ANNEX D

ORAL STATEMENTS, FIRST AND SECOND PANEL MEETINGS

Contents		Page
Annex D-1	Executive Summary of the Oral Statement of the European Communities – First Meeting	D-2
Annex D-2	Executive Summary of the Oral Statement of Mexico – First Meeting	D-8
Annex D-3	Executive Summary of the Oral Statement of the European Communities – Second Meeting	D-14
Annex D-4	Executive Summary of the Closing Statement of the European Communities – Second Meeting	D-20
Annex D-5	Oral Statement of Mexico – Second Meeting	D-22

ANNEX D-1

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE EUROPEAN COMMUNITIES - FIRST MEETING

(26 June 2007)

1. Mexico does not dispute that, under Article 13.1 of the *SCM Agreement*, before the initiation of the investigation the EC had to be invited to consultations and that an invitation was not made until 4 July 2003. However, the parties disagree over the date of the 'initiation' of the investigation: the EC says it was 2 July 2003, when the Minister signed the initiation measure, while for Mexico it was the date of publication of the measure on 16 July 2003. Mexico reaches this conclusion on the basis of an analysis of Mexican law regarding the entry into force of the instrument. The EC's contention is that the legal system in which the analysis has to be carried out is not that of Mexico but of the WTO. Footnote 37 to the *SCM Agreement* defines the word 'initiated' a "procedural action by which a Member formally commences an investigation".

2. The signing by the Minister is a 'procedural action'. In contrast, the publication of the instrument in the *Diario Oficial* may be procedural, but it cannot be considered as the first procedural action in the Mexican investigation procedure.

3. Mexico cannot deny that the signing of the Resolution is a "formal" act, and, in relation to the word 'commence', there can be no doubt that that action taken by the Minister is focused on commencing the investigation: paragraph 122 of the initiation Resolution affirms that "the Ministry accepts the request from Fortuny […] and declares the initiation of an investigation".

4. Moreover, the EC's position is sustained by the objectives of that provision. Mexico's haste in commencing the investigation did not provide a real and adequate opportunity for prior consultations with the EC. The consultations were not able to clarify the situation and to allow Mexico and the EC to arrive at a mutually agreed solution, which are the objectives of the consultations under Article 13.1 of the *SCM Agreement*, as, in a similar situation although under the *Safeguards Agreement*, the Appellate Body explained in *US – Line Pipe.*

5. The second of the EC's claims is that the Mexican investigation was not commenced following an application made by or on behalf of the domestic industry.

6. Mexico claims that the EC's interpretation of Article 16.1 of the *SCM Agreement* would mean that claims of injury in the form of material retardation of the establishment of a domestic industry would never be possible. Such a claim is not correct. While an entity with no domestic production would not be eligible for consideration as a domestic industry, a firm that was producing but which was having difficulties in developing because of dumped or subsidized imports would have the possibility of exploiting this option.

7. Mexico quotes from the panel report in *Mexico – Corn Syrup* in support of its argument that a firm that has ceased production may yet qualify as a domestic industry. However, the extract does not

have the meaning given by Mexico, since it merely emphasizes the three different forms that injury can take, and the significance that these forms have for the conduct of the investigation.

8. Mexico seeks to evade the terms of the *SCM Agreement* by arguing that Fortuny had the means to produce olive oil even though there was no production during the investigation period. However, the *Agreement* repeatedly emphasises the significance of production. This has also been underlined by Norway it its third-party submission, which makes reference to the Appellate Body report in *US-Lamb*.

9. Mexico invokes those cases where panels have considered the level of evidence that is necessary to commence an investigation. However, these cases concerned the issues of dumping (*Guatemala – Cement II*, *Argentina – Poultry*) and injury (*Mexico – Corn Syrup*), which are ones that are also examined in depth during the course of the investigation. On the contrary, the question whether the application has been made by or on behalf of the domestic industry will not be further examined during the course of the investigation. Consequently, the examination of this issue carried out prior to initiation must be a thorough one. It is this standard that the Mexican authorities have failed to meet.

10. To justify that Mexican industry consisted solely of Fortuny, Mexico refers to an article in the journal *Claridades Agropecuarias*. Although this article was referred to in the Preliminary and Final Resolutions, there is no record of its use in the Initiation Resolution and it should therefore not be permitted as a justification of that Resolution. Secondly, this article appeared in June 2001, and it mentioned that one other firm, Llanos de San Francisco, was in an experimental phase of production. Thirdly, contrary to what Mexico claims, from the article in *Claridades* it cannot be deduced that Ybarra was the only company producing olive oil in Mexico: the article only declares that Ybarra was the main olive oil producer in Mexico at that time. Finally, the article in *Claridades* refers to olive oil production figures in Mexico that are much higher (1 000 tons in 2000) than Fortuny's production (between 254 and 310 tons in 2001-02).

11. The sole items of supporting evidence that were cited by the Ministry in the Initiation Resolution were some letters from the Agriculture Department of the state of Baja California. However, they seem to refer only to the installed and productive capacity of Fortuny. In any event, the statement was made by an authority of the state of Baja California, whereas Mexico admits that there is also substantial olive production in the state of Sonora.

12. Finally, Mexico justifies the decision of the Minister regarding Fortuny's status as the sole Mexican producer by saying that this was confirmed by the investigation. However, a later finding of this kind is irrelevant to the question whether the original decision to initiate was justified as regards the standing of Fortuny.

13. The third of the claims made by the EC concerned Article 13(b)(i) of the *Agreement on Agriculture*. Mexico refers to the fact that the rule expired at the end of 2003. However, the EC considers that it applied to all proceedings initiated before that date, and the fact that it was within only a few months of expiry at the time of the olive oil investigation was commenced was not a reason for disregarding it.

14. Moreover, Mexico argues that, although the complaint invoked the notion of material retardation, the investigation focused on that of material injury (which was not prohibited under Article 13(b)(i)). However, such an approach cannot be reconciled with the terms of the *Agreement on Agriculture*, under which Mexico should have rejected a complaint based on material retardation.

15. Mexico argues that the 'due restraint' requirement of Article 13(b)(i) was no more than an obligation to respect a reasonable minimum standard. However, this presentation of that provision adds nothing to the original, provided that what is reasonable is recognised to be an objective matter

and not one to be decided by each WTO Member for itself. If Mexico is arguing that the standard is the same for agricultural and non-agricultural products, such a reading would deprive Article 13(b)(i) of utility, and clash with a principle of interpretation (*effet utile*) that has been repeatedly confirmed by WTO jurisprudence. The EC has noted the Ministry's haste in commencing the investigation: its failure to consult the EC in due time and in good faith, its inadequate consideration of the extent of the domestic industry, and its treatment of the alleged form of injury. These are defects that could have been cured by taking more time and/or giving a more thorough examination to the complaint. They necessarily reflect a failure on the part of the Ministry to exercise 'due restraint'.

16. In relation to Article 12.4.1 of the SCM Agreement and the obligation to provide non-confidential summaries of confidential information supplied to the investigating authorities, Mexico argues that an access to the confidential file under a protective order was possible and was used. But this line of defence has already been rejected by the report of the panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, confirmed by the report of the panel in *Mexico – Steel Pipes and Tubes.*

17. Mexico also claims that the requirement to provide non-confidential summaries was satisfied by the provision of versions of parties' submissions, with the confidential material blanked-out. But a document with confidential material deleted is patently not a *summary* of the confidential material that it contained. This was the conclusion of the panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*.

18. On the disclosure obligation in Article 12.8 of the *SCM Agreement*, Mexico contends that it satisfied this disclosure obligation by issuing its Preliminary Resolution. However, the Ministry should have informed the interested parties that the Resolution had this purpose. Moreover, following the adoption of the Preliminary Resolution of 18 May 2004, the Ministry engaged in a considerable amount of fact finding. In some, if not all, of these steps the Ministry was explicitly obtaining factual information from the interested parties.

19. Mexico seeks to defend itself against the accusation that the Ministry exceeded the 18-month time limit set by Article 11.11 of the SCM Agreement by invoking the complexity of the investigation and the need to treat the parties fairly. Article 11.11 provides that 'in special circumstances' investigations may exceed the one year limit, but this exception is explicitly limited by the rule that 'in no case' may they last more than 18 months. Assuming, *quod non*, Mexico's arguments that the delay was due to requests by interested parties for more time to respond to the Ministry's enquiries, Mexico's defence is irrelevant. The drafters specified an absolute limit to the length of investigations and Mexico had no option but to respect that limit.

20. Concerning the existence of subsidization and calculation of a 'benefit', the EC has explained the notion of 'subsidized import', which is not defined in the *SCM Agreement*. Mexico purports to find confusion as to whether the 'offsetting' is directed at the subsidies or at the benefits of the subsidies. Given that the rules clearly identify the benefit afforded by the subsidy as setting the maximum level of countervailing duties, the EC does not find this a meaningful distinction. The offsetting is directed at the subsidies, and its level is determined by calculating the benefit received under the subsidy.

21. Mexico claims that its measures on olive oil were targeted at the injury rather than the subsidy. However, the errors that the Ministry made in calculating the amount of the subsidy cannot be disregarded simply because it then decided to set duties at lower levels, based on an injury criterion.

22. A major element of the EC's criticism of the Ministry's determination concerns the argument that the benefit of the subsidy was not 'passed-through' from the firms that had received it to affect the products imported into Mexico. Mexico has entirely ignored the EC's arguments.

23. Another of the matters to which the EC took objection in the Ministry's finding of subsidization was its failure to take account of the fact that some of the olive oil exported from the EC to Mexico was actually made from olives bought from outside the EC, which had not been part of any aid scheme. Mexico's attitude has been that, because the companies could not prove what proportion had come from this source, no adjustment could be made.

24. The *Agreement* does not explicitly address the situation where information necessary for the completion of the investigation is not in the hands of an interested party or Member. Mexico's attitude appears to be that the investigating authority may demand such information from the party whose interest it is likely to serve, and if the party cannot provide it, to assume that such information is completely unfavourable to that party. Such an attitude misunderstands the proper allocation of the burden of obtaining evidence necessary for a countervailing duty investigation. The Appellate Body explained in *US - Wheat Gluten* that the word 'investigation' suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study must actively seek out pertinent information. Thus, the responsibility to obtain information lies on the investigating authority. If the information is held by interested Members or parties the authority can demand it from them. But, where the information lies elsewhere, the authority may not, as Mexico sought to do, escape its own responsibility by giving an interested party the task of obtaining it, or of suggesting how the problem might be overcome.

25. The same issue arose in respect of the information regarding costs incurred in relation to the olive oil after production of the oil. Again, there is a responsibility on an investigating authority to obtain the information necessary for its findings, and the Ministry did not properly discharge it.

26. Moreover, even assuming, *quod non*, that the subsidy passed through from the olive growers to the producers of olive oil, the Mexican authorities failed to adequately explain the methodology used to establish the countervailing duties and in particular to justify the use of the ex-work export price as basis for the calculation. Mexico calculated for each company an ad valorem subsidy margin in the provisional resolution and a specific duty in the definitive resolution, but apparently using the same methodology. The ex-work export price is an unsuitable basis for the calculation of a subsidy margin in the case of a production subsidy, which benefits the total production and not only exports.

27. As regards the accusation that the Ministry failed to make an adequate investigation of the extent of the domestic industry, Mexico reveals that a sample of Maprinsa's production was found to consist of rapeseed oil (canola). However, given that Maprinsa claimed to have used domestically sourced oil, and provided the names of several traders from whom it had acquired it, the fact that a sample of Maprinsa's output was found not to contain olive oil hardly seems a reason for abandoning further enquiries. A further indication of the inadequacies of the Ministry's investigations is also provided in the response by one of those bottlers, Olivarera Tulyehualco, SA de CV, which refers to two national producers of olive oil located in Baja California. The Ministry did nothing to investigate their existence or extent.

28. Similar indications of inadequacy are found in relation to Aceites Navarra. Because the exporters had identified this firm as one that only bottled olive oil, the Ministry chose not to make further enquiries of it. However, the crucial issue was whether there were Mexican producers of olive oil, a point on which this firm could have provided direct evidence. There is also no indication that the Ministry sought information from Olivos de California, a company indicated by Maprinsa as a producer of olive oil. The firm Llanos de San Francisco was also dismissed by the Ministry because, according to the article in *Claridades Agropecuarias*, it was only in an experimental stage. However, the article was published in June 2001, and presumably relied on information gathered before that date. Moreover, Llanos was operating at a sophisticated level, and it might well have been expected in the intervening period to have moved to actual production. The inadequacy of the Ministry's

investigations is also reflected on the fact that firms merely bottling olive oil were not always clearly asked to identify domestic sources of oil.

29. The Ministry contacted the national association of oil and edible fat industries, ANIAME. However, the association did not provide information on national olive oil producers, but merely reported that Fortuny was the only such producer that was *registered* with it.

30. Among the official bodies that the Ministry contacted as part of its investigation was the Mexican Institute of Industrial Property. Mexico has provided the letter that the Ministry wrote to the Institute, but not the response. Finally, the Ministry never wrote to the authorities of the States of Baja California and Sonora, which are regions where the Final Resolution declares that olive tree cultivation plays a very important economic and social role.

31. The indicia of injury listed in Article 15.4 cannot be applied in the situation of Fortuny because it was not a producer during the investigation period. To circumvent this problem Mexico invents a new index of injury: the state of being unable to restart operations. There is no such index of injury in the *Agreement*, a fact which is directly linked to the definition of industry.

32. The third of the 'substantive' claims that the EC makes against Mexico concerns the determination of injury. The Ministry failed to establish injury in accordance with the criteria listed in Article 15.4 of the *SCM Agreement*. First of all, the notion of prevention of restarting operations, that Mexico identifies as the injury suffered by its domestic industry, is not one recognized by the *Agreement*. It is not enough for Mexico merely to describe it as a form of material injury; it must be able to explain how that description is supported in the factors listed in Article 15.4. The fundamental problem that Mexico faces is that there was no production, and if there was no production there can have been no industry, and without an industry there can have been no material injury.

33. On the analysis of prices required by Articles 15.1 and 15.2, and despite the fact that in its chosen investigation period there were no sales by Fortuny, the Ministry claims to have made comparisons based on 'actual prices'. But the Final Resolution gave only undercutting margins for the previous two years. However, the absence of price data for 2002 did not entitle the Ministry to use a spurious indicator of price based on Fortuny's costs. Any price resulting from such an exercise is entirely artificial, and provides no indicator that can plausibly be used when applying Article 15.

34. Moreover, the usefulness of the price comparisons carried out under Article 15.1 and 15.2 is put in doubt by the bizarre pricing policy pursued by Fortuny. 2001 was a time when olive oil prices were falling everywhere. Thus, the fall in prices of exports to Mexico was merely part of an international trend. However, Fortuny's reaction to this development was actually to increase its prices by 34 per cent. In addition, Fortuny's price information prior to the end of 2001 is all derived from sales made by Fortuny's "predecessor", Formex Ybarra, to a company, Distribuidora Ybarra, to which it was related. As such it cannot be regarded as a reliable basis on which to make comparisons with the prices of imported olive oil.

35. The Ministry's examination of various indices of injury listed in Article 15.4 is constantly undermined by its decision to use data from periods of nine months in successive years. Mexico tries to justify the use of a nine-month investigation period by indicating that no distortion of information resulted from using such a period. However, apart from the fact that this period was suggested by the complainant, no explanation was provided for excluding data from several months of the year and, at times, the Ministry felt compelled to support its conclusions by reference to figures from the complete year.

36. Mexico says that the absence of an explicit provision in the *Agreement* means that a Member is under no obligation regarding the choice of the length of the investigation period. However, as confirmed by the Appellate Body in *US – Hot-Rolled Steel,* the criterion of an 'objective examination'

stated in Article 15.1 governs all aspects of the injury determination. In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body applied this principle to the selection of the investigation period, found that the use of six-month periods did not provide an accurate and unbiased picture of what was being examined. The recent panel report in *Mexico – Steel Pipes and Tubes* reinforces this conclusion: the panel said that "absent any proper justification for doing so, such an examination on the basis of an incomplete set of data proposed by an applicant cannot, in principle, be an objective examination of positive evidence".

37. In its First Written Submission the EC identified a <u>series of causation factors, known to the Mexican authorities</u>, which had not been investigated or had not been investigated adequately. Mexico has stressed that the prices charged for imported EC oil were below even the cost of production of Fortuny. However, it simply attributed this to the effects of subsidization on the prices of EC exports.

38. In the light of Mexico's First Written Submission it is easier to understand the reasons for Fortuny's high costs. The article in *Claridades Agropecuarias* explains that the greater part of the olive harvest in Mexico is used in the production of table olives. Consequently, olive growers in Mexico have a real choice of purchasers, and firms, such as Fortuny, which are considering olive oil production, have an objective criterion for costing their basic raw material. Moreover, because the olives are of varieties that are suitable for both uses, they are not specialized for oil production and their yield of oil (16 per cent) is relatively low. These considerations affecting cost remained unexplored in the Ministry's investigation. Furthermore, it is not only the production costs that were not addressed by the authorities, but also the impact of the high operating costs of Fortuny and Ybarra was not taken into account.

39. The issue of cost also seems to be an element in other aspect of causation. Alongside the dramatic fall in its sales, the main feature in Fortuny's history in the period examined by the Ministry is the break-up of its arrangements with Distribuidora Ybarra. This separation meant the loss not only of the distribution network and the relations with retailers, but also of the Ybarra trademark. As regards the trademark, the Ministry seems to have given very cursory attention to what seems to have been a crucial factor. Thus, the Ministry made no reference to a significant study of the marketing of olive oil in Mexico by the International Olive Oil Council in 2001, which shows that the trademark "Ybarra" has an extraordinary high rate of recognition in Mexico.

40. Mexico points out that Distribuidora Ybarra ceased to buy from Fortuny because olive oil imported from the EC was cheaper. However, the Ministry's investigations did not reveal how the prices of oil from Fortuny's "predecessor", Formex Ybarra, compared with those of oil imported from the EC. It seems to have been presumed by the Ministry that the price advantage of the imports was a recent development that just happened to coincide with the splitting-off of Fortuny. However, the only new fact that was clearly established was the separation of Fortuny from its sole customer, Distribuidora Ybarra. It is entirely possible that this development caused Distribuidora Ybarra to look more closely at its costs, and to take a more hard-headed decision on its purchases. Moreover, Fortuny chose the very moment, when it was losing its distributor and the valuable trademark, to increase its prices by 34 per cent.

ANNEX D-2

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF MEXICO – FIRST MEETING

(26 June 2007)

1. As explained in Mexico's first written submission, the anti-subsidy investigation began on the day following publication of the initiation resolution in the Official Journal of 16 July 2003 and not on 2 July as indicated by the EC. Therefore, in sending the EC the invitation to hold consultations on 4 July (as the EC itself acknowledges), Mexico acted in conformity with the text of Article 13.1 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). Thus, we consider the EC's claim to be without foundation.

2. With regard to Mexico's alleged violations of Articles 11.4 and 16.1 of the SCM Agreement, relating to the recognition of Fortuny as a domestic producer and the examination of the degree of support from the domestic industry, we repeat that the Ministry treated Fortuny as a domestic producer in a manner consistent with the SCM Agreement, since, in Mexico's opinion, there was no valid reason to believe that there was no domestic producer simply because Fortuny had temporarily suspended operations (a suspension which, moreover, was linked with unfair imports), while having sufficient production facilities to resume them, particularly as there were no factual or legal elements to suggest that it had disappeared as a legally recognized entity. We recall that, in accordance with *Mexico – Corn Syrup*, the articles of an Agreement should be interpreted reasonably and not necessarily literally.

3. We consider that the investigating authority (IA) is under no obligation to restrict itself to the terms of the application. Thus, the fact that Fortuny requested initiation for material retardation does not signify a violation of the SCM Agreement, since that Agreement does not impose any obligation in this respect. In this connection, we refer to the argument set out in Mexico's first written submission to the effect that when a WTO Agreement is silent on a particular point, there is a reason for it; otherwise the negotiators would have expressly mentioned it in the Agreement. Mexico decided to initiate on the basis of objective evidence of injury in the general sense as defined in footnote 45 to the SCM Agreement. Then, during the investigation, the IA determined that the type of injury suffered by the domestic industry was material injury. In fact, the European exporters themselves agreed with the IA in pointing out that the situation of the domestic industry corresponded more closely to material injury than to material retardation, since it was not a question of a new industry.

4. With regard to the question of whether Fortuny represented the domestic industry and the examination of the degree of support, it should again be pointed out that the Ministry had sufficient data to conclude that Fortuny accounted for 100 per cent of the domestic production of goods identical or similar to those investigated. Fortuny provided information concerning its status as a producer and the domestic industry as a whole (data on production, installed capacity, employment, etc.). The fact that it was producing 100 per cent of domestic output was corroborated by various documents, such as a specialized publication issued by the Mexican Federal Government's Ministry of Agriculture, Livestock, Rural Development, Fisheries and Food, which is accepted as an authoritative agricultural source, and by a statement from the Ministry of Agricultural Promotion of the Government of the State of Baja California confirming that the applicant had installed production capacity.

5. Thus, having determined that Fortuny was a domestic producer and having evidence that the enterprise accounted for 100 per cent of olive oil production in Mexico, the Ministry correctly concluded that Fortuny constituted the entire domestic industry, so that it was representative and the degree of support necessary to initiate a subsidy investigation was present.

6. Contrary to what the EC maintains, the Mexican IA fulfilled its obligations under Article 13(b)(i) of the Agreement on Agriculture. On the one hand, the due restraint mentioned in that Article applied to the stage prior to the initiation of an investigation, so that the EC's claim is unfounded. On the other hand, in accordance with Article 1(f) of the Agreement on Agriculture, the due restraint clause expired on 31 December 2003, so that as the rule was no longer in force when the measures were imposed there was no possibility of its being violated.

7. This having been made clear, we consider that in initiating the investigation the Ministry acted in a manner consistent with Article 13(b)(i). Due restraint does not constitute a different standard of initiation for agricultural products but an appropriate and reasonable standard, such as that applied by the IA. Moreover, the Ministry requested additional information from the applicant (by issuing a *prevención*) before initiating the investigation, in an attempt to obtain more data.

8. Furthermore, we consider that initiating an investigation promptly and efficiently can hardly be a violation of Article 13(b)(i), and even if it were, we should point out that 4 months elapsed between the application for initiation and the publication of the commencement of the investigation, a period which, to a considerable extent, was taken up by the above-mentioned efforts to obtain additional information (*prevención*). Thus, we cannot see any evidence of the unusual hurry claimed by the EC.

9. In relation to the imposition of definitive measures under the Agreement on Agriculture, we recall that the countervailing measures were imposed on the basis of the existence of material injury and not retardation, so that we fail to see the relevance of the EC's allegations in this respect.

10. We also disagree that the EC's assertions concerning the alleged violations of Article 12 of the SCM Agreement constitute a prima facie presumption of a violation on Mexico's part. In accordance with the findings 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 confidential information, while at the same time protecting the interests of the parties providing it. In the olive oil investigation, the parties were aware of this information and were therefore able to defend their interests properly. Mexican law <u>allows</u> the legal representatives of the interested parties <u>access to all the confidential information</u>. That alone is sufficient to achieve the above-mentioned objective, as the panel found in the case *Mexico – Steel Pipes and Tubes*, recently circulated to Members. Furthermore, there is evidence that the legal representatives of the exporters did in fact consult the confidential version of the administrative file, so that there is no basis for any claim in this respect.

11. Moreover, the interested parties <u>did provide non-confidential summaries of the confidential information they submitted</u>, so that the EC's claim that there were no such summaries is equally devoid of substance.

12. With regard to the EC's claim concerning Article 12.8 of the SCM Agreement, according to the panel's findings in *Argentina – Ceramic Tiles*, there being no guidance with respect to how an authority should comply with the obligation to make known the essential facts, this can be done in a number of ways. The Mexican IA disclosed the essential facts by presenting them to the interested parties in the Preliminary Resolution, which is consistent with the above-mentioned case-law. Thus, there is no basis for the EC's claim in this respect.

13. The EC argues that the duration of the investigation was incompatible with Article 11.11 of the SCM Agreement. It also endeavours to excuse the lack of cooperation on its own part and on the part of its exporters with unfounded assertions.

14. With regard to the duration of the investigation, it should be pointed out that the amount of information involved placed a heavy burden on the interested parties, so that they all requested numerous extensions during the proceedings. Almost all these requests were granted by the authority with a view to gathering as much information as possible and enabling the parties to defend themselves. Moreover, as a result of the information obtained at the public hearing, the authority had to request further details from the parties. Likewise, the exporters requested the IA to carry out an on-the-spot investigation at Fortuny, which it did on 19 January 2005. All this led to delays in the proceedings. Thus, the IA was not inactive, partial or negligent, quite the opposite. Given the complexity of the case, there was nothing for it but to extend the time allowed in order to establish a sound basis for a proper determination.

15. The EC admits not having provided the information requested by the Ministry and, moreover, maintains that it was not a valid request. There is no justification for this, since in no circumstances could it have been considered exempt from providing the information requested of it. We disagree with the EC when it says that "the only means of insisting on the importance of the rules of the SCM Agreement" was to refrain from providing information. The same applies to its claim that to provide this information would have been tantamount to "condoning" the actions of the Ministry. To accept the claims of the EC would be equivalent to ceding control over the investigation to the parties, which is unacceptable, since it would do significant harm to the multilateral system. Moreover, Article 12.7 of the SCM Agreement does not mention any exceptions to the obligation upon the parties to provide information requested; therefore recourse was had to the "facts available", in accordance with that Agreement.

16. Mexico gave an adequate and reasoned explanation of the existence of subsidization, its calculation of the benefit conferred on the olive oil exporters and the method applied in each particular case, in conformity with the SCM Agreement.

17. With regard to subsidization in general, we consider that the EC's argument has no basis in the SCM Agreement, since that Agreement does not require the pass-through analysis claimed. In this connection, as we have already pointed out, we consider that when a WTO Agreement is silent, there is a reason for it. In addition, the subsidy programme has been notified to the Committee on Agriculture as a subsidy-granting mechanism, and the EC has not maintained that that programme does not exist or was not in effect during the investigation period. Thus, there can be no question that the subsidy existed, was in effect and was being applied.

18. In this context, Regulation 136/66/EEC clearly indicates that the subsidy is intended to promote the production of olive oil, so that the IA assumed that the subsidy is actually granted for olive oil production. Thus, it had no reason to carry out a pass-through analysis.

19. With respect to the calculation of subsidy margins, we stress that even though the IA offered the parties the opportunity to propose methodologies and present documentary evidence, the exporters declined to provide the information necessary to enable the Ministry to make the adjustments that they themselves had requested, so that their request was denied. Nevertheless, even though the exporters failed to submit information or methodologies, the Ministry decided to calculate an adjustment factor that reflected the percentage of subsidized olive oil in the production cost structure for the oil, using the facts available.

20. On the other hand, with regard to the comparison of the amount of the subsidy with the exporters' ex-factory sales prices, it is important to point out that the Ministry established unit subsidy

margins (dollars/kg) and that when margins of this type are calculated the use of ex-factory or c.i.f. export prices does not affect the result.

21. Regarding the dilemma allegedly faced by the exporters in providing information requested by the IA, and the claim that they did not provide it because the time-limit for concluding the investigation had expired, we repeat that we cannot see why this should constitute a valid reason for not cooperating.

22. Concerning the determination that Fortuny was the only domestic producer, we consider it important to point out that, as established in the Appellate Body report in *United States – Softwood Lumber VI (21.5)*, the examination of the conclusions of the IA should be based on the information contained in the record as well as on the considerations contained in its resolutions. Thus, we consider it important that the analysis of these aspects should focus on the evidence contained in the record and that the question of whether the IA could reasonably have arrived at the conclusions it notified should be decided on that basis. As the EC has not established a prima facie presumption of violation on the part of Mexico, we request that its allegation be rejected. Moreover, the Ministry's actions and the evidence in its possession show that Fortuny was the only domestic producer.

23. In the final resolution it is clearly explained why it was confirmed that Fortuny complied with the requirements of representativeness and legitimacy to apply for an investigation. The resolution also mentions the efforts made by the authority to investigate the existence of other domestic producers.

24. Moreover, it is wrong to assert that the Ministry dismissed artisan production because it was not distributed through the same channels as imports. The Ministry did not dismiss artisan production. What happened is that it could not establish the existence of producers other than Fortuny, whether artisanal or not. It reached this conclusion after evaluating the replies to the requests for information that the IA sent to various entities, requesting them to identify any domestic producer of olive oil. The search was never restricted to manufacturers whose output was marketed through the same channels as the imported product. Everything possible was done to gather data but, nevertheless, the search was unsuccessful.

25. The EC submitted data from the Food and Agriculture Organization of the United Nations according to which Mexican production barely amounted to 200 tonnes, a figure consistent with Fortuny's production. Moreover, the world market information provided by the exporters' associations ASOLIVA and ASSITOL does not mention Mexico as an olive oil producing country. All this also indirectly confirmed that the applicant was Mexico's only producer.

26. Thus, the Ministry obtained information from the interested parties, government agencies and numerous entities not party to the investigation, and from all these data it was unable to deduce the existence of other domestic producers. All the evidence led it to believe that the domestic industry consisted of Fortuny. Consequently, the IA based its conclusions on an objective examination of the available facts, acting in a manner consistent with Article 15 of the SCM Agreement. The IA did not concentrate on determining what happened to Fortuny prior to the investigation period. The material injury consisted in the fact that the subsidized imports prevented it from resuming its operations.

27. Finally, concerning the relevance of the production element for determining whether or not a producer exists, we refer to the considerations set out in our first written submission, where the reasons why Fortuny was in fact a domestic producer are explained.

28. At the same time, with respect to the determination concerning the existence of injury, we note that the discussion falls under three heads: (a) the nature and existence of the alleged injury; (b) the examination of volumes and prices; and (c) the determination of material injury.

29. With regard to the nature and existence of the alleged injury, we first of all refer to our previous argument to the effect that the investigation began with the definition of injury in the general sense as set out in footnote 45 to the SCM Agreement, which in our opinion is perfectly valid.

30. We repeat that, with respect to both the provisional and the definitive measure, the IA made its determinations on the basis of an analysis of material injury, because it was not a question of a new industry but of one that had already existed for several decades and had suspended its activities, and then found itself unable to resume them because of the subsidized imports. As already noted, the exporters themselves argued that the situation of the domestic industry corresponded more closely to material injury than to retardation.

31. It would appear that in suggesting that the injury occurred before the investigation period the EC is assuming that the injury caused to the domestic industry was the suspension of Fortuny's activities, which, we stress, is incorrect. The Ministry determined that the injury consisted in the prevention of the resumption of operations by the domestic industry. The suspension of production was something that happened in the period examined for effects of injury, and was relevant to the material injury analysis; however, contrary to what the EC says, this does not mean that the IA had determined the existence of material retardation. In fact, the Ministry never issued a simultaneous determination of material injury and retardation.

32. With regard to the examination of volumes and prices, we consider it important to point out that the EC does not make any claim as such concerning import volumes and therefore does not offer a prima facie presumption of violation.

33. Concerning the examination of prices, the Mexican IA found that the prices of the subsidized product decreased during the first two years of the period examined for effects of injury, only to increase once Fortuny had suspended its production activity. An objective examination, based on positive evidence, of the effect of the subsidized imports on prices was carried out and it was found that the prices of those imports were even lower than domestic production costs, all this on the basis of relevant information. The subsidy largely explains the differential with respect to the real domestic costs and prices recorded during the examination period.

34. In addition, the IA obtained information from the real prices reported by Fortuny, which were confirmed by data provided by Distribuidora Ybarra, Fortuny's main customer. Distribuidora Ybarra stated that it had stopped buying from the domestic producer for price reasons, thus confirming the evidence on price undercutting.

35. As regards the determination of material injury, the IA's examination by which it determined its existence covered three years, which included the period investigated for the effects of the subsidy. The analysis of the trends and behaviour of the relevant factors was based on monthly and annual data in order to establish the situation more precisely and, in accordance with Article 15.4 of the SCM Agreement, the actual and potential effects of the imports on domestic production were also examined.

36. The trends in domestic production must be assessed comprehensively and not merely by comparing one year with another. Thus, we note that there was a steady decline in the applicant's production indicators, which confirmed that the subsidized imports from the EC had adversely affected the situation of the domestic industry to the extent of forcing it to interrupt its operations and preventing it from resuming them.

37. With respect to the use of nine months of successive years in the examination of injury, the EC has failed to offer a prima facie presumption of violation on the part of Mexico, confining itself to asserting that this undermined the objectiveness of the examination of injury. In this connection, the SCM Agreement does not lay down any guidelines concerning the time interval that should be

considered in carrying out the analysis, and we therefore consider that there cannot have been any violation of the SCM Agreement.

38. It should be made clear that it is incorrect that the IA only analyzed the information for 9 months of each year. The Ministry evaluated the data on trends at a monthly or annual level, from January 2000 to November 2003 and even beyond. In our opinion, this in no way affected the objectivity of the injury analysis.

39. With respect to the analysis of non-attribution of injury, it is sufficient to glance at the final resolution to confirm that reasons of a quantitative and qualitative nature were considered in order to determine that other factors were not causing the injury suffered by the domestic industry, so that the EC's arguments do not constitute a prima facie presumption of violation on Mexico's part.

40. At the same time, the importer Distribuidora Ybarra provided the Ministry with material to enable it to determine whether any of the factors mentioned by the EC were a cause of injury to the domestic producer. Specifically, it indicated that it had stopped buying Fortuny's product for price reasons. Thus, the problem was not the alleged loss of a distribution network or difficulties relating to the supply or quality of the product, but the low prices of European oil.

41. With regard to the loss of the Spanish brand Ybarra, both the importers and the exporters submitted a "*marketing study*" as proof of their claim. After examining it, the Ministry determined that it was not sufficient to show that the loss of the trademark was a cause of injury, since it only reflected the level of identification of the mark by the consuming public and not whether or not they preferred it to other brands. Moreover, preference for the Ybarra brand would also have affected the market share of the other European brands, which was not the case. Consequently, the Ministry rejected the claim of these interested parties.

42. With respect to the consumer's alleged mistrust of the Fortuny product, considering that the reason given by Distribuidora Ybarra for stopping buying Fortuny oil concerned price and not consumer preference, it was clear that this was not a cause of injury for the applicant either. As for Fortuny's allegedly high costs, the Ministry not only analyzed them but also considered several additional factors. The final resolution describes how the production costs were taken into account in order to determine whether the resumption of operations was economically feasible. The conclusion reached at the end of the feasibility study was that the subsidized imports from the EC were being sold to Mexico at low prices and it was that which was preventing Fortuny from resuming operations, which is consistent with the above-mentioned information from Distribuidora Ybarra.

43. Thus, the IA not only analyzed the factors mentioned by the EC, but also examined all the aspects that it considered might affect the state of the domestic industry, so that the EC's argument has no validity.

ANNEX D-3

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE EUROPEAN COMMUNITIES – SECOND MEETING

(13 October 2007)

1. The EC will concentrate its Second Oral Statement to respond to the evasive defence presented by Mexico in its Second Written Submission.

2. In relation to the claim concerning Article 13.1 of the *SCM Agreement*, contrary to Mexico's suggestion, the EC does not imply that the *Agreement* should be interpreted in a way that would allow an exporting Member to block an investigation by refusing to participate in consultations. The reference to expeditiousness in Article 13.3 makes any such interpretation impossible. In any case, the EC did not refuse to participate in pre-initiation consultations on olive oil. On the contrary, it accepted quite swiftly, only three days after having received the invitation from Economía.

3. As regards the date of initiation of the investigation, Mexico accuses the EC of basing its arguments on mere assertion. However, in footnote 37, the *SCM Agreement* provides a definition of the term 'initiated', and its First Oral Statement the EC has given a detailed explanation of why the action in the Mexican procedures that most closely matches that definition is the Minister's signature.

4. Finally, Mexico argues that according to the EC's interpretation an investigation would be initiated as soon as the investigation authority carries out any activity. However, the relationship between any ancillary administrative action concerning the complaint and the initiation of the investigation is not an issue that is relevant to the present dispute. In our case, the initiation was decided by the Minister, who is the highest post in Economía, when he signed it on 2 July 2003.

5. The EC's second claim is that Economía failed to determine that the application by Fortuny was made "by or on behalf of the domestic industry", contrary to Article 11.4 of the *SCM Agreement*.

6. The EC notes that Mexico continues to confuse the meaning of article 11.4 (standing test at initiation stage), which is relevant under this claim, and Article 16.1 (definition of domestic industry). As a result of this confusion, Mexico states that the term domestic industry has two "meanings" and that there are two ways of meeting the obligation to examine the domestic industry. But this interpretation is wrong since Article 11.4 clearly requires that the investigating authority has to determine the degree of support of the domestic industry before initiation. The investigating authority cannot solely rely on information provided in the application of the domestic industry, as done by Economía in this case. The analysis described in Mexico's Second Written Submission refers to the investigation period and thus cannot make good failings at the initiation stage of the investigation.

7. Mexico continues to criticize the EC's contention that production and output are at the heart of the notion of 'industry' in the *Agreement.* Far from being mere assertion, as alleged by Mexico, the contention has been supported by a careful analysis of the terms of the *Agreement*.

8. Mexico attempts to use the notion of material retardation as a means of attacking the EC's contentions, while acknowledging that the case under analysis relates to material injury. In particular, Mexico argues that the notion of establishment implies the starting up of an undertaking rather than its setting up on a secure basis. Mexico gives a definition of the Spanish term 'establecer' (establish) in support of its view. However, the EC's interpretation is also supported by an authoritative Spanish dictionary, the "María Moliner", which defines 'establecer' as 'dejar puesta una cosa en un sitio para que permanezca y realice su función en él' (to put something in a place to remain and fulfil its function there). Moreover, the term "establecimiento" (establishment) is defined as "local en que se desarrolla una actividad […] industrial" (premises where an industrial activity takes place). Both terms, "establecer" and "establecimiento", derive from the Latin word 'stabilire', which is linked to the notion of stability, something which is quite difficult to find in Fortuny's activities.

9. The fact that there may be difficulties in applying the notion to situations were an industry undergoes temporary closures in no way undermines the validity of the concept proposed by the EC. Borderline situations are an everyday legal occurrence. They would also arise in applying the criterion proposed by Mexico.

10. Mexico asserts that, as interpreted by the EC, the *SCM Agreement* would provide no remedy for companies in the situation of Fortuny. This argument does not take into account the possibility provided by the *SCM Agreement* to initiate an "ex officio" investigation.

11. The third of the claims made by the EC concerns Article 13(b)(i) of the *Agreement on Agriculture*.

12. The EC claims, firstly, that Mexico should not have entertained a complaint based on the notion of material retardation. Mexico's response is that, although Fortuny based its claim on an allegation of material retardation, Economía did not define which of the three kinds of injury it was relying on when initiating the investigation. However, Economía was obliged not to commence an investigation unless it had sufficient evidence of injury. It must not be allowed to invoke its own breaches of the rules in order to avoid other obligations, and must therefore be taken to have initiated the investigation on whatever basis it was requested, which in this case material retardation. Mexico says that the findings of an investigating authority are not limited to the particular kind of injury specified by the complainant. That, however, is not the issue in the present instance. Rather the issue is the connection between the type of injury identified in the complaint and that given as the basis for commencing the investigation.

13. Secondly, Mexico critics the EC for failing to provide a comprehensive definition of 'due restraint'. 'Due restraint' was the expression used by the drafters and presumably they thought it was an adequate expression, or they would have added a definition (as they did, for example, regarding the notion of injury). The *New Shorter Oxford Dictionary* defines "restraint" by reference to the verb "to restrain", which means "hold back or prevent from some course of action" or "restrict, limit".

14. Mexico repeats that 'due restraint' is the same standard that applies to the initiation of all investigations. The EC has already made reference to the doctrine of 'effet utile', and Mexico has given no explanation of why that doctrine should not apply in this context. There must be some circumstances in which 'due restraint' could have the effect of prohibiting an investigation that might otherwise have been initiated. Mexico does not attempt to show how its decision to initiate reflected a standard of due restraint.

15. Finally, Mexico appears to argue that the failure to respect the due restraint standard had no effect on the investigation as a whole. This at complete variance with WTO law and practice, as demonstrated by such cases as *Guatemala – Cement II*, and *Argentina – Poultry Anti-Dumping Duties*, where the panels condemned anti-dumping determinations because of infringements of the rules regarding initiation.

16. The claims under the fourth of the EC's headings also fall into two parts. The first of the claims concerns Article 12.4.1 and Mexico's failure to provide non-confidential summaries of confidential information supplied to the investigating authorities.

17. Although Mexico reproduces ten paragraphs from the report in *Mexico – Steel Pipes and Tubes* to support its arguments, paragraph 7.398 of the report refutes its contention that allowing access to the confidential file serves to satisfy the obligation in Article 12.4.1. Mexico has finally admitted this in its Second Written Submission.

18. Mexico's summation of the panel rulings in *Mexico – Steel Pipes* omits the vital fact that the panel had found that the non-confidential summaries satisfied the *Agreement* because sufficient reasons had been given for excluding summaries of the confidential information. No such reasons were given in the present investigation. The EC is not claiming that Economía wrongly accorded confidential treatment. Rather the EC contends that, in according such treatment, Economía failed to provide non-confidential summaries. The issues of access to non-confidential information and to confidential information are quite separate. Moreover, contrary to the impression that Mexico seeks to create, the panel in *Mexico – Steel Pipes and Tubes* said nothing to suggest that access to confidential information would compensate for failure to provide non-confidential summaries (or to explain why they could not be provided). Furthermore, contrary to Mexico's assertion, very substantial amounts of information are blanked out in the non-confidential versions made available by Economía.

19. The real issue is not how the interested parties submitted information, but whether Economía ensured proper provision of non-confidential summaries, and Economía completely failed in this respect. Where Mexico has provided non-confidential versions of documents, they do not satisfy the requirement of Article 12.4.1 because they do not contain non-confidential summaries of the confidential information.

20. Mexico's arguments in its Second Written Submission regarding Article 12.8 merely repeat what it has said previously, so the EC will not add anything to its own previous remarks.

21. The fifth of the EC's 'procedural' claims concerns the breach of the 18-month time limit set by Article 11.11 of the *SCM Agreement*. Mexico's Second Written Submission adds nothing to its previous observations on this issue, except to accuse the EC of trying to find excuses for not cooperating with the investigation, and thereby avoid the application of 'facts available' by the investigating authority. But the EC has not chosen to make a claim against Mexico regarding the use of 'facts available'.

22. The first of the claims on the substantive rules of the *SCM Agreement* concerns the existence of subsidization and the calculation of the benefit supposedly received by the imported olive oil. Once again, Mexico's treatment of this subject is a repetition of its earlier observations. As regards the purpose of the subsidy, the EC will emphasize once more the futility of trying to determine whether the original subsidy was given to olives or to olive oil. The crucial issue is whether the imported olive oil was a subsidized import. The EC has already shown that given the transformation in the product and the arm's-length transfers involved in its movement from olive tree to import, Economía was not justified in assuming a pass through of the subsidy and should have carried out a proper investigation of the issue.

23. Mexico challenges the EC's invocation of Articles 1 and 14 of the *SCM Agreement* as the basis for its claims. The EC has fully explained its choice in answer to the Panel's Question 46.

24. Mexico seeks to confuse the issues by means of shallow debating points concerning the calculation of the subsidy and the calculation of the benefit, as mentioned in Article 14. The EC

claims that Economía failed to explain how it calculated the benefit conferred on the recipient, contrary to the obligation in Article 14. However, in accordance with the practice of WTO dispute bodies where an allegation of substantive infringement is coupled with one of failing to explain or publicize the point in question, the EC has concentrated on the substantive infringement, which is the failure to examine the issue of pass-through when calculating the amount (if any) by which the imported olive oil is subsidized.

25. Finally, Mexico complains that the EC has not explained in what way Economía did not make appropriate adjustments. However, the EC fully addressed this issue in its First Written Submission.

26. As regards the issue of the domestic industry, Mexico makes an attempt to justify Economía's finding that Fortuny constituted the whole of the Mexican olive oil producing industry. The EC has shown that Economía failed to take steps that could reasonably be expected of it to determine the extent of the domestic industry, and in particular disregarded evidence of the existence of producers other than Fortuny.

27. Thus, Mexico tries to justify Economía's investigation of Maprinsa and its suppliers. Economía asked Bufete Químico to test a sample of just one of Maprinsa's two supposed olive oil products and found it was in fact rapeseed oil. From this it concluded that Maprinsa did not market olive oil, although one of Maprinsa's suppliers, Olivarera Tulyehualco, had informed Economía that it obtained olive oil from Baja California. Economía entirely disregarded this information. Mexico states that Olivarera Tulyehualco supplied rapeseed oil to Maprinsa. This is a completely new assertion, because in the Final Resolution Economía said that Olivarera Tulyehualco informed that it was not an olive oil producer and that it bottled the product under investigation, which is olive oil not rapeseed oil.

28. Regarding the firm Llanos de San Francisco, it was negligent of Economía not to have made enquiries regarding its activities during the investigation period. Mexico cites the periodical *Claridades Agropecuarias* as though its pronouncements were always irrefutable. However, it is evident that much of the information in the article is anecdotal, and at times it seems implausible.

29. As regards to the question of registration with the producers' organisation ANIAME, where only Fortuny was listed in respect of olive oil, Economía took this as evidence of the existence of a producer, but Economía did not enquire into the take-up among producers of registration with ANIAME, so Mexico's statement that any olive oil producer would have registered is mere assertion.

30. Mexico does not deny that Economía did not approach the authorities in Sonora, one of the two major olive producing states. However, in basing its assertion of low production on the article in *Claridades Agropecuarias* Mexico chooses to overlook the table on page 11 of that article, which shows that the level of olive production in Sonora regularly rivalled that of Baja California (4,930 tons and 4,127 tons, respectively, in 1999). Mexico argues that production in Sonora is not used for making olive oil, but the extract from *Claridades* on which it bases this assertion states just the contrary: according to *Claridades*, less than 5 per cent of the olives is processed as table olives in Caborca, the main region producing olives in Sonora.

31. The EC has shown that, contrary to Mexico's assertions, Economía had clear indications of olive oil production in Mexico apart from Fortuny. Such evidence was available to Economía and was not pursued. The responsibility of the investigating authority is not merely to reach a reasonable decision on the basis of the file, but to make sure that the file contains sufficient supporting evidence. Mexico is not entitled to assume that Fortuny, which it admits had zero output during the investigation period, would completely overshadow any such producers that might exist.

32. Mexico shifts from the individual steps that were or were not taken to the legal framework that applied to them. It proposes to equate the 'major proportion' criterion of Article 16.4 with the 'by

or on behalf of' standard of Article 11.4. However, it provides no reasoning or authority to support taking such a step.

33. Finally, Mexico seeks to retrospectively justify Economía's exclusive reliance on Fortuny by saying that the figure for total Mexican production of olive oil in 2000 was very similar to that of Fortuny. In fact the figure given by Fortuny is 742 tonnes, while that for total production is given as 1,000 tonnes. Those data alone should have given Economía reason to doubt that Fortuny was the sole producer. The figure of 1 000 tonnes is given in the *Claridades* article but it is not provided, as one would have expected, as part of a table showing annual production figures and citing a source. It is worth recalling that the International Olive Oil statistics refer to an olive oil production in Mexico of 1,500 tonnes in 2000/2001, 2,000 tonnes in 2001/2002 and 2,500 tonnes in 2002/2003.

34. Mexico's Second Written Submission has little to add to its previous responses to the EC's claim that, without output, Fortuny cannot constitute a domestic industry. It is not the EC's position that companies must have output throughout the subsidy investigation period in order to count towards the domestic industry. Rather, it is that a company with no production whatsoever during the period cannot qualify. The EC does not deny the relevance of trends over the period leading up to the investigation period. Nevertheless, the only verified evidence of subsidization available to the investigating authority will be that from the investigation period and unless the domestic companies concerned have output in that period, no injury can be demonstrated.

35. The third of the 'substantive' claims concerns the determination of injury. Mexico's latest contentions on this topic reflect the confused basis on which Economía developed its arguments. Thus, Mexico appears to argue that, since the notion of 'decline in output', is one of the factors of injury listed in Article 15.4 of the *SCM Agreement*, therefore zero output should be taken into account. However, the EC's point is that if output is zero there can be no industry within the terms of the *Agreement.*

36. Mexico calls for 'potential' injury to be considered, but does not explain how that notion is relevant to the present case. Neither Mexico is entitled to complete the investigation now, because Economía made no findings of potential injury in respect of the factors listed in Article 15.4.

37. Mexico's explanation of the ruling at paragraph 7.77 of the *Mexico – Corn Syrup* panel report is not easy to understand. The point at issue was the extent to which, as regards threat of material injury, projections of injury should be examined. However, the issue had arisen in regard to the contents of the application for an investigation rather than to the scope of the investigation itself. Mexico says that the panel ruling did not purport to confine the use of projections to cases of threat of injury. However, the panel did emphasize the importance of past experience as the source of evidence for future developments, and it evidently had in mind the use of data from the investigation period. In that respect the panel's ruling is clearly at odds with the approach adopted by Economía.

38. Mexico accuses the EC of contradicting itself in denying the existence of injury when Fortuny has ceased production. This is to misrepresent the EC's case, which is that if there is no production there is no industry, and if there is no industry there can be no material injury. Mexico also asserts that its output of olive oil fell because of subsidized imports, but Economía failed to establish this causal link.

39. The last claim concerns the Ministry's consideration of causation by 'other factors', and Mexico alleges that the EC changed its accusation regarding the examination of known factors from saying that there had been no examination to saying that the examination was inadequate. The criticism is of no significance but it is in any case wrong. The EC has from its first submission focused on the issue of inadequacy.

40. Finally, Mexico argues that the 'other known factors' identified by the EC had no effect on the domestic industry. This criticism reflects a lack of understanding of the nature of these proceedings, whose function is to review the decision taken by Mexico, not to retake that decision. Consequently, the EC merely seeks to establish that the factors that it has identified are ones that should have been properly examined, and that Economía, in so far as it looked at them at all, did so inadequately, so that the resulting determination constituted an infringement of Article 15.5.

ANNEX D-4

EXECUTIVE SUMMARY OF THE CLOSING STATEMENT OF THE EUROPEAN COMMUNITIES – SECOND MEETING

(13 October 2007)

1. Mexico should have never initiated this investigation since no standing test was performed, no due restraint was exercised and no pre-initiation consultations were held. Also during the investigation, besides the blatant exceeding of the 18-month deadline, Economía did not comply with its WTO obligations as regards the determination of pass-through, injury and casual link.

2. The EC will not to rehearse the arguments that have already been presented to the Panel. What the EC intends to do is pick out a handful of issues that we think call for special attention, and but which we think have not been adequately ventilated in these proceedings.

3. First, the Panel will by now be well aware of the somewhat curious path which was taken by Mexico's investigation of olive oil. Fortuny launched its complaint on the basis of an <u>allegation of injury</u> taking the form of material retardation of the establishment of domestic industry. The investigating authority began the investigation without any clear idea of whether what was at issue was material retardation or material injury. It was only in the course of the investigation, in particular in the Provisional Resolution, that the authority formed the view that what had occurred amounted to material injury rather than material retardation. It is clear that, in order to achieve or avoid a particular result, an authority is impeded from redefining that result in the course of the proceedings.

4. Mexico seeks to pass off its actions as a matter of administrative discretion or convenience. However, what might be convenient for the investigating authority and for the complainant Fortuny was not convenient for other interested parties or Members. The exporters and the EC sought to defend their interests on the reasonable understanding that what was at issue was a question of material retardation, only to discover in the Provisional Resolution, that the nature of the injury identified by the investigating authority was quite different. Of course they had the opportunity to address the issue following the publication of the Provisional Resolution, but by that time they had devoted considerable efforts to pursuing what proved to be an irrelevancy.

5. The EC is not trying to slip into these proceedings a claim based on failure to give parties a fair hearing during Economía´s investigation. We have deliberately chosen to concentrate our claims on particular issues in order to simplify the proceedings. Nevertheless, the negative consequences for interested parties of the investigating authority's actions give further emphasis to the EC's claim that Mexico has not properly initiated the investigation because it did not make an adequate determination of injury in accordance with Article 15.4 of the *SCM Agreement*.

6. The EC would also like to add that the confusion by Economía between material injury and material retardation has been maintained by Mexico all through the Panel proceedings.

7. The second point that the EC would like to bring to your attention in this Closing Statement concerns the <u>documentation supplied by Mexico</u> to defend this action. Mexico has shown a

regrettable tendency to make arguments on the basis of documents that it does not produce. It was only in response to the specific request of the Panel that many relevant documents were produced.

8. Unfortunately, when they were produced, the manner in which they were presented made the task of the EC, and that of the Panel, extremely difficult. Although Mexico produced what it says is the list of documents in the administrative file, the significance of many of the elements in that list is obscure. The problem was compounded by Mexico's failure to make any connection between the individual documents included in the list and the exhibits that it presented to the Panel.

9. Furthermore, some of the exhibits appear to be almost miscellaneous collections of documents, whose precise nature was sometimes very difficult to determine and, indeed, in some cases continues to elude us. We do not accuse Mexico of deliberately trying to create confusion, but we have to say that this was sometimes the result of its actions.

10. Confusion is also an aspect of the third topic that we wish to bring to the Panel's attention. In making its claims the EC has clearly distinguished between those errors that were committed by the investigating authority in the initiation of the investigation, and those that arose in the course of the investigation. Thus, the EC has made separate claims concerning the notion of industry when the decision to initiate is being made, which is addressed in Article 11.4 of the *SCM Agreement*, and to the determination of injury to industry made in the substantive findings of the investigating authority. Unfortunately, Mexico has moved back and forth between the topics as and when it appeared to best serve its interests. This distinction between initiation and substantive investigation also applies to other aspects of the EC's claims. Thus, in regard to the failure to provide summaries of confidential information or give an explanation for this failure the EC has laid special emphasis on the communications made to the investigating authority by Fortuny prior to initiation. The obligations in Article 12.4 apply as much to such communications as they do to those made in the course of the investigation.

11. Finally, the European Communities would like to thank the Panel, the Secretariat and the interpreters for so thoroughly and efficiently carrying out your responsibilities.

12. The EC would also like to thank Mexico's delegation for its efforts to defend such a difficult case for them. The EC considers Economia's investigation to be peculiar, confuse, unfounded and, most importantly, irreconcilable with the WTO Agreements. For these reasons and because the system of EC production aid in the olive sector was replaced at the beginning of 2006 by an entirely different system, the EC has requested the Panel to suggest to Mexico the complete repeal of the measure against olive oil.

ANNEX D-5

ORAL STATEMENT OF MEXICO - SECOND MEETING

(2-3 October 2007)

Representatives of the European Communities (EC) and of the third parties in these proceedings, Members of the Panel and officials of WTO Secretariat, good morning and thank you for the opportunity to present, orally, our country's position in this dispute.

Rather than running through our arguments once again, in this oral submission we shall be emphasizing the essential points that we think the Panel should take into account.

1. Regarding the EC argument concerning the obligation to hold consultations prior to initiation, it appears that 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.

2. 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. In other words, receipt of the document does not imply acceptance. Once the IA has analysed the information, it determines whether or not to draw up a draft acceptance of the document. If the application is satisfactory, the IA sends this draft to the Minister of the Economy, who can decide whether or not to accept the application. If the Minister accepts the application, he signs the document which is then sent to the Official Journal (DOF) for publication. Up until that moment, what has happened is that the application has been submitted and accepted, but nobody knows that the application exists. The investigation has not begun.

3. Consequently, if for some reason the document is not published, it will have no legal force whatsoever. In fact, the investigation clock does not begin to run until the day following publication, clearly because by then, the interested parties know that an investigation has been initiated. The Minister's signature does not mean the initiation of the investigation. If this were the case, the periods would have to run at that date, which simply cannot happen, since apart from the applicant, nobody knows that an application has been filed.

4. Footnote 37 of the SCM Agreement states that initiation is the formal action by which an investigation is commenced, but it gives no indication as to what requirements must be met for that action to take place. A "formal action" is an action which meets the legal requirements for being considered as valid. Clearly, each domestic legal system establishes what those requirements are. If the negotiators had intended that all Members should use only one particular action or type of action to consider an investigation as having been initiated, they would at least have established the specific requirements for that "formal action". Given that this is not the case, we assume that each Member has to define the legal act by which the investigation is initiated. We do not understand why the EC maintains that such questions cannot be left to the legal systems of each country.

5. The EC merely repeated that the signature of the Mexican Minister of the Economy constitutes the formal act of initiation 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 initiation would simply be receipt of the application, which is unacceptable. Consequently, regarding its reply to question 6, there can be no confusion as to whether the Mexican or the WTO legal system should be used, since the SCM Agreement does not establish what the act of commencement is; and as there are not two sets of rules applicable, there can be no conflict.

6. During the first hearing, the EC stated that the obligation in Article 13.1 of the SCM Agreement was to invite a Member to hold consultations before initiating the investigation. However, in its replies it maintains that there is an obligation to hold the consultations prior to initiation. This new interpretation would mean that a Member invited to hold consultations could decline or ignore the invitation, and afterwards claim before a panel that the Member invited violated the SCM Agreement because the consultations did not take place prior to initiation. This is unacceptable. In fact, Article 13.3 of the SCM Agreement states that the consultations are not intended to prevent the expeditious initiation of an investigation, which confirms that there cannot be any obligation to hold consultations before initiation, since that would obstruct initiation.

7. The EC insists that the term "domestic industry" alludes exclusively to the producer that is producing at the time its application is filed. Mexico takes the view that the EC's interpretation of Articles 11 and 16 of the SCM Agreement 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, for reasons which have already been mentioned in this dispute. Fortuny had to suspend production because of the subsidized imports from the EC, and the injury inflicted, for the purposes of an investigation, was that it was being prevented from resuming production.

8. The EC has not explained how the concept of "production" could be used as a factor to be analysed, when the injury suffered by the domestic industry is the material retardation of its establishment. We do not agree with the EC's interpretation of the scope of the term "establishment" ("material retardation of the establishment of such an industry") in the English version of footnote 45 to the SCM Agreement. Even supposing, for the sake of argument, that – as the EC claims – "to establish" means "to achieve a level of maturity", we do not see how a company that produced olive oil for decades could not be regarded as 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 unfortunate interpretations. If that were the main concept in the case of material retardation, then investigation for material retardation could be initiated even if the industry were already producing, since it may not have reached "maturity", which is untenable.

9. Moreover, both the Spanish and French versions of the SCM Agreement state, in footnote 45, that a cause of injury is material retardation in the creation of an industry. In other words, those two versions of the SCM Agreement do not support the EC's interpretation that the term implies "to achieve a level of maturity".

10. 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 insist that according to its interpretation, there would be no possibility of a new domestic industry being established, which is contrary to the concept of "creation" of a domestic industry. 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.

11. 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.

12. 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.

13. 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.

14. 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.

15. 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).

16. 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. 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.

17. Regarding the EC complaint that Mexico's argument concerning systematic access to all the confidential information was rejected in two panel reports, we do not agree.

18. With respect to *United States – OCTG (Article 21.5 – Argentina)*, unlike what happens in the US system, under the Mexican system the parties do have access to confidential information, so that in the olive oil investigation, the impairment of due process for the parties which the Panel examined in the mentioned case did not exist.

19. Regarding the panel report *Mexico – Steel Pipes and Tubes*, as we discussed in our rebuttal, the Panel's findings concerned two different aspects: first, whether or not the non-confidential summaries 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, as well as whether or not that information could be summarized and the way in which the IA should have communicated these decisions.

20. The Panel determined that the non-confidential summaries were inadequate, but as Mexico had acted in a manner consistent with Article 6.5 and 6.5.1 of the AD Agreement as regards the evaluation and granting of confidential treatment, and by 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 by Mexico of the AD Agreement. Mexico considers that the Panel's determinations are not applicable to this dispute in the way that the EC suggests. In any case it seems to us that the report supports Mexico's position in this dispute.

21. At the same time, the EC claims that the IA did not evaluate whether "good cause" had been demonstrated for certain information to be considered confidential. In *Mexico – Steel Pipes and Tubes*, the Panel determined that this claim was unfounded because there was no provision (in this case in the SCM Agreement) establishing what process the IA should follow when it considered that a request for confidential treatment was justified.

22. On the other hand, the exporters did in fact examine the confidential information. 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. This cannot be attributed to the IA. We cannot see what this alleged impairment of its rights of defence consists of.

23. On the matter of the non-confidential summaries, the EC maintains that its claim relates to the non-existence of such summaries, and not to their inadequacy. Regarding the non-existence of the summaries, Exhibit MEX-38, which contains the index of the record, shows that there are non-confidential summaries of every one of the documents to which confidential treatment was accorded. The fact that the non-confidential summaries did 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 as the EC claims.

24. 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.

25. Moreover, the EC failed to demonstrate that the PR was insufficient to acquaint the parties with the essential facts considered during the investigation. It only stated that a provisional measure could hardly acquaint the parties with the essential facts. Consequently, it has not established a prima facie presumption of violation by Mexico.

26. With regard to the exceeding of the 18-month limit under the SCM Agreement, in our submissions we explain 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. Thus, the granting of the extensions requested by the parties, 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. 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 invalid excuse for not supplying the information that the IA requested of it.

27. The EC continues to admit not having provided the information requested by the IA and, moreover, maintains that it was not a valid request. There is no justification for this, since in no circumstances could it have been considered exempt from providing the information requested of it.

We disagree with the EC when it says that "the only means of insisting on the importance of the rules of the SCM Agreement" was to refrain from providing information. The same applies to its claim that to provide this information would have been tantamount to "condoning" the actions of the IA. To accept the claims of the EC would be equivalent to ceding control over the investigation to the parties, which is unacceptable, since it would do significant harm to the multilateral system. Moreover, Article 12.7 of the SCM Agreement does not mention any exceptions to the obligation upon the parties to provide information requested; therefore recourse was had to the "facts available", in accordance with that Agreement. We fail to understand the nature of the EC's alleged "dilemma" in responding to these requests by the IA.

28. We 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.

29. 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 the FR in this investigation, part of that Article was deliberately omitted.

30. We do not think that there was any 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.

31. 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 that the subsidy was given for the production of olive oil. In that connection, 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.

32. 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. Consequently, we cannot give any further details in this respect.

33. 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. However, the EC does not indicate what concrete action should have been taken by the IA during the investigation into the domestic industry. Moreover, it 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".

34. 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*. Consequently, it is enough to show that the domestic industry did exist in order to invalidate its claim.

35. We repeat that the FR sets 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. This section describes the efforts that were made by the authority to determine whether there were other domestic producers.

36. Now, with respect to certain comments by the EC concerning some other possible additional inquiries, we repeat that these do not suffice to disregard the authority's evaluation of the extent of the domestic industry. The IA's findings in this regard are based on the information contained in the record taken as a whole.

37. Our submissions 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, did not produce olive oil; and according to official data, the State of Sonora does 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, replies which confirmed the presumption that Fortuny was representative of the domestic industry as a whole.

38. Added to all of this is the requests that were sent to the non-participating enterprises. Thus, 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 and other evidence 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.

39. In addition – according to the evidence in the record – assuming, for the sake of argument, that there was another domestic producer, it would not be likely either 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. 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".

40. At the same time, we 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 estimated at around 1,000 tonnes in 2000, and according to the correction submitted in our reply to question 18 and the corresponding explanations, Fortuny produced a similar amount in 1999 and 2000 (specifically, according to the data supplied by Fortuny, it produced 1,306 tonnes in 1999 and 742 tonnes in 2000, or an average of 1,024 tonnes per year). We note that in the course of this hearing, Mexico is ready to provide any clarifications that could be helpful concerning the production data mentioned in its written submissions and its replies to the Panel.

41. The EC has stated that under its procedures, if a domestic industry ceased to produce during an investigation, the investigation 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, the domestic industry would end up by disappearing. Imports that are the subject of unfair practices would then have destroyed the domestic producers' market.

42. 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.

43. 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 analysed, as stated on several occasions during this dispute.

44. 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.

45. The EC would appear to contend that when production reaches zero this cannot be considered a decline in that production. In our view, the word "decline" implies that an 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).

46. 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 analysed 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.

47. 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.

48. At the same time, we recall that the material injury consisted of the impediment to the domestic producers' resuming 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. On the other hand, regarding its argument that production was suspended months prior to the submission of the application, the EC does not take into account various steps that Fortuny had to undertake before requesting an investigation. In practice, the lapse of time between the suspension of operations, where applicable, and the submission of an application for initiation may be as much as one year or even more.

49. 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. 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.

50. 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 despite what the EC contends, in a proper examination, we do not see how injury could be double counted.

51. 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 in the application, 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.

52. 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.

53. 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, but also 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.

54. 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.

55. 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.

56. Regarding the alleged lack of a proper analysis, we reiterate what is stated in our FWS, namely that these (and other) factors were properly analysed. Our FWS clearly shows what was involved in the aforementioned analysis and the reasons why the Ministry made the determinations contained in the FR.

57. In addition, the EC has provided no evidence that these factors explained the state of decline of the domestic industry, still less that the evidence sufficed for this purpose, or to break or even undermine the causal link between the subsidized imports and the injury to the domestic industry (as expressly acknowledged in its reply to question 92). As we have already stated, simple assertions cannot constitute a prima facie presumption of violation on Mexico's part.

58. 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.

59. Finally, Mexico would like to note that owing to the inherent complexity of this procedure and for practical reasons (e.g. translation into Spanish of certain documents), our remarks may at times lack precision, and we would be glad to provide any clarifications that may be needed.