agreement in disclosing the essential facts of the investigation in its PR.

44. We reiterate that the EC has failed to show that the PR issued by the Ministry was insufficient to acquaint the parties with the essential facts considered during the investigation, so that it has not established a prima facie presumption of violation by Mexico. In its reply to question 33, the EC only states that a provisional measure could hardly provide adequate disclosure of essential facts. As noted

in paragraphs 92 to 94 of Mexico's FWS, this point was examined by the panel in *Argentina – Ceramic Tiles*, which establishes very clear guidelines concerning the disclosure of essential facts and describes various ways of disclosing them. Consequently, we request that the EC claim be dismissed.

45. As we asserted in our reply to question 35, the reason why Mexico maintains that the essential facts were disclosed in the PR is that, during the procedural stages following the Resolution, no information came to hand that could be included within the scope of Article 12.8 of the SCM Agreement. As already indicated in our replies to questions 32 to 35, the facts which must be disclosed are the most important ones and must have served as the basis for the decision to apply definitive measures. Thus, not all the facts subsequently obtained automatically constitute essential facts under Article 12.8 of the SCM Agreement. This was not the case with the information gathered subsequent to the PR which, at best, only confirmed the relevance of the essential facts which were already known prior to the PR and were disclosed therein (as in the case of the verification report on Fortuny or the requests made by the IA to other parties). Thus, as it was not new information which affected the authority's decision, there was no obligation to disclose it.

5. Mexico acted in a manner consistent with Article 11.11 of the SCM Agreement

46. The EC claims that Mexico acted in a manner inconsistent with Article 11.11 of the SCM Agreement because, as it maintains, Mexico failed to explain why the circumstances were "special", thereby justifying the extension from 12 to 18 months and, moreover, exceeded the absolute limit of 18 months for concluding the investigation. In addition, the EC tries to excuse the lack of cooperation on the part of both its exporters and the EC itself, suggesting that as a consequence of the above they were placed in the "dilemma" that if they wished to defend their interests they would have to "condone" the Ministry's failure to respect Article 11.11, and thus, that the IA should not have resorted to the facts available.

47. With respect to the obligation to notify the reasons for the special circumstances, we repeat that there is no such obligation in the SCM Agreement.

48. With regard to the exceeding of the 18-month limit under the SCM Agreement, we refer to paragraphs 100 to 104 of Mexico's FWS and our replies to questions 39 and 40, where we indicate the reasons why – and the documents that support our assertions – the IA decided to extend the period for the investigation, by giving priority to the need to gather more information and afford the parties an adequate opportunity to defend themselves and by granting the extensions they requested, and explain the relevance of carrying out the administrative actions requested by the parties (such as the on-the-spot investigation). We repeat that these extensions, the verification visit to the applicant's premises, and the actions taken by the IA in response to the questions raised by the parties themselves were the cause of the delay in the proceedings.

49. We consider that Article 11.11 of the SCM Agreement is designed to protect the interested parties from any unjustified delay or inaction, by ensuring that they are not left defenceless and that the delay does not work in favour of one of the parties. We do not see the IA as having breached this guarantee or undermined any due process rights. The EC's claim is not based on any specific and genuine impairment of its rights of defence or those of its exporters – it is merely an excuse for not supplying the information that the IA requested of it.

50. Therefore we reaffirm what we said in paragraph 106 of our FWS and request the Panel to take these circumstances into consideration in its analysis, since the delay was due not to negligence on the part of the IA but to a desire to obtain the best information possible, as requested by the interested parties themselves.

51. As already pointed out in our FWS, we consider that there is no foundation at all for the EC's attempts to excuse the lack of cooperation on its part and on that of its exporters (we recall that

the EC itself has admitted that it did not respond to the requests for information made after the public hearing). Accordingly, we repeat what was stated in paragraphs 108 to 110 of our FWS.

52. It would appear that the EC's only objective in arguing the exceeding of the limit is precisely to justify its failure to fulfil its obligations under the olive oil investigation procedure in order subsequently to mbaintain that the IA was wrong to apply the "available facts". However, we note that the SCM Agreement does not provide for any exception to the application of the available facts on the grounds that the investigation has taken more time than indicated in Article 11.11 of the Agreement. We fail to understand the nature of the EC's alleged "dilemma" in responding to the requests for information.

53. Furthermore, we repeat what was said in paragraph 110 of Mexico's FWS, to the effect that assuming the behaviour of the EC and its exporters to have been justified would be tantamount to handing over control of the investigation to the parties, which we consider unacceptable.

B. ARGUMENTS CONCERNING THE CONDUCT OF THE INVESTIGATION AND THE FINAL AFFIRMATIVE DECISION

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

54. In its reply to question 42, the EC states that the recipient of the benefit under the subsidies programme is the olive grower and that this is consistent with Article 5 of Council Regulation (EC) No. 1638/98, amending Regulation No. 136/66/EEC. It also claims that in paragraph 100 of the FR in this investigation part of this Article was deliberately omitted.

55. Contrary to what the EU claims in its reply to question 42, there was no omission in the FR. The FR never referred to Article 5 of Council Regulation (EC) No. 1638/98, but to Article 5 of Regulation No. 136/66/EEC, and did not omit any substantive part thereof. In any case, we do not detect any element in Article 5 of Council Regulation No.1638/98 that could be used to support the claim that the subsidization programme was not directed at olive oil. On the contrary, that Article also indicates that it is a subsidized good.

56. As stated earlier, the EC's subsidization programme is covered by Regulation No. 136/66/EEC, and was notified by the EC to the WTO's Committee on Agriculture as a subsidization mechanism. Consequently, it is a subsidy whose existence, validity and application are not open to question. Moreover, it is directed, in Article 5 of both Regulations, towards encouraging the production of olive oil. Both regulations are categorical in this respect. It was therefore assumed, quite correctly, that the subsidy was specifically given for the production of olive oil.

57. Regarding the alleged need to undertake a pass-through analysis of the subsidy's benefit, we once again state that in the SCM Agreement there are no grounds for the EC's argument. There is no provision in this Agreement indicating that such an analysis should be made, so we once again request the Panel to reject this claim. Moreover, we do not see why a pass-through analysis of the benefit should have been made when the subsidy is granted for the product investigated.

58. Furthermore, we note that in its reply to question 46, the EC explains its claim that the absence of a reasoned explanation of the existence of subsidization and the failure to carry out a pass-through analysis of the subsidy's benefit constitute violations of Articles 1 and 14 of the SCM Agreement. We see no basis in these articles for its claim.

59. In its reply to question 53, the EC claims that Mexico failed to provide a transparent and adequate explanation of the method used to calculate the amount of the subsidy. This claim has no substance. There is no obligation in Article 14 of the SCM Agreement to explain the calculation of the amount of the subsidy, but rather the benefit conferred. It cannot therefore be claimed that Mexico violated an obligation that does not exist in the SCM Agreement. In addition, paragraphs 126 to 178 of the FR set out the methodology used to determine both the amount of the subsidy and its effect on olive oil prices and the resulting benefit.

60. Likewise, in its reply to question 54, the EC does not explain why it considers that the necessary adjustments to the amount of the subsidy granted were not made. We cannot give any further details in this respect because the EC's argument is not clear. Nevertheless, we repeat the explanations given in paragraphs 137 to 146 of our FWS and in our replies to questions 59 and 61.

2. Mexico correctly defined its domestic industry

61. The EC claims that Mexico did not identify its domestic industry on the basis of positive evidence and thereby violated Article 15.1 of the SCM Agreement.

(a) The Ministry adequately determined that Fortuny was the only domestic producer

62. The EC's reply to question 64 incites two considerations: (a) The EC does not indicate what concrete action should have been taken by the IA during the investigation into the domestic industry; (b) it specifically states that its claim in paragraph 173 of its FWS was made to "illustrate the consequences of the non-existence of the domestic industry, rather than as an attempt to claim an inadequate inquiry into the extent of the domestic industry".

63. However, what paragraph 173 appeared to claim was precisely that there was an inadequate inquiry. What it is now contending its reply to question 64 is that this paragraph is not a claim that the enquiry was inadequate, but rather an illustration of the consequences of the non-existence of the domestic industry. In other words, the EC sets aside its claim regarding an alleged inadequate enquiry into the extent of the domestic industry and instead adopts the position that the domestic industry *did not exist*. There are therefore basically two consequences: (1) there is no reason whatsoever to take into account the claim in paragraph 173 of the EC's FWS inasmuch as the EC itself has set this aside; and (2) because its claim is based on the non-existence of the domestic industry, it is enough to show that the domestic industry did exist in order to invalidate its claim.

64. Despite the foregoing, however, we repeat that paragraphs 212 to 255 of the FR set out the reasons why the IA confirmed that Fortuny did meet the requirements of representativeness and legitimacy in order to request and proceed with the investigation, in accordance with Articles 11.4 and 16 of the SCM Agreement (the issue of the scope of these two Articles will be dealt with below). This section describes the efforts that were made by the authority to determine whether there were other domestic producers.

65. In addition, in paragraphs 27, 28 and 29 of the summary of its first oral statement, the EC claims the following: (a) even though Maprinsa did not produce olive oil, this was not sufficient reason to abandon further enquiries; (b) the Ministry did not investigate the existence of the two domestic producers indicated by Oliverara Tulyehualco; (c) the Ministry decided not to make enquiries into Aceites Navarra, even though it was a bottler, or into Llanos de San Francisco, which might have moved on from the experimental stage; (d) the National Association of Edible Oils and Fats Manufacturers (ANIAME) only reported that Fortuny was registered with it; and (e) in this dispute the Ministry did not present the reply from the Mexican Institute of Industrial Property (IMPI) and did not request information from the authorities of Baja California and Sonora, where olives are grown.

66. In this respect, we repeat what is stated in paragraphs 154 to 209 of Mexico's first written submission and even though the EC has indicated some other possible additional inquiries, these do not suffice to disregard the authority's evaluation of the extent of the domestic industry. The large amount of evidence in the record enables it to be reasonably determined that Fortuny constituted 100 per cent of the domestic industry. In this respect, Mexico considers it important to reiterate that, as provided in paragraphs 97 and 99 of the AB report in the *US – Softwood Lumber VI* (21.5) dispute, the review of the IA's findings should be based on information contained in the record as well as the considerations contained in its resolutions.

67. Each one of the specific claims set forth above was refuted both in Mexico's FWS and in its rebuttal submission, which also reflect the complexity of the inquiries and the proactive and unbiased attitude of the IA. In most cases, these inquiries were indeed carried out (for example Maprinsa and its suppliers, although they did not produce olive oil), while in other cases there were sufficient reasons and evidence in the record to suggest that the inquiries were not necessary (according to official data, Llanos de San Francisco was still at the experimental stage; Aceites Navarra, according to the exporters themselves and according to official data, did not produce olive oil; and the State of Sonora did not produce olive oil). Moreover, attention was drawn to the relevance of the reply by the ANIAME and to the IA's evaluation of the replies given by the different authorities.

68. On this point, we repeat that, in order to obtain further information, requests for information were also sent to non-party companies, as indicated in paragraphs 191 and 193 of Mexico's FWS, and again it was not possible to infer from their replies that there was any other domestic producer.

69. Far from having acted negligently, the IA undertook all possible inquiries. We do not consider that the fact that suppliers of canola oil were not investigated or that requests for information were not sent to a State whose production was non-existent according to official data are sufficient grounds for determining that Mexico acted inconsistently with the SCM Agreement. We repeat, moreover, that the IA did not only have the information collected but also took into account the fact that no other company came forward as a domestic producer.

70. We recall that both the interested parties and non-party entities, local governments and government offices were unable to provide information on a single domestic producer other than the applicant, and therefore, the IA's conclusion was fully justified. All this information cannot be considered as circumstantial or insufficient evidence and we fail to see how it can reasonably be assumed that, despite the foregoing, there must necessarily have been domestic producers other than the applicant. We cannot see what is the EC's basis for assuming this. The EC relies on the unfounded premise that they exist and no proper search was made for them, but it does not indicate what the IA should have done to find them.

71. In addition, assuming, for the sake of argument, that there was another domestic producer, it would not be likely either, in view of all the evidence contained in the record, that its level of production was such that it nullified Fortuny's legitimate status as the entity which acted for or on behalf of the domestic industry or had a decisive impact on the examination of injury caused by the subsidized import.

72. In this connection, attention should first be drawn to what is laid down in Articles 16.1 and 11.4 of the SCM Agreement, which are the rules directly applicable to this case. We know from Article 16.1 of the SCM Agreement that the term "domestic industry" has two meanings: (a) all domestic producers of like products; or (b) domestic producers whose products constitute a major proportion of the domestic production of like products.

73. In other words, there are two ways of meeting the obligation to examine the domestic industry: by examining all producers or by examining a major proportion of them. In this regard, Article 11.4 of the SCM Agreement gives us the guidance for determining whether the domestic

producers requesting the initiation of the investigation can be deemed sufficient to consider that the application is being made "by or on behalf of the domestic industry": when it is supported by domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application.

74. Consequently, if an application is made by a domestic producer constituting more than 50 per cent of the total domestic industry expressing support for or opposition to the application and accounting for at least 25 per cent of the country's total production, this shall be understood to mean that the investigation is being requested by the domestic industry and, as a result, the comprehensive examination to determine the existence of injury may focus solely and exclusively on that producer without this being considered as lacking objectivity. The EC itself, in its reply to question 65, stated that by representing 100 per cent of domestic production, there was in fact no need to examine the concept of "collective output".

75. In addition, we also recall that, according to the data in the article in "*Claridades Agropecuarias*", information also submitted by the EC, Mexico's total annual output of olive oil was around 1,000 tonnes, and according to the correction submitted in our reply to question 18 and the corresponding explanations, Fortuny produced a very similar amount. Assuming for the sake of argument that there were other domestic producers of olive oil, these additional producers' output would not be sufficient to nullify the conclusions reached by the Ministry regarding Fortuny's right to request the initiation of the investigation and the analysis of injury caused by the subsidized imports.

(b) The domestic industry does exist and suffered material injury

76. The EC has stated that if a domestic industry ceases to produce during an investigation, the procedure would conclude without the imposition of measures. For Mexico, the rigid application of such a criterion could mean that even where domestic producers had suffered the maximum degree of injury during the investigation and because of this had ceased to produce, they would be left to their own devices and the domestic industry would end up by disappearing. Imports that are the subject of unfair practices would then have destroyed the domestic producers' market.

77. Contrary to what is stated by the EC, the important point regarding the existence of a domestic industry is not simply to determine whether in fact it is producing or not or if it produced before the investigation was initiated or once it had commenced. The point is to determine, on the basis of various factors, whether the domestic industry exists or not and once it has been determined that it does exist to examine whether the suspension of production is the result of the injury suffered because of imports of products that are the subject of an unfair practice.

78. In our view, in its reply to question 68 the EC bases itself on two premises that are not substantiated in the SCM Agreement: (1) there must exist an industry-production level correlation throughout the period analysed in order to determine the existence of injury; and (2) the analysis should focus solely and exclusively on what occurred during the investigation period in order to calculate the subsidies, in other words, in this particular case, the nine months for which the subsidy margins were calculated.

79. We consider that the first of these premises is based on an erroneous assumption because, as we explained on several occasions, it is possible for industries to exist but not to produce at a particular time owing to various circumstances, (for instance if, for climatic reasons, there is no harvest in a particular year, which is no reason why they should be considered to have disappeared. In this respect, the EC's premise cannot in our view be sustained. Mexico considers that there should be a more detailed analysis of the causes that incited an industry to suspend production, whether the suspension is definitive or whether operations could be resumed under certain circumstances.

80. Regarding the second premise, in our view it is not possible to omit an analysis of historical trends in the industry, including those prior to the period investigated, in order to determine the existence of subsidization, when the relevant information is available, to examine how these changed or were modified during the period investigated, and to analyse the reasons for those changes. It could also be relevant to analyse any important event that occurred during the investigation, subsequent to the period investigated (for example, to determine its causes and examine whether these events are in any way linked to what occurred during the period investigated or their effect on the investigation itself). We do not, therefore, think that an investigation into injury should be limited to the situation prevailing during the period investigated in which subsidization was determined. Examination of injury should go further.

81. We agree with the EC's final indication to the effect that the process cannot be automatic but that the merits of each case should be taken into account. In the investigation into olive oil it was shown that the reason why the domestic industry could not resume operations was the presence of subsidized imports. Consequently, according to the merits of this case, it was considered that, even though there was no output during the period investigated, there was a domestic industry – a determination that was reached after various factors had been analyzed, as stated on several occasions during this dispute.

82. We consider that a domestic producer does not necessarily have to be producing at the time of submitting an application or during the investigation because in trade a producer may possibly have to suspend production of the article in question temporarily without this meaning that it loses its status as a domestic producer. This circumstance has to be analysed on a case-by-case basis.

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

83. The EC would appear to contend, in its reply to question 80, that when production reaches zero this cannot be considered a decline. In our view, the word "decline" implies that a specific indicator has moved downward over a lapse of time. It is not possible validly to contend that if this decrease reaches zero, it should be excluded as a "decline", and the EC does not explain how such a situation could be considered. To accept the EC's interpretation would be tantamount to awarding a premium for unfair imports because the maximum degree of injury has been achieved (inciting the domestic industry to cease production).

84. Furthermore, in our view the EC's arguments are contradictory for the following reasons: (1) it claims that the decline in output to zero is not really a decline; it has also stated that a domestic industry that is not producing simply does not exist; (2) nevertheless, in its reply to question 80 it states that provisional suspension of a domestic industry may be considered as an injury factor; (3) if it claims that decline in output to zero is not properly speaking a decline, then it is not clear to us how such decline could be analyzed as an injury factor; (4) if it claims that a domestic industry that is not producing does not exist, then we do not understand how it could be considered as a factor in the decline in output to zero since, according to what the EC has claimed, this industry does not exist.

85. In our opinion, the decline in output means a decrease over time, and if such decrease reaches zero, this simply means that the injury factor has reached its maximum level. It is indisputable that once it has been determined that a domestic industry exists and that it has scaled down or suspended operations as a result of the unfair practice, this constitutes a highly relevant factor in the injury analysis. Regarding the emphasis that the EC has given to the fact that the domestic industry suspended production one year before making its request, we repeat that the material injury consisted of the obstacle caused by unfair imports, which did not allow domestic producers to resume operations, making it necessary to examine the trend in production. It is thus obvious that the decline in Fortuny's output had to be taken into account in this examination. Furthermore, the EC's statement does not appear to us to be relevant, in that the EC does not take into account various steps that

companies undertake before requesting an investigation and the burden this imposes. Firstly, particularly in the case of small companies, when they are faced with unfair practices they try to expand their sales through other channels (new clients, new channels of distribution, etc.) and only afterwards do they turn to legal channels. Then there is a lapse of time during which the company contacts an office or expert to prepare their application for an investigation, which is not easy. Consequently, the lapse of time between the suspension of operations and the submission of an application for initiation may be as much as one year or even more.

86. In its reply to question 81, the EC indicates that the word "potential" in Article 15.4 of the SCM Agreement does not have great significance, at least as regards investigations that are based on an allegation of material injury. Mexico considers that an investigation into material injury should take into consideration the potential situation of the industry in the immediate future in order to examine whether the unfair practice could persist and continue to cause injury, and to assess the future situation of the domestic industry, as well as to determine what would be the alternative situation if there were no subsidized imports (for example, what might have been the level of domestic output "*if it had not been for*" the imports investigated). We see no grounds for the claim that it would only be relevant to examine the potential situation of the domestic industry in cases of threat of injury and that even then it is questionable. Article 15.4 of the SCM Agreement clearly indicates that there should be an examination of "actual and potential decline" of the factors enumerated therein and makes no distinction as to whether the potential examination only applies to cases of threat of injury.

87. Moreover, Article 15.2 of the SCM Agreement provides that, in order to consider the effect of the subsidized imports on prices, the authority should consider whether there is price undercutting, prices are depressed or price increases prevented. In a situation where price increases are prevented, we do not see how the relevant analysis can be made without potential aspects and the EC has not explained this. Moreover, the injury suffered by a domestic industry at the present time does not produce all its effects immediately. As it is usually a question of trends, these effects can occur in the future and can serve to carry out a proper examination of injury. We do not therefore accept that the word "potential" is of marginal or no importance in Article 15.4 of the SCM Agreement, and in a proper examination, we do not see how injury could be double counted.

88. Likewise, we consider that paragraph 7.77 of the Panel report in the *Mexico – Corn Syrup* dispute does not support the EC's statement. This paragraph merely indicates that in cases of threat of injury it is relevant to include projections <u>in the application</u>, but failure to include them does not suffice to reject the application. The Panel's finding did not refer to the material injury examination but to the application for initiation in which the threat of material injury is claimed. It is therefore important to include projections in the application regarding threat of injury because the injury claimed implies future developments; but this does not mean that potential data should only be considered in the case of applications regarding threat of injury.

89. As already stated, to consider that there is no domestic industry because production has been suspended would be tantamount to giving unfair imports a premium for having inflicted extreme injury on domestic producers, in that under this interpretation it would be impossible for domestic producers to request an investigation. For Mexico, the fact that this industry was unable to resume operations for a year shows the injury it suffered.

90. With regard to the EC's assertions concerning models, we note that any model or estimate is by nature an approximation of something, inasmuch as the results of its application are not real data but information that reflects the "possible reality" to a greater or lesser degree of accuracy. In fact, the exactitude of any model can be verified *a posteriori* once its greater or lesser accuracy in predicting the future has been proven. We do not, therefore, understand how one can advocate the use of models, projections or estimates and then question them.

91. At the same time, it is incongruous for the EC to maintain that there is no information on injury and in the next line to indicate that this is because the Mexican industry had ceased to produce, when what is being claimed is that the Mexican industry's production fell to zero as a result of the practice of exporting subsidized products from Europe. It is also important, as indicated in Mexico's replies concerning the price undercutting under which the imports from the EC entered, that the Panel should bear in mind that this examination was not only made in relation to the costs estimated by Fortuny in its business plan. In fact, the examination also covered the real-historical costs incurred by Formex, Fortuny's predecessor. In any event, the prices of the subsidized imports from the EC were also well below Fortuny's production costs. Furthermore, it is important to bear in mind that there was also an examination of what would occur if the subsidies were eliminated, and the finding was that the Mexican product could have been more competitive in comparison with the imports from the EC.

4. There was proper consideration of any known factors other than the subsidized imports which at the same time could have caused injury to the domestic industry, in accordance with Article 15.5 of the SCM Agreement

92. As mentioned in our FWS, the EC originally claimed that various factors (loss of the distribution network, loss of the Ybarra brand, high costs, etc.) were specific reasons for the injury suffered by the applicant, and that the IA had failed to carry out a ***proper*** analysis of these factors. In contradiction to the foregoing, the EC claims that these factors were ***not*** examined by the IA and that this is inconsistent with the SCM Agreement. In other words, the EC first asserts that the analysis was not proper and then claims that there was no analysis at all.

93. Regarding the alleged absence of analysis, we already stated in our FWS that this statement would be invalidated if it were shown that these factors were in fact analysed. We also explained in our FWS what was involved in that analysis, which in our opinion was proper. We therefore request the Panel to reject this claim by the EC.

94. Regarding the alleged lack of a proper analysis, we reiterate what is stated in our first written submission (paragraphs 273 to 290), namely that these (and other) factors were properly analysed. These paragraphs clearly show what was involved in the aforementioned analysis and the reasons why the Ministry made the determinations contained in the FR.

95. In addition, the EC has provided no evidence that these factors did in fact have any effect on the domestic industry, still less that the evidence sufficed for this purpose. As we have already stated, simple assertions cannot constitute a prima facie presumption of violation on Mexico's part.

96. We repeat that the IA did not only properly analyse the factors indicated by the EC but, in addition, also examined all those aspects which it considered might affect the situation of the domestic industry, therefore, the EC's argument is without substance.