1 ARTICLE 5

1.1 Text of Article 5

Article 5

Initiation and Subsequent Investigation

5.1 Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.

5.2 An application under paragraph 1 shall include evidence of *(a)* dumping, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and *(c)* a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

(i) the identity of the applicant and a description of the volume and value of the domestic production of the like product by the applicant. Where a written application is made on behalf of the domestic industry, the application shall identify the industry on behalf of which the application is made by a list of all known domestic producers of the like product (or associations of domestic producers of the like product) and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each

known exporter or foreign producer and a list of known persons importing the product in question;

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[13] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[14] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

(*footnote original*)[13] In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

(*footnote original*)[14] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

5.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned.

5.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

5.7 The evidence of both dumping and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation, and *(b)* thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not

> sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.
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> 5.9 An anti-dumping proceeding shall not hinder the procedures of customs clearance.
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> 5.10 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

1.2 General

1.2.1 Agreement on Subsidies and Countervailing Measures (SCM Agreement)

1. To the extent that the text of Article 11 of the SCM Agreement parallels the text of Article 5 of the Anti-Dumping Agreement, see also the Section on Article 11 of the SCM Agreement.

1.3 Article 5.2

1.3.1 General

2. In *Guatemala – Cement II*, the Panel examined Mexico's claim that Guatemala's authority, in violation of Article 5.2, had initiated the anti-dumping investigation without sufficient evidence of dumping having been included in the application. The Panel interpreted Article 5.2 with reference to Article 2, which outlines the elements that describe the existence of dumping. The Panel stated that "evidence on the … elements necessary for the imposition of an anti-dumping measure may be inferred into Article 5.3 by way of Article 5.2."[1] See paragraph 35 below. The Panel agreed that "statements of conclusion unsubstantiated by facts do not constitute evidence of the type required by Article 5.2."[2]

3. In *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, the Panel set out the legal requirements of Article 5.2 of the Anti-Dumping Agreement concerning the evidence and information that must be included in a complaint as follows:

> "Article 5.2 of the Anti-Dumping Agreement consists of a 'chapeau' and four subparagraphs that describe the 'information' that must be included in the written application submitted by the domestic industry or on its behalf to initiate an investigation (the complaint). The chapeau states that a complaint:
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> > [S]hall include evidence of *(a)* dumping, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and *(c)* a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following[.]
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> The 'information' on dumping (subparagraph (iii) of Article 5.2) relates to the normal value and the export price as established by the applicant. Other panels have been of the opinion that Article 5.2 (iii) should be read in the light of Article 2 of the Anti-Dumping Agreement, which defines dumping and methodologies for establishing

[1] Panel Report, *Guatemala – Cement II*, para. 8.35. (same conclusion in Panel Report, *Guatemala – Cement I,* paras. 7.49–7.53; Panel Report reversed in total by Appellate Body on procedural grounds as dispute not properly before the Panel, and adopted as reversed, WT/DSB/M/51, section 9(a)).

[2] Panel Report, *Guatemala – Cement II*, para. 8.53.

> a margin of dumping. This information covers the various components of the dumping margin calculation, i.e. elements for determining a normal value (on the basis of either the sales price or a reconstructed normal value), an export price, as well as any adjustments as may be necessary for a fair comparison."[3]

4. In relation to the chapeau of Article 5.2, the Panel noted as follows:

> "Meanwhile, the chapeau provides that 'evidence of dumping' must 'substantiate' the normal value, export price and adjustments submitted by the applicant. The definition of the word 'étayer' ('substantiate') states that this verb means '[s]outenir quelque chose par des arguments, des preuves, le fonder, l'établir ou en être la base, la preuve' ('to support something with arguments, evidence, to determine it, to establish it or to be grounds for, proof of it'), while the word 'preuve' ('evidence') is defined as an '[é]lément matériel … qui démontre, établit, prouve la vérité ou la réalité d'une situation de fait ou de droit' (a 'material element … that demonstrates, establishes, proves the truth or reality of a *de facto* or *de jure* situation'). This word choice indicates that the information provided in support of the complaint must have some probative value. With regard to dumping, the applicant must provide evidence that permits the actual normal value, export price and value of any adjustments to be established for the period identified in the complaint. A normal value and export price not substantiated 'by relevant evidence' would be 'insufficient' to meet the requirements of Article 5.2."[4]

5. In relation to the standard of evidence and the burden of proof in respect of a complaint, the Panel noted as follows:

> "Article 5.2 nevertheless accepts that the applicant can only be required to provide such evidence as is 'reasonably available to [it]'. The standard of evidence required in a complaint may therefore not go beyond what information may be reasonably available to a firm that is part of the domestic industry, which excludes, in particular, confidential information. This stipulation has been interpreted in other dispute settlement procedures as seeking 'to avoid putting an undue burden on the applicant to submit information which is not reasonably available to it'. Meanwhile, a number of panels have recognized that the quantity and quality of evidence provided at the complaint stage would necessarily be lower than the evidence required to impose anti-dumping measures."[5]

6. The Panel also noted the distinction between Articles 5.2 and 5.3, namely that Article 5.2 deals with the content of the complaint, whereas Article 5.3 establishes the standard of review for the complaint:

> "Lastly, we note that the parties differ over whether Article 5.2 of the Anti-Dumping Agreement lays down obligations, the violation of which may be found by a panel. In that respect, Tunisia maintains that by 'setting forth, in a prescriptive manner, the basic content of an application for initiating an anti-dumping investigation, Article 5.2 *imposes an obligation* that the authorities must comply with when assessing such an application'. On the other hand, Morocco considers that 'nothing in Article 5.2 imposes any legal obligation to do or not do something on' the investigating authority. To the extent that Tunisia makes claims based on Article 5.2 in this dispute, Morocco considers it 'essential that the Panel find that Article 5.2 does not contain an independent obligation *for the authority*'.
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> In this regard, we find that Article 5.2 determines the content of the complaint submitted by the domestic industry and does not therefore create directly an obligation for the investigating authority. It is Article 5.3 that, as we will see in the next section, sets the criteria for the review that the authority must undertake to

[3] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.350-7.351.
[4] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.352.
[5] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.353.

> determine **whether the evidence contained in the complaint is sufficient** to justify the initiation of an investigation."[6]

7. The Panel in *US – Lumber V* considered that an application need only include such reasonably available information on the relevant matters as the applicant deems necessary to substantiate its allegations of dumping, injury and causality, and not *all* information available to the applicant:

> "We note that the words 'such information as is reasonably available to the applicant', indicate that, if information on certain of the matters listed in sub-paragraphs (i) to (iv) is not reasonably available to the applicant in any given case, then the applicant is not obligated to include it in the application. It seems to us that the 'reasonably available' language was intended to avoid putting an undue burden on the applicant to submit information which is not reasonably available to it. It is not, in our view, intended to require an applicant to submit *all* information that is reasonably available to it. Looking at the purpose of the application, we are of the view that an application need only include such reasonably available information on the relevant matters as the applicant deems necessary to substantiate its allegations of dumping, injury and causality. As the purpose of the application is to provide an evidentiary basis for the initiation of the investigative process, it would seem to us unnecessary to require an applicant to submit *all* information reasonably available to it to substantiate its allegations.[7] This is particularly true where such information might be redundant or less reliable than, information contained in the application."[8]

1.3.2 Representativeness of an applicant

8. In *Colombia – Frozen Fries,* the Panel noted that the Anti-Dumping Agreement does not contain any provision explaining how an applicant should establish that it represents the domestic industry on whose behalf the application is submitted:

> "We note that nothing in the text of [Articles 5.1 and 5.2(i) of the Anti-Dumping Agreement], or elsewhere in the Anti-Dumping Agreement, provides guidance as to how the representation of domestic producers in an anti-dumping investigation should be established by an applicant. The Agreement is thus silent as to the form or manner in which an applicant, acting 'on behalf' of the domestic industry, must demonstrate that it has the capacity to represent domestic producers of the like product (or associations of domestic producers of the like product)."[9]

1.3.3 Evidence relating to the definition of "product under consideration"

9. In *Colombia – Frozen Fries*, the Panel found that Article 5.2(i) does not require an applicant to exclude from the scope of the product under consideration product types that are not imported into the importing country and those that are not produced in that country. Consequently, the Panel also held that Article 5.3 does not require the investigating authority to examine evidence on this issue:

> "Although Article 5.2(ii) requires an application to contain a 'complete description' of the 'allegedly dumped product', the provision does not otherwise define what may constitute a 'complete' description or definition of the 'allegedly dumped product' or the [product under consideration]. In this respect, we note that the European Union 'does not argue that Article 5.3 contains any requirement limiting the investigating authority's discretion in defining the product under consideration'. We also agree with prior adopted DSB reports that there is 'no specific provision in the AD Agreement concerning the selection, description, or determination, of a product under consideration'. As such, we are of the view that the treaty text does not require an

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[6] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.354-7.355.

[7] *(footnote original)* If the requirement were to be that all information reasonably available to the applicant must be submitted in the application, it could lead to absurd results in that the applicant might be required to submit a large volume of information for purposes of the initiation of the investigation.

[8] Panel Report, *US – Lumber V*, para. 7.54.

[9] Panel Report, *Colombia – Frozen Fries*, para. 7.49.

> applicant to ensure that the definition of the [product under consideration] that it submits to an investigating authority excludes all those specific product categories: that are not imported into its country; and that are not produced by the domestic industry. In the absence of such a definitional requirement, we cannot see how Article 5.2(ii) can be read to require an applicant to provide supporting evidence demonstrating that all the specific categories of products within the range of products covered by the definition of the [product under consideration] are, in fact, imported into another country and are produced by the domestic industry. Consequently, there is no basis, under Article 5.3 read in light of Article 5.2(ii), to fault an investigating authority for not examining the sufficiency of such evidence which is not required in the first place."[10]

10. The Panel in *Colombia – Frozen Fries* also noted that Article 5.2(i) does not require evidence demonstrating identity between the product under consideration and the domestic like product:

> "Article 5.2(i) requires 'a description of the volume and value of the domestic production on the like product by the applicant'. In the case of an application made on behalf of the domestic industry, the provision requires, 'to the extent possible, a description of the volume and value of domestic production of the like product accounted for by [the domestic] producers'. We note that Article 5.2(i) does not use the terms 'product under consideration' or 'allegedly dumped product'. We also note that the provision does not concern the issue of defining, describing, or determining the [product under consideration]. Rather, it focuses, *inter alia*, on information concerning the 'domestic production of the like product'. As such, we are of the view that Article 5.2(i) does not require an applicant to provide evidence demonstrating that the scope of the definition of the [product under consideration] 'correspond[s]' exactly to the scope of the 'like product manufactured by the domestic industry'."[11]

11. Based on this reasoning, the Panel in *Colombia – Frozen Fries* rejected the claim that, in the investigating at issue, the fact that the product under consideration identified in the application contained product types that were not produced domestically led to a violation of Article 5.3:

> "In relying on Article 5.2(i) to challenge the manner in which MINCIT defined the [product under consideration] for the purpose of initiation, the European Union suggests that the specific products that are produced by the domestic industry should serve as the 'starting point' for defining the [product under consideration] and that the definition of the [product under consideration] (or, in this case, the allegedly dumped product) should correspond exactly to the 'like' products produced by the domestic industry. This line of inquiry, in our view, effectively reverses the logic underlying the definition of the term 'like product' and finds no basis in the text of Articles 5.2(i) and 2.6. We thus disagree with the European Union's argument that the range of products covered by MINCIT's definition of the [product under consideration] at the stage of initiation was inconsistent with Article 5.3 because it contained certain products that were not produced by the domestic industry."[12]

1.3.4 "evidence of … dumping"

12. In *Guatemala – Cement II*, the Panel addressed the issue of whether the elements of "dumping" require sufficient evidence under Article 5.3, basing its analysis upon the term "dumping" in Article 2. See paragraph 35.

1.3.4.1 Types of pricing information in the application

13. The Panel in *Colombia – Frozen Fries* outlined the types of pricing information an applicant may provide in the application under Article 5.2(iii) as part of evidence regarding the normal

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[10] Panel Report, *Colombia – Frozen Fries*, para. 7.24.
[11] Panel Report, *Colombia – Frozen Fries*, para. 7.29.
[12] Panel Report, *Colombia – Frozen Fries*, para. 7.32. *(footnote original)* See e.g. Panel Report, *EC – Salmon (Norway)*, para. 7.51 (noting that, "[i]t is clear that the subject of Article 2.6 is not the scope of the product that is the subject of an anti-dumping investigation at all. Rather, the purpose of Article 2.6, apparent from its plain language, is to define the 'like product'").

value.[13] The Panel observed that Article 5.2(iii) distinguishes between domestic sales prices on the one hand and third-country sales prices, or constructed value, on the other, and that the possibility of using the latter is textually limited:

> "Article 5.2(iii) thus envisages the possibility of providing three types of pricing information in the application: (a) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export ('domestic sales prices'); or, 'where appropriate', (b) information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries ('third-country sales prices'); or, also 'where appropriate', (c) on the constructed value of the product ('constructed value'). The possibility of providing third-country sales prices and constructed value is, *unlike the case of domestic sales prices*, textually limited to 'where' this is 'appropriate' and forms part of a parenthetical text."[14]

14. In the *ad hoc* appeal arbitration under Article 25 of the DSU in *Colombia – Frozen Fries*, the Arbitrator agreed with the Panel's interpretation of Article 5.2(iii):

> "The reading of Article 5.2(iii) advanced by Colombia poses an immediate interpretative difficulty as it seeks to minimize the significance of the meaning and placement of the phrase 'where appropriate'. Article 5.2(iii) specifies three types of product prices for normal value: (i) domestic sales; (ii) third-country sales; and (iii) constructed normal value. The structure of the sentence, however, does not place these three sources of prices on equal footing. Rather than simply listing the three in sequence, third-country sales prices and constructed normal value, but not domestic sales prices, are qualified by the phrase 'where appropriate'.
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> …
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> Second, the fact that the phrase 'where appropriate' attaches to third-country sales prices and constructed normal value indicates to us that, as a general matter, domestic sales prices are to be accorded greater evidentiary value since an assessment as to 'appropriateness' with regard to such prices is not required. Colombia argues that the fact that the language in Article 5.2(iii) 'stands in stark contrast' to the detailed language in Article 2.2 'strongly suggests' that the drafters did not intend the 'strict hierarchy' in Article 2.2 to apply in the context of Article 5.2. We agree. However, recognizing the evidentiary value of domestic sales prices does not amount to importing the requirements or a 'strict hierarchy' from Article 2.2 into Article 5.2(iii). As noted, in the context of initiation of an investigation under Article 5.3, all that is required is that the evidence in the application must be sufficient. Indeed, as Brazil argued before us, Article 5.2 does not demand the submission of the best information available, but only that information which is reasonably available to the applicant. Thus, when MINCIT was faced with an application that advanced third-country sales prices, Articles 5.2(iii) and 5.3, when read together, required an examination of the 'appropriateness' of that evidence, bearing in mind that the use of domestic sales prices would not have attracted such an assessment."[15]

15. The Panel in *Colombia – Frozen Fries* considered that the use of the term "where appropriate" in Article 5.2(iii) does not give the applicant a free choice to choose the kind of information it wishes to submit in the application in support of the allegation of dumping:

> "For these reasons, we disagree with Colombia's interpretation that the use of the term 'where appropriate' indicates that an applicant enjoys complete 'free choice' to submit any information that it desires for calculating normal value. Accepting Colombia's interpretation would deny any effect to the meaning or placement of the term 'where appropriate', contrary to the principle of effectiveness in treaty interpretation. Rather, as we see it, an investigating authority's examination, under Article 5.3, of the 'adequacy' and sufficiency of the evidence for determining normal

[13] Panel Report, *Colombia – Frozen Fries*, para. 7.65.
[14] Panel Report, *Colombia – Frozen Fries*, para. 7.65.
[15] Award of the Arbitrators, *Colombia – Frozen Fries*, paras. 4.18 and 4.21.

> value for purposes of initiation requires, at the very least, an exercise of judgment as to the suitability or appropriateness of using third-country sales prices, instead of domestic sales prices, in the specific situation before it. Finally, while Article 5.3 requires investigating authorities to examine the accuracy and adequacy of the evidence provided in the application for purposes of initiation in a given case, we agree with prior adopted DSB reports that the provision says nothing regarding the nature of the examination to be carried out in the abstract. Nor does it say anything requiring an explanation of how that examination was carried out. Any review of an investigating authority's conduct under Article 5.3 must therefore be carried out on a case-by-case basis."[16]

16. In the *ad hoc* appeal arbitration under Article 25 of the DSU in *Colombia – Frozen Fries*, the Arbitrator also agreed with the Panel's view that Article 5.2(iii) should not be interpreted as giving an applicant free choice regarding the type of information on normal value that is presented in the application:

> "Accordingly, we do not see how a treaty interpreter, using the method for treaty interpretation set out in the Vienna Convention, could have reached Colombia's understanding of the phrase 'where appropriate'. We agree with the Panel that Colombia's interpretation of 'where appropriate' as granting an applicant 'free choice' in the selection of normal value prices 'would deny any effect to the meaning or placement of the term 'where appropriate', contrary to the principle of effectiveness in treaty interpretation'. At the hearing, Colombia indicated that the phrase is not redundant because it is meant precisely to signal that the strict hierarchy set out in Article 2.2 is not to be imported into the selection of pricing information under Article 5.2(iii). However, this would seemingly have been accomplished had the phrase 'where appropriate' simply not featured in the provision. While we agree with Colombia and third parties when they argue that the strict hierarchy in Article 2.2 cannot be imported into Articles 5.2(iii) and 5.3 given that Article 2.2 requires a more stringent evidentiary standard for the investigation phase of an anti-dumping proceeding, the meaning and placement of the phrase 'where appropriate' can only be given effect if it indicates, as we have suggested, some duty on MINCIT to examine the sufficiency of third-country sales prices in light of an evidentiary preference for domestic sales prices."[17]

17. However, in the *ad hoc* appeal arbitration under Article 25 of the DSU in *Colombia – Frozen Fries*, the Arbitrator found that the standard applied by the Panel in reviewing the investigation record was too stringent:

> "The Panel's analysis represents, in our view, an overly stringent application of the legal standard. As the Panel itself acknowledged, the task is to consider whether an unbiased and objective investigating authority, based on an examination of the 'accuracy' and 'adequacy' of the evidence, could have determined that the application contained 'sufficient evidence' to initiate the investigation. To satisfy Articles 5.2(iii) and 5.3 in the present case, MINCIT was required to examine the 'appropriateness' and 'sufficiency' of the United Kingdom export prices in light of the evidentiary value of domestic sales prices. Given that the authority had asked the applicant to define the normal value selected with reference to domestic sales prices for Belgium, and that the applicant then explained that it was relying on export prices to the United Kingdom, which formed part of a common market with the relevant countries (like Belgium) and therefore represented prices that were 'very close' to domestic sales prices, we consider that factual findings by the Panel demonstrate that there was a proper basis in the application for MINCIT to have examined the 'appropriateness' and 'sufficiency' of those export prices because the information was framed in terms of their evidentiary value vis-à-vis domestic sales prices.[18] We recall that, for the

[16] Panel Report, *Colombia – Frozen Fries*, para. 7.70.
[17] Award of the Arbitrators, *Colombia – Frozen Fries*, para. 4.22.
[18] (*footnote original*) Arguably, sales to the United Kingdom did not, at the time, constitute sales to a distinct market since the United Kingdom was part of the customs union of the European Union. The Anti-Dumping Agreement does not clarify how the concept of a "third country" is to be understood where multiple countries comprise a customs territory or single market. In any event, this interpretative question is not before us.

> purpose of initiating an investigation under Article 5.3, the quantity and quality of evidence needed is necessarily lower than what is required to impose anti-dumping measures. The information need not be the best evidence, only that which is sufficient to initiate an investigation. Moreover, as Colombia noted, MINCIT ultimately relied on domestic sales prices as the basis for normal value in its final determination."[19]

1.3.5 "evidence of … injury"

18. The evidence of threat of injury necessary in an application under Article 5.2, and the closely related issue of the amount of evidence necessary under Article 5.3 to justify the initiation of an investigation, are addressed in the Panel Report in *Guatemala – Cement II*; see paragraphs 47-48 below.

1.3.6 "evidence of … causal link" – subparagraph (iv)

19. In considering what information regarding the existence of a causal link must be provided in an application pursuant to Article 5.2, the Panel in *Mexico – Corn Syrup* found that "the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination of injury":

> "[T]he inclusion in Article 5.2(iv) of the word 'relevant' and the phrase 'such as' in the reference to the factors and indices in Articles 3.2 and 3.4 in our view makes it clear that an application is *not* required to contain information on *all* the factors and indices set forth in Articles 3.2 and 3.4. Rather, Article 5.2(iv) requires that the application contain information on factors and indices relating to the impact of imports on the domestic industry, and refers to Articles 3.2 and 3.4 as illustrative of factors which may be relevant. Which factors and indices are relevant to demonstrate the consequent impact of imports on the domestic industry will vary depending on the nature of the allegations made by the industry, and the nature of the industry itself. If the industry provides information reasonably available to it concerning factors which are relevant to the allegation of injury (or threat of injury) it makes in the application, and the information concerning those factors demonstrates, that is, 'shows evidence of', the consequent impact of dumped imports on the domestic industry, we believe that Article 5.2(iv) is satisfied.
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> Obviously, the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination of injury. Moreover, the applicant need only provide such information as is 'reasonably available' to it with respect to the relevant factors. Since information regarding the factors and indices set out in Article 3.4 concerns the state of the domestic industry and its operations, such information would generally be available to applicants. Nevertheless, we note that an application which is consistent with the requirements of Article 5.2 will not necessarily contain sufficient evidence to justify initiation under Article 5.3."[20]

20. In *Mexico – Corn Syrup*, the Panel distinguished, for the purposes of Article 5.2, between information and analysis:

> "Article 5.2 does not require an application to contain analysis, but rather to contain information, in the sense of evidence, in support of allegations. While we recognize that some analysis linking the information and the allegations would be helpful in assessing the merits of an application, we cannot read the text of Article 5.2 as requiring such an analysis in the application itself.[21]"[22]

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[19] Award of the Arbitrators, *Colombia – Frozen Fries*, para. 4.28.
[20] Panel Report, *Mexico – Corn Syrup*, paras. 7.73-7.74.
[21] *(footnote original)* Of course, the investigating authority must examine the accuracy and adequacy of the information in the application to determine whether there is sufficient evidence to justify initiation, pursuant to Article 5.3, a question which is addressed further below. However, this obligation falls on the investigating authority, and does not imply a requirement for analysis resting on the applicant.
[22] Panel Report, *Mexico – Corn Syrup*, para. 7.76.

21. In *Thailand – H-Beams*, the Panel, agreeing with the Panel in *Mexico – Corn Syrup*[23], rejected Poland's argument that paragraph (iv) of Article 5.2 implies that some sort of analysis of data is required in the application, and stated that "we do not read this provision as imposing any additional *requirement* that the application contain analysis of the data submitted in support of the application."[24] The Appellate Body did not review these findings.

1.3.7 "simple assertion, unsubstantiated by relevant evidence"

22. In *Thailand – H-Beams*, the Panel stated that "raw numerical data would constitute 'relevant evidence' rather than merely a 'simple assertion' within the meaning of this provision."[25]

1.3.8 Relationship with other paragraphs of Article 5

23. The Panel in *Guatemala – Cement II* discussed the relationship between Articles 5.2 and 5.3 in order to clarify the requirements under both Articles 5.2 and 5.3. See paragraph 35 below. In *Guatemala – Cement II*, the Panel stated that "[i]n light of our finding that the Ministry's determination that it had sufficient evidence to justify the initiation of an investigation was inconsistent with Article 5.3, we do not consider it necessary to rule on Mexico's Article 5.2 claims regarding the sufficiency of Cementos Progreso's application."[26]

24. In *Colombia – Frozen Fries,* the Panel addressed the relationship between Articles 5.3 and 5.2. See paragraph 71 below.

25. In *Colombia – Frozen Fries,* the Panel addressed the relationship between Articles 5.1 and 5.2(i). See paragraph 8 above.

1.4 Article 5.3

1.4.1 "sufficient evidence to justify the initiation of an investigation"

1.4.1.1 General

26. In *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, the Panel explained the legal requirements and standard of review which apply to the investigating authority's examination of a complaint, as follows:

> "The text of Article 5.3 is composed of just one sentence, which requires the investigating authority to examine 'the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation'. This provision covers explicitly the investigating authority and requires it to examine the complaint filed by the domestic industry, with a view to determining *whether there is* 'sufficient' evidence to initiate an investigation.
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> The authority's examination must focus on the 'accuracy' and 'adequacy' of the evidence provided in the complaint. The word 'exactitude' ('accuracy') means something '[q]ui est rigoureusement conforme à la réalité' ('which is strictly in line with reality') and 'adéquation' (adequacy) refers to the '[c]onformité à l'objet, au but qu'on se propose' ('conformity with the purpose, with the objective that one has in mind'). Thus, the authority must examine whether the evidence provided in the complaint is (a) in line with reality, and (b) in line with the objective of the complaint, which, in this case, is to 'prove' the existence of dumping, injury and a causal link. As other panels before us, we note however that 'Article 5.3 says nothing regarding the nature of the examination to be carried out. Nor does it say anything requiring an explanation of how that examination was carried out'. To know what evidence an authority must examine for accuracy and adequacy, reference must be made to the

[23] Panel Report, *Thailand – H-Beams*, paras. 7.75-7.76.
[24] Panel Report, *Thailand – H-Beams*, para. 7.77.
[25] Panel Report, *Thailand – H-Beams*, para. 7.77.
[26] Panel Report, *Guatemala – Cement II*, para. 8.59.

> context of this provision and, in particular, to paragraph 2 of Article 5, which determines what the material content of a complaint must be.
>
> At the end of its examination, the authority must 'determine' whether the evidence before it is sufficient to initiate an inquiry. The Larousse dictionary defines the word 'suffisant' ('sufficient') as '[q]ui correspond juste à ce qui est nécessaire' ('corresponding exactly to what is necessary'). The investigating authority must therefore determine whether it has before it the evidence necessary to initiate an investigation, i.e. whether an investigation appears to be justified, but also whether it has the information it needs to initiate its investigation. In that regard, the standard of review applied by other panels to a claim under Article 5.3 has been to verify 'whether or not an objective and unbiased investigating authority, looking at the facts before it, could properly have determined that there was sufficient evidence of dumping, injury and causal link to justify the initiation of an anti-dumping investigation'. We agree with this standard of review and have adopted it for this dispute."[27]

27. The Panel in *Colombia – Frozen Fries* explained the nature of the examination to be conducted by an investigating authority pursuant to Article 5.3, and underlined that a review of how such examination has been carried out should be conducted on a case-by-case basis:

> "Article 5.3 thus requires investigating authorities to 'examine' whether an application contains 'enough', 'precise', and 'suitable' evidence of dumping, injury, and causation to justify the initiation of an investigation. At the same time, we agree with a prior adopted DSB report that the provision 'says nothing regarding the nature of the examination to be carried out. Nor does it say anything requiring an explanation of how that examination was carried out.' Any review of an investigating authority's conduct under Article 5.3 must therefore be carried out on a case-by-case basis, in light of the specific facts and circumstances at issue."[28]

1.4.1.2 Distinction from the requirements under Article 5.2

28. In *Guatemala – Cement II*, in examining the claim that Guatemala's investigating authority based its initiation decision on insufficient evidence in violation of Article 5.3, the Panel commented that the fact that an application satisfied Article 5.2 does not demonstrate that there was sufficient evidence to justify initiation under Article 5.3:

> "Article 5.2 requires that the application contain sufficient evidence on dumping, injury and causation, while Article 5.3 requires the investigating authority to satisfy itself as to the accuracy and adequacy of the evidence to determine that it is sufficient to justify initiation."[29]

29. The Panel in *Guatemala – Cement II* held that the appropriate legal standard under Article 5.3 was not the adequacy and accuracy *per se* of the evidence in the application, but the sufficiency of the evidence:

> "[I]n accordance with our standard of review, we must determine whether an objective and unbiased investigating authority, looking at the facts before it, could properly have determined that there was sufficient evidence to justify the initiation of an anti-dumping investigation. Article 5.3 requires the authority to examine, in making this determination, the accuracy and adequacy of the evidence in the application. Clearly, the accuracy and adequacy of the evidence is relevant to the investigating authorities' determination whether there is sufficient evidence to justify the initiation of an investigation. It is however the sufficiency of the evidence, and

[27] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.356-7.358.
[28] Panel Report, *Colombia – Frozen Fries*, paras. 7.11 and 7.13.
[29] Panel Report, *Guatemala – Cement II*, para. 8.35 (same conclusion in Panel Report, *Guatemala – Cement I,* paras. 7.49–7.53; Panel Report reversed in total by Appellate Body on procedural grounds as dispute not properly before the Panel, and adopted as reversed, WT/DSB/M/51, section 9(a)). See also Panel Report, *US – Lumber V*, paras. 7.83-7.84.

> not its adequacy and accuracy *per se*, which represents the legal standard to be applied in the case of a determination whether to initiate an investigation."[30]

30. In *Guatemala – Cement II*, on the basis of the distinction between Articles 5.2 and 5.3 described in the excerpt in paragraph 35 below, the Panel stated that "[o]ne of the consequences of this difference in obligations is that investigating authorities need not content themselves with the information provided in the application but may gather information on their own in order to meet the standard of sufficient evidence for initiation in Article 5.3."[31] In support of this proposition, the Panel cited the panel's finding in *Guatemala – Cement I*.[32]

1.4.1.3 Sufficiency of evidence to initiate

31. The Panel in *Mexico – Steel Pipes and Tubes* rejected Mexico's argument that where the evidence in the application is sufficient to initiate an investigation, the mere fact that an investigating authority initiated the investigation indicates that it examined the evidence in the application and determined that it was sufficient to justify initiation for the purposes of Article 5.3. Mexico cited *EC – Bed Linen* as support for its argument. The Panel did not agree that *EC – Bed Linen* supported Mexico's contention and therefore did not agree that Article 5.3 did not impose a substantive obligation upon an investigating authority to assess the sufficiency of the evidence before it:

> "Although the *EC - Bed Linen* panel found that Article 5.3 does not address the *nature* of the examination to be carried out, and does not require the investigating authority to explain how it performed its examination, we do not read that case as standing for the proposition implied by Mexico, namely that Article 5.3 imposes *no substantive* obligation upon an investigating authority in respect of its assessment of the *sufficiency* of the evidence before it. Thus, in our view, the findings of the *EC - Bed Linen* panel are not germane to the substantive issue before us, which concerns Economía's assessment of the sufficiency of the evidence before it at the time of initiation."[33]

32. The Panel in *Mexico – Steel Pipes and Tubes* thought Article 5.3, read in light of Article 5.2, made it clear that there needed to be sufficient evidence in the application on dumping, injury and causation in order to justify initiating an investigation:

> "Although there is no express reference to evidence of "dumping" or "injury" or "causation" in Article 5.3, evidence on the three elements necessary for the imposition of an anti-dumping measure may be inferred into Article 5.3 by way of Article 5.2. In particular, Article 5.2 requires that the application contain evidence on dumping, injury and causation, and Article 5.3 requires the investigating authority to satisfy itself as to the accuracy and adequacy of 'the evidence provided in the application' to determine that that evidence is sufficient to justify initiation. Thus, reading Article 5.3 in the context of Article 5.2 makes clear that the evidence to which Article 5.3 refers is the evidence in the application concerning dumping, injury and causation."[34]

33. The Panel in *Mexico – Steel Pipes and Tubes* did caution however that it was "not necessary for an investigating authority to have irrefutable proof of dumping or injury prior to initiating an anti-dumping investigation."[35] The Panel went on to talk about its view of "sufficiency of evidence" in the context of Article 5.3:

> "While the absolute threshold of sufficiency will depend upon the circumstances of a given case, Article 5.3 makes clear that the determination of sufficiency must be based on an assessment of the 'accuracy' and 'adequacy' of the information. In this context, we are mindful that a piece of evidence that on its own might appear to be of

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[30] Panel Report, *Guatemala – Cement II*, para. 8.31. See also Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.60.
[31] Panel Report, *Guatemala – Cement II*, para. 8.62.
[32] Panel Report, *Guatemala – Cement I*, para. 7.53.
[33] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.20.
[34] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.21.
[35] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.22.

> little or no probative value *could*, when placed beside other evidence of the same nature, form part of a body of evidence that, in totality, was 'sufficient'."[36]

34. The Panel in *Colombia – Frozen Fries* stated that "the 'evidence' in an application that authorities must examine under Article 5.3 is evidence relating to the three elements necessary for the imposition of an anti-dumping measure, namely, evidence of dumping, injury, and a causal link between the two".[37]

1.4.1.4 Sufficient evidence of dumping

35. In *Guatemala – Cement II*, in examining the issue of whether Articles 2.1 and 2.4 are applicable to the decision to initiate an investigation, i.e. which specific elements of dumping need to be supported by sufficient evidence under Article 5.3, the Panel first held that what constitutes necessary evidence for the purposes of Article 5.3 can be inferred from Article 5.2. The Panel then found that "in order to determine that there is sufficient evidence of dumping, the investigating authority cannot entirely disregard the elements that configure the existence of this practice as outlined in Article 2":

> "[W]e first observe that, although there is no express reference to evidence of dumping in Article 5.3, evidence on the three elements necessary for the imposition of an anti-dumping measure may be inferred into Article 5.3 by way of Article 5.2. In other words, Article 5.2 requires that the application contain sufficient evidence on dumping, injury and causation, while Article 5.3 requires the investigating authority to satisfy itself as to the accuracy and adequacy of the evidence to determine that it is sufficient to justify initiation. Thus, reading Article 5.3 in the context of Article 5.2, the evidence mentioned in Article 5.3 must be evidence of dumping, injury and causation. We further observe that the only clarification of the term 'dumping' in the *AD Agreement* is that contained in Article 2. In consequence, in order to determine that there is sufficient evidence of dumping, the investigating authority cannot entirely disregard the elements that configure the existence of this practice as outlined in Article 2. This analysis is done not with a view to making a determination that Article 2 has been violated through the initiation of an investigation, but rather to provide guidance in our review of the Ministry's determination that there was sufficient evidence of dumping to warrant an investigation. We do not of course mean to suggest that an investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the quantity and quality that would be necessary to support a preliminary or final determination. An anti-dumping investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward. However, the evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 to justify initiation of an investigation.
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> We note that Article 2.1 states that a product is to be considered as dumped 'if the export price … is less than the *comparable* price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.' (emphasis added). Other provisions of Article 2 that further elaborate on this basic definition include Article 2.4, which sets forth certain principles regarding the comparability of export prices and normal value. In particular, Article 2.4 specifies that comparisons between the export price and the normal value shall be made at the same level of trade, and that due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in level of trade and quantity. Consistent with our discussion above, we consider that, although these provisions of Article 2 do not 'apply' as such to initiation determinations, they are

[36] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.24.
[37] Panel Report, *Colombia – Frozen Fries*, para. 7.12.

> certainly relevant to an investigating authorities' consideration as to whether sufficient evidence of dumping exists to justify the initiation of an investigation."[38]

36. The Panel in *Argentina – Poultry Anti-Dumping Duties* rejected Brazil's claim that an investigation cannot be initiated based on an application including only normal value data related to sales in one city and expressed the view that "it is sufficient for an investigating authority to base its decision to initiate on evidence concerning domestic sales in a major market of the exporting country subject to the investigation, without necessarily having data for sales throughout that country".[39]

37. The Panel in *Argentina – Poultry Anti-Dumping Duties* also examined the compatibility with Article 5.3, read in light of Article 2.4.2, of an initiation based on a weighted average export price that was calculated using only those transactions with a price lower than the normal value. As the weighted average export price was therefore not based on the totality of comparable export transactions, the Panel considered that "the use of such a practice would not allow an objective and impartial investigating authority to properly conclude that there was sufficient evidence of dumping to justify the initiation of an investigation".[40] The Panel thus also rejected the argument that, in order to initiate, an investigating authority need only satisfy itself that there has been some dumping, in the sense that certain transactions were dumped:

> "We recall that, 'in order to determine whether or not there is sufficient evidence of dumping for the purpose of initiation, an investigating authority cannot entirely disregard the elements that configure the existence of [dumping] outlined in Article 2'. A determination of dumping should be made in respect of the product as a whole, for a given period, and not for individual transactions concerning that product. An investigating authority therefore cannot disregard export transactions at the time of initiation simply because they are equal to or greater than normal value. Disregarding such transactions does not provide a proper basis for determining whether or not there is sufficient evidence of dumping to justify initiation."[41]

38. On the question of whether a comparison between normal value for one day and export price for a period of several months constitutes a proper basis for determining whether there is sufficient evidence of dumping to justify the initiation of the investigation, the Panel in *Argentina – Poultry Anti-Dumping Duties* recalled that Article 2.4 requires that a fair comparison be undertaken between the export price and the normal value in respect of sales "made at as nearly as possible the same time". It concluded that "there should be a substantial degree of overlap in the periods considered in order for the comparison of normal value and export price to be fair within the meaning of Article 2.4".[42] For a product in respect of which there are many transactions taking place on a daily basis, it was "not persuaded that domestic sales data for one day provides sufficient overlap with export price data for several months for the purpose of Article 5.3."[43].

39. The Panel in *Mexico – Steel Pipes and Tubes* considered Guatemala's complaint regarding the sufficiency of evidence of alleged dumping pertaining to normal value. Guatemala did not raise any complaint concerning the evidence on export prices. Guatemala argued that because of the deficiencies in the normal value evidence, that evidence could not be compared on a "fair"

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[38] Panel Report, *Guatemala – Cement II*, paras. 8.35-8.36 (same conclusion reached in Panel Report, *Guatemala –Cement I*, paras. 7.64-7.66, though Panel Report reversed in total by Appellate Body on procedural grounds as dispute not properly before the Panel, and adopted as reversed, WT/DSB/M/51, section 9(a)). The Panel on *Argentina – Poultry Anti-Dumping Duties* fully agreed with the Panel on *Guatemala – Cement II* while adding that it did not mean to suggest that "an investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the *quantity* and *quality* that would be necessary to support a preliminary or final determination. However, the evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 to justify initiation of an investigation." Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.62.

[39] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.67.

[40] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.78.

[41] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.80.

[42] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.84 (also stating that Article 5.3, read in light of Article 2.4, cannot be interpreted to require that data on normal value and export price cover *identical* periods of time).

[43] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.85.

basis with the export price evidence.[44] In considering the evidence relating to normal value the Panel, in looking at the evidence on normal value as a whole, identified a number of inter-related concerns in respect of "the sufficiency of the nexus with producer/exporter pricing in the Guatemalan home market for the product under investigation;the isolated nature of the information in terms of temporal coverage, volume, and product coverage; and, as a result, the comparability of this evidence with that on export pricing."[45] One of the main concerns was that none of the normal value evidence pertained to Tubac, "the only identified exporter, which accounted for almost all production and exports of the investigated product."[46] The Panel went on to say:

> "We do not here mean to imply that, at the stage of initiation, an investigating authority must have pricing documentation from every domestic producer or exporter, or even any domestic producer or exporter … Nevertheless, dumping is a company-specific practice, and this is reflected in the Agreement's provisions concerning the determination of dumping in respect of particular producers or exporters … Where, as is the case here, it is obvious on its face that the normal value evidence before the authority at the time of initiation does not pertain to a producer or exporter and indeed pertains to a different level of trade, and may not even reflect products produced in the exporting country, the authority should make its best endeavours to verify that that evidence reflects the prevailing home market pricing at the level of producers and/or exporters."[47]

40. The Panel in *Mexico – Steel Pipes and Tubes* considered the temporal, volume and product coverage of the evidence to be extremely limited and isolated and had similar concerns regarding the evidence concerning product volume and coverage:

> "There is no dispute that the dates of the invoice and the price quote were both within the period of investigation, but the fact that the home market pricing evidence for each broad product sub-group (i.e., galvanized and black pipe) pertained only to a single day out of the six-month-long period of investigation raises substantial questions as to whether that evidence was representative of pricing during that period as a whole. Mexico does not argue, and there is no evidence, that Economía sought confirmation from Hylsa that, or made any other effort to determine whether, this evidence was representative of the period as a whole. In fact, Mexico confirmed to us the contrary, stating that 'since the information submitted by the applicant was dated within the period of investigation, [Economía] did not require additional normal value information'. Mexico appears to be arguing, in other words, that so long as a piece of evidence is dated within the period of investigation, even if it represents only a single day during that period, this information is – by definition, and without more – sufficiently representative of the period of investigation as a whole for purposes of initiation. We disagree since it is indeed quite possible that an individual, isolated transaction may be an aberration from the typical prevailing prices and/or conditions, and therefore if the applicant has provided only such temporally isolated evidence, the authority should not assume without some corroboration that this evidence is representative of the period as a whole.
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> …
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> We asked Mexico: 'Is there any indication in the Initiation Determination or in the record that Economía assessed whether the pipes in the invoice and the price quote might be considered to be sufficiently representative of the product at issue?' Mexico responded that Economía had analysed the invoice and the price quote and found that 'the prices given in both sources correspond to the investigated merchandise, are for the Guatemalan market, and were in effect during the period of investigation'. We view this as an argument by Mexico that so long as a piece of evidence pertains to some part (no matter how restricted) of the product range covered by an application, that evidence – by definition and without more – is sufficiently representative of that

[44] Panel Report, *Mexico Steel Pipes and Tubes*, para. 7.28.
[45] Panel Report, *Mexico –Steel Pipes and Tube*, para. 7.34.
[46] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.35.
[47] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.35.

> product range for purposes of initiation. Again, we cannot agree with such a proposition. Where the evidence pertains to only a thin sliver of a broad overall product range, the authority should not assume without some corroboration that this evidence represents pricing for the full product range."[48]

41. However, the Panel in *Mexico –Steel Pipes and Tubes* cautioned against the view that a price quote was inherently invalid because it did not represent a completed transaction and because the quoted prices were subject to change. The concerns expressed by the Panel were to do with the particular price quote in this case and not the probative value of price quotes as such. "Indeed, in another case there could well be a situation where adequately corroborated and representative price quotes constituted sufficient evidence of alleged dumping."[49] Overall, in light of the evidence, the Panel concluded that "an unbiased and objective investigating authority could not have concluded there was sufficient evidence of dumping to justify the initiation of an anti-dumping investigation under Article 5.3."[50]

42. In *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, the Panel was asked to determine whether the Moroccan investigating authority had properly examined the accuracy and adequacy of the complaint by the domestic industry and determined in an unbiased and objective manner that there was sufficient evidence of dumping to justify the initiation of the investigation. The Panel explained that it did "not consider that the examination of the accuracy and adequacy of the evidence requires the investigating authority to ensure that the information provided is 'representative' of the *whole* period and of *all* types of the product under investigation."[51]

43. Against this threshold, the Panel found that the investigating authority's examination of the export price evidence did not comply with Article 5.3 because the evidence was limited and uncorroborated, and the investigating authority failed to cross-check it against other sources of export price information to substantiate it:

> "Our review seeks to determine whether MIICEN properly examined the accuracy and adequacy of the export price evidence and, notably, whether the complaint contained the elements needed to initiate an investigation. In that regard, we consider that invoices for sales of the product concerned during the relevant period normally have a high probative value, and that it cannot be reasonably expected that an applicant has at its disposal multiple invoices for a large sample of transactions and models of the product concerned over the period covered by the complaint. As another panel before us, we consider, however, that a single invoice cannot, without some corroboration, be sufficient to substantiate the export price of the product concerned. In particular, we believe that an authority cannot ensure the accuracy and adequacy of such information without cross-checking it against other 'information on export prices'. However, although the initiation report indicates that MIICEN did 'examine and verify' the 'petition data and supporting documents', we find no reference to other information substantiating the export price. Neither the investigation record, nor the arguments presented by Morocco before us, allow us to conclude in this case that the invoice submitted by the applicants was both relevant and sufficiently probative, or that the investigating authority sought to verify the relevance of that evidence by cross-checking it against other export price information for Tunisian exercise books.
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> From that point of view, and in the light of the information available to us, we consider that Tunisia has established that the investigating authority failed to examine the accuracy and adequacy of the export price evidence when determining whether that evidence was sufficient to justify the initiation of an investigation."[52]

44. The Panel also found that the investigating authority's examination of the normal value evidence did not comply with Article 5.3 because the evidence evaluated was derived from a limited sample and required further corroboration and cross-checking against other sources of normal value data:

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[48] Panel Report, *Mexico –Steel Pipes and Tubes*, paras. 7.39 and 7.37.
[49] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.41.
[50] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.43.
[51] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.378.
[52] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.380-7.381.

> "[A]s another panel before us, we consider that such a limited sample of retail prices cannot, without some corroboration, be sufficient to substantiate the normal value of the product concerned. In particular, we believe that an authority cannot ensure the accuracy and adequacy of such information without cross-checking it against other 'information on the normal value'. However, in this case, we find that the initiation report does not refer to other information substantiating the normal value: the section on the normal value in the initiation report only mentions data taken from those website pages. Neither the investigation record, nor the arguments presented by Morocco before us, allow us to conclude in this case that the website excerpts submitted by the applicants were both relevant and sufficiently probative, or that the investigating authority sought to verify the relevance of that evidence by cross-checking it against other information on the normal value of Tunisian exercise books.
>
> From that point of view, we therefore consider that Tunisia has established that the investigating authority failed to examine the accuracy and adequacy of the normal value evidence in accordance with the provisions of Article 5.3 of the Anti-Dumping Agreement when determining whether that evidence was sufficient to justify initiating an investigation."[53]

45. On the basis of this reasoning, the Panel concluded that Morocco's investigating authority had violated Article 5.3 of the Anti-Dumping agreement:

> "In the light of the foregoing, we therefore conclude that Tunisia has demonstrated that MIICEN failed to examine the accuracy and adequacy of the evidence of the export price, the normal value and the adjustment for transportation costs, in accordance with the provisions of Article 5.3 of the Anti-Dumping Agreement." [54]

46. The Panel in *Colombia – Frozen Fries* stated that, under Article 5.3, judgement should be applied as to the suitability of using third-country export prices as evidence of normal value in an application:

> "For purposes of an investigating authority's examination under Article 5.3, therefore, the use of the term 'where appropriate' implies, at a minimum, the exercise of judgment as to the fitness, suitability, or 'appropriateness', of using third-country sales prices, instead of domestic sales prices, in light of the specific situation at hand. As relevant context, we also note that the chapeau of Article 5.2 states that '[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph.' Relatedly, we note that Article 5.2(iii) uses the term 'where appropriate'163, and not the term 'where the applicant considers or deems it appropriate'."[55]

1.4.1.5 Sufficient evidence of injury

47. In *Guatemala – Cement II*, the Panel examined Mexico's argument that the Guatemalan authority did not have sufficient evidence of threat of material injury to justify the initiation of an investigation. In rebuttal, Guatemala argued that Article 3.7 does not apply to the determination of the investigating authorities on this issue, because Article 5.2(iv), which requires that an application contain certain information, does not refer to Article 3.7, but only to Articles 3.2 and 3.4. The Panel responded:

> "[W]hen considering whether there is sufficient evidence of threat of injury to justify the initiation of an investigation, an investigating authority cannot totally disregard the elements that configure the existence of threat of injury outlined in Article 3. We do not mean to suggest that an investigating authority must have before it at the time it initiates an investigation evidence of threat of material injury within the meaning of Article 3 of the quantity and quality that would be necessary to support a preliminary or final determination of threat of injury. However, the investigating authority must

[53] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.387-7.388.
[54] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.395.
[55] Panel Report, *Colombia – Frozen Fries*, para. 7.69.

> have before it evidence of threat of material injury, as defined in Article 3, sufficient to justify the initiation of an investigation."[56]

48. However, with respect to Article 3.7, the Panel added a caveat to its finding quoted under paragraph 47 above, in stating that the investigating authority need not have before it information on all Article 3.7 factors where there is an allegation of threat of injury:

> "Article 3.7 provides specific guidance on the factors to be considered by an investigating authority when making a determination of threat of injury. Although we do not necessarily believe that an investigating authority must have before it information on all Article 3.7 factors in a case where initiation of an investigation is requested on the basis of an alleged threat of injury, a consideration of those factors is certainly pertinent to an evaluation of whether there was sufficient evidence of threat of material injury to justify the initiation of an investigation."[57]

49. The Panel in *Mexico – Steel Pipes and Tubes* considered that Article 3 provided pertinent guidance for an investigating authority, before taking a decision to initiate an investigation, to satisfy itself as to the sufficiency of the evidence regarding injury. The Panel elaborated:

> "While, again, we do not mean to suggest that an investigating authority must have before it, at the time it initiates an investigation, injury-related evidence of the quantity and quality that would be necessary to support a preliminary or final determination of injury, it is clear that the authority must have before it the same *type* of evidence of injury as defined in Article 3, including as to the volume of allegedly dumped imports, sufficient to justify the initiation of an investigation."[58]

50. The Panel in *Mexico –Steel Pipes and Tubes* found that the investigating authority in Mexico had failed to properly determine that there was sufficient evidence of injury to justify the initiation of an anti-dumping investigation:

> "We disagree with Mexico's argument that requiring, at the initiation stage, some corroboration of the import volume at the tariff line level that related to the product under investigation is tantamount to imposing a requirement that initiation evidence of the same quality and quantity as evidence required to sustain a preliminary or final determination. Again, it is the *type* of evidence of injury which is our focus here.
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> in the circumstances of this case, we consider that an unbiased and objective investigating authority, in relying on the evidence in question, i.e., the official statistics of total imports under the two tariff lines concerned, as evidence of the volume of dumped imports – without cross-checking (even in an approximate manner) the proportion of those tariff line import data that corresponded to the product under investigation – could not properly have determined that there was sufficient evidence of injury to justify the initiation of an anti-dumping investigation in relation to the product under investigation. The fact that, during the course of the investigation, it was ultimately confirmed that the investigated product (however this was eventually defined) appeared to account for a substantial portion of the imports under the two tariff lines is not relevant to our examination under Article 5.3. What is relevant is what facts were known to the investigating authority at the time that it initiated the investigation. We see no basis on the record for Economía to have concluded that the total volumes at the tariff line level constituted a reasonable proxy for the volume of the allegedly dumped products during the period of investigation. We therefore find that Economía did not act consistently with Mexico's obligations

[56] Panel Report, *Guatemala – Cement II*, para. 8.45.

[57] Panel Report, *Guatemala – Cement II*, para. 8.52. (same conclusion reached in Panel Report, *Guatemala – Cement I*, paras. 7.75-7.77 on which specific elements of dumping need to be supported by sufficient evidence under Article 5.3; Panel Report reversed in total by Appellate Body on procedural grounds as dispute not properly before the Panel; Panel Report adopted as reversed, WT/DSB/M/51, section 9(a)).

[58] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.56.

> under Article 5.3 in performing its assessment of the sufficiency of the evidence of injury."[59]

51. In *Dominican Republic – AD on Steel Bars (Costa Rica)*, the Panel disagreed with the complainant's argument that invoices relating to a single type of imported product do not constitute sufficient evidence within the meaning of Article 5.3:

> "Article 5.3 does not establish quantitative thresholds for determining what is considered 'sufficient' evidence, and as such, we do not see anything in Article 5.3 that would make the sufficiency of the evidence of dumping dependent on the existence of evidence of a certain number of types of the imported product under investigation. We therefore do not see how, under the terms of Article 5.3, from the mere fact that the four purchase invoices allegedly referred to only one type of all of the types of products identified in the application that comprised the product under investigation, it could be established that the evidence was not sufficient to justify the initiation of the investigation."[60]

52. In coming to this conclusion, the Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* underlined that sufficiency of evidence will depend on the circumstances of each case, and noted that, in the case at hand, the product types for which information on the normal value was submitted included products that were identified by the applicant as among the main types of the product under investigation.[61]

53. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* also rejected the complainant's argument that the "sufficiency" of the evidence submitted in the application with regard to normal value depends on the volume of imports covered by such evidence:

> "…Article 5.3 does not establish quantitative thresholds for determining the sufficiency of evidence, and as such, we see nothing in Article 5.3 requiring that evidence of dumping must relate to particular sales volumes of the product in question. … We therefore find no basis in the text of Article 5.3 to support position that the invoices were not sufficient evidence because the volume of sales covered by those invoices was 'very low', and could not be used as a basis to make "generalizations" with respect to the normal value. At the same time, we are not convinced that the volume of sales covered by the evidence is a relevant factor as Costa Rica asserts. So, for example, in situations where the evidence of dumping refers to all types of the product under investigation and the entire POI (or vice versa), we do not see how the volume of sales covered by the evidence could affect the sufficiency of the evidence."[62]

54. In *Dominican Republic – AD on Steel Bars (Costa Rica)* Costa Rica, the complainant noted that there was a time difference of one year between the initiation of the investigation and the dates of invoices submitted in the application as evidence of normal value, and argued that this time lag "undermined the 'adequacy' and 'accuracy' of the evidence by failing to point to current dumping".[63] The Panel disagreed with Costa Rica, noting the investigating authority's efforts to verify the information submitted by the applicant. The Panel also rejected Costa Rica's argument that the investigating authority's analysis did not comply with the requirements of Article 5.3 due to failure to explain certain aspects of the comparison made, noting that Article 5.3 does not prescribe the kind of examination to be conducted by investigating authorities:

> "[W]e note that the CDC did not limit itself to asking the applicant questions about the invoices, but it also examined the additional evidence to corroborate the 'accuracy' and 'adequacy' of the information provided. In particular, we note that the CDC 'verif[ied] the market behaviour of the allegedly dumped imports subsequent to the dumping period provided in the application to initiate [an investigation]', and did so in order to 'find whether there [wa]s any correlation between the information ... on the

[59] Panel Report, *Mexico –Steel Pipes and Tubes,* paras. 7.59 and 7.60.
[60] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.342.
[61] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.342.
[62] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.344.
[63] See Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.345.

> record' and '[the information] verified by the [CDC] when preparing its [initial technical] report'.
>
> …
>
> [T]he fact that the CDC did not explicitly set out the type of rod used, the adjustments made, and its decision to compare transactions from different months, does not affect the examination it carried out to corroborate the relevance of the evidence by finding that dumping occurred on dates closer to the time of initiation. … Article 5.3 requires the accuracy and adequacy of the information to be examined in order to determine whether there is sufficient evidence to justify the initiation of an investigation, there is nothing in that provision governing such an examination, or requiring the authorities to conduct a particular type of analysis or to provide an explanation of how it carried out this examination. We therefore see no basis in Article 5.3 that requires an investigating authority to 'explain' or 'spell out' (or 'provide information' on) how it carried out the examination of the evidence in accordance with that provision.
>
> On the basis of the foregoing, we find that the information contained in the invoices corresponded to the [period of investigation], in the absence of any legal impediment to them being considered evidence of the normal value. In such circumstances, we disagree with Costa Rica's argument that the invoices could not be considered sufficient evidence because they concerned sales made almost a year before the application to initiate an investigation."[64]

1.4.1.6 Sufficiency of evidence to initiate

55. In *Pakistan – BOPP Film (UAE)*, the Panel considered that the parties' arguments raised the question whether Article 5.3 imposed requirements on the temporal scope of the evidence on which initiation is based. After examining the text, context, and object and purpose of Article 5.3, the Panel found that evidence justifying the initiation of an investigation must pertain to *current* dumping, injury, and causation:

> "[F]or evidence to be 'sufficient evidence to justify the initiation of an investigation' under Article 5.3, it must pertain to *current* dumping, injury, and causation. The more recent the data are at the time of initiation, the more likely they will be to provide evidence of current dumping, injury, and causal link, and vice versa. Whether a temporal gap between the date of initiation and the evidence on which initiation is based means that the evidence does not relate to current dumping, injury, and causation, must be assessed case by case in light of the relevant circumstances."[65]

56. The Panel then turned to the central question under Article 5.3 on the use by an investigating authority of a set of data to justify the initiation of an investigation occurring later in time. Specifically, the Panel phrased the central question as follows:

> "[W]hether an unbiased and objective investigating authority, looking at the facts before it, could have determined that the data ending in December 2009 (for dumping) and June 2010 (for injury), in light of all relevant circumstances, were 'sufficient evidence to justify the initiation of an investigation' on 23 April 2012. Specifically … if in light of all relevant circumstances the data could not be said to relate to 'current' dumping, injury, and causation, then the authority could not have determined that there was sufficient evidence to justify initiation within the meaning of Article 5.3."[66]

57. In making its assessment, the Panel considered, first, the temporal gap between the data and the date of initiation, and second, the relevant circumstances surrounding the authority's determination that there was sufficient evidence to justify initiation.[67]

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[64] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* paras. 7.348, 7.351 and 7.352.
[65] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.29.
[66] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.35.
[67] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.36.

58. Beginning with the temporal gap between the data and the initiation, the Panel noted that the temporal gap was approximately two years in duration:

> "We begin with the temporal gap between the data and initiation: for dumping, this was more than 27 months; for injury, the gap was almost 22 months. While the temporal gap alone is not enough to conclude that the data did not provide evidence of current dumping causing injury, these gaps are quite considerable, ranging from slightly less to slightly more than two full years."[68]

59. Turning to the circumstances surrounding the examination conducted by Pakistan's investigating authority (NTC), the Panel did not consider that a Pakistani court's order to NTC to initiate the investigation excused Pakistan from its obligations under Article 5.3:

> "A Member is responsible for the acts of all of its organs, including the judiciary. Therefore, whether the NTC was abiding by the instructions of a Pakistani court or acting in its own discretion does not affect the scope of Pakistan's obligations under Article 5.3 of the Anti-Dumping Agreement."[69]

60. The Panel also considered that, even though an investigation takes time to complete, this alone does not permit an investigating authority to initiate an investigation on the basis of already remote data:

> "It is true that an investigation takes time, leading to a gap between the end of the POI and the date of *final determination*. This, however, does not suggest that it is necessarily appropriate to *initiate* an investigation on the basis of evidence that is already remote at the time of initiation."[70]

61. Finally, the Panel noted that the NTC had not discussed or acknowledged the issue of the temporal scope of the evidence in its initiation memorandum or in any record document during the WTO proceedings.[71] This led the Panel to conclude that the NTC had not fulfilled its obligation to determine that there was "sufficient evidence" for purposes of Article 5.3:

> "The fact that the NTC does not appear to have considered the question of the temporal scope of the data, despite the fact that they were two years old at the time of initiation, leads us to conclude that the NTC did not fulfil its obligation to determine that there was 'sufficient evidence' for purposes of Article 5.3. The NTC gave no reasons for not updating the evidence and made no apparent attempt to do so. According to Pakistan, it failed to do so because a court order directed it to rely on the data in the original application. No such explanation, however, is discernible from the record and in any case, as we discuss above, this order did not relieve Pakistan of its obligation to abide by its commitments under the Anti-Dumping Agreement.
>
> We also recall the circumstances that, in *Mexico – Anti-Dumping Measures on Rice*, contributed to the conclusion that the authority did not base its injury determination on evidence of 'current' injury. We agree that those are relevant circumstances, and we note the similarities with the circumstances surrounding the NTC's determination that there was sufficient evidence to justify initiation: in 2012 the NTC did not demand more recent evidence, did not explain its choice, and largely relied on the data period proposed by the applicant, and Pakistan has not demonstrated that it was not possible to seek more recent evidence."[72]

62. Therefore, in the light of both the temporal gap and the circumstances surrounding the authority's determination, the Panel found that the NTC could not have determined that the data underlying initiation pertained to current dumping causing injury:

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[68] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.37.
[69] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.39-7.40.
[70] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.41-7.42.
[71] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.45.
[72] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.46-7.47.

> "Therefore, when we consider *both* the temporal gap of approximately two years between the data underlying initiation and initiation itself, *and* the circumstances surrounding the authority's determination that the data were sufficient, we find that the NTC could not have determined that the data underlying initiation pertained to current dumping causing injury. Therefore, the NTC acted inconsistently with Article 5.3 by failing to assure itself that there was sufficient evidence to justify initiation of an investigation."[73]

1.4.1.7 Standard of review – relationship with Article 17.6

63. In determining what constitutes "sufficient evidence to justify the initiation of an investigation" under Article 5.3, the Panel in *Guatemala – Cement I* applied the standard of review set out in Article 17.6(i)[74], referring, in so doing, to the GATT Panel Report in *US – Softwood Lumber II*. The Panel also agreed with the view expressed by the Panel in *US – Softwood Lumber II* that "the quantum and quality of the evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after the investigation".[75]

64. Referring to the approach of the Panel in *Guatemala – Cement I*[76], which took into account the reasoning of the GATT Panel in *US – Softwood Lumber II*, the Panel in *Mexico – Corn Syrup* stated that "[o]ur approach in this dispute will similarly be to examine whether the evidence before [the investigating authority] at the time it initiated the investigation was such that an unbiased and objective investigating authority evaluating that evidence, could properly have determined that sufficient evidence of dumping, injury, and causal link existed to justify initiation."[77]

65. In *Guatemala – Cement II*, the Panel found that "[i]t is clear on the face of these documents that the invoices reflecting prices in Mexico are for sales occurring at the very end of the commercialisation chain and the import certificates reflect prices at the point of importation which is the beginning of the commercialisation chain for Mexican cement in Guatemala".[78] The Panel subsequently found, applying the standard of review set forth in Article 17.6(i):

> "[T]he fact that the sales in the Mexican and Guatemalan markets were at different levels of trade was apparent from the application itself, and an unbiased and objective investigating authority should have recognized this fact without the need for it to be pointed out. Nor do we consider that an investigating authority can completely ignore obvious differences that could affect the comparability of the prices cited in an application on the ground that the foreign exporter has not demonstrated that they have affected price comparability. Moreover, at the point where the investigating authority is considering whether there is sufficient evidence to initiate an investigation, potentially affected exporters have not even been notified of the existence of an application, much less been provided a copy thereof. Thus, the logical implication of Guatemala's argument is that an investigating authority need never take into account issues of price comparability when considering whether there is sufficient evidence of dumping to initiate an investigation. We cannot agree with such an interpretation of the *AD Agreement*, particularly in light of the criteria set out in para. 8.36 above.
>
> After a thorough review of all the actions by the Ministry leading up to the initiation of the investigation, we find that no attempt was made to take into account glaring differences in the levels of trade and sales quantities and their possible effects on price comparability. Under these circumstances, an unbiased and objective

[73] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.48.
[74] Panel Report, *Guatemala – Cement I*, para. 7.57.
[75] Panel Report, *Guatemala – Cement I*, para. 7.57. (Report reversed in total by Appellate Body on procedural grounds as dispute not properly before the Panel; Panel Report adopted as reversed, WT/DSB/M/51, section 9(a)).
[76] Panel Report, *Mexico – Corn Syrup*, para. 7.94 (referring to Panel Report, *Guatemala – Cement I*, paras. 7.54-7.55, and stating: "that Panel's conclusions in this regard have no legal status. However, the Panel's report sets out a standard that we consider instructive in this case.")
[77] Panel Report, *Mexico – Corn Syrup*, para. 7.95.
[78] Panel Report, *Guatemala – Cement II*, para. 8.37.

> investigating authority could not in our view have concluded that there was sufficient evidence of dumping to justify the initiation of an anti-dumping investigation."[79]

66. Having found that the Guatemalan investigating authority should have considered the issue of price comparability when considering whether there was sufficient evidence of dumping to initiate an investigation, the Panel emphasized that it did not expect:

> "[I]nvestigating authorities at the initiation phase to ferret out all possible differences that might affect the comparability of prices in an application and perform or request complex adjustments to them. We do however expect that, when from the face of an application it is obvious that there are substantial questions of comparability between the export and home market prices being compared, the investigating authority will at least acknowledge that differences in the prices generate questions with regards to their comparability, and either give some consideration as to the impact of those differences on the sufficiency of the evidence of dumping or seek such further information as might be necessary to do so."[80]

1.4.2 "shall examine the accuracy and adequacy of the evidence provided in the application"

67. The Panel in *Guatemala – Cement I* considered whether there had been sufficient evidence to justify an anti-dumping investigation under Article 5.3.[81]

68. In determining what the parameters are of the requirement to "examine" the accuracy and adequacy of the evidence, and on what basis an assessment can be made regarding whether the necessary examination was carried out, the Panel in *EC – Bed Linen* stated:

> "The only basis, in our view, on which a panel can determine whether a Member's investigating authority has examined the accuracy and adequacy of the information in the application is by reference to the determination that examination is in aid of - the determination whether there is sufficient evidence to justify initiation. That is, if the investigating authority properly determined that there was sufficient evidence to justify initiation, that determination can only have been made based on an examination of the accuracy and adequacy of the information in the application, and consideration of additional evidence (if any) before it."[82]

69. Regarding a determination under Article 5.3, the Panel in *Mexico – Corn Syrup* stated that "Article 5.3 does not impose an obligation on the investigating authority to set out its resolution of *all* underlying issues considered".[83] Applied to the facts of the dispute, the Panel concluded that "Article 5.3 does not establish a requirement for the investigating authority to state specifically the resolution of questions concerning the exclusion of certain producers involved in defining the relevant domestic industry in the course of examining the accuracy and adequacy of the evidence to determine whether there was sufficient evidence to justify initiation."[84]

70. In *Guatemala – Cement II*, the Panel agreed that "statements of conclusion unsubstantiated by facts do not constitute evidence of the type … which allows an objective examination of its adequacy and accuracy by an investigating authority as provided in Article 5.3."[85]

1.4.3 Relationship with other paragraphs of Article 5

71. The Panel in *Colombia – Frozen Fries* explained the relationship between Articles 5.3 and 5.2 as follows:

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[79] Panel Report, *Guatemala – Cement II*, paras. 8.38-8.39.
[80] Panel Report, *Guatemala – Cement II*, para. 8.40.
[81] Panel Report, *Guatemala – Cement I*, para. 7.71. (Report reversed in total by Appellate Body on procedural grounds as dispute not properly before the Panel; Panel Report adopted as reversed, WT/DSB/M/51, section 9(a)).
[82] Panel Report, *EC – Bed Linen*, para. 6.199.
[83] Panel Report, *Mexico – Corn Syrup*, para. 7.102.
[84] Panel Report, *Mexico – Corn Syrup*, para. 7.105.
[85] Panel Report, *Guatemala – Cement II*, para. 8.53.

> "The reference to evidence provided 'in the application' in Article 5.3 and the requirements of Article 5.2(iii), specifying in detail what evidence and information is to be included in 'the application', establish, in our view, an explicit connection or link between these two provisions. As we see it, an examination of the accuracy and adequacy of the evidence in the application with a view to determining whether it is sufficient for initiation cannot be undertaken in the abstract or in a vacuum. Rather, such an examination under Article 5.3 is informed by Article 5.2, including Article 5.2(iii). For this reason, we disagree with Colombia insofar as it argues that 'the terms of Article 5.2 are not in principle relevant to assessing the European Union's claim' under Article 5.3."[86]

72. The Panel in *Guatemala – Cement II* rejected Mexico's argument that a violation of Article 5.3 due to the initiation of an investigation in the absence of sufficient evidence necessarily constitutes a violation of Article 5.7. See paragraph 91 below.

73. The Panel in *Morocco – Definitive AD Measures on Exercise Books (Tunisia)* explained the relationship between Articles 5.3 and 5.8, and rejected Tunisia's argument that a finding of a violation of Article 5.3 should automatically lead to a consequential finding of violation of Article 5.8:

> "Article 5.8 provides that an 'application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case'. Other panels have taken the view that Article 5.8 does not require an additional examination in relation to Article 5.3. We share this view. Article 5.8 regulates the situation in which an authority, following the examination required under Article 5.3, determines that there is not sufficient evidence to initiate an investigation. If that is the case, the complaint must be rejected by the authority.
>
> Nevertheless, we note that Article 5.8 obliges the authority to terminate an investigation when it is 'satisfied' that the evidence is not sufficient. Thus, reading Article 5.8 in its entirety shows that the obligation to reject the complaint (or to terminate an investigation already initiated) follows a determination by the authority that there is no basis (or no longer a basis) for an investigation. Article 5.8 says nothing, however, about an authority that has determined that the evidence is sufficient, as is the case in this dispute. For this reason, we do not believe that a panel that finds a violation of Article 5.3 - because some evidence was not sufficient to initiate an investigation - should automatically find a consequential violation of Article 5.8."[87]

74. In *Colombia – Frozen Fries*, the European Union also raised a "consequential" claim under Article 5.8 based on the Panel's finding of violation of Article 5.3. The Panel did not address the question of relationship between the two provisions, and decided to apply judicial economy with regard to the European Union's claim under Article 5.8:

> "The European Union does not present any independent bases for the alleged breach of Article 5.8 of the Anti-Dumping Agreement; instead, its claim under this provision is dependent entirely upon a finding that Colombia acted inconsistently with Article 5.3 of the Anti-Dumping Agreement. In these circumstances – and having already found that Colombia acted inconsistently with Article 5.3 – we do not consider it necessary to make additional findings concerning the European Union's Article 5.8 claim in order to provide a positive resolution to the dispute before us."[88]

75. The Panel in *Mexico – Corn Syrup* touched on the relationship between Articles 5.3 and 5.8. See paragraph 93 below.

76. The Panel in *Mexico – Steel Pipes and Tubes* looked at the relationship between Article 5.3 and Article 5.8. See paragraph 93 below.

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[86] Panel Report, *Colombia – Frozen Fries*, para. 7.63.
[87] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.359-7.360.
[88] Panel Report, *Colombia – Frozen Fries*, para. 7.109.

1.5 Article 5.4

1.5.1 General

77. The Appellate Body in *US – Offset Act (Byrd Amendment)* considered that Article 5.4 requires "no more than a formal examination of whether a sufficient number of domestic producers have expressed support for an application".[89] The Appellate Body went on to note that Article 5.4 contains no requirement for investigating authorities to examine the motives of producers that elect to support (or to oppose) an application.[90] The Appellate Body recalled that "there may be a number of reasons why a domestic producer could choose to support an investigation."[91]The Appellate Body strongly disagreed with the approach taken by the Panel in relation to the concept of support[92] and reached the following conclusion:

> "A textual examination of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* reveals that those provisions contain no requirement that an investigating authority examine the motives of domestic producers that elect to support an investigation. Nor do they contain any explicit requirement that support be based on certain motives, rather than on others. The use of the terms 'expressing support' and 'expressly supporting' clarify that Articles 5.4 and 11.4 require only that authorities 'determine' that support has been 'expressed' by a sufficient number of domestic producers. Thus, in our view, an 'examination' of the 'degree' of support, and not the 'nature' of support is required. In other words, it is the 'quantity', rather than the 'quality', of support that is the issue."[93]

78. The Panel in *EC – Salmon (Norway)* found that the investigating authority wrongly defined the domestic industry, by excluding salmon producers that did not express an opinion regarding the investigation, producers that did not provide information to the investigating authority, producers of organic salmon, and producers of salmon fillets that did not also farm salmon fish. The Panel found that the authority's assessment of whether the producers it did include accounted for "a major proportion" of domestic production of the like product was therefore based on incorrect information concerning the volume of total domestic production of the like product, as the information used related to a wrongly-defined industry; consequently it concluded that the determination was inconsistent with Article 5.4. As the EC had not obtained information on the production of the excluded producers, the Panel declined to make its own assessment as that would be *de novo* and prohibited.[94]

79. The Panel in *EC – Fasteners (China)* rejected a claim under Article 5.4 because *inter alia* (a) the mere fact of revisiting after initiation a determination which had to be and was made prior to initiation does not undermine the validity of the pre-initiation determination of standing; (b) the complaining party had not demonstrated that there was any reason to doubt the accuracy of the official statistics used to evaluate standing; and (c) it would be inappropriate to base a finding of violation of Article 5.4, concerning a decision made prior to initiation, on the investigating authority not having considered information brought to its attention after the determination has been made and the investigation initiated.[95]

80. In *EC – Fasteners (China),* the Appellate Body declined to draw on the 25 per cent threshold in Article 5.4 as context for interpreting the phrase "a major proportion" in Article 4.1, because "the 25 per cent benchmark under Article 5.4 does not address the question of how the entire universe of the domestic industry *itself* should be defined." [96]

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[89] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 286.
[90] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 291.
[91] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 290.
[92] The Panel in *US – Offset Act (Byrd Amendment)* was of the view that the Offset Act defeated the object and purpose of Article 5.4 as it considered that Article 5.4 was "introduced precisely to ensure that support was not just assumed to exist but actually existed, and that the support expressed by domestic producers was evidence of the industry-wide concern of injury being caused by dumped or subsidized imports." Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.65.
[93] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 283.
[94] Panel Report, *EC – Salmon (Norway)*, paras. 7.107-7.124.
[95] Panel Report, *EC – Fasteners (China)*, paras.7.150-7.183.
[96] Appellate Body Report, *EC – Fasteners (China)*, para. 418.

1.5.2 Relationship with Article 11.4 of the SCM Agreement

81. In *US – Offset Act (Byrd Amendment)*, the Appellate Body further to noting that both Article 5.4 of the Anti-Dumping Agreement and Article 11.4 of the SCM Agreement are "identical" provisions, analysed them jointly. See paragraph 77 above.

1.6 Article 5.5

1.6.1 "before proceeding to initiate"

82. In *Guatemala – Cement II*, Mexico claimed that in violation of Article 5.5, Guatemala did not notify the Government of Mexico before proceeding to initiate the investigation. Guatemala argued that that the effective date of initiation of the investigation was not 11 January 1996, the date alleged by Mexico, and maintained that according to its own Constitution and legislation, the investigating authority could not have initiated the investigation until the Government of Mexico had been officially notified. Referring to footnote 1 of the Anti-Dumping Agreement, the Panel first determined at what specific point in time the Guatemalan investigation had been initiated within the meaning of the Anti-Dumping Agreement:

> "[T]he date of initiation is the date of the procedural action by which Guatemala formally commenced the investigation. We are of the view that in the case before us the action by which the investigation was formally commenced is the date of publication of the notice of initiation which occurred on 11 January 1996."[97]

83. The Panel in *Guatemala – Cement II* further rejected Guatemala's argument that "[it] could not have initiated the investigation until after it had notified Mexico"[98], because its own Constitution and laws mandated it to do so:

> "In acceding to the WTO, Guatemala undertook to be bound by the rules contained in the *AD Agreement*, and our mandate is to review Guatemala's compliance with those rules. The fact that the Constitution of Guatemala mandates that the investigating authorities proceed in a way which is consistent with its international obligations, does not validate the actions actually carried out by those authorities if those actions violate Guatemala's commitments under the WTO. Whether Mexico chose not to pursue its rights under Guatemalan law is of no concern to us, as this would not affect its rights under the WTO Agreements."[99]

84. In *Guatemala – Cement II*, the Panel also stated, with respect to Guatemala's assertion that "in some cases Mexico has failed to notify the government of the investigated exporters in a timely fashion under Article 5.5"[100], that "[w]e are of the view that Mexico's actions regarding notifications is of no relevance to issues before us in this case, which requires us to review the actions of the Guatemalan authorities."[101]

1.6.2 "notify the government"

1.6.2.1 "Oral" notification

85. In *Thailand – H-Beams*, the Panel considered that a notification required under Article 5.5 can be made orally. The Panel stated:

> "Article 5.5 AD does not specify the form that the notification must take. The *Concise Oxford Dictionary* defines the term 'notify' as: 'inform or give notice to (a person)'; 'make known, announce or report (a thing)'. We consider that the form of the notification under Article 5.5 must be sufficient for the importing Member to 'inform'

[97] Panel Report, *Guatemala – Cement II*, para. 8.82. (Same conclusion reached in Panel Report, *Guatemala – Cement I*, para. 7.34, but report reversed in total by Appellate Body on procedural grounds as dispute not properly before the Panel, and adopted as reversed, WT/DSB/M/51, section 9(a)).
[98] Panel Report, *Guatemala – Cement II*, para. 8.83.
[99] Panel Report, *Guatemala – Cement II*, para. 8.83.
[100] Panel Report, *Guatemala – Cement II*, para. 8.83.
[101] Panel Report, *Guatemala – Cement II*, para. 8.83.

> or 'make known' to the exporting Member certain facts. While a written notification might arguably best serve this goal and the promotion of transparency and certainty among Members, and might also provide a written record upon which an importing Member could rely in the event of a subsequent claim of inconsistency with Article 5.5 of the *AD Agreement*, the text of Article 5.5 does not expressly require that the notification be in writing.[102]"[103]

1.6.2.2 Content of notification

86. In *Thailand – H-Beams*, the Panel examined what must be notified under Article 5.5, as follows:

> "The text of Article 5.5 does not specify the contents of the notification. It provides: 'after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned'.[104] Because the text of the provision specifies that notification necessarily follows the receipt of a properly documented application, we consider that the fact of the receipt of a properly documented application would be an essential element of the contents of the notification."[105]

1.6.3 "Harmless error" with respect to Article 5.5 violation/Rebuttal against nullification or impairment presumed from a violation of Article 5.5

87. In *Guatemala – Cement II*, Guatemala argued that the alleged violations of Articles 5.5, 12.1.1 and 6.1.3, had not affected the course of the investigation, and thus, (a) the alleged violations were not harmful according to the principle of harmless error, (b) Mexico "convalidated" the alleged violations by not objecting immediately after their occurrence, and (c) the alleged violations did not cause nullification or impairment of benefits accruing to Mexico under the Anti-Dumping Agreement. The Panel first responded to the argument on "harmless error", concluding that "the concept of 'harmless error' as presented by Guatemala" had not "attained the status of a general principle of public international law":

> "In our view, the GATT panel referred to by Guatemala in support of its position merely stated that it did not wish 'to exclude that the concept of harmless error could be applicable in dispute settlement proceedings under the Agreement.' It therefore cannot be concluded that the GATT panel referred to 'recognized the principle of harmless error 'as alleged by Guatemala. We do not consider that the concept of 'harmless error' as presented by Guatemala has attained the status of a general principle of public international law. In any event, we consider that our first task in this dispute is to determine whether Guatemala has acted consistently with its obligations under the relevant provisions of the *AD Agreement*. To the extent that Mexico can demonstrate that Guatemala has not respected its obligations under the relevant provisions of that Agreement, we must next consider arguments raised by Guatemala in respect of the nullification or impairment of benefits accruing to Mexico thereunder. Thus, while arguments regarding the existence and extent of the possible harm suffered by Mexico may be relevant to the issue of nullification or impairment, we do not consider that an argument of harmless error represents a defence in itself to an alleged infringement of a provision of the WTO Agreement."[106]

88. On the second argument put forward by Guatemala in the context of the alleged violations of Articles 5.5, 12.1.1 and 6.1.3, namely the lack of reaction from Mexico, the Panel found that

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[102] *(footnote original)* While there have been discussions in the Ad Hoc Group on the issue of the form of the notification (See G/ADP/AHG/R/4, para. 19 (Exhibit Thailand-61); G/ADP/AHG/R/5, paras. 18-19 (Exhibit Thailand-59); G/ADP/AHG/R/2, para. 5 (Exhibit Thailand-60)), there has been no recommendation adopted by the ADP Committee on this issue.

[103] Panel Report, *Thailand – H-Beams*, para. 7.89.

[104] *(footnote original)* While there have been discussions in the Ad Hoc Group on the elements that certain Members consider relevant in this context (G/ADP/AHG/R/4, para. 18 (Exhibit Thailand-61), G/ADP/AHG/R/5, para. 17 (Exhibit Thailand-59)) there has been no recommendation adopted by the ADP Committee on this issue.

[105] Panel Report, *Thailand – H-Beams*, para. 7.91.

[106] Panel Report, *Guatemala – Cement II*, para. 8.22.

"Mexico was under no obligation to object immediately to the violations it now alleges before the Panel":

> "Guatemala uses both the concepts of 'acquiescence' and 'estoppel' in support of this argument. We note that 'acquiescence' amounts to 'qualified silence', whereby silence in the face of events that call for a reaction of some sort may be interpreted as a presumed consent. The concept of estoppel, also relied on by Guatemala in support of its argument, is akin to that of acquiescence. Estoppel is premised on the view that where one party has been induced to act in reliance on the assurances of another party, in such a way that it would be prejudiced were the other party later to change its position, such a change in position is 'estopped', that is precluded.
>
> Regarding both arguments of acquiescence and estoppel we note that Mexico was under no obligation to object immediately to the violations it now alleges before the Panel. Mexico raised claims concerning Articles 5.5, 12.1.1 and 6.1.3 at an appropriate moment under the dispute settlement procedure envisaged by the *AD Agreement* and the DSU. Thus, Mexico cannot therefore be considered as having acquiesced to belated notification by Guatemala, to insufficiency in the public notice or to delay in providing the full text of the application, much less to have given 'assurances' to Guatemala that it would not later challenge these actions in WTO dispute settlement. Since Mexico raised its claims at an appropriate moment under the WTO dispute settlement procedures, Guatemala could not have reasonably relied upon Mexico's alleged lack of protest to conclude that Mexico would not bring a WTO complaint. In any event, Guatemala has not satisfied us that, had Mexico complained after the fact, but during the course of the investigation, Guatemala could or would have taken action to remedy the situation. Specifically, with respect to the delay in the Article 5.5 notification, Guatemala asserts that had Mexico objected to the notification delay in a timely manner, the Guatemalan authorities would have reinitiated the investigation after presenting Mexico with the notification under Article 5.5. We are of the view that this argument presented by Guatemala is highly speculative and note that the Panel has been established to rule on the WTO conformity of the actions by Guatemala and not on the WTO conformity of the actions Guatemala alleges it could have taken. In any event, Guatemala states at para. 217 of its first written submission that Mexico first raised the Article 5.5 issue on 6 June 1996, that is at a relatively early stage of the Ministry's investigation, and precedes the Ministry's preliminary affirmative determination. Nevertheless, Guatemala failed to take any steps to address the delayed Article 5.5 notification at that time. Based on these considerations the Panel rejects Guatemala's defence that Mexico 'convalidated' the alleged violations of Articles 5.5, 6.1.3 and 12.1.1 of the *AD Agreement*."[107]

89. The Panel in *Guatemala – Cement II* then considered the third element of Guatemala's argument in the context of the alleged violations of Articles 5.5, 12.1.1 and 6.1.3, namely that no nullification or impairment resulted from the alleged violation of Article 5.5. The Panel found that Guatemala did not rebut the presumption of nullification or impairment under Article 3.8 of the DSU, stating:

> "There is no way to ascertain what Mexico might have done if it had received a timely notification. The extension of time for response to the questionnaire granted to Cruz Azul has no bearing on the fact that Mexico was not informed in time. Thus, we do not consider that Guatemala has rebutted the presumption of nullification or impairment with respect to violations of Article 5.5."[108]

90. The Panel also rejected Guatemala's argument "that the Panel should examine Guatemala's acts and decide whether the non-fulfilment of a procedural obligation should be overlooked on the grounds that the omission did not prejudice the rights of Mexico or [the Mexican producer on whose products anti-dumping duties had been imposed]":

[107] Panel Report, *Guatemala – Cement II*, paras. 8.23-8.24.
[108] Panel Report, *Guatemala – Cement II*, para. 8.109.

> "We could find no basis for such a distinction in the DSU, as suggested by Guatemala between substantive and 'mere' procedural violations. There is no reason to regard violations of procedural obligations differently than obligation of a substantial nature. Compliance with the complete set of procedural rules relating to anti-dumping investigations, including those concerning notification and enhanced transparency, is required. This obligation to comply with all provisions, both procedural and substantive should not be taken lightly if one is not to devoid of all meaning the *AD Agreement* itself. As detailed in sections … above we have found that Guatemala violated Articles 5.5, 6.1.3 and 12.1.1 of the *AD Agreement* by failing to timely notify Mexico of the decision to initiate an investigation, to timely provide Mexico and Cruz Azul a copy of the application, and to publish an adequate notice of initiation. We consider that a key function of the transparency requirements of the *AD Agreement* is to ensure that interested parties, including Members, are able to take whatever steps they deem appropriate to defend their interests. Where a required notification is not made in a timely fashion, or the application is not provided in time, or the public notice is inadequate the ability of the interested party to take such steps is vitiated. It is not for us to now speculate on what steps Mexico might have taken had it been timely notified or provided with the application, or had the public notice been adequate, and how Guatemala might have responded to those steps. Thus, while there is a possibility that the investigation would have proceeded in the same manner had Guatemala complied with its transparency obligations, we cannot state with certainty that the course of the investigation would not have been different."[109]

1.7 Article 5.7

91. In *Guatemala – Cement II*, Mexico argued that because the application contained no evidence on injury, there was no evidence of dumping and injury for the investigating authority to consider at the time of initiation, and therefore there was a violation of Article 5.7; that is, the initiation of an investigation in the absence of sufficient evidence to justify initiation (contrary to Article 5.3) necessarily constitutes a violation of Article 5.7. Guatemala argued that its investigating authority had reviewed the available evidence on dumping and injury. The Panel held that Mexico had failed to present a prima facie case under Article 5.7, and held:

> "Article 5.7 requires the investigating authority to examine the evidence before it on dumping and injury simultaneously, rather than sequentially. We do not consider that the fulfilment of this requirement is conditioned in any way on the substantive nature of that evidence."[110]

92. The Panel in *Argentina – Poultry Anti-Dumping Duties* rejected the argument that evidence of dumping and injury must cover simultaneous periods. It was thus of the view that an argument which concerned the substantive nature of the evidence considered by the authorities in the decision whether or not to initiate an investigation, rather than the timing of the consideration itself, was "outside the scope of the obligation contained in Article 5.7".[111] The Panel considered that:

> "Article 5.7 imposes a procedural obligation on the investigating authority to examine the evidence before it of dumping and injury simultaneously, rather than sequentially, *inter alia* in the decision whether or not to initiate an investigation. We are of the view that Article 5.7 is not concerned with the substance of the decision to initiate an investigation, which is dealt with in Article 5.3 of the *AD Agreement*."[112]

[109] Panel Report, *Guatemala – Cement II*, para. 8.111. In support of this proposition, the Panel cited Panel Report, *Guatemala – Cement I*, para. 7.42 on "harmless error" (report reversed by Appellate Body on procedural grounds as dispute not properly before the Panel; report adopted as reversed, WT/DSB/M/51, section 9(a)).
[110] Panel Report, *Guatemala – Cement II*, para. 8.67.
[111] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.119.
[112] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.118.

1.8 Article 5.8

1.8.1 Rejection of an application to initiate an investigation

93. The Panel in *Mexico – Corn Syrup* found that "Article 5.8 does not impose additional substantive obligations beyond those in Article 5.3 on the authority in connection with the initiation of an investigation. That is, if there is sufficient evidence to justify initiation under Article 5.3, there is no violation of Article 5.8 in not rejecting the application."[113] The panels in *Mexico – Steel Pipes and Tubes*[114] and *Dominican Republic – AD on Steel Bars (Costa Rica)*[115] made the same observation regarding the relationship between Article 5.3 and Article 5.8.[116]

94. In *Guatemala – Cement II*, the Panel rejected the argument that Article 5.8 applies only after an investigation is initiated, stating:

> "[I]f the drafters intended that Article 5.8 apply only after initiation, the reference to promptly terminating an investigation would have sufficed. By referring to the rejection of an application Article 5.8 addresses the situation where an application has been received but an investigation has not yet been initiated. That the text of Article 5.8 continues after the quoted section to describe situations in which an initiated investigation should be terminated, does not support Guatemala's argument that the whole of Article 5.8 applies only after the investigation has been initiated."[117]

95. The Panel in *Guatemala – Cement II* also stated that the Panel Report in *Mexico – Corn Syrup* does not support the interpretation that Article 5.8 applies only after an investigation has been initiated:

> "The panel in *Mexico – HFCS* determined that there had not been a violation of Article 5.3 as there was sufficient evidence to justify initiation. After having made that determination the *Mexico – HFCS* panel proceeded to find that given that there was sufficient evidence to justify initiation under Article 5.3, there was no possible violation of Article 5.8. This in no way detracts from our position that Article 5.8 applies pre-initiation. The Panel in *Mexico – HFCS* would not have even considered the question of whether rejection of the application was warranted if it had not considered that Article 5.8 applies before initiation."[118]

96. The Panel in *US – Lumber V* stated that Article 5.8 does not require an investigating authority, after initiation, to continue to assess the sufficiency of the evidence *in the application* and to terminate the investigation on the grounds that other information undermines the sufficiency of that evidence:

> "We can however find no basis to conclude that Article 5.8 imposes upon an investigating authority a continuing obligation after initiation to continue to assess the sufficiency of the evidence *in the application* and to terminate the investigation on the grounds that other information undermines the sufficiency of that evidence. Once an investigation has been initiated on the basis of sufficient evidence of dumping, the application has served its purpose. Logically, the continuing obligation to terminate an investigation where an investigating authority is satisfied that there is not sufficient evidence to justify proceeding must be based on an assessment of the overall state of the evidence deduced before it in the investigation, not on an assessment of the continuing sufficiency of the information in the application. We are of the view that it could not have been the intention of the drafters of Article 5.8 that its interpretation could result in that an investigation could have been initiated on the basis of sufficient evidence, but that the very same investigation had to be terminated if additional

[113] Panel Report, *Mexico – Corn Syrup*, para. 7.99.
[114] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.25.
[115] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.357.
[116] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.25.
[117] Panel Report, *Guatemala – Cement II*, para. 8.72 (same conclusions reached in Panel Report, *Guatemala – Cement I*, para. 7.59; report reversed by Appellate Body on procedural grounds as dispute not properly before the Panel; report adopted as reversed, WT/DSB/M/51, section 9(a)).
[118] Panel Report, *Guatemala – Cement II*, para. 8.74.

> evidence was made available by the respondents at a later stage, while the evidence being gathered during the course of the investigation, indicates dumping".[119]

1.8.2 "an immediate termination"

97. In *Mexico – Anti-Dumping Measures on Rice,* the Appellate Body, confirming the Panel's finding, held that "the second sentence of Article 5.8 requires the immediate termination of the investigation in respect of exporters for which an *individual* margin of dumping of zero or *de minimis* is determined."[120] The Appellate Body noted that "for the purposes of Article 5.8, there is one investigation and not as many investigations as there are exporters or foreign producers", and that the Panel had made the point that Article 5.8 requires "immediate termination" of the investigation *in respect of* the individual exporter or producer for which a zero or *de minimis* margin is established.[121] The Appellate Body further explained:

> "The issuance of the order that establishes anti-dumping duties—or the decision not to issue an order—is the ultimate step of the 'investigation' contemplated in Article 5.8; in most cases, an investigation is 'terminated' with the issuance of an order or a decision not to issue an order … Given that the issuance of the order establishing anti-dumping duties necessarily occurs after the final determination is made, the only way to terminate *immediately* an investigation, in respect of producers or exporters for which a *de minimis* margin of dumping is determined, is to exclude them from the scope of the order."[122]

98. The Panel in *Canada – Welded Pipe* found, and the parties to that dispute agreed, that "it is only a final determination of a *de minimis* margin of dumping that triggers immediate termination under Article 5.8".[123]

99. The Panel in *Canada – Welded Pipe* found that Subsection 43(1) of Canada's Special Import Measures Act was inconsistent with the "immediate" termination requirement of Article 5.8 because under this provision "even though the CBSA determines that an exporter's final margin of dumping is *de minimis*, the investigation will continue to apply in respect of that exporter until such time as the CITT issues its final injury determination."[124]

100. The Panel in *Ukraine – Ammonium Nitrate* found that the Ukrainian authorities' approach in applying a 0% anti-dumping duty was inconsistent with the second sentence of Article 5.8, as "the only way to terminate the investigation against a producer found to have *de minimis* dumping margin in the original investigation is to exclude that producer from the scope of the anti-dumping measures, and not to impose any anti-dumping duty on it, even at a 0% rate".[125]

101. In *Colombia – Frozen Fries*, the Panel found that the Colombian investigating authority violated Article 3 of the Anti-Dumping Agreement by including in its injury and causation determinations imports from the exporters that were determined to have final *de minimis* margins of dumping.[126] As part of its assessment, the Panel underlined that the obligation to immediately terminate the investigation under Article 5.8 is an "unambiguous requirement":

> "Article 5.8 requires immediate termination of an investigation in certain situations, the provision does not prescribe the specific manner in which this termination is to be carried out. In other words, the provision prescribes the end but leaves the choice of means to achieve that end to investigating authorities. While investigating authorities thus enjoy certain freedom to structure and conduct their investigations as they consider appropriate, this cannot be used as a justification for non-compliance with the unambiguous requirement under Article 5.8 to terminate immediately an

[119] Panel Report, *US – Softwood Lumber V*, para. 7.137.
[120] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 217. See also Panel Report, *Canada – Welded Pipe*, para. 7.21.
[121] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 218.
[122] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 219.
[123] Panel Report, *Canada – Welded Pipe*, para. 7.64.
[124] Panel Report, *Canada – Welded Pipe*, para. 7.204. See also ibid. para. 7.210.
[125] Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.151.
[126] Panel Report, *Colombia – Frozen Fries*, para. 7.305.

> investigation in cases where the authorities determine that the margin of dumping is *de minimis*. As we have found above, once a producer or exporter has been assigned a *de minimis* margin of dumping, the continued treatment of any imports from that producer or exporter as 'dumped imports', in any subsequent injury and causation analyses under Article 3, would render ineffective the requirement, under Article 5.8, to 'immediate[ly] terminate' the investigation."[127]

1.8.3 "cases"

102. The Panel in *US – DRAMS* was called upon to decide whether the scope of Article 5.8, as defined by the word "cases" in the second sentence, includes both anti-dumping investigations and Article 9.3 duty assessment procedures. The Panel held that it did not see "how the sufficiency of evidence concerning a subsequent duty assessment could be relevant to the treatment of an 'application' or the conduct of an 'investigation'":

> "First, the term 'case' is used in the first sentence of Article 5.8. The first sentence is concerned explicitly and exclusively with the circumstances in which an 'application' ('under [Article 5,] paragraph 1') shall be rejected and an 'investigation' terminated as a result of insufficient evidence to justify proceeding with the 'case'. As the treatment of the 'application' and conduct of the 'investigation' is dependent on the sufficiency of evidence concerning the 'case', we consider that the term 'case' in the first sentence must at least encompass the notions of 'application' and 'investigation'. In our view, it would [be] meaningless for the term 'case' in the first sentence to also encompass the concept of an Article 9.3 duty assessment procedure, since we fail to see how the sufficiency of evidence concerning a subsequent duty assessment could be relevant to the treatment of an 'application' or the conduct of an 'investigation', both of which precede the Article 9.3 duty assessment procedure. As we consider that the term 'case' in the first sentence of Article 5.8 does not include the concept of 'duty assessment', we see no reason to adopt a different approach to the term 'cases' in the second sentence of that provision."[128]

1.8.4 "de minimis" test

103. Having determined (as noted in paragraph 102 above) that the term "cases" in Article 5.8 does not encompass the concept of an Article 9.3 duty assessment procedure,[129] the Panel in *US – DRAMS* then concluded that "Article 5.8, second sentence, does not require Members to apply a *de minimis* test in Article 9.3 duty assessment procedures".[130] The Panel described the function of the Article 5.8 *de minimis* test as "to determine whether or not an exporter is subject to an anti-dumping order" and clearly distinguished this from any *de minimis* test applied under Article 9.3 duty assessment procedures.[131]

1.8.5 "margin of dumping"

104. In *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body rejected Mexico's argument that Article 5.8 requires the termination of the investigation only when the "country-wide margin of dumping" is *de minimis,* and confirmed the Panel's view that the term "margin of dumping" in Article 5.8 refers to the individual margin of dumping of an exporter or producer rather than to a country-wide margin of dumping, to be consistent with the use of the term 'margins of dumping' in Article 2.4.2.[132]

1.8.6 Exclusion of exporters from subsequent administrative and changed circumstances reviews

105. The Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, having found that the investigating authority must exclude from the anti-dumping measure any exporter found to have a

[127] Panel Report, *Colombia – Frozen Fries*, para. 7.302.
[128] Panel Report, *US – DRAMS*, para. 6.87.
[129] Panel Report, *US – DRAMS*, para. 6.87.
[130] Panel Report, *US – DRAMS*, para. 6.89.
[131] Panel Report, *US – DRAMS*, para. 6.90.
[132] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 216.

zero or *de minimis* dumping margin (see paragraph 97 above) further agreed with the Panel that as a consequence:

> "[S]uch exporters cannot be subject to administrative and changed circumstances reviews, because such reviews examine, respectively, the 'duty *paid*' and 'the need for the *continued imposition* of the duty.' Were an investigating authority to undertake a review of exporters that were excluded from the anti-dumping measure by virtue of their *de minimis* margins, those exporters effectively would be made subject to the anti-dumping measure, inconsistent with Article 5.8. The same may be said with respect to Article 11.9 of the *SCM Agreement*."[133]

106. Applying this reasoning, the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* concluded that by requiring the investigating authority to conduct a review for exporters with zero margins and *de minimis* margins, Article 68 of Mexico's Foreign Trade Act was inconsistent with Article 5.8 of the Anti-Dumping Agreement and SCM Agreement Article 11.9.[134]

1.8.7 Exclusion of producers from subsequent interim or expiry reviews

107. Similar to the Appellate Body finding in *Mexico – Anti-Dumping Measures on Rice,* concerning subsequent administrative and changed circumstances reviews, the Panel in *Ukraine – Ammonium Nitrate* considered that the inclusion of producers found to have *de minimis* margins of dumping in an interim or expiry review would be in contravention to the requirements of the second sentence of Article 5.8 to immediately terminate the original investigation against such producers.[135]

1.8.8 Relationship with other paragraphs of Article 5

108. Regarding the relationship between Articles 5.3 and 5.8, see paragraph 93 above.

1.9 Article 5.10

109. The Panel in *Pakistan – BOPP Film (UAE)* addressed the UAE's two arguments in support of its overall claim that Pakistan's investigating authority (NTC) had acted inconsistently with Article 5.10 by exceeding the peremptory 18-month time-limit applying to original investigations.[136] The Panel began by framing the generally applicable legal requirements of Article 5.10. The Panel noted the importance of Article 5.10 in preserving predictability and in reducing uncertainty about the outcome of an investigation:

> "We consider that Article 5.10 'preserves predictability for the interested parties in an investigation' by ensuring that when an investigation is initiated, interested parties are not left in the uncertainty about the outcome of the investigation for more than one year 'and in no case more than 18 months'."[137]

110. The Panel then turned to the interpretative questions raised by the parties' arguments, namely, when investigations are initiated, and when they are concluded, within the meaning of Article 5.10.[138]

111. With respect to the initiation of investigations, the Panel examined the text of Article 5 and the context provided by footnote 1 and Article 12.1 of the Anti-Dumping Agreement.[139] The Panel concluded that the time limits in Article 5.10 start from "initiation", the "procedural action" that "formally commences an investigation", which could result from the notification to interested parties or publication of a notice of initiation:

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[133] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 305.
[134] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 307.
[135] Panel Report, *Ukraine – Ammonium Nitrate*, paras. 7.155-7.156.
[136] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.466-7.467.
[137] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.471.
[138] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.473.
[139] See Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.474-7.479.

> "To sum up, the time-limits in Article 5.10 start running under the express terms of Article 5.10, from 'initiation', and initiation, in turn, is the 'procedural action' that 'formally commences an investigation'. The context provided by Article 12.1 highlights one element of what is required 'as a matter of form' to commence an investigation, namely the notification to interested parties, and publication of a notice of initiation. Further, because footnote 1 refers to the procedural action 'by which a Member' formally commences an investigation, domestic legislation can be among the facts that are relevant to resolve questions concerning the date of initiation.
>
> The United Arab Emirates urges us to take into account, in our interpretation, the 'interests being protected' by Article 5.10. Specifically, the United Arab Emirates points out that the purpose of Article 5.10 is to ensure that parties to an anti-dumping investigation are not 'left in uncertainty' for too long. We agree: as another panel before us has pointed out, Article 5.10 'preserves predictability for the interested parties in an investigation'. Yet, Article 5.10 sets forth the precise terms in which predictability is to be preserved, and it does so by setting, as a starting point, the procedural action that commences an investigation as a matter of form. This does not, therefore, lead us to a different interpretive result from that set out above."[140]

112. Applying its understanding of the legal standard under Article 5.10 to the facts, the Panel set out to ascertain "the procedural action by which [Pakistan] formally commence[d] an investigation".[141] Having determined that the NTC published a notice of initiation in the requisite newspapers, in accordance with several provisions of municipal anti-dumping rules, the Panel determined that the initiation of the investigation on 23 April 2012, in accordance with domestic law, constituted "the procedural action by which [Pakistan] formally commence[d] an investigation".[142]

113. The Panel also noted further that 23 April 2012 was the date of "initiation" for purposes of the time-limit in Article 5.10, as the initiation of the first investigation was declared void and a new notice of initiation was subsequently published:

> "The question for us, then, is which was the procedural step by which Pakistan formally commenced the relevant investigation, within the meaning of footnote 1 and therefore of Article 5.10. Neither party disputes that the *first investigation* was initiated on 27 September 2010, i.e. that, at the time, the publication of the notice of initiation was the procedural action that formally commenced that investigation. Nor do the parties dispute that that initiation was subsequently declared void by a Pakistani court, leading to a new initiation on 23 April 2012.
>
> As we have underlined in discussing the requirements of Article 5.10, the emphasis in Article 5.10, read together with footnote 1, is on the procedural action that '*formally* commences an investigation'. In the case before us, where a first initiation was declared void, and a new Notice of initiation was published to commence, formally, a new investigation, it is the latter – publication of the Notice of initiation on 23 April 2012 – that designates the beginning of the time period to which the deadlines in Article 5.10 apply."[143]

114. Accordingly, the Panel found that the "initiation" within the meaning of footnote 1 and Article 5.10 took place on 23 April 2012.[144]

115. With respect to the conclusion of investigations, and in examining the text and context of Articles 5 and 12.2.2 of the Anti-Dumping Agreement, the Panel considered that an "investigation" initiated under Article 5 may be "concluded" in at least three ways:

> "Taken together, these provisions therefore indicate that an 'investigation' initiated under Article 5 may be 'concluded' in particular in the following ways: (a) with a final

[140] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.480-7.481.
[141] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.497.
[142] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.504. See also ibid. paras. 7.494-7.503.
[143] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.508-7.509.
[144] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.510.

> affirmative determination of injurious dumping that stipulates any measures to be imposed; (b) with a final negative determination (that injurious dumping is not established); or (c) with a decision to terminate without having determined whether injurious dumping existed."[145]

116. The Panel also examined additional context provided by Articles 11.4 and 13 of the Anti-Dumping Agreement.[146] From this context, the Panel considered that the date of conclusion of original investigations is the relevant date under Article 5.10, not including judicial review:

> "In our view, this context confirms that the time-limits in Article 5.10 apply to original investigations, and not to a time period encompassing their possible subsequent judicial review, and that therefore it is the date of conclusion of original investigations that is the relevant date under Article 5.10."[147]

117. Subsequently, the Panel determined that the date on which the investigation was "concluded" was 4 February 2013. The Panel recalled that the judicial review of a determination constitutes a separate step whose duration is not included in the time-period regulated by Article 5.10:

> "[A]s seen earlier, the Anti-Dumping Agreement distinguishes between final determinations and the judicial review of those determinations, the latter being a separate step, the duration of which is not included in the time period disciplined by Article 5.10. Therefore, the fact that the final determination of 4 February 2013 was subject to judicial review and then formally replaced (though 'ratified') by a determination adopted on remand does not mean that the clock under Article 5.10 continued ticking throughout judicial review.
>
> In support of its contrary argument, the United Arab Emirates emphasizes that the determination of 9 April 2015 was a 'fresh start'; that the February 2013 determination is 'officially valid' only because it was 'ratified' by the 9 April 2015 determination; and that the latter imposed duties only prospectively and was entitled 'final determination'. However, none of these points would mean that the time-limit in Article 5.10 should apply to the sum total of the time taken to reach the first final determination *and* the time taken for its subsequent judicial review *and* the time taken to reach a new determination on remand, as a result of judicial review."[148]

1.10 Relationship with other provisions of the Anti-Dumping Agreement

1.10.1 Article 1

118. The Panel in *Guatemala – Cement II* referred to footnote 1 to Article 1 in interpreting Article 5.5. See paragraph 82 above.

119. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the Anti-Dumping Agreement, among them Article 5. The Panel then opined that Mexico's claims under other articles of the Anti-Dumping Agreement, among them Article 1, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the *AD Agreement*."[149] For this reason the Panel considered it not necessary to address these claims.

1.10.2 Article 2

120. The Panel in *Guatemala – Cement II* discussed the relationship between Articles 2, 5.2 and 5.3 in order to clarify the requirements under Article 5.3. See paragraph 35 above.

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[145] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.488.
[146] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.489-7.490.
[147] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.492.
[148] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.515-7.516.
[149] Panel Report, *Guatemala – Cement II*, para. 8.296.

1.10.3 Article 3

121. The relationship between Article 5.2(iv) and Articles 3.2 and 3.4 was discussed in *Mexico – Corn Syrup*. See paragraph 19 above.

122. In *Thailand – H-Beams*, the Appellate Body referred to Articles 3.7, 5.2 and 5.3 in interpreting Article 3.1. See the Section on Article 3 of the Anti-Dumping Agreement.

123. Article 3 was discussed in interpreting which elements of "injury" have to be supported by sufficient evidence under Article 5.3 in *Guatemala – Cement II*. See paragraphs 47-48 above.

1.10.4 Article 6

124. In *Guatemala – Cement II*, the Panel referred to Article 5.10 in examining Mexico's claim under Article 6.1.3. See the Section on Article 6 of the Anti-Dumping Agreement.

1.10.5 Article 9

125. In *US – DRAMS*, the Panel discussed the relationship between Articles 5.8 and 9.3. See paragraphs 102-103 above, and the explanations on Article 9 of the Anti-Dumping Agreement.

126. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the Anti-Dumping Agreement, among them Article 5. The Panel then determined that Mexico's claims under other articles of the Anti-Dumping Agreement, among them Article 9, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the *AD Agreement*."[150] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims.

1.10.6 Article 10

127. In *US – Hot-Rolled Steel*, the Panel interpreted the term "sufficient evidence" in Article 10.7 by reference to Article 5.3. See the Section on Article 10 of the Anti-Dumping Agreement.

1.10.7 Article 12

128. The Panel in *Guatemala – Cement II* touched on the relationship between Articles 5.3 and 12.1 in addressing a claim under Article 12.1. See the Section on Article 12 of the Anti-Dumping Agreement.

129. In *Thailand – H-Beams*, the Panel discussed the difference between notification requirements in Articles 5.5 and 12.1. The Panel noted that each requires notification to the exporting Member's government of certain events connected with initiation, but the requirements for timing, form and content of the notifications are different:

> "Article 5.5 makes it clear that the notification referred to in that provision must take place 'after receipt of a properly documented application and before proceeding to initiate an investigation'. By contrast, Article 12.1 of the *AD Agreement* concerns notification of initiation, as it requires notification to 'the Member or Members the products of which are subject to such investigation…', '[w]hen the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5 …' and requires 'public notice' of initiation. As Article 12.1 provides that such 'public notice' must 'contain, or otherwise make available through a separate report, adequate information …', the notice must presumably be in writing. Furthermore, Article 12 involves the notification of a decision to initiate, which a Member may not yet have taken at the time of an Article 5.5 notification. That Article 12 specifically enumerates certain requirements with respect to the contents and form of the notice it requires, and Article 5.5 does not, strongly suggests to us that the requirements of Article 12 do not apply to notification under Article 5.5, and in no way changes our interpretation of the

[150] Panel Report, *Guatemala – Cement II*, para. 8.296.

requirements concerning the timing, form and content of the notification to be given under Article 5.5."[151]

1.10.8 Article 17

130. Regarding the application of the Article 17 standard of review to evaluation of claims under Article 5.3, see paragraphs 63-66 above.

1.10.9 Article 18

131. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the Anti-Dumping Agreement, among them Article 5. The Panel then found that Mexico's claims under other articles of the Anti-Dumping Agreement, among them Article 18, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the *AD Agreement*."[152] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims.

1.11 Relationship with other WTO Agreements

1.11.1 Article VI of the GATT 1994

132. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the Anti-Dumping Agreement, among them Article 5. The Panel then opined that Mexico's claims under other articles of the Anti-Dumping Agreement and under Article VI of GATT 1994, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the *AD Agreement*."[153] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims.

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[151] Panel Report, *Thailand – H-Beams*, para. 7.93.
[152] Panel Report, *Guatemala – Cement II*, para. 8.296.
[153] Panel Report, *Guatemala – Cement II*, para. 8.296.