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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 by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. 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.

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.

5.9 An anti-dumping proceeding shall not hinder the procedures of customs clearance.

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." See paragraph 18 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. 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.3 This is particularly true where such information might be redundant or less reliable than, information contained in the application."4

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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)).


3 (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.

1.3.2 "evidence of ... dumping"

4. 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 at paragraph 18.

1.3.3 "evidence of ... injury"

5. 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 25-26 below.

1.3.4 "evidence of ... causal link" – subparagraph (iv)

6. 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.

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."

7. 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."

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5 Panel Report, Mexico – Corn Syrup, paras. 7.73-7.74.
6 (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.
7 Panel Report, Mexico – Corn Syrup, para. 7.76.
8. In Thailand – H-Beams, the Panel, agreeing with the Panel in Mexico – Corn Syrup, 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."9 The Appellate Body did not review these findings.

1.3.5 "simple assertion, unsubstantiated by relevant evidence"

9. 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."10

1.3.6 Relationship with other paragraphs of Article 5

10. 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 18 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."11

1.4 Article 5.3

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

1.4.1.1 Distinction from the requirements under Article 5.2

11. 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."12

12. 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 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."13

8 Panel Report, Thailand – H-Beams, paras. 7.75-7.76.
9 Panel Report, Thailand – H-Beams, para. 7.77.
13 Panel Report, Guatemala – Cement II, para. 8.31. Also see Panel Report, Argentina – Poultry Anti-Dumping Duties, para. 7.60.
13. In *Guatemala – Cement II*, on the basis of the distinction between Articles 5.2 and 5.3 described in the excerpt in paragraph 18 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." In support of this proposition, the Panel cited the panel's finding in *Guatemala – Cement I*.15

1.4.1.2 Sufficiency of evidence to initiate

14. 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 Economia's assessment of the sufficiency of the evidence before it at the time of initiation."16

15. 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..."17

16. 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."18 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 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'."19

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17. See also under Article 5.2.

1.4.1.3 Sufficient evidence of dumping

18. 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.

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 certainly relevant to an investigating authorities' consideration as to whether sufficient evidence of dumping exists to justify the initiation of an investigation."20

20 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.
19. 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".21

20. 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".22 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."23

21. 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".24 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."25

22. 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" basis with the export price evidence.26 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."27 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."28 The Panel went on to say:

21 Panel Report, Argentina – Poultry Anti-Dumping Duties, para. 7.67.
22 Panel Report, Argentina – Poultry Anti-Dumping Duties, para. 7.78.
23 Panel Report, Argentina – Poultry Anti-Dumping Duties, para. 7.80.
24 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).
26 Panel Report, Mexico Steel Pipes and Tubes, para. 7.28.
27 Panel Report, Mexico – Steel Pipes and Tubes, para. 7.34.
28 Panel Report, Mexico – Steel Pipes and Tubes, para. 7.35.
"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." 29

23. 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 Hysla 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.

... 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 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." 30

24. 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." 31 Overall, in light

29 Panel Report, Mexico – Steel Pipes and Tubes, para. 7.35.
30 Panel Report, Mexico – Steel Pipes and Tubes, paras. 7.39 and 7.37.
31 Panel Report, Mexico – Steel Pipes and Tubes, para. 7.41.
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."\(^{32}\)

### 1.4.1.4 Sufficient evidence of injury

25. 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 have before it evidence of threat of material injury, as defined in Article 3, sufficient to justify the initiation of an investigation."\(^{33}\)

26. However, with respect to Article 3.7, the Panel added a caveat to its finding quoted under paragraph 25 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."\(^{34}\)

27. 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."\(^{35}\)

28. 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

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\(^{32}\) Panel Report, Mexico – Steel Pipes and Tubes, para. 7.43.

\(^{33}\) Panel Report, Guatemala – Cement II, para. 8.45.

\(^{34}\) 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)).

\(^{35}\) Panel Report, Mexico – Steel Pipes and Tubes, para. 7.56.
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."

... 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 under Article 5.3 in performing its assessment of the sufficiency of the evidence of injury."36

1.4.1.5 Standard of review – relationship with Article 17.6

29. 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)37, 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".38

30. Referring to the approach of the Panel in Guatemala – Cement I39, 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."40

31. 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".41 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

36 Panel Report, Mexico – Steel Pipes and Tubes, paras. 7.59 and 7.60.
37 Panel Report, Guatemala – Cement I, para. 7.57.
38 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)).
39 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.")
40 Panel Report, Mexico – Corn Syrup, para. 7.95.
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 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."42

32. 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."43

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

33. The Panel in Guatemala – Cement I considered whether there had been sufficient evidence to justify an anti-dumping investigation under Article 5.3.44

34. 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."45

35. 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

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44 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)).
all underlying issues considered". 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."

36. 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."

1.4.3 Relationship with other paragraphs of Article 5

37. The Panel in Guatemala – Cement II discussed the relationship between Articles 5.2 and 5.3. See paragraph 18 above.

38. 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 55 below.

39. The Panel in Mexico – Corn Syrup touched on the relationship between Articles 5.3 and 5.8. See paragraph 57 below.

40. The Panel in Mexico – Steel Pipes and Tubes looked at the relationship between Article 5.3 and Article 5.8. See paragraph 57 below.

1.5 Article 5.4

1.5.1 General

41. 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". 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. The Appellate Body recalled that "there may be a number of reasons why a domestic producer could choose to support an investigation." The Appellate Body strongly disagreed with the approach taken by the Panel in relation to the concept of support 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

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46 Panel Report, Mexico – Corn Syrup, para. 7.102.
47 Panel Report, Mexico – Corn Syrup, para. 7.105.
52 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.
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."53

42. 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.54

43. 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.55

44. 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." 56

1.5.2 Relationship with Article 11.4 of the SCM Agreement

45. 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 41 above.

1.6 Article 5.5

1.6.1 "before proceeding to initiate"

46. In Guatemala – Cement II, Mexico claimed that in violation of Article 5.5, Guatemala did not notify the Government of Mexico before proceeding to initiation 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."57

56 Appellate Body Report, EC – Fasteners (China), para. 418.
57 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)).
47. 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"\textsuperscript{58}, 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."\textsuperscript{59}

48. 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"\textsuperscript{60}, 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."\textsuperscript{61}

1.6.2 "notify the government"

1.6.2.1 "Oral" notification

49. 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' 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."\textsuperscript{62}\textsuperscript{63}

1.6.2.2 Content of notification

50. 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'.\textsuperscript{64} Because the text of the provision specifies that notification necessarily follows the receipt of a properly documented application, we consider that the fact of

\textsuperscript{58} Panel Report, Guatemala – Cement II, para. 8.83.
\textsuperscript{59} Panel Report, Guatemala – Cement II, para. 8.83.
\textsuperscript{60} Panel Report, Guatemala – Cement II, para. 8.83.
\textsuperscript{61} Panel Report, Guatemala – Cement II, para. 8.83.
\textsuperscript{62} (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.
\textsuperscript{63} Panel Report, Thailand – H-Beams, para. 7.89.
\textsuperscript{64} (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.
the receipt of a properly documented application would be an essential element of the contents of the notification.”65

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

51. 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."66

52. 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 "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

65 Panel Report, Thailand – H-Beams, para. 7.91.
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."

53. 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." 68

54. 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]]":

"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." 69

69 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
1.7 Article 5.7

55. 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."\(^{70}\)

56. 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",\(^{71}\) 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, \textit{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."\(^{72}\)

1.8 Article 5.8

1.8.1 Rejection of an application to initiate an investigation

57. 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."\(^{73}\) The Panel in Mexico – Steel Pipes and Tubes made the same observation regarding the relationship between Article 5.3 and Article 5.8.\(^{74}\)

58. 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...."\(^{75}\)
59. 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."76

60. 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 evidence was made available by the respondents at a later stage, while the evidence being gathered during the course of the investigation, indicates dumping".77

1.8.2 "an immediate termination"

61. 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.”78 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.79 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."80

76 Panel Report, Guatemala – Cement II, para. 8.74.
78 Appellate Body Report, Mexico – Anti-Dumping Measures on Rice, para. 217. See also Panel Report, Canada – Welded Pipe, para. 7.21.
79 Appellate Body Report, Mexico – Anti-Dumping Measures on Rice, para. 218.
80 Appellate Body Report, Mexico – Anti-Dumping Measures on Rice, para. 219.
62. 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".81

63. 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."82

64. 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".83

1.8.3 "cases"

65. 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."84

1.8.4 "de minimis" test

66. Having determined (as noted in paragraph 65 above) that the term "cases" in Article 5.8 does not encompass the concept of an Article 9.3 duty assessment procedure,85 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".86 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.87

1.8.5 "margin of dumping"

67. 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-

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81 Panel Report, Canada – Welded Pipe, para. 7.64.
83 Panel Report, Ukraine – Ammonium Nitrate, para. 7.151.
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 2.4.2.88

1.8.6 Exclusion of exporters from subsequent administrative and changed circumstances reviews

68. 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 zero or de minimis dumping margin (see paragraph 61 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."89

69. 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 11.9.90

1.8.7 Exclusion of producers from subsequent interim or expiry reviews

70. 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.91

1.8.8 Relationship with other paragraphs of Article 5

71. Regarding the relationship between Articles 5.3 and 5.8, see paragraph 57 above.

1.9 Relationship with other Articles

1.9.1 Article 1

72. The Guatemala – Cement II Panel referred to footnote 1 to Article 1 in interpreting Article 5.5. See paragraph 46 above.

73. 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."92 For this reason the Panel considered it not necessary to address these claims.

88 Appellate Body Report, Mexico – Anti-Dumping Measures on Rice, para. 216.
89 Appellate Body Report, Mexico – Anti-Dumping Measures on Rice, para. 305.
90 Appellate Body Report, Mexico – Anti-Dumping Measures on Rice, para. 307.
91 Panel Report, Ukraine – Ammonium Nitrate, paras. 7.155-7.156.
1.9.2 Article 2

74. 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 18 above.

1.9.3 Article 3

75. The relationship between Article 5.2(iv) and Articles 3.2 and 3.4 was discussed in Mexico – Corn Syrup. See paragraph 6 above.

76. 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.

77. 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 25-26 above.

1.9.4 Article 6

78. 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.

1.9.5 Article 9

79. In US – DRAMS, the Panel discussed the relationship between Articles 5.8 and 9.3. See paragraphs 65-66 above, and the explanations on Article 9 of the Anti-Dumping Agreement.

80. 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."93 In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims.

1.9.6 Article 10

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

1.9.7 Article 12

82. 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.

83. 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 requirements concerning the timing, form and content of the notification to be given under Article 5.5."94

1.9.8 Article 17

84. Regarding the application of the Article 17 standard of review to evaluation of claims under Article 5.3, see paragraphs 29-32 above.

1.9.9 Article 18

85. 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."95 In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims.

1.10 Relationship with other WTO Agreements

1.10.1 Article VI of the GATT 1994

86. 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."96 In light of this dependent nature of Mexico’s claim, the Panel considered it not necessary to address these claims.

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94 Panel Report, Thailand – H-Beams, para. 7.93.