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MEXICO – ANTI-DUMPING DUTIES ON STEEL PIPES AND TUBES FROM GUATEMALA

Final Report of the Panel

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I. INTRODUCTION

A. COMPLAINT OF GUATEMALA

1.1 On 17 June 2005, Guatemala requested consultations with Mexico pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "*DSU*"), Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994* (the "*GATT 1994*") and Article 17 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") regarding the definitive anti-dumping measures imposed by Mexico on imports of certain steel pipes and tubes from Guatemala and the investigation leading thereto.[1] Guatemala and Mexico held consultations on 15 July, 26 August, and 28 September 2005. These consultations failed to resolve the dispute.

1.2 On 6 February 2006, Guatemala requested the establishment of a panel pursuant to Article 6.2 of the DSU and Article 17.4 of the Anti-Dumping Agreement.[2]

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.3 At its meeting on 17 March 2006, the Dispute Settlement Body established a Panel pursuant to the request by Guatemala in document WT/DS331/2, in accordance with Article 6 of the Dispute Settlement Understanding (DSU). At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference are, therefore, the following:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Guatemala in document WT/DS331/2, the matter referred to the DSB by Guatemala in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

1.4 On 4 May 2006, the parties agreed to the following composition of the Panel:[3]

Chairman: Mr Julio Lacarte-Muró

Members: Mr Cristian Espinosa Cañizares
Mr Álvaro Espinoza

China, the European Communities, Honduras, Japan, and the United States reserved their third-party rights.

1.5 The Panel met with the parties on 12-14 September 2006 and 7-9 November 2006. It met with the third parties on 12 September 2006.

C. ADDITIONAL PROCEDURES FOR THE PROTECTION OF BUSINESS CONFIDENTIAL INFORMATION

1.6 To facilitate the submission of certain information by Mexico, on 27 September 2006 the Panel adopted additional procedures for the protection of business confidential information. These procedures ("the BCI procedures"), are set forth in Attachment 2.

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[1] WT/DS331/1.

[2] WT/DS331/2.

[3] WT/DS331/3.

II. FACTUAL ASPECTS

2.1 This dispute concerns the imposition by Mexico of anti-dumping measures on imports of certain steel pipes and tubes from Guatemala.

2.2 On 22 May 2001, the Mexican company Hylsa, S.A. de C.V. ("Hylsa") filed an application for an anti-dumping investigation concerning "standard" steel pipes and tubes.[4] Following Hylsa's response to a request for further information from the Mexican investigating authority[5], Economía published on 24 August 2001 a Notice of Initiation in its Official Journal[6], initiating an investigation on standard steel pipes and tubes, included within the tariff lines 7306.30.01 and 7306.30.99, originating in Guatemala. Tubac, S.A. ("Tubac") was the only Guatemalan exporting producer investigated.

2.3 The investigation covered the period from 1 July 2000 to 31 December 2000 [7] ("Investigation Period"). The examination of "trends" in the context of the injury analysis covered the period from 1 July to 31 December of 1998, 1999 and 2000 [8] ("Injury Investigation Period").

2.4 Numerous communications and exchanges, including questionnaires and meetings, occurred between Economía and Tubac and/or Tubac's legal counsel in the course of the investigation. A verification visit occurred at the premises of Tubac from 17 to 21 June 2002 and from 24 to 25 June 2002.[9]

2.5 On 13 March 2002, Mexico imposed provisional anti-dumping duties of 3.41 per cent and 12.82 per cent covering all products classified in the tariff lines 7306.30.01 and 7306.30.99, respectively, on imports from Tubac.[10] Mexico also imposed duties of 25.83 per cent and 26.59 per cent covering all products classified in the tariff lines 7306.30.01 and 7306.30.99, respectively, on imports from all other Guatemalan exporters.[11]

2.6 On 13 January 2003, Mexico imposed definitive anti-dumping duties of 25.87 per cent on imports of certain steel pipes and tubes from Guatemala as reflected in the Definitive Regulation.[12]

[4] Exhibit GTM-1.

[5] Exhibit GTM-2.

[6] Official Journal, 24 August 2001. Exhibit GTM-4.

[7] Exhibit GTM-4, para. 2.

[8] Exhibit GTM-4, para. 100.

[9] Exhibit GTM-13.

[10] Provisional Determination, Exhibit GTM-10, paras. 197 A and 197 B.

[11] Provisional Determination, Exhibit GTM-10, paras. 197 C and 197 D.

[12] Definitive Determination, Exhibit GTM-23, para. 275.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. GUATEMALA

3.1 Guatemala requests that the Panel:

(a) find that by imposing anti-dumping duties on imports of steel pipes and tubes from Guatemala, Mexico – through Economía – acted inconsistently with its commitments under Articles 1 and 18.1 of the *Anti-Dumping Agreement*, in contravening the following:[13]

(i) Article 5.2(iii), 5.2(iv), 5.3 and 5.8 of the *Anti-Dumping Agreement*, by initiating the investigation without properly examining the accuracy and adequacy of the evidence provided in the application for initiation, the evidence of itself not being adequate or accurate for a determination of dumping, injury or causal link between the two;

(ii) Articles 2.1, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 5.4, 6.4, 6.9 and 18.1[14] of the *Anti-Dumping Agreement*, by modifying the definition of the product under consideration and the like product in order to include pipes and tubes which were excluded from the definition in the preliminary determination and for which there was no investigation, by failing to make an unbiased and objective examination of the positive evidence in the record and any finding of dumping, injury or causal link between the two regarding products for which no investigation was either initiated or conducted, and, notwithstanding the foregoing, by imposing definitive anti-dumping duties on those products;

(iii) Article 6.8 and 6.13[15] and Annex II of the *Anti-Dumping Agreement* and hence Article 2.1, 2.2 and 2.4 of the *Anti-Dumping Agreement*, by relying on facts available without properly following the procedures laid out in Article 6.8 and Annex II of the *Anti-Dumping Agreement*;

(iv) Article 6.2, 6.4, 6.7 and 6.8[16] of the *Anti-Dumping Agreement*, by failing to disclose to the exporter that it had encountered problems at the on-the-spot investigation that warranted the rejection of all of the exporter's data and the use of facts available under Article 6.8; Article 6.2, 6.4, 6.7, 6.8 and 6.9 of the *Anti-Dumping Agreement*, by failing to provide any subsequent adequate explanation of the problems it had encountered at the on-the-spot

[13] First written submission of Guatemala, paras. 93, 94, 102, 154, 236, 266, 279, 280 and 361.

[14] In its request for the establishment of a panel, Guatemala also referred in this context to Article 3.6 (Appendix 1, point (b) of the claims relating to the product under consideration/like product).

[15] In its request for the establishment of a panel, Guatemala also referred in this context to Article 6.6 (Appendix 1, point (d) of the claims relating to the determination of dumping).

[16] In its request for the establishment of a panel, Guatemala also referred in this context to Article 6.6 (Appendix 1, point (e) of the claims relating to the determination of dumping).

investigation or of those that justified resort to facts available, and hence Articles 2.1, 2.2 and 2.4 of the *Anti-Dumping Agreement*[17];

(v) Article 3.1, 3.2, 3.4 and 3.5 of the *Anti-Dumping Agreement*, by basing its determination of injury and causation on a period of investigation that ended significantly before the initiation of the investigation, without taking into account relevant data relating to a period closer to that of the investigation, which resulted in a determination of injury and causal link that was not based on an objective examination or positive evidence;

(vi) Article 3.1, 3.2, 3.4 and 3.5 of the *Anti-Dumping Agreement*, by improperly limiting its injury analysis to data relating to six-month periods each year within the period of investigation, which resulted in a determination of injury and causal link that was not based on an objective examination or positive evidence;

(vii) Articles 3.1, 3.2, 3.4, 3.5 and 4.1[18] of the *Anti-Dumping Agreement*, by selectively and inconsistently using information relating to different time periods and different sets of data pertaining to different companies or combinations of companies in its analysis of the volume and price effects of the imports under investigation, of the impact of those imports on investigation on the domestic industry, and of causation, which resulted in a determination of injury and causal link that was not based on an objective examination or positive evidence;

(viii) Article 3.1 and 3.2 of the *Anti-Dumping Agreement*, by analysing both the volume of the allegedly dumped imports and the effect of those imports on prices in the domestic market for like products, and the consequent impact of those imports on the domestic producers of such products, without relying on an objective examination or positive evidence[19];

(ix) Article 3.1, 3.2, 3.4, and 3.5 of the *Anti-Dumping Agreement*, by failing to properly analyse other known factors that were at the same time causing injury to the domestic industry, and by failing to ensure that injury caused by those known factors was not attributed to the imports under investigation;

(x) Article 6.9 of the *Anti-Dumping Agreement*, by failing to inform the exporter of the essential facts under consideration that formed the basis for its decision to apply definitive duties;

[17] Guatemala's request for the establishment of a panel also contains a claim relating to adjustments made by Economía to the export price for certain categories of expenses without making the symmetrical adjustments to the normal value, which in the view of Guatemala was inconsistent with Article 2.1, 2.2 and 2.4 of the *Anti-Dumping Agreement* (Appendix 1, point (f) of the claims relating to the determination of dumping).

[18] In its request for the establishment of a panel, Guatemala also referred in this context to Article 3.6 (Appendix 1, point (i) of the claims relating to the determination of injury and a causal link).

[19] In its esponse to question 59 from the Panel, Guatemala withdrew the allegation contained in its request for the establishment of a panel (Appendix 1, point (k) of the claims relating to the determination of injury and a causal link) that Economía had failed to evaluate properly all relevant economic factors and indices having a bearing on the state of the domestic industry listed in Article 3.4, which in the view of Guatemala was inconsistent with Article 3.1 and 3.4 of the *Anti-Dumping Agreement*.

(xi) Article 12.2 of the *Anti-Dumping Agreement*, by failing to disclose in its preliminary and final determinations[20] in sufficient detail the findings and conclusions reached on all issues of fact and law that were considered material by the Mexican authorities;

(xii) Article 6.5 of the *Anti-Dumping Agreement*, by failing to require the applicant to provide non-confidential summaries and to disclose properly information that was not shown upon good cause to be confidential or to disclose non-confidential summaries of confidential information.

(b) pursuant to Article 19.1 of the DSU, recommend that Mexico brings its measure into conformity with the *Anti-Dumping Agreement*[21];

(c) pursuant to Article 19.1 of the DSU, suggest that Mexico repeal its anti-dumping duty order.[22]

B. MEXICO

3.2 Mexico requests that the Panel reject all of Guatemala's allegations and determine that Mexico acted in accordance with the *Anti-Dumping Agreement*. In particular, Mexico requests that the Panel find:

(a) in respect of initiation, that Mexico did not contravene Articles 5.2, 5.3 or 5.8 of the *Anti-Dumping Agreement* because the request for initiation contained the information that was reasonably available to the applicant; and because Economía analyzed this information, requested clarifications, and on this basis determined that there was sufficient evidence of the existence of alleged dumping, injury and causal link to justify initiation[23];

(b) in respect of alleged changes to the definition of the investigated product, that Mexico did not contravene Articles 1, 2.1, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 5.4, 6.4, 6.9 or 18.1, because the *Anti-Dumping Agreement* does not contain rules concerning the definition of the investigated product; because Economía correctly considered the physical characteristics and technical and commercial interchangeability of the products at issue; and because Economía reached its injury determination on the basis of an objective examination of positive evidence[24];

(c) in respect of Economía's rejection of the information provided by the exporter and resort to facts available for the determination of dumping, that Mexico did not contravene Article 6.8 or Annex II of the *Anti-Dumping Agreement* because the exporter deliberately provided incomplete and inaccurate information that did not come from its accounting records, such that it did not provide all of the necessary

[20] In its response to question 128 from the Panel, Guatemala withdrew its allegations relating to the final determination.

[21] Guatemala first written submission, para. 363.

[22] Guatemala first written submission, para. 353.

[23] First written submission of Mexico, paras. 14, 51, 75 and 76.

[24] First written submission of Mexico, paras. 91, 97, 98, 99, 104 and 108.

information within a reasonable period and thus significantly impeded the investigation[25];

(d) in respect of Economía's provision of opportunities for the exporter to see all relevant information and to prepare presentations thereon, Economía's provision of a report on the results of the verification, and Economía's informing the exporter of the essential fact that its information was to be rejected and facts available used instead, that Mexico did not contravene Articles 6.2, 6.4, 6.7, 6.8, or 6.9 of the *Anti-Dumping Agreement* because the exporter knew and was responsible for the existence of the problems encountered at verification; because the verification report prepared by Economía accurately described the results of the verification visit; because Economía informed the exporter of the essential facts that were the basis of its decision to apply definitive anti-dumping duties through: *(a)* the publication of its Preliminary and Final Determinations, *(b)* the public hearing, and *(c)* the content of the file to which Guatemala had access throughout the investigation process; and because Economía's published resolutions covered completely and adequately Economía's considerations and conclusions on the issues of dumping, injury and causal link, including all questions of fact and law considered pertinent by Economía, among which were its determination of dumping on the basis of facts available[26];

(e) in respect of Economía's use, for the injury analysis, of a period that concluded eight months before the initiation of the investigation, that Guatemala did not present a *prima facie* case that Mexico contravened Articles 3.1, 3.2, 3.4 or 3.5 of the *Anti-Dumping Agreement*; and that in any case, Economía made an objective examination based on positive evidence in using information for that period for its injury analysis[27];

(f) in respect of Economía's use, for the injury analysis, of data for three consecutive half-yearly periods, that Guatemala did not present a *prima facie* case that Mexico contravened Articles 3.1, 3.2, 3.4 or 3.5 of the *Anti-Dumping Agreement*; and that in any case, Economía made an objective examination based on positive evidence in using information for those periods for its injury analysis[28];

(g) in respect of Economía's use, in its analysis of different injury factors, of data for different companies or different combinations of companies within the domestic industry, that Mexico did not contravene Articles 3.1, 3.2, 3.4, 3.5 or 4.1 of the *Anti-Dumping Agreement* because Economía based its analysis on information that pertained either to the domestic industry as a whole or to a major proportion thereof in accordance with the *Anti-Dumping Agreement*[29];

(h) in respect of Economía's analysis of the volume of imports of the investigated product from countries other than Guatemala, and of the price effects of the subject imports, that Mexico did not contravene Articles 3.1 or 3.2 of the *Anti-Dumping*

[25] First written submission of Mexico, paras. 142, 148, 150 and 151.

[26] First written submission of Mexico, paras. 142, 152, 290, 293, 295, and 296.

[27] First written submission of Mexico, paras. 163, 174 and 175.

[28] First written submission of Mexico, paras. 188, 203 and 204.

[29] First written submission of Mexico, paras. 211 and 213.

Agreement because Economía's methodology (a sample of transactions to which was applied a range of minimum and maximum prices) was permissible as the *Agreement* contains no specific rules in this regard; and because Guatemala's allegation concerning Economía's analysis of the price effects of the subject imports was based on a factual error[30];

(i) in respect of Economía's causation/non-attribution analysis, that Guatemala did not present a *prima facie* case that Mexico contravened Articles 3.1, 3.2, 3.4 or 3.5 of the *Anti-Dumping Agreement* because in respect of the "other known factors" cited by Guatemala, *(a)* there was no increase in operating costs contrary to Guatemala's allegation; and *(b)* Mexico explained the reasons why it considered that the decline in exports was not a determinative factor causing injury[31];

(j) in respect of the treatment in the Preliminary and Final Determinations of the changes in the definition of the investigated product, that in relation to the Final Determination Mexico did not contravene Article 12.2 of the *Anti-Dumping Agreement* because Guatemala's citation of that Determination is inaccurate, as the change in product diameters is only relevant for the Preliminary Determination; and that Mexico did not contravene that provision in relation to the Preliminary Determination, because that Determination indicates that the exporter did not object to, and thus tacitly accepted, the change in the diameter; and that in general the Determinations contain all of the information required by Article 12.2[32]; and

(k) in respect of access to confidential information, that Mexico did not contravene Article 6.5 of the *Anti-Dumping Agreement* because under Mexican law all interested parties are allowed access to the confidential file subject to compliance with certain conditions; because Economía analyzed the sufficiency of the justifications presented by interested parties requesting confidential treatment for submitted information before granting such treatment; and because Economía obtained non-confidential summaries except in respect of certain types of information (tables of numbers) that in the view of Mexico cannot be summarized.[33]

IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties as set forth in their executive summaries submitted to the Panel, are attached to this Report as Annexes (see List of Annexes, page vi).

V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of the third parties as set forth in their executive summaries submitted to the Panel, i.e. the European Communities, Japan, and the United States, are attached to this Report as Annexes (see List of Annexes, page vi).

[30] First written submission of Mexico, paras. 238, 241 and 244.

[31] First written submission of Mexico, paras. 259, 261, 274, 278 and 279.

[32] First written submission of Mexico, paras. 300, 301, 302 and 303.

[33] First written submission of Mexico, paras. 305, 306, 312 and 313.

VI. INTERIM REVIEW

6.1 We have made a number of technical rectifications to paragraphs 2.2, 7.74 and 7.164 and to footnote 210.

A. REQUESTS FROM MEXICO

6.2 With regard to paragraphs 7.20 and 7.21, Mexico questions our characterization of some of its assertions regarding the obligations imposed by Article 5.2 and 5.3 of the *Anti-Dumping Agreement*. It submits, in particular, that it never argued that Article 5.3 does not impose obligations on an investigating authority. Guatemala does not comment. We have introduced a clarification regarding our reading of Mexico's argument.

6.3 With regard to paragraph 7.38, Mexico argues that none of the parties contended that there were 124 different products (figure cited by the Panel in that paragraph), and suggests that the Panel may have been referring to the alleged number of product codes (132) cited in Guatemala's arguments. Guatemala does not comment. We have amended a sentence in the paragraph for the sake of greater clarity and to point out in particular that the 124 products is a figure we ourselves found on the basis of the evidence submitted.

6.4 With regard to paragraphs 7.58 an 7.59, Mexico questions the standard we applied in finding that initiation was not justified by insufficient evidence on the volume of imports of the investigated product. Mexico asks us to clarify whether the reason was that the authority took no additional steps to ascertain the relevance of the information obtained at tariff line level, regardless of whether or not it could get more accurate information, or whether the incompatibility stemmed from the actual lack of additional data any more accurate than those provided in the application. Mexico challenges our finding that Economía "had access" to import "pedimentos" arguing that, on the contrary, Economía had to obtain them from other sources. Mexico also requests clarification of the assertion that our focus was on "the *type* of evidence of injury". Guatemala does not comment. As to the standard we applied, we have introduced a number of changes in paragraph 7.58. We have replaced "had access" in paragraph 7.59 with "obtained" so as to clarify the factual situation. As to our focus on the "*type* of evidence", we have introduced a new footnote, number 115, with a cross reference to paragraph 7.56.

6.5 As regards our determinations regarding the adequacy of information on imports from countries other than the one investigated, in general, Mexico argues that Economía sought a much larger set of "pedimentos" than it ultimately obtained. Mexico requests clarification as to the manner in which Economía could have gone about obtaining more "pedimentos". Guatemala does not comment. First, this request of Mexico's is not very clear to us since Mexico gives no paragraph references. We have nevertheless introduced a clarification in paragraph 7.283 regarding Mexico's argument on Economía's attempts to obtain more "pedimentos", which it did obtain in the end. Since we consider our findings and conclusions on this matter sufficiently clear, we have made no other changes to this part of the report.

6.6 With regard to 7.64, Mexico denies any contradiction in its assertions as to whether two types of tubing were investigated, or only one. Guatemala does not comment. We have introduced a clarification in the paragraph and point out that, in any event, the point of the paragraph (as paragraph 7.65 indicates) is not to assume that Mexico concedes that Economía changed the definition of the product in the course of the investigation.

6.7 In paragraphs 7.76 and 7.98, Mexico suggests that we correct the references to standards "ASTM A-513" and "ASTM A-500" respectively. Guatemala takes the view that these references are correct. Since they are exact quotations from documents in the file and pertain to products other than standard A-53 tubing, we have placed them in inverted commas.

6.8 Mexico seeks clarification of our assertion in paragraph 7.379 that "the Agreement does not address interested parties ..." Guatemala does not comment. We have clarified the paragraph.

B. REQUESTS FROM GUATEMALA

6.9 Guatemala questions our assertion in paragraph 7.239 regarding the practical constraints the applicant met in collecting and analysing data, in the context of the period between the investigation period and the initiation of the investigation, and seeks clarification as to how time constraints in analysing the information in an application would affect determination of the period of investigation. Guatemala also asks us to clarify how we considered the five factors listed in the report of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* (quoted by us in paragraph 7.238). Mexico does not comment. Our assertion in paragraph 7.239 cited by Guatemala concerns the practical constraints faced by an applicant, not the constraints faced by an investigating authority in analysing an application. We therefore see no need to change this paragraph. As to the factors listed by the Appellate Body in the *Rice* case, we believe our findings and conclusions to be clear in that the factual situation here is different from that in the *Rice* case. Furthermore, as the Appellate Body itself said in its report, the analysis and factors in *Rice* were specific to the case. Consequently, we do not consider them to be a standard "checklist" to be applied mechanically.

6.10 Guatemala asks us to explain our finding in paragraph 7.340 that Guatemala makes no allegation in respect of any "dissimilarity" between the scope of the product under investigation and the like product. Mexico does not comment. In order to clarify this finding, we have introduced in paragraph 7.339, by means of footnote 396, a reference to the cited response by Guatemala, and, in paragraph 7.340, a cross reference to paragraph 7.105 by means of footnote 397.

6.11 Guatemala asks us to clarify our factual findings regarding the point in the investigation at which Economía requested and received information from the Mexican producers regarding the products added to the scope of the investigated product. Mexico does not comment. We see no need to make any change since this matter is already dealt with in footnotes 402 and 403.

6.12 Guatemala argues that, in the light of our findings in paragraph 7.379 and 7.388 that there were no sufficiently detailed summaries to allow a reasonable understanding of the content of the documents concerned, we ought to have concluded that there was an inconsistency with Article 6.5.1 of the *Anti-Dumping Agreement*. Guatemala seeks clarification of our reasoning on this point. Mexico does not comment. We have introduced clarification in paragraph 7.394.

6.13 Guatemala asks us to omit paragraphs 7.396 to 7.398 as they are not necessary to settlement of the dispute and do not form part of Guatemala's claim, and at all events to avoid any kind of value judgement as to the parties' ability to meet internal requirements of the system of a Member. Mexico disagrees, arguing that these paragraphs respond to matters that Guatemala raised before us. We have made no change to these paragraphs.

VII. FINDINGS

A. GENERAL

1. Standard of review

7.1 The Panel recalls the standard of review that it must apply to the matter before it.

7.2 Article 11 of the *Dispute Settlement Understanding*[34] sets forth the appropriate standard of review for panels for all covered agreements except the *Anti-Dumping Agreement*. Article 11 imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", an obligation which embraces all aspects of a panel's examination of the "matter", both factual and legal.

7.3 Article 17.6 of the *Anti-Dumping Agreement* sets forth the special standard of review applicable to anti-dumping disputes. It provides:

> "(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;"
>
> "(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

7.4 Thus, together, Article 11 of the *DSU* and Article 17.6 of the *Anti-Dumping Agreement* set out the standard of review the Panel must apply with respect to both the factual and legal aspects of its examination of the claims and arguments raised by the parties.[35]

7.5 In light of this standard of review, in examining the claims under the *Anti-Dumping Agreement* in the matter referred to it, the Panel must evaluate whether the Mexican measure at issue is consistent with relevant provisions of the *Anti-Dumping Agreement*. The Panel must find it consistent if it finds that the Mexican investigating authority[36] has properly established the facts and evaluated them in an unbiased and objective manner, *and* that its determinations rest upon a "permissible" interpretation of the relevant provisions. The Panel's task is not to perform a *de novo* review of the information and evidence on the record of the anti-dumping investigation at issue, nor to substitute its judgment for that of Economía, even though it might have arrived at a different determination were it examining the record itself.

2. Burden of proof and "*prima facie*" case

7.6 The general principles applicable to burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim.[37] In these Panel proceedings, Guatemala, which has challenged the consistency of Mexico's measure, thus bears the burden of demonstrating that the measure is not consistent with the

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[34] Article 11 of the *DSU*, entitled "Function of Panels", states, in part: "The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements …"

[35] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 54-62.

[36] *Unidad de Prácticas Comerciales Internacionales*, hereinafter referred to as "Economía".

[37] Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 14-15.

relevant provisions of the Agreement. It is also generally for each party asserting a fact to provide proof thereof.[38] In this respect, therefore, it is also for Mexico to provide evidence for the facts which it asserts.

7.7 The parties' claims and arguments also touch upon a particular aspect of the burden of proof in dispute settlement proceedings: the concept of a "*prima facie* case". If a party bearing the initial burden of proof to assert the affirmative of a particular claim or defence adduces evidence sufficient to raise a presumption that what it asserts is correct (i.e. a *prima facie* case), the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut that presumption.[39]

7.8 Thus, a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case.[40] The evidence and arguments underlying a *prima facie* case must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.[41] The nature and scope of evidence required to establish a *prima facie* case will necessarily vary from measure to measure, provision to provision, and case to case.[42] A panel errs when it rules on a claim for which the complaining party has failed to make a *prima facie* case.[43]

3. Treaty interpretation

7.9 Where we are called upon to interpret provisions of the *Anti-Dumping Agreement*, we recall that Article 3.2 of the *DSU* indicates that Members recognise that the WTO dispute settlement system serves to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". Article 31 of the *Vienna Convention on the Law of Treaties*" ("*Vienna Convention*"), recognized as such a rule[44], provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[45]

B. CLAIMS RELATING TO INITIATION OF THE INVESTIGATION

1. Arguments of the parties

(a) Guatemala

7.10 **Guatemala** argues that Mexico violated Article 5.2 (paragraphs (iii) and (iv)) of the *Anti-Dumping Agreement* as the application failed to contain sufficient evidence of dumping and injury to

[38] Ibid.

[39] Ibid.

[40] Appellate Body Report, *EC – Hormones*, para. 104.

[41] Appellate Body Report, *US – Gambling*, para. 141.

[42] Appellate Body Report, *US – Wool Shirts and Blouses*, pp. 14-15. See also Appellate Body Report, *Japan – Apples*, para. 159.

[43] Appellate Body Report, *US – Gambling*, para. 139.

[44] E.g. Appellate Body Report, *US – Gasoline*, p. 15.

[45] (1969) 8 *International Legal Materials* 679.

justify the initiation of an investigation. Guatemala asserts that Mexico also violated Article 5.3 in initiating the investigation without properly examining the accuracy and adequacy of the evidence provided in the application to determine whether the application contained sufficient evidence of dumping and injury to justify the initiation. In particular, Guatemala asserts that Economía could not have *adequately* examined the evidence in the application, as if it had done so, it would not have initiated the investigation because it would have determined that the evidence was insufficient. According to Guatemala, these violations also led to a violation of Article 5.8, as there was insufficient evidence of dumping and injury to justify proceeding with the case.

(b) Mexico

7.11 **Mexico** asserts that Article 5.2 is directed at applicants, and does not impose any obligation on an investigating authority. According to Mexico, the application contained sufficient evidence of dumping and injury that was reasonably available to the applicant in accordance with Article 5.2 and the investigating authority properly examined the accuracy and adequacy of the evidence to justify the initiation of the investigation in compliance with Article 5.3. In Mexico's view, there was, accordingly, sufficient evidence to justify proceeding with the case under Article 5.8.

2. Arguments of the third parties

7.12 The **European Communities** asserts that the use of Articles 2 and 3 of the *Anti-Dumping Agreement* to inform the Panel's interpretation of Articles 5.2 and 5.3 would be correct. If the Panel were to find that the application did not contain sufficient evidence of dumping and injury under Article 5.2, it would not be necessary to also evaluate the Article 5.3 claim. According to the European Communities, to satisfy Article 5.2, an application should ordinarily contain evidence of normal value from a particular producer, or exporter, or an explanation or indication as to why data from another firm should be considered representative of that producer or exporter.

7.13 According to the **United States**, Article 5.2 does not dictate that an application must contain a particular form or quantum of evidence relating to dumping or injury. What is "reasonably available" to the applicant depends on the circumstances of each case. An investigating authority may initiate an investigation based on application evidence of home-market pricing of a producer not named in the application, or of a price quote, or relating to only certain models of the product in question, or relating to broader tariff classification import data.

3. Evaluation by the Panel

(a) Factual background

7.14 On 18 May 2001, Hylsa S.A. de C.V. filed an application for initiation of an anti-dumping investigation on "standard" welded galvanized and black pipes and tubes from Guatemala, imported under tariff classifications 7306.30.01 and 7306.30.99, respectively.[46] The application identified the Guatemalan company Tubac as the only known exporter of the allegedly dumped product. On 11 June 2001, the investigating authority, the Ministry of the Economy (*Secretaría de Economía* – "Economía") issued a request for further information (a "prevención"[47]) seeking certain clarifications

[46] Exhibit GTM-1. While the application itself is dated in the year "2000", this is presumably a typographical error, as the parties treated the application as having been submitted in 2001, and as it contains information up to December of 2000.

[47] Exhibit GTM-2.

from Hylsa, including with respect to the evidence of normal value[48], export price[49] and import volumes.[50] Hylsa responded on 9 July 2001. In support of the allegation of dumping, the evidence before Economía at the time of initiation comprised: (i) for normal value: two pieces of evidence – an invoice reflecting a sale of galvanized standard tubing and a price quote for a potential sale of black standard tubing[51]; (ii) for export price, import statistics from the statistics database of the Ministry of Economy "Sistema de Información Comercial de México" or "SICMEX", as well as estimates derived from private import "pedimentos".[52] In support of the alleged injury, the evidence before the IA comprised data on economic indicators for Hylsa, and the published data from SICMEX on the total volume and value of imports for the two tariff lines that included, but were not limited to, the product under investigation.[53] The Mexican investigating authority initiated the investigation on 24 August 2001, indicating that it had largely relied the evidence submitted by the applicant pertaining to normal value[54], export price[55] and import volumes[56] with minor adjustments.

[48] Exhibit GTM-2, p. 6, questions 18-23. The questions pertained to: why the application referred to an invoice of "Tubac" as exporter, when the actual invoice submitted pertained to Ferretería Ferrominera ("FF"); the domicile of the latter (as the invoice indicated that the buyer, but not the seller, was located in Guatemala); and normal value and adjustments for black standard tubing, as the invoice related only to galvanized standard tubing.

[49] See question 17 of Exhibit GTM-2. The question concerned adjustments for freight, insurance and credit terms.

[50] Exhibit GTM-2, p. 6, questions 3-4.

[51] See Initiation Determination, Exhibit GTM-4, paras. 62-66. See also Exhibit GTM-1, response to Question 21 and Exhibit GTM-3, response to Question 21. The invoice was submitted to the Panel as Exhibit MEX-1; the price quote was submitted (as Business Confidential Information) to the Panel in Exhibit MEX-26.

[52] In the Initiation Determination, Exhibit GTM-4, para. 55, this export price evidence is described as a document for each product with corresponding invoice. See Exhibit GTM-1, Vol. 1, response to Question 17 and associated annexes.

[53] Exhibit GTM-1, Volume 2, Section III.

[54] Exhibit GTM-4, paras. 62 and 63 indicated that Economía made slight adjustments to the applicant's proposed exchange rates to be applied to the invoice and the price quote. However, Exhibit GTM-4, para. 65 states: "The Ministry accepted the information provided by the applicant ... The Ministry based its calculation of the weighted average normal value for each product on ..." the invoice and the price quote. In respect of adjustments to normal value, para. 67 indicates: "The Ministry agreed to adjust the normal value for credit according to the information and methodology proposed by the applicant."

[55] Exhibit GTM-4, "Determination Accepting the Application of the Interested Party and Declaring the Initiation of the Anti-dumping Investigation on Imports of Standard Pipes and Tubes (merchandise currently classified under tariff classification 7306.30.01 and 7306.30.99 of the General Import Tax Law) exported from Guatemala, irrespective of the country of provenance, 24 August 2001". On export price, in paras. 56-57, the determination indicates that Economía accepted the applicant's information, and calculated an export price on that basis. Economía rejected the applicant's proposed adjustments for freight and insurance (and replaced this with its own adjustment on the basis of SICMEX) and credit (and made no credit adjustment). See paras. 59-60.

[56] As we discuss further below, in respect of import volumes, at the time of initiation, Economía had access to official SICMEX statistics, as well as to the SICMEX statistics submitted by the applicant.

(b) Analysis

7.15 In respect of Economía's initiation of the investigation, Guatemala has made claims of violation of three provisions: Articles 5.2, 5.3 and 5.8 of the *Anti-Dumping Agreement*.[57] At the heart of all of these claims is Guatemala's allegation that the evidence pertaining to dumping and to injury on which Economía based its initiation decision was "insufficient" in the sense of Article 5.3, in a number of respects, such that Economía's evaluation of that evidence was inadequate for the purposes of Article 5.3. This central question thus is the main focus of our analysis. In order to structure this analysis, we first cite the text of these provisions and consider the nature of, and relationship among, the obligations that they contain.

7.16 Article 5.2 of the *Anti-Dumping Agreement* provides, in part:

> "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: ...
>
> > (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."

7.17 Article 5.3 provides:

> "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."

7.18 Article 5.8 reads, in part:

[57] We address below, paras. 7.346-7.347, Guatemala's claim under Article 5.4 – that Economía should have, but did not, reassess "standing" during the course of the investigation as the covered product scope was enlarged – in the context of Guatemala's other claims and arguments concerning those changes in the product scope.

> "An application ... 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 ...".

7.19 Article 5.2 refers to the contents of the application by the domestic industry requesting the initiation of an investigation. It requires that the application shall include, *inter alia*, information on certain specific areas to the extent that it is "reasonably available" to the applicant. In this regard, Article 5.2 states that "[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph". Article 5.3 makes it clear that the investigating authority has 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 the investigation. In any case where the investigating authority judges the evidence in the application not to be a sufficient basis for initiating an investigation, Article 5.8 requires the authority to reject the application and terminate the investigation.

7.20 Mexico suggests 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 cites the *EC-Bed Linen* panel report in support of this proposition.[58] We note that the facts and legal issues in that case were different from the case before us. In particular, in contrast to Guatemala's claim before us, India's claim in that case was purely process-related; that is, India claimed that the European Communities failed *to examine* the accuracy and adequacy of the evidence before initiating the investigation, but made no claim in respect of the *sufficiency* of that evidence.[59] 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[60], we do not read that case as standing for the proposition implied by Mexico[61], 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.

7.21 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. We note, as have past panels in this context, that the meanings of the concepts of "dumping", "injury" and "causation" in Article 5

[58] Panel Report, *EC - Bed Linen*, paras. 6.199-6.201.

[59] See Panel Report, *EC - Bed Linen*, para. 6.200.

[60] We note that the panel in *Mexico - Corn Syrup* (para. 7.102) similarly concluded that Article 5.3 did not itself establish any obligation to make, or to make known, a determination concerning issues underlying the decision to initiate.

[61] Mexico's response to question 137 from the Panel.

are the same as those in the relevant substantive provisions of the Agreement (i.e., Article 2 for dumping and Article 3 for injury and causation). [62]

7.22 We must emphasize, however, that while the concepts are the same, we agree with Mexico[63] that it is not necessary for an investigating authority to have irrefutable proof of dumping or injury prior to initiating an anti-dumping investigation.[64] We note in this respect that Article 5.1 refers to the initiation of an investigation "to determine the existence, degree and effect of any *alleged dumping*" (emphasis added), and that Article 5.2 refers to "alleged injury", the "allegedly dumped product" and "allegedly dumped imports". We also are mindful that an anti-dumping investigation is a process where certainty on the existence of all of the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward.[65] While we disagree with Mexico that the information contained in a request for initiation does not have to be more than a "mere indication" ("*mero indicio*")[66], we note that Mexico nevertheless acknowledges that the investigating authority must verify that the evidence presented constitutes "reasonable indications" (*indicios razonables*) in order to initiate.[67]

7.23 Turning now in more detail to the provisions cited by Guatemala, we first consider Article 5.2. Here, a claim under Article 5.2 may focus on whether an application contains information "reasonably available" to the applicant, but the textual differences between Articles 5.2 and 5.3 lead us to observe that the "reasonable availability" of the evidence to the applicant is not determinative as to the "sufficiency", in the sense of Article 5.3, of that evidence as the basis for an investigating authority's decision to initiate. By the same token, in examining whether there is sufficient evidence to justify initiation, an investigating authority is not precluded from gathering information additional to that in the application so as to corroborate and verify the contents of the application.[68]

7.24 That said, the chapeau of Article 5.2 makes clear that in an application, "[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph." Therefore, for the purpose of Article 5.2, the applicant must submit a degree of actual evidence of alleged dumping allegedly causing injury, and for the purpose of Article 5.3, that evidence must constitute an objectively *sufficient* factual basis to initiate an investigation. 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

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[62] Panel Report, *Guatemala - Cement II*, para. 8.35; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 7.61, 7.62.

[63] "... it is clear that such evidence does not necessarily have to be of the quality that would be necessary to support a preliminary or final determination" (emphasis in original). First written submission of Mexico, para. 9.

[64] Panel Report, *Guatemala - Cement II*, para. 8.35.

[65] Panel Report, *Guatemala - Cement II*, paras. 8.35, 8.36; *Argentina – Poultry Anti-Dumping Duties*, paras. 7.61, 7.62.

[66] Second oral submission of Mexico, para. 5(i).

[67] See Mexico's response to question 136 from the Panel.

[68] Panel Report, *Guatemala – Cement II*, para. 8.62; Panel Report, *US – Softwood Lumber V*, para. 7.75 (point not appealed).

same nature, form part of a body of evidence that, in totality, was "sufficient". We are, furthermore, aware that it is appropriate for a panel to examine the evidence before the investigating authority at the time of the decision in the light of the investigating authority's own methodology and to review the decision on its own terms. As we have already mentioned, we are not entitled to conduct a *de novo* review of the investigating authority's determinations.[69]

7.25 Turning to Article 5.8, this provision requires the rejection of an application and prompt termination of the investigation as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or injury to justify proceeding with the case. The portion of Article 5.8 that applies to the pre-initiation phase of an anti-dumping investigation ("an application ... shall be rejected ...") does not impose additional substantive obligations beyond those in Article 5.3 on the authority in connection with the initiation of an investigation.[70] That is, if there is sufficient evidence to justify initiation under Article 5.3, there can be no violation of Article 5.8 in not rejecting the application at that point.[71]

7.26 Recalling that Guatemala's claims under the three provisions – Articles 5.2, 5.3 and 5.8 – are focused on the alleged insufficiency of the information on which Economía based its decision to initiate, we first examine Guatemala's claims under Article 5.3. In so doing, and in accordance with our standard of review, we will consider whether an unbiased and objective investigating authority, taking into account the accuracy and adequacy of the facts before it, could properly have determined that there was sufficient evidence to justify the initiation of an anti-dumping investigation.[72]

7.27 We will first examine Guatemala's allegations on the evidence concerning alleged dumping, and then will take up Guatemala's allegations on the evidence of alleged injury and causation. In this regard, our approach will be consistent with that of past panels, which have evaluated claims as to an authority's assessment of the sufficiency of evidence used for initiation in the light of the pertinent substantive requirements for dumping and injury determinations (i.e., Article 2 for evidence related to dumping and Article 3 for evidence related to injury).[73] We too shall look to those provisions not in terms of consistency of the initiation decision with them, but rather for guidance as to the substantive sufficiency (in the sense of Article 5.3) of the evidence of alleged dumping and alleged injury on which that decision was based. We reiterate that at the time of initiation an investigating authority is not required to have before it the quantity and quality of evidence that would be necessary to support a preliminary or final determination.

(i) Initiation evidence of dumping

7.28 We note first that Guatemala's complaint concerning the sufficiency of the evidence of alleged dumping is limited to the evidence pertaining to normal value. That is, Guatemala raises no issue concerning the evidence on export prices. (This evidence consisted of the unit value of imports of galvanized and black tubes and pipes based on SICMEX information for the period of

[69] See e.g. Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 141-152.

[70] We find support in Panel Report, *Guatemala – Cement II*, paras. 8.72-8.75.

[71] In response to questioning, Guatemala confirmed that its Article 5.8 claim flows from its claims under Article 5.2 and/or Article 5.3, both jointly and independently. See Guatemala's response to question 3 from the Panel.

[72] This approach is similar to that of previous panels that have examined claims under Article 5.3 of the *Anti-Dumping Agreement*. See, Panel Report, *Mexico –Corn Syrup*, paras. 7.91-7.110; Panel Report, *Guatemala – Cement II*, paras. 8.29-8.58; Panel Report, *Argentina - Poultry Anti-Dumping Duties*, paras. 7.60 *ff*.

[73] E.g. Panel Report, *Guatemala - Cement II*, paras. 8.35, 8.36 and 8.45.

investigation, as well as one customs document for each product group (galvanized and black, respectively) with corresponding invoices, provided by Hylsa.[74]) Guatemala does argue, however, that the deficiencies that it alleges in the normal value evidence meant that that evidence could not be compared on a "fair" basis with the export price evidence.

7.29 Concerning the normal value evidence, Mexico's initiation notice indicates that Economía generally accepted the evidence submitted by the applicant, without much further analysis or elaboration: "The applicant suggested calculating the normal value for both products [...], on the basis of home-market sales prices in the Republic of Guatemala ..."[75]; "For galvanized standard pipes and tubes, the applicant submitted a sales invoice from a Guatemalan company corresponding to the period of investigation."[76]; "For black standard pipes and tubes, the applicant supplied a quote from a Guatemalan company corresponding to the period of investigation."[77] The Ministry accepted the information provided by the applicant...".[78]

7.30 In particular, at the point of initiation, this evidence consisted of:

- one (apparently computer-generated) invoice for one sale, on 30 August 2000, by Ferretería Ferrominera, a distributor, to Atlantida SA, of 1,200 pieces of "ligero" galvanized (not black) steel pipes and tubes in three different diameters (1/2", 1" and 1-1/4").[79] At the average rate of exchange for 2000[80], the value of this sale was approximately US$5,900.

- one (handwritten) price quote, dated 15 December 2000, by **[XX - BCI.]**, a distributor, **[XX - BCI]**, for a total of **[XX – BCI]** pieces of "liviano" pipes in 6 different diameters (1/2", ¾", 1", 1-1/2", 2-1/2", and 4").[81] At the average rate of exchange for 2000, the total value of the quoted products was approximately [XX – BCI]. The document does not specify whether these are black or galvanized pipes, although Hylsa submitted it as evidence of pricing in the Guatemalan market for black (i.e., not galvanized) pipe. This document explicitly indicates in large print that "*prices are subject to change*".

7.31 It is apparent from the "prevención" that, prior to initiation, the Mexican investigating authority made an effort to clarify certain aspects of the normal value evidence (i.e., the invoice) accompanying the application. First, the "prevención" noted that the invoice covered only galvanized pipes and requested clarification as to the pricing of black pipes. (It was in response to this question

[74] Exhibit GTM-4, para. 55.

[75] Exhibit GTM-4, para. 61.

[76] Exhibit GTM-4, para. 62.

[77] Exhibit GTM-4, para.63.

[78] Exhibit GTM-4, para. 65.

[79] See Exhibit MEX-1. In particular, 1,000 pieces 1/2" x 6 mts.; 100 pieces 1" x 6 mts; 100 pieces 1-¼" x 6 mts.

[80] http.//www.worldpress.org/profiles/Guatemala.cfm. The source cited by Worldpress for the exchange rate information (7.7632 quetzales per US dollar in 2000) is the *CIA World Factbook*.

[81] In particular, prices were quoted for 3-14 units, 6 meters in length, of each of the various diameters. ½, ¾, 1, 1 ½, 2 ½, 4 inch tubes. See Exhibit MEX-26.

that Hylsa submitted the price quote.) The "prevención" also asked why the invoice was in respect of a Guatemalan company (Ferretería Ferrominera) other than the exporter, Tubac, identified in the application[82], and sought details concerning the domicile of Ferretería Ferrominera (noting that the document indicated that the buyer was located in Guatemala, but not the vendor), and about exchange rates.[83] The "prevención" further asked why there was, originally, no adjustment for credit terms, despite the fact that the invoice indicated that Ferretería Ferrominera had granted 30 days credit. Economía largely accepted Hylsa's responses to these questions, including an adjustment for credit terms and a modification of the exchange rate used.[84]

7.32 We now consider, in the light of the specific arguments raised by Guatemala, whether an unbiased and objective investigating authority, looking at these facts, could properly have determined that there was sufficient evidence of dumping to justify the initiation of an anti-dumping investigation.

7.33 Guatemala argues that the invoice and the price quote were insufficient for the following reasons: (1) that the prices were not those of Tubac, the one known and named Guatemalan exporter, which accounted for nearly all Guatemalan exports to Mexico, but were those of two Guatemalan distributors; (2) that the evidence related to an "insignificant subset" of the investigated product temporally, and in terms of volume and product coverage, in that the evidence corresponded to only one single transaction and one single price offer on two individual days during the period of investigation, the volumes involved were very small, and the product coverage was very limited *vis-à-vis* the overall scope of the domestic product, and indeed did not reflect the specific product (A-53 pipe) identified in the application as the investigated product; (3) that no adjustment was made by Economía to take into account the level of trade (distributor) of the emitters of the invoice and price quote; and (4) that the price quote, not representing a completed transaction, was inherently invalid as evidence. Thus, for Guatemala, the problems with both the quantity and the quality of the evidence were such that a proper assessment of it by Economía could not have resulted in a decision to initiate the investigation.

7.34 Given these allegations by Guatemala, we have considered in detail the normal value evidence, and have 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. We emphasize that our assessment is in respect of the normal value evidence as a whole that was before the investigating authority, with no one of the various concerns that we outline below necessarily being determinative.

7.35 First, we note that, as alleged by Guatemala, 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; instead, the evidence pertained to two distributors. Mexico does not dispute that the prices in the invoice and price quote were not Tubac's, and instead argues that these prices were reflective of prevailing prices in Guatemala. We do not here mean to imply that, at the stage of initiation, an investigating authority must have pricing documentation from every domestic producer

[82] In particular, Exhibit GTM-2, Question 18 reads: "Please explain why Annex 2 refers to Tubac SA as having issued the invoice presented for the purposes of substantiating the normal value, since the invoice in question (Annex 2.1) is that of the company Ferretería Ferrominera."

[83] See Exhibit GTM-2, Questions 18-23, and responses thereto in Exhibit GTM-3.

[84] For the invoice, Mexico applied the exchange rate published by the Bank of Guatemala for the date of the invoice, rather than the average monthly rate from the same source proposed by the applicant. For the price quote, Mexico applied the exchange rate for the date of the quote, rather than the average rate proposed by the applicant.

or exporter, or even any domestic producer or exporter. Indeed, we recognize that it can be extremely difficult for an applicant to obtain evidence of home market pricing, especially from its competitors, the producers or exporters. 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 (see, e.g., the various references in Article 2.2 to "the exporter or producer investigated"[85], and the requirement in Article 6.10 to calculate dumping margins for individual producers or exporters[86]). 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.

7.36 In this case, Mexico has pointed to no evidence, and indeed does not argue, that Economía took any steps to determine whether the products reflected in the invoice and price quote were reflective of Tubac's prices – in spite of the fact that Tubac was the only identified Guatemalan producer or exporter of the product – or even that these products were of Guatemalan origin.[87] Nor does Mexico point to any evidence, or argue, that Economía asked Hylsa to confirm the Guatemalan origin of the products reflected in the invoice and price quote, or to provide any information as to whether and how these prices should be adjusted to reflect the producer/exporter level (e.g., by subtracting an amount for distributor mark-up).[88]

7.37 Second, the temporal, volume and product coverage of the evidence was extremely limited and isolated, such that in our view this evidence was reflective of only an insignificant subset of the product and prices in question. In respect of temporal coverage, the invoice relates to only a single isolated transaction on a single day, and the price quote also relates to only a single isolated potential transaction that could have taken place on a single day. 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

[85] For example, Article 2.2.2.1 ("costs shall normally be calculated on the basis of records kept *by the exporter or producer under investigation*") (emphasis added); Article 2.2.2 "the amounts for administrative, selling and general costs and for profits shall be based on *actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation*") (emphasis added); and the subparagraphs of Article 2.2.

[86] Article 6.10 stipulates: "The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation ...".

[87] Response of Mexico to question 17 from the Panel. For example, (question 17(c)) we asked Mexico whether, in its assessment of the quality and accuracy of the submitted evidence, Economía had inquired as to what kind of company Ferretería Ferrominera was, and to cite the relevant portion of the record. Mexico's answer does not indicate that Economía undertook any such analysis. Rather, Mexico simply states that "[I]t is a company that sold the investigated goods at issue in the Guatemalan market during the period of investigation". We also asked Mexico (question 17(e)) what specific steps Economía had taken to assure itself that the products reflected in the invoice were produced in Guatemala, and to cite the relevant documentation. Again, Mexico points to no steps taken by Economía, but simply replies that Economía "found that those were the prices actually applied in the Guatemalan market during the period of investigation".

[88] See Mexico's response to question 17(h) from the Panel. Mexico did not respond to our question as to level of trade adjustments, but instead indicated that the invoice prices were adjusted for credit. (The terms of the invoice included 30 days credit.) We note as well that although in the "prevención" Economía asked Hylsa to clarify "how it was ascertained that there were no ... adjustments applicable to the normal value" other than the credit adjustment, Hylsa did not respond to this question. There is no evidence, and Mexico does not argue, that Economía followed up with Hylsa in respect of this non-answered question, in any way or at any time during the investigation.

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".[89] 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.

7.38 Concerning product volume and coverage, the normal value evidence was similarly limited and isolated. In particular, the transaction in the invoice was for 1,200 pieces of galvanized pipe with a total weight of about 8,000 kg[90] and a total value of about US$6,000, and the products were in only three diameters (1/2", 1" and 1-1/4") of a single wall thickness schedule ("ligero"). The coverage of the price quote was even more limited, as it reflected just [**XX - BCI**] pieces of black pipe weighing a total of about [**XX - BCI**][91], with a total value of a mere US$ [**XX - BCI**]. While the products were in six diameters (1/2", ¾", 1", 1-1/2", 2-1/2" and 4"), all were of a single wall thickness schedule ("liviano"). The extreme limitation of the size ranges covered by the invoice and price quote is evident from a comparison with the size range of covered products of Guatemalan origin identified by Hylsa in its response to the "prevención".[92] In particular, in that submission, Hylsa identified a total of 62 dimensions (i.e., diameter and wall thickness combinations). Taking into account that each of these dimensions could apparently exist in both galvanized and black finish, at the moment of initiation Economía had information that there could be a total of 124 different products. Given the very substantial variations among these dimensions (a range of ½" diameter with a wall thickness of 0.095" to 4" diameter with a wall thickness of 0.237") we do not see on what basis it was possible for Economía to have assumed, with no further inquiry or corroboration, that the very small subset reflected in the invoice and price quote, was representative of the prices for the overall investigated dimensional range. Furthermore, as inferred by Guatemala and confirmed by Mexico, all of the products covered by the invoice corresponded to BS-1387 pipe.[93,94] In other words, the products did

[89] Mexico's response to question 17(g) of the Panel.

[90] Derived from the conversion factors in Annex 15 to Hylsa's reply to the "prevención". Before us, Mexico argues that Economía had considered the invoice to be representative in terms of volume because the size of the transaction involved was several times larger than the average size of Tubac's home market sales as reflected in Tubac's response to the exporter's questionnaire. This argument is irrelevant to the present claim, however, given Economía's total lack of any information relating to Tubac's home market sales at the time of initiation.

[91] Derived from the conversion factors in Annex 15 to Hylsa's reply to the "prevención".

[92] Exhibit GTM-3, answer to question 16.

[93] Guatemala's response to question 7 of the Panel.

[94] Mexico's response to question 174 of the Panel.

not correspond to the A-53 specification, which the application identified as the predominant product among the investigated merchandise.

7.39 Here again, there is no evidence, nor does Mexico argue, that before initiation either Hylsa or Economía undertook to establish that the prices for the dimensions of pipe in the invoice and price quote were representative of the range of sizes covered by the investigation, or that the prices for BS-1387 pipe were representative of a broader range of specifications of investigated products, in particular of the predominating A-53 pipe. Nor is there evidence that either Hylsa or Economía sought information that might have been needed to adjust those prices to make them so representative. 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".[95] 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.

7.40 As in respect of company and temporal representativity of the evidence at the time of initiation, we do not mean to suggest at all that an investigating authority must have documentary evidence relating to every individual product covered by a given application. Rather, our view is that where the product coverage of the evidence, as here, is quite limited, the investigating authority needs to take the appropriate steps to determine whether that evidence is representative of the full product range, and to seek further information, including as to any adjustments, that would be necessary to render it so representative.

7.41 We emphasize here that we disagree with Guatemala's argument that the price quote, because it did not represent a completed transaction and because of its indication that the quoted prices were subject to change, was inherently invalid as evidence.[96] We have discussed above our concerns as to the lack of evidence that the particular price quote that was before Economía was representative of home market pricing for the range of Guatemalan-produced products covered by the scope of the investigation for the period of investigation. These concerns have to do with the specifics of that particular price quote, and not with 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.

7.42 Finally, we recall that although Guatemala has not raised any concerns in respect of the evidence on export prices that was before Economía, it has argued that the problems it identified in respect of the normal value evidence, as discussed above, would have meant that any comparison of that evidence and the evidence of export pricing (i.e., the calculation of the alleged dumping margin) was not "fair" in the sense of Article 2.4. We share the concern raised by Guatemala over the comparability of the evidence on normal value with that on export pricing. In particular, we recall

[95] Mexico's response to question 19(c) from the Panel.

[96] First written submission, para. 74. We note also Guatemala's argument in its rebuttal submission that price quotes have no legal status within Guatemala's domestic legal framework. In response to Panel questioning on this issue, Mexico asserted that the domestic legal status of price quotes in Guatemala was irrelevant, "given that, regardless of the obligation to apply the agreed price, a price quote obviously provides a reasonable indication of market selling prices". See Mexico's response to question 144 from the Panel.

that there is even no evidence that the merchandise in the invoice or price quote was of Guatemalan origin, and that the invoice and the price quote each represented distributor-level prices for a single transaction or potential transaction on a single day, for an extremely small subset of the products covered by the investigation, including the fact that this subset was limited to a technical specification other than the one identified by the application as the predominant specification in the market. By contrast, the export price information reflected the full spectrum of products imported by Mexico from Guatemala, over the entire period of investigation, at the level of the Guatemalan producer or exporter. Differences of this kind – which, we emphasize, are evident from the face of the evidence in question – typically lead to a distortion of the normal value *vis-à-vis* the export price, and thus if not adjusted for could give rise to apparent margins of dumping where no dumping in fact exists. Yet, according to the notice of initiation, the only adjustments that were made to the normal value and export pricing evidence (i.e., the credit adjustment to the prices in the invoice[97] and credit, freight and insurance adjustments to the export pricing evidence[98]) had nothing to do with the problems that we have identified. It is thus clear to us that after making these (unrelated) adjustments, Economía based its determination of the sufficiency of the evidence of the existence of dumping on a simple comparison of the prices that appear in the invoice and price quote with the export price information. Nor is there any evidence, and Mexico does not argue, that Economía took any steps to consider whether any further adjustments would have been necessary to take into account in the price comparisons the above-identified problems in the normal value evidence, so as to ensure that the allegation of dumping was well-founded.

7.43 We have carefully reviewed the record as to the evidence of dumping that was before Economía at the time of the initiation. We consider that the above-discussed problems in the evidence pertaining to normal value (the invoice and the price quote) are obvious on the face of those two documents and thus should have been, but were not, taken into account in Economía's assessment of the sufficiency of the evidence of dumping. Given these obvious problems in the normal value evidence, which were neither resolved nor addressed by Economía, in our view an unbiased and objective investigating authority could not have concluded that there was sufficient evidence of dumping to justify the initiation of an anti-dumping investigation under Article 5.3. We therefore find that Economía did not act consistently with Mexico's obligations under that provision in performing its assessment of the sufficiency of the evidence of dumping.

(ii) Initiation evidence of injury

7.44 Guatemala asserts that the Mexican investigating authority did not properly examine the adequacy and accuracy of the evidence relating to injury – in particular, the volume of the dumped imports – to ensure that it was sufficient to justify initiation for the purposes of Article 5.3 of the *Anti-Dumping Agreement*. Rather, according to Guatemala, the investigating authority accepted the evidence submitted by the applicant concerning total import volumes for the two tariff lines concerned without any independent evaluation, and with no downward adjustment for products imported under the same tariff lines that were not covered by the application.

7.45 To recall, in the application, as evidence of the volume of the dumped imports, Hylsa submitted the statistics published by SICMEX on the total volume of imports under the two tariff lines (7306.30.01 and 7306.30.09) within which the products named in the application were imported. There is no disagreement between the parties that the import information at the tariff-line level that was before Economía at the time of initiation *included* the products under investigation. The issue raised by Guatemala is that because Hylsa and Economía recognized, as of the time that the

[97] Initiation Determination, (Exhibit GTM-4), para. 67. For the price quote, no credit adjustment apparently was needed, as it specified cash payment.

[98] Initiation Determination, (Exhibit GTM-4), para. 58.

application was submitted, that this information *also* covered an unidentified volume of non-investigated products, the information was insufficient as evidence of the volume of the allegedly dumped imports, for purposes of initiation.

7.46 Turning first to the application, Hylsa's response to question 6 of the application questionnaire format gives the first indication of this issue. The question reads:

> "In the event that the tariff lines indicated include products other than the investigated product, the following information should be provided: (a) what are the products in question; (b) what, in your estimation, is the share of the investigated product in total imports entering under these lines; (c) an explanation of the methodology used and calculations made for the purposes of your estimate."[99]

Hylsa responded:

> "(a) As concerns tariff line 7306.30.01 (galvanized), there are pipes and tubes corresponding to the tariff line description, under which galvanized structural tubing and conduit tubing can be found. As to tariff line 7306.30.99 (black), there are pipes and tubes corresponding to the tariff line description, under which black structural tubing can be found. (b) Hylsa has no basis for making an estimate or calculating the percentage of imports of other products entering under those lines. (c) N/A".[100]

Thus, the application makes clear Hylsa's admission that the description of the products classified under the two relevant tariff lines was broader than the applicant's description of the product that was the subject of the application (by virtue of including structural and conduit tubing), but that Hylsa could make no estimate of the amount of imports of those non-investigated products.

7.47 Economía pursued this issue in the "prevención" with a view to establishing the respective proportions of the total imports entering under the tariff lines concerned that were accounted for by the product under investigation and by non-investigated products. In particular, the "prevención" asked whether the structural and conduit tubing referred to in the answer to question 6 of the application format were subject to the investigation and requested Hylsa, if they were not, to submit an estimate of the amount of the total imports under the two tariff lines accounted for by the non-investigated product.[101] Hylsa's responses (as contained in the public version of its reply to the "prevención" and as indicated in Mexico's answers to Panel questioning[102]) appear to confirm that the structural and conduit tubing were not covered by the investigation, but also that Hylsa had no basis to estimate the amounts of these non-covered products, as follows:

> "Both lines cover imports of black and galvanized conduction pipe and tubing and black and galvanized structural pipe and tubing, in addition to conduit tubing. The tariff line description is very broad, and both black structural pipe and tubing and

[99] Exhibit GTM-1, Sección I.A, question 6.

[100] Ibid.

[101] Exhibit GTM-3, questions 3 and 4.

[102] Exhibit GTM-3, answer to question 4. Mexico's response to Panel question 9(d) provides the text that was omitted as confidential information from the public version of Hylsa's response to the "prevención" contained in Exhibit GTM-3.

> black conduction pipe and tubing enter under the same line, i.e., 7306.30.99. Galvanized conduction pipe and tubing and galvanized structural pipe and tubing enter under the same line, i.e., 7306.30.01. This greatly restricts the ability to estimate imports of the aforementioned pipes and tubes. The use made of the pipes and tubes cannot be determined on the basis of Hylsa-DAT's internal data. Annex 3. No relevant information was obtained for a formal analysis, because even though some of the importers were known, the total amount of the imports was not. Annex 3 contains no information."

The initiation notice confirms that Hylsa was unable to provide any information in response to Economía's request for further precision as to the respective amounts of investigated and non-investigated products imported under the two tariff lines: "In fact, the Ministry noted that in order to describe the trend in the imports under investigation in the period July-December 2000 in relation to the previous comparable period, the applicant considered the total amount of imports entering the domestic market under the tariff lines in question."[103] Thus, it is clear to us (and Mexico does not contest) that Hylsa provided no information as to this product breakout.

7.48 In response to Panel questioning as to any steps other than the "prevención" (which, as just discussed, yielded no clarification) that were taken by Economía to identify the volume and value of the investigated products contained within the data for the two tariff lines, Mexico indicated that Economía had used the official SICMEX statistics first to verify the totals for the two tariff lines as reflected in the application and then to conduct its analysis of the trends in imports for purposes of initiation. In particular, Mexico stated that:

> "The investigating authority first of all analysed the import volume data provided by the applicant and noted that the amounts corresponded to the imports recorded for tariff lines 7306.30.01 and 7306.30.99"[104];

and further that:

> "Thus, the investigating authority used its own statistics drawn from official import sources to carry out the assessment under Article 3.1 and 3.2 of the *Anti-Dumping Agreement* and other provisions".[105]

7.49 Mexico also underlined to the Panel, however, that these official data were no more detailed as to product breakouts than the tariff-line level (i.e., than the level of detail in the application). In particular, Mexico stated:

> "It is important to note, moreover, that the investigating authority has access to official import statistics available from the Ministry of the Economy's Mexican Trade Information System (SIC-M), which is at the eight-digit level (i.e., two more than the Harmonized System), it being understood that, likewise, there are no official import data at the specific "product code" level (so that data at the tariff line level provide the narrowest range that includes the investigated product)."[106]

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[103] Exhibit GTM-4, para. 92.

[104] Mexico response to question 9(d) from the Panel.

[105] Ibid.

[106] Mexico response to questions 9(d) and (e) from the Panel.

7.50 In response to a question from the Panel as to whether in respect of the import data, Economía had limited itself to the above-described verification that the data in the application were the same as those published by SICMEX for the two tariff lines, although Mexico said that this was not the case, it pointed to no other concrete steps taken by Economía. Mexico nevertheless argued that:

> "[...] the authority's assessment of the imports is to be viewed as a harmonious whole made up of a number of interconnected elements which together provide a reasonable basis for the determination to initiate the investigation. In particular, it should be noted that the evidence adduced by the applicant (in the request for initiation and in its responses to the "prevención") permitted Economía to link the statistical data from the tariff lines to the trends in the imports under investigation (including volumes, values, or tendencies) in a reasonable manner. According to the IA, such evidence must be assessed on the basis of logic, knowledge and acquired experience".[107]

7.51 The Initiation Determination confirms that for purposes of initiation, for information on the volume and value of imports of both the allegedly dumped imports and total imports of the relevant products, Economía relied upon the official SICMEX statistics at the tariff line level, unadjusted in any way to exclude the non-investigated products also reported under those tariff lines. In particular, the notice of initiation states:

> "The indications received from the applicant did not provide the Ministry with the information enabling it to estimate, for the period of investigation and the two preceding similar periods, the share of imports of black and galvanized standard pipes and tubes in the total volume of imports under tariff lines 7306.30.01 and 7306.30.99 of the Schedule of the General Import Duty Law."[108]

7.52 The disussion in the notice of initiation in regard to the volume, trends and market share of the allegedly dumped imports was explicitly based on the totals reported for the two tariff lines, as follows: [109]

> "... in order to assess whether the period of investigation saw an increase in total imports and in imports from the Republic of Guatemala in relation to domestic consumption and production, the Ministry estimated the size of the standard pipe and tube market on the basis of apparent domestic consumption, defined as the sum of domestic production and total imports less total definitive exports. Total imports were obtained as specified under point 98 of this Resolution. As regards domestic output and total exports, the Ministry examined the figures provided by the applicant, obtained from the National Chamber of the Iron and Steel Industry.
>
> In this connection, the Ministry noted that, during the period of investigation, the share in Mexico's standard pipe and tube market of total imports under tariff lines 7306.30.01 and 7306.30.99 of the Schedule of the General Import Duty Law grew by 10 percentage points in relation to the previous comparable period, rising from 28 to 38 per cent. As to imports from the Republic of Guatemala, the Ministry noted that, in the period July-December 2000, their share in domestic consumption increased by

[107] Mexico response to question 9(e) from the Panel.

[108] Guatemala – Exhibit GTM-4, para. 97.

[109] Initiation Resolution, Exhibit GTM-4, paras. 103-104. The data in the application pertained to the July-December periods of 1999 and 2000.

> 2 percentage points in relation to the previous comparable period, from 5 to 7 per cent. In relation to domestic production, imports from the country under investigation accounted for 7 per cent in the period July-December 1999, reaching 11 per cent during the period of investigation."

7.53 While the notice of initiation makes thus clear Economía's recognition that it had no information as to the proportion of the total imports under the two tariff lines that were accounted for by the products subject to the application, the notice also indicates that Economía intended to take further steps *during* the investigation to estimate this information, as indicated in the following passage:

> "As the next step in the procedure, the Ministry will assemble the relevant information for an estimation of the volume of black and galvanized standard pipes and tubes that entered the domestic market under tariff lines 7306.30.01 and 7306.30.99 ... during the period of investigation and the two previous comparable periods."[110]

7.54 Recalling our view of the nature of the obligation imposed by Article 5.3, we see the issue before us as whether an unbiased and objective investigating authority could properly have determined that the evidence on import volumes of the allegedly dumped imports that was before Economía was sufficient in the sense of Article 5.3 for purposes of initiation of the investigation.

7.55 The WTO obligations of a Member's anti-dumping investigating authority are set out in the *Anti-Dumping Agreement*. We agree with Mexico that a Member's investigating authority has a certain degree of discretion to initiate and conduct an anti-dumping investigation, and is not subject to obligations that are not contained in the Agreement. That said, and as discussed at length above, the Agreement (Article 5.3) requires an investigating authority, before taking a decision to initiate an investigation, to satisfy itself as to the sufficiency of the evidence (in this case pertaining to injury) before it.

7.56 In this regard, the provisions of Article 3 provide pertinent guidance. In particular, the concept of the "dumped imports" is a centrally important and integral element of the entire analysis of injury and causation as provided for in Article 3. Article 3.1, an overarching provision pertaining to injury determinations as a whole, requires positive evidence and an objective examination of both *(a)* the volume of the *dumped imports* and their effect on prices in the domestic market for like products, and *(b)* the consequent impact of the *dumped imports* on domestic producers of the like products. Article 3.2 concerns the determination of the volume of *dumped imports*, and their effect on prices, and Articles 3.4 and 3.5 concern the impact of *dumped imports* on the domestic industry producing the like product, and causality between *dumped imports* and injury. Articles 3.6, 3.7 and 3.8 also contain numerous references to *dumped imports* and their impact. 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.

7.57 In this regard, the question before us is whether Economía complied with the obligations under Article 5.3 in assessing the sufficiency of the evidence pertaining to injury by basing its assessment of the volume of the allegedly dumped imports on the published data for total import volumes reported for two entire tariff lines, while being aware that those tariff lines also included an undetermined quantity of other products not the subject of the application. In other words, did Economía, in accepting this published aggregate information as a proxy for the volume of the

[110] Exhibit GTM-4, para. 99.

allegedly dumped imports, fail to comply with the requirement of Article 5.3 in respect of the sufficiency of this evidence for the purpose of initiation?

7.58 We take note of Mexico's argument that "the authority's assessment of the imports is to be viewed as a harmonious whole made up of a number of interconnected elements which together provide a reasonable basis for the determination to initiate the investigation."[111] We are aware that Economía had other evidence pertaining to the product under investigation before it, including information pertaining to the "'Description of the subject product' (technical or trade names by which the product is known, physical and technical characteristics, composition, production process, uses and users, including, moreover, manufacturing standards, diagrams of the manufacturing process, quality certification for both the Guatemalan and the domestically manufactured product, etc."[112] However, in respect of the volume of dumped imports, we do not see the relevance of this other information. Furthermore, it is not disputed that, for the purposes of initiation, having been informed by the applicant that it did not have any way to more precisely estimate the volume of the covered products within the two tariff lines, Economía relied exclusively upon statistics at the tariff line level, without making any estimation of the proportion thereof accounted for by the product under investigation. In other words, Economía recognized that it did not know, at the time it took the decision to initiate, anything about the percentage of the tariff line totals accounted for by the investigated products. For this reason, Economía also had no basis on which to consider the trends in the total volume of imports under those tariff lines as in any way representative of the trends in the volume of the allegedly dumped imports. In particular, while the trends in total imports might well be representative of the trends in the subject imports if the latter accounted for a large percentage of the former, this would not necessarily be the case where the subject imports were only a small percentage of the total.

7.59 In short, we disagree with Mexico that the information provided by the applicant may have permitted Economía to link the statistical data from entire tariff lines to the trends of investigated imports in a reasonable manner on the basis of logic, knowledge and acquired experience, as we see nothing in the record that was before Economía at the time of initiation establishing or addressing such a link.[113] We do not consider that it was sufficient for Economía not to find some reasonable basis to estimate the proportion of total imports accounted for by the product under investigation at the initiation stage. For example, we note that Economía obtained import "pedimentos" relating to a certain number of import transactions at later stages of the process.[114] This confirms to us that there would have been at least one way that Economía might have sought to corroborate the import volume statistics as they related to the product under 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.[115]

7.60 For these reasons, 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

[111] Mexico's response to question 9(e) from the Panel.

[112] See Volume 1, Section I.A of the application in Exhibit GTM-1.

[113] Mexico response to question 9 (e) from the Panel, quoted at paragraph 7.50, *supra*.

[114] See, for example, Preliminary Determination, Exhibit GTM-10, paras. 120-123; and Final Determination, Exhibit GTM-23, para. 169.

[115] See para. 7.56 *supra.*

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[116]) 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.[117] 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.

7.61 As there was no proper determination that there was sufficient evidence of dumping or injury to justify proceeding with the case under Article 5.3, the application should have been rejected and the investigation should not have been initiated by the terms of Article 5.8. In light of our findings of violation of Articles 5.3 and 5.8, we do not consider that it is necessary for us also to examine Guatemala's claim under Article 5.2.

C. FACTS RELATING TO DEFINITION OF PRODUCT UNDER INVESTIGATION/LIKE PRODUCT

7.62 Guatemala raises a number of claims that are based on its factual allegation that at two points during the investigation, Economía expanded the definition and scope of the product under investigation. Briefly, Guatemala claims that in spite of changing the scope of the products covered by the investigation – and thus, eventually, those covered by the anti-dumping measure – Economía never investigated the added products in respect of either dumping or injury. Concerning the dumping finding in particular, Guatemala alleges that although Tubac was not requested to provide any data concerning the added products, the fact that it did not do so was one of Economía's main reasons for rejecting Tubac's data and resorting to facts available in calculating the definitive margins of dumping. Similarly, in respect of the injury and causation determinations, Guatemala alleges that Economía did not gather, collect nor analyse data pertaining to the expanded product definition.

7.63 Before turning to the specifics of Guatemala's claims concerning the alleged changes to the scope of the investigated products, we start by considering the basic factual issue, i.e., whether the facts of record, as presented to us in this dispute, indicate that Economía modified the scope of the investigation as argued by Guatemala.

7.64 In its first written submission, Mexico appeared to admit that the two changes alleged by Guatemala did take place. Concerning the first alleged change, the expansion of the range of diameters of pipe covered by the investigation from 1/2"-4" to 1/2"-6", Mexico stated in its first submission that: " (d) [o]nly the diameter of the pipes and tubes investigated <u>was modified</u>"[118] and that "a 2-inch <u>increase</u> in diameter does not signify that the Ministry made a substantial alteration in

[116] We refer to our discussion of the changes in product definition in the course of the investigation, *infra*.

[117] For example, para. 165 of the Final Determination indicated that in the periods July-December-1998, 1999 and 2000, the investigated product accounted for 79, 66 and 64 per cent, respectively, of tariff-line import volumes.

[118] First written submission of Mexico at paragraph 91(d) (emphasis added).

the description of the product under investigation"[119], and that "the Guatemalan exporter had every opportunity to raise any objection it saw fit to the change in question".[120] Concerning the second alleged change, the addition of certain structural tubing to the scope of the investigated product, Mexico stated in its first submission that: "the scope of the product under investigation was not generically expanded to include "structural" pipes and tubes, but merely pipes and tubes that were technically and commercially interchangeable with those possessing the following characteristics …".[121] Mexico made similar statements in its first oral statement.[122] Furthermore, in response to questions from the Panel following the first substantive meeting of the Panel, Mexico acknowledged that these modifications had been made (although it referred to them as "clarificatory adjustments" (*precisiones*), "clarifications" (*clarificaciones*), or "ajustments" (*ajustes*)).[123] Mexico defended these modifications on the grounds that Economía, not being an expert in pipe and tube products, found it appropriate to make these changes or clarifications to the product scope in the light of information that it progressively gathered over the course of the investigation as to the commercial interchangeability of the products. However, Mexico also made such statements as: "they are one and the same [product]"[124]; "it is the same product"[125]; and "it is the same merchandise".[126] Furthermore, during the second substantive meeting Mexico in an oral comment to the Panel denied that Economía had changed the definition of the investigated product.[127]

7.65 Because of these differing statements by Mexico as to whether in fact Economía had changed the scope of the investigated product (1) by increasing the maximum diameter covered from 4" to 6", and (2) by adding certain structural tubing to the product definition, we cannot conclude that this is an uncontested fact in this dispute. Accordingly, and because of the central importance of this factual issue to many of Guatemala's claims, we now consider in detail the record evidence that pertains to this point.

1. The application (GTM-1)

7.66 The application by Hylsa described the product subject to the application as black and galvanized "standard pipe and tube" produced under various technical standards, the most important being ASTM A-53 and BS-1387. The application stated that these products, which were known in

[119] Ibid. at paragraph 91(e) (emphasis added).

[120] Ibid. at paragraph 91(f) (emphasis added).

[121] Ibid. at paragraph 104 (emphasis added).

[122] First oral statement of Mexico at paras. 21(d) and 28.

[123] Mexico's responses to questions 89 and 90 from the Panel.

[124] First written submission, para 105: "In this connection, Guatemala seeks to imply that these are two different products, when in fact they are one and the same [...]." (emphasis added)

[125] First oral communication, para 33: "[...] since for the purposes of the investigation, it was the same product." (emphasis added)

[126] Mexico's response to question 89 from the Panel: "[...] the information available indicates that it is the same merchandise [...]." (emphasis added)

[127] Written transcript of second substantive meeting. Mexico, commenting on Guatemala's claims concerning the alleged changes in the definition of the investigated product, stated: "We take sharp issue with Guatemala that changes were made in this regard. ... The product under investigation remains the same, i.e., black or galvanized standard pipes and tubes, without going into the details adduced to make a case for two differentiated products."

Mexico as "standard pipe" or "conduction pipe", were principally used to carry liquids and gases, but also could be used to produce pipe fittings and similar products, and for certain structural purposes (e.g., fencing). The application indicated that in Guatemala these products are known as "*cañería*" (conduction), or "*tubería liviana*" (light), "*tubería mediana*" (medium), and "*tubería pesada*" (heavy) or "*gruesa*" (thick)". The application emphasized that the imported Guatemalan product and the Mexican "like product" both conformed to the A-53 standard, making the point that the imported and like products were "identical". With further reference to physical characteristics, the application stated that although the size range for standard pipe went up to 26" diameter, the product imported from Guatemala ranged from ½" to 4", and that the most common schedules [wall thicknesses] were 30, 40 and 80, with schedule 40 predominating. In terms of production process, the application indicated that the product was produced via electric resistance welding from hot-rolled steel coils. As for tariff classification, the application indicated that the subject products were imported under two categories[128] that included but were not limited to those products, as in addition to the investigated products, structural tubing and conduit also were included. The application asserted that the pipe from Guatemala was identical to that produced by the Mexican domestic producers, and that both had the same "quality, standards, specifications and uses".[129]

2. The "prevención" (GTM-3)

7.67 In its answers to the pre-initiation questioning by Economía (the "prevención"), Hylsa again stressed that the product at issue corresponded to the ASTM A-53 standard: "The specifications are based on ASTM A-53, the most common standard used for this type of pipe and tubing".[130] In support, Hylsa provided copies of analyses of investigated products produced by Tubac and by Hylsa, all of which were identified as corresponding to the ASTM A-53 specification.[131] In a footnote on the page containing the information for Hylsa's product, it is stated that ASTM A-53 was not the only applicable standard, as BS-1387 also was relevant, and also was produced by Tubac, although it was consumed less in Mexico than A-53 pipe.[132] In a footnote to the page containing the information for Tubac's product, it is stated that "hot-rolled sheets are the common input for these pipes".[133] The description of the production process for the investigated product[134] also indicated that the process began with the unrolling of a coil of hot-rolled steel sheet ("principal input").

7.68 Question 3 of the "prevención" noted that in the application, Hylsa had indicated that under the two tariff categories identified, "in addition to the product subject to the investigation, structural tubing and conduit tubing" also entered Mexico. Economía asked Hylsa to clarify whether structural and conduit tubing were or were not covered by the investigation. Hylsa's response was submitted as confidential.[135] Question 4 of the "prevención" asked Hylsa, in the event the response to question 3

[128] As discussed, *supra*, the two tariff categories were 7306.30.01 and 7306.30.99 (galvanized and "other" welded carbon steel pipe and tube, respectively).

[129] Exhibit GTM-1, Volume 2, p. 5. The annexes to Volume II of the application contain (largely confidential) injury information submitted by the applicant.

[130] Exhibit GTM-3, answer to Question 1.

[131] Exhibit GTM-3, Annex 1.

[132] Ibid.

[133] Ibid.

[134] Exhibit GTM-3, Annex 10.

[135] Exhibit GTM-3, answer to question 3.

was negative, to estimate the amount of the total reported imports represented by the non-subject products. Hylsa provided a narrative response confirming that structural and conduit tubing also were classified within the two tariff categories, but part of the narrative was confidential.[136] Hylsa indicated that it was not able to provide the requested estimates because it did not know the total amounts of the imports, but only those of certain importers.[137]

7.69 In response to question 16 of the "prevención" concerning diameters and wall thicknesses of the product under investigation, Hylsa provided a table of diameters and wall thicknesses which it said were those of the standard pipes imported from Guatemala. The source of this information was not indicated.

7.70 In response to question 23 of the "prevención", which requested information on the conversion factors used to convert the prices in the price quote and the invoice, from a per-piece to a per kilogram basis, Hylsa provided a table identified as coming from a specification for products produced by Hylsa, which according to Hylsa also applied to the Guatemalan products, as both were produced according to strict standards. Hylsa did not otherwise identify the specification in question, and the schedule of dimensions does not correspond to that in the ASTM A-53 specification. In Tubac's questionnaire response, a table containing the same dimensions, identified as corresponding to those in the BS-1387 specification was provided. In answer to a question from the Panel, Mexico confirmed that the dimensions referred to in the table provided by Hylsa were those for BS-1387 pipe.[138]

3. The notice of initiation (GTM-4)

7.71 The description of the investigated product in the notice of initiation was essentially the same as that in the application. The notice stated that the product imported from Guatemala was a "commodity" product, produced from hot-rolled steel coils, known by the generic name of standard pipe, and by the commercial and/or technical names of galvanized and black standard pipe (mentioning as well the names by which the product was known in Guatemala[139]). Concerning the physical characteristics and chemical composition of standard pipe, the notice stated that the applicant had indicated that these were as set forth in the ASTM A-53 standard, the "principal standard" for these products, and that that standard also established that the product was produced to particular "schedules" denoting wall thickness, resistance and durability, among which schedules 30, 40 and 80 were the most common, especially schedule 40 (the most widely demanded). The notice also recited long excerpts from the ASTM A-53 standard, and indicated that although the technical analyses of the Guatemalan and Mexican products showed some physical differences, all of the reported values fell within the ranges specified in ASTM A-53. The notice indicated that, as stated in the application, although standard pipes could range from 3/8" to 26" in diameter, those imported from Guatemala ranged from ½" to 4" in diameter.

7.72 In terms of the definition of the "like product", the notice of initiation states:

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[136] As indicated above, in answer to questioning by the Panel Mexico provided the text that had been omitted as confidential from the public version of Hylsa's reply to this question. See paragraph 7.47, *supra*.

[137] Questions 5-15 requested clarifications of the injury information provided in the application.

[138] Response to question 174 of the Panel: "The table indeed conforms to the BS-1387 standard." Economía also requested and received clarifications relating to the injury information submitted with the application. See Exhibit GTM-3, questions 14 and 15.

[139] *Cañería*, *tubería liviana*, *mediana*, and *tubería pesada* or *gruesa*.

> "... relying upon the information supplied by the applicant regarding the description, physical characteristics, chemical composition, uses, production process and inputs of domestically manufactured standard pipes and tubes and standard pipes and tubes imported from the Republic of Guatemala, as referred to in points 5 to 29 of this Resolution, the Ministry made a preliminary determination that the two products were similar in terms of their physical characteristics and chemistry and were destined for the same end uses, which enabled them to fulfil the same functions and made them commercially interchangeable, and were hence like products."[140]

7.73 In terms of the "alleged injury" component of its initiation analysis, Economía relied upon the domestic industry information supplied by the applicant, while concluding that, in respect of financial indicators, "the 'Hylsa-DAT' statement of results to which the applicant refers does indeed correspond to operating results for *the like product*, and it therefore decided that at the current stage in the investigation, the assessment would be confined to results concerning the like product and the applicant as a whole." (emphasis added)[141]

4. Submission of Tubac accompanying response to exporters' questionnaire / questionnaire response (GTM-5)

7.74 In conjunction with its reply to the exporters' questionnaire, Tubac made a written submission questioning various points related to the investigation, including the definition of the product under investigation. Tubac argued in this submission that Economía and the applicant had not adequately defined the coverage of the investigated product. According to Tubac, the description of the pipes in question was confusing, and did not permit Tubac to know the scope or coverage of the product under investigation. Tubac stated that in the technical and commercial literature there was no reference to any product called "standard pipe", even in the ASTM A-53 standard cited by the applicant. Tubac stated that Hylsa's own website referred to three types of "heavy walled pipe": conduction, conduit, and mechanical tubing. Tubac indicated that it was unclear whether all of these three types were covered by the application, and that even the IA had recognized the lack of clarity, asking Hylsa in the "prevención" whether structural and conduit tubing were included. Tubac noted, and objected to the fact, that Hylsa had qualified its reply to that question as confidential, but also noted a statement in the application that the published import statistics covered, "in addition to black and galvanized standard pipes, products known as galvanized structural tubing and conduit tubing". Tubac went on to conclude that, without prejudice to its position, in its questionnaire response, it reasonably assumed that the investigated product was only galvanized and black conduction pipe, as defined by Hylsa on its website. The excerpt from Hylsa's website, Annex 2 to the submission, listed a variety of diameters ranging from ½" to 6", in schedules 40 and 80 (and a few also with thinner-walled dimensions whose schedule was identified as "X"). The "typical applications" were identified as pipe for conduction of water, air, gas and special fluids.

7.75 In its response to the exporters' questionnaire, Tubac listed in response to question 2.13, on product codes, various sizes of pipe referred to either as "*mediana*" or "*liviana*", or as schedule 40 or 80. Most of the listed codes were schedule 40. In its answer 2.17 (installed capacity) Tubac stated that the data it provided were limited to information on conduction pipe. In its answer to question 2.18, Tubac stated that the data it submitted on the other economic indicators also were only those relating to conduction pipe, both the ASTM and the BS norms. Tubac furnished, in Annex 10 to its response, a document indicating the technical differences between ASTM A-53 and BS-1387. It

[140] Exhibit GTM-4, para. 69.

[141] Exhibit GTM-4, para. 134. See also our factual summary of injury data, *infra*, paras. 7.292 *ff*. We recall that we have already addressed above Economía's treatment of the volume of dumped imports at the initiation stage.

further stated that the IA should be aware that Tubac produced other products than these in the same plants.

5. Hylsa's reply to Tubac's submission and exporters' questionnaire response (GTM-27)

7.76 In its reply to Tubac's submission (Exhibit GTM-5), Hylsa challenged Tubac's assertion that the term "standard pipe" did not exist, quoting from various references that used that term. (We note that none of the annexed documents contained a definition of the term, however.) Hylsa also challenged Tubac's statement that the product definition was not clear. Hylsa stated that it was the case "as the exporter concludes, that the investigated product is defined as all welded standard pipe, galvanized or black, for conduction, it needing to be stated that this definition ... naturally applies to welded standard pipe, galvanized or black, of the dimensions specified in Annex 2, which have identical physical characteristics, chemistry and finish, and similar resistance, and it being clarified that so-called *conduit* tubing is not part of the investigated product" because it was not sufficiently similar for purposes of the relevant provisions of Mexican law. In Annex 2, Hylsa stated that structural tubing ("not included in the investigation) coming from Guatemala corresponded to the "ASTM A-513" standard, and was produced from cold-rolled steel, and that structural tubing could be distinguished from conduction pipe on the basis of its wall thickness, as structural was lighter-walled. Hylsa further stated that ASTM A-53 did not exclusively cover conduction pipe, and that what was not covered by Hylsa's application was tubing with thin walls and thus structural tubing, with wall thickness less than 14 gauge, i.e. between 15 and 22 gauge. Hylsa attached a table which it indicated referred to structural tubing from Guatemala not covered by the investigation. Hylsa presented a second table in Annex 2 of "Dimensions of the denounced tubing", ranging from 1/2" to 6" in diameter in a range of wall thicknesses denominated in inches and millimetres. In Annex 2, Hylsa described the difference between the gauge (or sheet thickness) and the pipe schedule, the latter being a relationship between the thickness and the diameter of the pipe, or between the resistance to the material being conducted and the resistance to force of the steel. Hylsa concluded with the statement that the most common pipe schedules were 20, 30, 40 and 80, and that pipe schedules generally are mentioned in referring to standard pipe.

6. Information from the domestic industry prior to the Preliminary Determination

7.77 In response to Economía's request of 10 December 2001[142], Hylsa submitted[143] a conciliation of financial data for its Tubular Products Division, Hylsa-DAT, for costs, sales and profits for the "like product" to the data for Hylsa S.A. that had been submitted previously in response to Economía's initial (pre-initiation) "prevención". Economía requested information, on 17 December 2001, from Tuberías Procarsa ("Procarsa"), Tubería Nacional ("TN") and Compañía Mexicana de Perfiles y Tubos ("CMPT") and the National Chamber of the Iron and Steel Industry ("CANACERO"). In addition to requesting economic injury data for the years 1998, 1999 and 2000[144], and information on the methodology used to calculate installed capacity for production of standard black and galvanized tubing, these requests sought import information (including invoice and "pedimentos"). At that point, the imported product from Guatemala was identified by Economía as "*tubería estándar negra y galvanizada*" (standard pipes and tubes, black and galvanized) classified by tariff line. Tubería Nacional, Compañía Mexicana de Perfiles y Tubos and CANACERO submitted responses.[145]

[142] Exhibit GTM-8.

[143] Exhibit GTM-9.

[144] See also our factual summary of aspects of injury data taken into account, *infra*, para. 7.301.

[145] Exhibit GTM-10, para. 106.

7. Preliminary Determination (GTM-10)

7.78 The Preliminary Determination stated at paragraph 5 that "the product" consisted of "commodity" products, produced from hot-rolled coils, in diameters ranging from ½" to 6". At paragraph 6 the determination stated that the product was known in Mexico as "standard pipe" or "conduction pipe", and was known in Guatemala by the names of "*cañería*", "*tubería ligera o liviana*", "*tubería mediana*" and "*tubería pesada o gruesa*". At paragraph 7, the determination indicated that Tubac had argued that the description of the investigated product was too imprecise for Tubac to know the scope of the investigation, as in the literature and on Hylsa's own web page there was no reference to "standard pipe". At paragraph 8, the determination indicated that Economía had rejected this argument because of the references in the various publications submitted by Hylsa to "standard pipe", and because Tubac had indicated that "conduction pipe" was among the tubing produced by Hylsa, and this was one of the names by which the investigated product was known in Mexico.

7.79 Concerning the physical characteristics of the subject product, the determination stated at paragraph 13 that Hylsa had indicated that the physical characteristics and chemistry of "standard pipe" were those contained in ASTM A-53 (the most common) specification, and at paragraph 14 that the product also could be produced under the BS-1387, DIN 2440, DIN 2441 and JIS G 3454 specifications. At paragraph 15, the determination indicated that Hylsa had stated that "conduction pipe" (imported from Guatemala and produced in Mexico) was available in diameters between ½" and 6" inches, and with wall thicknesses between 1.60 and 7.11 mm, "in different schedules, among which 30, 40, and 80, especially 40, were the most common."

7.80 At paragraph 17, the Determination indicated that Economía had observed that the imported product and the Mexican product were both produced under ASTM A-53 and also, for the Guatemalan product, BS-1387, that the chemical composition fell within the ranges specified in A-53, and that both products were available in the diameter range of ½" to 6", especially in schedules 40 and 80.

7.81 At paragraph 19, the Determination indicated that standard pipe was produced in two major steps, the first starting with the welding, from hot-rolled steel, of the tubular shape, and cutting to length, and the second consisting of the finishing (painting, galvanizing). (At paragraph 18, the Determination recounted Hylsa's statements that the Guatemalan and Mexican products were produced via similar processes: electric resistance welding, using as the principal inputs hot-rolled steel coils, electricity, natural gas, zinc, water, etc.) As for functions and uses of the product, paragraph 20 of the Determination stated that the product had a broad range of uses, principally conduction of water, air, non-corrosive liquids, cables, etc., with galvanized used where protection from the environment was important. In addition, the Determination stated that the product could be used for production of pipe fittings and other products, and for structural purposes. At paragraph 117, the Determination indicated that Hylsa's application stated that structural and conduit tubing "... are non-subject products".

7.82 The Preliminary Determination contains Economía's definition – at that point in the investigation – of the "like product" produced by the domestic industry. In particular, Economía determined that the investigated product – black or galvanized standard pipe, as described in paragraphs 5-23 of the Determination – "ranging from 1/2" to 6" in diameter ... is like the domestically manufactured product ... *inter alia* because the two possess the same physical and chemical characteristics, enabling them to fulfil the same functions and making them commercially interchangeable".[146] The Preliminary Determination indicates that "the information coming from

[146] Exhibit GTM-10, para. 84.

CMPT differed from the figures supplied by CANACERO; a possible explanation is that non-subject products were included, so the matter will be further investigated in the next stage of the procedure"; describes Economía's injury analysis of the domestic industry producing the "like product"[147] and its analysis of the impact of the dumped imports on this domestic industry.[148]

8. Technical information meeting with Tubac (GTM-11(A))

7.83 Following the Preliminary Determination, Economía held a technical meeting with representatives of Tubac to explain the calculation methodology used in that Determination. At the meeting, one of Tubac's representatives stated that the description of the investigated product in the Determination was not correct, and also was confused, which meant that the provisional measures were being applied to all of the products that were entering Mexico under the two tariff categories. She requested that the investigated product be clarified – as a definition of "standard pipe" did not exist – so that in the Final Determination the products not subject to the duties would be clearly specified.

7.84 The Economía official responded that the product imported from Guatemala and the domestic like product were commodity products, in diameters between ½" and 6", and that the generic name for them was standard pipe, also known as standard galvanized or standard black pipe. In Mexico these products were identified as "standard pipe" or "conduction pipe", and this was the product on which the analysis in the investigation was conducted, and which was subject to the provisional measures.

9. Technical information meeting with Hylsa (GTM-11(B))

7.85 Economía also held a technical information meeting with representatives of Hylsa following the Preliminary Determination. Among the issues raised by Hylsa's representatives in respect of the data that Tubac had submitted were the criteria that had been used to determine whether a given product of Tubac was similar or identical to the investigated product, and whether the 32 product codes of Tubac that had been taken into account for the Preliminary Determination were the only product codes of that company pertaining to standard pipe. The representatives argued that if commercial considerations were taken into account, a larger number of product codes would be covered by the investigation. In response to these points, Economía explained that Tubac had provided a table containing a description of all of the physical characteristics, and the official standards, for each of its product codes. Economía stated that it had analysed all of these codes, and that only 32 of them fell within the definition of standard pipe.[149]

[147] See GTM-10, paras. 150-164 (analysis of economic injury factors); paras. 165-182 (financial injury factors). See also our factual summary of aspects of Economía's analysis, *infra*, paras. 7.304 and 7.305.

[148] For example, in terms of data on imports from Guatemala, the Preliminary Determination further reveals that Economía received 312 import "pedimentos" and invoices, of which Economía estimated 74 per cent related to the subject product. In respect of imports from sources other than Guatemala, the applicant had estimated the proportion of imports in the respective tariff lines accounted for by the subject product (up to 6"), but Economía made its own estimate. In addition, Economía had 313 "pedimentos" and invoices from 59 customs agents relating to standard black and galvanized tubing "en las dimensiones señaladas" (i.e. implying this meant the product between ½ and 6 inches). Exhibit GTM-10, paras. 120-126.

[149] In its 29 April 2002 comments on the Preliminary Determination, Hylsa submitted supplementary information in respect of the financial injury data of Hylsa/Hylsa-DAT and asserted that the analysis of the product under investigation/like product had to be based on the essential characteristics of the product, given that product codes were arbitrary and not useful for a comparison of normal value and export price (p. 7).

10. Notice of verification to Tubac (GTM-13)

7.86 Prior to the verification visit, Economía sent to Tubac a written notice that it planned such a visit. From this notice it is clear that the verification was to focus extensively on which of Tubac's products and sales were and were not covered by the scope of the investigation. The notice specified the points that Economía wanted to verify, identifying the product to be verified (standard pipe), and the period of investigation.[150] The notice indicated that the company would be allowed to present during the visit any information that would clarify and support any arguments that it wished to advance.[151] The notice also indicated that the company would be asked to explain the criteria it had used to determine which were identical and similar product codes, and to demonstrate that the only differences between the non-identical products referred to in Tubac's questionnaire response were threading and coupling.[152] It further indicated that Tubac would be asked for a worksheet with the details of the characteristics and criteria that had been used to exclude product codes from the submitted database, as well as the documentary and accounting evidence supporting these exclusions.[153]

7.87 The notice indicated that Tubac's questionnaire response would be submitted to a "Prueba de totalidad" ("completeness test") in which the figures for the reported transactions would be compared to the company's accounting records.[154] In addition, the company would be asked to explain how it had ensured that no transactions had been erroneously omitted from or included in the sales listings in the questionnaire response.[155] Economía also indicated that Tubac would be asked to reconcile to its accounting records its Diagram 1 (provided with the questionnaire response), which reported total sales of the company and subdivided those between investigated and non investigated products and then subdivided the former among third markets, domestic market and exports to Mexico.[156] As part of this, Tubac would be asked to show the process the company had followed to identify:[157] the total sales of the company; the transactions to the domestic and third market of products identical and similar to those exported to Mexico; the export transactions to Mexico corresponding to the product codes for standard tubing; the sales to Mexico corresponding to other, non-investigated, product codes; and the total sales of products other than standard tubing. The notice also requested Tubac to prepare a report showing the domestic sales, and the exports to Mexico and to other markets of the identical or similar product codes. This information was to be presented on a monthly basis and detailed by product code, as well as by country in the case of third markets.[158]

[150] GTM-13, para. 6.

[151] GTM-13, para. 7.

[152] GTM-13, para. 10.

[153] GTM-13, para. 11.

[154] GTM-13, para. 17.

[155] Exhibit GTM-13, para. 18.

[156] Exhibit GTM-13, para. 19.

[157] Exhibit GTM-13, para. 20.

[158] Exhibit GTM-13, para. 23.

11. Verification report – Tubac (GTM-15)

7.88 The report on the on-site verification of Tubac contains a number of passages pertaining to the product scope of the investigation, and the products of Tubac that fell within that scope. Under the heading "Validation of the sample of sales invoices", subheading "Product codes", the report indicates that the company explained its 9-digit product codes.[159] The report indicates that Tubac presented a listing of all of its product codes, including investigated and non investigated products, and that Tubac explained that its products covered by the investigation corresponded to the ASTM A-53 and BS-1387 technical standards, which contained the technical specifications of the production process, including chemical composition, tolerances (for weight, dimensions, etc.), testing and other aspects.

7.89 Concerning the "Prueba de totalidad", the report states that Economía was satisfied with the conciliation of the figures corresponding to Diagram 1 and that the company had provided a report of domestic sales of identical or similar products to those exported to Mexico, and of sales of all other investigated products. The report indicates that on the basis of these reports, Economía made further selective tests to corroborate the information reported in the database sent to Economía by product code and by country, and that no differences were found.[160]

7.90 Concerning Tubac's sales to the domestic market, exports to Mexico and to other countries, the report indicates that the company provided the sales report containing the sales of all product codes for each month of 1999 and from January–June of 2000. The report indicates that from this report, the verification team selected the codes under investigation and compared the total volume with the information in the questionnaire response.

7.91 As an additional test and with the purpose of verifying that no relevant invoices (for covered products) had been omitted from the database, Economía selected 19 invoices from the report of total sales to corroborate that invoices that did not appear in the data base did not involve sales of any investigated product codes, and that invoices involving sales of any such products were duly included in the data base.

12. Verification report – Hylsa (GTM-24)

7.92 The report on the on-site verification of Hylsa refers to "imports of standard pipe, classified in tariff lines 7306.30.01 and 7306.30.99 [...] originating in the Republic of Guatemala …".[161] It indicates that certain information to be verified "concerned the production capacity and use of the installed capacity for black and galvanized standard conduction pipe, referred to in point 27 of the verification document itself ."[162] It further indicates that Hylsa explained that its information system did not identify products at the level of the "investigated product", and that the reported product codes had been manually identified. At the request of Economía, the company had conducted an exercise identifying the product codes selected for reporting to Economía. As a result of this exercise, Economía observed that the information that had been presented by Hylsa included conduction tubing as well as a certain "type of structural or mechanical tubing, since, according to the company, they are products with the same physical characteristics, composition, dimensions and uses, as was verified."

[159] Exhibits GTM-15/MEX-12 at pages 4-5.

[160] Ibid. at pages 12-13.

[161] Exhibit GTM-24, p. 1.

[162] Exhibit GTM-24, p. 3.

13. Other information from the domestic industry between the Preliminary and Final Determinations

7.93 In August 2002, Economía sent a request for further injury information to Tuberías Procarsa, Tubería Nacional and Compañía Mexicana de Perfiles y Tubos.[163] This request asked for clarification as to whether responses to the previous request included only information pertaining to "seamed tubing, largely 'ERW: electric resisstant [sic] welded', of a diameter ranging from ½ to 6 inches and with a wall thickness of 0.065 to 0.280 inches, in schedules 30, 40 and 80." This product description explicitly includes tubing from 4"-6", and does not appear to exclude structural tubing. The request asked for the information to be provided in a table, which contained the same product definition (including up to 6"). The domestic firms were also asked to indicate how the methodology used to calculate installed capacity for production of standard black and galvanized tubing that they had already provided to Economía related to this product, and also were asked for information on the gauges and schedules corresponding to these specifications, with a table clearly including entries for tubing up to 6". Certain of the firms were also asked for updated information on imports of the product as identified in that request (i.e. including 4"-6" tubing and not excluding structural tubing).[164,165]

14. Public hearing (GTM-19)

7.94 At the public hearing the representative of Tubac argued that Tubac had insisted during the investigation that the applicant's definition of the investigated product was confused and prevented Tubac from knowing the scope and coverage of the product. Nevertheless, Tubac had concluded that the covered product was "iron or steel conduction pipe in ½" to 6" diameters, black or galvanized, produced to the standards ASTM and BS"[166], and that products excluded from the investigation were black and galvanized mechanical tubing, industrial tubing, structural tubing, fence tubing, and conduit tubing.[167] The Tubac representative stated later in the hearing that at verification Economía had confirmed the existence and consistency of the product codes reported by Tubac, and that Tubac thus would abide by the analysis and judgement of the investigating authority at verification.[168] The representative of Hylsa, disputing Tubac's characterization of the issue, maintained that the product definition had always been clear, and that "Tubac itself has correctly characterized the product as conduction tube, recognizably for conduction".[169] The representative went on to say that independent of the standards or incidental characteristics, the investigated product was "standard pipe of carbon steel, ½" to 6" in diameter, whether black or galvanized, with longitudinal weld, and recognizable for conduction, with the possibility that it might improperly be used for structural purposes".[170]

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[163] Exhibit GTM-18.

[164] The request to TN does not include such a question on imports. The Final Determination, Exhibit GTM-23, paras. 139-142, reflects these companies' responses to these requests for information.

[165] CMPT indicated that it did not produce the product as defined. Final Determination, Exhibit GTM-23, para. 142.

[166] Exhibit GTM-19, p. 7.

[167] Exhibit GTM-19, p. 8.

[168] Exhibit GTM-19, p. 27.

[169] Exhibit GTM-19, p. 30.

[170] Exhibit GTM-19, pp. 30-31.

7.95 In response to questioning from Tubac's representative as to whether "industrial tubing" produced from cold-rolled sheet and used for metal furniture was included, Hylsa's representative then stated that all tubing in gauges thicker than 16 for mainly conduction purposes in the stated diameters were included. The representative also stated that although Hylsa did not tie the product definition to specific standards, nevertheless the most common were BS-1387 and A-53, and the thicknesses under these standards went from 14 gauge to thicker and this was the reason for the product coverage.[171]

7.96 The Hylsa representative also said that there were countless cases where pipe and tube with the same physical and chemical characteristics as conduction pipe but with no hydrostatic test were used as conduction pipe in non-critical uses, that some other clients conducted hydrostatic tests after purchase[172], and that products produced from both hot-rolled and cold-rolled steel were covered by the investigation, so long as they were 14 gauge or thicker.[173] Economía asked whether tubing produced from cold-rolled steel could be used for conduction, given its tendency to oxidize, and the Hylsa representative answered affirmatively, stating that it could be coated, such as with varnish, or galvanized.[174]

7.97 Economía asked Tubac whether it could guarantee that none of its products sold without hydrostatic testing were used for conduction purposes. The Tubac representative replied that the diameters of the industrial tubing mentioned by Hylsa were different from those of A-53 or BS-1387 pipe meaning that it would not be possible to thread them or attach a coupling. While it was possible that someone might use conduction pipe for mechanical purposes, this would not make sense, because of the higher price for conduction pipe due to the hydrostatic test, while doing the reverse would not be possible.[175] Economía stated that it would formulate an information requirement to the parties on this issue.

15. Arguments – 6 September 2002

(a) Hylsa (GTM-20)

7.98 Hylsa argued in its written brief following the public hearing that the product definition was clear and that Tubac had "correctly considered" that product by characterizing it as tubing recognizable for conduction. Hylsa stated that the definition was standard tubing produced from carbon steel, in diameters from ½ to 6", black or galvanized, and recognizable for conduction, although it was possible that it could be "improperly" used for structural purposes. Hylsa stated that in the Mexican market, certain structural tubing of schedule 40 meeting the "ASTM A500" standard

[171] Exhibit GTM-19, p. 36.

[172] Exhibit GTM-19, p. 38.

[173] Exhibit GTM-19, p. 40.

[174] Exhibit GTM-19, p. 92. In Hylsa's written responses to questions following the public hearing, Exhibit GTM-28(B), 3 September 2002, Hylsa submitted estimates of percentages of the investigated product destined for the conduction and structural markets, and indicated its view that imports of standard tubing from sources other than Guatemala "had no repercussions on the operational performance either of Hylsa's Division of Steel Tubing or of the rest of the domestic industry, as far as the investigated product is concerned ...".

[175] Exhibit GTM-19, p, 98.

was being used for conduction, and that this situation needed to be taken into account in any measure applied, to prevent the measure from being eluded.[176]

(b) Tubac (GTM-29)

7.99 In its written brief, Tubac argued that there was an absolute lack of a definition of the investigated product. Tubac argued that the applicant was confused regarding the product, sometimes saying that it included structural tubing and sometimes saying that it did not. Tubac stated that it concluded from Hylsa's statements that the merchandise that entered under the two tariff categories that was not covered and needed to be expressly excluded was, among others, conduit tubing and thin-walled tubing produced from hot-rolled steel in gauges 16 and thinner. Tubac disagreed with Hylsa on the inclusion of any product produced from cold-rolled steel, arguing that such products could not be used for conduction. Tubac also disagreed that the fact that a given tube did not meet the ASTM or BS specification was irrelevant to whether it could be used for conduction purposes. Tubac said that all of its conduction pipe met those standards, and that if its customers were using other kinds of tubing for that purpose it was on their own responsibility. Tubac also stated, in the context of another argument, that in the absence of a precise definition by the applicant, the criterion used by Tubac to define the investigated product was: "pipe for conduction, welded, produced from hot-rolled carbon steel, in 1/2 " to 4" diameters, black or galvanized, produced under the standards ASTM A-53 and BS-1387".

16. Final Determination

7.100 The Final Determination, at paragraphs 31 and 32, contains the conclusions of Economía concerning the scope of the investigated product. These conclusions follow a lengthy recitation of the arguments of the parties on this issue that were presented over the course of the investigation. These paragraphs indicate the following: Paragraph 31 states that after analyzing these arguments and evidence Economía had sufficient elements to consider that the principal use of the product was conduction, which was fundamentally linked to certain ranges of diameters and wall thicknesses, and that the raw material – hot-rolled or cold-rolled steel sheet – or the standard under which it was produced, were not necessarily determinative for that use. Paragraph 32, chapeau, states that:

> "... the Ministry found sufficient evidence to determine that, regardless of the standard or of the input used in manufacturing it, the physical characteristics and technical specifications of the investigated tubing are the following: tubing manufactured with carbon steel, with longitudinal weld, whether galvanized or black, of a diameter ranging from ½" to 6" (equivalent to 12.70 and 152.40 mm,

[176] Exhibit GTM-20, p. 9. In its 17 September 2002 responses to Economía's questions, Exhibit GTM-31, Hylsa offered additional views of the "product under investigation"/"like product" and, in particular whether or not it included structural tubing. In response to a question relating to how its product corresponded to the given description of the product, Hylsa confirmed that "the investigated tubing fits in 100 per cent with the types of tubing referred to in the [document] cited..." and gave estimates about the percentage of the investigated product that was sold with hydrostatic tests as ASTM-A53 and as BS-1387. Hylsa also indicated: "The remainder ... corresponds to structural tubing under investigation used for the purpose of conduction because it is commercially interchangeable and has the same physical and chemical characteristics as conduction tubing …" Hylsa also responded that its production lines needed no modifications to ensure that the product satisfied these norms. Much of the document in question is "confidential" (see our findings on the issue of the treatment of confidential information by Economía below); nevertheless, the public information in the responses and the titles of these annexes indicate that they include documents and testimonials and invoices from producers/distributors concerning the commercial practice of acquiring structural tubing without "hydrostatic testing" and using it for conduction; information from importers of certain types of structural tubing; estimates of the breakdown of national production of the product under investigation; and testimonials on the substitutability and representativeness of certain products.

> respectively), with wall thicknesses of over 0.075" and up to 0.280" (equivalent to 1.91 and 7.11mm, respectively), of gauges equal to or greater than 14 and of various schedules - most commonly but not solely 30, 40 and 80." (emphasis added)

7.101 The remainder of paragraph 32 provides a list of the particular considerations that led Economía to this definition.

7.102 Concerning the Mexican "like product", the Final Determination, indicates that the investigated product as defined "is like the domestically manufactured product ... because among other things it has the same physical characteristics and diameter and wall thickness specifications, enabling it to fulfil the same functions and making it commercially interchangeable".[177] We examine below the contents of the Final Determination in respect of the injury analysis of the domestic industry producing the "like product"[178]; and of the impact of the dumped imports on this domestic industry producing the "like product".[179]

17. Factual finding by the Panel

7.103 On the basis of the relevant record evidence, as recited above, we are persuaded that, as Guatemala argues, Economía twice expanded the scope of the investigated product. The first modification, the addition of 4"-6" diameter pipe, was made in the Preliminary Determination. We find this change to be self-evident from a comparison of the product descriptions in the Notice of Initiation and the Preliminary Determination. The former states that the size range of the product imported from Guatemala was ½" to 4", while the latter states that product ranged in size from ½" to 6".

7.104 Regarding the second modification, we find that Economía added the structural tubing in question to the product scope late in the investigation (i.e., after the public hearing, which followed verification), rather than having included it in the scope from the outset. In this regard, we attach particular importance to the following evidence recited above: (1) the heavy emphasis placed, in the application, the "prevención", and the notice of initiation, on the technical standards, especially ASTM A-53, as describing the "standard pipe" under investigation; (2) the fact that Economía did not react, at the time Tubac submitted its questionnaire response and the accompanying submission, to Tubac's very explicit statements that it was reporting data only on its sales of A-53 and BS-1387 pipe, its understanding of the scope of the investigated product; (3) the fact that Hylsa did not object, in its reply to the brief accompanying Tubac's questionnaire response, to the scope of products covered by Tubac's questionnaire response; (4) the fact that the Preliminary Determination states that the application indicated that structural was not subject to the investigation; (5) Economía's statement, during its technical meeting with Hylsa following the preliminary determination, that Tubac had provided a table containing all of the physical characteristics and official standards applicable to its product codes, that Economía had analysed all of these product codes, and that only 32 of them fell within the definition of "standard pipe"; (6) the indications in the verification notice that the question of product codes was to be scrutinized in detail at verification and the statements in the verification report indicating that all of Tubac's product codes were analysed, and that at various points during the verification visit, the verification team itself identified the product codes corresponding to the investigated product; and (7) the debate during the public hearing (which was held after verification) as to whether structural tubing should or should not be considered part of the investigated product,

[177] GTM-23, para. 117.

[178] See also our factual summary of the data gathered and taken into account for the purposes of the analysis of injury to the domestic industry, *infra*, paras. 7.301-7.312.

[179] Exhibit GTM-23, paras. 165-169. See *infra* para. 7.264 *ff.*

and the questions posed by Economía after the public hearing on this subject, which indicated that this was a new issue to Economía as of that point in the investigation.

7.105 We emphasize that the above discussion constitutes a factual finding that the product scope changes alleged by Guatemala took place, and is not intended to resolve any of Guatemala's claims pertaining to these changes, nor is it meant to imply that changing the product scope of an investigation, as such, is problematic under the *Anti-Dumping Agreement*. We note in this regard that the parties are in agreement that the Agreement does not prohibit, as such, changes to the product scope of an investigation. We take up Guatemala's claims pertaining to the changes to the product scope in the following sections. We recall that these include claims related to both the injury and dumping findings, and as a result to the scope of the measure eventually applied by Mexico. The essence of all of these claims is that although Economía changed the scope of the investigated product twice during the course of the investigation, it did not gather or analyse information pertaining to the added products. In this regard, although Guatemala alleges a violation of Article 2.6 in respect of the injury analysis, it has confirmed to us that it makes no allegation of any "dissimilarity" between the scope of the product under investigation, on the one hand, and of the like product, on the other.

7.106 We start our analysis of Guatemala's claims related to the changes to the product scope of the investigation in the section below, with the dumping related claims.

D. CLAIMS RELATING TO DETERMINATION OF DUMPING – RESORT BY ECONOMÍA TO FACTS AVAILABLE

1. Claims pursuant to Article 6

7.107 We begin our analysis of Guatemala's claims concerning Economía's Final Determination of dumping by considering the claim that Economía's resort to facts available violated Articles 6.2, 6.4, 6.7, 6.8, 6.9, 6.13, and Annex II.

(a) Arguments of parties

(i) Guatemala

7.108 **Guatemala** claims that Economía's recourse to "facts available" to calculate the margin of dumping was unjustified, and violated Articles 6.2, 6.4, 6.7, 6.8, 6.9, 6.13, and Annex II of the *Anti-Dumping Agreement.* According to Guatemala, recourse to facts available is permitted only in exceptional circumstances, i.e., where the interested party in question does not cooperate, or presents insufficient information; and even there, the investigating authority's discretion to resort to facts available is not unlimited, as usable verified information should be used. Guatemala argues that the record indicates that the exporter provided to the Economía all of the information that was requested of it, and cooperated throughout the investigation, but that nevertheless all of the exporter's information was rejected by Economía, in particular the information pertaining to the determination of dumping. According to Guatemala, this was not only substantively unjustified, but Economía also failed to inform the exporter that it was rejecting the information, and failed to give the exporter an opportunity to provide further explanations, as required by Annex II of the *Anti-Dumping Agreement*. Guatemala further argues that in rejecting Tubac's information and resorting to facts available, Economía also violated Articles 6.7, 6.9, and 6.13.

(ii) Mexico

7.109 **Mexico** argues that Guatemala's claim is based on the propositions that: (1) there were no problems at verification, and (2) that Mexico did not advise Tubac that it was going to base the final dumping determination on facts available. Mexico argues that neither assertion is correct.

Concerning verification, Mexico points to language of Article 6.8 that allows resort to facts available where the interested party fails to provide necessary information, or significantly impedes an investigation, and asserts that, in this case, the Final Determination recounts problems encountered at verification, including the "deliberate" incompleteness of information provided by Tubac. According to Mexico, the problems with the information provided by Tubac meant that Tubac both "did not provide necessary information" and "significantly impeded the investigation" in the sense of Article 6.8, thereby justifying Economía's determination that the information was not usable. In its first submission and first oral statement, Mexico argued that the determinations published by Economía amply fulfilled the notice requirements of the *Anti-Dumping Agreement* in respect of explanations of methodology and conclusions reached. In its second submission, second oral statement and answers to questions from the Panel, Mexico argued that the verification report itself fulfilled the requirements of paragraph 6 of Annex II, by informing Tubac that its information might be rejected and by providing a five-day period for Tubac to submit any comments on the contents of the report.[180]

(b) Arguments of the third parties

7.110 None of the submitting **third parties** addressed this claim as such in its written submission. The **European Communities**, however, agrees with Guatemala in the context of its general procedural claims, that the IA did not inform the interested parties of two "essential facts", one being the rejection of Tubac's price data as a result of the verification visit, and the second being the inclusion of certain structural tubing in the product definition. In the view of the European Communities, this failure violates Article 6.9 of the *Anti-Dumping Agreement.* **Japan** also considers that the facts determining the product under consideration are "essential" and subject to disclosure pursuant to Article 6.9. The **United States** argues that if there is to be a change to the product definition, the parties must be informed of the proposals relating thereto and given time to defend their interests.

(c) Evaluation by the Panel

7.111 This claim of Guatemala raises both substantive and procedural points concerning the use of facts available. While Guatemala claims violations of a number of provisions in relation to Economía's use of facts available, the central substantive issue, which is the subject of Guatemala's claim of violation of Article 6.8 and Annex II, is Economía's decision to reject all of the information submitted by Tubac on the basis of the results of the verification visit, and to use instead, as facts available for calculating the margins of dumping, information provided in the application and information obtained from importers. We thus begin our analysis with this issue. In doing so, we will consider whether the evidence of record supports Economía's decision to reject Tubac's data, i.e., whether, on the basis of the record evidence, an unbiased and objective investigating authority could have reached the conclusion that the nature and number of problems encountered at verification were so significant that none of Tubac's data in fact could be used. We then will consider whether, as Guatemala alleges, Economía failed to fulfil the relevant procedural requirements of Annex II, and whether Economía, by using for the normal value the data provided by Hylsa for purposes of initiation, failed to use "special circumspection". In performing this analysis, we will apply the provisions of the *Anti-Dumping Agreement* that govern the use by investigating authorities of facts available, i.e., Article 6.8 and Annex II.

(i) Article 6.8 and Annex II

7.112 We turn first to the text of these provisions. Article 6.8 provides:

[180] Mexico's second written submission, para. 123 and 125; Mexico's second oral communication, paras. 25, 26 and 31; Mexico's responses to questions 111 (a) and (b), and 182 from the Panel.

"6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph."

7.113 Annex II provides:

BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

"1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefore, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory,

the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."

7.114 We now turn to Guatemala's specific allegations and the related record evidence.

(ii) The Final Determination concerning resort to facts available

7.115 The first of Guatemala's facts available claims is that Economía unjustifiably decided to reject Tubac's data in their entirety, and to rely instead on facts available (the data from the application for normal value and data from importers for export price). According to Guatemala, the data submitted by Tubac were successfully verified by Economía, any problems in the data were small and Tubac acted to the best of its ability. Thus, Guatemala argues, Economía acted inconsistently with paragraphs 3 and 5 of Annex II in rejecting the data, and had no basis under Article 6.8 to resort to facts available, as Tubac neither failed to provide necessary information nor significantly impeded the investigation. Mexico, for its part, argues that the problems encountered at verification were so numerous and so significant that Economía was justified in concluding that Tubac had deliberately underreported and misreported its data, and thus that Tubac's entire database was biased and could not be relied upon. In particular, Mexico argues, "to alter figures has consequences for the investigation, and these are set forth clearly in Article 6.8 of the Anti-Dumping Agreement: 'preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available' if a party significantly impedes the investigation. To alter the figures deliberately is to impede the investigation, so the company was aware of the consequences of its actions and cannot pretext that the investigating authority failed to inform it that the differences in the adjustment have implications for all the data used to calculate normal value."[181] Mexico asserts that Economía thus was fully justified in rejecting Tubac's data in their entirety and relying on facts available.

7.116 We note in the first instance that the parties agree that Economía based its decision to reject Tubac's data as submitted on the results of verification - in particular the reasons cited in paragraph 80 of the Final Determination - and that paragraphs 81 and 82 of that Determination contain the explanation of the significance for the Determination of these reasons. These paragraphs are reproduced in their entirety below. Both parties also agree that the verification report (Exhibits GTM-15/MEX-12) constitutes the record evidence concerning the results of the verification of Tubac's data. We therefore will review the pertinent parts of the Final Determination and the verification report in detail.

7.117 In conducting this review, we recall our obligations under the standard of review in Article 17.6. In particular, we are bound to evaluate the claims and arguments before us, and to render our findings, on the basis of what actually happened in the investigation as reflected in the record thereof. We are not to reweigh evidence so as to conduct a *de novo* review of the evidence. Nor are we to take into account *post hoc* arguments as to the reasons for decisions by the investigating

[181] Mexico's response to question 181 from the Panel.

authority which reasons cannot be found in the authority's own contemporaneous explanations contained in its determinations and other documents of record. Rather, we will consider whether a unbiased and objective investigating authority could have reached the conclusions referred to in the Final Determination on the basis of the relevant record evidence (namely the verification report) as to what happened at verification.

7.118 The paragraphs of the Final Determination that pertain to the results of the verification of Tubac's data and Economía's decision to resort to facts available read as follows:

> "Verification visits
>
> "78. Pursuant to Articles 83 of the FTA, 143 and 173 of the FTA Regulations, and 6.7 and Annex I of the Anti-Dumping Agreement, the investigating authority carried out the following verification visits to ascertain that the information and evidence provided by the companies in the course of the proceedings were correct, complete and came from their accounting records, to evaluate the methodology used in presenting the information submitted, to collate the documents in the administrative file and obtain details on them. As regards the exporting company, the visit was notified in advance to the Government of the Republic of Guatemala in accordance with Annex I, paragraph 5 of the Anti-Dumping Agreement [subparagraphs A and B provide the dates of the verifications of Tubac and Hylsa, respectively.]
>
> 79. The Ministry took detailed minutes of the abovementioned verification visits, recording the results of the visits in accordance with Articles 83 of the FTA and 173 of the FTA Regulations. They have been placed in the administrative file of this investigation and are public documents having full probative value within the meaning of Articles 85 de la FTA, and 129 and 202 of the Federal Code of Civil Procedure, which applies subsidiarily.
>
> Results of the verification visit
>
> 80. From the verification visit and an analysis of the information provided by Tubac, the Ministry found the following:
>
> A. All the information which the company provided prior to the verification visit and which was collated in the course of the visit with the company's accounting records and the originals of the documents, pertains solely to standard pipe manufactured to two international standards, British Standard BS 1387: 1985 and American Society for Testing and Materials standard ASTM: A53-97, both of which are subject to hydrostatic testing.
>
> B. The company explained that in the database sent to the Ministry, it did not record all the discounts, rebates and refunds from domestic market sales and export sales to Mexico and other countries. The verification team noted this when examining the company's accounting records.
>
> C. In examining the supporting accounting documents for the information supplied by the company, it was noted that for four product codes, some of the figures the company supplied before the verification visit and which were used in calculating constructed value, do not come from its accounting records.
>
> D. As to the adjustments for internal freight provided by Tubac, the team found that in 57 per cent of the domestic market transactions reported prior to the

verification visit, the transport used to carry the goods was the customer's own, so the company ought not to have reported any adjustment on this account. Similarly, in the transactions regarding the market for exports to Mexico reported prior to the verification visit, the Ministry found discrepancies between the export freight reported and the export freight verified.

E. As to the adjustments for external freight, in examining a third export market of Tubac's, the verification team found discrepancies between the figures reported prior to the verification visit and the verified figures.

F. The company was unable to provide accounting documents in support of the information it used to determine the adjustments in respect of insurance and physical differences reported to the Ministry prior to the verification visit.

G. As to the exporting company's indicators for the headings production, inventories, domestic market sales, export sales to other countries and installed capacity for 1999 and 2000, and 1999 export sales to Mexico, in examining the accounting information supplied by the company at the time of the visit the verification team noted that the information sent to the Ministry prior to the visit was not accurate and did not come from the accounting records.

81. In view of the findings made in the course of the verification visit to Tubac referred to in point 80 of this Resolution, the Ministry cannot use the company's information to calculate normal value, export price or any price discrimination margin because the information the company supplied prior to the verification visit on transactions regarding domestic market sales, exports to Mexico and exports to other countries, constructed value, domestic and external freight and adjustments for insurance and physical differences, is incomplete, inaccurate and/or does not come from the company's accounting records.

82. Since the information supplied by the exporting company Tubac is not complete, is inaccurate and/or does not come from its accounting records, it will be disregarded and the Ministry will proceed on the basis of the facts available, in accordance Article 6.8 of the Anti-Dumping Agreement.

[…]

97. Because the information provided by the export company Tubac as described in points 78, 79, 80, 81 and 82 of this Resolution was disregarded, the Ministry was unable to determine a price discrimination margin for the company on the basis of its own information. Consequently, in accordance with Article 5.2 of the Anti-Dumping Agreement which establishes that the application to initiate an investigation shall include evidence of: (A) dumping, (B) injury, and (C) a causal link between the two, and that simple assertion, unsubstantiated by relevant evidence, cannot be sufficient to meet the requirements of this provision, with Article 6.8 of that Agreement, and with Article 54 of the FTA, the Ministry calculated the price discrimination margin applicable to the company on the basis of the facts available.

98. The Ministry took as facts available the information supplied both by the applicant and by the importers of the investigated product, as described in points 102 to 114 of this Resolution."

7.119 Taking these passages together, we understand the Final Determination first to describe, at paragraph 80, problems encountered at verification, and then to conclude, in paragraphs 81 and 82, that because of the nature and number of those problems, Tubac's data were disregarded, and facts available were used instead. Paragraphs 97 and 98 indicate that the facts available to be used were the data provided by Hylsa in the application and data obtained from importers.

(iii) Record evidence regarding the problems referred to in paragraph 80 of the Final Determination

7.120 We turn now to a detailed examination of the record evidence regarding each of the problems identified in paragraph 80 of the Final Determination.

Scope of the products for which Tubac provided data

7.121 The first of the issues cited in the Final Determination, which appears at subparagraph A of paragraph 80 of the Final Determination, is that Tubac provided data only on conduction pipe meeting the ASTM A-53 and the BS-1387 standards, both of which are subject to hydrostatic (i.e., pressure) testing. Factually, the record is clear that these were the only products on which Tubac provided data, as indicated in paragraphs 7.74 and 7.75, *supra*.

7.122 As discussed in detail below, however, the parties' views differ as to the significance of this issue as a factor leading to Economía's decision to reject all of Tubac's data. For Guatemala, this reference signifies that Tubac was penalized by Economía (in the sense that Economía in part based its decision to reject Tubac's data on this fact) for not having submitted data on any other products, even though according to Guatemala, Economía never requested such data.[182] Mexico, at least in certain submissions[183], disagrees with Guatemala's characterization of this aspect of the Final Determination, arguing that Tubac's not having provided data on products other than A-53 and BS-1387 pipe was not among the reasons for Economía's rejection of Tubac's data.

7.123 We will consider first the issues identified in subparagraphs B through G of paragraph 80 of the Final Determination, which pertain to the data that *were* provided by Tubac. After this we will consider the issue referred to in subparagraph A, as to the completeness of the scope of those data.

Underreporting of certain discounts, rebates and refunds

7.124 The problem as described in subparagraph B of paragraph 80 of the Final Determination is that at verification, Tubac explained that it had not reported in its questionnaire all of the discounts, rebates and refunds related to internal sales, and to exports to Mexico and third parties, and the verification team confirmed this in reviewing Tubac's accounting registers. We asked Mexico to identify which portion of the verification report identified this problem, and Mexico cited the following passages:[184]

[182] First submission of Guatemala, paragraphs 192-194.

[183] See, Mexico's response to question 106 (a) from the Panel. As discussed at paragraph 7.159, *infra*., however, Mexico's position on this issue appears to have changed over the course of this dispute.

[184] In question 107 from the Panel in connection with the first substantive meeting, we asked Mexico, for each problem at verification cited in the Final Determination as a basis for resorting to facts available, to provide a cross-reference to the pertinent passages in the verification report, and to explain how each of these passages supported the conclusion that Tubac's information was not verifiable or verified. Mexico submitted its reply to this question only at the time of the second substantive meeting, and Mexico resubmitted this reply in responding to question 132 from the Panel following the second substantive meeting. In question 132, we asked

Page 12:

"... the company informed the verification team that in preparing the supporting accounting documents for the verification visit, it realized that the credit, debit, charge (*cargo*) and payment (*abono*) notes were not entered in the database sent to the Ministry."

Page 13:

"Credit notes

"Since the company did not include the charge, payment, credit and debit notes in the database sent to the Ministry, at the verification team's request it supplied the credit note daily logbook (which included the credit, debit and payment notes) and the general daily logbook (*diario mayor general*) of the corresponding accounts in which these operations are entered for July 2000 - June 2001. It also supplied copies of the credit notes relating to the sales invoices included in the database."

7.125 We note that factually these passages from the verification report indicate, as stated in subparagraph B of paragraph 80, that Tubac's questionnaire response underreported discounts, rebates and refunds. That said, however, these passages give only an incomplete picture of what happened at verification in regard to this issue when all of the relevant passages of the verification report are examined. We note in the first place that the passage makes clear that it was Tubac itself that brought this problem to the attention of the verification team ("the company informed the verification team ") on its own initiative. Second, the passages cited by Mexico omit the parts of the verification report that describe what then occurred at verification in regard to these missing data. This is set forth in the following passages.

Page 12, immediately following the first passage above:

"At the request of the verification team, the company provided the records of all notes for the period July 2000 - June 2001, together with the supporting accounting documents and reconciliation with the financial statements, and copies of the notes affecting sales transactions pertaining to the investigated product, recorded in the aforementioned database.

...

... No significant differences were found, and the explanation and supporting documents for the reconciled figures were to the satisfaction of the verification team." (emphasis added)

Page 13, immediately following the second passage above:

"Company staff explained the origin of every credit note and supplied accounting records for the entire amount recorded in the credit note daily logbook. The verification team checked that the entire amount recorded in the credit note logbook

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Mexico to provide a copy of the Verification Report of Tubac with markings in the margins to identify the relevant passages referred to in the cross-references it had provided in response to question 107. Mexico submitted this annotated version of the verification report without an exhibit number, and then subsequently submitted as Exhibit MEX-12 an unannotated copy of the verification report for Tubac. We have transferred Mexico's annotations to Exhibit MEX-12. Thus our references to Exhibit MEX-12 are to the annotated version of the verification report for Tubac.

> tallied with the accounting entries of the general logbook and the statement of results, and that the credit note data tallied with the credit note logbook."

7.126 The passages from page 12 come from the section of the verification report dealing with the "Prueba de totalidad", in which the total sales figures for domestic sales and export sales to Mexico and to third countries were verified. As the full passages make clear, once the missing data were provided by Tubac to the verification team, all of the totals in the accounting registers fully reconciled and no further errors or problems were encountered.[185] The passages from page 13 come from the subsection of the "Prueba de totalidad" section of the report entitled "Credit notes", and the same is true there. That is, the missing data provided by Tubac were checked against the main diaries of credit notes and no errors were found. In other words, the problems that were found in the sales data in the database due to the underreporting of discounts, rebates and refunds were corrected on the spot. From the verification report, these appear to have been the only problems identified in respect of the sales data.

Errors in certain data used for constructed value calculations

7.127 Subparagraph (C) of paragraph 80 of the Final Determination indicates that for four product codes, certain cost figures reported by Tubac prior to verification, and with which constructed values were calculated, could not be traced to Tubac's accounting records. Guatemala argues that there is no corresponding reference in the verification report, and thus questions the factual basis for this finding by Economía. In answer to our question, Mexico cited the following passage in the verification report as the basis for this subparagraph of the Final Determination.[186] We note that this passage, which is the only one cited by Mexico as related to subparagraph C, also is cited by Mexico as relevant to subparagraph G. That is, Mexico cites no passage in the verification report that deals exclusively with the problem referred to in subparagraph C of paragraph 80.

> Page 11:
>
> "The verification team selected the codes under investigation, collated the total sum of the volume with that sent to the Ministry and found differences. The total of the investigated codes was converted into United States dollars using the average exchange rate of the relevant month. Differences were found with what had been reported to the Ministry."

We see nothing in this passage related in any way to constructed value, which is the subject of the problem referred to in subparagraph C of paragraph 80 of the Final Determination.

7.128 Looking elsewhere in the verification report, beginning on page 14 we find an entire section, divided into four subparts, devoted to constructed value. No passage in this section is cited by Mexico as related to the content of subparagraph C of paragraph 80, however. Nor do we find any indication in this section of any problems whatsoever at verification concerning the data that Tubac had submitted in connection with constructed values. In particular, in the subpart on raw materials, the verification report indicates that the correct volumes and values of raw materials had been reported, as well as the correct average unit costs.[187] In the subpart on direct labour, the verification

[185] Exhibits GTM-15/MEX-12, page 12, second paragraph under the heading "Prueba de totalidad". See similar statements as to the lack of significant differences in the data, and the "satisfactory" results of this part of the verification, in the first partial paragraph on page 13, and the first, second and third full paragraphs on page 13, of the verification report.

[186] Exhibit MEX-12.

[187] Exhibits GTM-15/MEX-12, page 14.

report indicates that Tubac provided the monthly salary reports along with documentation and the underlying accounting registers, and a work sheet for how Tubac had prorated the amounts to each cost centre for each product code requested in the pre-verification notice.[188] Concerning indirect labour, and indirect manufacturing costs, the verification report at page 15 states that the verification team confirmed the correctness of the costs derived from the cost centre sheets, and that only "differences of little significance" were found when the costs of production for selected product codes taken from the cost sheets of the costs centre for total costs were compared to the production cost reported by Tubac to Economía. Similarly, only " differences of little significance " were found in converting the production costs from quetzales to dollars, and comparing these results with what Tubac had reported to Economía. Concerning selling and administrative expenses, financial expenses, and profits, the verification report also contains no indication of any problems. To the contrary, the report indicates that the verification team confirmed that the figures used to assign these items to product codes came from Tubac's accounting registers, and that "no differences were found" in calculating the factors that were used to assign these items to the product codes. As a further indication that the verification team apparently was satisfied with the constructed value data as submitted, we note that in the section on adjustments for physical differences[189] the verification team asked Tubac to recalculate the physical difference adjustments "based on the cost sheets that had been validated and used for constructed value".

7.129 Based on the foregoing, we find no factual support in the verification report for the statement in subparagraph C of paragraph 80 that problems were encountered in respect of constructed value data for four product codes. Nor has Mexico identified any other factual support from the record for this statement.

Internal freight and freight on exports to Mexico

7.130 Subparagraph D of paragraph 80 states that at verification, it was discovered that Tubac had incorrectly included a charge in respect of freight for all of its internal sales, whereas in reality for 57 per cent of these sales the purchaser had used its own trucks to transport the merchandise. Subparagraph D also states that Economía had encountered discrepancies between the freight reported in respect of export sales to Mexico and the data that were verified.

7.131 In response to our request, Mexico identified the following passage in the verification report as the basis for the statement in subparagraph D of paragraph 80 of the Final Determination concerning internal freight:[190]

> Page 7:
>
> "It was found that in a large proportion of the sales to the Guatemalan market, the customers' own transport was used, so there was no freight charge. However, in the database sent to the Ministry, all internal sales transactions were adjusted for freight."

7.132 Here, similarly to the case of subparagraph B, we note that while factually this passage from the verification report indicates, as stated in subparagraph D of paragraph 80, that in Tubac's database internal freight charges were incorrectly attributed to certain domestic sales, the full content of the verification report related to this issue tells a different story from that reflected in the Final

[188] Ibid.

[189] Exhibits GTM-15/MEX-12, page 10.

[190] Exhibit MEX-12.

Determination. In particular, immediately following the passage cited by Mexico, the verification report states:

> Pages 8 and 9:
>
> "During the visit, every transaction involving a freight charge was identified and a check was made in the company's accounting system that the operation actually took place, including the amount corresponding to freight.
>
> The company was asked to supply an electronic and a paper list of all operations involving freight. From the list, ten operations entered as involving freight were selected for examination in the accounting system in order to check that an amount was actually charged for freight.
>
> From the examination, no discrepancies were found between the information examined and that in the company's accounting system. The Ministry will therefore remove adjustment for freight from the database for all operations in which the customers' own trucks were used for transport." (emphasis added)

7.133 Taking all of these paragraphs together, it is clear that, although the data submitted in the questionnaire response incorrectly attributed an internal freight charge to certain domestic sales, at verification this error was corrected through the verified identification of the sales that did not include a freight charge, and that Economía was satisfied with these corrections (given its stated intention to adjust the data base on the basis of the verification results).

7.134 In response to our request, Mexico identified the following passage in the verification report as the basis for the statement in subparagraph D of paragraph 80 of the Final Determination concerning freight to Mexico:[191]

> Page 8:
>
> "Because, in the sales to Mexico, the freight adjustment figure was an average, an examination was done of a sample of fifteen invoices of transport companies for which the amount was obtained in quetzals per tonne and converted into dollars using the end-of-period exchange rate for each month of the investigation period. The figure in dollars per tonne for each operation in the sample of invoices to transporters was used to obtain a simple average freight cost. That figure must replace the average figure for freight entered in the database, because it is verified information."

7.135 Here, we do not read this passage of the verification report as referring to any problem or discrepancy in the data at all. Rather, we view this passage as indicating that the verification team decided that, rather than verifying the freight charge on export sales to Mexico as reported by Tubac by examining each such transaction in the data base and recalculating the average freight charge on this basis, it would select a sample for which it would verify the data, and then would calculate the freight charge on the basis of the sample it had selected. Obviously, the average freight charge calculated on the basis of a subset of the relevant transactions will almost certainly be different from the average freight charge calculated on the basis of all of the relevant transactions. This, however, would not make the original figure wrong, and indeed we do not read the verification report as suggesting that the figure reported in Tubac's questionnaire response was found to be wrong. We thus do not consider that this passage factually supports the statement in paragraph D that discrepancies were found in the data reported by Tubac on freight charges in respect of its export sales to Mexico.

[191] Ibid.

Discrepancies in freight on third country export sales

7.136 Subparagraph E of paragraph 80 of the Final Determination indicates that at verification, discrepancies were found in the information that had been reported concerning shipping charges for export sales to a third country. In response to our question, Mexico identified the following passage in the verification report as corresponding to this subparagraph:[192]

> Page 9:
>
> "For freight to Costa Rica, a payment made to a transport company in two of the sales operations reported in the database was presented. On the basis of the information from these invoices an adjustment for freight was calculated that did not tally with the one in the database. Although the two vary only slightly, the correct information is the verified information. This new information is the weighted average of the two freight operations to Costa Rica. The figures used to calculate the freight average were taken from the sample of sales to third markets."(emphasis added)

7.137 We do not consider that this passage points to any error at all in the data reported by Tubac for freight charges on sales to Costa Rica. Rather, as was the case in respect of the freight charges on export sales to Mexico, it appears from this passage that the verification team chose to verify the freight charges for sales to Costa Rica on the basis of a sample of two transactions from the data base, rather than by recalculating the charges for all of the transactions in the data base. Thus, it appears that the reason for the difference that was found, which was characterized as "pequeña", was simply that the two figures were calculated on the basis of two different sets of data, one being a subset of the other (which subset was chosen by the verification team). We thus do not see that this passage factually supports the statement in subparagraph E that discrepancies were found in the freight charges on third country sales.

Adjustments for insurance and physical differences

7.138 Subparagraph F of paragraph 80 of the Final Determination indicates in respect of insurance and physical differences that at verification, Tubac was not able to provide support from its accounting records for the previously-reported information that it had used to determine adjustments for insurance and for physical differences.

7.139 Concerning insurance, in response to our request, Mexico did not identify any corresponding passage in the verification report.[193] The verification report, however, contains the following passage pertaining to insurance:

> "To back up the export insurance figure, the transport policy of Aseguradora General S.A. was presented, which sets out the rate applying to the amount of the sale. Also presented were two partial payments to Aseguradora General and a company called Occidente de Seguros. These payments covered two months of the investigation period, November and December 2000. The endorsements submitted for the two insurance companies set out the amount of the premium applied to the value of the goods transported.

[192] Ibid.

[193] Ibid.

> Furthermore, the value of sales for November and December 2000 was presented in order to corroborate that the total of the amounts insured in the two companies is similar to the total monthly sales of Tubac S.A." [194]

7.140 We do not read this passage as identifying any problems that were found at verification. Rather, it simply describes the supporting documents that Tubac presented regarding the adjustment it had calculated, and indicates that the documents showed that the sum of the insured amounts for two particular months was similar to the total monthly sales of Tubac. We thus find nothing in this passage that factually supports the statement in subparagraph F that Tubac was unable to provide support from its accounting records for the insurance adjustment reported in its questionnaire response.

7.141 Concerning the adjustments for physical differences, Mexico identified the following passage as corresponding to the reference in subparagraph F:[195]

> Page 10:
>
> "Physical differences
>
> "The verification team asked the company for an explanation of the methodology used to the determine physical differences. The company was unable to reproduce the methodology, so the Ministry asked it to calculate the cost differences on the basis of the validated cost centre sheets used for constructed value. Using this methodology the company worked out new physical difference figures, which differed significantly from the ones submitted during the investigation."

7.142 This passage indicates factually that at verification Tubac was not able to reproduce the methodology it had used to calculate the adjustments for physical differences that were reported in its questionnaire response, as stated in subparagraph F. It is also clear from this passage, however, that at verification Economía not only identified an alternative basis on which to calculate these adjustments – namely the cost data that had been verified in connection with constructed value – but also had Tubac perform the recalculations on the spot from those verified data. In other words, at verification, Economía obtained and successfully verified corrected data on these adjustments.

Indicators for Tubac

7.143 Subparagraph G of paragraph 80 of the Final Determination states that at verification, Economía found that certain information that Tubac had reported in its questionnaire response concerning its indicators was inexact and did not come from Tubac's accounting registers. The information identified was: production, inventories, domestic sales, export sales to third countries, installed capacity for 1999 and 2000, and export sales to Mexico for 1999. In response to our question, Mexico identified the following passages in the verification report as corresponding to subparagraph G:[196]

[194] Exhibits GTM-15/MEX-12 at pages 9-10.

[195] Exhibit MEX-12.

[196] Ibid.

Page 11:

"The sales for July and December 2000 were reviewed together with the "Prueba de totalidad" of the sales, which is described in the relevant paragraph of this report. The figures reviewed for volume and value were collated with those in Annex A3 and the differences found were of little significance." (emphasis added)

"... The verification team selected the codes subject to investigation, and compared the total volume with that sent to the Ministry and noted differences. It converted the total amount pertaining to the investigated codes into United States dollars using the average exchange rate of the corresponding month, and found differences with the figures sent to the Ministry."

7.144 Concerning this passage, we note first that it refers exclusively to sales, and does not refer at all to production, inventories or installed capacity. Second, we take note of the first sentence of the passage, which indicates that this review was undertaken in conjunction with the "Prueba de totalidad". As discussed above, at paragraphs 7.124 to 7.126, the verification report states that once the adjustments for the discounts, rebates and refunds were corrected, the "Prueba de totalidad" was verified satisfactorily. We infer from this that the discrepancies in the sales data referred to in the passage quoted above derived from the same source, and ultimately were satisfactorily verified in the context of the "Prueba de totalidad". Indeed, if this were not the case, we do not see how the verification report could have indicated that the "Prueba de totalidad" ultimately was satisfactorily verified.

7.145 While, as noted, the passage of the verification report cited by Mexico in response to our question does not refer at all to production, inventories or installed capacity, other sections of the verification report do address these topics. We examine each of these in turn to see whether they provide factual support for the statement in subparagraph G of paragraph 80 of the Final Determination.

7.146 Concerning production, the verification report contains the following passage:

Page 10:

"Production

"The company explained that in preparing the supporting documents for the information in Annex 3, it found differences with the information sent to the Ministry. It therefore supplied a worksheet identifying the differences and sent the production reports in units and tonnes for the manufacturing and galvanization plants for January-December 2000 and reports on the value of production for the selected months."

"The verification team collated the production volume shown in the production reports with that in the worksheet supplied at the verification and found no differences. The production evaluation by product family was likewise collated with the general daily log and no differences were found." (emphasis added)

7.147 We do not consider that this passage provides factual support for the characterization in subparagraph G that the verification team encountered discrepancies in the production figures during verification. To the contrary, this passage indicates (1) that it was Tubac that discovered problems in the data that it had provided in its questionnaire response, that brought this matter to the attention of the verification, and that furnished documentation and calculations reconciling the differences; and (2)

that the verification team reviewed this corrected information in detail and found no discrepancies at all. In other words, at verification Tubac voluntarily identified the error and provided corrected information, which Economía verified on the spot.

7.148 Concerning inventories, the verification report contains the following passage:

> Page 11:
>
> "Inventories
>
> "The company provided reports of inventories from the inventory system and added up the volume of the investigated codes. The verification team compared this total with that sent to the Ministry and found differences. The company also provided the inventory value lists showing the investigated codes. The total by family was collated with the general daily log for the selected months and no differences were found."

7.149 This passage indicates factually that certain differences were identified in the inventory data. There is no indication of the size of the differences. We note that these differences were limited to the information on inventory volume, however, as the verification report indicates that no differences were encountered in the data reported by Tubac on the value of inventories. The passage also makes clear that Economía obtained the correct volume figures from Tubac's accounting records.

7.150 Concerning installed capacity, the verification report contains the following passage:

> Page 11-12:
>
> "Installed capacity
>
> "The company explained that it calculated installed capacity for 1 ¼" light conduction pipe (*tubo de cañería liviano de 1¼)* because this is the product that represents the company's average production. It also said that real installed capacity was calculated using the average monthly output and machine utilization data for the period from January to May 2002."
>
> "For the purpose of the review the company supplied worksheets showing ideal and real installed capacity, the data on downtime, the output data for January-May 2002 and the technical specifications of the plant mill. "
>
> "To verify ideal installed capacity, the verification team collated the data on theoretical maximum speed of output with the technical specifications of the mill. Pipe weight was collated with the technical specifications of the product; the arithmetical calculations were checked, and no differences were found. The plant's installed capacity was determined on the basis of real machine utilization, the percentage of which was compared with the data on mill downtime, and average monthly output was collated with the output data for January-May 2002. Differences were found with the information supplied to the Ministry."

7.151 Factually, this passage indicates that some differences were encountered at verification in respect of at least part of the capacity data that Tubac had reported in its questionnaire response. The passage does not make clear the exact nature of the differences, and indeed indicates that some of the data were verified with no differences found. The passage also indicates that at verification, the installed capacity figure was "determined" on the basis of the information examined concerning the

utilization of the machinery, machine downtime, and production reports. From this we conclude that while certain differences were encountered in the data as reported in the questionnaire response, the verification process itself resulted in a correct and verified calculation of the capacity figures.

Product scope of the data provided by Tubac (subparagraph A of paragraph 80)

7.152 We now turn to the remaining issue listed in paragraph 80, the product scope of the data provided by Tubac, in particular, the limitation of those data to A-53 and BS-1387 pipe. As noted above, Guatemala argues that this reference signifies that Tubac was penalized by Economía for not having submitted data on any other products (in the sense that Economía in part based its decision to reject Tubac's data on this fact), even though according to Guatemala, Economía never requested such data.[197] We note that this issue is closely related to Guatemala's argument (in respect of which it raises a number of claims) that, late in the investigation, Economía expanded the scope of the investigated product by adding certain structural tubing. In the context of this claim, Guatemala's argument is that the scope of the data that Tubac submitted corresponded to the initial definition of the investigated product, but that once the structural tubing was added to the investigation, Tubac was faulted by Economía for the "incompleteness" of its data submission, i.e., for not having submitted data on the structural products in question, in spite of the fact that Economía had never requested such data.

7.153 Mexico disagrees with Guatemala's characterization of this aspect of the Final Determination. Mexico argues that Tubac's not having provided data on products other than A-53 and B-1387 pipe was not among the reasons for Economía's rejection of Tubac's data.[198] Rather, Mexico argues, the references in paragraphs 81 and 82 to "incompleteness" of data were to what Mexico characterizes as the deliberate incompleteness of the data that were presented by Tubac in its questionnaire response.[199] Mexico offers no explanation of the significance of subparagraph A of paragraph 80.

7.154 As noted above, this issue is closely related to the factual question as to the scope of the investigated product, in particular whether products produced by Tubac other than A-53 and BS-1387 pipe were covered by the investigation. We recall in this regard our finding, *supra*, that as alleged by Guatemala, Economía twice during the course of the investigation expanded the scope of the investigated product, the second time by adding – late in the investigation – certain structural tubing.[200] These late-added structural tubing products did not correspond to either of the technical standards referred to in subparagraph A of paragraph 80, that is A-53 or BS-1387.

7.155 With this background, we examine the meaning of subparagraph A of paragraph 80, i.e., what the Final Determination indicates as to whether the content of this subparagraph was or was not a factor that contributed to Economía's decision to reject Tubac's data in their entirety. Here, we note first that paragraph 81 refers to the content of paragraph 80 in its entirety as the basis for Economía's conclusion that "[Tubac's data] cannot be used to calculate ... a price discrimination margin." Paragraph 97, which addresses the use of facts available due to Tubac's data being disregarded, makes

[197] First submission of Guatemala, paragraphs 192-194.

[198] Mexico response to question 106 (a) from the Panel.

[199] Ibid.

[200] We recall that the first change, which consisted of an expansion of the range of diameters covered by the investigation, is evident on its face, as the product definition in the preliminary determination refers to a broader range of diameters (1/2" to 6") than the Initiation Determination (1/2" to 4") cites. As this change is not relevant to Guatemala's facts available claims, we do not consider it further here.

a similar reference to paragraph 80 in its entirety. Thus, to us it is clear that the role of paragraph 80 in the Final Determination is to identify problems that were encountered in Tubac's data.

7.156 Turning to the specifics of paragraphs 81 and 82, we note that the "incompleteness" of Tubac's data is identified as one of the problems (referred to in paragraph 80) that led to the data's rejection. In particular, paragraph 81 states: "[B]earing in mind the facts found during the verification visit to Tubac referred to in point 80 of this Resolution the Ministry cannot use its data ... because the information ... is not complete …" (emphasis added). Paragraph 82 states that to the extent the information was *inter alia* incomplete, it was rejected and facts available used instead.

7.157 In this regard, among all of the subparagraphs of paragraph 80, subparagraph A is the one that deals clearly and exclusively with the "incompleteness" of the data base. The other subparagraphs refer to discrepancies between the data submitted in the questionnaire response and the data in Tubac's accounting records. Thus, we read the issue identified to in subparagraph A as at least being among the problems of data incompleteness to which paragraphs 81 and 82 refer.[201]

7.158 Furthermore, concerning the reference in subparagraph A to the fact that Tubac's data related to products corresponding to only two particular technical standards, other parts of the Final Determination make clear how central in the investigation were the related questions of technical standards and the presence or absence of hydrostatic testing to the question of the product scope. First, the Final Determination (at paragraphs 10-30) presents a lengthy recapitulation of the parties' exchanges of views on the scope of the investigated product. From that description, it is clear that the parties vigorously debated this issue, and in particular that they held very different views as to whether technical standards, including the requirement for hydrostatic testing, were determinative as to the scope of the product (in particular the suitability of various dimensions of pipe and tube for use in conduction applications). Then, at paragraphs 31 and 32, the Final Determination describes the scope of the investigated product as being based essentially on the diameter and wall thickness of the product, without regard for the technical standard to which the product is produced, or the raw material from which it is made (hot- or cold-rolled steel sheet). Given all of this context, we read the characterization in subparagraph A of paragraph 80 of Tubac's data as "exclusively" pertaining to A-53 and BS-1387 pipe, "both subject to hydrostatic testing" as a reference to a problem or a shortcoming in the data submitted by Tubac forming part of Economía's justification for rejecting those data.

7.159 Finally, we note that Mexico's position on this point appears to have changed over the course of this dispute. While in its answers to questions Mexico argues that Tubac's restriction of its data to A-53 and BS-1387 pipe was not a factor that led Economía to reject those data[202], Mexico's first submission seems to indicate the contrary. In particular, in that submission Mexico states that "from a mere reading of the Guatemalan exporter's replies to the official questionnaire ... it can be seen that the exporter did not provide all the necessary information, nor did it provide complete, accurate and precise information in the course of the investigation".[203] Because, as regards the completeness of the data provided by Tubac, the "mere reading" of the questionnaire response only indicates that those data were limited to A-53 and BS-1387 pipe, we see no other possible basis for Mexico's statement in its submission that Tubac did not provide "all the necessary information". Furthermore, later in the same submission, Mexico quotes paragraph 80 of the Final Determination in its entirety (i.e.,

[201] Nor, apart from the issue of underreporting of discounts, rebates and refunds – which was resolved on the spot at verification – do we see in the verification report any reference to incompleteness of data.

[202] Response to question 106 (a) from the Panel.

[203] First written submission of Mexico at para. 142 (emphasis in original).

including subparagraph A), as the description of the "inconsistencies" encountered during verification[204], and then states that "... the exporter's information was deliberately incomplete ...".[205]

7.160 In sum, we find the Final Determination to indicate that Tubac's not having provided data on any products other than A-53 and BS-1387 pipe was deemed by Economía to be a flaw in Tubac's data, in the sense that those data were incomplete (in the light of Economía's Final Determination as to the scope of the investigated product), and that this incompleteness was a factor underlying Economía's decision to reject those data. Although Mexico has argued to the contrary before us, it points to no record evidence in support of its argument, and in fact, as noted in the preceding paragraph, its position before us on this point appears to have shifted during the course of this dispute.

(iv) Substantive aspects of Article 6.8 / Annex II claims

7.161 We turn now to an analysis of these facts in the light of the provisions cited in Guatemala's claim, i.e., Article 6.8 and Annex II. Given that Article 6.8 requires that the provisions of Annex II be observed in applying Article 6.8, we begin our analysis with Annex II. In particular, we note that, concerning the substance of Economía's decision to reject Tubac's data and resort to facts available, the particular provisions of Annex II cited by Guatemala are paragraphs 3 and 5 of Annex II. Concerning paragraph 3, Guatemala argues that the record evidence contains no indication that Tubac's data were not verifiable, or that using these data would have caused "undue difficulties". Concerning paragraph 5, Guatemala argues that Tubac fully cooperated in the investigation and provided all of the data requested of it by Economía and thus "acted to the best of its ability", and that the record does not support a conclusion to the contrary. Mexico, for its part, argues that on the basis of the problems found at verification, Economía concluded that Tubac had "failed to provide necessary information", and had "failed to cooperate" and as a result had "significantly impeded the investigation", for both of which reasons Economía's rejection of Tubac's information and resort to facts available was fully justified.

7.162 In the light of these claims and arguments we start our analysis by considering whether the record evidence supports a conclusion that Tubac's data were not "verifiable", and could not be used without "undue difficulties" in the sense of paragraph 3 of Annex II, and that as Mexico argues, Tubac deliberately submitted biased information such that Economía was justified in rejecting all of Tubac's data. We also consider whether the basis for this decision is clearly and adequately set forth in the Final Determination.

7.163 We consider the "verifiability" of the data in the sense of paragraph 3 of Annex II to be central to this claim. In this regard, we understand Mexico's position to be, in part, that significant errors in Tubac's submitted data were found at verification, the overall effect of which was to cast doubts on the accuracy of the entire data base. We consider this argument in the light of whether on the basis of the record evidence, a unbiased and objective investigating authority could have concluded that the individual problems identified in paragraph 80 were such that, in terms of paragraph 3 of Annex II, the data as a whole were unreliable. We further consider whether the evidence could support a conclusion that it would have been "unduly difficult" to use the data submitted by Tubac, in the light of the identified problems. In this context we consider the existence and nature of these problems, whether corrected data were available to Economía, and whether there is evidence that using any such corrected data would have delayed the investigation (that is, whether the data were submitted in an "untimely" fashion), or posed any other "difficulties".

[204] Ibid. at para. 147.

[205] Ibid. at para. 148.

7.164 In this regard we take the same approach as the Panel in Egypt – Steel Rebar in considering that paragraphs 3 and 5 of Annex II together set forth the substantive elements for a justified decision to reject a party's information and resort to facts available.[206] We also note that the Appellate Body's ruling in US – Hot-Rolled Steel is consistent with that approach, in that the Appellate Body ruled that investigating authorities "are not entitled to reject information submitted" if that information meets the conditions in paragraph 3 of being "verifiable", "appropriately submitted so that it can be used without undue difficulties", and "supplied in a timely fashion"[207]. The Panel in US - Steel Plate considered that information is verifiable when "the accuracy and reliability of the information can be assessed by an objective process of examination"[208]. That Panel also found that the term "undue difficulties" are difficulties "beyond what is otherwise the norm in an anti-dumping investigation", and that an investigating authority is required by paragraph 6 of Annex II "to explain the basis of a conclusion that information which is verifiable and timely submitted cannot be used in the investigation without undue difficulties."[209] Finally, we note in connection with this claim the Panel's characterization as a case-by-case question whether a conclusion that some information fails to satisfy the criteria of paragraph 3 and thus may be rejected can justify the rejection of other information that would, in isolation, have satisfied the criteria of paragraph 3[210], as we view this as an important element of Mexico's argument.

7.165 Starting with the nature of the identified problems, we recall the record evidence and our observations related to each point listed in paragraph 80:

- For the product scope of the data provided by Tubac (i.e., the reporting of data only on A-53 and BS-1387 pipe), the verification report and other evidence make clear that this was fully known to Economía well before the verification visit, that Economía had confirmed the correctness of the product scope of Tubac's data to Hylsa before the verification visit, and that Economía reconfirmed at several points during the verification visit the correctness of that product scope. The record evidence also makes clear that at no point did Economía ever request Tubac to provide data on any other of its products.

- For discounts, rebates, refunds, and credits, although some information was omitted from the data as submitted, at verification the correct data were obtained and satisfactorily verified on the spot.

- For data used to calculate constructed values, there is no reference in the verification report to any problems being found, and we thus see no factual basis for the statement in the Final Determination that there were any such problems.

- For data on internal freight, although the data base as submitted incorrectly attributed freight charges to certain transactions, at verification the correct data were obtained and satisfactorily verified on the spot.

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[206] Panel Report, *Egypt – Steel Rebar* at para. 7.159.

[207] Appellate Body report, *US - Hot-Rolled Steel* at paragraph 81. As in the *Hot-Rolled Steel* case, the fourth condition listed in paragraph 3, that the information is supplied in a medium or computer language requested by the authorities, is not at issue in this dispute.

[208] Panel Report, *US – Steel Plate*, at footnote 67.

[209] Ibid., at paras. 7.72 and 7.74.

[210] Panel Report, *US –Steel Plate*, at paragraph 7.62.

- For freight on export sales to Mexico and freight on third country export sales, the verification report contains no evidence of any error, but instead states that differences arose because the verification team verified these elements on the basis of samples rather than the entire data base. We thus see no factual basis for the statement in the Final Determination that there were any such problems.

- For adjustments for insurance, there is no reference in the verification report to any problems being found, and we thus see no factual basis for the statement in the Final Determination that there were any such problems.

- For adjustments for physical differences, although certain discrepancies were found, at the request of the verification team Tubac recalculated the adjustments on the basis of the cost data that had been verified in the context of constructed value. Thus, the record indicates that at verification, the correct data were obtained at the express request of the verification team.

- For Tubac's indicators, the verification report indicates that of its own initiative Tubac informed the verification team that it had discovered errors in the production data it had reported, and that Tubac presented the verification team with worksheets and supporting documentation that resolved the errors to the satisfaction of the team. Concerning sales, the verification report characterizes some of the differences as "poco significativas", and in respect of the other differences, because these were encountered in the verification of the "Prueba de totalidad" they appear to have been related to the underreporting of discounts, rebates, and refunds referred to above, and to have been resolved in that connection, as the correction of these data led to the "satisfactory" verification of the "Prueba de totalidad". Concerning inventories, the verification report indicates that differences were found in the data on inventory volume, but not value. Concerning capacity, the verification report indicates that some differences were found, but that the correct capacity figures were calculated at verification.

7.166 As indicated in the foregoing summary, there is no record evidence of the existence of any problem in respect of the data on constructed value, on freight charges for export sales to Mexico or to third countries, or on adjustments for insurance. Thus, the record evidence indicates that these data were fully verified without any difficulties or questions, from which we conclude that they were "verifiable" in the sense of paragraph 3 of Annex II.

7.167 For the price-related data where discrepancies were found (i.e., for discounts, rebates and refunds, for internal freight, and for adjustments for physical differences) the record evidence indicates that corrected data were obtained and verified on the spot. We conclude from this that these data as well were "verifiable" because they were in fact verified. The further question becomes whether it would have been "unduly difficult" for Economía to have used these data, including whether the corrected data became available so late in the investigation that using them would have delayed the investigation. There is nothing in the record evidence that indicates that there would have been any difficulty in using any of the individual corrected data elements obtained at verification, nor is there any such statement in the Final Determination. Indeed, the verification report itself states in respect of at least one of these data elements (the internal freight adjustment for domestic sales) that Economía would correct the data base provided by Tubac on the basis of the corrections that had been obtained and verified during the verification visit.[211] As for timeliness, there is no indication in the Final Determination that any data corrections were made after the verification visit, or that there was

[211] GTM-15/MEX-12 at pages 7-8.

any issue of shortness of time available to Economía to perform the dumping calculations for the Final Determination. Indeed, given that the verification visit took place in June 2002, Economía had had the corrected data in its possession for more than six months by the time the Final Determination was issued in January 2003.

7.168 For the discrepancies in the data on Tubac's economic indicators (i.e., for production, sales, inventories, and capacity), here as well the record evidence indicates that corrected data were obtained at verification and verified on the spot. Thus, we consider that the record evidence indicates that these data were "verifiable" because they were in fact verified. Nor do we find any basis to conclude that even if, hypothetically, some of the data on the economic indicators could be considered "unverifiable", this would have made it "unduly difficult" for Economía to have used the verified pricing data to calculate the dumping margins. This is because we do not see a particular analytical connection (nor, more importantly, does the Final Determination identify any) between data on the company's production, inventories and capacity and the pricing data that would be used to calculate dumping margins.

7.169 Concerning the product scope of the data submitted by Tubac, given our finding that the record indicates that Economía faulted Tubac for having provided data only on A-53 and BS-1387 pipe, we consider whether there is factual evidence that Economía ever specifically requested any pricing data from Tubac (such as would be necessary to calculate dumping margins) on products other than these, either in the questionnaire or at any point thereafter. We find no record evidence of any such request, nor does Mexico argue that any such request was made.[212] In this context we emphasize that whatever issues there may have been at various points during the investigation regarding product scope (and we note Tubac's requests for clarification on this point from the very outset of the investigation), the facts of record show that Tubac was fully transparent throughout the investigation as to the scope of the products for which it reported data and its reasons for doing so. There is no evidence to the contrary, and indeed Mexico confirmed Tubac's transparency in this regard in response to questioning by the Panel.[213] Nor did Economía, before the final phase of the investigation, raise any issue in this respect.[214] To the contrary, Economía itself on numerous occasions confirmed the correctness of the scope of the data provided by Tubac, including during the technical meeting with Hylsa and at verification (where the verification team at several points identified Tubac's product codes that were covered by the investigation). Thus the evidence is unequivocal that Economía was fully aware of the product scope of the data provided by Tubac, and never identified to Tubac that there was any problem in this regard, or sought data on other products.

7.170 We now consider whether the inclusion of only two specifications of pipe in Tubac's data base, as referred to in subparagraph A of paragraph 80, as such could have rendered that data base "unverifiable". We conclude that this scope limitation in itself could not have done so, because only if there were record evidence of other problems with the data contained in the data base could the data base overall potentially become unusable in respect of the products it included. In this connection, we recall our conclusions in paragraphs 7.166-7.168, *supra*, that the evidence does not support a finding that the specific problems in respect of certain data elements as referred to in the other subparagraphs

[212] Mexico states in response to question 106 (d) from the Panel, that Economía's only request to Tubac for information on the structural tubing at issue in this dispute was via the information request to which Tubac responded on 17 September 2002. (Exhibit GTM-22) We note, however, that this information request had nothing to do with price data, and instead went to the question that had been raised at the public hearing as to whether the structural products should be added to the scope of the investigation.

[213] Response to question 106 (c) from the Panel.

[214] Response to question 106 (d) from the Panel.

of paragraph 80 rendered those particular data elements unverifiable, or that using them would have been unduly difficult for Economía.

7.171 We next evaluate whether in spite of the "verifiability" of these data items individually, there is record evidence that supports Mexico's position that these problems taken together so undermined the credibility and reliability of the data base as a whole as to render that data base unusable. We do not consider that an unbiased and objective investigating authority could have concluded that the problems listed in subparagraphs B through G of the Final Determination, when evaluated in the light of the verification report, rendered the data base as a whole unreliable. In this regard, we recall that for a number of the problems referred to in these subparagraphs , we have found no record evidence whatsoever that the cited problems even existed. For the rest, it appears from the verification report that the errors were corrected on the spot without difficulty. We see no factual basis for the implicit characterization in the Final Determination that these errors were pervasive and fundamental, such that they would affect the overall credibility of the data base. Rather, in the light of the verification report, it appears to us that Economía applied an unacceptably demanding standard, namely that no error encountered in the data base provided by Tubac, no matter how small, could or would be corrected, even where correct data were obtained and verified during the verification visit.

7.172 This brings us to a consideration of whether, as claimed by Guatemala, Economía acted inconsistently with paragraph 5 of Annex II. In particular, we have found above that the record evidence does not support a conclusion that the data submitted by Tubac, in spite of errors or discrepancies as reflected in the verification report, were unverifiable in the sense of paragraph 3 of Annex II. We now take up the question of whether the evidence supports a conclusion, as argued by Mexico, that the identified errors and discrepancies were the result of deliberate action by Tubac to provide incorrect and biased information, and that Tubac thus did not cooperate. In this context, Guatemala argues that Tubac "acted to the best of its ability" in the sense of paragraph 5 of Annex II, and that Economía therefore acted inconsistently with that provision in rejecting Guatemala's information. Mexico disputes that Tubac acted to the best of its ability and argues that to the contrary, Economía "considered that Tubac changed the physical difference adjustment figures in order to bias the dumping margin calculation to its advantage"[215], and that Economía in fact "considered whether the exporter acted to the best of its ability and … found evidence that not only had the exporter not acted to the best of its ability, but it done everything it could to slant or hide information needed for the investigating authority's analysis, so the investigating authority disregarded the information from the Guatemalan exporter".[216]

7.173 We find useful guidance for our examination of this aspect of Guatemala's claim in previous disputes that have considered paragraph 5 of Annex II. The Appellate Body in *US – Hot-Rolled Steel* considered that "investigating authorities are entitled to expect a very significant degree of effort – 'to the best of their abilities' – from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters".[217] The Panel in *US – Steel Plate* stated that "paragraph 5 can be understood to highlight that information that satisfies the requirements of paragraph 3, but which is not perfect, must nonetheless not be disregarded".[218]

[215] Mexico's response to question 179 from the Panel.

[216] Mexico's response to question 182 from the Panel.

[217] Appellate Body Report on *US - Hot-Rolled Steel*, paragraph 102.

[218] Panel Report on *US – Steel Plate*, paragraph 7.65.

7.174 Given the nature of the parties' respective arguments as to whether or not Tubac acted to the best of its abilities we consider first whether as a factual matter there is evidence in the record supporting Mexico's characterization that the information provided by Tubac was *deliberately* misleading.

7.175 We first return to the question of the product scope of the data reported by Tubac, which is relevant here to the extent that part of Economía's decision to resort to facts available may have hinged on an assessment that Tubac failed to act "to the best of its ability" in the sense of paragraph 5 of Annex II by not providing data on any other products than A-53 and BS-1387 pipe.[219] We view paragraph 1 of Annex II as relevant context for answering this question, in that this provision makes clear that it is the investigating authority's responsibility in the first instance to inform an interested party of the precise information that it requires of that party (i.e, the "necessary information" in the sense of Article 6.8.) We note here that being fully aware from the outset as to the product scope of the data provided by Tubac, and not having requested Tubac to provide data on any other products, Tubac's not having provided such data clearly could not be considered a failure on its part to have acted to the best of its ability in this respect.

7.176 Concerning Mexico specific arguments before us on this issue, we recall that at our second substantive meeting, we questioned Mexico in detail about the problems that it argued justified Economía's decision to reject all of Tubac's data. Mexico stated that at verification, Economía had discovered large problems in Tubac's selection of the product codes that it had included in its data base. We asked where in the Final Determination this problem was identified and addressed, and Mexico identified subparagraph F of paragraph 80. We then asked Mexico to explain the connection between this subparagraph, which refers to adjustments for insurance and for physical differences, and the issue concerning Tubac's selection of product codes to include in its data base.[220] Mexico responded that the discrepancies in the data on adjustments for physical differences were so large that Economía had no certainty either as to the adjustments themselves or as to the selection of product codes for normal value that were used to compare with to the product codes exported to Mexico, given that the purpose of adjustments for physical differences is to "standardize" the prices of similar but non-identical products being compared, by neutralizing the differences between them.[221]

7.177 We find it surprising, in the light of Mexico's insistence in its oral answers to Panel questions during the second substantive meeting with the Panel that this issue was the central problem encountered during Tubac's verification, that Mexico first raised it only at that late stage of this dispute. Indeed, neither of Mexico's written submissions and neither of its prepared oral statements (including at the second substantive meeting with the Panel) makes any reference to this problem. The first written reference to it before us appears in Mexico's written responses to our written questions raised in connection with the second meeting. (These written answers make the same arguments as were made in Mexico's oral responses during the meeting.)

7.178 More importantly, we find no reference to this issue in the Final Determination. Indeed, the only reference in the Determination to discrepancies in the physical difference adjustments is a sentence fragment, stating only that certain differences were found, contained in a subparagraph of paragraph 80 that also covers insurance adjustments. There is no link in the Determination, in that subparagraph or elsewhere, of the physical difference adjustments issue with doubts about the

[219] In our view, the Final Determination could be read to imply this, although Mexico's arguments before us concerning Tubac's alleged failure to act to the best of its ability are focused on issues other than the product scope of Tubac's data.

[220] Question 183 from the Panel.

[221] Mexico's replies to questions 132 and 183 from the Panel.

selection of product codes included in the data base. Indeed, the only reference at all in the Final Determination to any issue relating to product coverage of the data base appears in subparagraph A of paragraph (which has nothing to do with adjustments for physical differences). Furthermore, as noted above, (paragraph 7.152) Mexico has argued before us that the issue identified in subparagraph A was not among the problems on which Economía based its decision to reject Tubac's data.

7.179 Nor do we see any reference to any problem relating to product codes in the verification report. That is, we find no factual support in the verification report for Mexico's implication before us that Economía did not have full knowledge about the entire range of products produced by Tubac, either about their physical characteristics or about their product codes, and thus had no basis on which to judge whether Tubac had included all of the relevant product codes in its data base. Indeed, as set out in paragraphs 7.88-7.91, *supra*, the verification report indicates the contrary, starting with its section entitled "Códigos de producto" which begins on page 4.[222] We recall that this section states that Tubac presented a detailed description of its product codes, including a table containing the description and structure of each of those codes. The report then describes in detail the structure of the product codes, indicating that the different digits in each 9-digit product code respectively identify the product family, the presentation (shape, finish, and whether or not threaded), the calibre and weight, the dimensions in inches, and the length, of the product. The report further states that Tubac presented the verification team with a list of all of its product codes, covering all investigated and non-investigated products. From this it appears that the verification team had, via the lists of product codes provided, a complete physical description of all products produced by Tubac. Furthermore, we recall that the verification report indicates that the issue of which of Tubac's product codes were and were not covered by the investigation was extensively discussed at the verification, in connection with the "Prueba de totalidad" and that the corresponding data were verified with no discrepancies found.

7.180 In addition, according to the record evidence, the verification visit was not the first time that Economía had received information from Tubac as to the product codes of all of its products. To the contrary, as indicated in the report on Economía's technical meeting with representatives of Hylsa following the Preliminary Determination (i.e., before the verification visit to Tubac), Economía informed Hylsa that it had received and studied the full list of Tubac's product codes, and had concluded that "only 32 of them" corresponded to the investigated product.[223] Furthermore, the fact that all of the data reported in Tubac's questionnaire response corresponded to two technical specifications, with well defined physical and dimensional parameters, would seem as a matter of logic to limit the possibility that products with enormously different physical characteristics could have been compared in the data base.

7.181 Nor do we see a necessary logical connection, as asserted by Mexico, of discrepancies between accounting records and questionnaire responses for adjustments for physical differences, to the physical similarity or dissimilarity of the products involved. For example, we can imagine a situation where a questionnaire response did in fact identify and compare the most similar products, but deliberately or inadvertently reported incorrect information as to the costs associated with the physical differences between those products. These inaccuracies in the adjustments for physical differences would have nothing to do with the selection of the similar products, or with the overall scope of the data base, but instead would have to do with inaccuracies in the data reported.

7.182 In short, Mexico's argument before us on this point seems to be a *post hoc* explanation of Economía's decision to reject Tubac's data, which neither appears in Economía's Final Determination nor finds factual support in the record evidence underlying that Determination. In other words, we

[222] GTM-15/MEX-12.

[223] Exhibit GTM-11(B).

see no factual basis in the investigation or justification in the Determination for this argument by Mexico.

7.183 As for the question of whether the record otherwise contains any evidence that Tubac acted in a deliberately misleading manner in terms of the data it provided in its questionnaire response, at verification, or at any other point, we see none, and Mexico points to none. Indeed, given that according to the verification report Tubac itself brought certain errors in its data base to the attention of the verification team, and otherwise is described in that report as providing all data and documentation requested by the verification team without delays or other problems, we consider that an unbiased and objective investigating authority could not conclude on the basis of the verification report that Tubac had failed to cooperate in the manner asserted by Mexico As a result, we also find no basis in the record for Mexico's assertion that Tubac significantly impeded the investigation.

7.184 For the foregoing reasons, we conclude that Economía acted inconsistently Mexico's obligations with paragraphs 3 and 5 of Annex II and thus Article 6.8 when it decided to reject in their entirety the data that Tubac had submitted and to rely instead on facts available.

(v) Procedural aspects of Article 6.8 / Annex II claims

7.185 Guatemala also raises procedural claims related to Economía's resort to facts available. In particular, Guatemala claims that Economía never informed Tubac that Economía had decided to reject Tubac's data in their entirety, and never gave Tubac an opportunity to provide further explanations, and that Mexico thereby violated paragraph 6 of Annex II. Mexico disagrees, arguing that the verification report itself both constituted the required notification to Tubac as to the rejection of its data, and provided the required opportunity for Tubac to present further explanations. The questions before us in this claim thus are primarily factual, namely whether Economía informed Tubac that its data were being rejected, and whether Economía provided Tubac with the opportunity to present further explanations. As Mexico's defence of this claim is based on the verification report, we return to that document to see whether it supports Mexico's argument.

7.186 Starting with Economía's decision to reject Tubac's data, we recall that paragraph 6 of Annex II requires that the party supplying information that "is not accepted" by the investigating authority must be "informed forthwith of the reasons therefore" and given "an opportunity to provide further explanations within a reasonable period". The nature of this obligation is well settled[224], and the parties to this dispute do not disagree in this regard. Rather, their disagreement centres on whether – as a factual matter – Economía provided the requisite notification and opportunity to submit further explanations within the meaning of Annex II.

7.187 We note that Mexico argued before us that the verification report constitutes only the factual account of what happened at verification, and does not constitute or contain any conclusions or analysis or evaluation on the part of Economía. We asked Mexico to reconcile this argument with its position that via the verification report Economía fulfilled the requirement in Annex II, paragraph 6 to inform Tubac that its data were being rejected. Mexico replied that there was no contradiction between these characterisations, because the verification report indicated to Tubac the discrepancies that were found at verification, and stated the possibility that the Final Determination could be made on the basis of facts available. Mexico stated in particular that "given the discrepancies in the information submitted of which Tubac was aware, there is a sound basis for inferring that Tubac knew

[224] See Panel Reports *Argentina – Ceramic Tiles*, e.g. at paragraph 6.21, and *Egypt – Steel Rebar*, e.g. at paragraph 7.262.

about this situation"[225] of rejection of its data and reliance on facts available. Mexico also stated that "although the verification report did not contain a determination in the sense that facts available were indeed to be used, it did include a clear warning that their use was a possibility".[226] (emphasis added)

7.188 We do not find this argument convincing. To the contrary, we see the quoted statements as an admission by Mexico that Economía never directly or explicitly informed Tubac that its data were being rejected. Indeed, the "warning" that Mexico refers to is framed in general language that seems to be standard for verification reports produced by Economía, given that the same language appears at the end of Economía's report on the verification of Hylsa.[227] The language reads: "On the strength of the results obtained in the course of resolving this matter and on the basis of the information in the administrative file of the case, the Ministry may issue final conclusions based on the facts available to it". All that this language says is that final results may be based on facts available, not that a decision has been taken in the particular case that they will be. We view paragraph 6 of Annex II to require not a general statement of the possibility that facts available could be used (which possibility in fact exists in all anti-dumping investigations), but rather an affirmative and direct notification to the party concerned that in the particular case a decision has been made to reject its information, along with a statement of the reasons for that decision. A determination of this importance in an investigation cannot be left to the party in question to infer from a document that Mexico itself characterizes as not containing analysis or conclusions, but just facts. We thus find that Economía did not abide by the requirements of paragraph 6 of Annex II to inform Tubac that it had decided to reject Tubac's data, and to explain the reasons for that decision.

7.189 We next consider whether Economía gave Tubac an opportunity to provide further explanations following Economía's decision to reject its data, as also required by paragraph 6 of Annex II. Here again, Mexico refers to the verification report – in particular to the five-day period allowed in the verification report for any comments on the report's contents – as constituting this opportunity[228], and argues that Tubac submitted no comments and otherwise took no corrective action in respect of the problems that had been found at verification and described in the report.[229] Given, as discussed in detail above, that the verification report did not inform Tubac that its information was being rejected, and to the contrary indicated that essentially all of the problems encountered were resolved on the spot at verification, we fail to see on what basis Tubac could have supposed that any further corrective action was expected or required by Economía. Furthermore, and in any case, in the light of our finding that the verification report does not satisfy the requirement in paragraph 6 of Annex II to notify the interested party of the decision to reject its information and of the reasons

[225] Mexico's answer to question 178 from the Panel. Mexico's second written submission, para. 123 and 125; Mexico's second oral communication, paras. 25, 26 and 31; Mexico's responses to questions 111 (a) and (b) from the Panel.

[226] Ibid.

[227] Exhibit GTM-24, at page 14.

[228] Mexico's answer to questions 11(b) and 182 from the Panel.

[229] Mexico argues in its second written submission (at paragraph 110) that "[I]f Tubac, although well aware that there were differences between the data it had submitted to the investigating authority and the data obtained during the on-site investigation, did nothing to clarify at all the information, it is logical that the investigating authority should proceed" by rejecting the information. Mexico further argues in the same submission (at paragraph 125) that "... as the report of the verification visit shows, these problems were pointed out to Tubac's representatives, and it was the exporters that took no remedial action to bring the information into conformity with the purpose of its being used by the investigating authority".

therefor, that report by definition also could not satisfy the requirement to provide the interested party an opportunity to submit further explanations following the decision.

7.190 On the basis of the foregoing considerations, we find that Economía acted inconsistently with paragraph 6 of Annex II, and thus Article 6.8, by failing to inform Tubac that its data were being rejected and of the reasons for that decision, and by failing to provide Tubac with an opportunity to submit further explanations.

(vi) Annex II, paragraph 7 – "special circumspection" regarding information used as facts available

7.191 **Guatemala** claims that Economía did not use special circumspection when deciding to base the dumping determination, in particular as to normal value, on the information provided in the application. According to Guatemala, the problems that made this information an insufficient basis for initiation, which were not rectified or addressed at the final phase, made this information even more inadequate as the basis for the final determination of dumping.

7.192 **Mexico** argues that the information in the petition constituted an adequate and reliable basis for determining normal value, given that Economía had evaluated its accuracy and adequacy at the time of initiation. In this context, concerning the data on imports that were used as the basis for export prices in the Final Determination, Mexico asserts that these data were taken from the import "pedimentos" obtained from importers and thus were fully accurate and comprehensive. Mexico also argues in general that once Economía determined that it would rely on facts available, it "sought to corroborate the information with other independent sources, such as the SICMEX import statistics, the information provided by customs agents, and the information obtained from other interested parties during the investigation".[230] Mexico further argues that Tubac failed to cooperate in the sense of the last sentence of paragraph 7 of Annex II, providing more justification for Economía's use of the information contained in the application as facts available.

7.193 We recall our findings, *supra*, that Economía acted inconsistently with Article 5.3 and thus Article 5.8 by initiating the investigation on the basis of evidence pertaining to normal value (i.e., the invoice and the price quote) that was insufficient due to a number of specific shortcomings which in our view are obvious on the face of that evidence. We see no factual basis in the record, and Mexico points to none, in support of its argument that before using that same normal value information as the basis for the final dumping determination, Economía took any steps to verify its accuracy. Nor do we see any evidence, and Mexico points to none, that Economía sought to ascertain the representativeness of that information in respect of the products and period covered by the investigation, or to adjust it in any way to address the problems that we identified in the context of Guatemala's claims related to the initiation. To the contrary, the Final Determination makes clear that the information as submitted by Hylsa was accepted and used essentially "as is" by Economía as the basis for normal value in the final dumping calculations – the invoice for all galvanized products within the scope of the investigation and the price quote for all black products within that scope.[231] In

[230] Mexico's response to question 182 from the Panel.

[231] In particular, paragraph 109 of the Final Determination describes the invoice, and indicates that Economía converted the prices reflected therein from quetzales using the Bank of Guatemala's published exchange rate for the date of the invoice. Paragraph 110 describes the price quote, and indicates that Economía converted the prices from quetzales on the same basis. Paragraph 111 indicates that Hylsa provided the methodology and factors for converting the per piece prices in the invoice and price quote to a per kilogram basis. Paragraph 112 states that Economía "accepted the information supplied by the applicant, in accordance with Article 5.2 of the *Anti-Dumping Agreement* and Section XI of the FTA Regulations". Paragraph 114, the sole paragraph appearing under the heading "Ajustes al valor normal", indicates that Economía adjusted the prices in the invoice for credit, for the period specified in the invoice, on the basis of a methodology provided by

other words, the Final Determination makes clear that the normal value information used for the final dumping determination was identical to that used for initiation, and thus included, unaddressed, all of the flaws and shortcomings that rendered that information insufficient for purposes of initiation.

7.194 Of particular relevance in this regard is the very narrow product coverage of the invoice and price quote compared with the overall product scope of the investigation. Not only was this problem still present and unaddressed by Economía at the time of the Final Determination, but in fact it had become more pronounced given the expansion of the product scope to include certain structural tubing as well as products in the 4"-6" size range. That is, because of the expansion of the product scope, the invoice and price quote represented an even narrower subset of the total covered products at the final phase of the investigation than had been the case at the time of initiation. Yet, as discussed above, there is no evidence that Economía took any steps at the time of the Final Determination to ascertain whether the pricing information contained in those two documents could be viewed as representative *inter alia* of Guatemalan prices for the broader product range covered by the investigation at that point, including the added products.[232]

7.195 Here, we recall our agreement with the principle asserted by Mexico (in defence of Economía's reliance on the invoice and price quote at the initiation stage) that the standard of evidence for initiation is lower than that for a preliminary or final determination[233] (although, as noted above[234], we disagree with Mexico that a "mere indication" of alleged dumping is sufficient at the initiation stage). We view this defence by Mexico in the context of Guatemala's initiation claim as an implicit acknowledgement that the invoice and price quote would not have been a sufficient basis for a final determination, and we do not see how, given the absence of any evidence in the record that Economía took any steps to ascertain the accuracy and representativeness of these documents at the final stage of the investigation, this argument can be reconciled with Mexico's apparent position in the context of the Final Determination that the invoice and price quote were sufficient "as is".

7.196 We further note Mexico's argument that "the last sentence of paragraph 7 of Annex II of the AD Agreement says 'It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate', *which is exactly the way the investigating authority proceeded* (emphasis added). In our view, Mexico's reliance on the argument that Tubac "failed to cooperate" in the sense of paragraph 7 of Annex II and that the last sentence of

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Hylsa. Thus, the Final Determination is clear that the normal value evidence used by Economía was that provided in for purposes of initiation (i.e., the invoice and price quote), and that the only adjustment of any kind was the same adjustment to the invoice prices for credit that was made at the time of initiation. There is no reference to any other adjustment or verification process undertaken by Economía in respect of this evidence before it was used in the final dumping calculations. Finally, we note that the above description in the Final Determination of this evidence and the sole adjustment thereto (the credit adjustment to the invoice) is virtually identical to the corresponding drafting in the Initiation Determination (see Exhibit GTM-4 at paragraphs 61-67). We view this fact as further confirmation that the normal value information used for the final determination of dumping was identical to that used for purposes of initiation.

[232] We note here that Mexico has argued before us that Economía found these products to be "competitive" and in some cases substitutable. While this may have been the case (an issue that is not in any case before us), the competitiveness or substitutability of a given product with another is not informative as to their relative or absolute prices.

[233] See paragraph 7.22, *supra*, and e.g., first written submission of Mexico at paragraph 33: "[Since] the evidence submitted with the application does not have to be of the quality and quantity needed to support a determination of unfair practice and the application of an anti-dumping duty, but to initiate an investigation, the information in the application need be no more than a mere indication of 'alleged dumping'."

[234] See paragraph 7.22, *supra.*

that provision therefore justified Economía in relying on the normal value information from the application constitutes an acknowledgement by Mexico that Economía used that information for the purpose of arriving at a "less favourable" result for Tubac than otherwise would have been the case[235], and that it did not evaluate that information on its own merits for representativeness and sufficiency.

7.197 On the basis of the foregoing considerations, we find that Economía failed to use "special circumspection" in relying on this unadjusted evidence for its Final Determination, as required by paragraph 7 of Annex II. Here we agree with the observation of the panel in *Egypt – Rebar* that the provisions of Annex II have to do with ensuring the reliability of the information used by the investigating authority.[236] Furthermore, as discussed in the preceding section, we do not see any evidence in the record to support Mexico's argument that Tubac failed to cooperate in the investigation and thereby significantly impeded the investigation as asserted by Mexico. Thus, even if *arguendo* (as Mexico implies but which, as noted, is not an issue raised in this dispute) the last sentence of paragraph 7 permits a deliberate use of so-called "adverse facts available" in the case of non-cooperation by an interested party, that sentence would not apply to the factual situation at hand and thus is not relevant to the case before us. On the basis of these considerations, we find that Economía acted inconsistently with paragraph 7 of Annex II and Article 6.8 because in applying as facts available the normal value evidence that was provided by the applicant and used in Economía's initiation decision it failed to use "special circumspection".

(vii) Other claims pursuant to Article 6

7.198 **Guatemala** claims that Economía's rejection of Tubac's data and resort to facts available also violated Articles 6.2, 6.4, 6.7, 6.9, and 6.13. Regarding Articles 6.2 and 6.4, Guatemala argues that by deciding only at the very end of the investigation to resort to facts available, Economía denied Tubac the opportunity to see all of the relevant information, to prepare presentations thereon, and thus to fully defend its interests. Regarding Article 6.7, Guatemala argues that the verification report does not correspond with the description of the verification results that appears in the Final Determination, and that the Mexico points to no other document of record referring to the alleged flaws uncovered at verification, and that therefore Economía did not comply with its obligation to inform Tubac of the results of the verification.[237] Regarding Article 6.9, Guatemala argues that Economía did not disclose the essential fact of the resort to facts available prior to making its Final Determination. Regarding Article 6.13, Guatemala argues that Economía did not take due account of difficulties experienced by Tubac in supplying the requested information.

7.199 **Mexico** argues that Guatemala has not established a violation of any of these provisions. Regarding Articles 6.2 and 6.4, Mexico argues that Tubac had full opportunity to present information and argument in respect of the inclusion of certain structural tubing within the product scope. Regarding Article 6.7, Mexico argues that the requirement is to disclose the factual results of the verification, not the analysis of those facts. Regarding Article 6.9, Mexico argues that the decision to resort to facts available is not an "essential fact" subject to the disclosure requirement of that

[235] In the context of the last sentence of paragraph 7, prior panels and the Appellate Body have used the term "adverse facts available" to describe the situation where an investigating authority applies facts available in such as way as deliberately to give rise to a "less favourable" outcome for a non-cooperating party than would have been the case had that party cooperated. We emphasize here that Guatemala has not raised, and we thus do not express any view as to, the issue of whether the final sentence of paragraph 7 of Annex II permits such deliberate use of "adverse facts available" where a party has failed to cooperate with an investigating authority.

[236] Panel Report on *Egypt – Steel Rebar*, at paragraph 7.154.

[237] Guatemala also argues that its Article 6.7 claim is subsidiary to its Article 6.8 claim, such that the Panel would only need to reach it in the event it found no violation of Article 6.8. (Response of Guatemala to question 103 from the Panel, at para. 110.)

provision. Regarding Article 6.13, Mexico does not elaborate a specific argument, but instead relies on its rebuttal to the Article 6.8 claim.

7.200 The arguments of the **third parties** related to this issue are summarized at paragraph 7.110, *supra*.

7.201 We see Guatemala's additional Article 6 claims that relate to facts available as covering essentially the same substantive issues as are covered by Guatemala's claims under Article 6.8 and Annex II. In the light of our findings that Economía acted inconsistently with both substantive and procedural requirements of Article 6.8 and Annex II in deciding to reject Tubac's information and resort to facts available, we see no need to reach these additional facts available claims under Article 6, and thus make no findings thereon.

2. Claims pursuant to Article 2

7.202 Guatemala raises other claims relating to the determination of dumping, alleging in particular that Mexico violated Articles 2.1, 2.4 and 2.6 as a result of expanding the scope of the investigation to include products in the 4"-6" diameter range, and to include certain structural tubing. In particular, Guatemala argues in respect of Article 2.1 that Economía did not obtain information on these added products, and did not calculate dumping margins for them, so that it did not establish the existence of dumping in respect of the "product as a whole" as required by Article 2.1. Concerning Article 2.4, Guatemala argues that this provision requires a "fair comparison" between normal value and export price for the investigated product, and that it is not possible to realize such a fair comparison without pricing information for all of the products covered by the investigation. Thus, according to Guatemala, this claim is closely related to its Article 2.1 claim. Regarding Article 2.6, Guatemala argues that Economía acted inconsistently with this provision by defining the investigated product and the like product at initiation, and then failing to maintain these definitions over the course of the investigation. Guatemala notes that while Article 2.6 does not prohibit changes to the definitions of the investigated product or the like product, in this case Mexico changed the definitions without positive evidence and without an impartial and objective examination of the facts.

7.203 Mexico responds that none of these claims has merit. According to Mexico, all of the products included in the scope of the investigation as of the Final Determination constituted a single investigated product, and therefore the investigation was comprehensive in respect of that product, and the comparisons made were fair. Mexico also notes that Guatemala acknowledges that Article 2.6 does not prohibit changes to the scope of the investigated product or the like product, and further argues that the *Anti-Dumping Agreement* contains no rules on the establishment or definition of the investigated product. Thus, Mexico maintains, Economía was in full compliance with its obligations under the Agreement in respect of the scope of the investigated product over the course of the investigation.

7.204 The arguments of the third parties related to this issue are summarized at paragraphs 7.336-7.338, *infra*.

7.205 All of these claims have as their factual basis the two expansions to the scope of the investigated product. We have found, above, that in deciding to reject Tubac's data and resort to facts available, and in its selection of the normal value information to use as facts available, Economía acted inconsistently with Annex II and Article 6.8. We recall that these findings are related in part to the expansions of the scope of the investigated product during the course of the investigation. Furthermore, and in any case, as a result of these findings, Economía's final determination of dumping as a whole – in respect of the entire expanded product scope – was inconsistent with the *Anti-Dumping Agreement*. On this basis we do not consider it necessary to, and thus do not, make findings on these remaining claims pertaining to Economía's final determination of dumping.

E. CLAIMS RELATING TO DETERMINATION OF INJURY AND CAUSAL LINK

1. "Objective examination" of "positive evidence" in injury determinations

7.206 Guatemala makes a number of claims relating to the Mexican investigating authority's injury analysis. These claims are based on certain common principles in Article 3 of the *Anti-Dumping Agreement*, which deals with the determination of injury caused to the "domestic industry" (as defined by Article 4.1) producing the "like product" (defined in Article 2.6). Therefore, before examining each of these claims individually, we recall the relevant legal provisions and general guiding principles involved.

7.207 Article 3 of the *Anti-Dumping Agreement* is entitled "Determination of Injury". Article 3 as a whole deals with obligations of Members with respect to the determination of injury and causal link. "Injury" means "material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry".[238] The focus of an injury determination is the state of the "domestic industry"; the causation analysis focuses on the causal link between dumping and any injury to the "domestic industry".

7.208 The term "domestic industry" is defined in Article 4.1. Article 4 is entitled "Definition of domestic industry". Article 4.1 reads, in part:

> "For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products ..."

7.209 The concept of "like product" is therefore also at the root of the notion of "domestic industry". Article 2.6 of the *Anti-Dumping Agreement* states:

> "Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."

7.210 This provision defines the scope of the "like product" in relation to the scope of the "product under consideration". However, the Agreement contains no further explicit guidance in relation to the delineation of the "product under consideration".

7.211 Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in respect of the determination of injury and causation. Article 3.1 provides:

> "A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products."

7.212 This provision requires, among other things, that the injury determination be based on an "objective examination" of "positive evidence".

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[238] Footnote 9 to the *Anti-Dumping Agreement*.

7.213 We consider that "positive evidence" is evidence that is relevant and pertinent with respect to the issue to be decided, and that has the characteristics of being inherently reliable and creditworthy. Under the positive evidence criterion of Article 3.1, the question whether the information at issue constitutes "positive evidence" — i.e., is relevant, pertinent, reliable, and creditworthy —is assessed with respect to the particular issue at stake and the particular circumstances of a given case.[239]

7.214 While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, the term "objective examination" is concerned with the investigative process itself. An "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process. Therefore, the identification, investigation and evaluation of the relevant factors must be "even-handed".[240]

7.215 The overarching obligation in Article 3.1 – that the determination of injury to the domestic industry be based on an "objective examination" of "positive evidence" – informs the more detailed obligations in succeeding paragraphs. For the purposes of this dispute, these relevant obligations concern the consideration of the volume of dumped imports, and their effect on prices (Article 3.2), the impact of dumped imports on the domestic industry (Article 3.4) and the causal link between dumped imports and injury (Article 3.5). These provisions read:

> "3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance. [...]
>
> 3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.
>
> 3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports

[239] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 164 and 165, upholding Panel Report, *Mexico – Anti-Dumping Measures on Rice*, paras. 7.55 and 7.61. See also Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

[240] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196. WTO panels are under a similar duty, under Article 11 of the *DSU*, to make an "objective assessment of the matter … including an objective assessment of the facts". The obligation to make an "objective assessment" includes an obligation to act in "good faith", respecting "fundamental fairness". We find support in Appellate Body Report, *EC- Hormones*, para. 133.

> and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry."

7.216 Against this backdrop, we address Guatemala's claims relating to the Mexican investigating authority's injury and causation analyses below.

2. Time gap between the end of the period of investigation and the initiation of investigation

(a) Arguments of the parties

(i) Guatemala

7.217 **Guatemala** asserts that Mexico violated Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement by relying on a period of investigation that ended significantly (eight months) before the initiation of the investigation (and two years prior to the imposition of duties) and therefore failed to take into account relevant data relating to the period immediately preceding the investigation. According to Guatemala, the determination of injury and causal link was therefore not based on an objective examination of positive evidence.

(ii) Mexico

7.218 **Mexico** argues that Guatemala's allegations are without foundation and fail to establish a prima facie case, and that the injury/causation determination complied with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement. Mexico asserts that the Anti-Dumping Agreement does not contain any specific and express rules relating to the injury investigation period, and that the period of eight months between the end of the investigation period and the initiation was reasonable and as close as possible to the date of initiation.

(b) Arguments of the third parties

7.219 The **European Communities** endorses Guatemala's analysis of considerations relevant to the Panel's examination. According to the European Communities, data from a recent POI are more likely to yield relevant positive evidence, and Mexico's arguments are of questionable merit.

7.220 **Japan** takes no position on the factual aspects of this case, but asserts that an eight-month period from the initiation of the investigation may raise doubts about the pertinence of the information gathered to the existence of current injury, questioning the merits of Mexico's arguments.

7.221 The **United States** asserts that the use of a "stale" POI is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the *Anti-Dumping Agreement*, and questions the merits of Mexico's arguments in light of the circumstances of this case.

(c) Evaluation by the Panel

(i) Factual background

7.222 We first recall the undisputed facts on the record. Economía examined data for a period of investigation covering July through December 2000 for purposes of its dumping determination, and July through December 1998, 1999 and 2000 for purposes of its injury analysis. Economía adopted the injury POI proposed by the applicant.[241] The application was filed on 22 May 2001. Economía sought clarifications from the applicant on 11 June 2001, and the applicant submitted responses on 9 July 2001. The investigation was initiated on 24 August 2001, about eight months after the end of the period of investigation. Final anti-dumping measures were imposed pursuant to the Final Determination published on 13 January 2003, just over two years after the end of the period of investigation.

(ii) Analysis

7.223 We see the main issue before us as whether, in this case, in using data from an investigation period that ended about eight months prior to the date of initiation of the investigation (and about two years prior to the imposition of the final anti-dumping measure), the Mexican investigating authority breached the requirement in Article 3.1 to conduct an "objective assessment" of "positive evidence". As outlined above, because Article 3.1 sets out an overarching principle that informs the injury obligations in the rest of Article 3, our views on this issue will also resolve Guatemala's claims here under Articles 3.2, 3.4 and 3.5 of the Anti dumping Agreement.

7.224 We begin by underlining that the selection by an investigating authority of the period of investigation is clearly a critical element in the anti-dumping investigative process: it determines the data that will form the basis for the assessment of dumping, injury and the causal relationship between dumped imports and the injury to the domestic industry.[242]

7.225 We agree with Mexico[243] to the extent it argues that the Anti-Dumping Agreement does not contain any specific and express rules concerning the period to be used for injury data collection in an anti-dumping investigation.[244,245] However, as also acknowledged by Mexico, this does not mean that

[241] The notice of initiation, Exhibit GTM-4, para. 90, indicates that the applicant, "proposed the period from July to December 2000 as the period to be investigated because during that time imports of standard pipe from Guatemala were carried out in conditions of price discrimination, which was reflected in a deterioration of its production plant, commercial activity and financial operations. The Ministry determined the period July-September 2000, which meets the requirements laid down in the law, as the period to be investigated". See also Exhibit GTM-23, para. 152.

[242] We find support for our view in the Panel Report in *Mexico – Anti-Dumping Measures on Rice*, para. 7.56. The Appellate Body upheld the Panel's finding on this issue. See Appellate Body Report, para. 172.

[243] See e.g. Mexico's response to question 23 from the Panel.

[244] We recall and endorse the view of the *Egypt - Rebar* panel, paras. 7.130-7.131, that neither Article 3.1 nor 3.5 nor any other provision of the *Anti-Dumping Agreement*, "contains any specific rules as to the time periods to be covered by the injury or dumping investigations, or any overlap of those time periods." That panel further observed, : ".... the only provisions that provide guidance as to how the price effects and effects on the domestic industry if the dumped imports are to be gauged are (as cross-referenced in Article 3.5), Articles 3.2 (volume and price effects of dumped imports), and Article 3.4 (impact of the dumped imports on the domestic industry). Neither of these provisions specifies particular time periods for these analyses ..."

[245] We recall that footnote 4 to Article 2.2.1 of the *Anti-Dumping Agreement*, associated with the term "extended period of time" in the context of determining whether certain sales may properly form the basis for a

the authority enjoys unlimited discretion to use any period of investigation in reaching its injury determination.

7.226 We consider that Article VI of the GATT 1994 and the relevant provisions of the Anti-Dumping Agreement offer textual and contextual evidence for the proposition that a Member may impose an anti-dumping measure only if it makes a reasoned determination that dumped imports are currently causing injury. In this respect, Article VI.2 of the GATT 1994[246] provides that:

> "In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product".

Article 11 of the *Anti-Dumping Agreement* similarly provides that:

> "An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury".

In addition, Article 3.2 addresses the volume and price effects of the dumped imports. Article 3.4 requires an examination of the impact of the dumped imports upon the state of the domestic industry. Article 3.5 of the *Anti-Dumping Agreement* provides:

> "It must be demonstrated that the dumped imports *are*, through the effects of dumping, as set forth in paragraphs 2 and 4, *causing injury* within the meaning of this Agreement. [...]". (emphasis added)[247]

7.227 These provisions – with such terms as "offset" and "counteract" and the requirement of a *current* causal link – furnish clear textual indications that anti-dumping measures may be imposed only to offset dumping *currently* causing injury. We agree with the approach of previous panels in discerning an inherent real-time link between the investigation leading to the imposition of measures and the data on which the investigation is based. This link connects the imposition of the measure and the conditions for application of the measure: dumping (*currently*) causing injury.[248]

7.228 It is well established that the data on the basis of which this determination is made may be based on a past period, known as the period of investigation. Nevertheless, because this "historical" data is being used to draw conclusions about the current situation, it follows that the more recent data

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normal value in a dumping calculation, provides: "The extended period of time should normally be one year but shall in no case be less than six months."

[246] The term "offset" suggests that the scheme established in Article VI of the GATT 1994, and applied through the provisions of the *Anti-Dumping Agreement*, fulfils a corrective function: Members are permitted to take corrective measures in order to counter the injurious situation created by dumping. Under the logic of this corrective scheme, the imposition of anti-dumping duties is justified to the extent that they respond to injury caused by dumping. See, for example, Panel and Appellate Body Report in *Mexico – Anti-Dumping Measures on Rice*, paras. 7.58 and 165, respectively.

[247] We are aware that the Spanish text of the Agreement reads: "Habrá de demostrarse que, por los efectos del dumping que se mencionan en los párrafos 2 y 4, las importaciones objeto de dumping *causan* daño en el sentido del presente Acuerdo". The use of the present tense of the verb in the Spanish text confirms to us the necessity that the Agreement envisages that measures may be imposed only where dumped imports cause *current* injury.

[248] We find support for our views in Panel and Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, paras. 7.56 – 7.61 and 165, respectively.

is likely to be inherently more relevant and thus especially important to the investigation. This implies, consequently, that the data considered concerning dumping, injury and the causal link should include, to the extent practicable, the most recent possible information, taking into account the inevitable delay caused by the need for an investigation, as well as any practical problems of data collection in a particular case. We find further, contextual, support for our views in the *Anti-Dumping Agreement*.[249] We also note that past panels and the Appellate Body have underlined the importance for POI data to relate to the recent past, so as to establish the existence of injury caused by dumped imports (as far as practicably possible).[250]

7.229 Moreover, we note that the Committee on Anti-Dumping Practices adopted a Recommendation concerning the Periods of Data Collection for Anti-Dumping Investigations (G/ADP/6, adopted 5 May 2000) which sets forth guidelines for determining what period or periods of data collection may be appropriate for the examination of dumping and of injury. The Recommendation stipulates *inter alia* that the period of data collection should end as close to the initiation of the investigation as is practicable.[251] This Recommendation is a non-binding guide to the common understanding of Members on appropriate implementation of the *Anti-Dumping Agreement*, and does not add new obligations, nor detract from the existing obligations, of Members under the

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[249] For example, in Article 14.2 of the *Anti-Dumping Agreement* dealing with anti-dumping actions on behalf of a third country. Article 14.2 provides as follows:

> "14.2 Such an application [for an anti-dumping action on behalf of a third country] shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping *is causing injury* to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require" (emphasis added).

If such is the case in respect of applications for third country anti-dumping actions, it seems reasonable to conclude that a similar temporal requirement exists when the anti-dumping proceedings relate to injury being caused to a Member's own domestic industry.

[250] For example, Panel Report, *EC - Tube or Pipe Fittings*, para. 7.101 (addressing the dumping POI): "The period of investigation terminates as close as possible to the date of initiation of the investigation in order to ensure that the data pertaining to the investigation period, while historical, nevertheless refers to the recent past ..." (the Appellate Body upheld the Panel's findings on this issue – see Appellate Body Report, *EC - Tube or Pipe Fittings*, para. 84); Panel Report, *US - Hot-Rolled Steel*, para. 7.234: "In our view, a proper evaluation of the impact of dumped imports on the domestic industry is dynamic in nature and takes account of changes in the market that determine the current state of the industry." Further contextual support can be found in the *Agreement on Safeguards*, and Article 2.1 of the *Agreement on Safeguards* in particular. See, for example, Appellate Body Report, *Argentina – Footwear (EC)*, footnote 130; Panel Report, *US - Lamb*, para. 7.192.

[251] Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations (G/ADP/6, adopted 5 May 2000) provides in relevant part that:

> "the Committee recommends that with respect to original investigations to determine the existence of dumping and consequent injury -
> 1. As a general rule:
> (a) the period of data collection for dumping investigations normally should be twelve months, and in any case no less than six months, ending as close to the date of initiation as is practicable;" (footnote omitted) ...
> (c) the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation; ...".

Agreement.[252] We nevertheless observe that it by no means runs counter to our interpretation of the obligations found in the text of the *Anti-Dumping Agreement*.[253]

7.230 There are, of course, potential difficulties with the reliability and probative value of data relating to the period *after* initiation, because those data may be affected by the very existence of the investigation. However, we consider that the investigating authority should rely upon information pertaining to a period approaching, as close as practicable, the date of initiation of the investigation. This is particularly important because the Agreement envisages that an investigation may last 12 - or, in special circumstances 18 - months.[254] Even in an optimal scenario where the POI ends the day before the date of initiation, the data from which conclusions would be drawn relating to current dumping causing injury will be at least 12 (and in special circumstances, 18) months old.

7.231 As we have stated, in the case at hand, duties were imposed pursuant to an initiation approximately eight months after, and a final resolution issued approximately 24 months after, the end of the period of investigation, on the basis of an investigation that lasted 17 months.

7.232 Given these considerations, we evaluate whether, in this case, this gap of eight months between the end of the period of investigation and the initiation of the investigation, and another gap of just over two years between the end of the period of investigation and the imposition of the final anti-dumping duties raises such doubts about the existence of a sufficiently relevant nexus between the data relating to the period of investigation and *current* injury and causal link as to result in a violation of Article 3.1 (and Articles 3.2, 3.4 and 3.5) of the *Anti-Dumping Agreement*. To resolve this issue, we focus on the issue of "remoteness" of the investigation period from the date of initiation, given that the instant investigation took place within the overall time-frames envisaged by the Agreement (and Guatemala does not assert otherwise).[255]

7.233 Mexico insists that the end of the period of investigation was the closest it could possibly have been to the initiation, taking into account, *inter alia*, that this was five months prior to the submission of the application. Moreover, Mexico points out that, during the three-month period between the submission of the application (on 22 May 2001) and the issuance of the Initiation Determination (on 24 August 2001), the investigating authority took steps to assess the information in the application and to require the submission of supplementary information.[256] Economía issued a

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[252] G/ADP/M/7 at para. 40, G/ADP/AHG/R/7, para. 2.

[253] Past panels have similarly referred to this Recommendation in their reasoning. See e.g. Panel Report, *Guatemala – Cement II*, para. 8.266; Panel Report, *US – Hot-Rolled Steel*, footnote 152; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.287.

[254] Article 5.10 provides: "Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation."

[255] We recall Mexico's argument that it is not possible to challenge the selection of a POI in the abstract, because it is necessary to consider the nature and relevance of the data actually gathered during the POI. We note that we are considering the data actually on the record of the underlying investigation in our evaluation of this claim. In respect of Mexico's contention that changes in circumstance which may occur at late stages of a POI may be the subject of subsequent reviews under Articles 9 and 11, we would simply point out that this case does not involve changes occurring late in the POI, nor can the availability of reviews substitute for compliance with obligations governing the initiation and conduct of the investigation.

[256] Exhibit GTM-2, e.g. some questions like 5 and 7 ask about developments during the three six-month periods July-December 1998, 1999 and 2000. As the Mexican investigating authority did not ask any questions directed at assessing the validity of the POI proposed by the applicant, we consider that Economía had already accepted the POI at that point.

"prevención" and assessed the evidence in the application during a period over and above the time required to arrange publication of the notice in the Official Register. In response to questioning as to whether any practical problems necessitated this particular period of investigation; whether it was established that updating the information was not possible; and whether any attempt was made to update the information, Mexico confirmed that, as Economía deemed that the POI was appropriate and that the information before it was adequate in order to complete its investigation, Economía made no attempt to update the information, did not request more recent information and therefore did not experience any practical problems in updating the information.[257]

7.234 We consider that it would have been appropriate and desirable for Economía to collect updated data, if not prior to initiation, then at least for the purposes of its substantive injury analysis.[258] However, we observe that there are practical time constraints in respect of the production, gathering and analysis of data. Particularly in light of the time required for data of the type included in this anti-dumping application to be produced and published, and then collected and analysed by the applicant in order to rely upon it in its application, it was not unreasonable for the investigating authority to rely on a data set terminating eight months prior to the initiation of the investigation.

7.235 In this case, furthermore, the investigation occurred within the overall time frame envisaged by the Agreement. That is, the investigation fell within the time window – i.e. except in special circumstances, 12 months, and in no case more than 18 months – envisaged by Article 5.10 of the Agreement. In any event, Guatemala has made no allegation that the provisions of Article 5.10 are not satisfied. We do not consider that Guatemala has established that the information used by Economía did not reflect a sufficiently relevant nexus between the data relating to the period of investigation and *current* injury and causal link, and thus did not give reliable indications of current injury. Given that the *Anti-Dumping Agreement* does not contain any specific and express rules concerning the period to be used for injury data collection in an anti-dumping investigation, and on the basis of the facts and arguments before us, we do not consider that the period used in this case was remote.

7.236 This is not to say that we are fully satisfied with Economía's selection of the injury POI, and we believe it is instructive to set out our remaining concerns in some detail. We note that Economía adopted the period of investigation proposed by the applicant. It is clear to us that acceptance of the POI proposed by the applicant may not necessarily constitute a violation of Article 3.1, but we are concerned that Economía adopted this period without giving any consideration to whether or not it was appropriate to use this period in the circumstances of this particular case. The record does not

[257] See Mexico's response to question 156 (a) from the Panel. Economía was certainly aware of the possibility of acquiring updated information; this occurred in relation to the applicant's allegation of "threat of material injury" (which is not at issue here). In this respect, the record indicates that Economía did request, in respect of certain injury factors, updated information at least for a similar time period following the POI. See Exhibit GTM-2, Question 9) In response, Hylsa provided certain information pertaining to the first semester (January-June) of 2001, or, in certain circumstances where all of the information was not available, January-March 2001. See Exhibit GTM 3: "The annexes are documented; volume and value, capacity and the financial data which update the situation for the indicators contained in the annexes, for the first six months of 2001. The updated information is documented; some information is still being processed, so not all the information is documented." See also Hylsa's response to Question 10 in Exhibit GTM-3, referring to other information for the period January-June 2001.

[258] Certain record evidence appears to pertain to the post-POI period. For example, the exporter Tubac submitted post-POI information relating to imports into Mexico (Exhibit GTM-5, pp. 24-26); and with respect to the evolution of imports in 2001 (post-POI) (Exhibit GTM-12, p. 25). Tubac was requested to submit evidence on the evolution of export prices from the preliminary investigation to the date of the technical meeting in March 2002 (Exhibit GTM-19, pp. 81-2). This information, in response to Question 28 (a), is confidential.

reflect that Economía gave any such specific consideration. The explanation for the applicant's selection of the period, as reflected in the Initiation Determination and in the Final Determination[259] was that, according to the applicant, it was during this period that dumped imports caused injury to its domestic industry. We consider that it would have been appropriate and highly desirable for the IA to have evaluated whether or not it was appropriate to use this period in the circumstances of this particular case. This would have provided an enhanced assurance of the objectivity of the IA in selecting the injury POI.

7.237 We further note that none of the interested parties, including Tubac, questioned Economía's selection of POI at any point during the underlying investigation. Mexico underlines that the POI was indicated in the Initiation Determination, so that interested parties had knowledge of, and could challenge it, from that point in time; none did. Mexico asserts that Economía was entitled to rely on the POI selected in this case in light of the interested parties' tacit admission of its appropriateness. We have already noted the determinative role of the POI in establishing the framework for injury data collection and analysis for the purposes of Article 3. We believe that the selection of the POI is linked to the IA's obligation under Article 3.1 to conduct an objective assessment of positive evidence and an IA is bound to satisfy its obligations in this respect whether or not it is raised by an interested party in the course of an investigation. By this, we do not mean to suggest that the established rules on burden of proof and standard of review would not apply in the event an investigating authority were challenged in this respect before a WTO Panel.

7.238 In considering the evidence and arguments presented by the parties before us, we have kept in mind the recent case, *Mexico – Anti-Dumping Measures on Rice*. There, the panel found that Mexico had violated Articles 3.1, 3.2, 3.4 and 3.5 of the *Anti-Dumping Agreement* by relying on a period of investigation that ended significantly prior to the initiation of the investigation. In upholding the Panel's decision, the Appellate Body stated:[260]

> "We agree with Mexico that using a remote investigation period is not *per se* a violation of Article 3.1. In our view, however, the Panel did not set out such a principle, as its findings relate to the specific circumstances of this case. The Panel was satisfied that, in this specific case, a *prima facie* case was established that the information used by Economía did not provide reliable indications of current injury and, therefore, did not meet the criterion of positive evidence in Article 3.1 of the *Anti-Dumping Agreement*. The Panel arrived at this conclusion on the basis of several factors. The Panel attached importance to the existence of a 15-month gap between the end of the period of investigation and the initiation of the investigation, and a gap of almost three years between the end of the period of investigation and the imposition of final anti-dumping duties. However, these temporal gaps were not the only circumstances that the Panel took into account. The Panel, as trier of the facts, gave weight to other factors: (i) the period of investigation chosen by Economía was that proposed by the petitioner; (ii) Mexico did not establish that practical problems necessitated this particular period of investigation; (iii) it was not established that updating the information was not possible; (iv) no attempt was made to update the information; and (v) Mexico did not provide any reason—apart from the allegation that it is Mexico's general practice to accept the period of investigation submitted by the petitioner—why more recent information was not sought. Thus, it is not only the remoteness of the period of investigation, but also these other circumstances that formed the basis for the Panel to conclude that a *prima facie* case was established. In the light of the general assessment of these other circumstances carried out by the Panel as trier of the facts, we accept that a gap of 15 months between the end of the

[259] See Exhibit GTM-4, para. 90 and Exhibit GTM-23, para. 152 *ff*.

[260] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 167.

> period of investigation and the initiation of the investigation, and another gap of almost three years between the end of the period of investigation and the imposition of the final anti-dumping duties, may raise real doubts about the existence of a sufficiently relevant nexus between the data relating to the period of investigation and current injury. Therefore, we have no reason to disturb the Panel's assessment that a *prima facie* case of violation of Article 3.1 was made out." (footnotes omitted)

7.239 We have taken careful note of the considerations in that case. In our view, a key distinction between that case and the case before us is a factual one. That is, the temporal gaps in the instant case are not as large, with the result that the investigation period in the case at hand is not as "remote" as in the *Rice* case. By choosing to base its determination of injury on a period of investigation which ended eight months before the initiation of the investigation, and not updating the information, Economía indubitably lacked the *most* pertinent, credible and reliable information. However, given the practical time constraints inherent in the production of data that must then be collected and analysed by the applicant (in order to be relied upon and submitted in the application), and then analysed by the investigating authority, and given that the investigation occurred within the overall time constraints envisaged by the Agreement, we do not consider that Guatemala has established that the temporal gaps in this case precluded Economía from making a determination of injury based on positive evidence and which involved an objective examination.

7.240 For these reasons, we find that Guatemala has failed to establish that, in the circumstances of this case, Economía violated its obligations under Articles 3.1, 3.2, 3.4 and 3.5 by relying on data from an investigation period that terminated about eight months prior to the initiation and about two years prior to the imposition of the definitive measures.

3. Use of six-month periods for the injury analysis

(a) Arguments of the parties

(i) Guatemala

7.241 **Guatemala** argues that Mexico acted inconsistently with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement as it improperly limited its injury analysis to data relating to six-month periods each year within the period of investigation (July–December 1998, 1999 and 2000), resulting in a determination of injury and causal link that was not based on an objective examination of positive evidence.

(ii) Mexico

7.242 **Mexico** contends that Guatemala fails to establish a *prima facie* case that its investigating authority did not comply with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement in using six-month periods from each year of the period of investigation for the purposes of its injury analysis.

(b) Arguments of the third parties

7.243 The **European Communities** endorses Guatemala's assessment under Articles 3.1, 3.2, 3.4 and 3.5. According to the European Communities, in this case, there is no indication that the selective use of six-month data is justified (e.g. on seasonal grounds).

7.244 **Japan** takes no position on the factual aspects of this case, but asserts that there would not be an objective examination required by Article 3.1 if authorities consider only limited information out of a limited period of each year without "proper justification".

7.245 The **United States** agrees with Guatemala that an objective determination cannot be based on an incomplete series of data unless the investigating authority provides a justified explanation for doing so. While there does not appear to be evidence that the six-month periods used here were periods of highest import penetration, it would in most cases be difficult to demonstrate dumping causing current injury by looking at six-month snapshots over a three-year period.

(c) Evaluation by the Panel

(i) Factual background

7.246 We begin with the undisputed facts on the Panel record. Economía adopted the dumping and injury POIs proposed by the applicant. For its dumping determination, Economía relied upon data pertaining to a six-month POI: July-December 2000. In making its injury determination, Economía identified the same six-month period as the "POI" and relied principally upon data from three six-month periods (July-December 1998, 1999, 2000).[261]

(ii) Analysis

7.247 We see the issue raised by Guatemala's claim as whether Economía fulfilled the Article 3.1 obligation to conduct an objective examination of positive evidence in relying on data from three six-month periods (July-December 1998, 1999, 2000) in making its injury determination. As already mentioned, because Article 3.1 sets out an overarching principle that informs the injury obligations in the rest of Article 3, our views on this issue will also resolve Guatemala's claims here under Articles 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.

7.248 As we have already emphasized, the selection by an investigating authority of the period of investigation is a critical element in the anti-dumping investigative process: it determines the data that will form the basis for the assessment of dumping, injury and the causal relationship between dumped imports and the injury to the domestic industry.

7.249 We agree with Mexico to the extent it argues that the Anti-Dumping Agreement does not set forth any express requirement regarding the choice of the period of investigation for the purpose of conducting an injury analysis.[262] However, as also acknowledged by Mexico, this does not mean that an investigating authority's discretion in respect of the period it selects as the basis for its injury analysis is unlimited.[263] We consider that the Article 3.1 requirement to base a determination of injury on positive evidence and pursuant to an objective examination nevertheless impose certain limitations on an investigating authority's discretion with regard to the comprehensiveness and reliability of the data used as the basis for its injury determination. In this respect, we recall that, under the standard of review set forth in Article 17.6 of the Anti-Dumping Agreement, we are called

[261] The notice of initiation, Exhibit GTM-4, para. 90, indicates that the applicant, "proposed the period from July to December 2000 as the period to be investigated because during that time imports of standard pipe from Guatemala were carried out in conditions of price discrimination, which was reflected in a deterioration of its production plant, commercial activity and financial operations. The Ministry determined the period July-September 2000, which meets the requirements laid down in the law, as the period to be investigated".

See also Exhibit GTM-23, para. 152. In its determination, Economía relied principally on data from July-December 1998, 1999 and 2000. See Exhibit GTM-23, paras. 156 *ff*.

[262] We refer to and incorporate our views above, para.7.225.

[263] See e.g. Mexico's response to question 44 from the Panel.

upon to assess whether the investigating authority's establishment of the facts was proper, and its evaluation unbiased and objective.[264]

7.250 We consider that an objective examination of positive evidence of the effects of dumping on the state of the domestic industry which enables the authority to conclude that dumped imports are causing injury to the domestic industry involves an analysis of trends over time of the volume and price of imports and of the state of the domestic industry. It is only such an analysis that will enable the authority objectively to gauge the effects of the dumped imports on the domestic industry as required by Articles 3.1, 3.2 and 3.4 of the Anti-Dumping Agreement, and to assess whether the injury found to exist is caused by the dumped imports, as required by Article 3.5 of the Anti-Dumping Agreement.[265]

7.251 We therefore consider whether Economía's use of a subset of data temporally limited to July-December 2000[266] and the corresponding six-month periods in the two previous years (1998, 1999), was capable of yielding an accurate and representative picture that in turn enabled Economía to make an objective examination of positive evidence in reaching its affirmative injury determination.

7.252 We are of the view that, absent any proper justification for doing so, such an examination on the basis of an incomplete set of data proposed by an applicant cannot, in principle, be an objective examination of positive evidence. In our view, an investigating authority is precluded from using temporal subsets within a period, without a sufficient explanation and without a consideration as to whether the developments within that temporal subset are reflective of developments throughout the period or whether and why these subsets are justified and not anomalous. This truncated temporal approach of using only certain data for the injury analysis does not constitute a proper establishment of the facts on which to base the determination.

7.253 We hasten to point out that our decision should not necessarily be understood to say that there could never be any convincing, valid reasons for examining data pertaining to only certain parts of years (although, in our view, that may be an exceptional case). However, in the case at hand, Mexico has not presented any effective refutation to Guatemala's claim by pointing to a proper justification by Economía for the use of the six-month periods. Mexico's main justification before us was a "structural symmetry" argument that the period of investigation for purposes of the dumping determination was July-December 2000, and that, therefore, a corresponding six-month period should be used in the injury analysis in order to avoid "distortions" in the comparison between the period of investigation for purposes of the dumping determination and the period of investigation for purposes of the injury analysis. In particular, Mexico asserted:

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[264] The Appellate Body in the *EC – Bed Linen (Article 21.5 – India)* case also linked the objective examination requirement with the panel's standard of review that requires it to examine whether the authority's establishment of the facts was proper. The Appellate Body explained:

> "These requirements of paragraphs 1 and 2 of Article 3, as well as the requirements of Article 17.6(i), that investigating authorities establish the facts of the matter *properly* and evaluate those facts in an *unbiased and objective* manner, are mutually supportive and reinforcing. "
>
> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, footnote 141.

[265] We find support for our approach in Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.80. The Appellate Body upheld the Panel's finding on this issue. See, in particular, Appellate Body Report, paras. 180-188.

[266] See *supra*, para. 7.246.

> "... Mexico carried out an analysis and objective evaluation, taking account of previous comparable periods in order to avoid distortions in the comparison of the period of investigation of dumping with the period of injury analysis".[267]

7.254 However, while it is certainly appropriate for the injury POI to include the entirety of the dumping POI, we see no necessity or requirement in the *Anti-Dumping Agreement* for a period of investigation on the injury analysis to be limited strictly to the period of investigation for the dumping analysis, particularly where the latter period of investigation covers a period of less than 12 months.

7.255 Although Mexico asserted that Economía used "symmetrical" six-month periods from each year in order to avoid distortions[268], Mexico also confirmed that it was not, in fact, arguing that the use of data pertaining to six-month periods would provide better information than the use of annual data, or that the use of annual data would produce distortions.[269] In any event, it is not clear to us how the use of data relating to the whole three-year period, as opposed to three six-month periods within those years, would have introduced distortions (or would have resulted in more distortions) to the assessment of the "state of the domestic industry". In this respect, we find support in the following statement of the Appellate Body in *Mexico – Anti-Dumping Measures on Rice*:[270]

> "We fail to see how, in the present case, the use of data relating to the whole year, as opposed to the March to August period, would have introduced "distortions" of the assessment of the "state of the domestic industry". Rather, in our view, examining data relating to the whole year would result in a more accurate picture of the "state of the domestic industry" than an examination limited to a six-month period."

Similarly, in the case at hand, we consider that an examination of data relating to the whole years would produce a more accurate and representative picture of the "state of the domestic industry" than an examination limited to three six-month periods.

7.256 We note that companies customarily maintain annual financial, investment and accounting records. In this case, certain data pertaining to the entire three-year period was on the record.[271] Mexico asserted, and the Preliminary (and Final) Determinations confirm, that financial information pertaining to Hylsa-DAT was submitted on an annual[272], as well as semestral, basis, and Economía asserted that it was able to verify the correspondence between the two. In response to questioning,

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[267] Mexico first written submission, para. 196.

[268] See, for example, Mexico's first written submission, paras. 194-196. At para. 195, Mexico stated: "that a semester of a year is structurally the same as the corresponding period of the previous year".

[269] See Mexico's response to question 155 from the Panel.

[270] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 183.

[271] Exhibit GTM-1, question 62, indicates that Economía sought, for example, with respect to sales, "monthly information for the thirty-six months making up the period analysed ...". Annex 6 of the applicant's questionnaire in Exhibit GTM-1 indicates that Economía requested and received "Statement of costs, sales and profits of the like product" on an annual basis (for 1988, 1989) and for the six-month periods, July-December 1999 and 2000. Exhibit GTM-1, applicant's questionnaire, Annex 4 ("Domestic market indicators"), 5A ("Applicant company's indicators, volumes") and 5B ("Applicant company's indicators, values") reflect monthly data over the three years. As a further example, the 17 December 2001 requests from Economía to domestic firms and CANACERO contained a chart asking for economic injury factor data relating to the first *and* second semesters of 1998, 1999 and 2000, as well as any imports between January 1998 and December 2000.

[272] See Preliminary Determination, Exhibit GTM-10, para. 169; see Final Determination, Exhibit GTM-23, e.g. paras. 215, 219-225.

Mexico further asserts that Economía never translated annual information into semestral information, as most of the information on economic indicators was given on a monthly basis.[273] We consider that Mexico's account is not altogether consistent throughout these proceedings and it is not evident to us from the record how Economía conducted such a reconciliation.[274] Moreover, such reconciliation would only have been in respect of a subset of the injury data used to reach the overall injury determination. Furthermore we note that Mexico's position in this dispute is that it was unnecessary to seek full-year data:[275]

> "Bearing in mind that the second half of 2000 was taken as the period of investigation and hence the same previous periods for the purpose of comparison, with regard to economic indicators, no consideration at all was given to whether or not to take into account any information corresponding to the period of thirty-six months, or to the reconciliation of the trends in the three six-month periods with the annual information. However, it should be pointed out that in the case of financial indicators, for variables where there was only annual information, the analysis took account of full years."

7.257 We consider it significant that, in response to questioning as to: (i) whether any practical problems necessitated the use of the particular POI relied upon in this investigation for the injury analysis; (ii) whether it was established that use of a comprehensive data set pertaining to the whole three years was not possible or practicable; (iii) whether Economía considered the representativeness of the semestral data *vis-à-vis* the data for the entire three year period; and (iv) whether any attempt was made to gather a comprehensive data set pertaining to the whole three years, Mexico confirmed that, as Economía deemed that the POI was appropriate and that the information before it was adequate in order to complete its investigation, Economía made no attempt to gather and/or analyse a complete data set for the three years.[276] Nevertheless, the record indicates that, for certain injury factors, Economía did take annual information into account.[277] We consider that Economía did not perform a comprehensive assessment of the extent to which the injury data upon it relied provided an accurate reflection of the state of the domestic industry over the whole three-year period concerned (1998, 1999, 2000).[278]

7.258 We recall the disagreement between the parties as to whether or not record evidence indicated that the POI used by Economía was "selective" in the sense, for example, of being the period of

[273] Mexico's response to question 160 from the Panel. Mexico asserts in response to question 160 (a) from the Panel that, "[t]o validate this information in operational terms, the investigating authority added up the headings sales income, cost of sales, gross profit, operating expenses and operating profit for the first and second semesters and the result obtained was equal to the figures for the same headings in annual terms. The Ministry therefore deemed the figures for the first semester to be correct as regards economic indicators".

[274] The Preliminary Determination, Exhibit GTM-10, paras. 169-170 indicates, for example, that "Hylsa, Division of Steel Tubing,… provided by the applicant in annual terms. For the sake of financial comparability, the Ministry updated the financial information on the basis of the method of changes in the general level of prices …".

[275] See Mexico's response to question 52 from the Panel.

[276] See Mexico's responses to questions 30 and 47-53 from the Panel.

[277] See the table summarizing time periods taken into account in respect of the various injury factors in Guatemala's first written submission, para. 262.

[278] We recall our view of the determinative role of the POI in terms of the Article 3.1 obligation to perform an objective examination of positive evidence, and incorporate here our views expressed in para.7.237 *supra.*

highest import penetration. The question arises because Economía departed from a POI with comprehensive and continuous temporal coverage by accepting the applicant's proposed POI, and the two previous six-month periods. Moreover, because Economía gave no comprehensive consideration as to whether and how the trends within the six-month periods related to developments outside that period, it is not clear to us how Economía could have been confident that its approach avoided, rather than caused, distortions, and, in particular distortions that might have been favourable to the applicant. In the Initiation Resolution, Economía stated that the applicant "said that consumption of standard pipe is largely related to the behaviour of the construction and manufacturing industries. The applicant stated in particular that on the domestic market consumption of standard pipe is the same all year except for a few months where, for fiscal reasons, there is an increase, as in December, or a drop, as in April ...".[279] The Final Determination reads, in part: "... the applicant stated that on the domestic market consumption of the pipe under investigation is normally constant all year, other than in a few months for fiscal reasons."[280] We consider that the applicant's indication of variations in consumption patterns should have provided even more of an incentive for Economía to evaluate how such alleged trends within an annual period may or may not have been reflected in the data pertaining to the three six-month periods relied upon by Economía. However, the record indicates that Economía accepted the applicant's assertion without undertaking any such comprehensive evaluation.[281] Even though there is no clear indication in the record that the POI was chosen in order to be "biased" in favour of the applicant, as for example, to reflect a period when imports clearly increased, in the absence of any explanation as to whether or how the POI consisting of the six-month period proposed by the applicant, and two previous periods of six-months was appropriate and reflective of the state of the domestic industry over the relevant period, we consider that the POI was indeed "selective" in the circumstances of this case.

7.259 We note Mexico's argument that none of the interested parties, including Tubac, questioned Economía's selection of POI at any point during the underlying investigation. Mexico underlines that the POI was indicated in the initiation notice, so that interested parties had knowledge of, and could challenge it, from that point in time; none did. Mexico asserts that Economía was entitled to rely on the POI selected in this case in light of the interested parties' tacit admission of its appropriateness. However, as the selection of the POI is linked to an investigating authority's obligation under Article 3.1 to conduct an objective assessment of positive evidence, that authority is bound to satisfy its obligations whether or not this issue is raised by an interested party in the course of an investigation.[282] We therefore do not believe that the fact that the issue was not raised by any interested party in the course of the underlying investigation justifies the lack of any attention to this issue by Economía.

7.260 We recall the findings of the panel (upheld by the Appellate Body) in the recent *Mexico – Anti-Dumping Measures on Rice* dispute. Considering a claim of inconsistency with Article 3.1, that panel (upheld on appeal) found that the data used by the Mexican investigating authority – similarly pertaining to six-month periods within the investigation period – did not provide an "accurate and

[279] Exhibit GTM-4, para. 88.

[280] Exhibit GTM-23, para. 151. See similar citation in the preliminary resolution, Exhibit GTM-15, para. 113.

[281] We note Mexico's reference (in paragraph 155 of Mexico's rebuttal submission) to paras. 202 and 203 of the Final Determination, where Economía sets out its findings that the Mexican market, measured in terms of consumption, "remained practically constant in the periods July-December 1998 and 1999, then rose 5 per cent in the period July-December 2000 …". We do not consider that this finding of essentially "constant" consumption in relation to developments in the six-month periods is necessarily reflective of developments in the other six-month periods in those years.

[282] See *supra*, para.7.237.

unbiased picture". That panel found an inconsistency with Article 3.1 not only due to the investigating authority's selective use of the information gathered for the purpose of the injury analysis (without any proper justification), but also the acceptance by the investigating authority of the period of investigation proposed by the petitioner, knowing that the petitioner proposed that period because it allegedly represented the period of highest import penetration. In the specific circumstances of that case, these two factors, considered together, were sufficient to make out a *prima facie* case that the data used by the investigating authority did not provide an "accurate and unbiased picture". The panel (upheld on appeal) found that Mexico had not presented an "effective refutation" of that *prima facie* case by providing a proper justification for the use of the six-month period. The only explanation presented by Mexico was that the period of investigation for purposes of the dumping determination was March to August 1999, and that, therefore, a corresponding six-month period should be used in the injury analysis in order to avoid "distortions" in the comparison between the period of investigation for purposes of the dumping determination and the period of investigation for purposes of the injury analysis. Although the case is, in some respects, similar to the one before us, we wish to point out that our finding here rests on a slightly different basis. That is, while our finding rests in part on the "selectivity" inherent in Economía's acceptance of the injury POI proposed by the applicant without sufficient justification, we also focus upon on the non-comprehensiveness and unreliability of the factual basis used by Economía, i.e., an incomplete data subset from three six-month periods in 1998, 1999 and 2000 that had been proposed by the applicant and accepted by Economía without sufficient evaluation and justification of its representativity of developments over the injury POI.

7.261 For the above reasons, we find that Economía's reliance, without sufficient justification, upon a subset of data temporally limited to three six-month periods (July-December) over three consecutive years (1998, 1999, 2000), as proposed by the applicant, was not capable of yielding an accurate and representative picture enabling Economía to make an objective examination of positive evidence in reaching its affirmative injury determination. We therefore find that Economía acted inconsistently with Mexico's obligations under Articles 3.1, 3.2, 3.4 and 3.5 of the *Anti-Dumping Agreement*.

4. Volume and price effects of dumped imports

(a) Arguments of the parties

(i) Guatemala

7.262 **Guatemala** claims that Mexico violated Articles 3.1 and 3.2: (i) in estimating the volume of imports of the product under investigation from countries other than Guatemala by using a non-representative sample for six-month periods, and by applying unfounded hypotheses (according to Guatemala, the resulting figures were not positive evidence and the IA's examination of them was not objective; such imports are a component of domestic consumption in the injury analysis and the IA relied on such evidence in concluding that the increased imports from Guatemala (relative to domestic consumption) had had negative volume and price effects in the Mexican market); (ii) in evaluating the price effects of imports from Guatemala, Economía used an insufficient sample of 17 per cent of all imports from Guatemala, and performed its analysis of price effects for only for one six-month period (July-December 2000).

(ii) Mexico

7.263 **Mexico** counters that the estimation methodology used by the IA for imports from sources other than Guatemala was sound, that no alternative source existed for the information, and that the sample it relied on was representative as it was based on significant volumes out of the total imported, and reflected data for the largest importers. In respect of the price effects of imports from Guatemala, Mexico disagrees with the factual premise of Guatemala's allegation, arguing that the 17 per cent

sample was used only for the purpose of estimating the charges for bringing the imported merchandise from the port of entry to the Mexican customer's warehouse. Therefore, Mexico argues, the IA's conclusions as to the volume and price effects of the dumped imports were in conformity with the obligations in Articles 3.1 and 3.2 of the Agreement.

(b) Evaluation by the Panel

7.264 We consider whether Economía conducted an objective examination based on positive evidence in its analysis of the volume and price effects of the dumped imports. Guatemala's allegations in respect of Economía's treatment of the volume and price effects of the dumped imports in the course of its injury analysis under Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* focus on two main elements: first, the methodology used by Economía to estimate the volume of the investigated product from sources other than Guatemala (used as a component in estimating domestic consumption); second, the sample and period used to estimate the price effects (or aspects of these effects) of imports from Guatemala. We consider each in turn.

(i) Methodology to estimate volume of imports from sources other than Guatemala

7.265 We begin our analysis by recalling the text of Articles 3.1 and 3.2 of the Anti-Dumping Agreement, cited above. We agree with the views in previous dispute settlement reports that it flows from reading these two provisions together that the basis of any evaluation as to the volume of dumped imports or the price effects of such imports has to be "positive evidence".[283] As we have already stated, the term "positive evidence" in Article 3.1 relates "to the quality of the evidence that authorities may rely upon in making a determination" and that "[t]he word 'positive' means ... that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible."[284] We also recall that, in Thailand – H-Beams, the Appellate Body said that "Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation" with respect to the injury determination, and that this general obligation "informs the more detailed obligations" in the remainder of Article 3.[285] Therefore, the question before us is whether Economía based its determinations regarding the volume of dumped imports from sources other than Guatemala and the effect of the dumped imports on prices in the domestic market on information that has the quality of positive evidence.

7.266 As discussed in detail at paragraphs 7.44 to 7.59, supra, from the outset of the investigation, it was clear that the two tariff lines under which the investigated product was classified (7306.30.01 and 7306.30.99) also covered other products. The Final Determination shows that Economía was conscious of the need to distinguish the subject imports – both from Guatemala and from other sources – from imports of all other products entering under the two relevant tariff lines.

7.267 More specifically, in respect of import volumes, Economía relied on estimates derived from import statistics and samples of "pedimentos" and their underlying invoices. By the final phase of the investigation, Economía had obtained customs documentation and invoices covering nearly 100 per cent of the "investigated product" imported from Guatemala during the three six-month periods reviewed.

[283]Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.98; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 202.

[284]Appellate Body Report, *US – Hot-Rolled Steel*, para. 192.

[285]Appellate Body Report, *Thailand – H-Beams*, para. 106.

7.268 Economía explained in the Final Determination how it established the volume of dumped imports of the subject product from Guatemala into Mexico.[286] In respect of the volume of subject imports from Guatemala, the Determination indicates that Economía:

> "... collected 31 copies of additional 'pedimentos' with their respective invoices corresponding to imports from the Republic of Guatemala under TIGIE tariff items 7306.30.01 and 7306.30.99, so that together with the 312 in its possession in the preliminary stage, it had a total of 343 import pedimentos, 202 of which corresponded to import transactions in the period July-December 2000, 137 to transactions in the same period of 1999 and 4 in the same semester of 1998; these 'pedimentos' covered nearly 100 per cent of the volume imported from the Republic of Guatemala for the period analysed."[287]

7.269 On the basis of this information, Economía asserted:

> "According to the characteristics and specifications of the investigated product in the product likeness section of this Resolution, an analysis of the documentation gave the following results: in the periods July-December of 1998, 1999 and 2000, 79, 66 and 64 per cent of the import volume correspond, respectively, to investigated products, and the remaining percentages to non-investigated products. In particular, in the period July-December 2000, of the volume identified as investigated products 82 per cent corresponded to pipe manufactured to standard ASTM A-53 and 89 per cent was schedule 40."[288]

7.270 In respect of imports of the product under investigation under the two relevant tariff lines from countries *other than* Guatemala, the Final Determination indicates:[289]

> "... the Ministry collected 599 copies of "pedimentos" with their respective invoices, corresponding to imports from countries other than the Republic of Guatemala under TIGIE tariff items 7306.30.01 and 7306.30.99, so that in all, including those of the preliminary stage, the IA was in possession of a total of 673 import 'pedimentos', 546 of which corresponded to import transactions in the period July-December 2000, 79 to transactions in the same period in 1999 and 48 in the same period in 1998; these "pedimentos" covered respectively 48, 16 and 10 per cent of the total volume imported from sources other than the investigated country in the periods indicated."

7.271 To estimate the volume of imports of the investigated product from sources other than Guatemala, Economía applied the following methodology:

> "... for each period referred to, maximum and minimum prices were identified for the imports identified as investigated products, on the basis of the invoices and import 'pedimentos' reviewed. Then, on the basis of the SICMEX list of import 'pedimentos', from the operations involving imports from sources other than Guatemala, those transactions were identified that fell within the minimum and

[286] Exhibit GTM-23, Final Determination, paras.163-165. See also paras. 120-121 of the Preliminary Determination in Exhibit GTM-10.

[287] Exhibit GTM-23, para. 164.

[288] Exhibit GTM-23, para. 165.

[289] Exhibit GTM-23, para. 166.

> maximum price range of the import operations identified as pipe subject to investigation."[290]

7.272 On this basis, Economía estimated that in the July-December periods of 1998, 1999 and 2000, the investigated products accounted for 81, 72 and 67 per cent of the total volume and 65, 58 and 49 per cent of the total value of imports from countries other than Guatemala, respectively.

7.273 Thus, in respect of imports from sources other than Guatemala, Economía obtained documentation covering not more than 48 per cent of the total imports under the relevant tariff categories during these periods.[291] As we have already mentioned, from these documents Economía estimated the total import volume of the investigated products from countries other than Guatemala by identifying the ranges of minimum and maximum prices for the imports known to be of the relevant product, then assuming that all imported products with prices within those ranges were investigated products.

7.274 According to Guatemala, import figures are an important component in the calculation of apparent domestic consumption, and Article 3.2 requires the volume effect of dumped imports to be assessed *inter alia* against domestic production or consumption. Therefore, according to Guatemala, both the IA's calculation of consumption, and its analysis of whether dumped imports had increased relative to consumption, were flawed. Guatemala further argues that the IA should have based its analysis on evidence that was more "positive" or at least should have explained in its determinations why it was not possible to use 100 per cent of the customs documents, and why the sampling methodology that it used was reasonable.

7.275 It is clear that, as argued by Guatemala, the volume of imports from countries other than Guatemala formed part of Economía's injury determination. The Final Determination indicates that:

> "... in order to assess whether, in the period investigated, there was an increase in imports in relation to internal consumption and domestic production, an estimate was done of the size of the Mexican market for the investigated pipe, on the basis of domestic production figures plus imports less exports. Imports were calculated using the methodology described in points 163 to 169 of this Resolution."[292]

7.276 We note that, in the course of the investigation, Tubac contested the validity of the methodology used by Economía in estimating the volume of imports from sources other than Guatemala.[293] Tubac also indicated, in the course of the investigation, that it did not have the necessary information to offer an alternative estimate of the volume of such imports.[294]

7.277 The parties' claims and arguments about the sampling and estimation techniques in respect of imports from sources other than Guatemala raise the question whether the methodology for calculating the volume of imports from sources other than Guatemala rested on sufficient evidence

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[290] Exhibit GTM-23, paras. 167 and 168.

[291] As indicated in the Final Determination, Exhibit GTM-23, para. 166, the coverage of the samples of customs documents and related invoices was 48 per cent for July-December 2000, 16 per cent for July-December 1999 and 10 per cent for July-December 1998.

[292] Exhibit GTM-23, para. 173.

[293] Exhibit GTM-23, para. 159.

[294] Exhibit GTM-23, para. 161.

and substantiated assumptions so as to constitute positive evidence for the purposes of Articles 3.1 and 3.2. In particular, we must consider whether the use of this methodology – based on samples of 48, 16 and 10 per cent of imports of the product from sources other than Guatemala in the three relevant periods of 2000, 1999 and 1998, respectively, and the application of a price range test - resulted in an injury analysis that was consistent with the requirements under Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* to conduct an objective examination based on positive evidence of the volume and price effects of the dumped imports.

7.278 In considering the soundness of the methodology used by the IA in respect of the imports of the investigated product from sources other than Guatemala, we recall the following statement of the Appellate Body:

> "... Articles 3.1 and 3.2 do not prescribe a methodology that must be followed by an investigating authority in conducting an injury analysis. Consequently, an investigating authority enjoys a certain discretion in adopting a methodology to guide its injury analysis. Within the bounds of this discretion, it may be expected that an investigating authority might have to rely on reasonable assumptions or draw inferences. In doing so, however, the investigating authority must ensure that its determinations are based on 'positive evidence'. Thus, when, in an investigating authority's methodology, a determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified."[295]

7.279 Mindful of these considerations, we examine the soundness of the methodology applied by Mexico, in particular, the resort to the "pedimento" samples concerned and the application of the price range test.

7.280 In respect of the "pedimento" samples, Mexico opted to request such customs documentation from private sources, such as customs agents, instead of from the presumably comprehensive official set of "pedimentos" in the hands of the Treasury ministry (another Mexican government agency). Mexico replied as follows to the Panel's query as to why the IA (a Mexican government agency) resorted to seeking samples from private sources, instead of from the other government agency and whether it would have been practicably impossible for Economía to have obtained the customs documentation concerned directly from "the office of the Treasury":

> "In our view the term 'impossible' is not the most apt. What is true is that the Ministry has great difficulty in obtaining documentation from the offices of the Treasury, although the two are government agencies. The steps the Ministry takes to obtain the relevant information do not always achieve the best results, because the body from which the information is sought does not always respond.
>
> In practice, to ask for information in the possession of the customs authorities would mean a very long delay in the investigation as well as imposing a very considerable administrative burden. In fact, this step alone would have taken up a fairly long period and affected the time limits for the investigation, with the possibility , too, of not obtaining the information. It is for this very reason that, in an attempt to obtain reliable and timely information so as meet deadlines, the Ministry addresses requests for information to customs agents and importers. However, the IA also lacks the authority to require customs agents or importers to supply the information sought.

[295] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204.

> Even when it approaches these bodies, the Ministry frequently fails to obtain all the information requested …".[296]
>
> By way of illustration, in a recent case (involving brushes from China), import 'pedimentos' with the corresponding invoices were requested from the Treasury. The latter took about three months to provide the Mexican authority with 30 'pedimentos' and their invoices (it is reasonable to suppose that the time taken would increase according to the Treasury office's workload at the time the request is made by the Mexican IA). Another case in which there were delays of this kind is that involving valves from the United States ...".

7.281 Mexico further indicated that,

> "... as part of its administrative practice, when trying to obtain reliable and timely information so as to meet deadlines applying under anti-dumping legislation, the IA normally addresses requests for information directly to customs agents and import companies (often interested parties), which likewise have the documentation for the imports but which nearly always take a reasonably shorter amount of time to respond than would the Treasury if asked to supply the information ...".[297]

7.282 From this, we understand that it would not have been physically or technically impossible for Mexico to have made a request to the Treasury Ministry for "pedimentos", but rather that it might have taken some time to receive the requested "pedimentos". We recall the example given by Mexico of another recent case in which the SHCP took three months to produce certain requested "pedimentos".[298] This does not convince us that the time required by Treasury to produce a comprehensive, or at least statistically robust, set of "pedimentos" could not have been accommodated within the timeframe of the normal anti-dumping investigation. We recall that Article 5.10 of the *Anti-Dumping Agreement* provides: "Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation." The investigation at issue lasted approximately 17 months. It seems to us that if Economía had made a request at or near the outset of the investigation, it could have received a comprehensive, or at least statistically robust, response well within the time-frames of this investigation. We would have vastly preferred that Economía acquire a comprehensive official data set – or at least a statistically robust sample – from the competent Mexican government agency. We believe that such information would have been the best available source to calculate volumes of imports from sources other than Guatemala. However, we are aware that, for certain Members, considerable periods of time may be needed in order to acquire such information from the competent government agencies, and that, for the purposes of conducting a timely investigation as required by the Agreement[299], it may not always be possible to acquire such information from a government source. In any event, we do not consider that simply by not seeking information from official government sources, Economía's analysis would necessarily be flawed.

7.283 In respect of the limited "pedimento" samples of varying magnitudes in question (i.e. 48, 16 and 10 per cent), Mexico explains that Economía was able to get almost 100 per cent of the "pedimentos" pertaining to imports from Guatemala because the volume of such imports was not as

[296] Mexico's response to question 72 from the Panel.

[297] Mexico's response to question 72 from the Panel.

[298] Exhibit MEX-4.

[299] In particular, Article 5.10.

high as the volumes of imports from sources other than Guatemala, and there were not very many transactions. We are aware that the number of import transactions from countries other than Guatemala was relatively high and that, as Mexico argues, Economía requested a larger set of "pedimentos" than it finally obtained.[300] We nevertheless consider that Economía should have better demonstrated or explained why it was not possible to obtain the actual figures using the "pedimentos" or at least to have obtained more comprehensive/better samples, in terms of magnitude and consistency over time. The Preliminary Determination[301] indicates that the IA anticipated receiving 313 fiscal "pedimentos" from 59 customs agents, but that only 16 customs agents produced the requested information; therefore, according to Mexico, the IA received only 22 per cent of what had hoped for. The Final Determination indicates that "the Ministry sought additional information from several import companies and customs agents".[302] Nevertheless, in light of the limited and inconsistent sample sizes available at the time of the Final Determination, there is no indication that Economía attempted to find another way to bolster the robustness of its sample sizes, or reconcile its samples more comprehensively with the overall picture of imports from sources other than Guatemala.[303]

7.284 With respect to the price range test applied by Mexico to identify the product that it would take into account for the purposes of estimating the volume of imports from sources other than Guatemala, we observe that there is no explanation as to why this test would produce a systematic, reliable, or statistically valid result. There is no substantiation of the price assumptions underlying this approach. We note that Mexico admits that "... for the imports from countries other than Guatemala, the documentation was to some extent limited ... it is clear that the volume of the pipe under investigation was estimated using the methodology of the maximum and minimum prices identified for the investigated pipe ...".[304] Mexico further asserted:

> "Considering that the volumes of the investigated pipe from countries other than Guatemala were the result of an estimate made using maximum and minimum prices that the IA identified for import transactions for the investigated pipe, on the strength of the documentation in its possession it is reasonable to assume that in fact non-investigated products could have been included or investigated pipe excluded. The IA nonetheless deemed the methodology to be the most reasonable in the light of the documentation it had."[305]

7.285 We consider that, taken together, the "pedimento" sample sizes of 48, 16 and 10 per cent and the price range test that Economía applied to these imports from sources other than Guatemala are not sufficient to give a reliable, representative picture about imports from sources other than Guatemala. We therefore consider that Economía acted inconsistently with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* due to the limited magnitude and consistency of samples, together with the

[300] 1720, 1752 and 2456 transactions for the 1998, 1999 and 2000 periods, respectively. See Mexico's response to question 73 from the Panel; Mexico's first written submission, para. 238.

[301] Exhibit GTM-10, para. 122.

[302] Exhibit GTM-23, para. 163.

[303] Article 55 of Mexico's Ley de Comercio Exterior, Exhibit GTM-14, indicates that Economía is entitled to ask for information from a wide range of sources, including producers, distributors, customs agents or any other person.

[304] Mexico's response to question 102 from the Panel.

[305] Mexico's rebuttal submission, para. 182.

unsubstantiated price range assumptions on which Economía relied to estimate the volume of subject products imported from countries other than Guatemala. An investigating authority that uses a methodology premised on a limited sample and unsubstantiated assumptions does not conduct an examination based on positive evidence. An assumption is not properly substantiated when the investigating authority does not explain why it would be appropriate to use it in the analysis. The assumption with respect to maximum and minimum price range to identify the investigated product on which Economía relied in its methodology played a role in its reasoning. In the Final Determination, Economía did not explain why the use of limited samples of varying magnitudes, together with the price range test, was appropriate and credible in the analysis of the volume and price effects of the dumped imports, or how this methodology would provide an accurate picture of the volume and price effects of the dumped imports.[306]

7.286 We now consider Guatemala's further allegation that Economía assumed that the prices of the products imported from Guatemala and from all other countries were the same in all instances (i.e., that the minimum and maximum prices used to estimated import volumes for the "other" countries were for imports from Guatemala). Mexico asserts that this allegation is based on an incorrect reading of the Final Determination, and that the price range of the subject imports from Guatemala was not used to estimate the volume of the subject imports from the other countries. Our review of the Final Determination persuades us that Guatemala's allegation is factually erroneous.[307] In particular, paragraphs 164-165 of the Final Determination address "pedimentos" relating to imports from Guatemala. By contrast, paragraphs 166-169 address "pedimentos" corresponding to imports from sources other than Guatemala. We have already cited these paragraphs above.[308] They indicate to us that Economía resorted to the "pedimentos" pertaining to imports from sources *other than Guatemala* in order to identify the minimum and maximum price range for those imports and to estimate the volume of those same imports (also with reference to SICMEX statistics pertaining to imports from those other sources).[309] We therefore find that Guatemala has not established this element of its allegation pertaining to the methodology applied by Economía to calculate imports from sources other than Guatemala.

7.287 Guatemala argues that this situation before us is essentially the same as the one found to violate Articles 3.1 and 3.2 in the *Mexico - Anti-Dumping Measures on Rice* dispute, while Mexico asserts that there is little similarity. We believe the facts before us differ from those in the *Mexico – Rice* case. The differences include: (i) in the present case, the methodology in question was used to estimate import volumes for imports from countries other than Guatemala (a practically complete set of actual data derived from "pedimentos" being available in respect of Guatemalan product), while in *Rice* the volume of dumped imports (including those from companies other than the participating

[306] We find support for this approach in Appellate Body Report, *Mexico - Anti-Dumping Measures on Rice*, para. 205.

[307] See Exhibit GTM-23, paras. 167 and 168.

[308] See *supra*, paras.7.268-7.271.

[309] Specifically, Exhibit GTM-23, paragraph 167 indicates that the "pedimentos" concerned were "referred to in the previous point". Paragraph 166 refers to "pedimentos" corresponding to imports from sources *other than* Guatemala. See also Exhibit GTM-23, para. 168. Exhibit GTM-23, para. 160, indicates that Tubac had made a similar allegation before Economía and that Economía's position on this was "... as indicated in points 122 to 126 of the preliminary resolution, account was taken of the minimum and maximum price of imports of pipe identified as subject to investigation from countries other than Guatemala, on the basis of import "pedimentos" supplied by customs agents; these were the prices used to estimate the import volumes from other sources of the investigated product". Moreover, paras. 184-186 of the Final Determination indicate Economía's view that the prices of imports from Guatemala were different from those of imports from other sources.

firms, and as opposed to those that were not dumped) was estimated using a sampling technique; (ii) in the present case, trends were not extrapolated from one period to another, but rather samples (albeit limited and of widely varying magnitudes) were available for each of the three six-month periods concerned. That said, the basic conclusion of the *Rice* panel (upheld on appeal) – that the IA relied on unfounded assumptions in reaching its conclusions as to the volume effects of the subject imports– has a counterpart here in Economía's analysis of imports from sources other than Guatemala, especially given the low coverage of the sample for the six-month period in 2000 and the exceedingly low coverage of the samples for the 1998 and 1999 six-month periods, together with the inherent imprecision of identifying the relevant products on the basis of price ranges.

7.288 For these reasons, we find that the methodology applied by Economía to estimate the volume of imports from sources other than Guatemala – i.e. reliance on limited samples of varying magnitudes for the three relevant periods in 1998, 1999 and 2000 as the basis for identifying the ranges of minimum and maximum prices for the imports known to be of the relevant product, and on the assumption that all imported products with prices within those ranges were investigated products – was inconsistent with the requirements of Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* to conduct an objective examination of positive evidence.

(ii) Price effects

7.289 Guatemala initially asserted that, in evaluating the price effects of the imports from Guatemala (and in particular the price of the imported product in the Mexican market), Economía used a sample of only 17 per cent of the total of such imports for the period July-December 2000, and did not examine the 1998 and 1999 periods. According to Guatemala, this resulted in an inconsistency with Articles 3.1 and 3.2 of the *Anti-Dumping Agreement*. Mexico disagreed with the factual premise of Guatemala's allegation, arguing that the 17 per cent sample was used only for the purpose of estimating the charges for bringing the imported merchandise from the port of entry to the Mexican customer's warehouse (rather than for the overall price of the imported product in the Mexican market). In its oral statement at the first Panel meeting[310], Guatemala asserted that it was not clear from the Final Determination whether the 17 per cent sample pertained only to the charges for bringing the imported merchandise from the port of entry to the Mexican customer's warehouse. Subsequently, in response to questioning from the Panel about this factual discrepancy, Guatemala maintained that even if the 17 per cent sample related only to certain charges and not to the overall price information taken into account to calculate the price of the imported product sold in the Mexican market, its allegation relating to non-representativity and the limitation to one six-month period remained valid. In particular, Guatemala alleged:

> "... In Guatemala's view, Economía's argument is not a satisfactory response to the questions about its price analysis. For example, Guatemala takes issue with the fact that having collected import 'pedimentos' for 100 per cent of the imports from Guatemala, Mexico used only 17 per cent of the imports in calculating the price of the imported good after entry (assuming also that, as Mexico says, the 17 per cent of the sample refers solely to charges on imports (*gastos de internación*)). In its reply Mexico does not deny that Economía used only a part of all the information at its disposal – only the import charges for the purpose of calculating the total internal price of all the imported products. Nor does Mexico deny Guatemala's assertion that although it had 100 per cent of the import 'pedimentos' for 1998 and 1999, it did not

[310] Guatemala's first oral statement, para. 37.

> determine the overall price (*precio nacionalizado*) for the imported product for 1998 and 1999. Economía's analysis is therefore wrong".[311] (footnote omitted)

7.290 The issues raised by the parties' arguments are addressed in paragraphs 186 and 190-194 of the Final Determination. Paragraph 186 of the Final Determination indicates how Economía calculated the prices of the investigated product:

> "... in order to estimate the prices for the pipe under investigation, the Ministry calculated the average prices of the imports from Guatemala and those from other sources of supply for the periods July-December 1998, 1999 and 2000 using the figures for value and volume of the total imports recorded in the SICMEX, adjusted according to the methodology described in points 163 to 169 of this Resolution."

7.291 Paragraph 190 of the Final Determination, which deals with the comparison of import prices and domestic prices, states:

> "In order to compare the price of imports from Guatemala with the domestic price, the Ministry added the value at point of entry of the investigated imports under tariff items 7306.30.01 and 7306.30.99, the corresponding tariff and customs fees and the import charges for taking the product to the importer's warehouse during the period of investigation. *These latter* were calculated using the information supplied by the importers registered by SICMEX that responded to the investigating authority's request for information, including a number of Hylsa's customers. This information for this stage of the investigation covered 17 per cent of the investigated imports from Guatemala in the period July-December 2000." (emphasis added)

7.292 Paragraphs 191-194 of the Final Determination state:

> "Furthermore, in order to estimate the price of sale to the domestic market by domestic producers, delivered at their customers' warehouses, the Ministry considered only the information from the applicant and Tubería Nacional regarding delivery at the customers' warehouses, since the other two domestic producers gave no information on these charges. It is important to note that in the period of investigation, Tubería Nacional and Hylsa together accounted for 85 per cent of domestic production of the investigated pipe.
>
> On the basis of what is indicated under the two previous points, the Ministry observed that in the period investigated, July-December 2000, the weighted average price of the investigated imports from Guatemala, delivered at the importer's warehouse, was 13 per cent lower than the weighted average price at customer's warehouse of the producers referred to under the previous point.
>
> In addition, according to the section on price discrimination in this Resolution, in the period July-December 2000 imports from Guatemala to the Mexican market of the investigated pipe under tariff items 7306.30.01 and 7306.30.99 entered with dumping margins of 29.92 and 35.26 per cent, respectively.
>
> On the basis of what is indicated in points 182 to 193 of this Resolution, the Ministry determined that the behaviour of the investigated imports and the increase in their share of the Mexican market is a result of significant undercutting margins in relation to the domestic price and the imports from other sources, reflecting the dumping

[311] Guatemala's response to question 79 from the Panel.

> margins found; the increase in the imports and the conditions in which they were effected caused suppression of domestic prices."

7.293 We find, as a matter of fact, that the text of the Final Determination does not support Guatemala's principal allegation on this matter. In particular, we read paragraph 186 as describing how Economía established the prices of imports of the investigated product from Guatemala and from other sources (for the three six month periods in 1998, 1999 and 2000), while paragraph 190 deals with a comparison of prices of imported and domestic products, and indicates elements going into this calculation, with an indication of the sample size relied upon. Specifically, we read the phrase "[t]hese latter" in para. 190 of the Final Determination as referring to charges for the imported merchandise from the port of entry to the Mexican customer's warehouse, rather than to all of the elements relating to the price of the imported product from Guatemala. As a result, the term "[t]his information" introducing the last sentence of this paragraph also refers to such charges. We have doubts whether a sample of such magnitude could give an accurate reflection of such charges, and we note that the information gathered relates only to the period from July-December 2000 (with no indication of developments in 1998 and 1999). Nevertheless, we note the practical problems inherent in data collection in an anti-dumping investigation in relation to certain elements of the injury analysis, and Economía's experience in this respect (as indicated in the Determination). We find that the factual premise for Guatemala's principal allegation – i.e. that the 17 per cent sample from the six-month period in 2000 related to Economía's calculation of the price of the imported product from Guatemala in Mexico rather than to only one component element of that price ("import charges for delivery of the product to the importer's warehouse") – is erroneous.[312]

7.294 Guatemala only corrected its allegation in respect of the price effects of the imported product – that is, to state that even if the 17 per cent sample related to only "import charges for delivery of the product to the importer's warehouse", an inconsistency nevertheless still resulted with Articles 3.1 and 3.2 in relation to the calculation of the import price for only the period July-December 2000 – in response to a request for clarification from the Panel (we have cited their response above).

7.295 We are mindful that it is not for the Panel to establish the complainant's case for the complainant.[313] In this respect, the limited (17 per cent) data in question was used to estimate only one adjustment in the process of calculating the relevant price of the imported product in the Mexican market for the purposes of the overall injury determination; and Economía *did* calculate the "average prices of imports from Guatemala and from other sources of supply for the periods July-December 1998, 1999 and 2000" (i.e. for each of the relevant periods over these three years) on the basis that we have outlined above.[314] That is, the record indicates that Economía *did* resort to the virtually 100 per cent of the import "pedimentos" in respect of imports from Guatemala (as well as to that proportion of "pedimentos" that it had received in respect of imports from other sources for the purposes relating to estimating the value of the dumped imports) as outlined in paragraph 186 of the Final Determination; and Economía did outline problems it had experienced in respect of data collected from the domestic industry in relation to the price comparison. Guatemala did not substantiate before us why, despite the correction that it had to make in its argumentation before us, it still considered that calculating the adjusted price of imports from Guatemala only for the period July-December 2000 necessarily

[312] In response to question 79 from the Panel, Guatemala maintained that even though the 17 per cent related only to certain charges and not to the overall price information, its allegation relating to non-representativity and the limitation to one six-month period remained valid.

[313] We find support for our view in, *e.g.*, Appellate Body Report, *Japan- Agricultural Products II*, para. 129.

[314] *Supra*, para.7.290.

resulted in an inconsistency with Articles 3.1 and 3.2.[315] We therefore find that Guatemala has failed to establish a *prima facie* case of inconsistency with Articles 3.1 and 3.2 in this respect.

5. Injury to the "domestic industry"[316]

(a) Arguments of the parties

(i) Guatemala

7.296 **Guatemala** argues that Economía's injury analysis was based on the selective and inconsistent use of information pertaining to the domestic industry. Without any proper explanation, Economía collected and relied upon data for part of its injury analysis referring to three of the four companies that constituted the domestic industry, and for other parts of its analysis, data referring to only one of those companies (that is, the petitioner).

7.297 In Guatemala's view, the selective and inconsistent gathering and analysis of factors indicating the state of the industry is contrary to the requirement in Article 3.1 to conduct an "objective examination" of "positive evidence", and consequently to the requirements Articles 3.2, 3.4, 3.5 and 4.1.

(ii) Mexico

7.298 **Mexico** argues that it complied with its obligations under Article 3.1 to conduct an "objective examination" of "positive evidence", and consequently with those under Articles 3.2, 3.4, 3.5 and 4.1. Mexico asserts that Article 4.1 allows two meanings for the term "domestic industry": (i) the domestic producers "as a whole" or (ii) those whose collective output constitutes "a major proportion" of the total domestic production. According to Mexico, an investigating authority can comply with the "domestic industry" requirement by using either of those definitions, that is, by examining either the domestic producers "as a whole" or those whose collective output constitutes "a major proportion" of total domestic production. Mexico turns to Article 5.4 to inform its interpretation of the "major proportion" element in Article 4.1, arguing that, if a producer alone satisfies the Article 5.4 threshold of 50 per cent of the domestic industry expressing support or opposition to the application, then an objective examination of injury factors may rely upon data pertaining solely to that producer.

7.299 In this case, Mexico contends, the data collected and analysed by Economía for the economic injury factors pertained to three firms accounting for 88 per cent of domestic production. Furthermore, as Hylsa accounted for 53 per cent of the domestic industry, and the whole of the domestic industry supported the request for initiation, Mexico argues that Economía was justified in collecting and relying upon financial injury data pertaining solely to the applicant.

(b) Arguments of the third parties

7.300 The **European Communities** endorses Guatemala's assessment that Economía's injury analysis, based on data relating to various combinations of information from various firms comprising the domestic industry, was not coherent, and thus, inconsistent with Article 3.1. According to the

[315] Guatemala did not, for example, further address or substantiate this allegation in its rebuttal submission, although it did further address its allegation relating to the methodology applied by Economía to analyse the volume of imports from sources other than Guatemala.

[316] In response to question 59 from the Panel, Guatemala confirmed to us that it no longer pursues any independent claim under Article 3.4 pertaining to Mexico's examination of the particular injury factors enumerated in that provision.

European Communities, Mexico's Article 4.1 argument is not relevant, as Guatemala's allegation does not relate to the representativity of the data, but rather to its incoherent and arbitrary use.

(c) Factual background

7.301 At the initiation phase, Economía defined the domestic industry as consisting of four firms: Tuberías Procarsa, Tubería Nacional, Compañía Mexicana de Tubos ("CMT") and Hylsa.[317] For the purposes of the injury component of its Initiation Determination, Economía relied upon information from Hylsa pertaining to its own situation, as well as certain data pertaining to other firms in the domestic industry included in Hylsa's petition (sourced from CANACERO")[318], as well as SICMEX statistics. More specifically, in terms of economic injury indicators, Economía relied upon data supplied by Hylsa, and SICMEX statistics[319] to analyse national apparent consumption[320], as well as on data supplied by Hylsa sourced from CANACERO[321], to analyse domestic production; total, domestic and export sales; installed capacity; and inventories. In terms of financial injury factors, Economía focused on the situation of Hylsa, based on audited financial statements and data submitted by Hylsa[322], while also focusing on the situation of Hylsa-DAT.[323] More specifically,

> "... the Ministry calculated the percentage share of income from sales of standard pipe in the applicant's total sales in order to ascertain the influence of these sales on Hylsa's profits. The investigating authority noted that the percentage share was 3 per cent in 1998, 1999 and 2000, which is why there was a preliminary determination that sales of the like product had little influence on the applicant's financial situation.
>
> For this stage of the investigation, the investigating authority decided to conduct an analysis of the applicant's financial situation and the operating results of the like product for the years 1998 to 2000; it took into account Hylsa's audited basic financial statements for the years 1998 to 2000, the value and volume indicators and the statement of costs, sales and profits of the like product for those same years, and the period of investigation and the two comparable previous periods. It should be noted that in the interests of financial compatibility, the Ministry updated the financial data using the changes in general price level method ...".[324]

7.302 In order to support the asserted deterioration of Hylsa's financial situation[325], Hylsa had also submitted:

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[317] Exhibit GTM-4, para. 82; Exhibit GTM-23, para. 131(B).

[318] Exhibit GTM-4, paras. 82-83. In order to calculate the price in the Mexican market at the initiation phase, Economía based itself on the information submitted by the applicant on sales prices, sourced from CANACERO, as well as figures on its sales volume and value. See Exhibit GTM-10, para. 111.

[319] Exhibit GTM-4, para. 116.

[320] Exhibit GTM-4, para. 118.

[321] Exhibit GTM-4, para. 119.

[322] Exhibit GTM-4, paras. 129-131, 132-154.

[323] Exhibit GTM-4, paras. 132-134.

[324] Exhibit GTM-4, paras. 130-131.

[325] Exhibit GTM-4, para. 133.

> "… a statement of results entitled "Hylsa-DAT"; however, on the basis of the methodology described in the reply to the request addressed to it by the IA, and an analysis of the numerical operations in a worksheet entitled 'Statement of costs, sales and profits of the domestic product', submitted by the applicant, the Ministry concluded that the Hylsa-DAT statement of results, to which the applicant refers, actually corresponds to the operating results of the like product. It therefore decided at this stage of the investigation to evaluate only the results of the like product together with those of the applicant as a whole."[326]

7.303 On this basis, Economía analysed the operating profits of the applicant and of the "like product". Economía also analysed the return on investment[327]; capital flow[328]; ability to raise capital[329]; other injury factors.[330] On the basis of its analysis, the Secretaría concluded that initiation was warranted.[331]

7.304 For the preliminary phase, Economía requested information from the three companies other than the applicant that constituted the domestic industry (Tuberías Procarsa, Tubería Nacional and Compañía Mexicana de Perfiles y Tubos)[332] as well as from CANACERO.[333] In particular, it requested information pertaining to the principal economic indicators of these companies for 1998, 1999 and 2000.[334,335] At this stage, Economía also requested certain clarifications from the petitioner regarding its data on financial indicators.[336] In particular:

> "... the inconsistencies between the statement of results of Hylsa's Division of Steel Tubing furnished in the applicant's reply and the statement of costs, sales and profits of the like product supplied in answer to the 'prevención' (Annex 8) prompted the

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[326] Exhibit GTM-4, para. 134.

[327] Exhibit GTM-4, paras. 140-146.

[328] Exhibit GTM-4, paras. 147-149.

[329] Exhibit GTM-4, paras. 150-154. Economía also analysed "threat of injury", not at issue in this dispute.

[330] Exhibit GTM-4, paras. 166-170.

[331] Exhibit GTM-4, para. 171.

[332] For the preliminary phase, CMT had been considered as CMPT. Exhibit GTM-23, para. 131(A).

[333] Exhibit GTM-10, para. 39.

[334] Exhibit GTM-10, para. 105. See Economía's requests for information, dated 17 December 2001, to Tuberías Procarsa, Tubería Nacional and Compañía Mexicana de Perfiles y Tubos. These requests asked, in particular, for "information on the following economic indicators for black and galvanized standard pipe manufactured in 1998, 1999 and 2000: production, sales to the domestic market, sales abroad, own consumption, inventories, employment, price of sale to the domestic market and installed production capacity …".

[335] Procarsa was the only company that did not respond to this request for information. Exhibit GTM-10, para. 106.

[336] Exhibit GTM-10, para. 169.

> Ministry to seek clarification. However, the applicant's reply provided no certainty regarding the data in the statement of costs, sales and profits of the like product. The investigating authority therefore determined that the analysis of the financial variables referred to the narrower range of products, i.e. Hylsa's Division of Steel Tubing. It is also clarified that the information the applicant supplied on that division is expressed in annual terms, so in the next phase the Ministry will obtain information from Hylsa's Division of Steel Tubing corresponding to the period of investigation and comparable previous periods.
>
> The Ministry examined the applicant's financial situation to determine whether there is any evidence allowing the conclusion that the impact of the subject imports had a significant effect on the financial variables of the domestically manufactured like product, standard pipe. For this purpose it took into account the applicant's audited basic financial statements for 1998 to 2000, the economic indicators for both value and volume and the specific statement of results of Hylsa's Division of Steel Tubing which the applicant provided in annual terms. For the sake of financial comparability, the Ministry updated the information using the changes in general price level method …".[337]

7.305 In its Preliminary Determination, Economía defined the domestic industry as comprising four firms: Tuberías Procarsa, Tubería Nacional, Compañía Mexicana de Tubos and Hylsa.[338] In reaching its Preliminary Determination, Economía calculated the weighted average price of the domestic industry in the domestic market on the basis of information furnished by Hylsa, Tubería Nacional and CANACERO.[339] It also analysed certain economic indicators, *inter alia*: national apparent consumption using information from Hylsa, the SICMEX and CANACERO[340]; installed capacity figures using information of Hylsa and Tubería Nacional[341]; and inventories using information of Hylsa and Tubería Nacional.[342] Concerning its analysis of the financial variables, Economía used financial information not only from Hylsa, but also from Hylsa's Division of Steel Tubing, Hylsa-DAT, on the basis outlined above[343] Economía concluded:

> "On the basis of the indications in points 165 to 181 of this Resolution, the Ministry concluded that the operating profits of Hylsa and its Division of Steel Tubing showed a decline in 2000 because of the fall in total sales income. This adversely affected the operating margin of the company and its Division of Steel Tubing, as well as the latter's return on investment and its contribution to that return in 2000. Hylsa was also adversely affected in terms of its ability to raise capital given its reduced

[337] Exhibit GTM-10, paras. 169-170.

[338] Exhibit GTM-10, para. 107.

[339] Exhibit GTM-10, para. 146.

[340] Exhibit GTM-10, paras. 150, 152 and 153.

[341] Exhibit GTM-10, para. 160.

[342] Exhibit GTM-10, para. 161.

[343] Exhibit GTM-10, paras. 169-170; see paras. 171-182 for Economía's analysis of financial indicators.

operating cash flow and operating profits, and its increased level of financial indebtedness."[344]

7.306 For the purposes of its Final Determination, Economía again requested information from the responding companies other than Hylsa (Tubería Nacional and Compañía Mexicana de Perfiles y Tubos) to corroborate whether the information on their economic indicators referred to the specifications, lengths, diameters and wall-thicknesses of the investigated product as it was defined at that time.[345] Economía also requested information from Compañía Mexicana de Tubos on its economic indicators corresponding to the specifications length, diameters and wall-thicknesses of the investigated product as it was defined at that time. The Final Determination indicates that, in response to this information request, Tubería Nacional indicated that the economic injury data it had submitted pertained only to the product as defined (in schedules 30, 40 and 80) while Compañía Mexicana de Tubos indicated that it produced the product as defined only in schedule 40 and submitted economic injury data.[346]

7.307 In the Final Determination, Economía defined the domestic industry as consisting of four firms: Tuberías Procarsa, Tubería Nacional, Compañía Mexicana de Tubos and Hylsa.[347]

7.308 In reaching its Final Determination, in respect of economic injury factors, Economía used information of three companies: Hylsa, Tubería Nacional and Compañía Mexicana de Tubos.[348] These companies together represented 88 per cent of the domestic industry.[349] On this basis, Economía decided that the trends in these companies' economic factors were representative of the domestic industry.[350] In particular, on the basis of this information, Economía analysed:

- the national production oriented to the domestic market[351],
- sales to the domestic market[352],

[344] Exhibit GTM-10, para. 182.

[345] Exhibit GTM-23, para. 139 and Exhibit 18, (Oficio UPCI.310.03.1912/2 and Oficio UPCI.310.02.1867/2), respectively.

[346] Economía's treatment of CMT and CPMT somewhat confusing. In any event, Economía explained that it had not received such information before this final stage since Hylsa had furnished the wrong address for this company. Exhibit GTM-23, para. 140 and Exhibit 18, (Oficio UPCI.310.02.1498/2). Furthermore, CMPT indicated that it did not produce the product as defined. Exhibit GTM-23, para. 142. Economía further indicated in para. 145 that "… not a part of the domestic industry, Compañía Mexicana de Perfiles y Tubos, which stated that it does not manufacture the product being investigated." Thus, by the time of the Final Determination, CMT formed part of the domestic industry and CMPT did not.

[347] Exhibit GTM-23, para. 145.

[348] Exhibit GTM-23, para. 201. The Final Determination also indicates, in para. 148, that, in the context of considering whether or not Hylsa had standing to initiate the investigation, Economía observed that Hylsa had brought to its attention three other domestic producers that produced "structural tubing manufactured to standard ASTM A500 in schedule 40". Economía observed: "However, the production of this tubing by these producers is not significant ...". It is clear that these other domestic producers were not included in the domestic industry as defined by Economía for the purposes of its injury determination.

[349] Exhibit GTM-23, para. 201.

[350] Exhibit GTM-23, para. 201.

[351] Exhibit GTM-23, para. 204.

- domestic production for the export market[353],
- installed capacity[354],
- inventories[355], and
- employment.[356]

7.309 In respect of its analysis of financial injury factors, Economía used information either for Hylsa (the company as a whole), and/or for Hylsa and its Division of Steel Tubing, Hylsa-DAT. Economía had determined that "the applicant's output accounted for a large part of domestic production, amounting to 53 per cent of domestic production of the investigated pipe".[357] Economía indicated:

> "For the purpose of the preliminary resolution, the Ministry decided to analyse the results of Hylsa-DAT and of the company as a whole on the basis of the information available. At this phase of the investigation, Hylsa provided the Ministry with a statement of costs, sales and profits, but it does not tally with the sales in value recorded in the company's indicators for the investigated product.
>
> Also at this phase of the investigation, Hylsa provided the statements of results of the Division of Steel Tubing (Hylsa-DAT) for the first and second semesters of 1998, 1999 and 2000, and the Ministry deemed these adequate for an analysis of the profits and profitability of the Division of Steel Tubing.
>
> Taking account of the information set out in the point above and Hylsa's audited basic financial statements for 1998 to 2000, the value and volume economic indicators, and the statement of costs, sales and profits of the like product for those same years, the Ministry carried out an examination of the financial situation of the applicant company Hylsa for the years 1998 to 2000 and of Hylsa-DAT for those same years and the period of investigation and two comparable previous periods; the latter information pertained to the more restricted range, which included the like domestic product."[358]

7.310 Thus, for the analysis of the ability to raise capital Economía used information for Hylsa[359], and for the following indicators, Economía used information for both Hylsa-DAT and Hylsa:

- profits[360],

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[352] Exhibit GTM-23, paras. 205 and 206.

[353] Exhibit GTM-23, para. 207.

[354] Exhibit GTM-23, paras. 208 and 209.

[355] Exhibit GTM-23, para. 210.

[356] Exhibit GTM-23, para. 210.

[357] Exhibit GTM-23, para. 146.

[358] Exhibit GTM-23, paras. 214-216.

[359] Exhibit GTM-23, paras. 234 to 236.

[360] Exhibit GTM-23, paras. 218, 221 to 224.

- return on investment[361], and
- cash-flow.[362]

7.311 In terms of the data pertaining to Hylsa and Hylsa-DAT, respectively, Economía stated:

> "Based on the foregoing, below are the results of the examination of the financial situation of the company Hylsa and of the Division of Steel Tubing.
>
> The Ministry calculated the share of the income generated by the total sales of the investigated tubing in the income of Hylsa-DAT, the result of this exercise showed that in 1998 it amounted to 37 per cent, and to 36 and 33 per cent in 1999 and 2000 respectively. The Ministry accordingly determined that sales of the investigated pipe have a significant influence on Hylsa-DAT's financial situation. It further determined that the total income of the Division of Steel Tubing amounted on average to an 8 per cent share of the applicant company's total sales between 1998 and 2000".[363]

7.312 Mexico confirmed to us that Economía did not request, at any time during the investigation, information on the financial indicators of any of the companies that composed the domestic industry, other than Hylsa (and, within Hylsa, its division Hylsa-DAT).[364]

(d) Evaluation by the Panel

7.313 Based on the parties' evidence and arguments, the question before us is whether Economía made an objective examination based on positive evidence, as required by Articles 3.1, 3.2, 3.4 and 3.5, in its collection and evaluation of data pertaining to injury to the "domestic industry" as that term is defined in Article 4.1.

7.314 Economía defined the domestic industry for the purposes of the Final Determination[365] as being constituted of four firms: Hylsa, Tuberías Procarsa, Tubería Nacional y Compañía Mexicana de Tubos. This was the domestic industry defined by Economía for the purposes of the injury analysis.[366] However, Economía's analysis of the economic and financial indicators was based on sets

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[361] Exhibit GTM-23, paras. 218, 225 and 226.

[362] Exhibit GTM-23, paras. 218, 227 to 233.

[363] Exhibit GTM-23, paras. 219-220.

[364] Mexico's response to question 64 from the Panel.

[365] Exhibit GTM-23, para. 145. Definition of domestic industry at initiation phase: Exhibit GTM-4, para. 82; definition of domestic industry at Preliminary Determination phase: Exhibit GTM-10, para. 107.

[366] Economía had concluded, in its Final Determination analysis of "standing" for the purpose of initiation of the investigation, that three other domestic producers (who had not participated in the investigation but had been brought to Economía's attention by Hylsa at the final stage of the investigation) had "not significant" production of "structural tubing manufactured using standard ASTM A500 in schedule 40". Having found that the production of these non-participating companies was "not significant", Economía did not include their production as part of the domestic industry in its injury analysis. Referring to these three non-participating companies, Economía stated "... in this phase of the investigation, *as well as the companies that make up the major part of domestic production of the investigated tubing* ..." (emphasis added), implying that the domestic industry it defined for the purposes of its injury investigation was a major proportion of domestic production, rather than the domestic industry "as a whole". In Economía's view, inclusion of these producers would not have materially changed its view that the "standing" requirement for initiation was fulfilled, or that Hylsa accounted for "a major proportion" ("*una parte importante*") of domestic production. See paras. 148-149 of

of information that at no point referred to the whole industry as this had been defined by Economía. For the purpose of the injury analysis in the Final Determination, Economía relied upon information on the economic indicators of three firms constituting 88 per cent of the domestic industry.[367] Regarding financial information, Economía only sought and relied upon information accounting for 53 per cent of the domestic industry, from Hylsa and/or its Tubing Division, Hylsa-DAT.[368]

7.315 Therefore, the specific issue that arises before us on the facts of this case is whether Economía's collection and reliance upon economic injury data relating to three firms constituting 88 per cent of national production, and financial injury data pertaining to only one firm constituting 53 per cent of national production was consistent with Mexico's obligations under Articles 3.1, 3.2, 3.4 and 3.5 concerning the determination of injury to the "domestic industry" as that term is defined in Article 4.1.

7.316 At the outset, we wish to emphasize our understanding that the issue before us, as raised by Guatemala, does *not* include the consistency with the cited provisions of Economía's reliance upon financial injury data pertaining to *both* Hylsa and Hylsa-DAT. In our view, Economía's reliance on data of both Hylsa and Hylsa-DAT could introduce considerable distortions into the injury analysis, as the record indicates that Hylsa-DAT revenue accounted for 8 per cent of Hylsa's total sales from 1998-2000.[369] The record further indicates that Economía considered Hylsa and Hylsa-DAT's information *together* for the purposes of its financial injury analysis. Apart from indicating that Economía analysed the financial information of Hylsa and Hylsa-DAT in accordance with standard accounting principles[370], we find no clear indication in the record as to how Economía ensured that it took Hylsa-DAT's financial performance into account only once, that is, on its own, and not also again as part of Hylsa's overall financial performance. Mexico has certainly not clarified how and the extent to which Economía reduced the possibility of "double-counting" of Hylsa-DAT's experience as part of the domestic industry. We are left unclear as to how the experience of Hylsa-DAT, which accounted for a relatively small proportion of Hylsa's overall sales, could have been reflective of Hylsa's overall situation.[371] However, although Guatemala makes reference to the use by Economía of various combinations of companies as sources of information, it does not specifically identify the use of Hylsa and/or Hylsa-DAT's information as a specific issue for our consideration.[372]

Exhibit GTM-23, the Final Determination. The proportion of the "domestic industry" – as this was defined by Economía – accounted for by Hylsa was the main basis for Mexico's argument before us that Economía was entitled to seek out financial injury data only from Hylsa (and Hylsa-DAT), and not from the other firms constituting the "domestic industry" as this had been defined by Economía. For this reason, we do not consider that Economía's treatment of these three producers with production that was "not significant" materially affects our analysis here. That is, whether the domestic industry, as defined by Economía, at the outset constituted the domestic industry "as a whole" or "a major proportion thereof" does not change the nature of our analysis, which focuses on the treatment of this "domestic industry" – *once this had been defined by Economía* for the purposes of its injury analysis. We note, in any event, that Guatemala has not challenged Economía's *definition* of the domestic industry used for the purposes of its injury analysis.

[367] Exhibit GTM-23, para. 201.

[368] Exhibit GTM-23, paras. 215 and 216.

[369] Response to question 81 from the Panel.

[370] Exhibit GTM-23, para. 217.

[371] See, for example, Exhibit GTM-23, para. 238.

[372] See, for example, Guatemala's first written submission, paras. 276-277; Guatemala's response to question 168 from the Panel; Guatemala's rebuttal submission, e.g. para. 133. In para. 277 of its first written submission, Guatemala asserts: "... while the financial performance of the applicant and of Hylsa-DAT is

Accordingly, our findings below are without prejudice to our views on this issue. As regards Hylsa and Hylsa-DAT, the issue before us focuses upon the consistency with the cited provisions of Economía's approach in seeking and relying upon data relating to *no more than* 53 per cent of the domestic industry for the purposes of its analysis of financial indicators in its injury analysis.

7.317 In addressing the issue before us, we first consider Mexico's main justification for Economía's approach.

7.318 Mexico argues that, in respect of the various injury factors, Economía was justified in examining data relating either to all (or almost all) of the domestic industry, or to "a major proportion" thereof.[373] According to Mexico, this was consistent with the Article 4.1 definition of "domestic industry", as *either* the totality *or* "a major proportion" thereof. Regarding the analysis of economic injury indicators, Mexico argues that the use of data from three firms covering 88 per cent of national production was "representative" of the domestic industry.[374] In respect of the "major proportion" element, Mexico invokes Article 5.4 of the *Anti-Dumping Agreement*, which sets out the "standing" rule and threshold percentages for initiation of an investigation "by or on behalf of the domestic industry". According to Mexico, because Hylsa alone represented 53 per cent of the domestic industry – that is, more than the 50 per cent threshold set out in Article 5.4 – then an objective examination of injury factors could rely upon data pertaining solely to that producer.[375] In Mexico's view, this is sufficient to consider that the result of such an analysis reflects the situation of the domestic industry.[376]

7.319 Guatemala counter-argues that Article 5.4 relates to the "standing" requirement to initiate an investigation whereas Article 4.1 defines the meaning of "domestic industry" "for the purposes of the Agreement".

7.320 We recall the relevant legal framework for our analysis. We have already cited the text of the relevant provisions of Article 3 and of Article 4.1 above. Article 3.1 requires that a determination of injury shall be based on positive evidence and involve an objective examination of, *inter alia*, the impact of the dumped imports on the domestic producers of the like product. Article 3.4 provides for an examination of "the impact of the dumped imports on the *domestic industry* concerned shall include an evaluation of *all relevant economic factors and indices* having a bearing on the state of the [*domestic] industry*..." (emphasis added) and Article 3.5 states that "It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in *paragraphs 2 and 4*, causing injury...to the *domestic industry*" (emphasis added). The focus of an injury determination is thus the state of the "*domestic industry*", as that term is defined in Article 4.1. The title of Article 4 of the *Anti-Dumping Agreement* is "Definition of domestic industry". The term "domestic industry" is defined in Article 4.1, which reads, in part:

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relevant to assessing injury, equally important is the financial performance of the other components of the domestic industry and the domestic industry as a whole …".

From this assertion, we understand Guatemala's complaint to be primarily focused on the fact that Economía did not seek out financial injury data from domestic firms other than Hylsa/Hylsa-DAT.

[373] For example, response to question 66 from the Panel.

[374] Exhibit GTM-23, para. 201.

[375] Response to questions 67 from the Panel and Mexico first written submission, para. 213.

[376] Response to questions 67 from the Panel and Mexico first written submission, para. 216.

> "For the purposes of this Agreement, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products ...".

7.321 The provision in Article 4.1 and footnote 9, which defines injury as "material injury to a domestic industry,[…] interpreted in accordance with the provisions of [this] Article [3]", inescapably requires the conclusion that the domestic industry with respect to which injury is considered and determined must be the domestic industry as defined in accordance with Article 4.1.[377] It follows that an anti-dumping injury determination is, in fact, a determination that the domestic producers "as a whole", or a "major proportion" of them, are "injured". Indeed, the concept of "domestic industry" is critical to an injury determination, as it defines the framework for data collection and analysis.

7.322 Article 4.1 defines the domestic industry in two ways, either as "referring to the domestic producers as a whole of the like products" or "to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products". The text of Article 4.1 indicates no hierarchy of preference between these two options. However, this does not lead us to conclude that an investigating authority is permitted to switch back and forth between these two possibilities in the course of a single injury analysis (or to oscillate back and forth between various allegedly "major proportions" of the domestic industry in the course of the same injury analysis). Article 4.1, and in particular the term "a major proportion", permits a degree of flexibility in defining the domestic industry or "major proportion" thereof, but once an investigating authority has identified the framework for its analysis - whether an entire domestic industry or a major proportion thereof - it must use this identified framework consistently and coherently throughout an investigation.

7.323 Article 5.4 reads:

> "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." (footnotes omitted)

7.324 The introductory clause of Article 4.1 indicates that the definition of "domestic industry" applies *"[f]or the purposes of this Agreement*", i.e. throughout the Agreement. It would therefore also define the term "domestic industry" as used in Article 5.4. Article 5.4 commences with the phrase: "An investigation shall not be initiated pursuant to paragraph 1 unless ...". This is a clear textual indication that Article 5.4 sets out a fundamental requirement that must be respected in *initiating* an investigation.[378] However, as we have concluded that Article 4.1 does not permit an investigating

[377] We note that the Panel Report, *Mexico - Corn Syrup*, para. 7.147, expressed a similar view.

[378] The importance of this initiation requirement has been consistently highlighted in WTO dispute settlement. E.g. Appellate Body Report, *US – Offset Act (Byrd Amendment)* paras. 282, 289; Panel Report, *US – 1916 Act (Japan)*, para. 6.261 (upheld on appeal).

authority in the course of a single injury analysis to switch back and forth between the two possible definitions of "domestic industry" – i.e. (i) the domestic producers as a whole of the like products; or (ii) those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products – we do not believe that Article 5.4 is strictly germane to the issue before us. This is because the issue raised by Guatemala's claim is *not* the definition of the domestic industry *per se*, or the identification of "a major proportion of" the domestic industry as the "domestic industry" for the purposes of the injury analysis. Rather, Guatemala's claim relates to the consistency and representativeness of the data set relied upon by Economía in its analysis of the state of the domestic industry, as this had been defined by Economía.[379] We therefore reject the relevance of the legal premise underlying Mexico's argument pertaining to Articles 4.1 and 5.4.

7.325 We turn to the issue raised by Guatemala that Mexico violated Article 3.1 and other relevant obligations in Article 3 as it did not use a consistent and representative data-set pertaining to the "domestic industry", as this was defined by Economía, in conducting its injury analysis. Within this context, we consider whether Economía's collection and reliance upon economic injury data relating to three firms constituting 88 per cent of national production, and financial injury data pertaining to only one firm constituting 53 per cent of national production was consistent with Mexico's obligations under Articles 3.1, 3.2, 3.4 and 3.5 concerning injury to the "domestic industry" as that term is defined in Article 4.1.

7.326 We are of the view that once an investigating authority defines which entities comprise the domestic industry that will form the basis for its injury analysis, it should seek and use a consistent data-set reflecting the performance of those entities. We understand that, in practice, an investigating authority could have partial information to start an investigation, which might then be supplemented as the investigation proceeds. An investigating authority may also be confronted with problematic incomplete data furnished by one or more domestic producers. In such a case, it should request supplementary information, or, if that is not practicable, resort to a reasonable estimation methodology which will yield results that are reflective of the state of the domestic industry. This is because the requirement is to determine whether the domestic industry, as defined, is injured by dumped imports or not.

7.327 The requirement for an investigating authority to conduct an "objective examination" of "positive evidence" under Article 3.1 means that it cannot examine parts of a domestic industry on an inconsistent, arbitrary or selective basis. We recall the following statement of the Appellate Body in *US-Hot-Rolled Steel*:

> "We have already stated that it may be highly pertinent for investigating authorities to examine a domestic industry by part, sector or segment. However, as with all other aspects of the evaluation of the domestic industry, Article 3.1 of the *Anti-Dumping Agreement* requires that such a sectoral examination be conducted in an "objective" manner. In our view, this requirement means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry. Different parts of an industry may

[379] See, for example, Guatemala's first written submission, para. 270. Guatemala asserted that, having defined the domestic industry as consisting of four firms, Economía should have based itself on the economic situation of these four firms.

> exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry, even if coupled with an examination of the whole industry, may give a misleading impression of the data relating to the industry as a whole, and may overlook positive developments in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry. We note that the reverse may also be true – to examine only the parts of an industry which are performing well may lead to overlooking the significance of deteriorating performance in other parts of the industry.
>
> Moreover, by examining only one part of an industry, the investigating authorities may fail properly to appreciate the economic relationship between that part of the industry and the other parts of the industry, or between one or more of those parts and the whole industry. For instance, we can envisage that an industry, with two parts, may be overall in mild recession, where one part is performing very poorly and the other part is performing very well. It may be that the relationship between the two parts is such that the healthier part will lead the other part, and the industry as a whole, out of recession. Alternatively, the healthy part may follow the other part, and the industry as a whole, into recession.
>
> Accordingly, an examination of only certain parts of a domestic industry does not ensure a proper evaluation of the state of the domestic industry as a whole, and does not, therefore, satisfy the requirements of "objectiv[ity]" in Article 3.1 of the *Anti-Dumping Agreement*." [380]

7.328 We are of the view that the Article 3.1 requirement to base a determination of injury on positive evidence and pursuant to an objective examination imposes certain obligations on an investigating authority with regard to the consistency of the data collected and relied upon as the basis for its determination. In brief, examining only a part of the industry as defined by the investigating authority is not an objective examination of positive evidence since it is not representative of the overall state of the domestic industry. The use of a consistent and representative data set will best reflect the state of the domestic industry for the purposes of an injury analysis. We thus disagree with Mexico's view that an IA may opt to limit its collection and evaluation of data in respect of certain injury factors to only a certain part of the domestic industry as defined by it for the purposes of its injury analysis.

7.329 Mindful of these considerations, we believe that Economía was required, by the explicit terms of the *Anti-Dumping Agreement*, to determine the question of injury on the basis of a consistent data set reflective of the state of the domestic industry, as it had defined it.

7.330 We recall the relevant facts that we have outlined above. For the Final Determination, in respect of economic injury factors, Economía sought and relied upon data pertaining to three

[380] Appellate Body Report, *US-Hot-Rolled Steel*, paras. 204-206. See also Panel Report, *Mexico – Corn Syrup*, para. 7.154.

companies: Hylsa/Hylsa-DAT, Tubería Nacional and Compañía Mexicana de Tubos.[381] These companies together represented 88 per cent of the domestic industry.[382] In particular, on the basis of this information, Economía analysed and drew conclusions about the state of the domestic industry in respect of: the national production oriented to the domestic market[383], sales to the domestic market[384], domestic production for the export market[385], installed capacity[386], inventories[387], and employment.[388]

7.331 However, in respect of its analysis of financial injury factors, Economía used information only for the applicant (either for Hylsa SA or for Hylsa and its Division of Steel Tubing, Hylsa-DAT). In particular, for the analysis of the ability to raise capital Economía used information for the company as a whole[389], and for the following indicators, Economía used information for both Hylsa-DAT and Hylsa: profits[390], return on investment[391], and cash-flow.[392] Mexico confirmed to us that Economía did not request, at any time during the investigation, information on the financial indicators of any of the companies that composed the domestic industry, other than Hylsa/Hylsa-DAT, as it did not consider this to be necessary.[393] We recall and underline our view already expressed above that Economía's reliance on data of both Hylsa and Hylsa-DAT could introduce considerable distortions into the injury analysis, as the record indicates that Hylsa-DAT revenue accounted for 8 per cent of Hylsa's total sales from 1998-2000. However, we again observe that this particular issue is not specifically before us.

7.332 Thus, in respect of the economic injury factors, Economía sought information from four companies and received and analysed information from three companies constituting 88 per cent of the domestic industry. We are of the view that, under these circumstances, the use of such data might have been reflective of the state of the domestic industry in respect of those factors. However, in respect of the financial indicators, we emphasize that Economía *did not even attempt* to seek information from other firms constituting the domestic industry as Economía had defined it.[394] We consider that Economía acted inconsistently with its injury analysis obligations under Article 3 in treating the partial financial data that it sought, acquired and analysed as a sufficient basis for its

[381] Exhibit GTM-23, para. 201.

[382] Exhibit GTM-23, para. 201.

[383] Exhibit GTM-23, para. 204.

[384] Exhibit GTM-23, paras. 205 and 206.

[385] Exhibit GTM-23, para. 207.

[386] Exhibit GTM-23, paras. 208 and 209.

[387] Exhibit GTM-23, para. 210.

[388] Exhibit GTM-23, para. 210.

[389] Exhibit GTM-23, paras. 234 to 236.

[390] Exhibit GTM-23, paras. 221 to 224.

[391] Exhibit GTM-23, paras. 225 and 226.

[392] Exhibit GTM-23, paras. 227 to 233.

[393] Response to question 64 from the Panel.

[394] Response to question 64 from the Panel.

determination in respect of such factors, and as a component of its overall injury analysis. Among other things, there was no assessment as to how, or the extent to which, Hylsa's financial performance was reflective of, or better or worse than, the financial state of the rest of the domestic industry, as this had been defined by Economía. Furthermore, Mexico has failed to provide any acceptable justification regarding these gaps in the information sought and received and then analysed in its injury investigation. We note that there were only four firms comprising the domestic industry as defined by Economía for the purposes of its injury analysis; in our view it would not have been impracticable for Economía to have acquired financial injury data from the remaining firms constituting the domestic industry as defined by Economía.

7.333 We therefore conclude that Economía failed to conduct an objective examination on the basis of positive evidence, as required by Article 3.1, of injury to the domestic industry as that term is defined in Article 4.1, and consequently also violated Articles 3.2, 3.4 and 3.5, by failing to gather and analyse representative and consistent data pertaining to the domestic industry, in particular the data concerning the financial indicators of the "domestic industry", as defined by it.

6. Article 3 claims relating to the scope of the investigated product/like product

(a) Arguments of the parties

(i) Guatemala

7.334 Guatemala asserts that changes in the definition of the product under investigation/like product in the course of the investigation rendered the determinations of injury (and causal link) inconsistent with Articles 3.1, 3.2, 3.4, 3.5 , 4.1 and 5.4.

(ii) Mexico

7.335 **Mexico** asserts that an IA has discretion to determine the scope of the product under investigation and that Economía properly did so and complied with its obligations under Articles 3.1, 3.2, 3.4, 3.5, 4.1 and 5.4 relating to the determination of injury to the domestic industry (and causal link).

(b) Arguments of the third parties

7.336 The **European Communities** supports Guatemala's claim on the implications of the product definition. In particular, a change in the product definition in the Preliminary Determination (as happened in this case) means that the information in the questionnaires that have been submitted is incomplete, and the problem becomes worse where the change is only announced in the Final Determination (as also happened here) – the data on which the determination is based have not been subject to the investigative process.

7.337 **Japan** also supports Guatemala's arguments about the implications of the product definition (and changes thereto) for the injury determination: if the definition of the investigated product is changed during an investigation, then the injury investigation also must be conducted on that revised basis.

7.338 The **United States** generally agrees with Japan's observation that the Agreement permits changes to the definition of the product under investigation, but the IA must be cognizant of the broad implications of such changes.

(c) Evaluation by the Panel

7.339 We address here Guatemala's allegation that the change in the definition of the product under investigation/like product in the course of the investigation to include tubing of 4"-6" and certain structural tubing rendered the determinations of injury (and causal link) inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 4.1 and 5.4 as there could not have been a valid assessment of the volume and price effects of the imported product under consideration on the "domestic industry". According to Guatemala, Economía lacked the evidentiary basis to conduct an objective examination of positive evidence and did not adequately explain how information which it allegedly lacked in respect of the products added to the scope of the definition had been taken into account in its injury analysis. We underline that Guatemala's argumentation concentrates on the alleged failure by Economía to gather and analyse evidence pertaining to the products falling within the product scope following the two adjustments to include tubing of 4"-6" and certain structural tubing in the product scope.[395] Furthermore, in response to Panel questioning, on its claim under Article 6.2, Guatemala clarified that:

> "the claim is based on the way in which Economía made various changes to the definition of the product at issue so as to include, at a late stage of the investigation, additional products which were originally excluded, without any positive evidence on these products and without having made any attempt to satisfy itself that they were properly investigated. Guatemala accordingly has reiterated that its allegation is not concerned with whether or not the products originally defined by Economía are similar to the products that were included in the definition at a late stage …".[396] (footnote omitted)

7.340 We therefore understand that Guatemala makes no allegation in respect of any "dissimilarity" between the scope of the product under investigation, on the one hand, and of the like product, on the other.[397]

7.341 We have set out above the factual background of the change in the definition of the product in the course of the investigation to include tubing from 4"-6" and certain structural tubing[398], and our factual findings in that regard.[399] We have also set out above the legal considerations governing an investigating authority's analysis of injury under Article 3 to the domestic industry (as defined by Article 4.1) producing the "like product" (as defined in Article 2.6).[400]

7.342 The immediate issue before us here is whether Guatemala is correct in alleging that Economía failed progressively to reconcile the information it collected and analysed for the purposes of its injury and causation analysis with the two changes in the product definition.

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[395] We refer to Guatemala's arguments in, for example, Guatemala's first written submission, paras. 161-163; Guatemala's response to question 172 from the Panel; Guatemala's rebuttal submission, paras. 59-73, especially paras. 60, 65.

[396] Guatemala's response to question 173 from the Panel.

[397] See *supra*, para. 7.105.

[398] See *supra*,paras. 7.62-7.102.

[399]See *supra*, paras. 7.103-7.106.

[400]See *supra*, paras. 7.206-7.216.

7.343 It is clear that there must be identity between the product subject to the anti-dumping duty and the product in respect of which a determination of dumping is made.[401] Similarly, injury and causation must be assessed in respect of domestic producers of the "like product". In this respect, we see nothing in Article 3, or elsewhere in the Agreement, that would prevent an investigating authority from adjusting the definition of the product under investigation or the "like product". Indeed, in certain circumstances, it might be necessary or highly appropriate for an investigating authority to adjust or refine its product definition in light of information collected and analysed in the course of the investigation that was not available to the IA at the time of initiation. We do not mean to suggest that such adjustment or refinement could fundamentally change the nature of the product under investigation; rather it would clearly have to respect appropriate parameters. Such adjustments to the definition of the product under investigation and/or like product might very well call for modifications in the scope of data collected and analysed in order to ensure a sufficient data set to fulfil the Article 3.1 requirement to make an objective examination of positive evidence in reaching a determination of injury. The requirement for investigating authorities to conduct an "objective examination" of "positive evidence" under Article 3.1 means that investigating authorities must gather and analyse evidence pertaining to the "dumped imports" as well as to the affected "domestic industry" producing the "like product".

7.344 In respect of the extent to which Economía's collection and analysis of injury data reflected the first and second changes in product definition – i.e. the inclusion of 4"-6" tubing and certain structural tubing – the record evidence we have described above indicates that, by the time of the Final Determination, Economía had sought, from certain domestic producers, and the record included, at least some economic and financial injury information on the state of the domestic industry and information on the volume and price effects of the dumped imports on the domestic industry[402] pertaining to a product definition that clearly included 4"-6" tubing and did not exclude certain structural tubing.[403] Furthermore, as we have already noted, the record is clear (and Guatemala does not contest) that by the end of the investigation, in addition to official SICMEX import statistics, Economía had obtained import "pedimentos" covering essentially 100 per cent of the subject imports from Guatemala[404], and certain import "pedimentos" reflecting imports from sources other than Guatemala, and thus had virtually comprehensive information concerning the product then being imported from Guatemala and (less comprehensive) information on imports from other sources[405] that

[401] E.g. Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.26.

[402] The post-hearing Exhibit GTM-31 indicates that while Economía requested from Hylsa updated injury data in respect of certain other potential adjustments to the product definition, it did not do so specifically in respect of the inclusion of structural tubing at that juncture. Exhibit GTM-20, dated 6 September 2002, indicates that Hylsa perceived the product as standard black and galvanized tubing with diameters of ½-6" "with longitudinal weld and recognizable for conduction". However, the verification report (Exhibit GTM-24) indicates that the verified injury information pertained to a product that included certain structural tubing.

[403] We address the comprehensiveness of the overall data set gathered and analysed for the purposes of Economía's analysis of injury to the "domestic industry" as defined by Economía elsewhere, see *supra*, paras. 7.313 *ff*.. We refer to and incorporate here our citations of passages from the Preliminary and Final Determinations relating to the data acquired by Economía from the firms constituting the domestic industry, *supra*, paras.7.301-7.312. We also recall our factual summary above relating to the changes in the product scope and the information gathered from the domestic industry in that context; see, in particular, paras. 7.72, 7.77, 7.82, 7.92, 7.93 and 7.102.

[404] Exhibit GTM-23, para. 164.

[405] We do not address here Guatemala's allegations pertaining to the methodology applied by Economía in respect of the volume of imports of the product under investigation from sources other than Guatemala. We address those allegations elsewhere in this report. See paras. 7.264 *ff*.

it could use for the purposes of its injury and causation determinations. For the purpose of the Final Determination, this "pedimento" data was reviewed in line with the product definition in the Final Determination[406] (i.e. including 4"-6" product and not excluding certain structural tubing).

7.345 Given this record evidence, we find that the factual premise for Guatemala's allegations about the collection and analysis of data on injury and causation in relation to the final product scope under investigation and the domestic industry producing the like product is not accurate. Given that this factual premise underpins Guatemala's Article 3 allegations, we are thus unable to conclude that Guatemala has established that Economía violated Article 3.1, or, consequently, Articles 3.1, 3.2, 3.4 and 3.5 by failing to conduct an objective examination of positive evidence in respect of the data collected and analysed in its determination of injury caused to the domestic industry (as defined in Article 4.1) in light of the changes of the product definition to include 4"-6" tubing and certain structural tubing.

7.346 We recall that Guatemala also asserted a violation of Article 5.4 in the context of its claims and arguments relating to the change of product scope over the course of the investigation. That Article provides:

> "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. "(footnotes omitted)

7.347 Guatemala clarified[407] that its Article 5.4 allegation was that "... changes to the definition of the investigated product have repercussions on the definition of the domestic industry and hence also on the grounds for requesting initiation of an investigation. By not taking account of possible repercussions of this kind when it broadened its definition of the investigated product, Economía acted in a manner inconsistent not only with Article 4.1 but also with Article 5.4 of the Anti-Dumping Agreement." It is thus clear that Guatemala's Article 5.4 allegation relates to changes in the product definition *after* the initiation of the investigation. In our view, Article 5.4 pertains exclusively to initiation, and there is no on-going obligation to monitor domestic industry support once an investigation has been initiated under the *Anti-Dumping Agreement*. We thus disagree with the legal premise underlying Guatemala's allegation (that post-initiation changes in product scope may be challenged under Article 5.4). That being said, however, we can envisage situations in which a radical change in the product definition may result in involving entities additional to, or different from, those that had supported the initiation of the investigation. A WTO Panel called upon to scrutinize such a situation would have to do so very closely. However, in the case at hand, Guatemala has not brought to our attention any shift in the composition of the domestic industry in terms of the production of the like product occasioned by the expansion of the scope of the investigation over its

[406] See Exhibit GTM-23, para 165, in respect of imports from Guatemala: "On the basis of the characteristics of the investigated product set forth in the product likeness section of this Resolution, an analysis of the documentation gave the following results...". In respect of imports from other sources, para. 167 states: "… the maximum and minimum prices of the imports identified as investigated products were identified".

[407] Guatemala's response to question 172 from the Panel.

course. Therefore, even assuming *arguendo* that Guatemala's legal premise was sustainable, the record facts do not sustain Guatemala's claim.

7. Causation/non-attribution

(a) Arguments of the parties

(i) Guatemala

7.348 **Guatemala** argues that Mexico's analysis of the causal link between dumping and injury was inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 as it failed to analyse properly other known factors that were causing injury to the domestic industry at the same time as the dumped imports, and failed to ensure that injury caused by other known factors was not attributed to the imports under investigation. In particular, Mexico did not properly take into account and/or explain that a decrease in exports was a factor causing injury and that that the reduction in operating profits resulted primarily from a cost increase.

(ii) Mexico

7.349 **Mexico** asserts that Economía acted consistently with Mexico's obligations under Articles 3.1, 3.2, 3.4 and 3.5. According to Mexico, Guatemala's vague arguments fail to establish a *prima facie* case that the reduction in operating profits resulted primarily from a cost increase; that the Final Determination makes no mention of a cost increase and, in any event, any such increase could not be attributed to injury caused by dumped imports and was taken into account in the injury analysis of profits. In respect of the decrease in exports, Mexico asserts that Guatemala also fails to establish a *prima facie* case. Mexico affirms that the Determination indicates that, due to the small relative proportion of exports to total production, such decrease could not have been a determining factor in causing injury to the domestic industry.

(b) Arguments of the third parties

7.350 **Japan** and the **United States** assert that the failure to make an objective examination of positive evidence within the meaning of Article 3.1 also leads to a violation of Article 3.5 of the *Anti-Dumping Agreement*.

(c) Evaluation by the Panel

7.351 In considering Guatemala's allegations relating to causality and non-attribution, the question to be addressed by this Panel under Articles 3.1, 3.2, 3.4 and 3.5 is whether an unbiased and objective investigating authority could have treated two specific factors – cost trends and a decrease in exports – in the manner that Economía did when analyzing injury and causality.

7.352 We have already cited the relevant obligations in Article 3 above. Briefly, in concert with the Article 3.1 requirement of an "objective examination" of "positive evidence", Article 3.5 requires that an investigating authority establish a "causal relationship" between dumped imports and the injury to the domestic industry. In the course of identifying this causal relationship, investigating authorities are not permitted to attribute to dumped imports injuries caused by other factors which are injuring the domestic industry at the same time. Critical to the effective operation of the non-attribution obligation, and indeed, the entire causation analysis, is the requirement of Article 3.5 to "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry", for it is the "injuries" caused by those "other" "known factors" that must "not be attributed" to dumped imports.

7.353 We note that Guatemala has raised two allegedly "other known" causal factors in this context – cost developments and a decrease in exports. We consider the consistency of Economía's treatment of each of these factors in turn, below, in light of the requirements of causality and non-attribution set out in the relevant provisions of Article 3.

(i) Costs

7.354 Guatemala argues that according to the Final Determination, Economía attributed the decline in Hylsa-DAT's operating profit during the period of investigation to a decline in sales revenues and an increase in "costos de operación" ("operating costs"). According to Guatemala, the Final Determination indicates that those costs continued to increase during 2000.[408] Guatemala states that in the Final Determination, Economía considered the decline in sales revenue to be the principal cause of the loss of profits, in spite of the fact that cost increases are a determinative factor in reduced profits, given that profits are calculated as revenues minus costs. Guatemala argues that Economía failed to provide a reasoned and adequate explanation as to how it ensured that injury from the increase in costs was not attributed to the subject imports. Guatemala's argument thus is that Economía acted inconsistently with Articles 3.1, 3.2, 3.4 and 3.5 of the Agreement by failing to distinguish appropriately between the injury caused by the increase in operating costs (which, according to Guatemala was an "other known factor" causing injury) versus that caused by the dumped imports; and by failing to perform any analysis to ensure that the injury caused by the increased costs was not attributed to the dumped imports.[409]

7.355 Mexico argues that contrary to Guatemala's assertion, the Final Determination makes no reference to an increase in "costos", and Mexico denies that there was any such increase. Mexico argues that in fact "costos operativos" declined during the period of investigation.[410] According to Mexico, therefore, Guatemala failed to establish a *prima facie* case in respect of this claim.

7.356 We note that central to this claim is a factual disagreement between the parties as to whether the Final Determination indicates that Hylsa-DAT's operating costs increased during the period of investigation. We thus start our analysis by considering the portion of the Final Determination - paragraphs 221 and 224 - to which Guatemala refers in its First Written Submission in respect of this claim:

> "221. In addition, on the basis of Hylsa-DAT's six-monthly statements of results, those for the years 1998 to 2000 were obtained. They showed that in 1999 the applicant recorded a 14 per cent drop in operating profits owing largely to a decline of just over 5 per cent in sales revenue and a 10 per cent increase in operating expenses; for the year 2000, the company's operating profits dropped 51 per cent as a

[408] First written submission of Guatemala at paragraph 309, citing paragraphs 221 and 224 of the Final Determination (Exhibit GTM-23).

[409] Guatemala's response to question 170 from the Panel.

[410] Mexico also argues that, by definition, an increase in costs can not be attributed in any way *to the injury caused by dumped imports.* First written submission of Mexico, at paragraph 261(b). We understand this to be a response to Guatemala's argument that Economía did not explain "how it ensured that this increase in costs was not attributed to the injury caused by the dumped imports" (First written submission of Guatemala at paragraph 310). On the basis of Guatemala's further development of the arguments regarding this claim, we understand Guatemala to be claiming that injury caused by increased costs was improperly attributed to the subject imports.

result of the 7 per cent decline in the company's total revenue, while there were practically no variations in the cost of goods sold." (emphasis added)

[…]

224. Moreover, in the comparable period prior to the period of investigation, July-December 1999, Hylsa-DAT's operating profits posted a decline over the previous comparable period owing to the fact that the cost of goods sold increased 15 per cent, while the Division's total revenue grew 8 per cent; this adversely affected the operating margin, which dropped 4-1/2 percentage points, to 9 per cent. For the period of investigation, July-December 2000, the operating profit fell 79 per cent because the Division's sales revenue dropped 19 per cent and operating expenses rose 6 per cent, which was reflected in a 7 percentage point drop in Hylsa-DAT's operating margin, to 2 per cent." (emphasis added)

7.357 Guatemala's argument – as presented in its First Written Submission – appears to be based on the references in the above passages to increases in "operating expenses" ("gastos de operación") during the POI. Given Mexico's denial that any increase in "operating costs" ("costos operativos") took place, we asked Mexico to clarify why an increase in "gastos operativos" did not result in an increase in "costos operativos". Mexico responded by providing a schematic financial statement, reproduced below, which defines the terms used in the Final Determination as well as the relationships among those terms.[411]

Operation	Heading	Explanation
A	Net sales	Net sales revenue
B	Cost of goods sold	The cost of goods sold includes the cost of manufacture, raw material, labour, indirect manufacturing expenses, initial and final inventories of: raw material, production in process and finished product.
C = A-B	Gross profit	The result of subtracting the cost of goods sold from sales income.
D	Selling expenses	The expenses a company incurs in putting the product on sale.
E	Administrative expenses	Usually consists, *inter alia*, of salaries of administrator, manager, payment of office services.
F = D+E	Operating expenses	The result of adding sales expenses and administrative expenses.
G = B+F	Operating cost	The result of adding cost of goods sold and operating expenses.
H = A-G	Operating profit	The result of subtracting operating cost from sales revenue.

7.358 The above table makes clear that in Mexico's terminology "operating expenses" ("gastos operativos") are not the same thing as "operating costs" ("costos operativos"), and indeed are a component of operating costs, the other component being "cost of goods sold" ("costo de ventas"). We note that, as Mexico argues, cost of goods sold would typically be the major component of

[411] Mexico's response to question 85 from the Panel.

operating cost, given that it comprises all direct and some indirect costs (materials, labour, and manufacturing costs), while operating expenses comprise selling and administrative expenses. We thus agree with Mexico that the influence on profits of one or another component of total operating cost will depend upon the relative magnitudes and movements of these components.[412] In this regard we take note of Mexico's arguments that what paragraph 224 of the Final Determination refers to is an increase in "operating expenses", not "operating costs" during the POI (i.e., July-December 2000), and that an increase in the former does not necessarily mean that there will be an increase in the latter because of their different relative magnitudes, and because cost of goods sold could move in the opposite direction. We also note Mexico's argument before us that as a factual matter Hylsa-DAT's cost of goods sold declined by 13.2 per cent during the period of investigation. The Final Determination does not refer to this fact.[413]

7.359 Guatemala responds to this argument by stating that because the Final Determination indicates that, in percentage terms, the 19 per cent decline in sales revenue was smaller than the 79 per cent decline in operating profits, there must have been other factors which were the main causes of the decline in profits (which we understand to mean causes more important than the decline in revenues).[414] Guatemala also presents a lengthy argument as to what it considers to be the necessary consequences of Hylsa's and Hylsa-DAT's financial indicators as presented in paragraphs 221-224 of the Final Determination. According to Guatemala, these consequences include an increase in operating costs (i.e., cost of goods sold plus operating expenses).[415]

7.360 We consider that this claim raises two interrelated issues. The first is the factual question of whether Guatemala has made a *prima facie* case that there was an "other known factor", namely an increase in operating costs, that should have been but was not taken into account in Economía's causation analysis in the Final Determination. The second is whether an unbiased and objective investigating authority could have reached the conclusion, as Economía did, that the decline in profitability was due principally to a decline in revenues and an increase in operating expenses, and that of the two, the former was predominant.

7.361 Concerning the first issue, we note that Guatemala's arguments in respect of this claim, as well as the portions of the Final Determination which it cites in support, changed considerably over the course of this dispute. For example, as indicated in paragraph 7.356 above, Guatemala's claim as set forth in its first submission was limited to Hylsa-DAT, and was based on paragraphs 221 and 224 of the Final Determination exclusively. As noted above, the only references in those paragraphs to increased cost elements during the POI (July-December 2000) are the references to increases in "gastos operativos" which are neither the same as, nor do they ineluctably cause, increases in "costos operativos". Furthermore, while in its First Written Submission Guatemala refers to paragraph 221 as pertaining to Hylsa-DAT, in a subsequent answer to one of our questions it indicates that this

[412] Ibid.

[413] Ibid.

[414] Guatemala's response to questions 170 of the Panel, at para 52.

[415] Guatemala argues, in its response to question 170 of the Panel, that "Economía drew no distinction between, on the one hand, the injury caused to its profits by the drop in sales (assuming for the time being that the sales were affected solely by dumped imports) and, on the other hand, the injury caused by other factors that had a decisive influence on the decline in profits (which include increases in operating costs in both its components, in operating expenses and in cost of goods sold, for which Economía provides partial and incomplete information)." We note that, to the extent that this argument refers to the issue of the six-month periods used for the analysis, or to the fact that Economía based the analysis only on information for Hylsa/Hylsa-DAT, we have addressed these issues in other sections of this report.

paragraph refers to "la solicitante" (i.e., Hylsa).[416] Guatemala then raises a number of new arguments, based on other paragraphs of the Final Determination, pertaining to both Hylsa and Hylsa-DAT. Among these arguments is a lengthy speculation as to what would have happened to various components of Hylsa's and Hylsa-DAT's financial statements if certain events had occurred or certain trends had continued. We consider that Guatemala's initial presentation of its claim was based on a misreading of paragraph 221 and a misunderstanding of the term "gastos operativos" in paragraphs 221 and 224, and we do not find its subsequent very different and essentially speculative arguments to be convincing. As complainant, Guatemala bore the initial burden of proof to assert the affirmative of its claim. For the reasons discussed, we consider that Guatemala did not provide evidence sufficient to raise a presumption that what it asserted was correct, i.e., that the Final Determination indicates that Hylsa-DAT's "operating costs" must have increased during the period of investigation.

7.362 Concerning the second issue, it is evident to us from the Final Determination that Economía evaluated the details of Hylsa-DAT's financial performance, and that on the basis of this analysis, Economía concluded that the decline in operating profits was caused by the reduction in sales revenue and the increase in operating expenses, and that of these, the decline in sales revenue was predominant.[417] In our view, an unbiased and objective investigating authority could properly have reached this conclusion on the basis of the facts as presented in the relevant portions of the Final Determination. While we find the explanation in the Final Determination to be somewhat hard to follow, we disagree with Guatemala that the Final Determination indicates that Economía had no factual basis for the conclusion that it reached. Furthermore, given our standard of review, the issue is not whether we would have evaluated the facts differently from Economía and come to a different conclusion, but rather whether Economía failed to take into account an "other factor" which was "known" to it. In our view, therefore, Guatemala has failed to establish a *prima facie* case of inconsistency with the obligations under Articles 3.1, 3.2, 3.4 and 3.5, and even if it had met its *prima facie* burden, we still would not find an inconsistency with Articles 3.1, 3.2, 3.4 and 3.5 for the reasons set forth.

(ii) Exports

7.363 In respect of Economía's alleged breach of Articles 3.1, 3.2, 3.4 and 3.5 relating to non-attribution of injury from a decrease in exports, there is no disagreement between the parties that this "decrease" occurred and was a "known factor". Rather, Guatemala's claim is that Economía's appraisal of the decrease in exports was inadequate. In particular, according to Guatemala, on the basis of the facts as set forth in the Final Determination, the absolute decrease in exports (described in the Final Determination as a decline in the share of exports in relation to national production from 7 per cent to 5 per cent, or two percentage points, between the six-month periods of 1998 and 2000) must have been equal to or greater than the 2 per cent drop in the volume of domestic sales during the POI. In particular, Guatemala argues, a reduction of 2 per cent of total production would if anything be larger in absolute terms than a reduction of 2 per cent of domestic sales, as total production could be expected to be greater than domestic sales. As such, Guatemala argues, the impact on the state of the domestic industry of the reduction in exports must have been at least commensurate with the impact of the reduction in domestic sales. Guatemala further asserts that even if the impact of the

[416] Guatemala's response to question 170 of the Panel, at para. 42.

[417] "…[I]n the period of investigation as compared to the previous comparable periods, the operating profits of the Division of Steel Tubing recorded a decline which can be attributed essentially to the drop in its sales revenue, which was reflected in declines in the Division's operating margin ...". Exhibit GTM-23, para 238; Mexico's second written submission, para 193.

decrease in exports was not determinative, the resulting injury should still have been properly attributed.[418]

7.364 Mexico did not respond directly to Guatemala's statistical argument outlined above until the very end of this dispute, in its comments responding to Guatemala's comments on statistical information requested by the Panel at that stage[419], but instead initially argued that Guatemala had not made out a *prima facie* case as in Mexico's view, Guatemala had claimed that the Final Determination did not even address the decline in exports. In this regard, Mexico referred to the statement in the Final Determination that Economía did not consider the decline in exports to be "determinative" because of the small share of domestic production accounted for by exports. According to Mexico, this assessment was reasonable and sufficient, and Economía thus acted in full conformity with the cited provisions of the Agreement in its treatment of exports. Mexico's direct responses to Guatemala's statistical argument, submitted in its response to Guatemala's comments on the newly-submitted statistical information are set forth below, at paragraph 7.371.

7.365 Before considering the detailed arguments of the parties, we set forth the relevant portion of the Final Determination ("Effects on economic indicators"):

> "201. At this stage of the investigation, the Ministry had direct information on the economic indicators of the investigated pipe of the applicant, of Tubería Nacional and of Compañía Mexicana de Tubos, which together accounted for 88 per cent of the domestic industry, so the Ministry determined that the behaviour of these indicators was representative of the industry.

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[418] Guatemala's response to question 80 from the Panel:

> "... Economía did not properly quantify the effects on domestic production of the drop in exports as compared to the drop in domestic sales. Economía indicated that domestic industry's sales to the domestic market grew by 3 per cent from 1998 to 1999 and then fell by 5 per cent in 2000. There was thus an overall decline of 2 per cent in the period 1998-2000. Economía also explained that domestic industry exports fell from 7 per cent "of market-oriented domestic production" to 5 per cent in the course of the 1998-2000 period. It would therefore appear that the decline in exports was largely the same as the decline in domestic sales. In fact, the drop in exports may even have been greater than the drop in domestic sales insofar as Economía apparently used different denominators in reckoning these percentages. The drop in sales to the market is shown as a percentage of domestic sales, while the drop in exports is expressed as a percentage of "market-oriented domestic production", which apparently refers to production for all markets. It can be assumed that 2 per cent of total domestic production for the market as a whole ("*mercado de comercialización*") is broader in absolute terms than 2 per cent of sales to the domestic market. Therefore, contrary to Economía's conclusion, Economía's figures suggest that the decline in exports had a greater effect on the performance of the domestic industry than the decline in domestic sales. In these circumstances, Economía should have conducted a proper non-attribution analysis to ensure that the injury caused by this factor was not attributed to the subject imports."

Mexico argues in its 23 January 2007 response to Guatemala's comments on information submitted by Mexico in response to a question from the Panel (see paragraph 7.368, *infra*.) that, in arguing that the volume of the decline in exports was triple the volume of the decline sales to the domestic market, Guatemala raised a new argument in its comments. We disagree. We consider that Guatemala's argument on this point has been consistent throughout this dispute, although obviously Guatemala lacked the precise data underlying the statements in the Final Determination until Mexico's response to our request.

[419] The Panel's request for information was dated 17 January 2007, Mexico's response submitting the requested information was dated 19 January 2007, Guatemala's comments on the submitted information were dated 23 January 2007, and Mexico's response to Guatemala's comments was dated 25 January 2007.

202. On the basis of the information referred to in the previous point and that obtained from the SICMEX list of 'pedimentos', the Ministry noted that the Mexican market for the investigated pipe, measured in terms of apparent domestic consumption, calculated as set out in points 173 and 174 of this Resolution, remained practically constant in the periods July-December of 1998 and 1999, and increased 5 per cent in the period July-December 2000.

203. The increase noted in apparent domestic consumption between July-December 1998 and the period of investigation was filled in part by imports of Guatemalan investigated pipe which attained a 5 per cent share in the period of investigation, having been insignificant in the period July-December 1998; imports from sources other than Guatemala increased their share by 6 percentage points in the period of investigation, following a virtually constant share in the period July-December 1998 and 1999.

204. The performance of imports was reflected in the behaviour of the total domestic-market-oriented production of the applicant, Tubería Nacional and Compañía Mexicana de Tubos. In absolute terms, this indicator dropped 2 per cent from the period July-December 1998 to the same period in 2000, notwithstanding a 1 per cent increase in the period of investigation in relation to the previous comparable period.

205. Sales to the domestic market by these companies grew 3 per cent in July-December 1999 in relation to the level reached in July-December 1998, then fell 5 per cent in the period of investigation.

206. The drop in the sales of these companies to the domestic market was largely accounted for by the investigated imports entering in conditions of price discrimination, for the following reasons: prices of imports from other sources were higher than the price of Guatemalan imports and, as stated in points 178 and 179 of this Resolution, there is no evidence in the administrative file that the main companies that imported pipe identified as investigated products from other sources accounted for loss by the domestic industry of sales or customers, since in the periods July-December 1998 and 1999 and in the period of investigation, they were not identified as customers of the applicant, the main domestic producer of the investigated pipe.

207. Total exports of the investigated pipe by the domestic industry showed a downward trend: in July-December they dropped 51 per cent and in the period of investigation posted a drop of 25 per cent. It should be pointed out that while in the period July-December 1998 they represented 7 per cent of market-oriented domestic production, in the period July-December 1999 and the period of investigation they accounted for 3 and 5 per cent respectively, so their behaviour could not be a decisive factor in explaining the injury to the domestic industry.

208. The trend in sales was reflected in a decline in production and, hence, in the utilization of the installed capacity for production of the investigated pipe corresponding to the domestic manufacturers.

209. As to production in absolute terms, this indicator recorded a drop of 6 per cent from July-December 1998 to the same period in 1999 and showed practically the same level in the period of investigation in relation to the comparable previous period; utilization of installed production capacity dropped 4 percentage points from the period July-December 1999 to the period of investigation.

210. With regard to the average inventories of these companies, the Ministry noted that in the period of investigation they increased 3 per cent over the level recorded in July-December

> 1999; it is important to highlight that these accounted for 16 and 17 per cent of domestic-market-oriented domestic production in the periods indicated. Furthermore, in the period of investigation, the average employment level dropped 5 per cent as compared to the level recorded in the comparable previous period.
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> 211. On the basis of the indications in points 195 to 210 of this Resolution, and taking account of the arguments of the exporter and the applicant, the Ministry determined that the economic indicators corresponding to the domestic producers Hylsa, Tubería Nacional and Compañía Mexicana de Tubos, recorded negative behaviour in the period of investigation owing largely to the increase in imports from Guatemala in conditions of price discrimination.[420]

7.366 We read the above portion of the Final Determination as a description of injury in the form of and attributable to volume declines in domestic industry sales and production, which in turn, according to Economía, were "principally due to" the increase in the volume of dumped imports from Guatemala. In particular, the argument in the Final Determination is that although apparent domestic consumption increased during the period of investigation, this growth was more than captured by imports – among them the investigated imports from Guatemala – and that as a result the volume of domestic producers' sales into the Mexican market declined. Economía attributed the decline in these domestic sales largely to the imports from Guatemala on the basis that the Guatemalan products' prices were lower than those of the other imports, and that the importers of the other imports were not customers of Hylsa. The argument continues that the reduction in the volume of the Mexican producers' domestic sales brought about a decline in production and an increase in inventories. In more precise terms, we thus view this part of the Final Determination as identifying the decline in the volume of the domestic producers' sales into the Mexican market as the nexus of the injury described in this section of the Final Determination[421], as the Determination identifies this decline as the cause of the concurrent decline in production, capacity utilization and employment.[422]

7.367 We recall that Guatemala's factual argument in support of its claim is that the cited portion of the Final Determination indicates that the reported net decline of two percentage points in the volume of exports in relation to production between the 1998 and 2000 half-year periods must, as a matter of logic, have been at least as large as the net decline in the volume of sales to the domestic market between the same periods, given that the industry's total production volume could be expected to be at least as large as the volume of domestic sales. We first considered this argument on the basis of the text of the Final Determination cited above, and found its logic to be compelling. That is, on the basis of this text, we did not see how the amount of the decline in export volume could be less than the amount of the decline in the volume of domestic sales.

7.368 We noted, however, that because of the absence in the cited text of either any absolute figures or of any definitions of the terms used and their interrelationships, we could not reach a definite conclusion as to this factual question. In particular, we needed to understand the meanings of the different terms used in the text (e.g., "producción" (production), "producción nacional" (domestic production), "producción orientada al mercado interno" (domestic market-oriented production),

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[420] Guatemala - Exhibit GTM-23.

[421] We recognize, as argued by Mexico, that Economía's causation analysis was not limited to volume effects but also took into account financial and price effects (i.e., decreased profits). The section of the Final Determination at issue in this claim is, however, concerned only with volume effects, as the other effects referred to by Mexico are addressed elsewhere in the Final Determination (and the claim relating thereto is analyzed in the preceding section of this report).

[422] Exhibit GTM-23, para. 207; Mexico first written submission, paras. 278 - 280.

"producción nacional orientada al mercado" (market-oriented domestic production), "producción nacional orientada al mercado interno" (domestic market-oriented domestic consumption), "consumo nacional aparente" (apparent domestic consumption), "importaciones de Guatemala y de otros orígenes" (imports from Guatemala and other sources), "ventas al mercado interno" (sales to the domestic market), "exportaciones" (exports), and "inventarios" (inventories)) and how they related to one another. That is, because of the different terms used, we could not be sure as to the degree of similarity or difference between the bases on which the declines in domestic sales and exports, as reported in the Final Determination, were calculated. For this reason, as indicated above we asked Mexico to provide us with the documents from the record of the investigation containing the figures that justified the analysis and percentages referred to in paragraphs 201-210 of the Final Determination. Mexico submitted a number of exhibits in response.[423] Guatemala then had an opportunity to comment in writing on the new information submitted by Mexico, and Mexico had an opportunity to respond to Guatemala's comments.[424]

7.369 Of the information submitted, we find the first page of Exhibit MEX-15 to be the most pertinent to the factual question before us. This page, which consists of a table entitled "Indicadores de la Industria Nacional" (Domestic Industry Indicators), contains all of the figures on which the narrative in the cited paragraphs of the Final Determination is based. From this table, we understand that not all of the different production-related terms that appear in those paragraphs in fact have distinct meanings. In particular, we note that "producción nacional" refers to total production of the industry, including Procarsa (which did not provide data to Economía), while "producción" refers to the production reported to Economía by Hylsa, Tubería Nacional, and Compañía Mexicana de Tubos. Furthermore, the only subcategory of "producción" that appears in this table is "producción nacional orientada al mercado Mexicano" (Mexican market-oriented domestic production). From this fact, and

[423] Our precise question, which we posed on 17 January 2007, was: "Paragraphs 201-210 of the Final Determination refer to certain indicators relating to the Mexican market and the performance of Mexico's domestic industry, in particular "apparent domestic consumption", "imports from Guatemala and other sources", "production for the domestic market", "sales to the domestic market" "exports", "domestic production for the market ", "production" and "inventories". The Panel needs documents from the investigation file that contain all of the figures supporting the analysis and the percentages in these paragraphs, i.e. the documents Economía used in drafting the above-mentioned paragraphs." In response to this question, on 19 January 2007 Mexico submitted Exhibits MEX-15 through MEX-25.

[424] Guatemala's comments were dated 23 January 2007 and Mexico's responses were dated 25 January 2007. In addition to commenting on the question of the decline in exports, Guatemala raised a number of points relating to its claims concerning Economía's use of six-month periods in its injury analysis, and concerning Economía's use of data for varying groups of domestic producers for different injury indicators. Guatemala also questioned whether the Panel's request for data from the record of the investigation was in accordance with the Panel's standard of review. Mexico submitted responses on all of these points. We have not found it necessary to rely on the arguments of the parties from this late stage of the dispute in reaching our conclusions on Guatemala's claims relating to the six-month periods or the varying groups of domestic producers, as we already had sufficient elements before us to resolve those claims. Concerning our standard of review, we consider that Mexico correctly interpreted, and fully complied with, our request for information, and we disagree with Guatemala's implication that a panel is prevented by the standard of review from seeking the compiled data from the record of an investigation on which statistical descriptions contained in the authority's determination are based. In this connection, we recall that under our standard of review, as set forth in Article 17.6 of the *Anti-Dumping Agreement*, our task involves, *inter alia*, assessing the investigating authority's establishment and analysis of the *facts* in the investigation. It is indeed well-established that Articles 17.5 and 17.6(i) require a panel to examine the facts made available to the investigating authority. See, for example, Appellate Body Report, *Thailand – H-Beams*, para. 118.

from a comparison of the data in the table with the percentages cited in the Final Determination, we conclude that the other similar terms in the Final Determination[425] in fact refer to this same concept.

7.370 This table provides confirmation of Guatemala's factual allegation. That is, the data in the table show that in absolute volume terms, the decline in exports was in fact three times as large as the decline in the volume of sales to the domestic market over the period described in the Final Determination (i.e., July-December 1998 to July-December 2000). Mexico argues in its comments related to this information that Guatemala unjustifiably compares the data for the 1998 period to that for the 2000 period, without taking into account the developments in the 1999 period. We note that the Final Determination compares at various places data for the 1998 period to that for both 1999 and 2000, and that we therefore do not find Guatemala's argument to be invalid. Guatemala's essential point is that over the period examined by Economía, the decline in export volume was at least as great as the decline in the volume of sales to the domestic market, and that given the focus on volume in this section of the Final Determination, there was no basis for Economía to have considered the volume decline in exports as less important than the volume decline in domestic sales. In other words, according to Guatemala, the decline in exports was an "other known factor" causing injury, in respect of which Economía failed to conduct the necessary non-attribution analysis to ensure that this injury was not attributed to the investigated imports.

7.371 In its response to Guatemala's comments on the new information submitted by Mexico in Exhibits MEX-15 to MEX-25, Mexico provided a specific response to Guatemala's argument that the volume decline in exports was greater than that in domestic sales, such that the statement in the Final Determination that the export decline was not determinative due to the small proportion of national production accounted for by exports was an insufficient non-attribution analysis. Mexico does not contest the factual accuracy of this argument, but rather contends that it is erroneous to consider that the importance to an industry of a decline in exports is based on the number of tons involved, *per se*, and that the significance of the decline instead depends on the percentage that this represents of national production. We thus see Mexico as arguing that because domestic sales account for a considerably higher proportion of domestic production than did export sales, the absolute tonnage decline in domestic sales had a much greater (apparently "determinative") negative volume-based impact on the condition of the domestic industry than did the three-times-larger absolute tonnage decline in export sales. We find no development of such concepts in the Final Determination, however, but instead see only a conclusory statement there.[426]

7.372 Under our standard of review, our task is to determine whether an unbiased and objective investigating authority, on the basis of the relevant facts of record, could have reached the conclusion in the Final Determination. Put in concrete terms, could an unbiased and objective investigating authority have found that a given decline in the volume of sales to the domestic market was a principal element of and factor in the injury experienced by the domestic industry (i.e., that this decline which was caused by displacement by the subject imports led to a harmful decline in production, capacity utilization and employment), while dismissing as not a "determinative factor" a decline in the volume of export sales of at least the same magnitude (in this case three times larger over the full period considered). To us, the answer on the face of these facts can only be in the

[425] I.e., "producción orientada al mercado interno" (domestic market-oriented production) and "producción nacional orientada al mercado" (market-oriented domestic production).

[426] Mexico also raises other counterarguments to Guatemala's comments. First, Mexico argues that Guatemala's argument as presented in its comments is new, a contention with which we disagree, as we explain in footnote 418. Mexico also asserts that Guatemala argued that Economía had not provided any reasons for considering the decline in export sales not to be determinative, which Mexico denies by stating that in fact the Final Determination does refer to a reason. We do not consider that this characterization reflects Guatemala's allegation, which in our view is that the reason provided is not convincing in the light of the facts as they can be deduced from the relevant portion of the Determination.

negative. Nor do we consider that Economía made any attempt in the Final Determination to distinguish the relative impacts on the industry of the respective declines in the volumes of domestic sales and exports. To the contrary, the only explanation given by Economía for dismissing the decline in exports as a determinative factor was exports' small share of domestic production. This statistic is irrelevant, however, given that the "yardstick" used in Economía's entire analysis in this section of the Determination was the absolute decline in volume, by which yardstick the decline in exports over the period analysed by Economía was considerably larger than that in domestic sales. In short, we do not consider that Economía's non-attribution analysis in respect of the impact of the decline in exports on the domestic industry was sufficient. For these reasons, we find that Economía acted inconsistently with Mexico's obligations under Articles 3.1, 3.2, 3.4 and 3.5 in its treatment of the decrease in exports in its causation analysis.

F. PROCEDURAL CLAIMS

1. Confidentiality and non-confidential summaries

(a) Arguments of the parties

(i) Guatemala

7.373 **Guatemala** asserts that Mexico violated Article 6.5 of the *Anti-Dumping Agreement* as it failed to require the applicant to provide non-confidential summaries, to evaluate the sufficiency of the summaries, and to disclose properly information that was not shown upon good cause to be confidential or, alternatively, to disclose non-confidential summaries of confidential information.

(ii) Mexico

7.374 **Mexico** argues that it proceeded precisely as envisaged by Article 6.5 of the *Anti-Dumping Agreement*: it permitted the information concerned to be treated as confidential upon a showing of sufficient good cause, while allowing qualified representatives of all interested parties (including Tubac) opportunities for full access to the confidential information. Furthermore, Article 6.5.1 envisages that in exceptional circumstances, parties may indicate that information is not susceptible of summary, if they provide a statement of the reasons why summarization is not possible. According to Mexico, that is precisely what happened in the instant investigation.

(b) Arguments of the third parties

7.375 The **European Communities** declines to comment on certain aspects of Guatemala's claim, as it has no access to the confidential information concerned (e.g. in respect of Mexico's assertion that numerical information is not susceptible of summary). However, a justification to designate information as confidential cannot be a tautology, and the grounds that permitted understanding and review of the reasons that led the IA to conclude that the information should be treated as confidential is not clear from the record. In addition, Mexico's domestic law and regulations on access to confidential information cannot trump its obligations under Article 6.5 of the *Anti-Dumping Agreement*.

(c) Evaluation by the Panel

7.376 We understand Guatemala to allege violations of the chapeau and paragraph 1 of Article 6.5 in respect of certain information in the course of the investigation.[427] The primary focus of

[427] In response to question 114 from the Panel, Guatemala maintains that the legal basis for its claims regarding the treatment of confidential information is the chapeau and paragraphs 1 and 2 of Article 6.5. The

Guatemala's claims is the initiation evidence relating to "normal value" (i.e. the invoice and the price quote, already discussed above in our examination of Guatemala's claims under Article 5.3), while Guatemala also refers to Hylsa's 17 September 2002 document containing information on the description of the product under investigation (in particular, the issue of inclusion of certain structural tubing within the scope of the product under investigation/like product).[428] We consider each of these allegations below, after setting out relevant legal considerations.

7.377 Article 6.5 of the *Anti-Dumping Agreement* reads:

> "6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.*
>
> > 6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.
> >
> > 6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct."**
>
> *Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.
>
> **Members agree that requests for confidentiality should not be arbitrarily rejected.

7.378 The text of Article 6.5 of the *Anti-Dumping Agreement* states that confidential information shall, upon good cause shown, be treated as such by the authorities. Such information shall not be

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panel request refers to Article 6.5 only. While the parties have not raised any issue that the legal basis of the claim is not identified in sufficient detail for the claim to be within the Panel's terms of reference, we are aware that this is ultimately the Panel's responsibility. We consider that, in light of the description of the claims in the Panel request, the reference to Article 6.5 is here sufficient to encompass claims under Articles 6.5 (chapeau) and paragraphs 6.5.1 and 6.5.2.

[428] In response to question 115 from the Panel, Guatemala explains that Economía gave confidential treatment to certain information relating to the product under investigation. This information was included in the 17 September 2002 response by Hylsa to certain questions by Economía (and is in the Panel record, Exhibit GTM-31). Guatemala asserts that this information was submitted as confidential, with no justification and without a non-confidential summary.

disclosed without specific permission of the party submitting it.[429] This provision distinguishes between two types of confidential information: (1) "information which is by nature confidential", and (2) information "which is provided on a confidential basis". The requirement to show "good cause" has been understood to apply to both these types of confidential information.[430] However, in our view, the nature and degree of that requirement would depend on the type of information concerned.[431] For example, a showing of "good cause" for information that is "by nature confidential" may consist of establishing that the information fits into the Article 6.5 (chapeau) description of such information: "for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information."

7.379 Article 6.5.1 establishes that the investigating authority must require that interested parties submitting confidential information also furnish a sufficiently detailed non-confidential summary.[432] These summaries have to permit a reasonable understanding of the substance of the confidential information. However, such non-confidential summaries need not be furnished when, "in exceptional circumstances", the information "is not susceptible of summary". In such cases, "a statement of the reasons why summarization is not possible must be provided". Although Article 6.5.1 does not explicitly provide that "the authorities shall require" interested parties to provide a statement of the reasons why summarization is not possible, we consider that Article 6.5.1 will be meaningfully construed if the interested party on its own initiative gives the reasons why summarization is not possible, in which case it will be for the investigating authority to ensure compliance with the mandate in Article 6.5.1.[433] Accordingly, we consider that Article 6.5.1 imposes an obligation on investigating authorities to require parties that indicate that information is not susceptible of summary to provide a statement of the reasons why summarization is not possible.

7.380 We see that Article 6.5.1 strikes a balance between the interests of the interested parties submitting confidential information to have that confidentiality maintained during the investigation and the interests of the rest of the interested parties to be reasonably informed about the substance of

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[429] There is recognition that disclosure may be required pursuant to narrowly-drawn protective orders.

[430] Panel Report, *Guatemala - Cement II*, para. 8.219; Panel Report, *Korea - Paper*, para. 7.334.

[431] Panel Report, *Korea – Certain Paper*, para. 7.335.

[432] Like the panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.135, we find the following finding by the panel in *Guatemala – Cement II* helpful:

> "Although Article 6.5.1 does not explicitly provide that "the authorities shall require" interested parties to provide a statement of the reasons why summarization is not possible, any meaningful interpretation of Article 6.5.1 must impose such an obligation on the investigating authorities. It is certainly not possible to conclude that the obligation concerning the need to provide a statement of reasons is an obligation imposed exclusively on the interested party submitting the information, and not the investigating authority, since the *Anti-Dumping Agreement* is not addressed at interested parties. The *Anti-Dumping Agreement* imposes obligations on WTO Members and their investigating authorities. Accordingly, in our view Article 6.5.1 imposes an obligation on investigating authorities to require parties that indicate that information is not susceptible of summary to provide a statement of the reasons why summarization is not possible."
>
> Panel Report, *Guatemala – Cement II*, para. 8.213.

[433] We believe that this would also find support in Panel Report, *Guatemala – Cement II*, para. 8.213.

that information in order to be able to defend their interests.[434] We are aware that the designation of information as "confidential" might affect the ability of interested parties to have full access to that information, and therefore might affect their ability to defend their interests in the course of an anti-dumping investigation. We are further aware of the potential for abuse of the possibility to designate information as confidential so as to consciously place other interested parties at a disadvantage in the investigation. We consider that the conditions set out in Article 6.5, chapeau, and 6.5.1 are of critical importance in preserving the balance between the interests of confidentiality and the ability of another interested party to defend its rights throughout an anti-dumping investigation. For precisely this reason, we consider it paramount for an investigating authority to ensure that the conditions in these provisions are fulfilled. We consider it equally important for a WTO Panel called upon to review an investigating authority's treatment of confidential information strictly to enforce these conditions, while remaining cognizant of the applicable standard of review.

7.381 Article 6.5.2 does not require any justification to be provided by the interested party requesting confidential treatment. Any such obligation derives from Article 6.5, and not 6.5.2. Article 6.5.2 speaks only to particular circumstances – if the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form. Since there is nothing to suggest that the Mexican investigating authority found that the applicant's request for confidentiality of the relevant information was *not* warranted, Article 6.5.2 would, in any event, not appear to be applicable in the factual circumstances of this case. It may, nevertheless, provide contextual guidance in our resolution of Guatemala's claim.

7.382 Article 6.5.2 addresses circumstances where the authorities find that a request for confidentiality is *not* warranted. To us, this is a clear textual indication that the investigating authority has the responsibility – indeed, the obligation – to review, and decide upon, whether a request for confidentiality in line with the chapeau of Article 6.5 is, or is not, warranted. It is clear that Article 6.5 requires an investigating authority to examine the request for confidential treatment and to decide whether or not it is warranted. However, Article 6.5 says nothing regarding the nature of the examination process to be carried out. Nor does it say anything requiring an explanation of *how* that examination was carried out.[435] There is no express provision regulating what should occur in the circumstance where an investigating authority considers that a request for confidentiality *is* warranted, beyond the obligation to treat such information as confidential. Nor does the text of Article 6.5 or 6.5.1 contain any express obligation relating to *how* an investigating authority should decide in respect of a party's assertion that summarization of confidential information is not possible, nor how an investigating authority should or must communicate any decision on this matter.

7.383 With these considerations in mind, we turn to the particular circumstances of this case. Turning to the initiation evidence on normal value, we see that the applicant requested confidential treatment for much of the evidence supporting its application – including information relating to normal value and the description of the product under investigation.

7.384 With respect to Guatemala's allegations about the treatment of confidential information in connection with the initiation evidence relating to "normal value", we recall that both of the relevant

[434] See, for example, Panel Report, *Argentina – Ceramic Tiles*, paras. 6.38-6.39.

[435] We recall that the notice required by the transparency provisions in Article 12.1 is not at issue here. In any event, the obligations in Article 12 include the statement that: "Such a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular: ..."

pieces of evidence – the invoice and the price quote – were part of the Panel record.[436] The applicant provided a non-confidential *version* of the application, but as the invoice was "confidential", it was not included in this non-confidential version of the application; similarly, as the price quote was "confidential" it was not included in Hylsa's response[437] to the "prevención".[438] In the non-confidential version of the application, certain parts of the application were deleted from the text and replaced by blank square brackets, or – in the case of the Annex concerned – simply by blank columns. The substance was left out. The application contains a general statement indicating why the applicant considered the information should be treated as confidential.[439] No non-confidential summary of the omitted confidential information was submitted to Economía, nor is there any indication that Economía requested such a non-confidential summary once it had seen how information therein had been treated. The application asserts that the non-confidential version of the application contained sufficient detail to permit a reasonable understanding of the substance of the information, while omitting certain elements and data that, due to their confidential nature and as they consisted of numerical data and identification numbers, were not susceptible of summary.[440]

7.385 More specifically, the non-confidential version of the application (Exhibit GTM-1, Section II.B.1), indicates only that the evidence of normal value "is documented with the commercial invoice of the investigated product documented in Annex 2.1."[441] It also contains square brackets, indicating that confidential information has been redacted. "Anexo 2" is a table containing 14 columns, of which nine contain square brackets indicating that confidential information has been redacted, and five contain information. The information included in the table sets out the tariff lines, the description of the product under investigation – standard welded conduction tubing and standard black conduction tubing – the conversion factor of the unit of measurement for the tariff line, the US dollar exchange rate and, finally, the adjusted price (US dollar per tonne). This adjusted price for both types of tubing is given as "707". This Annex makes reference to "documentation of the internal price in Guatemala" in Annex 2.1, but does not further describe or summarize the documents containing the supporting evidence. Therefore, we consider that there is no summary in sufficient

[436] The former was annexed to Mexico's first written submission; the latter was submitted in response to the Panel's request and following the Panel's adoption of special BCI Procedures after the first meeting.

[437] Exhibit GTM-3.

[438] Exhibit GTM-2.

[439] The lawyer's cover letter for the application states: "My client considers that the information omitted in the square brackets in the public version of Volumes I and II, and the annexes expressly mentioned therein is bound to confer on them a confidential character, for which reason the Honorable Unit is kindly requested under the terms of Article 158 of the Foreign Trade Act Regulations to assign such character to the said information, since its disclosure would have the consequence of harming its competitive position and its ability to obtain information relevant to the running of the investigation". Exhibit GTM-1. The cover letter to Hylsa's response to the "prevención" in Exhibit GTM-3 contains a similar paragraph. The "prevención" in Exhibit GTM-2 indicates Economía's guidelines as to how confidential information should be treated in responding to the questions contained therein, including the need submit both a confidential and public version of the responses, with the public version redacting the confidential information, as well as the need to justify the confidential treatment of the information, and to summarize it.

[440] Exhibit GTM-1. The cover letter to Hylsa's response to the "prevención" in Exhibit GTM-3 contains a similar paragraph.

[441] There is also a brief response explaining why, in the applicant's view, the sales prices presented are proper. Exhibit GTM-1.

detail to permit a reasonable understanding of the substance of the information submitted in confidence.[442]

7.386 In response to questioning[443], Guatemala clarified that it is also alleging that the treatment of information contained in the petitioner's 17 September 2002 response to Economía's 3 September 2002 "oficio" pertaining to the basis for the possible inclusion of certain structural tubing within the scope of the product definition was inconsistent with Mexico's obligations under Articles 6.5 and 6.5.1.[444] In particular, Guatemala alleges that this information was designated as "confidential" without justification and without a requirement to provide a non-confidential summary.

7.387 Here again, the applicant provided a non-confidential version of the document concerned. In the non-confidential version, certain parts of the responses in the document were deleted from the text and replaced by blank square brackets, or – in the case of the Annexes – simply by title pages with absolutely no contents. The substance was left out. In response to Economía's indication in the 3 September 2002 "oficio" that any request for confidential treatment had to be justified and a non-confidential summary provided[445], Hylsa's cover letter contains an explanation as to why it treats the information as "confidential", and why summarization of certain confidential information was not possible.[446] No non-confidential summary of the omitted confidential information was submitted to Economía, nor is there any indication that Economía requested such a non-confidential summary once it had seen how information therein had been treated.[447]

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[442] Exhibit GTM-3 indicates that, in response to a question concerning evidence of normal value in respect of standard black tubing, Hylsa responded: "There is documentation of normal value in the Guatemalan market regarding black standard tubing and the corresponding adjustments. See annex 13 [Confidential]". Annex 13 is entitled "Documentación del Valor Normal para la tubería estándar negra y ajustes correspondientes" (Documentation of normal value for black standard tubing and corresponding adjustments); Annex 13.1 is entitled "Documentación del precio interno de Guatemala" (Documentation of domestic price in Guatemala); Annex 13.2 is entitled "Cálculo para obtener Dólares por Tonelada" (Calculation to obtain dollars per tonne); Annex 13.4 is entitled " Documentación del domicilio de la empresa que expide el documento que muestra el valor normal" (Documentation of the domicile of the company issuing the document that shows normal value); Annex 13.5 is entitled "Estimación del margen de dumping para la tubería estándar negra" (Estimate of the margin of dumping for standard black tubing). The contents of all of these annexes are entirely redacted. (Annex 13.3 includes non-confidential data on exchange rates).

[443] Guatemala's response to question 115 from the Panel.

[444] Exhibit GTM-31.

[445] Exhibit GTM-21.

[446] The cover letter states: "My client considers that the information omitted between the square brackets in the public version of the attached, and the annexes expressly specified therein, must be treated as confidential, for which reason, pursuant to Article 158 of the Foreign Trade Act Regulations they kindly request the Honorable Unit to confer a confidential character on the said information, since its disclosure would have the consequence of harming their competitive position and ability to obtain information relevant to the running of the investigation. Accordingly, pursuant to Article 153 of the Foreign Trade Act Regulations, and as indicated herein, my client has attached a public version of the said information which contains enough elements to allow a reasonable and comprehensive understanding of the matter, while omitting from the said version certain aspects and information which, being by nature confidential and consisting of numerical and identification data, are not susceptible of summary." Hylsa thus requested: "… that confidential treatment be afforded to the replies and annexes hereto as indicated, since their disclosure could affect the competitive position of the company and cause my client substantial harm".

[447] Mexico, however, asserts that the non-confidential version contains a summary of the confidential information. See, for example, Mexico's rebuttal submission, para. 215. Mexico submits Exhibit MEX-5 to

7.388 More specifically, the non-confidential version of the document in question contains certain responses by Hylsa-DAT regarding the scope of the product under investigation. Certain of the information in the responses is redacted as "confidential". In addition, the entire content of the six Annexes[448] is all redacted as "confidential". The document does not further describe or summarize the redacted portions in the body of the document, nor the annexes containing the supporting evidence. Therefore, we consider that there is no summary in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.

7.389 Guatemala takes issue with two main aspects of Economía's treatment of the information concerned. First, the application and Exhibit GTM-31 contain a general statement indicating why the applicant considered that the information should be treated as confidential. Guatemala alleges that there is no indication on the record of the investigation that Economía assessed the sufficiency of this justification as to whether "good cause" existed to afford confidential treatment. Second, the applicant also asserts that the non-confidential version of the application contained sufficient detail to permit a reasonable understanding of the substance of the information, while omitting certain elements and data that, due to their confidential nature and as they consisted of numerical data and identification numbers, were not susceptible of summary.[449] In this context, Guatemala asserts that, even if the confidential treatment was justified, it was not impossible for the applicant to provide non-confidential summaries. Nevertheless, the information was omitted and not summarized.

7.390 We note that, in respect of both the initiation evidence on normal value, and its 17 September responses, the applicant *did* provide reasons which, in its view, justified non-disclosure and non-summarization of the information concerned.

7.391 Guatemala argues that Economía did not evaluate whether "good cause" had been shown for the underlying information to be treated as confidential. Guatemala also asserts, in respect of the price quote and the invoice, that the disclosure of the information would not have affected the applicant's competitive position or its ability to obtain further information, as: the information concerned prices within Guatemala; the exporter (and not the applicant) would have the responsibility of seeking such information post-initiation; and – with the exception of the name of the buyer or of the requester of the price quote – the information was not confidential by nature.

7.392 Mexico argues before us that Economía's practice is *only* to record explicitly reasons for *rejecting* a request for confidential treatment – where Economía accepts such a request, it makes no explicit indication, but simply accords confidential treatment to the information.[450] In the instant case,

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substantiate its assertion that it transmitted this non-confidential version to Tubac's legal representative. However, the issue is not whether a non-confidential version of the submission was transmitted; but rather, whether an adequate non-confidential *summary* of the confidential information was transmitted.

[448] The public information in the responses and the titles of these annexes indicate that they include documents and testimonials and invoices from producers/distributors concerning the commercial practice of acquiring structural tubing without hydrostatic testing and using it for conduction; information from importers of certain types of structural tubing; estimates of the breakdown of national production of the product under investigation; and testimonials on the substitutability and correspondence of the data provided with the description of the product.

[449] Exhibit GTM-1.

[450] Mexico outlined the provisions of its domestic legislation and regulations in respect of the treatment of confidential information throughout an anti-dumping investigation, in particular Article 80 of its Foreign Trade Act and Articles 148-158 of its associated regulations. Briefly, Article 80 of Mexico's Foreign Trade Act provides that restricted commercial information and confidential government information shall not be available to any interested parties. Article 148 of the Regulations says that summaries of confidential information and

we find that there is no such explicit indication in the record. However, it is implicitly clear that Economía accepted the assertions of the applicant and did not oppose the request for confidential treatment. The record does not contain any explicit indication as to how, or the extent to which, Economía assessed this justification for non-summarization or reached a reasoned conclusion on this matter. However, again, implicitly, the record reveals that Economía accepted the applicant's assertions relating to non-disclosure and non-summarization.[451]

7.393 Recalling the standard of review, as we have stated above, we do not consider that the obligations contained in Article 6.5 set forth exactly how an investigating authority should or must evaluate a request for confidential treatment;. Nor do we consider that this provision sets forth how an investigating authority should or must indicate (explicitly or otherwise in the record of the investigation) how, and the extent to which, it assessed an applicant's assertion to conclude that "good cause" existed for the information to be treated as confidential within the meaning of Article 6.5, or how, and the extent to which, it assessed an assertion that summarization was not possible within the meaning of Article 6.5.1.

7.394 We consider that, in this case, Mexico adhered to the minimum threshold permitted by Article 6.5 and 6.5.1 in its treatment of the confidential information concerned. In particular, the investigation file indicates clearly that Hylsa sought confidential treatment and provided reasons for its request and that Hylsa also explained why, in its opinion, it was impossible to summarize certain information. As said above, we infer from the fact that Economía granted the confidential treatment that Economía accepted the request and the explanations, and we point out that the cited provisions of the Agreement contain no express requirement regarding the nature of the evaluation by the

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restricted commercial information presented in accordance with Article 153 of the Regulations (Article 148.II) shall be treated as public information. Article 150 defines restricted commercial information as information that meets Articles 152, 153, and 158 of the Regulations and information the disclosure of which may result in substantial and irreversible material and financial harm to the owner of the information, *inter alia*. Article 153 establishes that the party interested in ensuring the confidential or restricted commercial treatment of his information and documents shall submit a public summary thereof to the Ministry. This summary shall be presented in writing and shall be sufficiently detailed to allow anyone consulting it to have a reasonable and comprehensive understanding of the subject. Article 158 of the Regulations establishes that the interested party concerned shall comply with the following requirements: submit the information in writing; explain why his information is of a confidential or restricted commercial character; present a summary of the information or, if applicable, an explanation of the reasons why it cannot be summarized; and, if applicable, give his express consent in writing that the information marked as confidential or restricted commercial may be examined by the legal representatives of the other interested parties.

We are not called upon to evaluate the consistency of these legal and regulatory provisions *as such* with Mexico's obligations under Article 6.5 of the Agreement, and recall that the provisions of a Member's internal law do not justify a violation of its international obligations. See, e.g. Appellate Body Report, *Brazil - Aircraft (Article 21.5 -Canada*), para. 46.

[451] We note, in passing, Mexico's assertion that Tubac also asserted in the course of the underlying investigation that numerical data was not susceptible of summary, and Economía afforded confidential treatment on the same basis as it had to Hylsa's information. Tubac asserted, for example, in its 14 May 2002 "escrito" (Exhibit GTM-12, pp. 2-3; see also Exhibit GTM-7, para. 17) that it had produced a public version of its confidential submissions, redacting certain confidential information between square brackets. Tubac also asserted that, as certain information could consist of internal accounting or financial data of the exporter or a third party, of which there were not very many, disclosure might cause irreversible damage to Tubac or third parties. Tubac further asserted that certain data were not susceptible of summary due to their numerical nature. There is no indication on the record that such assertions on the part of Tubac were treated any differently than the similar assertions made by Hylsa. We would expect an IA to afford such even-handed treatment to both interested parties.

investigating authority. We would have preferred an explicit indication, on the part of Economía, as to why it considered that the assertions of "good cause" for confidential treatment of the information concerned were merited. We would also have preferred an explicit indication by Economía as to how it went about evaluating the existence of the "exceptional circumstances" referred to in Article 6.5.1 in order to justify the non-summarization of certain confidential information. In this respect, we recall that a main reason given for information not being susceptible to summarization was that it was numerical in nature. We note that Mexico's own domestic legal framework explicitly envisages the possibility that information on costs and prices may be presented in ranges of percentage variation not exceeding a factor of 10 per cent.[452] This provision indicates to us Mexico's (and Economía's) own official recognition that at least certain numerical information may be susceptible of summarization.[453] However, we do not see any indication in the record that any efforts were made to explore possibilities for presentation of the confidential information concerned in a manner that, while not compromising the confidentiality of the information, would have permitted interested parties a higher degree of access to it in terms of the non-confidential record of the investigation.

7.395 Nevertheless, for the reasons above, the Panel finds that Guatemala has not established that Mexico violated its obligations under Article 6.5 and 6.5.1 in its treatment of requests for confidentiality and assertions of reasons why summarization of confidential information was not possible.

7.396 We also note that Article 6.5 acknowledges, in the territory of certain Members, disclosure of confidential information pursuant to a narrowly-drawn protective order may be required. We are aware that Mexico has in a place a legislative/regulatory framework governing the treatment of confidential information throughout a Mexican anti-dumping investigation. Under that framework, legal representatives of all interested parties may have full access to confidential information, upon satisfying a number of conditions and filing the requisite documentation.[454] Furthermore, Mexico submits in evidence a request (by Tubac's legal representative) for access to certain confidential information.[455] Mexico asserts that this proves that there was no prejudice to the Guatemalan exporter, as it had the right to have access to the confidential information in the application at the time of the initiation of the investigation, and, in fact, availed itself of that right on at least one occasion. However, Guatemala contends that Mexico's evidence and argumentation about access to the confidential record by Tubac's legal representative is erroneous. According to Guatemala, Tubac's legal representative never requested access to *any part* of the confidential record, including the confidential version of the application, as she did not satisfy all of the conditions under Mexican law pertaining to requesting access to the confidential record, and accordingly never did so. In particular, Guatemala asserted:

> "Guatemala confirms that Tubac did not have access to the information supplied by the applicant and that in the end it was used as 'facts available' for the purpose of the determination of dumping. As the attached statement explains:

[452] Article 149 of Mexico's Regulations associated with its Ley de Comercio Exterior.

[453] In response to question 121 from the Panel, Mexico stated that Article 149 of Mexico's Regulations has not been applied in the administrative practice of Economía and thus it was not possible to clarify the scope of this provision.

[454] See, in particular, Articles 159-161 of Mexico's Regulations associated with is Ley de Comercio Exterior.

[455] Exhibit MEX-2. The date of the request for access is dated November 2002 (whereas the initiation occurred in August 2001, and the Preliminary Determination, public hearing and communications arising out of the public hearing, including Exhibit GTM-31, were all submitted prior to November 2002).

> According to Article 80 of the Foreign Trade Act and to Articles 159, 160 and 161 of its Regulations, in order for the legal representatives of the parties interested in the proceedings to have access to the confidential information, a request in writing must be submitted to the Ministry expressing the need for review of the confidential information, and must be accompanied by the following:
>
> (a) The duly requested official form 'Accreditation of Legal Representative Requesting Access to Confidential Information'.
>
> (b) Surety (policy) for the amount set by the Ministry in accordance with the Federal Fiscal Code. The amount is currently $4,200,000.00 MN.
>
> (c) A written statement from the company represented (Tubac in this case) to the effect that the legal representatives have not been partners or directors or acted as a salaried agents or representatives of the company or other interested parties during the previous year.
>
> (d) Documents showing that the representatives are resident in Mexico.
>
> Upon submission of the request, Economía issues a document authorizing or refusing access. It is Economía's administrative practice to include in the public administrative file both the request for access and the document granting or refusing it.
>
> In this investigation Tubac's legal representatives had not even the possibility of gaining access to the confidential information because not all the requirements were met for filing the request."[456]

7.397 We do not fully understand the decision of Tubac to participate in this investigation exclusively on the basis of the non-confidential record.[457] We commend Mexico on maintaining a domestic legal and regulatory framework that permits legal representatives of interested parties in an anti-dumping investigation, under certain circumstances, to access the confidential record. We note that some of the conditions for access are somewhat stringent, and may, as in the present case, affect the legal representation of an interested party on the basis of the confidential record of the investigation. However, we do not see these conditions as being so insurmountable as to bar effective legal representation of an informed interested party. For example, under the bond requirement, the company would have to pay approximately US$2,000.[458]

7.398 Notwithstanding the foregoing, while such a system of limited disclosure is certainly envisaged by Article 6.5[459], and may certainly act as a supplement to a Member's fulfilment of its

[456] Guatemala's response to question 104 from the Panel. See also Guatemala's response to questions 117-118 from the Panel and Exhibit GTM-32. See Articles 159-161 of Mexico's Regulations to the Ley de Comercio Exterior.

[457] At least, Guatemala has not brought to our attention in these Panel proceedings any other representative of Tubac that *did* have access to the confidential record of this investigation.

[458] See Mexico's response to question 184 (b) from the Panel.

[459] In particular, the footnote reading:

obligations under Article 6.5, we find no textual basis in Article 6.5 that would indicate to us that permitting limited access to the entire confidential record to individuals fulfilling certain conditions, provides a derogation from, or replaces, the obligations of an investigating authority under Article 6.5 to require justification for treatment of information as confidential and, if such treatment is justified, to require non-confidential summaries of the confidential information, or, alternatively, to require justification for the non-summarization of certain information.[460]

7.399 For these reasons, we find that Guatemala has failed to establish that Mexico has acted inconsistently with its obligations under the chapeau of Article 6.5 and paragraph 6.5.1 in this case.

2. Contents of Preliminary and Final Determinations

7.400 We recall Guatemala's allegation that Mexico violated Article 12.2 of the *Anti-Dumping Agreement* as it failed to provide adequate and reasoned explanations in either the Preliminary or Final Determination[461] on the decision of Economía to change the definition of the product under consideration to include tubing from 4" to 6" in its Preliminary Determination.[462] We recall our finding that Mexico acted inconsistently with its obligations under paragraph 7 of Annex II and Article 6.8 in respect of its use of facts available to reach its dumping determination, including in respect of the change in the product definition to include product with diameters from 4-6".[463] In light of our finding of inconsistency with these provisions, we find it neither necessary nor appropriate to address Guatemala's Article 12.2 claim of inadequate notice in respect of the change in product definition to include with diameters from 4-6". We note that our finding concerning paragraph 7 of Annex II and Article 6.8 addressed, among other things, the explanation of the dumping determinations in Mexico's notices. Having found a violation of the requirements set forth in paragraph 7 and other paragraphs of Annex II along with Article 6.8 in relation to Economía's resort to "facts available" in reaching its dumping determination, the question of whether the notice of either the Preliminary or Final Determinations is "sufficient" under Article 12.2 is immaterial. We agree with the view of the Panel in *EC - Bed Linen* that a notice may adequately explain the determination that was made, but if the determination was substantively inconsistent with the relevant legal obligations, the adequacy of the notice is meaningless. By the same token, it is meaningless to consider whether the notice of a decision that is substantively inconsistent with the requirements of the *Anti-Dumping Agreement* is, as a separate matter, insufficient under Article 12.2. A finding that the notice of an inconsistent action is inadequate does not add anything to the finding of violation, to

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> "Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required."

[460] We find support for our view in e.g. Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.137.

[461] Guatemala's argumentation was not always consistent concerning the scope of its claim under Article 12.2. For example, in its rebuttal submission, the pertinent section is entitled "Mexico failed to refute Guatemala's claim that the disclosure of the findings and conclusions in *the preliminary determination* is inadequate" (emphasis added). In other places, such as Guatemala's first written submission, para. 336, Guatemala refers to both the Preliminary and Final Determinations. As the panel request, and at least certain of Guatemala's arguments, refer to both the Preliminary and Final Determinations (see document WT/DS331/2, para. (n)), we have treated Guatemala's claim as referring to both the Preliminary and Final Determinations.

[462] Guatemala confirmed to us that it abandoned its additional complaint about the "inclusion" of certain structural tubing in the final determination. See Guatemala's response to questions 128-130 from the Panel.

[463] We refer to our finding, s*upra*, para.7.197.

the resolution of the dispute before us, or to the understanding of the obligations imposed by the *Anti-Dumping Agreement*. We therefore make no findings in respect of this claim.[464]

3. Essential facts

7.401 Guatemala claims that Mexico violated Article 6.9 failing to disclose to Tubac the "essential facts" under consideration in the investigation. According to Guatemala, Tubac was never informed in any way before the Final Determination that: (1) facts available, in particular information submitted by the applicant, would be used to calculate the margin of dumping; or that (2) certain structural tubing would be included in the scope of the product under investigation and the anti-dumping measure imposed. We recall our earlier finding, in respect of Economía's dumping determination that Economía had acted inconsistently with paragraph 6 of Annex II, and thus Article 6.8, by failing to inform Tubac that its data were being rejected and of the reasons for that decision, and by failing to provide Tubac with an opportunity to submit further explanations. In light of this finding, we do not consider it necessary to also address Guatemala's allegations under Article 6.9.

G. CLAIMS UNDER ARTICLES 1 AND 18 OF THE ANTI-DUMPING AGREEMENT

7.402 Guatemala alleges that Mexico – through Economía – acted inconsistently with its obligations under Articles 1 and 18 of the *Anti-Dumping Agreement* in having contravened the other provisions of the *Anti-Dumping Agreement* cited in its complaint. We note that Guatemala's claims under Articles 1 and 18 of the *Anti-Dumping Agreement* are dependent claims, in the sense that they depend entirely on findings that Mexico has violated other provisions of the Agreement. In light of the dependent nature of Guatemala's claims under Articles 1 and 18 of the Agreement, and of our findings, *supra*, of violations of other provisions, we see no useful purpose to deciding them.[465] In particular, we do not believe that deciding such dependent claims will provide any additional guidance as to the steps to be undertaken by Mexico in order to implement our recommendations regarding the violations that we have found.

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 For the reasons set out above, we conclude that Mexico's initiation of the investigation, the conduct of the investigation and the imposition of a definitive anti-dumping measure on imports of black and galvanized steel pipes and tubes from Guatemala is inconsistent with the requirements of the *Anti-Dumping Agreement*, in that:

(a) Economía's determination that there was sufficient evidence of dumping and injury to justify initiation of the investigation is inconsistent with Mexico's obligation under Article 5.3 of the *Anti-Dumping Agreement* and, consequently, its failure to reject the application in the absence of sufficient evidence of either dumping or injury to justify proceeding with the case is inconsistent with Article 5.8 of the *Anti-Dumping Agreement*;

(b) Economía acted inconsistently with Mexico's obligations under Articles 3.1, 3.2, 3.4 and 3.5 of the *Anti-Dumping Agreement* in relying, without sufficient justification, upon injury data limited to three six-month periods (July-December) in the years 1998, 1999 and 2000 in its determination of injury and causation, as proposed by the applicant;

[464] See Panel Report, *EC - Bed Linen*, paras. 6.259 - 6.261.

[465] We note that a similar approach was followed, e.g., in Panel Reports, *Guatemala – Cement II*, para. 8.296; *US – DRAMS*, para. 6.92; *Argentina - Poultry Anti-Dumping Duties*, para. 7.369.

(c) Economía acted inconsistently with Mexico's obligations under Articles 3.1 and 3.2 to conduct an objective examination of positive evidence by using a methodology premised on a limited sample and unsubstantiated assumptions in estimating the volume of imports from sources other than Guatemala;

(d) Economía acted inconsistently with Mexico's obligations under Articles 3.1, 3.2, 3.4 and 3.5 of the *Anti-Dumping Agreement* to conduct an objective examination on the basis of positive evidence of injury to the domestic industry – as that term is defined in Article 4.1 – by failing to gather and analyse representative and consistent data pertaining to the domestic industry, in particular the data concerning the financial indicators of the domestic industry as a whole, as this had been defined by Economía;

(e) Economía acted inconsistently with Mexico's obligations under Articles 3.1, 3.2, 3.4 and 3.5 of the *Anti-Dumping Agreement* in its analysis of injury and causation by failing to adequately analyse and properly attribute injury to the domestic industry caused by a decrease in exports;

(f) Economía acted inconsistently with Mexico's obligations under paragraphs 3 and 5 of Annex II and Article 6.8 in deciding to reject in their entirety the data that Tubac had submitted and to rely instead on facts available;

(g) Economía acted inconsistently with Mexico's obligations under paragraph 6 of Annex II and Article 6.8 by failing to inform Tubac that its data were being rejected and of the reasons for that decision, and by failing to provide Tubac with an opportunity to submit further explanations;

(h) Economía acted inconsistently with Mexico's obligations under paragraph 7 of Annex II because in applying as facts available the normal value evidence that was provided by the applicant and used in Economía's initiation decision, it failed to use "special circumspection".

8.2 In the light of our findings above, we further conclude that:

(a) Guatemala failed to establish that, in the circumstances of this case, Economía acted inconsistently with Mexico's obligations under Articles 3.1, 3.2, 3.4 and 3.5 to conduct an objective examination of positive evidence by relying on data from an investigation period that terminated eight months prior to the initiation and about two years prior to the imposition of the definitive measures;

(b) Guatemala failed to establish a *prima facie* case of inconsistency with Articles 3.1 and 3.2 in respect of Economía's analysis of the price effects of imports from Guatemala;

(c) Guatemala failed to establish that Economía acted inconsistently with Mexico's obligations under Articles 3.1, 3.2, 3.4 3.5 or 5.4 by failing to conduct an objective examination of positive evidence in respect of the data collected and analysed in its determination of injury to the domestic industry (as that term is defined in Article 4.1) in light of the changes of the product definition to include 4"-6" product and certain structural tubing;

(d) Guatemala failed to establish that Economía acted inconsistently with Mexico's obligations under Articles 3.1, 3.2, 3.4, or 3.5 in its consideration of the behaviour of costs in the context of the injury and causation analysis;

(e) Guatemala failed to establish that Economía acted inconsistently with Mexico's obligations under the chapeau of Article 6.5 and paragraph 6.5.1 in its treatment of confidential information in this case.

8.3 In the light of our findings, it was not necessary for us to address, and we have exercised judicial economy, in respect of:

(a) Guatemala's claims under Articles 2.1, 2.4 and 2.6 relating to the changes to the scope of the product under investigation;

(b) Guatemala's claims under Articles 6.2, 6.4, 6.7, 6.9 and 6.13 relating to Economía's rejection of the information submitted by Tubac and its resort to facts available;

(c) Guatemala's transparency claim under Article 12.2 relating to the contents of the Preliminary and Final Determinations in respect of the inclusion of 4"-6" product in the scope of the product definition;

(d) Guatemala's claims under Article 6.9 pertaining to the alleged failure to disclose "essential facts" pertaining to the resort to facts available and the inclusion of certain structural tubing in the scope of the product definition; and

(e) Guatemala's consequential claims under Articles 1 and 18 of the *Anti-Dumping Agreement*.

8.4 Under Article 3.8 of the *DSU*, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the Mexico has acted inconsistently with certain provisions of the *Anti-Dumping Agreement*, it has nullified or impaired benefits accruing to Guatemala under that Agreement.

8.5 Article 19.1 of the *DSU* reads:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations. (footnotes omitted)

8.6 Pursuant to Article 19.1 of the *DSU*, having found the inconsistencies with the *Anti-Dumping Agreement* set out above, we "recommend that [Mexico] bring the measure into conformity with that agreement".

8.7 Guatemala also requests that the Panel use its discretion under Article 19.1 to make suggestions as to the implementation of any recommendations. As third parties, the United States asserts that the Panel should decline Guatemala's request, while the European Communities submits that a panel may make suggestions where appropriate and that certain violations are so "fundamental" that the only possible remedy would be revocation of the anti-dumping measure. Japan, too, would be in favour of a Panel suggestion that Mexico revoke the anti-dumping measure due to the violations of the initiation obligations.

8.8 In this respect, under paragraph 19.1 a panel "may", i.e., has discretion to, suggest ways in which a Member could implement the recommendation that the Member concerned bring the measure into conformity. Clearly, however, a panel is not required to make a suggestion.

8.9 In this case, we have found that Mexico has not acted in a manner consistent with its obligations concerning many of the steps in the initiation and conduct of the investigation on imports of steel pipes and tubes from Guatemala. In particular, we have concluded that an unbiased and objective investigating authority could not properly have determined, based on the evidence and information available at the time of initiation, that there was sufficient evidence to justify initiation of the anti-dumping investigation; and that Mexico conducted the anti-dumping investigation in a manner inconsistent with its obligations relating to the determinations of dumping, injury and causation under various provisions of the *Anti-Dumping Agreement*. We consider these multiple inconsistencies we have found to be fundamental and pervasive.

8.10 In this respect, we note that other panels have suggested that revocation would be an appropriate route for implementation where they have found multiple, fundamental and pervasive violations of the obligations governing the initiation and conduct of an investigation. For example, the panel in *Guatemala-Cement II* determined that Guatemala had acted inconsistently with its obligations under the *Anti-Dumping Agreement* in its imposition of anti-dumping duties on imports of grey portland cement from Mexico, and found these violations to be of a "fundamental nature and pervasive". That panel continued:

> "In light of the nature and extent of the violations in this case, we do not perceive how Guatemala could properly implement our recommendation without revoking the anti-dumping measure at issue in this dispute. Accordingly, we suggest that Guatemala revoke its anti-dumping measure on imports of grey portland cement from Mexico." [466]

8.11 Similarly, the Panel in *Argentina – Poultry Anti-Dumping Duties* stated:

> "We have determined that Argentina has acted inconsistently with its obligations under the *Anti-Dumping Agreement* in its imposition of anti-dumping duties on imports of eviscerated poultry from Brazil. We have found these violations to be of a fundamental nature and pervasive.
>
> In light of the nature and extent of the violations in this case, we do not perceive how Argentina could properly implement our recommendation without revoking the anti-dumping measure at issue in this dispute. Accordingly, we suggest that Argentina repeal Resolution No. 574/2000 imposing definitive anti-dumping measures on eviscerated poultry from Brazil."[467]

8.12 Insofar as we find that Mexico has not acted consistently with its obligations in the various phases of the investigation and was in breach from the very outset of the investigation, the Panel suggests revoking the anti-dumping measures applied to steel pipes and tubes from Guatemala in order to implement properly the conclusions and recommendations identified in this case.

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[466] *Guatemala – Cement II*, para. 9.6.

[467] *Argentina – Poultry Anti-Dumping Duties*, paras. 8.3-8.7.

8.13 We find support for our decision to make this suggestion in the previous panel reports we have cited above. We emphasize, however, that it is the fundamental and pervasive nature of the multiple inconsistencies that we have found *in this case* that motivate our decision to make our suggestion.

IX. APPENDICES

APPENDIX 1

WORLD TRADE ORGANIZATION

WT/DS331/2
7 February 2006

(06-0526)

Original: English

MEXICO – ANTI-DUMPING DUTIES ON STEEL PIPES AND TUBES FROM GUATEMALA

Request for the Establishment of a Panel by Guatemala

The following communication, dated 6 February 2006, from the delegation of Guatemala to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

On 17 June 2005, Guatemala requested consultations with Mexico pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), Article XXIII:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") and Article 17 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement") regarding the definitive anti-dumping measures imposed by Mexico on imports of certain steel pipes and tubes from Guatemala and the investigation leading thereto.

Guatemala and Mexico held consultations on 15 July, 26 August, and 28 September 2005. These consultations unfortunately failed to resolve the dispute. Accordingly, Guatemala respectfully requests, pursuant to Article 6 of the DSU and Article 17.4 of the Anti-Dumping Agreement, that at its next meeting on 17 February 2006, the Dispute Settlement Body establish a panel with the standard terms of reference set out in Article 7.1 of the DSU to examine this matter and the claims set forth below.

The investigation leading to the imposition of the measures at issue was initiated by the Mexican investigating authority, the Secretaría de Economía ("Economía")[1], on 24 August 2001.[2]

On 13 March 2002, Economía issued a preliminary resolution, in which it found that the imports under investigation were being dumped at margins of 3.41 per cent for standard galvanized

[1] The Secretaría de Economía is now known as the Ministerio de Economía.

[2] *Resolución por la que se acepta la solicitud de parte interesada y se declara el inicio de la investigación antidumping sobre las importaciones de tubería estándar, mercancía clasificada en las fracciones arancelarias 7306.30.01 y 7306.30.99 de la Tarifa de la Ley del Impuesto General de Importación, originarias de la República de Guatemala, independientemente del país de procedencia*, 24 August 2001 (the "Initiation Resolution").

pipes and tubes and 12.82 per cent for standard "black" pipes and tubes from known exporters, and 25.83 per cent and 26.59 per cent, respectively, from all other exporters, and that these dumped imports were causing injury to the Mexican industry.[3] Thus, Economía imposed provisional anti-dumping duties on those products at the above mentioned rates.

On 13 January 2003, Economía issued its final resolution, in which it found dumping margins of 29.93 per cent for standard galvanized pipes and tubes and 35.26 per cent for standard "black" pipes and tubes, and that these imports were causing injury to the Mexican industry.[4] Accordingly, using the lesser duty rule, Economía imposed definitive anti-dumping duties at the rate of 25.87 per cent for both galvanized and "black" pipes and tubes from all exporters.[5]

Article 1 of the Anti-Dumping Agreement requires that "[a]n anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of [the Anti-Dumping] Agreement." In the light of this requirement, and based on Article VI of the GATT 1994 and the Anti-Dumping Agreement, Guatemala considers that Mexico's definitive anti-dumping duties and the investigation leading thereto are inconsistent with Mexico's obligations under the provisions of the Anti-Dumping Agreement hereinafter cited in the following respects:

Claims Relating to the Initiation of the Investigation:

(a) The application for the investigation failed to contain sufficient evidence either of dumping, injury or a causal link to justify the initiation of an investigation. Mexico then initiated the investigation without properly determining whether the application for the investigation contained sufficient evidence of dumping, injury and a causal link to justify the initiation, and without properly examining the accuracy and adequacy of the evidence provided in the application. These failures are inconsistent with Articles 5.2, 5.3, and 5.8 of the Anti-Dumping Agreement.

Claims Relating to the Product under Consideration/Like Product:

(b) In the Initiation Resolution, Mexico provided a definition of the product under consideration and the like product. During the course of the investigation, however, Mexico failed to adhere to and improperly changed its definitions of the product under consideration and the like product without any objective examination of positive evidence regarding these definitions. As a result, Mexico failed to conduct an unbiased and objective investigation and made findings of dumping, injury and a causal link with respect to products that were not properly investigated. These failures are inconsistent with Articles 2.1, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 3.6, 4.1, 5.4, 6.4 and 6.9 of the Anti-Dumping Agreement.

[3] *Resolución preliminar de la investigación antidumping sobre las importaciones de tubería estándar, mercancía actualmente clasificada en las fracciones arancelarias 7306.30.01 y 7306.30.99 de la Tarifa de la Ley del Impuesto General de Importación, originarias de la República de Guatemala, independientemente del país de procedencia*, 13 March 2002 (the "Preliminary Resolution"), para. 197.

[4] *Resolución final de la investigación antidumping sobre las importaciones de tubería estándar, mercancía actualmente clasificada en las fracciones arancelarias 7306.30.01 y 7306.30.99 de la Tarifa de la Ley de los Impuestos Generales de Importación y de Exportación, originarias de la República de Guatemala, independientemente del país de procedencia*, 13 January 2003 (the "Final Resolution"), paras. 115, 273.

[5] Ibid., paragraph 275.

(c) As a result of the changes to the definitions of the product under consideration and the like product during the course of the investigation, Mexico applied its final measure to products that were not covered by its investigation and for which it had not made determinations of dumping, injury, and a causal link. This is inconsistent with Articles 2.1, 2.6, 3.1, 3.2, 3.4, 3.5, 9.1, 9.3 and 18.1 of the Anti-Dumping Agreement.

Claims Relating to the Determination of Dumping:

(d) Mexico relied on facts available to determine the margin of dumping for the largest Guatemalan exporter of the subject products. Mexico lacked a basis under Article 6.8 of the Anti-Dumping Agreement to resort to facts available, and did so without properly following the procedures laid out in Article 6.8 and Annex II to the Anti-Dumping Agreement. These failures are inconsistent with Articles 6.6, 6.8, 6.13, and Annex II of the Anti-Dumping Agreement, as well as with the requirements of Articles 2.1, 2.2, and 2.4 of the Anti-Dumping Agreement to conduct a fair comparison between the export price and the normal value.

(e) Mexico's report on the on-the-spot investigation of the largest Guatemalan exporter contains no grounds to conclude that Mexico had encountered problems that justified recourse to facts available under Article 6.8. Thus, Mexico failed to disclose to the Guatemalan exporters that it had encountered problems at the on-the-spot investigation that warranted the rejection of that exporters' data and the use of facts available, contrary to Articles 6.2, 6.4, 6.6, 6.7 and 6.8 of the Anti-Dumping Agreement. Mexico also failed to provide any subsequent adequate explanation of any problems it had encountered at the on-the-spot investigation or how those problems justified its resort to facts available. These failures are also inconsistent with Articles 6.2, 6.4, 6.7, 6.8 and 6.9 of the Anti-Dumping Agreement.

(f) Mexico made adjustments to the export price for certain categories of expenses without making the symmetrical adjustments to the normal value for the same categories of expenses that was necessary to achieve a fair comparison between the normal value and the export price. This failure is inconsistent with Articles 2.1, 2.2 and 2.4 of the Anti-Dumping Agreement.

Claims Relating to the Determination of Injury and a Causal Link:

(g) In its determination of injury and a causal link, Mexico relied on a period of investigation that ended significantly before the initiation of the investigation and therefore failed to take into account relevant data relating to the period immediately preceding its investigation, resulting in a determination of injury and a causal link that was not based on an objective examination or positive evidence. This failure is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.

(h) Mexico improperly limited its injury analysis to data relating to six-month periods each year within the period of investigation, resulting in a determination of injury and causal link that was not based on an objective examination or positive evidence. This failure is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.

(i) Mexico selectively and inconsistently used data relating to different domestic producers, products and groups or ranges of products, and time periods, in its analysis of the volume and price effects of the imports under investigation, of the impact of

those imports on investigation on the domestic industry, and of the causal link, resulting in a determination of injury and causal link that was not based on an objective examination or positive evidence. These failures are inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.6 and 4.1 of the Anti-Dumping Agreement.

(j) Mexico's analysis of both the volume of the allegedly dumped imports and the effect of those imports on prices in the domestic market for like products, and the consequent impact of those imports on the domestic producers of such products, was not based on an objective examination or positive evidence. These failures are inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

(k) Mexico failed to evaluate properly all relevant economic factors and indices having a bearing on the state of the domestic industry listed in Article 3.4, including, *inter alia*, utilization of capacity, inventories, employment, wages, and growth. In addition to its failure to consider properly particular listed factors, Mexico's overall analysis of the factors listed in Article 3.4 did not conform to the standards of Article 3. These failures are inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

(l) Mexico's analysis of the causal link between dumping and injury failed to analyse properly other known factors, including, *inter alia*, changes in consumption, cost increases, differences in production methods, technology, productivity, decline in exports, and imports from other countries, that were at the same time causing injury to the domestic industry, and failed to ensure that injury caused by those known factors was not attributed to the imports under investigation. This failure is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.

Claims Relating to Procedural Matters:

(m) Mexico failed, before making its final determination, to inform the Guatemalan exporters of the essential facts under consideration that formed the basis for its decision to apply definitive measures, including, *inter alia*, the facts relating to the decision to resort to facts available and to the definitions of the product under consideration and the like product. This failure is inconsistent with Article 6.9 of the Anti-Dumping Agreement.

(n) Mexico failed to disclose in its preliminary and final resolutions in sufficient detail the findings and conclusions reached on all issues of fact and law that were considered material by the Mexican authorities, including, *inter alia*, the reasons for Mexico's definition of the product under consideration and the like product and its resort to facts available to calculate dumping margins for the largest Guatemalan exporter. These failures are inconsistent with Article 12.2 of the Anti-Dumping Agreement.

(o) Mexico failed to require the applicants to provide non-confidential summaries and to disclose properly information that was not shown upon good cause to be confidential or to disclose non-confidential summaries of confidential information. These failures are inconsistent with Article 6.5 of the Anti-Dumping Agreement.

Guatemala considers that the foregoing methodologies, calculations, comparisons, determinations and procedures made or used by the Mexican authorities in their investigation and the imposition of the measures referred to above cannot be reconciled with Article VI of the GATT 1994, Articles 1 and 18.1 of the Anti-Dumping Agreement, or the specific provisions of the Anti-Dumping Agreement cited above.

APPENDIX 2

27 September 2006

SUPPLEMENTAL WORKING PROCEDURES OF THE
PANEL CONCERNING CERTAIN BUSINESS
CONFIDENTIAL INFORMATION

1. Mexico shall submit to the Panel six copies and to Guatemala one copy of any information designated as business confidential.

2. For the purposes of these proceedings, business confidential information means any information that is designated as such by the Party submitting the latter and that is not information accessible to the general public.

3. The party submitting business confidential information shall mark the cover and/or first page of the document containing business confidential information, and each page containing such information to indicate the presence of such information. Specifically, the information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains business confidential information on pages xxxxxx", and each page of the document shall contain the same notice at the top of the page.

4. In addition to the requirements laid down in Article 18.2 of the DSU, Guatemala shall treat as confidential the information that has been designated as business confidential under these procedures; i.e., Guatemala shall not disclose the information contained therein without the formal authorization of Mexico. The parties shall have the responsibility for all members of their delegations, which, for the purposes of these supplemental procedures only, shall not include any employee of any private entity that was an interested party in the anti-dumping investigation, and shall provide the other party and the WTO Secretariat with a list of the names and functions of persons having access to such information. In particular, no member of the delegations of the parties shall disclose to any person outside said delegations any information designated as business confidential under these procedures, and any such information must only be used for the purposes of submissions and argumentation in this dispute and for no other purpose.

5. The parties and the Secretariat engage to keep business confidential information in a secure location so as to ensure that it is used solely by persons authorized under these procedures.

6. Any party referring in its written submissions or oral statements to any information that has been designated as business confidential under these procedures, shall clearly identify all such information in those submissions and statements. All such written submissions shall be marked as described in paragraph 2, above. An edited version not containing any express reference to business confidential information of any written submission containing business confidential information shall be submitted to the Panel simultaneously with the version containing business confidential information. In the case of an oral statement containing business confidential information, a written, edited version not containing any express reference to such information shall be submitted within a day after the statement has been made. Non-confidential versions shall be redacted in such a manner as to convey a reasonable understanding of the substance of the business confidential information deleted therefrom.

7. The Panel engages not to disclose, in its report, or in any other way, any information designated as business confidential under these procedures. The Panel may, however, make statements of conclusion drawn from such information.

8. Submissions containing information designated as business confidential under these procedures will, however, be included in the record forwarded to the Appellate Body in the event of any appeal of the Panel's Report.

9. Once the Panel proceedings have been completed, in the event that the Panel's Report has not been appealed, or once the Appellate Body proceedings have been completed, as the case may be, all business confidential information received by the WTO Secretariat is to be returned to Mexico.

ANNEX A

SUBMISSIONS OF GUATEMALA

ANNEX A-1

FIRST WRITTEN SUBMISSION OF GUATEMALA

(7 July 2006)

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I. INTRODUCTION

1. This dispute between Guatemala and Mexico relates to the investigation of and definitive anti-dumping duties imposed on imports of steel pipes and tubes originating in Guatemala, classified under tariff items 7306.30.01 and 7306.30.99 of the Tariff established under the General Import and Export Duty Law ("TIGI") of Mexico. Guatemala considers that the anti-dumping duties in question and various aspects of the investigation leading to their imposition are inconsistent with various provisions of the Anti-Dumping Agreement, in particular Articles 1, 2.1, 2.2, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 5.2, 5.3, 5.4, 5.8, 6.2, 6.4, 6.5, 6.7, 6.8, 6.9, 6.13, 12.2, 18.1 and Annex II thereof.

II. FACTUAL BACKGROUND

2. Mexico's domestic industry for steel pipes and tubes, as identified by the Mexican Ministry of the Economy ("Economía"), was made up of four enterprises. The application for an investigation was submitted by one of them (the "Applicant") on 22 May 2001, with the support of two others, and made allegations against only one Guatemalan exporter (the "Exporter").

3. The applicant defined the product under consideration as *standard galvanized pipes and tubes* and *standard black pipes and tubes*, produced under manufacturing standard ASTM A53, from *hot-rolled sheet*, of *½ to 4 inches* in diameter, which were imported under tariff items 7306.30.01 and 7306.30.99, respectively, of the Mexican tariff classification. The Applicant also stated that, in addition to the product investigated, *galvanized structural pipes and tubes* and conduit-type *pipes and tubes* were also imported under tariff item 7306.30.01, as were *black structural pipes and tubes* under tariff item 7306.30.99, thereby implying that such pipes and tubes were excluded from the investigation.

4. The Applicant indicated that the dumping investigation period was from 1 July to 31 December 2000 and the injury analysis period from 1 January 1998 to 31 December 2000.

5. In its Initiating Resolution, Economía accepted without any comment the relevant product definition, the evidence of normal value and the investigation period proposed by the Applicant. Moreover, neither the Applicant nor Economía had in its possession evidence serving to distinguish the product under consideration from the one that was not being investigated for the purposes of the import volume analysis.

6. Subsequently, in its Preliminary Resolution, Economía changed the definition of the product under consideration, adding thereto standard (galvanized and black) pipes and tubes of more than 4 to 6 inches in diameter, without providing any justification or requiring the Exporter to submit additional information on the pipes and tubes thus included. In the Preliminary Resolution, Economía also determined the existence of margins of price discrimination by the Exporter of 3.41 per cent in the case of galvanized standard pipes and tubes and of 12.82 per cent in the case of black standard pipes and tubes.

7. During the verification visit to the Exporter's facilities, staff of the enterprise provided access to and disclosed all the information required by Economía. There is nothing in the record to indicate that the enterprise placed any obstacles in the way of the verification of information. The Exporter also explained to Economía that it had detected some errors in the information supplied prior to the visit and accordingly provided it with corrected information, so that those shortcomings could be remedied and the corrected information could be verified. Moreover, Economía found that some of the information previously provided by the Exporter exhibited "insignificant discrepancies", such as information relating to sales, evidence of completeness of reported figures, indirect labour and indirect manufacturing costs. Economía also found discrepancies with the information reported by the Exporter in respect of freight, physical differences and credit notes, and for this reason the Exporter made fresh calculations and supplied the information required by Economía.

8. At the public hearing, the Applicant for the first time clearly stated its intention to include structural (black and galvanized) pipes and tubes within the scope of the investigation. Subsequently, Economía called on both the Applicant and the Exporter to submit "justifications" for the inclusion or non-inclusion of structural pipes and tubes within the scope of the investigation. It did not require either of the parties to submit information on prices in relation to pipes and tubes of this type. Their responses were to be presented even after the deadline for the submission of final arguments and after the lapse of the period for the submission of evidence in the investigation.

9. In its Final Resolution, Economía made a determination of dumping on the basis of the facts available, inasmuch as it disregarded all the information supplied by the Exporter, alleging that it was incomplete, inaccurate and/or not drawn from the accounting records of the enterprise. As a consequence, Economía based its determination of normal value for standard galvanized pipes and tubes on a single sales invoice from a Guatemalan enterprise different from the Exporter, and for standard black pipes and tubes on a single quotation by a Guatemalan enterprise presumably different from the Exporter.

10. For its injury determination, Economía used outdated and incomplete information corresponding to an investigation period which did not end as close as possible to the initiation of the investigation, and referred solely to six-month periods within each of the years analysed. Economía also made selective use of information from subsets of the domestic industry for its analysis of a number of injury factors. Economía failed to explain how the selective use of that information could constitute positive evidence for an objective examination of the effect of the dumped imports on the state of the domestic industry. On the basis of its analysis, Economía concluded that the dumped imports caused injury to the domestic industry.

11. Thus, Economía imposed a definitive anti-dumping duty of 25.87 per cent on imports of carbon steel pipes and tubes, with longitudinal seams, both galvanized and black, in the range of ½ to 6 inches in diameter. Economía makes no reference to "standard pipes and tubes", "conduit pipes and tubes", the raw material (hot-rolled sheet) or the manufacturing standard (ASTM A53 or BS 1387) in order to define the scope of the definitive measure, so that it could include any type of seamed steel pipes and tubes, whether black or galvanized, that come within the specified range.

III. LEGAL BASIS

A. STANDARD OF REVIEW

12. Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement preclude the possibility for a panel to conduct a *de novo* review of the anti-dumping investigation or simply to endorse the conclusions of the national authority. Accordingly, the Panel must base its report on "the information contained in the record and the explanations given by the authority in "*its published report*"; it cannot rely on *ex post* explanations provided by Economía regarding its actions. Similarly, Article 17.6(i) of the Anti-Dumping Agreement requires panels to confine themselves to examining the manner of the investigating authority's "establishment" of the facts and to determining whether its evaluation of those facts was "unbiased and objective".

B. CLAIMS RELATING TO THE INITIATION OF THE INVESTIGATION

1. Mexico initiated the investigation without sufficient evidence of dumping and injury, in violation of Articles 5.2, 5.3 and 5.8 of the Anti-Dumping Agreement

13. The application in this case lacked sufficient evidence of dumping. In order to prove the normal value of standard galvanized pipes and tubes and standard black pipes and tubes, the Applicant presented an invoice and a price quotation, respectively. Both documents were issued by enterprises other than the single exporter under investigation, and they refer to two separate types of

product covered by the definition of the product under consideration. Moreover, these documents were used to compare an individual transaction with average prices over an entire period of investigation, and this is not enough to substantiate a dumping allegation. The only document that substantiated the normal value for all standard black pipes and tubes (the quotation) refers to a *potential* sale and contains no information on the prices at which the product in question *is sold*, in accordance with the provisions of Article 5.2(iii).

14. Nor did the application contain adequate and accurate information on the volume of imports of the product under consideration. The Applicant acknowledged that it did not have this information, and Economía made the unsupported and unexplained assumption that the information on *all* the products imported under the tariff items in question could be representative of the information on imports of the product under consideration (a *subset* of products under the tariff items concerned).

15. Consequently, the application did not satisfy the requirements of Article 5.2 of the Anti-Dumping Agreement. Moreover, Economía failed to prove the insufficiency of the evidence submitted by the Applicant, just as it failed to make any effort to establish that the evidence in question contained accurate information. It simply accepted the evidence and failed to evaluate its accuracy or relevance, in violation of Article 5.3 of the Anti-Dumping Agreement. Thus, by not rejecting the application and terminating the investigation promptly as soon as it was satisfied that there was not sufficient evidence of dumping or injury to justify the investigation procedure, Economía acted in a manner inconsistent with Article 5.8 of the Anti-Dumping Agreement.

C. CLAIMS RELATING TO THE PRODUCT UNDER CONSIDERATION/LIKE PRODUCT

1. Economía changed the definition of the product under consideration to include products not subject to investigation, and this resulted in the imposition of definitive anti-dumping duties in violation of Articles 1, 2.1, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 5.4, 6.4, 6.9 and 18.1 of the Anti-Dumping Agreement

16. While Article 2.6 of the Anti-Dumping Agreement refers to the concept of "like product", the Anti-Dumping Agreement contains no definition or specific guidelines for the definition of the "product under consideration". Presumably, however, an applicant and, more especially, the investigating authority should define the product under consideration on the basis of the product which is allegedly dumped within the meaning of Article 2 and which is causing or threatening to cause injury, within the meaning of Article 3, to the domestic industry defined under Article 4. Clearly, the way in which the investigating authority defines the product under consideration at the beginning of the investigation is highly important for conferring legitimacy on the process as a whole, and any subsequent change to that definition may have implications for every aspect of the investigation and for the possible imposition of anti-dumping duties. Guatemala would point out that it does not maintain that an investigating authority, in the course of an investigation, is not entitled to make minor clarifications necessary to the definition of the product under consideration. Rather, Guatemala maintains that, in doing so, the authorities must comply with all the relevant legal formalities provided for in the Anti-Dumping Agreement, and in particular, that they must rely on positive evidence and on an objective and unbiased evaluation of that evidence.

17. In *US – Softwood Lumber V*, the Panel stated that it was obvious that there must be identity between the product subject to the anti-dumping duty and the product in respect of which determinations of dumping and injury are made. Moreover, as mentioned above, the Panel, in assessing this claim, must determine whether Economía's establishment of the facts was proper and whether its evaluation thereof was *unbiased and objective*.

18. Economía made two significant changes to the definition of the product under consideration. The first change was made by means of the Preliminary Resolution and consisted in the *addition* of standard pipes and tubes of *more than four to six inches* in diameter. The second change was

introduced by the Final Resolution which, in addition to standard pipes and tubes, included *galvanized structural pipes and tubes* and *black structural pipes and tubes*, of ½ to six inches in diameter. The products added by each change in the definition of the product under consideration had initially been excluded from investigation by Economía, and at no point in the investigation did Economía require information from the Exporter on these additional products, particularly for calculating the margin of dumping.

19. The situation described in the preceding paragraph led Economía not to base its dumping determination on the product *as a* whole, in accordance with Article 2.1 of the Anti-Dumping Agreement, as confirmed by the Appellate Body in its jurisprudence. Moreover, as the Exporter had no information on these products, Economía could not have carried out a proper analysis in respect of the export price or normal value. Thus, Economía's determination could not be consistent with the provisions of Article 2.2 of the Anti-Dumping Agreement concerning the establishment of normal value and Article 2.4 of the same Agreement, which requires a fair comparison between the export price and the normal value.

20. Furthermore, as it had no information on the additional products, Economía could not have conducted an investigation based on *positive evidence* and an *objective examination* of dumping, injury and causation in respect of the product under investigation, in violation of Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.

21. Guatemala considers that Economía had the idea of including structural pipes and tubes within the definition of the product under consideration as a result of the discussion held during the public hearing in the investigation, on the same day that marked the end of the period for the submission of evidence. Nevertheless, Economía simultaneously required information from the Applicant and the Exporter on the "arguments" in support of the inclusion or non-inclusion of structural pipes and tubes. At no time did Economía give the Exporter or any other interested party an opportunity to prepare presentations, in accordance with Article 6.4, in respect of this new information, and in fact, Economía did not even indicate that the inclusion of structural pipes and tubes was one of the "essential facts" under consideration which formed the basis for the decision to apply definitive measures. Thus, Economía contravened not only Article 6.4 but also the requirements of Article 6.9 of the Anti-Dumping Agreement. Moreover, inasmuch as Articles 1 and 18.1 of the Anti-Dumping Agreement provide that anti-dumping measures may be applied only if they are consistent with the Agreement, these provisions have also been breached as a result of the violations referred to above.

22. In the light of the foregoing, Economía acted inconsistently with Articles 1, 2.1, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 5.4, 6.4, 6.9 and 18.1 of the Anti-Dumping Agreement.

D. CLAIMS RELATING TO DUMPING

1. Mexico's use of the facts available is inconsistent with Articles 6.2, 6.4, 6.7, 6.8, 6.9, 6.13 and Annex II of the Anti-Dumping Agreement

23. Article 6.8 allows the investigating authority to disregard information provided by the exporter and to rely on the facts available in three circumstances: when an interested party (a) refuses access to necessary information; (b) fails to provide information within a reasonable period of time; or (c) significantly impedes the investigation. Annex II provides that the investigating authority may not reject information which (a) is verifiable, is appropriately submitted so that it can be used in the investigation without undue difficulties, is supplied in a timely fashion and, where applicable, supplied in a medium or computer language requested by the authorities (paragraph 3), or which (b), although not ideal in all respects, has been provided by the interested party to the best of its ability (paragraph 5).

24. In addition, paragraph 6 of Annex II provides that, if evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period. Finally, according to paragraph 7 of the same Annex, if the information is rejected and the authorities have to rely on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should use that information with special circumspection.

25. In the investigation at issue, the Exporter presented all the information requested of it by Economía and maintained a cooperative attitude throughout the investigation. Nothing in the administrative record indicates otherwise. Despite this, Economía rejected all the information from the Exporter. Thus, instead of relying on information from a primary source, Economía calculated the margin entirely on the basis of the facts available, which in this case rested on the insufficient and inaccurate information presented by the Applicant for the purpose of initiating the investigation.

26. The reasons adduced by Economía for using the facts available are mentioned in paragraph 80 of the Final Resolution. They are incorrect and are at variance with the facts on record in the public investigation file, which shows that the Exporter corrected the information in which Economía had found certain errors. Economía checked the new information presented by the Exporter, and when it *found* it to be correct, indicated that it would use it in place of the incorrect information. Economía did not do so.

27. Moreover, although the results of the verification visit point to discrepancies between the information reported and that which was verified in relation to physical differences, assuming these discrepancies to exist, there would be no justifiable grounds for rejecting all the information provided by the Exporter. In fact, Economía failed to explain how the inadequacy of the information relating to physical differences made it impossible for it to use the remainder of the information which it had verified and which was not affected by the information rejected, in accordance with paragraphs 3 and 5 of Annex II to the Anti-Dumping Agreement.

28. Furthermore, in the event that Economía's reasons for rejecting some of the information provided by the Exporter were justified, Economía had no grounds for disregarding *all* the information from the Exporter, particularly such information as satisfied the requirements of paragraph 3 of Annex II to the Anti-Dumping Agreement, and the use of which was not affected by the rejection of any other type of information. In addition, Economía does not properly explain how it complied with paragraph 5 of Annex II to the Anti-Dumping Agreement, specifically as regards how, even though the information provided might not have been ideal in all respects, this could have provided justification for Economía to disregard it entirely, despite the fact that the Exporter had acted to the best of its ability.

29. Economía's decision to rely on the facts available was not made known until the Final Resolution was published. Thus, it was not during the course of the investigation, *but at the end thereof*, that Economía satisfied itself as to the accuracy of the information presented by the parties, in violation of Article 6.6 of the Anti-Dumping Agreement. Moreover, by making that determination only in the Final Resolution, Economía gave the Exporter no opportunity to provide further explanations within a reasonable period, in violation of Article 6.8 and paragraph 6 of Annex II to the Anti-Dumping Agreement.

30. Furthermore, Economía simply used as facts available the information supplied by the Applicant in relation to dumping margins, and made no attempt to examine the Applicant's information in order to assess whether it was the most fitting or appropriate for making determinations with regard to the Exporter. For these reasons, Economía's use of the facts available was inconsistent with paragraph 7 of Annex II to the Anti-Dumping Agreement.

31. Because Economía took the decision to use the facts available at the time of concluding the process, the Exporter was also deprived of any opportunity to review all of the information relevant to the presentation of its case, to prepare presentations on the basis of such information, and to defend its interests. This is inconsistent with the provisions of Articles 6.2 and 6.4 of the Anti-Dumping Agreement.

32. Economía also failed to make the results of the investigation available to the Exporter, and thus acted in a manner inconsistent with Articles 6.7 and 6.9 of the Anti-Dumping Agreement. In addition, it should be mentioned that Economía also failed to comply with the provisions of Article 6.13 of the Anti-Dumping Agreement. For example, if Economía knew that the Exporter had experienced difficulties in allocating production costs for its own product codes, Economía should have cooperated with the Exporter in order to develop a system acceptable (to Economía), so that such costs could be appropriately allocated. For all of the above reasons, the dumping margin was also calculated in a manner inconsistent with Articles 2.1 and 2.4 of the Anti-Dumping Agreement.

E. CLAIMS RELATING TO INJURY

1. Economía's use of the outdated investigation period proposed by the Applicant is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement

33. In accordance with Article 3.1 of the Anti-Dumping Agreement, a determination of injury must be based on an objective examination of positive evidence, and in this connection, the choice of the investigation period determines the data that will form the basis for the assessment of dumping, injury and the causal link. Moreover, anti-dumping measures must be designed to offset or prevent dumping that is *currently* causing injury to the domestic industry. Thus, in order to arrive at an objective determination of current injury or threat of injury to the domestic industry, the investigation period must be the most recent period possible.

34. However, in this case, Economía used for its investigation the period on which the Applicant's claims of dumping and injury were based, with no review of the relevance of that period. In the circumstances, the investigation period was not the one as close as practicable to the date of initiation of the investigation, and was too remote to provide relevant, pertinent, reliable and trustworthy information as a potential basis for an objective examination of injury. Before using that period, Economía should have considered whether it was appropriate to use such a remote period, whether it was appropriate to use the period proposed by the Applicant and whether it was possible to update the period. Moreover, Economía could have obtained data for the six-month period ending in June 2001. However, Economía in this case made the same mistakes as in *Mexico – Anti-Dumping Measures on Beef and Rice*, and for the same reasons the use of the investigation period in question is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.

2. Economía limited its injury analysis to data relating to six-month periods in each year under consideration in violation of Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement

35. Article 3.1 of the Anti-Dumping Agreement requires that a determination of injury should be based on positive evidence and should involve an objective examination. In *Mexico – Anti-Dumping Measures on Beef and Rice*, the Appellate Body upheld the Panel's finding that the selective use of periods within each year of investigation does not constitute an objective examination within the meaning of Article 3.1, unless the investigating authority provides justification for such use. In the present case, Economía established that the period of investigation was the period between July and December 2000. For the purposes of the injury investigation, Economía received information for six-month periods from July to December of each of the three years from 1998 to 2000, and made no attempt to compile information for the six-month periods from January to June of each of those years.

36. At the same time, Economía was aware of the fact that the consumption of pipes and tubes in the domestic market had been subject to some fluctuations in certain months owing to taxes. According to the Appellate Body's interpretation, the selective use of data for only one part of the year, covering the greatest import activity, or for different periods, is *prima facie* evidence that the use of data by the investigating authority does not provide an unbiased and accurate overview of the effects of allegedly dumped imports, the state of the domestic industry, or the causal link between the two.

37. Moreover, Economía received full-year information from the Applicant in respect of certain factors, so that it used six-month periods as a basis for its analysis in some cases, and twelve-month periods in others. Thus, Economía's use of data on different periods for the domestic industry and the Exporter constitutes a further lack of objectivity in its injury analysis. Consequently, Economía acted in a manner inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.

3. Economía's selective use of information relating to the state of the domestic industry is inconsistent with Articles 3.1, 3.2, 3.4, 3.5 and 4.1 of the Anti-Dumping Agreement

38. In principle, once the domestic industry has been defined, that definition must be used for the determination of injury carried out under Article 3, which must be based on a coherent review of the information relating to the domestic industry as a whole. A "sectoral" review of injury may be permissible only if the investigating authorities provide justification as to the reasons why it is not necessary to examine the domestic industry as a whole. Consequently, in the absence of such justification, the injury determination must relate to the domestic industry as a whole.

39. In this case, Economía examined various factors of injury based on different sets of information from different companies or combinations of companies within the domestic industry, without providing an explanation of the need to proceed in this manner. The domestic industry was defined as comprising four Mexican companies. However, Economía compiled information from only three of them, and for its analysis of certain factors of injury it used only information from the Applicant (among other combinations of different sets of information). This selective use of evidence cannot contribute to an objective examination of injury based on positive evidence, in accordance with Article 3.1 of the Anti-Dumping Agreement. In addition to the violation of Article 3.1, Articles 3.2, 3.4, 3.5 and 4.1 of the Anti-Dumping Agreement are also violated by extension.

4. The analysis of the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement

40. The Panel in *Mexico – Anti-Dumping Measures on Beef and Rice* found that the way in which the investigating authorities established trends in the volume of imports under Article 3.2 of the Anti-Dumping Agreement was inappropriate, inasmuch as their determination had been based on unjustified hypotheses instead of positive evidence. In particular, in view of the fact that the dumped imports were classified under the same tariff heading as other products, Economía determined the volume of dumped imports by assuming that all imports that fell within a particular price range (which in principle characterized the product in question) were imports of the product under consideration. The Panel made it clear that "[it did] not wish to imply by this that an authority is never allowed to complete its analysis by drawing certain inferences, provided it offers a well reasoned explanation".

41. In the present case, Economía based its analysis of imports from sources other than Guatemala on a limited sample of half-year imports, even though it had ample access to information possessed by the Mexican Government on all imports. On the basis of this sample, Economía used unsubstantiated assumptions to determine the volume and value of the investigated products from sources other than Guatemala.

42. Economía proceeded as follows in this respect: it compiled the Mexican Trade Information System (SICMEX), containing information on a total of 673 import declarations (*pedimentos*) from countries not investigated for three different six-month periods from July to December, which constituted the period of investigation. These declarations covered 10, 16 and 48 per cent, respectively, of total imports for each of the years from 1998 to 2000. On the basis of this limited number of declarations, Economía established a range of minimum and maximum prices for the product under consideration. In the light of this price range, Economía apparently identified all the imports under SICMEX that came within the range.

43. If Economía had access to 100 per cent of imports from Guatemala, it could also have had access to 100 per cent of imports from countries not investigated, and it is therefore inappropriate for Economía to have used a price range to determine subject products from different sources, while for the analysis of imports from Guatemala subject products were determined according to whether they were covered by import declarations and related commercial documents.

44. Consequently, taking into account the fact that imports from non-investigated sources constitute one of the components of domestic consumption, Economía's determination of domestic consumption is imprecise and, furthermore, its assessment as to whether there had been an increase in dumped imports relative to consumption in the importing Member is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

F. CLAIMS RELATING TO CAUSATION

1. Economía failed to analyse or verify the non-attribution of injury to the domestic industry caused by other known factors, in violation of Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement

45. Economía failed properly to examine factors other than the subject imports which at the same time were injuring the domestic industry. In particular, Economía failed to take account of the following factors:

(a) The decline in the Applicant's operating profits during the period of investigation, primarily as a result of an increase in costs, which was not explained in detail in Economía's determinations;

(b) the decline in exports by the domestic industry during the period of investigation, with a posted reduction of at least four per cent in domestic industry output, was not explained by Economía as another determining factor of injury.

46. Furthermore, Economía failed to carry out any analysis to ensure that the injury caused by these factors was not attributed to the subject imports. Consequently, the causation analysis conducted by Economía is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.

G. CLAIMS RELATING TO PROCEDURAL ASPECTS

1. Economía failed to inform the Exporter of the essential facts under consideration, contrary to Article 6.9 and Annex II, paragraph 6 of the Anti-Dumping Agreement

47. In the instant case, there is simply no evidence in the record to establish that Economía disclosed the "essential facts" in accordance with Article 6.9 of the Anti-Dumping Agreement. In fact, a careful review of the record provides no basis for the inference that Economía considered two facts to be essential to its final determination, namely:

(a) That Economía used the facts available and that the price information furnished by the Applicant was the primary basis for calculating the dumping margin;

(b) that despite the fact that no investigation was initiated in respect of structural pipes and tubes and that Economía at no time required or compiled information on prices for such pipes and tubes, the decision had been taken to include structural pipes and tubes in the definition of the product under consideration, and consequently, to apply anti-dumping measures to such pipes and tubes also.

48. These facts became known to the Exporter only after publication of the Final Resolution. Consequently, contrary to the provisions of Article 6.9 of the Anti-Dumping Agreement, Economía failed to disclose to the interested parties the essential facts under consideration which formed the basis for the decision to apply the definitive measure. Furthermore, Economía also failed to inform the Exporter that the information on prices, particularly export prices, was unacceptable. This omission also constitutes a violation of paragraph 6 of Annex II to the Anti-Dumping Agreement.

2. The disclosure of Economía's findings and conclusions in its Preliminary and Final Resolutions is inconsistent with the provisions of Article 12.2 of the Anti-Dumping Agreement

49. Neither Economía's Preliminary Resolution nor its Final Resolution meets the standards of Article 12.2 of the Anti-Dumping Agreement. Neither of them contains an explanation of Economía's decision to modify the definition of the product under consideration in order to include four to six inch pipes and tubes or structural pipes and tubes.

50. Consequently, Guatemala considers that both the Preliminary Resolution and the Final Resolution fail to meet the requirements of Article 12.2 of the Anti-Dumping Agreement, inasmuch as they contain no explanation of Economía's determination with respect to the pipes and tubes that fell within the scope of the definition of the product under consideration.

3. Economía afforded confidential treatment to information from the Applicant notwithstanding failure to show good cause or to furnish non-confidential summaries, in violation of Article 6.5 of the Anti-Dumping Agreement

51. In *Guatemala – Cement II*, the Panel confirmed that Article 6.5 distinguishes between two types of confidential information: (1) "information which is by nature confidential", and (2) information "which is provided on a confidential basis". Article 6.5 then provides that the provision of confidential treatment is conditional on "good cause" being shown, and the requirement to show "good cause" appears to apply for both types of confidential information, such that even information "which is by nature confidential" cannot be afforded confidential treatment unless "good cause" has been shown. In that Panel's view, good cause must be shown by the interested party submitting the confidential information at issue and not by the investigating authority, "since – with respect to information that is not "by nature confidential" in particular – the investigating authority may not even know whether or why there is cause to provide confidential treatment".

52. In addition to the showing of "good cause", Article 6.5.1 provides that the authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. In the event that the aforementioned requirements cannot be met, Article 6.5.2 provides that, if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

53. In the present case, Economía: (i) failed to evaluate the good cause shown by the Applicant for the confidential treatment of information crucial to the main determinations; and (ii) failed to

assess whether the summaries provided were in "sufficient detail"; or alternatively, (iii) failed to suggest that certain information be made public or to request authorization for its disclosure in generalized or summary form. Guatemala therefore considers that Economía failed to satisfy the requirements laid down by Article 6.5 of the Anti-Dumping Agreement.

54. In its application, the Applicant requested confidential treatment for most of the information it presented. However, Economía failed to assess whether "good cause" had been shown for the invoice and the quotation, for example, to be given confidential treatment. Even if the Panel were to find that good cause was shown for that information to be treated as confidential, Economía failed to require the provision of non-confidential summaries thereof, thereby continuing to act inconsistently with Article 6.5 of the Anti-Dumping Agreement. Moreover, Guatemala notes that, with regard to the definition of the product under consideration, Economía also failed to comply with the provisions of Article 6.5 of the Anti-Dumping Agreement. In response to Economía's subsequent requests for information, the Applicant furnished certain replies in a confidential form. Economía did not require a showing of "good cause" or the submission of non-confidential summaries in order to treat that information as confidential. It cannot be ignored that the definition of the scope of the investigation is primarily based on the definition of the product. Thus, Economía acted inconsistently with Article 6.5 of the Anti-Dumping Agreement.

IV. REASONS FOR REQUESTING SUGGESTIONS CONCERNING IMPLEMENTATION OF POSSIBLE RULINGS AND RECOMMENDATIONS BY THE PANEL

55. If the Panel finds in favour of Guatemala in respect of the claims set out above, Guatemala requests the Panel to exercise its authority under Article 19.1 of the DSU to suggest ways in which Mexico could implement the Panel's rulings and recommendations.

56. In order to implement the Panel's rulings and recommendations, Economía would have to re-conduct the investigation, and for the new injury determination to be made in the future the information relating to the period of investigation would be much more out of date than even the information used for the injury determination in this dispute. Thus, the Exporter would also be unfairly subjected to this entire procedure all over again.

57. Guatemala submits that, in this case, as in *Argentina – Poultry Anti-Dumping Duties*, the Panel could consider that, given the nature and extent of the violations found in this case, there is no conceivable way in which Mexico could properly implement its recommendations "without revoking the anti-dumping measure at issue"; this would lead to the suggestion that the definitive anti-dumping measure at issue be repealed.

V. REQUEST FOR RULINGS AND RECOMMENDATIONS

58. In the light of the foregoing, Guatemala requests the Panel to find that, by imposing anti-dumping duties on imports of steel pipes and tubes from Guatemala, Mexico – through Economía – has acted inconsistently with its commitments under Articles 1, 2.1, 2.2, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 5.2, 5.3, 5.4, 5.8, 6.2, 6.4, 6.5, 6.7. 6.8, 6.9, 6.13, 12.2 and 18.1 of the Anti-Dumping Agreement and Annex II thereto.

59. Guatemala therefore requests the Panel to recommend that the DSB, pursuant to Article 19.1 of the DSU, request Mexico to bring its measure into conformity with the relevant provisions of the Anti-Dumping Agreement.

ANNEX A-2

FIRST WRITTEN SUBMISSION OF MEXICO

(16 August 2006)

CONTENTS

I. MEXICO INITIATED THE INVESTIGATION WITH SUFFICIENT EVIDENCE OF DUMPING AND INJURY, CONSISTENT WITH ARTICLE 5.2, 5.3 AND 5.8 OF THE ANTI-DUMPING AGREEMENT

1. As recognized by the Appellate Body in paragraphs 61, 65 and 69 of its final report in *US – Carbon Steel*, if a WTO Agreement remains silent on a particular subject, there is a reason for such silence. It is not tenable that there should be obligations in the Anti-Dumping Agreement that are not indicated therein as Guatemala has maintained on several occasions.

2. Regarding the alleged lack of sufficient evidence in the request for initiation of the investigation, we note that according to Article 5.2 of the Anti-Dumping Agreement, a request for initiation shall include such evidence as is reasonably available to the applicant of dumping, injury, and a corresponding causal link. At the same time, the Anti-Dumping Agreement makes no mention of what is meant by "such evidence as is reasonably available to the applicant". Consequently, it is the investigating authority that determines, according to the particular circumstances of each specific case, whether the evidence submitted with the application provides "reasonable" indications for the initiation of an investigation.

3. At the same time, as stated in the final reports of the Panel in *Mexico – Corn Syrup*, *Guatemala – Cement II*, and *Argentina – Poultry Anti-Dumping Duties*, it is clear that such evidence does not necessarily have to be of the quality that would be necessary to support a preliminary or final determination. It is also clear that such evidence need not be any more than data or information, a review of which reveals that it is sufficient to determine that there is a well-founded likelihood of dumping, injury, and causal link. In this case, the investigating authority considered that the application for initiation contained such information as was reasonably available and that it included sufficient data.

4. Guatemala erroneously maintains that the application for initiation lacked sufficient information because the invoice and price quotation submitted by the applicant were not issued by Tubac. This is not a valid reason for such a claim. Investigations are initiated by a country, and not exclusively by an exporter. The applicant claimed that imports from Guatemala, and not from the exporter Tubac, were being dumped. Consequently, domestic producers were under no obligation to produce evidence of normal value with respect to Tubac specifically. Moreover, Article 5 of the Anti-Dumping Agreement does not establish an obligation in the sense that Guatemala claims, so that its argument is unfounded. Indeed, if there were an obligation to submit invoices issued by the exporters mentioned in the application, for them to be able to be considered sufficient, this would mean precluding the possibility of obtaining data on normal value in cases in which the exporters do not produce the product under investigation, or do not sell it in its market of origin, which is clearly unacceptable. It would also be tantamount to maintaining that the application has to contain evidence of dumping of the quantity and quality that would be necessary to support a preliminary or final determination, since the information for each exporter is needed to calculate their individual dumping margin in such determinations. Once again, there is no foundation for this.

5. Furthermore, according to the final report of the Panel in *US – Softwood Lumber*, under Article 5.2 of the Anti-Dumping Agreement, if the applicant has data reasonably available to it and considers such data to be sufficient to support its claims, it is not required to provide all of the information to which it has access.

6. Consequently, Mexico considers that even though the mentioned invoice was not issued by the exporter under investigation, the evidence submitted with the application for initiation was sufficient to determine that initiation was appropriate (in this case with respect to the likelihood of dumping, based on the documents relating to normal value).

7. As regards the price quotation used to determine normal value, we repeat that the applicant was under no obligation to provide all of the information reasonably available to it or all of the information it could reasonably have obtained, but only the information that it considered relevant, among all of the information reasonably available to it, to support its contentions.

8. At the same time, Article 5.1 of the Anti-Dumping Agreement clearly states that the objective of an investigation is to determine the existence, degree and effect of any alleged dumping. If it were necessary for the applicant to produce (and for the investigating authority to examine the sufficiency of) evidence of dumping – and not of alleged dumping – initiation would be practically impossible. In fact, there would be no sense in conducting an investigation, since an assessment of the relevance of the evidence submitted with the application would be enough to immediately impose anti-dumping duties.

9. Although a price quotation is not evidence of actual sale, it does provide an indication of the existence of "alleged dumping", since it is a sufficient signal that there is a well-founded probability that the sale will take place according to the terms of the price quotation. It is reasonable to suppose that there are buyers that will accept the terms thus established and that the sales will take place accordingly. Thus, the price quotation does constitute a sufficient reason to believe that there is "alleged dumping", and hence to initiate the investigation to determine whether such dumping in fact exists. This is also supported by the final report of the Panel in *US – Softwood Lumber*.

10. Guatemala erroneously claims that the invoice and price quotation submitted in support of the normal value concerned isolated transactions, and that this was not enough to substantiate a dumping allegation. It relies, in this connection, on the final report of the Panel in *Argentina – Poultry Anti-Dumping Duties*. That determination does not apply to the case at issue, since in the case of Argentina, it was found that Article 2.4 and 2.4.2 of the Anti-Dumping Agreement had been violated through an incorrect calculation of the margins of dumping, while what Guatemala is claiming is that there was not enough information to initiate the investigation under Article 5.2 of the Anti-Dumping Agreement.

11. At the same time, the invoice contains data on sales prices for an equivalent of 8,000 kg of the investigated product, while according to the data provided by the Guatemalan exporter, the transactions conducted in Guatemala during the investigation period averaged 1,790 kg. Thus, the mere volume of the sale recorded in the invoice is sufficient for the invoice to be considered a solid basis for determining that there was a well-founded likelihood of dumping.

12. Guatemala also erroneously argues that the application did not contain sufficient evidence of dumping for the product under investigation in its totality, and that this violated the Anti-Dumping Agreement. Mexico considers that although the application did not contain many items of evidence, what was produced was the information reasonably available to the applicant, comprising elements from which it was possible to infer the likelihood of dumping by Guatemalan exporters, in keeping with the standard established in the Anti-Dumping Agreement itself and in the relevant WTO jurisprudence (see *Guatemala – Cement II*, *Mexico – Corn Syrup*, and *Argentina – Poultry Anti-Dumping Duties*, in which it was determined that the evidence submitted with the application did not need to be of the same quality and quantity that would be necessary to support a preliminary or final resolution).

13. The Anti-Dumping Agreement contains no express obligation to provide more information than what was submitted by the applicant. In fact, Article 5.2 of the Anti-Dumping Agreement establishes the applicable criterion, namely the "reasonableness" of the data in the application, a criterion which, as stated above, was met in the application for initiation.

14. As regards the use of two tube sizes for the initiation of the investigation, according to the final report of the Panel in *US – Softwood Lumber* it is not necessary, for the purposes of the initiation

of an investigation, to produce specific evidence for each category of the product under investigation. In fact, in our view, such an obligation would be contrary to the reasonableness criterion established in Article 5.2 of the Anti-Dumping Agreement and with the criteria governing the sufficiency of information mentioned earlier.

15. The application did contain relevant information to support possible injury caused by allegedly dumped imports. With respect to the evolution in the volume of imports, given the way in which goods are classified under the Harmonized System and in a system with more digits, it is perfectly understandable that the description of the products classified under tariff lines 7306.30.01 and 7306.30.99 should not correspond entirely to the product subject to the anti-dumping investigation. Moreover, the identification – where applicable – of the product under investigation requires documentation relating to import transactions with the relevant invoices, since in Mexico, official statistics are recorded with the description of the tariff lines, and not by specific product.

16. This means that to require the applicant enterprise to provide accurate information on the volume of the allegedly dumped imports would be to impose a standard that is practically unattainable, which is in fact why a much lower standard is applied to evidence accompanying an application than to the evidence required to make a determination. If Guatemala's claim had any merit, the applicants would have to have all of the documentation on imports – information which is not public, but belongs to the importing enterprises. This is practically impossible during the initial stage of an investigation, not to mention the added difficulty of having to collect monthly data for a period of at least three years.

17. The investigating authority therefore considered that the information provided by the applicant on the behaviour of imports from Guatemala was the information that was reasonably available to the applicant at the time of application for initiation of the investigation, and appropriately reflected the evolution in the volume of allegedly dumped imports, bearing in mind that the information on import volumes and trends referred to the most restrictive range of products that includes the product under investigation.

18. Mexico properly examined the accuracy and adequacy of the evidence of dumping and injury. According to the final report of the Panel in *EC – Bed Linen*, if the evidence produced in the application for initiation is sufficient to initiate an investigation and the investigation has in fact been initiated, it must be inferred that the investigating authority actually conducted the accuracy and adequacy examination.

19. Moreover, the SE did conduct a full examination of the accuracy and adequacy of the evidence provided in the application. In fact, that examination led the SE to issue a request for additional information from the applicant ("*prevención*") to clarify and/or supplement various other items of information.

II. ARGUMENT CONCERNING THE CLAIMS RELATING TO THE PRODUCT UNDER INVESTIGATION AND THE LIKE PRODUCT

20. Mexico made two changes to the definition of the product under consideration, acting in conformity with the Anti-Dumping Agreement. Firstly, the Preliminary Resolution included diameters of pipes and tubes in addition to those considered in the Initiating Resolution. Secondly, structural pipes and tubes were included.

21. We repeat that under Article 3.2 of the DSU and the report of the Appellate Body in *US - Carbon Steel*, if a WTO agreement is silent on a particular matter, it is for a reason: when the negotiators intended disciplines to apply in another context, they expressly said so. Guatemala attempts to base its arguments on the determination of the product under investigation on obligations

that are non-existent in the Anti-Dumping Agreement, since that Agreement provides no guidance on how the said determination should be made. Consequently, its arguments are without foundation.

22. Even if the Anti-Dumping Agreement did provide guidance for determining the product under investigation, it would be unreasonable not to be able to adjust the definition of the investigated product provided at the initiation of an investigation on the basis of evidence submitted by the interested parties or obtained by the investigating authority.

23. Concerning the first change in the definition of the product under investigation, we note that it is customary to describe the product case by case, considering its specific characteristics, from the outset of the investigation. Since the investigating authority is not an expert with detailed knowledge of all of the physical and technical characteristics of the product, in the Initiating Resolution it bases its product description on data that has essentially been provided by the applicant in accordance with Article 5.2(ii) of the Anti-Dumping Agreement, which is what was done in this case. The Initiating Resolution describes the numerous physical and technical characteristics which, together, must be taken into account in describing the product under investigation. One of the characteristics alone, or several of them, cannot be considered sufficient to describe the product.

24. Thus, the inclusion in the Preliminary Resolution of pipes and tubes of more than four and up to six inches in diameter does not substantially alter the description in the Initiating Resolution, and is consistent with the Anti-Dumping Agreement for the following reasons:

(a) Although the Initiating Resolution sets out the main characteristics of the product under investigation, this does not mean that the description is definitive. We note that the Anti-Dumping Agreement contains no restrictions in this respect.

(b) 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". In other words, even the investigation helps gradually to complete the description of the product under investigation.

(c) The Initiating Resolution established that the diameter of the pipes and tubes considered was basically in the range of one half to four inches. Nowhere did it state that this range was the only one that could enter the domestic market – this must be assessed on the basis of commercial interchangeability.

(d) Only the diameter of the pipes and tubes investigated changed. The other characteristics indicated in the Initiating Resolution remained the same. An increase in diameter does not signify a substantial alteration in the description of the product under investigation, especially when the diameter is not the only relevant characteristic used to describe it.

(e) In terms of the characteristics and uses of the pipes and tubes investigated, it would be technically and commercially possible, for certain purposes, to substitute the four inch pipes and tubes with pipes and tubes of up to six inches.

(f) Tubac had the opportunity to state its position with respect to this change. By not doing so, it tacitly accepted that the product under investigation was the product described in the Preliminary Resolution.

25. Guatemala asserts that the Ministry of the Economy (SE) failed to conduct an objective examination based on positive evidence of dumping, injury, and causal link. However, the obligation in Article 3.1 of the Anti-Dumping Agreement does not apply to the calculation of a dumping margin. The standard mentioned by Guatemala is unacceptable.

26. The dumping, injury and causal link determinations in the Preliminary Resolution are consistent with the Anti-Dumping Agreement. According to the Panel in *US – Softwood Lumber CCI* and the Appellate Body in *US – Hot-Rolled Steel*, an investigating authority complies with Article 3.1 of the Anti-Dumping Agreement when: (a) it bases itself on affirmative, objective, verifiable and credible evidence; and (b) it gathers and evaluates that evidence in good faith and fundamental fairness. The investigating authority complied with all of these conditions: it conducted an objective examination of the volume of imports, of their effect on the prices of like products, and the impact on the domestic industry, based on positive evidence, and this was taken into consideration in imposing the anti-dumping duties.

27. For the above reasons, Mexico requests the Panel to dismiss Guatemala's arguments: indeed, there are no specific guidelines for defining the product under investigation, the investigating authority being entitled to do so as it deems appropriate; the ranges included in the Preliminary Resolution were commercially interchangeable with the ranges included in the Initiating Resolution; the exporter expressed no objections to the change, and hence accepted it; and an analysis was conducted of the specifications and technical characteristics of the product under consideration in order to define it properly.

28. Regarding the second change to the product under investigation, we repeat that "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". Since there is nothing in the Anti-Dumping Agreement to prevent it from doing so, in the Final Resolution the SE described the product under investigation on the basis of the facts available to it, including the technical and commercial interchangeability of standard and structural pipes and tubes.

29. The applicant provided information specifying the <u>main</u> use of the pipes and tubes under investigation (conduction of fluids, use linked to the diameter and thickness of the pipes and tubes), establishing that regardless of whether the pipes and tubes were made of hot- or cold-rolled sheet and of the manufacturing specifications, pipes and tubes of certain diameters and thickness could be used for conduction. Galvanized and black structural pipes and tubes one half to six inches in diameter of certain wall thicknesses can be used for conduction, as established in the Final Resolution.

30. According to the information obtained by the SE, the same pipes and tubes could be used for the conduction of fluids or for structural uses, even when they have been submitted to a "hydrostatic test" (required by Standard ASTM A53). The fact that Tubac may not have known that this was the case does not mean that it was not done in the Mexican market. As stated in the Final Resolution: (a) black or galvanized structural pipes and tubes have wall thicknesses, physical characteristics and compositions equivalent to standard pipes and tubes, and can therefore be used for conduction; (b) in fact, standard pipes and tubes are purchased without a hydrostatic test and with or without a subsequent test they are marketed as pipes and tubes for conduction; (c) certain enterprises import structural pipes and tubes and market them as pipes and tubes for conduction.

31. Thus, the analysis of the arguments and evidence submitted by the parties provided the SE with the necessary elements to describe the pipes and tubes under investigation by their main use and main characteristics for that use rather than in terms of standards or inputs or by the indications "standard" or "structural", as stated in the Final Resolution. In describing the product under investigation in these terms, the SE proceeded correctly, bearing in mind the essential characteristics of the products and in view of the fact that since - as recognized by Guatemala - there are no guidelines for defining the product under investigation, it is up to the authority to do so and to carry out an objective examination based on positive evidence in its injury analysis.

32. Thus, the SE merely specified what pipes and tubes were under investigation. The scope of the product under investigation was not generically expanded to include "structural" pipes and tubes, but merely pipes and tubes that were technically and commercially interchangeable with galvanized or

black pipes and tubes, half an inch to six inches in diameter and with a wall thickness from 0.075 up to 0.28 inches, regardless of their intended use (which is impossible to detect from a customs point of view).

33. Contrary to what Guatemala has tried to demonstrate, these are not two different products – they are one and the same. Pipes and tubes may be acquired for "structural" purposes, but used for the conduction of fluids and even marketed as pipes and tubes for conduction, subject only to the hydrostatic test. Consequently, a consumer that did not require the hydrostatic test could purchase structural pipes and tubes and use them for the conduction of fluids. In other words, the two types of pipes and tubes can be commercially interchangeable.

34. Regarding the disclosure of the essential facts, this will be dealt with in the chapter containing the responses to the claims relating to procedural aspects.

35. The investigation was conducted in an unbiased manner and involved an objective analysis based on positive evidence. Throughout the procedure, the interested parties were given the opportunity to produce evidence, arguments and data to ensure a ruling consistent with the Anti-Dumping Agreement. As indicated in the Final Resolution, there were several requests for information, and the replies to these requests were taken into account by the investigating authority in its determinations. Similarly, during the on-the-spot investigation, Tubac could have exercised its right to make any statements it deemed appropriate, but instead it was merely confirmed that the information it had provided during the proceedings was not sufficient to be considered. And Tubac was given the same opportunity once again during the public hearing and the pleading stage. Consequently, the basis for Guatemala's claim is not very clear, since the SE, in compliance with Article 3 of the Anti-Dumping Agreement, conducted an unbiased procedure comprising an objective analysis based on positive evidence.

36. We repeat that Article 3.1 of the Anti-Dumping Agreement does not apply to the dumping analysis, so that the standard that Guatemala would impose is unacceptable. The Final Resolution reflects the analyses of dumping, injury and causal link. In its main determinations set forth in the Final Resolution, with respect to injury and causal link the SE clearly relied on positive evidence that it had analysed objectively.

37. Regarding the injury analysis, we insist that according to the final report of the Panel in *US – Softwood Lumber* and the report of the Appellate Body in *US – Hot-Rolled Steel*, the investigating authority complies with Article 3.1 of the Anti-Dumping Agreement when: (a) it bases itself on affirmative, objective, verifiable and credible evidence; and (b) it gathers and evaluates that evidence in good faith and fundamental fairness. The SE fulfilled those conditions by carrying out an objective examination of the volume of imports, their effect on prices for like products, and the impact on the domestic industry, all of which is reflected in the Final Resolution

38. Regarding paragraphs 94, 151, 158, 161 and 162 of Guatemala's first written submission, the Anti-Dumping Agreement does not require any particular methodology for making price comparisons and evaluating price effects. In the absence of specific guidelines on the manner in which such comparisons should be made, any WTO Member is free to conduct its analysis as it deems appropriate, provided that it relies on positive evidence and makes an objective examination.

39. Thus, since the structural and standard pipes and tubes were technically and commercially interchangeable; since the exporter remained silent when it had the opportunity to make a statement; since there are no guidelines for defining the product under investigation; and since an analysis was conducted of the specifications and technical characteristics of the product investigated in order to define it correctly, Mexico acted in conformity with the Anti-Dumping Agreement.

40. The SE did provide explanations on the manner in which it conducted its analysis of dumping, injury and causal link. Before examining this point, it should be noted that the SE provided adequate justification of the coverage and description of the product under investigation. Since structural and conduction pipes and tubes are included because they are mutually substitutable from a technical and commercial point of view, the SE considered that the variables analysed applied to both categories. In the Final Resolution, the SE clearly indicates the manner in which it conducted its dumping, injury and causation analysis, and that it carried out an objective analysis based on positive evidence. Consequently, in determining the definitive anti-dumping duties for Guatemalan pipes and tubes, Mexico complied with the provisions of the Anti-Dumping Agreement, and because it has been demonstrated that the basic premise of the Guatemalan argument – that structural pipes and tubes should not have been included in the product under investigation – is without foundation, it follows that the entire argument is without foundation.

41. Mexico also considers that the comparisons between export prices and normal value were done fairly. Thus, it acted in conformity with Article 2.2 and 2.4 of the Anti-Dumping Agreement for the reasons set out above.

42. The exporter had ample opportunity to present arguments in respect of the new information submitted following the public hearing. As mentioned earlier, the description of the product under investigation in the Final Resolution took account of the possible entry into the Mexican market of structural pipes and tubes which had all of the required characteristics for use in the conduction of fluids, since there was sufficient technical evidence to show that the two categories of pipes and tubes were technically and commercially substitutable. We note that Guatemala fails to mention in its first written submission the characteristics that distinguish standard from structural pipes and tubes.

43. The clarifications regarding the inclusion of structural pipes and tubes in the definition of the product under investigation owing to its technical and commercial interchangeability with pipes and tubes used for conduction could not be provided at the initiation of the investigation because there was nothing in the record to indicate that their physical and chemical characteristics and the process by which they were produced were the same, and that the only difference resided in the "hydrostatic test", nor was there anything to indicate that certain consumers purchased "structural" pipes and tubes ultimately to use them for the conduction of fluids.

44. When the SE learned of these facts, it gave Tubac the opportunity to submit data and evidence concerning the technical and commercial substitutability of standard and structural pipes and tubes (it sent out a request for information, to which Tubac replied). It should be stressed that the inclusion of structural tubing was not an essential fact when it came to imposing definitive anti-dumping duties, since for the purposes of the investigation, it was the same product. We do not therefore believe that there was any obligation to disclose the essential facts once again: they had already been disclosed in the Preliminary Resolution and in the public hearing. Consequently, Mexico acted in conformity with the Anti-Dumping Agreement.

III. MEXICO APPLIED THE FACTS AVAILABLE IN CONFORMITY WITH THE ANTI-DUMPING AGREEMENT

45. Guatemala maintains that there was no reason for the SE to reject the information in respect of which it did not encounter any problems during the verification visit, and that it did not notify the exporter that it would be carrying out the final determination on the basis of the facts available. Mexico considers Guatemala's claims to be without foundation, since the investigating authority used these facts in conformity with the Anti-Dumping Agreement itself.

46. According to Article 6.8 of the Anti-Dumping Agreement, the cases in which the investigating authority may use the facts available are: (a) when an interested party refuses access to necessary information; (b) when the said party does not provide such information within a reasonable

period; or (c) when it significantly impedes the investigation. And the Panel reports in *Argentina – Ceramic Tiles* and *Egypt - Steel Rebar* establish that in order to remedy this lack of information it is possible to resort to the facts available.

47. The Guatemalan exporter did not provide all the information necessary, and the information submitted in the course of the investigation cannot be considered reliable, complete, accurate and precise: indeed, when the AI conducted its on-the-spot investigation, it found so many inconsistencies with the data previously provided by Tubac that it was practically impossible to use the information.

48. Thus, in conformity with the Appellate Body report in *US – Hot-Rolled Steel* and with the final report of the Panel in *Argentina – Poultry Anti-Dumping Duties*, finding that the data supplied by the exporter could not be used (even if only part of the information was involved, as referred to by the Appellate Body in *EU – Hot-Rolled Steel*), and in keeping with the Panel report in *Egypt - Rebar*, the SE had to cure the lack of information by using the facts available. The SE could not consider Tubac's data, since it was inconsistent, incomplete and inaccurate, and was not drawn from the company's accounting records (as Guatemala accepts with respect to the constructed value in paragraphs 200-202 of its first written submission, with respect to normal value and export price adjustment for freight in paragraph 204, with respect to external freight to a third country in paragraphs 207 and 208, and with respect to adjustments for insurance and physical differences in paragraph 212).

49. Thus, the exporter having failed to provide reliable information and to provide it within a reasonable time, i.e. during the entire period prior to the on-the-spot investigation, and since it therefore significantly impeded the anti-dumping investigation, the SE dismissed the information provided by the exporter and properly resorted to the facts available, in conformity with the Anti-Dumping Agreement and in keeping with accepted WTO criteria. In fact, the investigating authority was not only entitled to do this, it was obliged to do so in order to draft a resolution that was in keeping with the Anti-Dumping Agreement.

50. At the same time, the resolutions issued by the SE set out in ample and sufficient detail the considerations and conclusions reached by the investigating authority on dumping, injury and causal link, and include all of the matters of fact and law that the SE deemed relevant, including the determination of the margin of dumping based on the facts available and the reasons which led to the imposition of the definitive measure.

IV. CLAIMS RELATING TO THE DETERMINATION OF INJURY

51. In using the period 1 July to 31 December 2000 as the investigation period, the SE acted consistently with the Anti-Dumping Agreement.

52. Guatemala states without the slightest evidence that the investigation period was not as close as practicable. This does not amount to the establishment of a prima facie case of violation by Mexico. In our view, it is not possible for a panel to rule in favour of a party that has not established such a case.

53. Guatemala erroneously asserts that it is establishing the same prima facie case as the United States established in *Mexico – Rice*. However, the rice dispute was based on different considerations from those being analysed here. Since the assumptions are entirely different, and since Guatemala has not provided any further arguments, its statement is without foundation. Indeed, in the rice case, the time span between the end of the investigation period and the initiation of the investigation was 15 months, while in the present case, it was only eight months, so that it cannot be said that the data from the investigation period was no longer relevant. In this case, the SE conducted a much fuller analysis of the information submitted in the application, as reflected in the request to the

applicant for additional technical information (in fact, that request and the reply thereto took up a considerable portion of the eight months). And in the rice case the Appellate Body found that Mexico had acted inconsistently with the Anti-Dumping Agreement in that the investigation period proposed by the applicant was accepted because it reflected the period of highest export penetration.

54. While the period investigated is supposed to be as close as practicable to the initiation, this does not mean that the Anti-Dumping Agreement is violated if the period is not immediately prior to the initiation. In Mexico, the initiation of an investigation using an investigation period immediately prior to the initiation is not possible. Not only does it take time for the applicant to gather the required information, but in this case that information did not meet what the investigating authority considered to be the necessary requirements, so that it had to ask the applicant for additional information. In other words, there will inevitably be a delay. So yes, the period investigated was as close as practicable to the date of initiation. Moreover, the delay was not such as to cast doubt on the relevance of the investigation period used. Consequently, it is incorrect to say that the SE ostensibly accepted the investigation period proposed by the applicant: rather than accepting it, the SE issued the mentioned request for further information, and once it had received the reply, decided that investigation could appropriately be initiated. In other words, the question of whether the investigation period is as close as practicable to the initiation must be examined case by case.

55. In using the information from the period under investigation Mexico conducted an objective examination based on positive evidence. Article 3.1 of the Anti-Dumping Agreement provides no guidance on the remoteness of the investigation period *per se*, but on the acceptability of the data used, in which respect the age of the said data is only one factor to be analysed. Moreover, if the period investigated is as close as practicable to the date of initiation, the data from the said period are relevant, and hence, should be considered in the investigation. Guatemala itself accepted in its first written submission that it cannot be determined a priori that the remoteness of an investigation period is *per se* a cause of inconsistency with the Anti-Dumping Agreement, but the scope of the data used and their applicability should be examined.

56. Thus, given that the investigation period was as close as practicable, there is no obligation in the Anti-Dumping Agreement to the effect that the investigating authority should gather more data. According to the final report of the Panel in *EC – Tube or Pipe Fittings*, the purpose of using an investigation period is to be able to rely on data that is not affected by the initiation of the investigation or by any subsequent action by exporters or importers. The Anti-Dumping Agreement does not provide for changes in the situation during the investigation period through information updates in the course of the investigation, but through examination mechanisms, as stated in the Appellate Body Report in the above case. Consequently, if there are any major changes during a late phase of the investigation period or after that period, those changes must be considered during a subsequent examination in conformity with Articles 11 or 9 of the Anti-Dumping Agreement.

57. The SE acted consistently with the Anti-Dumping Agreement by using six-month periods in each year in its injury examination. Guatemala merely affirms that the use of six-month periods for each year is prima facie evidence of Mexico's violation of the Anti-Dumping Agreement without carrying its reasoning any further, which is unsustainable. Similarly, it relies on the Report of the Appellate Body in *Mexico – Rice* – wrongly, since the assumptions of that case are totally different from those of the case at issue.

58. At the same time, we repeat that if a WTO Agreement is silent on a particular matter it is for a reason. When the negotiators intended disciplines established in a particular provision to apply in another context, they expressly said so. Since there is no indication in the text of the Anti-Dumping Agreement of how an injury analysis should be conducted with respect to the periods used, the use of six-month periods in each year in no way violates that Agreement.

59. We nevertheless note that in the injury analysis, the periods from July to December of 2000, 1999 and 1998 were compared, irrespective of whether or not the situation was better or worse during this period than during the six-month period from January to June. Thus, if the investigating authority had found that the indicators from July to December of 1998, 1999 and 2000 had shown a negative situation in the domestic industry but were identical, it would not have determined that injury had been caused, even if the period from July to December were less favourable for the domestic industry than January to June. By comparing the same periods for each year, the structure is by definition the same, and seasonal or cyclical tendencies or fluctuations in the economic indicators (for example price index or GDP) are avoided, besides which the six-month periods are consistent with the investigation period.

60. Mexico acted correctly in considering some of the financial indicators on an annual basis. The information regarding these indicators was obtained from financial statements that had been submitted to an auditor, because audited statements are even more reliable. In accordance with Mexico's accounting practices, the purpose of financial statements that have been submitted to an auditor is to provide information on the financial situation at a certain date, and they are submitted for the same dates as the financial information reported to the tax auditors on the situation of an enterprise. Financial information regarding an enterprise is normally submitted for tax purposes on an annual basis. Consequently, these financial factors must be analysed on the basis of annual information, and not six-monthly information. With respect to profits earned for the like product, however, annual and six-monthly information was available, so that in the Final Resolution, that information is analysed on an annual and six-monthly basis. It is therefore clear that affirmative, objective, verifiable and credible evidence was used, and that the examination of that evidence was objective, in conformity with Article 3 of the Anti-Dumping Agreement. Similarly, because it rests on a permissible interpretation of the provisions of the Anti-Dumping Agreement, in conformity with Article 17.6(ii) of that Agreement, the measure adopted by Mexico is consistent with Article 3 of the Anti-Dumping Agreement.

61. Mexico acted consistently with the Anti-Dumping Agreement in analysing the factors of injury to the domestic industry. According to Articles 4.1 and 5.4 of the Anti-Dumping Agreement, if an application is submitted by a domestic producer that represents more than 50 per cent of total domestic production expressing either support for or opposition to the application, the investigation shall be considered to have been requested by the domestic industry, and the examination can therefore objectively focus on injury to that producer. In this case, the applicant enterprise represented 53 per cent of Mexico's total domestic production, so that the investigating authority correctly based its analysis of the financial variables on information from the applicant. It is therefore wrong to state that the analysis of the domestic industry was sectoral.

62. The investigating authority's analysis of the volume of imports from sources other than Guatemala is consistent with the Anti-Dumping Agreement, since it uses all the available and relevant information. It is common in anti-dumping investigations throughout the world that the product under investigation should not necessarily correspond to the descriptions in the import tariffs. Although the description of tariff lines is as concise as possible, it is materially impossible for such descriptions to cover the scope of anti-dumping investigations.

63. The authorities therefore gathered information through the interested parties participating in the investigations and entities that are not interested parties. It is clear both in the Preliminary Resolution and the Final Resolution that the SE tried at all times to obtain the best indicators. It must not be thought, however, that the investigating authority can always obtain all of the data it asks for, since it does not always receive replies from the entities concerned. The investigating authority does not have the power to require customs brokers or importers to provide the information it requests of them; and the fact is that in practice, asking for information that is in the hands of the customs authorities would lead to considerable delays which would inevitably add to the time it takes to complete the investigation, which is why the SE submits its requests for information to customs

brokers and importers. As regards imports from countries other than Guatemala, the investigating authority was unable to obtain all of the information that it tried to obtain. Such practical difficulties are common. Even the exporter, Tubac, omitted certain estimates of imports from Guatemala, and pointed out that the SE could "estimate" the volume of imports of the goods investigated on the basis of information provided by "customs brokers and importing enterprises".

64. Mexico obtained 100 per cent of the documentation on imports from Guatemala because, unlike imports from other sources, the volume of imports from Guatemala was not very high. Contrary to what Guatemala claims, the SE did not obtain the import declarations (*pedimentos*) from the Mexican Trade Information System (SICMEX). The system shows only a "list of import declarations" (i.e. statistical information) and not the declarations themselves, which are in the hands of the Ministry of Finance and Public Credit. The number of import transactions from sources other than Guatemala under tariff heading 7306.30.01 and 7306.30.99 was 1,720 in 1998, 1,752 in 1999 and 2,456 in 2000. Consequently, given that the Anti-Dumping Agreement does not provide specific guidance in this respect, the SE collected a sample of import declarations reflecting significant portions of the total volume imported and transactions by the leading importing enterprises. Thus, the SE requested 745 import declarations with corresponding invoices, of which 90 were from 1998, 106 from 1999 and 549 from 2000, i.e. 26 per cent, 22 per cent, and 57 per cent respectively of total imports from countries other than Guatemala. It only saw a total of 673 import declarations.

65. Given the volumes covered by these declarations, and given that even the Guatemalan exporter stated that it did not have the relevant data, the SE considered that the available declarations with the relevant invoices and the volumes covered by them represented a valid sample for estimating the range within which the price of imports of the subject product from other sources fluctuated. The criterion used to estimate the subject product from other sources was the maximum and minimum prices for the imports identified as the product under investigation from other countries. Clearly, Mexico did not assume that the prices of imports from Guatemala and from the countries not investigated were in all instances at the same level.

66. In evaluating the impact of the prices of Guatemalan imports on domestic prices, the investigating authority in no way relied on a sample of 17 per cent of total imports from Guatemala during the period from July to December 2000. The 17 per cent to which Guatemala refers is a sample of imports from that country which was used to calculate the cost of transporting the product from the port of entry into Mexico to the importer's warehouse during the investigation period. It bears no relation to the average prices of imports from Guatemala. Those average prices were calculated on the basis of value and volume figures for total imports recorded in SICMEX and duly adjusted.

67. Paragraph 7.115 of the final report of the Panel in *Mexico – Rice* (in which, according to Guatemala, the Panel "observed that the declarations from Mexico contained all of the information on the volume and value of the imports and could have provided a more accurate basis for an assessment of the subject imports") is not applicable to the case of Guatemalan pipes and tubes for the following reasons:

(a) In the rice case, what was being questioned was the way of separating dumped imports from non-dumped imports, while in this case the totality of Guatemalan imports were dumped;

(b) in the rice case, not all of the import declarations and invoices from the country under investigation were available, while in this case, there were declarations "covering practically 100 per cent of the volume imported from the Republic of Guatemala";

(c) in the rice case, what was being questioned was the fact that a growth rate in dumped imports from the US was assumed on the basis of the growth rate for total imports from the US, something which was not done in this case;

(d) in the rice case, the Panel established that the reason why there was a need to resort to the declarations was that the alleged obligation to send a questionnaire to all of the US exporters had not been complied with. However, the Appellate Body rejected the suggestion that Mexico was under an obligation to send the questionnaire to all of the US exporters. Thus, the final determination in paragraph 7.115 of the Panel report does not apply, since the Appellate Body rejected the fundamental premise on which it was based.

V. GUATEMALA ERRONEOUSLY CLAIMS THAT THE SE FAILED TO ANALYSE OR VERIFY THE NON-ATTRIBUTION OF INJURY CAUSED BY OTHER KNOWN FACTORS

68. Basically, Guatemala maintains that the investigating authority acted inconsistently with Article 3 of the Anti-Dumping Agreement for the following reasons:

(a) It argues that the SE failed to consider that the decline in the applicant's operating profits during the period of investigation **was primarily the result of an increase in costs**, and that this was not explained **in detail** by the SE;

(b) it maintains that **the SE failed to explain as another determining factor of injury** the decline in exports by the domestic industry during the period of investigation, with a posted reduction of at least 4 per cent in output.

69. As regards the first of these arguments, Guatemala contradicts itself when it subsequently points out that the alleged inconsistency on the part of the SE consists of **not having evaluated the injury caused by the increase in operating costs**.

70. In fact, according to WTO jurisprudence (Appellate Body reports in *US – Wool Shirts and Blouses, EC – Hormones,* and *Japan – Agricultural Products II*), it is up to the party asserting a fact to prove its claim. Thus, in dispute settlement proceedings it is for the complaining to establish a prima facie case, after which the burden of proof shifts to the party complained against. The suggestion that a mere assertion constitutes a proof of a claim in untenable.

71. In other words, it is up to Guatemala to make a prima facie case for its claims, and this cannot validly be done through mere assertions. And yet, Guatemala plainly and categorically asserts, without the slightest proof, that the decrease in the applicant's profits was primarily the result of increased costs. We therefore ask this Panel to dismiss its claim on the grounds that it has not established a prima facie case of violation by Mexico as it contends, and that a panel cannot rule in favour of a complaining party that has failed to prove such an assumption.

72. Moreover, contrary to what Guatemala has claimed, nowhere does the Final Resolution state that there had been "an increase in operating costs", so that we see no reason why, according to Guatemala, the investigating authority should have had to explain the situation (in fact, we do not know on what basis Guatemala asserts that there was an increase in operating costs). Furthermore, assuming, *arguendo,* that it should have done so, an increase in costs cannot be attributed to the injury caused by dumped imports. In other words, the negative effects of the dumped imports, which are finished products, cannot have an impact on the costs of a like product, which is another finished product; so that it is impossible to carry out the analysis that Guatemala has called for. Consequently, we ask this Panel to dismiss Guatemala's claim.

73. Nor does the Final Resolution contain any statement to the effect that the injury to domestic production was exclusively the result of a decrease in sales revenue. On the contrary, what the Final Resolution establishes is the structure of the analysis conducted in conformity with Article 3 of the Anti-Dumping Agreement. Obviously, understanding the behaviour of producers' profits requires a knowledge of the behaviour of other factors, namely sales revenue, selling costs and operating expenses. In this context, the Final Resolution states that the behaviour of revenue and operating expenses were the factors that influenced the downward trend in operating profits, which was the factor to be evaluated.

74. As if that were not enough, in paragraph 223 of the Final Resolution, the SE continued to analyse the elements which according to Guatemala were disregarded; and indeed, it was precisely owing to the behaviour of costs that the decline in profits was less sharp, since the decrease in sales revenue was greater than the recorded decrease in costs and expenses.

75. Moreover, the Final Resolution clearly states that the decrease in profits was a direct consequence of the decrease in sales revenue and not of any identifiable adverse trend in sales costs. This is precisely why there is no suggestion that the injury recorded in the "profits" variable was attributable to the behaviour of costs. In any case, what is mentioned in paragraph 224 is the 6 per cent increase in operating expenses which is proportionally considerably less than the 19 per cent decrease in sales revenue. Consequently, Guatemala's claims in this respect are without foundation.

76. Similarly, regarding Guatemala's argument that Mexico acted inconsistently with the Anti-Dumping Agreement by not providing an explanation to the effect that the decline in exports by the domestic industry was another determining factor of injury, we note that in paragraph 304(b) of its first written submission, what Guatemala appears to suggest, rather, is that the decline in exports was another determining factor of injury and that the SE did not make a determination to that effect.

77. In this connection, Mexico would like to repeat the arguments and points made in the previous section concerning the obligation to establish a prima facie case of violation attributable to the party complained against.

78. At the same time, there is, in the Final Resolution, an explanation by the investigating authority as to why the decline in the domestic industry's exports was not a determining factor of injury. According to this explanation, although total exports by the domestic industry of the product under investigation decreased by 51 per cent during 1999 and 25 per cent during the investigation period, this does not *per se* constitute an indication that the decline was a determining factor of injury, since in 1998 they represented 7 per cent of domestic production, in 1999 3 per cent, and during the investigation period 5 per cent. Thus, even if the comparative percentages of exports are high, the effect was practically negligible in view of the small volume of exports.

79. So, Guatemala has based its assertion that the SE favoured one factor of injury over another, and that its examination cannot be considered objective, on an erroneous premise. It would appear that Guatemala has assumed that the decline in domestic sales has the same specific weight or impact as the decline in exports, and that the SE should not therefore have considered one factor and disregarded the other. What Guatemala fails to mention is the vital element referred to above, namely the volume of sales.

80. As mentioned, the reason why the decline in exports was not considered to be a determining factor of injury was that it had a negligible impact in view of the low volume of exports. Thus, the reason why the decline in domestic sales was considered as a factor of injury, and not the decline in exports, was that the latter was too small to justify the assumption that it was a determining factor of injury. So Mexico did conduct an objective examination based on positive evidence of the factors listed by Guatemala, and consequently, Guatemala's claims are without foundation.

81. For all of the reasons mentioned in this section, we request this Panel to determine that Mexico acted consistently with the Anti-Dumping Agreement and that Guatemala's claims are without foundation.

VI. ARGUMENTS WITH RESPECT TO CLAIMS RELATING TO PROCEDURAL ASPECTS

82. Concerning Guatemala's arguments with respect to Article 6.9 and paragraph 6 of Annex II of the Anti-Dumping Agreement, it would appear that Guatemala considers that the alleged violation of Article 6.9 of the Anti-Dumping Agreement automatically implies a violation of paragraph 6 of Annex II of the Anti-Dumping Agreement. In Mexico's view, that paragraph is not applicable to the disclosure of the essential facts.

83. Guatemala provides an incomplete quotation from paragraph 6.125 of the report of the Panel in *Argentina – Ceramic Tiles*. In its totality, the paragraph derives its importance from the fact it establishes clear guidelines on the disclosure of the essential facts: in the absence of any mention of how the essential facts must be communicated, the investigating authority may do so, *inter alia*, by issuing a special document, a verification report, a preliminary determination, etc. In this case, the SE disclosed the facts both in the Preliminary Resolution and in the public hearing. In the light of the above considerations, this is consistent with the Anti-Dumping Agreement.

84. Contrary to what Guatemala claims, Article 6.9 of the Anti-Dumping Agreement contains two obligations: (a) to inform the interested parties of the essential facts which form the basis for the decision whether to apply definitive measures; and (b) to provide this information in sufficient time for the parties to defend their interests. The "essentiality" of those facts was notified in the Final Resolution and in the public hearing. Consequently, it is wrong to assert that there is no indication in any document that the essential facts were disclosed.

85. It is logical that if there are requests for information on the product under investigation as such, that information should not be considered as essential. The investigating authority made a request to Tubac, to which it received a reply that was sufficiently detailed for the information to be used in the Final Determination (paragraph 67).

86. Similarly, Tubac is responsible for the fact that the information verified during the on-the-spot investigation was not consistent with the information it submitted, so that in the light of Article 6.8 of the Anti-Dumping Agreement, since Tubac's information was unreliable, the investigating authority decided to resort to the facts available. Tubac knew that its information was flawed, so that it was predictable that it would be dismissed. We refer to Mexico's arguments in this respect in part III of this submission.

87. As regards the disclosure of the essential facts through the contents of the record, we submit that Tubac's rights were not affected: contrary to what Guatemala asserts, its defence did have access to the information relating to the case, since in Mexico, confidential information may be consulted by the legal representative of any of the interested parties. In fact, Tubac's legal representative did access the confidential information in question, so that no prejudice was caused in this respect.

88. Regarding the second obligation of Article 6.9 of the Anti-Dumping Agreement, the SE gave Tubac ample opportunity to defend its position in the anti-dumping investigation and submit evidence and arguments. The on-the-spot investigation revealed that Tubac had not provided complete, accurate and suitable information for the determination of dumping, a circumstance that significantly impeded the investigation. The investigating authority therefore had to resort to the facts available.

89. Concerning the complaint relating to Article 12.2 of the Anti-Dumping Agreement, Guatemala states that the public notice or separate report must set forth in sufficient detail the findings

and conclusions reached on all issues of fact and law, that the SE failed to explain, in the Preliminary Resolution, the decision to modify the definition of the product under consideration to include pipes and tubes of up to six inches, and finally, that the Preliminary and Final Resolutions are inconsistent with Article 12.2 of the Anti-Dumping Agreement in that they contain no explanation of the diameters included in the definition of the product investigated.

90. The Preliminary Resolution and the Final Resolution do set forth the required findings and conclusions, and are therefore consistent with Article 12 of the Anti-Dumping Agreement. As is evident from the *considerando* and *resultando* sections, the Final Resolution contains all relevant information on the matters of fact and law which led to the imposition of the final measures.

91. Likewise, the investigating authority's determinations do contain a description of the product which is sufficient for customs purposes; the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2 of the Anti-Dumping Agreement; considerations relevant to injury as set out in Article 3 of the Anti-Dumping Agreement; and the reasons leading to the determination.

92. Regarding the change in the product investigated, if the applicant suggests such a change and the exporter expresses no objection thereto, it is normal that the investigating authority should have no objection to making that change, the assumption being that the interests of the parties are not affected and that the parties in fact agree. Mexico requests the Panel to dismiss the claim concerning the change in the definition of the product investigated.

93. Concerning Article 6.5 of the Anti-Dumping Agreement, it is not true that the exporter was denied access to confidential information even though there were no non-confidential summaries. Under Article 80 of the Foreign Trade Act (FTA), Mexico allows all of the interested parties access to confidential information from the investigation provided they comply with certain requirements. In declaring information to be confidential, the SE complied with that Article.

94. For information to be considered confidential, there must be a justification which, in the absence of relevant guidelines in the Anti-Dumping Agreement, is considered sufficient if the investigating authority so determines. The investigating authority conducted the relevant analysis which was set out in the administrative arrangement applicable to each application. We repeat that for the reasons stated above, the fact that the domestic producers did not provide non-confidential summaries did not cause Tubac any prejudice. In fact, as pointed out in Folio 803 on the control of requests and access to the record, Tubac's legal representative consulted, on 8 November 2002, volumes 8, 9 and 10 of the confidential version of the administrative record (Exhibit MEX-2), so that Guatemala's claim of defencelessness in this respect is without foundation.

95. Regarding the requirement to provide public summaries of confidential information, the second sentence of Article 6.5.1 of the Anti-Dumping Agreement states that there are exceptional circumstances in which it is possible that the information cannot be summarized. In the case of tables containing numbers, there is no way of summarizing them. Consequently, Mexico considers that it acted appropriately by indicating the type of information involved in order to inform the interested parties that the information existed in confidential form and that they could therefore consult it.

96. For these reasons, Mexico considers it correctly disclosed the "essential facts" on which its Final Resolution was based; that the resolutions set out in sufficient detail the findings and conclusions reached by the investigating authority on issues of fact and law; and that the information from the applicant that was classified as confidential was correctly so marked, enabling the parties to consult it at any time. Thus, Mexico respectfully requests the Panel to dismiss Guatemala's claims.

ANNEX B

EXECUTIVE SUMMARY OF THE WRITTEN SUBMISSIONS OF THE THIRD PARTIES

ANNEX B-1

THIRD PARTY STATEMENT OF THE EUROPEAN COMMUNITIES

(4 September 2006)

1. The European Communities, as a third party, is making this submission owing to its general interest in the correct interpretation of the Anti-Dumping Agreement (AD Agreement). In doing so, it will focus its remarks on certain issues, reserving the right to address others in its oral submission.

2. Regarding the initiation of the investigation, the parties do not appear to disagree on the interpretation of Article 5.2, 5.3 and 5.8 of the AD Agreement, but rather, on the application of those provisions in the specific case at issue. Guatemala claims that the application for initiation of the investigation lacked, in four respects, sufficient evidence of dumping; that it lacked sufficient evidence of injury in relation to the volume of imports; and that the Ministry of the Economy (SE) failed to properly examine the accuracy and adequacy of the evidence of dumping and injury in the application.

3. To resolve these issues, the European Communities considers the use of Articles 2 and 3 of the AD Agreement to interpret Article 5.2 and 5.3 (and the use of the former to interpret the latter), as was done in *Guatemala – Cement II*, to be correct, and suggests that the Panel should do likewise in this case.

4. If the Panel were to reach the conclusion that the application for initiation lacked sufficient evidence of dumping and injury, the European Communities considers that there would be no need to assess whether the SE properly examined the accuracy and adequacy of the evidence of dumping and injury in the application.

5. Regarding the definition of the allegedly dumped product, ("product under consideration"), the parties agree on the fact that the definition in both the application and the Initiating Resolution (pipes and tubes for conduction of a diameter of one half to four inches, produced under a certain technical standard from hot-rolled sheet) was expanded on two occasions: first, in the Preliminary Resolution, to include pipes and tubes of more than four and up to six inches in diameter, and second, in the Final Resolution, to include structural pipes and tubes of one half to four inches in diameter.

6. The discrepancies essentially lie in the appreciation of these changes from the standpoint of various provisions of the AD Agreement. It should be noted in this connection that Article 5.2(ii) of the AD Agreement stipulates that the application must contain "a complete description of the allegedly dumped product", although it is true that Article 5.2 of the AD Agreement provides that the application shall contain "such information as is reasonably available to the applicant", and that in *US – Softwood Lumber*, the Panel pointed out that the AD Agreement contained no instructions for determining the "product under consideration".

7. Nevertheless, the European Communities agrees with Guatemala on the importance of a proper definition of the product under consideration from the outset of the procedure, although, as Guatemala states, this does not preclude such minor clarifications to the definition as may be necessary. Guatemala includes in its submission a list, which the European Communities considers accurate, of the various implications of the definition of the product with respect to the different components and phases of an anti-dumping investigation: definition of the like product, definition of the domestic industry and its level of support for the initiation of the investigation, and determination of dumping, injury, and causal link.

8. These implications have an impact on essential aspects of the investigation, on the identification by the interested parties (exporters, importers and industry) of the information that they must or can supply, and on the investigating authority's examination. The importance of these implications increases as the procedure advances. Thus, a change in the definition of the product in the Preliminary Resolution, as occurred in this case, means that the information provided by the exporters or the foreign producers in their reply to the questionnaires will be incomplete.

9. The problem is more serious if, as also occurred in the case at issue, the change in the description of the product under consideration is made in the Final Resolution, since we are now faced with a new problem: the data on which the Final Resolution is based have not been discussed in the course of the procedure, and will not be discussed, because the procedure has been finalized. In other words, the authorities will have failed to comply with their obligation to inform the interested parties, prior to the adoption of the Final Determination, of the essential facts, as we shall see later on, and this, in its turn, results in the violation of the rights of the parties to defend their interests (Article 6.2 of the AD Agreement).

10. The parties differ on the consistency of the investigation period, which ran from 1 July to 31 December 2000, while the Initiating Resolution was issued on 14 August 2001, i.e. seven and a half months later.

11. The European Communities shares Guatemala's interpretation of the application of the teachings from *Mexico – Rice* to the case at issue. Although in this case, the time elapsed was not fifteen months, but seven and a half months, a difference of more than six months is too much to consider the investigation period as being representative, and is inconsistent with the obligation under Article 3.1 of the AD Agreement to carry out an objective examination based on objective evidence. We recall the statement of the Appellate Body that more recent data are likely to provide better indications about current injury.

12. At the same time, in this case we have all of the other factors to which the Panel in *Mexico – Rice* attributed importance in its evaluation of the facts and that the Appellate Body listed in its report. Contrary to what Mexico has stated in this case, in *Mexico – Rice*, the suggestion that the investigation period proposed by the applicant was accepted "knowing that that period had been proposed because it allegedly reflected the maximum penetration of exports" was not taken into account.

13. Moreover, the European Communities considers the fact that in this case a full examination was conducted of the information provided in the application for initiation, and that a request for additional information was made, to be irrelevant to the issue before us unless Mexico can demonstrate that from that examination it deduced that the information relating to the period of investigation conveyed indications as to current injury and constituted an appropriate basis for determining whether there was current injury, as stated by the Appellate Body in *Mexico – Rice*.

14. The European Communities also agrees with Guatemala's analysis that in the present case, the use of information from the second half only of the three years from 1998 to 2000 for the injury analysis was not objective and representative, and was therefore inconsistent with the AD Agreement.

15. The European Communities notes that there is no data whatsoever in the record to suggest that the selective use of the second half of each of three years rather than the complete years is justified by seasonal considerations or factors.

16. As with respect to the previous issue, the teachings of the Appellate Body in *Mexico – Rice* are fully applicable to this case.

17. The European Communities also agrees with Guatemala's analysis that in the present case, the use of information relating to the factors based on different sets of information from different companies within the domestic industry, as summarized by Guatemala in the table appearing in its written submission, was not coherent, and consequently, it was not objective and it was inconsistent with Article 3.1 of the AD Agreement.

18. In its written submission, Mexico does not respond to Guatemala's claims in this respect, but merely states that under Article 4.1 of the AD Agreement, there are two ways of complying with the obligation to examine the domestic industry: by examining the producers in their totality, or by examining a significant portion of the producers. However, this is not what Guatemala claims: it does not refer to the representativeness of the data, but rather, to their incoherent and arbitrary use.

19. Guatemala points out that in violation of Article 6.9 of the AD Agreement, the SE failed to inform the interested parties of two essential facts: the rejection, based on the verification visit, of the information on prices provided by the exporter and the inclusion of structural pipes and tubes in the definition of the product under investigation.

20. Although Mexico rejected the first claim, it did so through a generic reference to the Preliminary Resolution and the records of the hearing, so that the European Communities was unable to conduct the necessary verification.

21. At the same time, as already mentioned, the inclusion of structural pipes and tubes in the definition of the product under investigation took place in the Final Resolution, hence violating the Article 6.9 requirement that the authorities inform all interested parties of the essential facts under consideration "before a final determination is made".

22. Although not very clearly, Guatemala states that contrary to the requirements of Article 6.5 of the AD Agreement, the SE failed to assess whether the confidential treatment requested by the applicant of the invoice and price quotation attached to the application was justified, and failed to ask the applicant for a non-confidential summary.

23. Since it is unable to verify the content of the confidential information, the European Communities will refrain from examining this element, concerning which Mexico merely pointed out that information expressed in numbers could not be summarized.

24. Mexico further responds that "the justification for designating a piece of information as confidential is sufficient provided the investigating authority considers this to be the case". The explanation is somewhat tautological, and fails to clarify where in the corresponding decision there is any explanation of the motives that would help to understand, and control, the reasons that led the investigating authority to the conclusion that the information was confidential.

25. Finally, it is unacceptable that a WTO Member should consider, as Mexico suggests, that its domestic legislation on access to confidential information in the hands of the administration can replace the obligations set forth in Article 6.5 of the AD Agreement. That Article requires the authorities to clarify whether a request for confidentiality is warranted, and if it is not, and the supplier insists that it should not be disclosed, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct. This procedure cannot simply be replaced by another procedure such as the one set forth in Article 80 of Mexico's Foreign Trade Act, supplemented by Article 147 of the Regulations thereto.

ANNEX B-2

THIRD PARTY SUBMISSION OF THE UNITED STATES

(4 September 2006)

INTRODUCTION

The United States makes this third party submission to provide the Panel with its view of the proper legal interpretation of certain provisions of the *Agreement on Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") that are relevant to this dispute. The United States addresses in this submission the proper interpretation of: (1) Article 5.2 of the AD Agreement; (2) Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement; and (3) Article 19.1 of the DSU. The United States also comments on several aspects of the factual record in this dispute.

Guatemala claims that Mexico breached Article 5.2 of the AD Agreement because it initiated an investigation based on an application that lacked sufficient evidence of dumping and injury. Specifically, regarding dumping, Guatemala argues that the evidence contained in the application concerning normal value – one sales invoice and one price quote – was insufficient for purposes of initiation because: (1) the invoice and price quote are not related to the exporter named in the application; (2) the price quote is not an "actual" sales price; (3) the single sale represented by the invoice was compared to a multiple-month average export price; and (4) evidence of prices for two models is not representative of the "full range of products under investigation."[1] Regarding injury, it argues that the evidence in the application was insufficient because it included volume and price information for "all imports" entering the country under two tariff classifications, despite the fact that other imported pipes and tubes that also entered the country under these tariff classifications had been "explicitly excluded from the investigation."[2]

Article 5.2 of the AD Agreement does not dictate that an application must contain a particular form or quantum of evidence regarding dumping or injury. Rather, it requires that an application contain such information as is "reasonably available to the applicant." What is "reasonably available" necessarily depends on the circumstances of each case.[3]

Thus, depending on the circumstances, an investigating authority may decide to initiate an investigation based on an application that contains home-market pricing information solely from a producer not identified in the application. Article 5.2(iii) requires only that an application contain home-market price information specific to "the product in question" (*i.e.*, the "allegedly dumped product" referred to in subparagraph (ii)).

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[1] *See* First Written Submission of Guatemala, paras. 69-80.

[2] First Written Submission of Guatemala, para. 81.

[3] *See United States – Hot-Rolled Steel (AB)*, para. 84 ("The word 'reasonable' implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is 'reasonable' in one set of circumstances may prove to be less than 'reasonable' in different circumstances.").

Similarly, an investigating authority is not required to summarily reject an application based partially or solely on a price quote, as opposed to an "actual" price. Article 5.2(iii) refers to "information on" prices, and a price quote provides "information on" prices. If the drafters had intended to require nothing short of "actual" prices – regardless of the circumstances – they would have done so.[4] Nor is an investigating authority required to summarily reject an application (1) that only provides home-market pricing information with respect to some, but not all, models or types of the product in question[5] or (2) that provides information on the volume of the allegedly dumped imports using import data from tariff classifications that are broader than the product in question. Again, the relevant question is whether more specific or accurate information was "reasonably available" to the applicant.[6]

Guatemala claims that, "based on the specific circumstances of the investigation in question," Mexico breached Articles 3.1, 3.2, 3.4, and 3.5 of the AD Agreement because it selected a period of investigation that was too remote to allow for the gathering of positive evidence to be used as the basis for an objective examination of injury – in much the same way as occurred in *Mexico – Rice*. Mexico, on the other hand, attempts to distinguish this case from *Mexico – Rice*.

It is worth recalling that the Panel in *Mexico – Rice* did not base its findings solely on the "temporal gap" between the period of investigation and the initiation of the investigation. As the Appellate Body recognized:

> The Panel, as trier of the facts, gave weight to other factors: (i) the period of investigation chosen by [Mexico's authority] was that proposed by the petitioner; (ii) Mexico did not establish that practical problems necessitated this particular period of investigation; (iii) it was not established that updating the information was not possible; (iv) no attempt was made to update the information; and (v) Mexico did not provide any reason – apart from the allegation that it is Mexico's general practice to accept the period of investigation submitted by the petition – why more recent information was not sought. Thus, it is not only the remoteness of the period of investigation, but also these other circumstances that formed the basis for the Panel to conclude that a *prima facie* case was established.[7]

Based on the submissions the United States has received in this dispute, many of these "other circumstances" appear to be present in this case in much the same way as they were in *Mexico – Rice*. Mexico acknowledges that, as in *Mexico – Rice*, the period of investigation chosen by its authority was that proposed by the petitioner[8], and Mexico did not assert during the investigation or in its First Written Submission that it was not possible to update the information. Moreover, Mexico has not

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[4] *See, e.g.*, AD Agreement, Article 2.2.2 (requiring that, when constructing normal value for purposes of determining dumping, the amounts for administrative, selling, and general costs and for profits shall be based on "actual data").

[5] *See United States – Softwood Lumber AD Final (Panel)*, paras. 7.121-7.123.

[6] *See also United States – Softwood Lumber AD Final (Panel)*, para. 7.54 ("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. ... This is particularly true where such information might be redundant or less reliable than information contained in the application.").

[7] *Mexico – Rice (AB)*, para. 167.

[8] First Written Submission of Mexico, para. 164.

asserted that it attempted to update this information during the investigation. It also has not provided any reason why more recent information was not sought.

Mexico makes three points in attempting to distinguish this case from *Mexico – Rice*: (1) the gap between the end of the period of investigation and the initiation of the investigation was "only" eight months in this case, whereas it was 15 months in *Mexico – Rice*; (2) its authority performed a more thorough examination of the petition here, and that examination caused delay in the initiation of the investigation; and (3) in *Mexico – Rice*, Mexico's authority accepted the period of investigation proposed by the petitioner knowing that that period reflected the maximum penetration of imports.[9]

With respect to Mexico's first point, the United States appreciates that there is a difference between a 15-month gap between the period of investigation and the initiation of an investigation and an eight-month gap. The United States, recalls, however, that the Panel in *Mexico – Rice* considered not only this gap, but also the gap between the period of investigation and the imposition of final anti-dumping duties. In *Mexico – Rice*, this gap was two years and nine months. In this case, the gap is two years and thirteen days.

With regard to Mexico's second point, Mexico has failed to explain why a more thorough review of a petition would justify lengthening the gap between the period of investigation and initiation in this case. Even if Mexico's authority performed a more thorough examination of the petition[10], and that examination caused a delay in initiating the investigation, Mexico could have established a more recent period of investigation to reflect the delay: the period of investigation was not set in stone when it was proposed by the petitioner. Moreover, notwithstanding Mexico's explanation that initiation in this dispute was delayed because its authority undertook a more thorough investigation than was undertaken in *Mexico – Rice*, in the *Rice* dispute there was a much longer delay between the filing of the petition (on 2 June 2000) and the initiation of the investigation (11 December 2000) than in this dispute (petition filed on 22 May 2001; investigation initiated on 24 August 2001).

With regard to Mexico's third point (*i.e.*, unlike in this dispute, the period proposed by the petitioner in *Mexico – Rice* was the period of maximum import penetration), nothing in the Panel or Appellate Body reports suggests this was a factor in the analysis of the "stale" period of investigation. The issue of seasonal differences in imports arose in *Mexico – Rice* not in the context of a "stale" period of investigation but in the context of an incomplete period of investigation (*i.e.*, the six-month period of each year when imports of rice were at their peak).

As explained by the Appellate Body, the Panel in *Mexico – Rice* found that Mexico's injury analysis, which was based on data covering only six months of each of the three years examined, did not allow for an "objective examination," as required by Article 3.1 of the AD Agreement, for two reasons:

> [F]irst, whereas the injury analysis was selective and provided only a part of the picture, no proper justification was provided by Mexico in support of this approach; and secondly, [Mexico's investigating authority] accepted the 'period of investigation proposed by the applicants because it allegedly represented the period of highest

[9] First Written Submission of Mexico, para. 161. While Mexico lays out four separate subparagraphs in paragraph 161, the points in the second and third subparagraphs appear to be the same.

[10] Mexico does not appear to argue that its authority examined the period of investigation proposed in this petition more closely than in the petition in *Mexico – Rice*. Instead, it appears the authority's examination of the petition related to issues not relevant to that period. *See* First Written Submission of Mexico, para. 164.

> import penetration and would thus show the most negative side of the state of the domestic industry.'[11]

In this case, while Mexico's authority accepted the six-month period proposed by the petitioner, there does not appear to be any evidence that this period represented the period of highest import penetration. Guatemala appears to acknowledge this in paragraph 259 of its First Written Submission.

Thus, the Panel in this case must determine, in essence, whether an injury analysis that is based on data covering only six months of each of the three years examined allows for an "objective examination" where the investigating authority chose the period proposed by the petitioner and provided no justification in support of examining only parts of years, but where there is no evidence that imports were higher during the six-month periods selected.

In the view of the United States, examining data relating to the whole year normally "would result in a more accurate picture of the 'state of the domestic industry' than an examination limited to a six-month period."[12] While there may be circumstances in which there could be "convincing and valid reasons for examining only parts of years"[13], an investigating authority cannot simply assume that the six-month periods proposed by a petitioner will provide an accurate picture of the state of the domestic industry.

Indeed, in most circumstances it would be difficult to "demonstrate [ ] that the dumped imports are, through the effects of dumping, . . . causing injury"[14] by looking at six-month snapshots over a three-year period. For example, while dumped imports may increase and the domestic industry's condition may have deteriorated from the first half of the first year to the first half of the third, the condition of the industry may be due to a natural disaster that destroyed most of the industry's production capacity in the second half of the first year. But six-month snapshots would mistakenly suggest that the industry was injured by dumped imports, not by the natural disaster.

The burden should not fall on exporters and foreign producers to investigate what happened to the domestic industry during those months that are disregarded by the authority, in the hope of persuading the authority to investigate a continuous period. While the petitioners admitted in their petition in *Mexico – Rice* that the six-month period reflected the period of highest import penetration,[15] it will not always be so easy for exporters and foreign producers to discover the biases that may result from a discontinuous period of investigation.

As the Panel found in *Mexico – Rice*, Article 3.1 of the AD Agreement "impose[s] certain obligations on the . . . investigating authorities with regard to the completeness of the data used as the basis for its determination."[16] The United States agrees with Guatemala that an objective

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[11] *Mexico – Rice (AB)*, para. 176.

[12] *Mexico – Rice (AB)*, para. 183.

[13] *Mexico – Rice (Panel)*, para. 7.82.

[14] AD Agreement, Article 3.5.

[15] *Mexico – Rice (Panel)*, para. 7.83.

[16] *Mexico – Rice (Panel)*, para. 7.77.

determination cannot be based on an incomplete series of data unless the investigating authority provides a justified explanation for doing so.[17]

Guatemala requests that, if the Panel were to find in Guatemala's favor, the Panel should suggest that Mexico "immediately end the measure" at issue in this dispute. The Panel should decline Guatemala's request and provide the recommendation set forth in DSU Article 19.1 that Mexico bring its measure into conformity with its obligations under the relevant agreements.

In general, panels have declined requests to make suggestions under Article 19.1 of the DSU, and for good reason. A Member generally has many options available to it to bring a measure into conformity with its WTO obligations. As the Panel noted in *US – Softwood Lumber ITC Investigation*, Article 21.3 of the DSU makes clear that "the choice of means of implementation is decided, in the first instance, by the Member concerned."[18]

Guatemala asserts that the situation in this dispute is analogous to the situation in *Argentina – Poultry*, where the Panel suggested repeal of the anti-dumping measures in question because the Panel could not "perceive how Argentina could properly implement our recommendation without revoking the anti-dumping measure at issue in this dispute."[19] However, it is counterintuitive that a panel should provide guidance where guidance is needed least (*i.e.*, where there is only one "way"[20] to implement the recommendations, and that way is clear).[21]

Moreover, in this particular case, it would be difficult to square a suggestion that Mexico "immediately" end the measure with Article 21.3 of the DSU. That provision recognizes that it may be impracticable to comply "immediately" and creates a process to determine a reasonable period of time to comply – *after* the report has been adopted, and *after* the Member concerned informs the DSB of its intentions in respect of implementation. Article 21.3 also expresses a clear preference (a) for a reasonable period proposed by the Member concerned and approved by the DSB, (b) for a period of time "mutually agreed by the parties to the dispute" and (c) as a last resort, a period of time determined through binding arbitration. The Panel plays no role in that process. As a result, a suggestion from the Panel to "immediately" end the measure would insert the Panel inappropriately in the process to determine the time in which to comply.

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[17] First Written Submission of Guatemala, para. 257.

[18] *US – Softwood Lumber ITC Investigation (Panel)*, para. 8.8.

[19] *Argentina – Poultry (Panel)*, para. 8.7.

[20] Article 19.1 of the DSU refers to "ways" to implement the Panel's recommendations, not to a single "way."

[21] Guatemala also notes Mexico's announced intentions regarding the implementation of the rulings and recommendations in *Mexico – Rice* in support of its request. In the view of the United States, however, a dispute involving a different measure and a different complaining party does not support a request for a suggestion under DSU Article 19.1, even though some of the claims in the two disputes are similar to one another.

ANNEX B-3

THIRD PARTY SUBMISSION OF JAPAN

(1 September 2006)

I. CHANGES IN THE DEFINITION OF THE PRODUCT UNDER CONSIDERATION AND THEIR CONSISTENCY WITH ARTICLES 2 AND 3

1. Mexico appears not to disagree that its investigating authority changed the definition of the PUC, but it argues that the changes were not substantial and were justified by the process of investigation.

2. Under the *AD Agreement*, the authorities might be able to change the definition of the PUC during the course of the investigation. However, this does not relieve Mexico of its obligation to make dumping and injury determinations pursuant to the relevant provisions, in particular, Articles 2 and 3 of the *AD Agreement*. In this respect, Japan agrees with Guatemala that the definition of the PUC has broad implication for the investigation, and changes to the PUC could affect the Panel's determination of whether the investigation and resulting measure at issue is consistent with the relevant provisions of the *AD Agreement*. Japan finds support for this position in the Panel's analysis in *Guatemala - Cement II* with respect to the claims raised by Mexico involving anti-dumping measures imposed by Guatemala on imports of cement from Mexico.

3. As the Appellate Body observed, "[h]aving defined the *product* as it did, [investigating authority] was bound to treat that *product* consistently thereafter in accordance with that definition." Thus Japan considers that, if and when investigating authorities change the definition of the products, they must conduct their examination concerning dumping and injury based on such changed definition of the product (including the definition of the "like product"), in accordance with "the need for *consistent treatment* of a product in an anti-dumping investigation" as defined or redefined by the authorities.

4. Given that Guatemala and Mexico do not disagree that the definition of the PUC was changed, the Panel should make the necessary factual findings as to precisely what these changes were, when and how they were made, and the consequences of such changes in terms of the scopes of investigation for dumping and injury determinations at issue. Since changes in the definition of the PUC could have impact on the legitimacy (or WTO consistency) of investigations under review, the Panel should make these factual findings and carefully examine the consistency of any such changes with the *AD Agreement*, in particular Articles 2 and 3, based on such findings.

II. SELECTION OF THE PERIOD FOR INJURY ANALYSIS AND ITS CONSISTENCY WITH ARTICLE 3

A. REMOTE PERIOD FROM THE INITIATION OF THE INVESTIGATION FOR THE INJURY ANALYSIS

5. Japan believes that the Appellate Body in *Mexico - Rice* has already shown useful guidelines in evaluating the consistency of a selection of a remote period of data collection, or a remote period of investigation, for injury analysis. In that case, the Appellate Body agreed with the Panel below that "evidence that is *not relevant or pertinent to the issue … is not 'positive evidence'*" and that "relevance or pertinence must be assessed with respect to the existence of injury by dumping *at the time the*

investigation takes place." The Appellate Body further explained that "[b]ecause the conditions to impose an anti-dumping duty are to be assessed *with respect to the current situation*, the determination of whether injury exists should be based on data that provide indications of *the situation prevailing when the investigation takes place.* [...] *[M]ore recent data is likely to provide better indications about current injury*." Thus, more recent data is more relevant and pertinent as to assessing "current injury," as observed by the Appellate Body.

6. In addition, the Appellate Body in *Mexico - Rice* considered other factors to be relevant as follows "these temporal gaps were not the only circumstances that the Panel took into account. The Panel, as trier of the facts, gave weight to other factors: (i) the period of investigation chosen by Economía was that proposed by the petitioner; (ii) Mexico did not establish that practical problems necessitated this particular period of investigation; (iii) it was not established that updating the information was not possible; (iv) no attempt was made to update the information; and (v) Mexico did not provide any reason - apart from the allegation that it is Mexico's general practice to accept the period of investigation submitted by the petitioner - why more recent information was not sought." While the Panel's assessment of these other factors in *Mexico - Rice* relates to the specific circumstances of that case, Japan considers that these other factors are highly relevant for the Panel's disposition of this issue in light of the similarity between that case and the case at hand. To begin with, it is apparent from Economía's the Notice of the Initiation on 13 March 2002 that, at least, factors (i) and (iii) thereof are also present in this case.

7. As to other factors, Mexico raised four factors, in paragraph 161 of its First Written Submission, intending to distinguish this investigation from the investigation that was reviewed in *Mexico - Rice* case. Japan considers that as regards point (a) thereof, an 8-month period from the initiation of the investigation, thus more than 24-month period from the completion of the investigation, may still raise doubts whether the period reflects "the situation prevailing when the investigation takes place." As regards point (c) thereof, the scrutiny before initiating an investigation that is required under Articles 5.2 and 5.3 of the *AD Agreement* does not justify the authority's use of outdated information. As regards point (d) thereof, we question its relevance, because the Appellate Body in *Mexico - Rice* took this factor into consideration in examining the WTO consistency of the injury analysis limited to data relating to six-month period each year within a period of investigation for injury analysis, not in the context of the Mexico's selection of a remote period of investigation. As regards point (b) thereof, we do not take a specific position with regard to factual aspects.

8. While Mexico stresses the pertinence of the information in selecting the period for injury analysis rather than the contemporaneity, or up-to-dateness of the information, the question still remains as to which period is more pertinent. It is not clear why the remote period would be more pertinent than the recent period. Mexico's only proffered justification is that information of the more recent period would be affected by the dumped imports. In light of the Appellate Body's finding in *Mexico - Rice* that Guatemala refers to, Japan requests the Panel to examine whether Mexico demonstrates that "the information relating to the period of investigation convey indications as to current injury and constitute an appropriate basis for determining whether there was current injury, in spite of its remoteness."

B. AVAILABILITY OF PROCEEDINGS UNDER ARTICLES 9 AND 11

9. Furthermore, Japan has doubts about the argument advanced by Mexico concerning the availability of subsequent reviews of the dumping and injury determination after the imposition of anti-dumping measures. Mexico contends that changes in the circumstances which may occur at a later stage of the period of investigation or even thereafter should be considered in subsequent reviews under Articles 9 or 11 of the *AD Agreement*, relying on the following statement of the Appellate Body in *EC - Tube or Pipe Fittings* "[i]n our view, the *Anti-Dumping Agreement* takes into account the possibility of such major changes occurring at a late stage of the POI, or even after the POI, not by

allowing investigating authorities to pick and choose a subset of data or sub-periods of a POI according to their subjective considerations, but by review mechanisms."

10. Mexico's reliance on this statement is misplaced. First, unlike in *EC - Tube or Pipe Fittings*, the issue before the Panel in this case is not whether "major changes occurring at a late stage of the POI" justifies the use of remote period of investigation. Second, the mere availability of a review to re-examine injury cannot substitute for compliance with the obligations governing the initiation and conduct of an investigation, in particular, the obligation to base injury determination "on data that provide indications of the situation prevailing when the investigation takes place" or "current injury." Japan notes that in some cases, compliance with these obligations could lead to a decision not to impose anti-dumping duties, in which case there would be no review under Article 11 in the first place.

C. LIMITED EXAMINATION OF INJURY TO SIX-MONTH PERIODS OF EACH YEAR

11. The Appellate Body in *Mexico - Rice* found that "the focus of an injury determination is the state of the 'domestic industry,'" and that "in our view, examining data relating to the whole year would result in *a more accurate picture of the 'state of the domestic industry'* than an examination limited to a six-month period." The Appellate Body clarified that this does not mean that there is "a presumption that an injury analysis based on data relating to only parts of years is not objective."

12. On this issue, Japan also does not have a specific position with regard to the factual aspects. However, given the Appellate Body's finding in *Mexico - Rice*, Japan considers that it would not be an objective examination required under Article 3.1 of the *AD Agreement* if the authorities consider only limited information out of a limited period of each year without "proper justification."

13. In this regard, the Appellate Body in *Mexico - Rice* affirmed the Panel's finding that the combination of selective use of data in the injury analysis with "the acceptance of a period of investigation proposed by the applicants because it allegedly represented *the period of highest import penetration* and would thus show the most negative side of the state of the domestic industry" established "a *prima facie* violation of Article 3.1." On this issue, too, Japan does not take a specific position as to the factual aspects and recognizes that the Panel's assessment of the relevant factors in *Mexico - Rice* relates to the specific circumstances of that case. However, in light of the similarity between the *Rice* case and this case, Japan considers it appropriate for the Panel to inquire as to whether the Mexican authorities accepted the period proposed by petitioner, knowing that the period chosen was allegedly a period of higher import penetration.

ANNEX B-4

THIRD PARTY ORAL STATEMENT OF THE EUROPEAN COMMUNITIES

(12 September 2006)

Table of Cases Cited in this Oral Statement

Short title	Full case title and citation
Argentina – Poultry	*Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, Report of the Panel, adopted by the DSB on 19 May 2003
US – Softwood Lumber (Article 21.5 – Canada)	*United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/RW, Report of the Appellate Body, adopted by the DSB on 1 September 2006
US – Zeroing	United States – Laws, regulations and methodology for Calculating Dumping Margins ("Zeroing"), WT/DS294/AB/R, Report of the Appellate Body, adopted by the DSB on 9 May 2006
Guatemala – Cement II	Guatemala – Definitive Anti-Dumping Measures on Grey Portland cement from Mexico, WT/DS156/R, Report of the Panel, adopted by the DSB on 17 November 2000
Mexico – Rice	*Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/AB/R, Report of the Appellate Body, adopted by the DSB on 20 December 2005
Mexico – Rice	*Mexico – Definitive Anti-Dumping Measures on Beef and Rice*, WT/DS295/R, Report of the Panel, adopted by the DSB on 20 December 2005, as modified by the Appellate Body, WT/DS295/AB/R

1. INTRODUCTION

Mr Chairman, distinguished members of the Panel,

1. The European Communities would like to thank the Panel for this opportunity to make its third party oral submission, which is justified by the EC's general interest in the correct interpretation of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement)*.

2. In deference to the Panel and the parties, this submission will be in Spanish which, it should be stressed, is a first for the European Communities at the World Trade Organization.

3. To avoid wasting the Panel's time or trying its patience, we would like to begin by referring to our written submission, whose arguments we shall not repeat. Our oral statement will be confined to commenting on two issues raised in the written submissions of the other third parties: the initiation of the original investigation, and the request for suggestions from the Panel.

2. INITIATION OF THE ORIGINAL INVESTIGATION

4. Regarding the written submission of the United States, the European Communities agrees that the use of the term "reasonably" in Article 5.2 of the *Anti-Dumping Agreement* implies a degree of flexibility.[1] However, this does not mean that the investigating authorities' discretion in that respect is "boundless".[2] The Appellate Body has stated in this connection that there is a correspondence between the concepts of "dumping" and "margin of dumping"[3], and that "it is a unitary concept" which has the same meaning throughout Article VI of the GATT 1994 and the *Anti-Dumping Agreement*.[4] Moreover, both the panels and the Appellate Body have repeatedly pointed out that the concept of dumping refers to the margins of dumping for specific exporters or foreign producers.[5]

5. Accordingly, the European Communities would expect the information in an application submitted under Article 5.1 of the *Anti-Dumping Agreement* relating to normal value, on the one hand, and export prices on the other, normally to refer to products from the same enterprise. Otherwise, given that circumstances can vary significantly from one producer or exporter to another, it is questionable that an application could be said to contain any evidence of dumping. In such circumstances, the application could at least be expected to include some explanation or indication of why the normal value demonstrated for producer or exporter X should be considered representative of the normal value for producer or exporter Y in respect of which export price evidence has been submitted, or vice versa. In the absence of such evidence or explanation, it is doubtful that the application would comply with the Article 5.2 requirement that it include evidence, with respect to a specific exporter or producer, of dumping.

6. The above remarks are made without prejudice to the possibility – provided the "reasonableness" criterion is respected – that a complaint could be based on data relating to a different country or pertaining to a different producer or exporter.

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[1] US written submission, paragraphs 3 and 4.

[2] Report of the Panel, *Mexico – Rice*, paragraph 7.57, as upheld by the Report of the Appellate Body, *Mexico – Rice*, paragraphs 158 to 172.

[3] Report of the Appellate Body, *US – Zeroing*, paragraph 125.

[4] Report of the Appellate Body, *US – Softwood Lumber (Article 21.5 – Canada)*, paragraph 89.

[5] Report of the Appellate Body, *Mexico – Anti-Dumping Measures on Rice*, paragraphs 215-221; Report of the Appellate Body, *US – Zeroing*, paragraph 129.

3. REQUEST FOR THE PANEL TO MAKE SUGGESTIONS

7. Guatemala requests that in view of the magnitude and number of errors committed by the Ministry in conducting its investigation, the Panel suggest to Mexico that it apply the rulings and recommendations in this case not by re-conducting the investigation, but by terminating the measure at issue.[6]

8. Mexico makes no arguments in this respect, but the United States proposes that the Panel decline Guatemala's request.

9. The European Communities considers that this calls for a few comments.

10. To begin with, we note that certain panels have already issued recommendations that the anti-dumping measure at issue in a dispute be terminated, for instance in *Argentina – Anti-Dumping Duties on Poultry*[7] and *Guatemala – Cement II*.[8] The second of these two cases was an anti-dumping case between the same parties as in this dispute, although in different procedural positions. However, these panels provided concise justifications for the suggestions they made.

11. For example, in paragraphs 8.6 and 8.7 of its report, the Panel in *Argentina – Anti-Dumping Duties on Poultry* stated the following:

> We have determined that Argentina has acted inconsistently with its obligations under the *AD Agreement* in its imposition of anti-dumping duties on imports of eviscerated poultry from Brazil. We have found these violations to be of a fundamental nature and pervasive.
>
> In light of the nature and extent of the violations in this case, we do not perceive how Argentina could properly implement our recommendation without revoking the anti-dumping measure at issue in this dispute. Accordingly, we suggest that Argentina repeal Resolution No. 574/2000 imposing definitive anti-dumping measures on eviscerated poultry from Brazil.

12. Similar wording was used in *Guatemala – Cement II*.

13. The European Communities does not believe that the "pervasive" nature of certain violations is sufficient to justify a suggestion that an anti-dumping measure be revoked. In principle, there is no reason why a general violation, or even a major violation, cannot be remedied by means other than revoking the measure.

14. On the other hand, it is possible that in the case of fundamental violations, i.e. those that affect the very essence of the measure, there may be no other remedy than to revoke the measure. This is the European Communities' understanding of what the Panel ultimately wished to say in *Argentina – Poultry* when it added that "we do not perceive how Argentina could possibly implement our recommendation without revoking the anti-dumping measure".

15. However, the European Communities believes that it is up to each panel to explain exactly why it considers a violation to be "fundamental" in the sense that the only way of complying is to revoke the measure. Since suggestions are not binding, they can only contribute to the rapid and

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[6] Written submission of Guatemala, paragraph 353 et seq.

[7] Report of the Panel *Argentina – Poultry*, paragraphs 8.3 to 8.7.

[8] Report of the Panel in *Guatemala – Cement II*, paragraph 9.6

effective solution of disputes in accordance with the objectives set forth in Article 3 of the Dispute Settlement Understanding if they are substantiated.

16. In the European Communities' view, an example of a violation of the *Anti-Dumping Agreement* that can only be remedied by revoking the measure is when the proceedings are initiated in violation of the Agreement, for instance, because the Article 5.2 conditions are not respected. In that case, there are no errors in the investigation, or even in the measure, that can be resolved. The error that needs to be rectified is the initiation itself. Accepting a new complaint would lead to the institution of new anti-dumping proceedings without rectifying the error committed when the original investigation was initiated.

17. In any case, the European Communities does not agree with the position of the United States that a panel suggestion would be contrary to a principle that the United States considers to be implicit in Article 21.3 of the Dispute Settlement Understanding. That principle, according to the United States, is that it would be up to the affected Member, in the first instance, to choose the means of implementation. This is incorrect, since Article 19.1 of the DSU expressly permits panels to make suggestions.

18. However, the European Communities agrees with the United States that a suggestion should not specify that the measure must be ended "immediately". The period of time needed to revoke is not a form or means of implementation, but is regulated by Article 21.3 of the DSU.

Mr Chairman, distinguished Members of the Panel, this completes the oral submission of the European Communities. We remain at your disposal for any questions you may wish to raise.

Thank you for your attention.

ANNEX B-5

THIRD PARTY ORAL STATMENT BY THE UNITED STATES

(13 September 2006)

Introduction

1. Thank you, Mr. Chairman, and members of the Panel. It is a pleasure to appear before you today to present the views of the United States in this proceeding. The purpose of this oral statement is to highlight certain aspects of the US third-party submission and to comment on points raised by other third parties in their submissions.

Information in application

2. Guatemala questions the sufficiency of the application and the Mexican Investigating Authority's decision to initiate based upon the information in the application. Article 5.2 of the Antidumping Agreement sets forth the evidence an application "shall include," which includes "information on prices."

3. Guatemala maintains that an application supported by one invoice for galvanized tubing and a quotation for light-walled tubing is insufficient. Whether this information was sufficient to establish the home-market price component of evidence of dumping for purposes of initiation is a case- and fact-specific inquiry. We note, however, that Article 5.2 provides that an application contain such information "as is reasonably available" to the applicant. The phrase "reasonably available" is not defined in the Agreement. Moreover, pricing, cost of production, and profitability information pertaining to foreign producers or domestic competitors is likely difficult to obtain and, thus, may not normally be "reasonably available" to an applicant.

4. Article 5.2(iii) also does not prescribe the precise form of the information or evidence that must be submitted. Nor does Article 5.2 specify the quantum of evidence that must be submitted.[1] Rather, the plain language of Article 5.2(iii) simply requires the application to contain "information on prices" at which the product in question is sold when destined for consumption in the domestic market of the country of origin or export. We therefore disagree with Guatemala's argument that one invoice and quotation are *necessarily* insufficient to initiate an investigation, or that an application must contain pricing information for a particular exporter.

Product under consideration

5. In addition to questioning the sufficiency of the application and the decision to initiate an investigation, Guatemala contests the various changes to the definition of the "product under consideration." Mexico does not dispute that the definition was changed, but maintains that, as a factual matter, the changes were insignificant.

[1] *United States – Final Dumping Determination on Softwood Lumber from Canada*, Panel Report, WT/DS264/R, adopted 31 Aug. 2004, para. 7.101 (applicant need not submit "all" information reasonably available).

6. The United States generally agrees with Japan's observation in its third-party submission that the Antidumping Agreement permits changes to the definition of the product under consideration, but the investigating authority must be cognizant of the broad implications of such changes.[2] For instance, the definition of the product under consideration implicates the requisite threshold for industry support set forth in Article 5.4. This threshold could be rendered meaningless if an applicant could unilaterally and significantly alter the definition of the product. That is, one could imagine an applicant first narrowly defining the product under consideration so that, at initiation, the applicant would account for a sufficiently large percentage of the domestic industry to justify initiation. Subsequently, the applicant could alter that product definition such that, if industry support were re-examined subsequent to initiation, the applicant would no longer account for a significant percentage of the domestic industry.

7. The European Communities also recognizes that under certain situations, the definition of the product under consideration may change in minor and necessary ways.[3] A change to the definition of the product under consideration announced in a final determination is not necessarily inconsistent with Article 6.9 of the Anti-Dumping Agreement. Article 6.9 requires that interested parties be informed of the essential facts *under consideration* and not necessarily the conclusion an authority may ultimately draw from those facts. That said, in order to provide parties a full opportunity "for the defence of their interests" under Article 6.2, they must be made aware of proposals for changes to the product under consideration and be afforded an opportunity to advocate their position on such proposals.

8. As noted in Japan's third-party submission, Guatemala and Mexico agree that the definition of the product under consideration changed, but disagree as to the significance of the changes.[4] In the view of the United States, the appropriate time for definitively identifying the product under consideration will depend upon the circumstances of the case. The parties should, however, be afforded a reasonable opportunity to address proposed significant changes.[5]

Conclusion

9. This concludes our presentation to the Panel. Thank you for your attention.

[2] *Third Party Submission of Japan* at para. 5.

[3] *Third Party Submission of the European Community* at para. 10.

[4] *Third Party Submission of Japan* at para. 7.

[5] *See, e.g.*, Anti-Dumping Agreement, Articles 6.1, 6.2, and 6.4.

ANNEX B-6

THIRD PARTY ORAL STATEMENT OF JAPAN

(12 September 2006)

I. INTRODUCTION

1. Mr Chairman and distinguished Members of the Panel, Japan appreciates this opportunity to present its view as a third party. Today, Japan will not repeat its arguments set forth in its written submission. Instead, it would like to focus on certain additional issues relating to (1) Guatemala's claim on Article 6.9 of the AD Agreement with regard to the disclosure of the definition of the product under consideration (PUC) (paragraph 166 of the Guatemala's First Written Submission), and (2) the Guatemala's request for specific suggestions under Article 19.1 of the DSU (paragraph 353 of the Guatemala's First Written Submission).

II. ARGUMENTS

1. The changes in the definition of the PUC in the final product and their consistency with Article 6.9 of the Agreement

2. The first issue relates to the lack of "disclosure" of "essential facts" under Article 6.9, as raised in the EC's written submission.

3. Let me read out the text of Article 6.9 one more time:

> The authorities shall, before a final determination is made, *inform* all interested parties of *the essential facts* under consideration which *form the basis for the decision* whether to apply definitive measures. Such *disclosure* should take place in sufficient time for the parties to defend their interests. (Emphasis added.)

4. As Japan explained in its third party submission (at paragraphs 5 and 7), the definition of the PUC could have a substantial impact on the scope and legitimacy of the anti-dumping investigation and resulting measures. Accordingly, in Japan's view, facts that form the basis for determining the definition of the PUC would constitute "essential facts [] which form the basis for the [final] decision." In the present case, however, Mexican authorities do not seem to have identified or specified to all interested parties what essential facts are with regard to the final definition of the PUC, as the EC pointed out in paragraph 24 of its written submission.

5. Article 6.9 does not prescribe, in every detail, the specific manner in which the authorities are to comply with its requirement of disclosing "the essential facts". However, for the purpose of Article 6.9, the authorities cannot inform or disclose "essential facts" "in sufficient time" without explicitly notifying what consists of such "essential facts" so as to let the interested parties be aware of such facts out of a massive amounts of "all information" (Article 6.4) and enable them to "defend their interests." In this case, the interested parties cannot have opportunities to adequately defend their interests concerning such facts, if the authorities merely imply the "essential facts" through simply asking interested parties comments on the definitional factors of the product during the course of the investigation, without informing them of the facts that form the basis for the change of the definition of the PUC, that is, the inclusion of structural pipes.

6. Thus, Japan asks the Panel to decide on the Guatemala's claims that Mexico failed to comply with the obligation under the Article 6.9 by not disclosing the essential facts concerning the definition of the PUC until the issuance of the final determination.

2. Guatemalan request to the Panel for suggesting a revocation of a measure to implement recommendations

7. In its third party submission, the United States argues that the Panel should reject Guatemala's request to suggest the way to implement the recommendations pursuant to Article 19.1 of the DSU. Japan disagrees. The panel has the authority to make suggestions under Article 19.1 where it deems appropriate, and in this case the Panel may well consider it appropriate to suggest a revocation of the measure as a way to implement the recommendations.

8. *First*, the second sentence of Article 19.1 serves important objectives of the dispute settlement mechanism, *i.e.*, to secure prompt and positive settlement of disputes. These objectives are articulated in the various provisions of the DSU; for example, Article 21.1 says "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefits of all Members." Articles 3.3, 3.4 and 3.7 also set forth these objectives in a slightly different manner. To facilitate these objectives, panels are authorized under Article 19.1 to decide whether it is appropriate to suggest ways to implement and, if so, the specific ways to be suggested to the Member concerned.

9. In Japan's view, this provision contemplates that, as a trier of facts and issues of law raised before them, panels are well positioned and equipped to suggest specific ways to implement their recommendations and rulings. Moreover, nothing in the text of the DSU precludes panels from exercising its discretion under Article 19.1 in cases where there are only one way to implement the recommendations. Nor must panels restrain themselves from so doing simply because of the fact that the previous panels in other cases didn't make suggestions under Article 19.1. Japan does not disagree with the United States' observation that "[a] Member generally has many options available to it to bring a measure into conformity with its WTO obligations." However, Japan would also point out that the choice made by the Member concerned does not necessarily lead to the prompt and positive solution to the dispute.

10. *Secondly*, nothing in the DSU prevents the panel from suggesting a revocation of the measure as a way to implement under Article 19.1, while Japan also recognizes that the Member concerned will have a "reasonable period of time" "[i]f it is impracticable to comply *immediately* with the recommendations" (Article 21.3 of the DSU, emphasis added).

11. The findings of the panels in the similar cases are instructive. The panel in *Guatemala – Cement I* found inconsistency with Article 5.3 of the AD Agreement and suggested the responding Member to revoke the measure on the ground that "*the entire investigation rested on an insufficient basis, and therefore should never have been conducted*" and that such violation cannot be cured afterward (WT/DS60/R, paragraph 8.6, emphasis added). The panel in *Guatemala – Cement II* also suggested a revocation "in the light of the nature and extent of the violations in this case," including the violation of the initiation requirements (WT/DS156/R, paragraph 9.6). Thus, it is Japan's view that a revocation of the measure in dispute can be at least one of positive and effective ways to implement the recommendations and rulings depending, of course, on the nature and extent of the violations and the specific circumstances of this case.

12. In the present case, Guatemala asks the Panel to suggest that Mexico revoke the measure at issue. The alleged violations relate to the initiation requirements of investigations and the nature and extent of such violations can be such that "*the entire investigation … should never have been conducted*" in the first place.

13. For all these reasons, Japan respectfully requests the Panel to consider, in exercising its discretion under Article 19.1, to suggest a revocation of measures in question as a way in which Mexico implement the recommendations in order to secure prompt and positive settlement of this dispute.

III. CONCLUSION

14. To conclude, Japan would like the Panel to carefully examine these issues mentioned in this statement, in addition to the arguments advanced in its written submission. Thank you, again, for your attention.

ANNEX C

EXECUTIVE SUMMARIES OF THE REBUTTAL SUBMISSIONS OF THE PARTIES

ANNEX C-1

REBUTTAL SUBMISSION OF GUATEMALA

(13 October 2006)

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I. CONSIDERATIONS CONCERNING THE STANDARD OF REVIEW AND THE BURDEN OF PROOF UNDER THE DEFENCE RAISED BY MEXICO

A. CONSIDERATIONS RELATING TO THE STANDARD OF REVIEW IN THE LIGHT OF MEXICO'S ARGUMENTS

1. Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article 17.6 of the Anti-Dumping Agreement govern the examination by this Panel. In the light of the jurisprudence, this examination of the conclusions and determinations of Economía must be "critical and searching", and be based on "the information contained in the record and the explanations given by [Economía] in *its published report*[s]" as opposed to possible post hoc explanations which do not flow from those determinations or from the record.

2. Mexico has attempted to justify the way in which Economía established various essential facts and its evaluation thereof based solely on post hoc justifications that are not contained in its resolutions. These post hoc justifications should be disregarded by the Panel.

3. Guatemala also considers that the criterion of lack of opposition by the interested parties, as applied by Mexico, likewise cannot constitute the basis for establishment of the facts, just as it cannot modify as such the nature of a fact whose characteristics exist objectively.

4. Furthermore, Mexico contends that, as long as a matter is not governed by the Anti-Dumping Agreement, the treatment thereof falls under the discretion of the investigating authority. It deploys these arguments with particular reference to the definition of the product under investigation as well as the definition of the investigation period.

5. Guatemala considers that in both cases, Mexico's interpretations seek to ignore the provisions of Article 17.6 (ii) of the Anti-Dumping Agreement. They are inadmissible in the light of this standard of review since, although the Agreement contains no provision expressly regulating various topics, any discretion enjoyed by an investigating authority is limited by Article 17.6 (i) of the Anti-Dumping Agreement.

6. Another way in which Mexico seeks to evade the legal standard of review is by invoking its domestic right to release itself from international obligations. This is the case with the claim relating to the confidentiality of certain information provided by the Applicant, concerning which Economía invokes the possibility of access to the confidential record on the part of the Exporter. However, Guatemala considers that the granting of access to the confidential record under Mexican law is irrelevant to an interpretation of Mexico's obligations under Article 6.5 of the Anti-Dumping Agreement and to compliance with those obligations in the light of the provisions of customary law.

B. BURDEN OF PROOF

7. If a party provides sufficient evidence to justify the presumption that its claim is legitimate, the burden of proof shifts to the other party, which must provide sufficient evidence to rebut the presumption. Mexico seeks to invoke this rule as a substitute for its obligations under Article 17.6 of the Anti-Dumping Agreement, disregarding the fact that the evidence on which Guatemala's claims are based is constituted by the determinations and factual elements contained in the investigation record. Nevertheless, Guatemala considers that it has succeeded in establishing a prima facie case concerning the legitimacy of the claims made, and Mexico has not succeeded in refuting those claims.

II. REBUTTAL

A. CLAIMS RELATING TO THE INITIATION OF THE INVESTIGATION

1. Mexico's interpretation of Articles 5.2, 5.3 and 5.8 of the Agreement is erroneous

8. Mexico considers that the purpose of initiating an investigation is to determine the existence of alleged dumping, and that consequently the quality and quantity of evidence of dumping may serve merely as an indication of the existence of dumping. Guatemala takes the view that the "alleged" existence of dumping carries no implication as to the nature of the evidence to be submitted in support of the claim, evidence which must be *sufficient*.

9. Mexico points out that the evidentiary standard laid down by Article 5.2 of the Anti-Dumping Agreement concerns evidence "reasonably available to the applicant". Guatemala considers that this provision describes the required content of the application for initiation of the investigation and serves as a parameter for the investigating authority to conduct an evaluation and determination under Article 5.3 of the Anti-Dumping Agreement.

10. Mexico, for its part, disregards the fact that the standard for assessing evidence is one of "adequacy", a requirement that must be analysed on a case-by-case basis and which, in the present case, did not justify characterizing the evidence submitted by the Applicant as adequate.

11. Moreover, Mexico states that, in evaluating the consistency and coherence of the arguments and evidence presented, the investigating authority must necessarily consider whether the parties are acting in good faith, and this must be based, overall, on standards of certainty. On this view, as the investigating authority must rely on the good faith of the applicant, the term "shall examine" is rendered meaningless in this provision and is transformed into an appraisal of the good intentions of the parties. However, this is not what is required by Article 5.3 of the Anti-Dumping Agreement. What is required by that provision is an objective *examination* of the evidence presented with the application.

12. Mexico also states that, if the applicants do not respond to all the questions or provide inadequate responses, at least in the stages subsequent to initiation, the investigating authority is entitled to obtain supplementary information in order to "complete the investigation". Mexico thus challenges the applicability of Article 5.3, which requires an examination of the adequacy of the evidence, and of the consequences whereby, under Article 5.8, any application that does not contain sufficient evidence is to be rejected.

2. Economía's evidence and procedures, as reflected in its determinations, invalidate the factual basis of Mexico's arguments

13. It is clear that the only two documents relied on by Economía to justify the normal value are neither adequate, nor accurate, nor relevant, in view of the fact that: (i) they were issued by two trading companies which are neither producers nor exporters, and which are not connected with the only exporter identified and investigated; (ii) it was not ascertained whether the products concerned were actually produced in Guatemala or whether they were imported; (iii) they relate to a transaction conducted in one day and a potential transaction (which was not shown to have been carried out, and if so under what conditions) in order to compare transactions over the entire period investigated; (iv) they contain information on an insignificant number of products which are not representative of the product as a whole (three and six dimensions of a product from a range which ostensibly covers at least 132 dimensions and other characteristics); the information from this limited sample relates to pipes and tubes that *were not produced* to Standard ASTM A53, the manufacturing standard originally used to define the product under investigation, and not all adjustments were made to normal value in order to guarantee a fair comparison with the export price. This evidence could not therefore

be considered to be accurate, relevant and adequate under the terms of Articles 5.2 and 5.3 of the Agreement.

14. Moreover, Mexico confines itself to explaining that to require an applicant enterprise to provide accurate information on the volume of the allegedly dumped imports would be to impose a standard that is practically unattainable by the applicant, and this, in Guatemala's view, is an explicit acknowledgement that it possessed no "accurate" information in this regard.

B. CLAIMS RELATING TO THE PRODUCT UNDER CONSIDERATION/LIKE PRODUCT

15. Mexico relies on the concept of "likeness" in order to justify its change in the definition of the product. Guatemala wishes to reiterate that it is not alleging that Economía's comparison of the product under consideration with the like product was inadequate. Rather, Guatemala questions the way in which Economía made various changes in the definition of the product under consideration so as to include, at a late stage of the investigation, additional products which were initially excluded, without positive evidence regarding those products and without having made any effort to satisfy itself that they were properly investigated.

16. It is not disputed that the product under investigation was originally defined as standard pipes and tubes produced under Standard ASTM A53, of one half to four inches in diameter. Nor does Mexico dispute the fact that both structural pipes and tubes and standard pipes and tubes of more than four and up to six inches in diameter were excluded at the time of initiation of investigation. Finally, it is not disputed that the initial definition was altered on two occasions.

17. Mexico considers that the fact of including in the Preliminary Resolution pipes and tubes of more than four and up to six inches in diameter does not substantially alter the description in the Initiating Resolution. However, Mexico has not demonstrated, nor is it stated in any part of the administrative record, that the investigating authority requested additional information on prices, import volumes, injury and causal link, among other aspects, in respect of the range of products included at the preliminary stage. Similarly, neither the administrative record nor Economía's determinations set out the reasons used to justify increasing the range of diameters of the pipes and tubes under investigation, particularly as regards why the *only* exporter investigated produced only pipes and tubes in the range of one half to two inches in diameter.

18. Mexico argues that the second change in its definition of the product under investigation was due to the fact that structural pipes and tubes and standard pipes and tubes are interchangeable products. Mexico alleges that standard pipes and tubes can have "structural" uses and infers from this reasoning that, conversely, structural pipes and tubes could be used for conduction. On the basis of this erroneous idea, Mexico considers that the investigating authority was entitled to include structural pipes and tubes within the scope of the definitive anti-dumping measure, and it further describes them, in relation to standard pipes and tubes, as "one and the same" product.

19. On this point in particular, it is important to make it clear that the facts in the record establish indisputably that standard pipes and tubes and structural pipes and tubes are not one and the same product, as is erroneously asserted by Mexico in its replies to the questions asked by the Panel. Furthermore, it can easily be seen from the same evidence contained in the record that both Economía and the Applicant itself treated structural pipes and tubes and standard pipes and tubes as two distinguishably separate products and not as part of the product under investigation. In fact, Mexico recognized that the product under investigation was standard pipes and tubes, and once the investigating authority realized that structural pipes and tubes had the characteristics referred to, it deemed it convenient to include them in its definition of the product under investigation. This inclusion, as is shown by the relevant evidence, took place at the end of the investigation.

20. It is clear that the authority did not disclose this essential fact. Moreover, Mexico now argues that the disclosure regarding the inclusion of structural pipes and tubes in the definitive measure is not an essential fact within the meaning of Article 6.9 of the Anti-Dumping Agreement. Guatemala considers it illogical that the disclosure of a fact as important as the pipes and tubes to which anti-dumping duties are to be applied is not seen as "essential" within the meaning of Article 6.9. Consequently, Guatemala has no doubt that Mexico acted inconsistently with Articles 1, 2.1, 2.4, 2.6, 3.1, 3.2, 3.4, 3.5, 4.1, 5.4, 6.4, 6.9 and 18.1 of the Anti-Dumping Agreement.

C. CLAIMS RELATING TO DUMPING

21. Guatemala notes that, in general terms, Mexico does not dispute Guatemala's interpretation of the legal rules applicable to the use of the facts available. In particular, Guatemala notes that Mexico raises no defence against Guatemala's argument that, for the purposes of the final dumping determination, Economía failed to evaluate the invoice and the price quotation with special circumspection, as required by paragraph 7 of Annex II to the Agreement. Such an evaluation was absolutely necessary, since neither the invoice nor the quotation emanated from the only exporter under investigation, nor did they relate to the investigated product as a whole or to the entire period proposed for the review of dumping.

22. Far from rebutting one by one the arguments put forward by Guatemala regarding Economía's use of the facts available, Mexico simply affirms that a mere reading of the Guatemala exporter's replies to the official questionnaire, together with the results of the verification visit, shows that the exporter did not provide all the information required, and that the information it did provide in the course of the investigation was not complete, accurate and precise. As has been explained by Guatemala, each of the reasons set out in the points of the Final Resolution cited by Mexico as alleged justification for the use of the facts available does not coincide with the content of the record of the verification visit. Consequently, Guatemala considers that Economía's action was not justified under Article 6.8 and Annex II of the Anti-Dumping Agreement.

23. Mexico also fails to put forward arguments rebutting Guatemala's claims under Articles 6.2, 6.4, 6.6, 6.7, 6.8 and 6.9 of the Anti-Dumping Agreement, as elaborated in its first written submission. Moreover, Mexico only acknowledges that the investigating authority presumed (*presumió*) that, given the existence of various discrepancies, the exporter would consider *(consideraría)* that its information could (*podía*) be disregarded. In this connection, Guatemala reiterates that Mexico, by using the facts available, acted in a manner inconsistent with Articles 6.2, 6.4, 6.7, 6.8, 6.9, 6.13 and Annex II of the Anti-Dumping Agreement.

D. CLAIMS RELATING TO INJURY

1. Mexico failed to refute Guatemala's claim that the period chosen for an analysis of the alleged injury to the domestic industry was outdated

24. Mexico and Guatemala agree that the period of investigation should end on a date as close as practicable to the initiation of the investigation, in accordance with the relevant provisions of Article 3 of the Anti-Dumping Agreement.

25. However, Mexico justifies post hoc the fact that the investigation period was not challenged by the interested parties. Mexico also puts forward the argument that, in order to determine whether the evidence is objective, verifiable and credible, it is necessary to analyse the actual data on which the investigating authority relied in order to issue its injury determination, and it is not possible to conclude that a piece of evidence does not meet those requirements simply because no additional information was available. Guatemala reiterates its position that the degree of adequacy and relevance of the evidence of injury is determined not only by the nature of the data provided but also by their remoteness.

26. Guatemala observes that in this case the same conditions obtain as in *Mexico – Anti-Dumping Measures on Rice*, despite the fact that Mexico seeks unjustifiably to depict them in a different light. In particular, in accordance with the jurisprudence established in that case, Economía: (a) ostensibly accepted the investigation period proposed by the Applicant, without taking into account the discrepancy between that period and the date of initiation of the investigation and without examining whether the outdated information could still serve as a basis for an objective examination of the current state of the domestic industry; (b) failed to determine whether practical problems justified the use of that period of investigation or whether it would not be possible to update the information beyond that period; (c) in the course of the investigation, did not seek to update the information obtained from the interested parties; (d) failed to explain, in its Final Resolution, the reasons for not collecting more recent information. Thus, Mexico failed to demonstrate that the choice of the investigation period is consistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement.

2. Mexico failed to refute Guatemala's claim that the use of six-monthly information does not reflect the injury to the domestic industry as a whole

27. Mexico considers that the "positive evidence" requirement involves evaluating evidence of injury as such. If the evidence is positive in that context, there is no reason to dismiss it "simply because no additional information was available".

28. Guatemala considers that the temporal integrity of the evidence, that is to say the totality of the data corresponding to the years analysed, is a key element in determining whether evidence is "positive".

29. Mexico argues that the Anti-Dumping Agreement contains no obligation as to how the injury analysis is to be conducted in relation to the periods used, and that the use of six-month periods in each year does not therefore involve any violation of the Agreement. It also points out that a six-month year-on-year comparison makes it possible to analyse periods that are "structurally" the same in each year. Mexico goes on to explain that these periods were compared without considering whether or not the situation was better or worse during each six-month period than during the six months from January to June. Guatemala sees this as clear evidence of a lack of objectivity. As is affirmed by Guatemala and the United States, an objective evaluation cannot be based on an incomplete series of data unless the investigating authority provides a justified explanation in this regard. Exporters should not have the burden of investigating what happened during the months not proposed by the Applicant, for the purpose of "persuading" the investigating authority that it should also request information on the periods not proposed by the Applicant.

30. For the above reasons, Guatemala observes that there is no evidence in the record to suggest that this selective use of second half-year periods could be justified. The post hoc explanation now offered by Mexico, to the effect that "structural symmetry" was taken into account, is not reflected in any of Mexico's determinations. Moreover, Guatemala considers that there are not even any objective reasons for having opted for the use of the six-month periods July to December rather than January to June of each year. On the contrary, as was indicated in the Initiating Resolution, Economía was aware of the fact that the consumption of pipes and tubes in the domestic market remained constant throughout the year, apart from fluctuations in certain months owing to taxes, when consumption increases (as in December) or decreases (as in April). In view of the foregoing, Guatemala is of the opinion that Mexico failed to determine a period in keeping with the need to conduct an objective evaluation of positive evidence to substantiate injury to the domestic industry.

3. Mexico has failed to refute Guatemala's claim that the use of information on segments of the domestic industry does not reflect injury to the domestic industry as a whole

31. Guatemala does not disagree with Mexico about the possibility of evaluating the domestic industry by examining all or a major proportion of producers. What Guatemala contends is that, once

the domestic industry is defined by including all or a major proportion of producers, the investigating authority must adhere to that definition.

32. However, Mexico takes the view that, if a producer is authorized to submit an application and the investigating authority nevertheless determines that the domestic industry comprises other producers in addition to the Applicant, information on that producer can legitimately be used for the analysis of certain factors of injury, while information on total domestic production is used for others.

33. The standard under Article 5.4 is different from the one under Article 4.1 of the Anti-Dumping Agreement. In fact, Mexico disregards the thesis reflected in jurisprudential interpretation to the effect that a "sectoral" injury analysis may be relevant insofar as the investigating authorities provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry. In the present case, Mexico has not provided a satisfactory explanation as to why it was not necessary to examine directly or specifically the other parts of the domestic industry. Consequently, Guatemala is of the opinion that Economía acted in a manner inconsistent with Articles 3.1, 3.2, 3.4, 3.5 and 4.1 of the Anti-Dumping Agreement.

4. Mexico has failed to refute Guatemala's claim that no objective examination was conducted on the basis of positive evidence relating to import volumes

34. Mexico acknowledges that, in applying the methodology of minimum and maximum prices to imports from countries not investigated in order to determine the corresponding volumes, it is reasonable to assume that a product not under investigation could have been included or that pipes and tubes under investigation could have been excluded. Mexico's statement confirms what was indicated by Guatemala regarding the unfounded hypothesis on which Economía based the determination of volumes for countries not investigated. In its Final Resolution, Economía did not even provide justification of the grounds for using the range of prices for imports from non-investigated countries.

35. Mexico further affirms that Economía does not always receive a favourable response from institutions requested to provide information (including Customs and the Ministry of Finance), nor is it empowered to require customs brokers or importers to provide information, and that in any case Economía cannot issue orders that exceed its sphere of competence. Contrary to what is asserted by Mexico, Article 55 of Mexico's Foreign Trade Act reveals the extensive powers enjoyed by Economía under the law for the purpose of requesting information from third parties. Moreover, nowhere in the record is there any indication that Economía made even the slightest effort at least to request such information.

E. CLAIMS RELATING TO CAUSATION

36. Mexico considers that, as exports account for 7 per cent or 5 per cent of domestic production, a decline in exports is not a determining factor for the injury analysis. What Mexico ignores and what is most relevant in this connection is that the decline in exports was equal to or greater than the decline in domestic sales. The decline in exports was so great that it was bound to cause injury to the domestic industry, and its effects should have been distinguished from the effects caused by allegedly dumped imports. Economía failed to make this distinction. Even assuming that exports were not so determinative of injury, as Mexico states, Economía should nevertheless have made the attribution of injury to that less determinative factor. However, it failed to do so.

37. Regarding the drop in profits, Mexico also fails to point out that it was due mainly to lower sales figures and not to increased sales costs. Economía should therefore have made a distinction and should not have attributed injury caused by the Applicant's increased costs and expenses. Guatemala also notes that, although Economía attributes the decrease in profits primarily to the decrease in sales, it makes no distinction between the fall in sales attributable to the fall in exports, which represented

2 per cent of domestic production, and the fall in domestic sales, which was only 2 per cent, a seemingly smaller proportion than the fall in exports. On this additional aspect, Economía also failed to make the appropriate non-attribution finding.

F. CLAIMS RELATING TO PROCEDURAL ASPECTS

1. Mexico has not refuted Guatemala's claim that Economía failed to inform the exporter of the essential facts and of the rejection of the information it had supplied

38. To sum up, what Mexico claims is that, insofar as a fact is reflected in the record (which is the case with all the facts), the interested parties are informed of that fact and may "foresee" the treatment to be given to it in the final determination. In Mexico's opinion, this satisfies the obligation to "inform" under Article 6.9 of the Anti-Dumping Agreement. As not all the facts in the record are "essential", what Mexico proposes is that the parties "guess" which of them will be essential facts, thus rendering pointless the obligation to "inform". The failure to identify and disclose to the interested parties the facts deemed essential within the universe of essential and non-essential facts contained in the record constitutes a violation of the obligation to inform under Article 6.9 of the Agreement.

39. With regard to disclosure of the essential fact concerning the inclusion of structural pipes and tubes at the end of the investigation, Mexico first affirmed in its first written submission that it was illogical to think that, if there were requests for information on the product under investigation, that information should not be considered as an essential fact. Mexico went on to state that disclosure regarding the inclusion of structural pipes and tubes in the definitive measure was not an essential fact within the meaning of Article 6.9 of the Anti-Dumping Agreement.

40. As regards the disclosure of the essential fact concerning the use of the facts available, Mexico acknowledged that the investigating authority presumed (*presumió*) that, given the existence of various discrepancies in the information supplied, the exporter would consider (*consideraría*) that the information could (*podía)* be dismissed.

41. In both cases, such explanations are not only unjustified but are also inconsistent with Article 6.9 and paragraph 6 of Annex II of the Anti-Dumping Agreement.

2. Mexico failed to refute Guatemala's claim that the disclosure of the findings and conclusions in the preliminary resolution is inadequate

42. Article 12.2 of the Anti-Dumping Agreement is designed to prevent any attempt to justify actions or determinations of the investigating authority post hoc. Mexico, however, in connection with the definition of the product under investigation, instead of identifying those parts of its preliminary and final resolutions which allegedly contain its factual findings and conclusions, merely asserts that its resolutions contain "a description of the product which is sufficient for customs purposes", which is not the object of Guatemala's claim.

3. Mexico failed to refute Guatemala's claim that confidential treatment was afforded without a good cause analysis and without requiring the presentation of adequate non-confidential summaries

43. Guatemala regards as totally irrelevant the provisions of Mexican law concerning access to confidential information. Guatemala does not consider that domestic law mechanisms release Mexico from its obligation under Article 6.5.1 to grant confidential treatment to information only if good cause is shown and sufficiently detailed non-confidential summaries are provided. In accordance with international custom under the law of treaties, "a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

44. In Guatemala's opinion, it was to be hoped that Mexico would demonstrate that it had made a good cause evaluation before affording confidential treatment to the information provided by the Applicant, and that it had evaluated the "sufficient detail" justifying acceptance of the summaries furnished (where they had been furnished) or, alternatively, that it had suggested that certain information be made public or had requested authorization for its disclosure in generalized or summary form. However, no justification along these lines is to be found in Mexico's submissions, and instead Mexico confines itself to explaining that the legal representatives of the interested parties had (or could have had) access to the confidential record and that, in its opinion, this guaranteed the defence rights of the interested parties.

45. Guatemala recognizes that, under Mexican law, the legal representatives of interested parties are allowed access to the confidential record under certain restricted conditions. While it is true, however, that such access may *contribute* to the right of defence of interested parties, it could in no sense be considered as a *substitute* for the obligations laid down in Article 6.5 of the Anti-Dumping Agreement. Accordingly, it is clear to Guatemala that Economiá acted in a manner inconsistent with Article 6.5 of the Anti-Dumping Agreement.

ANNEX C-2

EXECUTIVE SUMMARY OF THE REBUTTAL SUBMISSION OF MEXICO

(2 November 2006)

CONTENTS

LIST OF ABBREVIATIONS IN ALPHABETICAL ORDER

Abbreviation	Full name/title
AB	Appellate Body
ADA	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EC	European Communities
IA	Investigating authority
LCE	*Ley de Comercio Exterior de México* (Mexican Foreign Trade Law)
SE	*Secretaría de Economía* (Ministry of the Economy)
SICMEX	*Sistema de Information Comercial de México* (Mexican Trade Information System)
TIGI	*Tarifa de la Ley del Impuesto General de Importación de México* (Tariff established under Mexico's General Import Duty Law)
TIGIE	*Tarifa de la Ley de los Impuestos Generales de Importación y Exportación de México* (Tariff established under Mexico's General Import and Export Duty Law)
Tubac	Tubac, S.A. (Guatemalan exporter)
US	United States of America
WTO	World Trade Organization

I. MEXICO INITIATED THE INVESTIGATION WITH SUFFICIENT EVIDENCE OF DUMPING AND INJURY, CONSISTENT WITH ARTICLE 5.2, 5.3 AND 5.8 OF THE ANTI-DUMPING AGREEMENT

1. Mexico notes that Guatemala claims the following in its responses: (a) The invoice and the price quotation supplied by the applicant do not constitute sufficient evidence (Article 5.2 of the ADA); (b) the analysis of the accuracy and adequacy of the evidence must be based exclusively on evidence provided in the application; (c) if the invoice and the price quotation were not sufficient and the application did not contain data on import volumes, the application should have been rejected.

2. Guatemala also argues that its claims under Article 5.8 of the ADA derive from those made under Article 5.2 and 5.3 of the ADA, considered both individually and as a whole. In Guatemala's view, Article 5.2 lays down obligations relating to the content of an application while Article 5.3 refers to the examination of evidence. It therefore submits that if an the application fails to meet the requirements of Article 5.2 and the IA initiates an investigation, the latter will constitute action contrary to Article 5.2 and 5.3 of the ADA and consequently Article 5.8 as well.

3. Mexico therefore holds that Guatemala's claim regarding these Articles taken as a whole would be groundless if it were demonstrated that not a single of the Articles had been violated. Thus, we respectfully request that, should Mexico demonstrate the foregoing, the Panel deem this part of Guatemala's claim to be without foundation, on the basis of an analysis of Mexico's arguments.

4. Mexico considers that a breach of Article 5.2 of the ADA cannot be imputed to an IA. Article 5.2 is an exception within the ADA, since it establishes obligations for the applicant for an investigation – not for an IA. Mexico therefore fails to understand how Guatemala can claim that it has violated Article 5.2 of the ADA. The interpretation and application of a legal system requires that a distinction be made as to whom the provision in question applies. In this case, the burden does not in any way lie with the IA, so it cannot be argued that a non-existent obligation has been breached.

5. Furthermore, it is important to take account of the fact that the applicant's obligation, as set out in Article 5.2 of the ADA, is to provide such information "as is reasonably available". Guatemala has not in any way demonstrated that the information provided in the application was not that which was reasonably available to the applicant. We fail to see how such a claim can be upheld, without, moreover, the slightest evidence.

6. We disagree with Guatemala's interpretation of Article 5.3 of the ADA. In our view, an IA may indeed gather additional information to that provided in the application in order to establish the factual basis on which to make its determinations. In fact, the only way in which an IA can verify the accuracy, adequacy and sufficiency of the information provided in the application is precisely by gathering additional data.

7. The applicant is not under any obligation to provide more information than that which is reasonably available. In fact, it is not obligated to submit all the information that is reasonably available (see report of the Panel in *US – Softwood Lumber*). Even though there are no specific guidelines as to when the application should be deemed to contain such information as is reasonably available to the applicant, we repeat that that such evidence clearly does not necessarily have to be of the quality necessary to support a preliminary or final determination. It is also clear that such evidence need not be any more than data or information, that is, indications on which the allegations of dumping, injury and causal link are based, and a review of which, conducted pursuant to Article 5.3 of the ADA, reveals that they are sufficient for the IA objectively to determine that there is a well-founded likelihood that the applicant's allegations of unfair practice, injury and causal link are correct. It is for Guatemala to prove that a violation of Article 5.2 of the ADA has been committed, which it has failed to do.

8. Article 5.1 of the ADA clearly states that the purpose of an investigation is to determine the existence, degree and effect of alleged dumping. Thus, the information contained in the application need not be any more than a mere indication of "alleged dumping". If it were necessary for applicants to produce evidence of dumping – and not alleged dumping – initiation would be practically impossible. Moreover, even if an investigation could be initiated, it would be pointless because evidence of dumping, injury, and causal link would already be there, and therefore all that would need to be done is to issue the final determination. In the case at issue, such was the line taken by Mexico's IA.

9. As regards import volumes, Mexico considers that it is indeed appropriate for the IA to seek to obtain additional data. Very frequently the only way to verify the accuracy, adequacy and sufficiency of information provided in an application is for the IA to gather further data. If the applicant presents indicia of alleged dumping and the effects thereof and is unable to obtain certain data, this does not preclude the IA from considering the information available as a factual basis for a decision.

10. In its responses, Guatemala also states that Mexico should have used Tubac's information for the determination of normal value, because it is exporters that engage in dumping, not countries; because it is exporters that provide the information for calculating their individual margins of dumping; and because it makes no sense to base an allegation of dumping on information from firms that do not manufacture the product under investigation.

11. Our view is that Mexico is under no obligation to act as Guatemala claims that it should, and the latter's contention appears to us to be unfounded. When an application concerns a single exporter, there is no reason why the evidence pertaining to normal value (i.e. the domestic price of the product at issue) should necessarily be submitted by the exporter in question, since, by definition, the normal value of goods should not necessarily be connected to a specific exporter but to the domestic market. Likewise, we do not see the relevance of referring to Article 6.10 of the ADA (individual margin of dumping for each exporter), when this is a question that arises at the pre-investigation stage. Such margins are calculated individually, but this bears no relation to the documents regarding normal value that are examined prior to the initiation of the investigation. In fact, having documents from each exporter in order to initiate an investigation would preclude the possibility of obtaining normal value data in cases where the exporters do not produce the goods at issue or sell them in their home market. Moreover, this would be tantamount to requiring the qualitative and quantitative data necessary to issue a determination, which is at variance with WTO jurisprudence.

12. Contrary to Guatemala's statement, moreover, Hylsa never provided evidence of the existence of 132 (66 standard and 66 galvanized) models of pipe and tube. It submitted data pertaining to 66 product codes only, concerning solely standard pipes and tubes. We do not know on what basis Guatemala assumes that the number of product codes for black pipes and tubes is identical, since this cannot be directly inferred. A company's product codes may vary depending on colour, packaging, and so forth. Hence it is impossible to deduce that Hylsa actually has the same number of models of black and of standard pipes and tubes. Moreover, nothing in the ADA requires product codes to be identical.

13. The above notwithstanding, and regardless of the models used by Hylsa, this bears no relation to the approach taken by the IA in relying on the documents relating to normal value that were provided in the application. An IA is only required to consider whether the product under investigation is identical or highly similar to the like product, regardless of the classifications used by each enterprise. A requirement such as that alleged by Guatemala would lead to the extreme situation of an applicant having to submit as many normal value references as the number of its product codes, which is untenable, and if this were the case, a review of the applicant's and the exporter's product codes would almost certainly reveal discrepancies between the different classification systems. Attempting to reconcile these discrepancies would be an impossible task.

14. We strongly emphasize that, according to the determination in *US – Softwood Lumber*, it is not necessary, for the purpose of initiating an investigation, to produce specific evidence for each category of the product at issue. Acceptance of Guatemala's argument would also imply a major contradiction with the adequacy of information criteria adopted in WTO jurisprudence and referred to in Mexico's first written submission. For the reasons put forward in this rebuttal, the precedent in question does not apply as Guatemala claims, and Mexico therefore requests that such an interpretation be dismissed.

15. Guatemala further holds that there are two ways of initiating an investigation (at a party's request or *ex officio*) and that if the option used is application by the domestic industry, the IA may not gather more information than that provided in the application in order to determine whether or not it is appropriate to initiate an investigation. In this connection, we repeat the arguments made earlier as to the possibility for an IA to gather additional data in order to establish the relevant factual basis.

II. ARGUMENT CONCERNING THE CLAIMS RELATING TO THE PRODUCT UNDER INVESTIGATION AND THE LIKE PRODUCT

16. Mexico regards the fact that Tubac did not object to the inclusion of pipes and tubes of up to six inches in diameter as an important point. If an interested party gave express consent to or tacitly accepted an assertion, circumstance or determination, the IA should deem such acceptance to be valid. With tacit endorsement of the definition of the product at issue, the IA had no reason to disregard pipes and tubes of up to six inches in diameter. In any case, consent from the interested parties lends greater objectivity and relevance to the definition.

17. Concerning the above, it is important to emphasize that, in paragraph 100 of its responses, Guatemala indicates that "Article 2.1 of the Agreement does not prohibit minor changes to the product at issue during the course of the investigation", which shows that Mexico's interpretation in this respect was correct.

18. Mexico respectfully requests that the Panel find that Guatemala is pursuing its attempt to sustain a number of arguments on non-existent grounds. Since the ADA provides no specific guidance on certain points, it should be taken that there may be several valid interpretations of such points. We therefore consider that the IA acted in conformity with the ADA.

19. Mexico now proposes to put forward a number of considerations on the adjustments to the definition of the product at issue during the course of the investigation.

A. FIRST ADJUSTMENT TO THE DEFINITION OF THE PRODUCT UNDER INVESTIGATION

20. With regard to the first adjustment, Guatemala contends that the preliminary resolution improperly included diameters of pipe and tube additional to those considered at the outset of the investigation and failed to show good cause or any evidentiary basis for the IA's determinations of dumping, injury, and causal link. It is important to recall that it is customary to describe a product under investigation on a case-by-case basis, considering the particular characteristics of the product from the outset of the procedure, and to regard an anti-dumping investigation as a process in which the elements supporting the determination whether or not to impose a definitive measure are assembled gradually.

21. We emphasize that the IA – not being an expert on the products at issue – is not familiar with their physical and technical characteristics and hence should in principle rely on the applicant's information. Thus, the description of the product under investigation in the initiating resolution is based primarily on information supplied by the applicant.

22. The preliminary resolution's express reference to pipes and tubes of up to six inches in diameter while the other characteristics considered at the outset of the investigation remain unchanged does not constitute an alteration inconsistent with the ADA. As explained before, the ranges indicated in the initiating resolution were commercially interchangeable with the ranges referred to in the preliminary resolution, and Mexico therefore considers that the change made by the SE is consistent with the ADA.

B. SECOND ADJUSTMENT TO THE DEFINITION OF THE PRODUCT UNDER INVESTIGATION

23. As regards the second adjustment, we repeat that in the final resolution the SE described the product under investigation on the basis of the facts available, in accordance with the ADA, since the clarificatory adjustments regarding the product description were made on the basis of the arguments and evidence in the administrative record, including the technical and commercial interchangeability of standard and structural pipes and tubes.

24. Turning to paragraph 103 of Guatemala's responses, we maintain our arguments relating to Article 2.1 and 2.4 of the ADA, as stated in all our submissions to the Panel, and given that a fair comparison was made and sufficient, appropriate elements were used for the purposes of the comparison, Guatemala's arguments relating to Article 2.1 and 2.4 of the ADA are without foundation, and we therefore request that they be dismissed.

25. According to the data and evidence presented by the parties, the main use of the pipes and tubes under investigation is the conduction of fluids, a use linked to the diameter and thickness of the pipes and tubes, and, regardless of the type of sheet used for their manufacture and the manufacturing standard, pipes and tubes in general of certain diameters and thicknesses could be used for conduction. The pipes and tubes described in the final resolution could be used for conduction; these are therefore not a new product but the same product, and it is therefore proper that both should be included in the definition of the product under investigation.

Mexico stresses that there is evidence of pipes and tubes being purchased in Mexico without hydrostatic testing that are either used for the conduction of fluids or undergo ex-post testing and are marketed as pipes and tubes for conduction (as several enterprises do).[1] The above evidence was supplied in Exhibit MEX-3. There is further evidence in the administrative record that both types of pipe and tube are manufactured on the same production line, because the manufacturing process is identical. Therefore, the adjustment to the definition was not specific to "structural" tubes and pipes but was generic to the pipes and tubes covered, in technical and commercial terms, by the definition provided in the final resolution. These are not different products, they are the one and the same from the commercial standpoint.

26. Thus, considering that for the purposes of the anti-dumping investigation the IA determined that the product was the same, there was no obligation yet again to state the essential facts given in the preliminary resolution and at the public hearing, as indicated in Mexico's responses 96, 97 and 98.

27. Mexico also emphasizes once again that Tubac had the opportunity to supply additional information in its replies to the requests for information made by the IA, which Mexico took into account in its preliminary and final resolutions and in the on-the-spot investigation, the public hearing and the pleading stage.

28. Consequently, given that structural and standard pipes and tubes are technically and commercially interchangeable; that the exporter remained silent when it had the opportunity to express its views; that the ADA provides no guidance for defining a product under investigation; and that an analysis was made of the specifications and technical characteristics of the product in order to

[1] See Mexico's response to question 89(b) of the Panel.

define it properly, we consider that the SE acted in conformity with the ADA in defining the product at issue. Mexico therefore requests that Guatemala's arguments in this respect be dismissed.

29. As regards Guatemala's Article 1 and 18.1 claims, Mexico considers that there was no violation of the provisions in question. On the other hand, assuming arguendo – and without in any way acknowledging – that action was taken at variance with these Articles, this would not necessarily imply that the measure would have to be revoked. We consider that the Panel should leave it up to the respondent Member to choose the way in which its measure will be brought into conformity with the WTO Agreements. According to Article 17.6(ii) of the ADA, the provisions of the Agreement may be interpreted in various permissible ways, so that if one of these valid interpretations is followed, the ADA will not have been violated in any way. Thus, assuming that Mexico was required to bring its measure into conformity, the Panel could assess, at the appropriate procedural stage, whether Mexico had done so according to one of the permissible interpretations of the ADA.

III. MEXICO APPLIED THE FACTS AVAILABLE IN CONFORMITY WITH THE ANTI-DUMPING AGREEMENT

30. Guatemala basically contends that Mexico's IA improperly applied the facts available, arguing that there was no reason for the SE to reject information which posed no problems in the on-the-spot verification and that, moreover, the exporter was not informed that the final determination would be based on those facts. In this connection, Article 6.8 of the ADA provides that an IA may make use of the facts available in cases where: (a) an interested party refuses access to necessary information; (b) fails to provide such information within a reasonable period; or (c) significantly impedes the investigation.

31. The Guatemalan exporter did not provide the necessary information within a reasonable period. Moreover, the data submitted by the exporter in the investigation cannot be considered reliable, complete, accurate and precise, because inconsistencies were found, in the on-the-spot investigation, with the data supplied by Tubac which made it practically impossible to use that information.

32. Regarding Guatemala's response 103, in which Guatemala's contends that "on that assumption Economía would be acting in a manner inconsistent with Article 6.7 of the Agreement", Mexico agrees that Article 6.7 requires only the factual results of the on-the-spot investigation to be made available to the parties, or the parties to be informed thereof, but does not require disclosure to the parties of the IA's findings regarding the process of that investigation. The detailed record refers only to what occurred during the on-the-spot investigation but not to the IA's evaluation and analysis of all the information verified, and does not in any way constitute the outcome of a thorough and exhaustive analysis of that information. Consequently, Guatemala is wrong in taking the record to be "thorough and complete".

33. In line with the above, if Tubac, knowing that there were discrepancies between the data it had submitted to the IA and those obtained in the on-the-spot investigation, did nothing to clarify the information in question, it was logical for the IA to proceed on the basis of the facts available, as indicated in the detailed record of the on-the-spot investigation.

34. There are consequently no grounds for contending that the SE did not act in conformity with Article 6.7 of the ADA, since there are no inconsistencies between the final resolution and the outcome of the on-the-spot investigation as Tubac was duly advised of the discrepancies in its data and was warned that it would be possible to use the facts available.

35. It is not clear how Guatemala's Article 6.7 claims can be subsidiary to its Article 6.8 claims. Article 6.7 of the ADA sets out the procedure to be followed in on-the-spot investigations and refers to Annex I to the ADA. We do not see the basis for Guatemala's contention that the IA violated that

provision, since it obtained the consent of the interested enterprises, notified the Guatemalan Government, followed the procedure in Annex I to the Agreement, made the results available to the enterprises, and provided all the factual information stemming from the on-the-spot investigation. We therefore fail to see how a breach of the ADA can be deduced therefrom.

36. As regards Guatemala's response 104, no application from Tubac to consult the confidential information was found by Mexico in the administrative record, but there is a reason for this. Indeed, the administrative practice followed by Mexico's IA in recent years – contrary to what Guatemala contends – was to incorporate such documents either in the administrative record or in parallel records, the latter being under the independent control of the director of whatever department might be in charge of the investigation. This was because it was not considered necessary for these documents to be in the administrative record. It is unfortunately extremely difficult to trace such documents because as a result of restructuring, staff moves and changes in administrative practice, many of these parallel records are impossible to locate. Mexico therefore did not present these documents as evidence. Nevertheless, the Archives department, which operates independently, has always maintained the same administrative practice and has therefore always used documents such as the one that was submitted in order to control access to the records. Hence, considering that there is a registration for access by Tubac's legal representative, the excuse of an "involuntary error" is not valid.

37. Furthermore, Guatemala has submitted no evidence that Tubac's representative was denied access to the confidential record and even asserts that access was never requested. As stated earlier, since access as such is argued to be irrelevant, it can be inferred that Guatemala withdraws its claim that the SE undermined the exporter's ability to defend itself against the allegations of dumping, and we therefore respectfully request that the Panel deem this to be so.

38. Assuming – without acknowledging – that Tubac never did request access to the confidential version of the record, it could not then claim that its right to defence was being undermined, since the result would have been that Tubac did not exercise a right to which it was entitled. In fact, Tubac always did have the right to access the confidential record, and we cannot assume that the IA denied access if the exporter never requested it.

39. Reverting to Guatemala's argument that the exporter was not notified that its information had been rejected, we believe it important to refer to Mexico's explanation regarding the content of the record of the verification visit, because that is where the exporter was advised of the use of the facts available.

40. As regards Guatemala's response 105, the problems referred to were conveyed to Tubac's representatives, as emerges from the record of the verification visit, and the exporters failed to take any remedial measures to bring their data into conformity so that the IA could make use of the information.

41. We emphasize that since Annex II to and Article 6.9 of the ADA contain separate obligations, it cannot be taken that there was a cumulative breach of both provisions. We would add that Tubac did not provide access to the necessary information, and even less did it provide information within a reasonable period, which significantly impeded the investigation.

42. Given that Article 6.8 of the ADA specifies that the IA may rely on the facts available to calculate the margins of dumping applicable to exporters that failed to provide the necessary information within a reasonable period and significantly impeded the investigation, and since Tubac fulfilled the negative criteria in the second and third provisions of the Article, the IA had to make use of the facts available, in keeping with the final report of the Panel in *Egypt – Steel Rebar*, pursuant to the ADA, and in accordance with the WTO criteria.

IV. CLAIMS RELATING TO THE DETERMINATION OF INJURY

A. CHOICE OF THE PERIOD OF INVESTIGATION

43. We strongly emphasize that the rice case was based on entirely different considerations from those of the present case, and hence Guatemala's assertion is without foundation. Since the assumptions are entirely different and Guatemala has not provided any additional arguments, it has failed to make a *prima facie* case of violation by Mexico in the terms indicated.

44. The reasons why Guatemala does not establish the same *prima facie* case as that made by the US in the long-grain white rice dispute are as follows: (a) In the rice case, the remoteness of the period of investigation was 15 months compared to 8 months in the present case, so that it cannot be said that the data relating to the investigation period are no longer relevant; (b) in the rice case, the SE did not conduct as comprehensive an analysis of the information presented with the initiating application as that carried out in the Guatemalan pipes and tubes case; (c) in the rice case there was no request for information, a matter which takes time and therefore adds to the remoteness of the investigation period; (d) in the rice case, the AB found that Mexico had acted inconsistently with the ADA in that it had accepted the period of investigation proposed by the applicants, presumably in the knowledge that the period in question was suggested because it reflected the period of highest export penetration. The circumstances of the rice case are therefore different from those of the present case, and consequently Guatemala has not made the same *prima facie* case as the US did.

45. Likewise, Guatemala once again asserts without evidence that the period of investigation was not was not as close as practicable. We request that the Panel dismiss this allegation, since Guatemala has not established a *prima facie* case of violation and a panel cannot rule in favour of a complainant that fails to substantiate its claim.

46. Solely for the purpose of making matters clearer for the Panel in regard to its question why it should consider that Tubac did not object to the choice of the period of investigation, it should be noted that, contrary to what occurred in the *Mexico – Rice* case, Tubac had no objection to the choice made and requested only that the IA clarify that the investigation period did span the period 1 July to 31 December 2000. Such a request should be regarded as consent on the part of the exporter.

47. The fact that Tubac never did object to the period of investigation should also be underscored. In our view, it would be appropriate for the Panel to take this into account, because an IA is required to evaluate all the elements arising during the course of an anti-dumping investigation and to issue its determination on that basis. Thus, if an interested party tacitly or expressly accepts a fact or gives its consent thereto, Mexico considers that the most appropriate course is to consider such acceptance or consent as a relevant element.

48. Various Articles of the ADA give preference to first-hand information, which is precisely that provided by the parties (see paragraphs 7.238 of the final report of the Panel and 288 and 289 of the AB report in *Mexico - Rice*). The fact that acceptance by an interested party is an element that cannot be challenged must therefore be taken into account. According to the general principles of law, this no reason to disregard a party's consent. Since there was tacit agreement to the choice of the investigation period, the IA did not see any reason to change it.

49. Paragraph 164 of Mexico's first written submission clearly shows that Guatemala's allegation regarding the possibility of establishing a more recent period of investigation is without foundation, and details the chronology of events as follows: (a) The application for initiation was filed on 22 May 2001 with a proposed investigation period spanning 1 July to 31 December 2000; (b) on 11 June 2001, the applicant was requested to provide the technical information necessary for determining whether or not to initiate the investigation; (c) on 9 July 2001, the applicant responded to that request; (d) on 9 July 2001, the IA began its analysis of the new information, which took a long

time; and (e) on 24 August 2001, the initiating resolution was published. Such circumstances were genuine impediments to the use of a more recent period of investigation. If we look at the sequence of events, the delay was perfectly reasonable. The investigation period was indeed as close as practicable to the initiation date. Furthermore, the time-span between that period and the initiation does not constitute a delay such as to cast doubt on the relevance of the investigation period. If the remoteness of data poses a problem of potential irrelevance of the information, it is necessary to demonstrate on a case-by-case basis that such data cannot be used. Guatemala has not provided the slightest evidence in this respect and has therefore not established a *prima facie* case of violation, nor has it substantiated its allegation that the applicant could have presented more recent information.

50. The ADA does not require coincidence in time between the investigation and the data on which it is based. The period of investigation need not necessarily immediately precede initiation. On the contrary, it is necessary, on the basis of a past period as close as practicable to the initiation, to substantiate that dumping continues to cause injury. This of necessity implies a case-by-case analysis in order to determine whether the investigation period is relevant, regarding which Guatemala never provided the slightest argument.

With all due respect, we would consider it most unfortunate for the dispute settlement system if this Panel were to find a *prima facie* case of violation in the absence of the slightest supporting evidence.

51. Concerning Guatemala's response 23, stating that the applicant could have submitted more up-to-date injury data, Guatemala fails to mention the limited nature of the information provided by Hylsa and the context in which it was submitted. It is wrong to contend that the applicant supplied the data "without a request from Economía". The information was submitted in response to a request for information from the IA concerning the applicant's allegation of threat of injury, and hence the data did not pertain to material injury, which is the subject-matter of the investigation. In other words, the authority did make a request but the data provided by the applicant did not constitute proof that it could have presented more up-to-date injury information, since the data related to threat of injury.

52. In response to that request for information, Hylsa supplied, for the period January-June 2001, only limited information in terms of the SE's request. For example, it did not provide any forecasts of the potential impact of the imports under investigation on the indicators given for the period comparable to the one under investigation (six-month period July-December 2001), and confined itself to supplying a few indicators, without the corresponding estimates.

53. However, Hylsa explained that it provided data for first six months of 2001 in order to substantiate and support its argument concerning the potential threat of injury, inasmuch as the information confirmed the damaging effects of the imports under investigation on indicators such as output and domestic sales and prices, which, according to Hylsa, had dropped by 19 per cent, 11 per cent and 15 per cent, respectively. These elements, in addition to confirming that the IA had not been "selective" in defining the period of investigation, show why this information, limited as it was without any estimates for a comparable period subsequent to the investigation period, did not constitute sufficient grounds for changing the period of injury analysis, the more so since no domestic industry data or information concerning the imports under investigation were provided.

54. Guatemala denies that the period of investigation was as close as practicable and does not specify the grounds for its allegation. Therefore, once *US – Rice* has been demonstrated to be fundamentally different from the present case, it cannot validly be argued that Guatemala has established a *prima facie* case of violation.

55. In its response 28, Guatemala states that if an investigation period is not as close as practicable, the evidence is no longer positive. We consider that in the case referred to above, the AB found that "positive" evidence is that which is relevant and important to the matter to be decided. More recent data are therefore likely to provide better indications, but remoteness of the period of

investigation is not *per se* a violation of Article 3.1 of the ADA. Guatemala merely makes an assertion without any evidence in support of its argument. It is difficult to see how this could constitute a *prima facie* case of violation of the ADA.

B. CHOICE OF HALF-YEAR PERIODS FOR THE PURPOSES OF INJURY ANALYSIS

56. We consider that the use of comparable periods for the purposes of injury analysis eliminated any potential distortions, and the SE was thus able to correctly compare the information relating to the investigation period with that pertaining to previous comparable periods. A reading of the final resolution shows that consumption of the product under investigation basically depends on performance in the construction and manufacturing sectors (which very probably depends to a large extent on growth in expenditure and investment in the domestic economy). It is therefore difficult to foresee a pre-defined pattern (for example in agricultural products, including rice) for the second half-year period of each year. In order to avoid seasonal or cyclical tendencies or fluctuations in economic indicators (such as price index or GDP), it is customary to compare identical periods which are, moreover, consistent with the period of investigation.

57. Thus, if the SE had found that the indicators for July-December 1998, 1999 and 2000 showed a negative trend in the domestic industry but had been identical (with no variations), a determination of injury would not have been made, even if the period from July to December had been less favourable for the domestic industry than January to June.

58. Regarding the level of import penetration for each of the six-month periods of each year, it is not right in Mexico's view to say that the July-December period of each year is that of maximum penetration. We repeat that it is necessary to take a thorough look at the resolutions of the investigation, which show that dumped imports were definitely on the rise, including after a purging of data in favour of more accurate information. Hence there was no bias in the "selection" of half-year periods for the purposes of injury analysis. In Mexico's opinion, Guatemala has no objective grounds for suggesting that the periods were "selected". This would be tantamount to assuming that the SE knew beforehand that, once it had obtained the import declarations (*pedimentos*) and invoices for Guatemala's imports for the six-month periods of the three years under analysis, the results of the analysis would reveal a significant growth in imports, or that the outcome of all the inquiries conducted throughout the course of the investigation would confirm injury to the domestic industry, which is practically impossible.

59. Confirmation of Guatemala's lack of evidence can be found in response 40, in which Guatemala acknowledges that it has no data for performance of the industry or imports in the first six months of each year used for the purposes of injury analysis. In other words, it does not know whether there actually was higher or lower import penetration and hence whether or not the analysis was objective in this respect. Therefore, it has no elements to substantiate its claim and has not established a *prima facie* case of violation by Mexico.

C. DOMESTIC INDUSTRY

60. According to Article 4.1 of the ADA, there are two ways of complying with the obligation to examine the domestic industry: by examining the producers as a whole, or by examining a significant portion of the producers.

61. Article 5.4 of the ADA provides guidance for determining whether the domestic producers as a whole that apply for initiation of an investigation can be considered sufficient for the application to be regarded as having been made "by or on behalf of the domestic industry". Thus, if an application is filed by a domestic producer accounting for more than 50 per cent of total production expressing either support for or opposition to the application, the investigation shall be considered to have been

requested by the domestic industry, and the examination for the purposes of injury determination can therefore focus exclusively on that producer without this being regarded as a lack of objectivity.

62. Guatemala appears to contend that under Article 4.1 of the ADA, once it has been determined whether the producers as a whole or a significant portion thereof are to be regarded as the domestic industry, the IA should strictly confine itself to the data concerning the producers as a whole or, as the case may be, the significant portion of the producers. In fact, there is nothing in the ADA to support Guatemala's interpretation. Such a rigid approach would actually imply that if the domestic industry were made up of a significant portion of the producers, and data were subsequently obtained concerning the domestic industry as a whole, the additional data would have to be disregarded, which is unacceptable.

D. VOLUME AND PRICE EFFECT OF THE IMPORTS UNDER INVESTIGATION

63. Guatemala starts from the premise that, as far as it understands, the SE had two sources for obtaining positive evidence on the volume of imports, namely the importers and customs, and that by opting not to use the second source, Mexico acted in a manner inconsistent with the ADA, as the importers did not send all the information requested by the IA. We emphasize that it is wrong to say that the importers alone were asked by the SE to provide data on the volume of imports, because the SE also requested documents from customs agents. It is not true that the IA used only one source of information and disregarded the other available source.

64. In an investigation, the IA has to find the most appropriate way of collecting information. One of the key factors in this process is sound judgement on the part of the IA, which has to determine whether certain decisions are appropriate in the light of their likely consequences, relying for this on its practical experience.

65. In this case, the IA decided not to request information from the customs authorities, because it knew from long-standing experience that it would take too long to receive a reply, which would have affected the timeframe of the investigation and entailed a potential risk of violation of Article 5.10 of the ADA. As an example, documents relating to the case involving brushes from China were submitted as Annex MEX-4.[2] Another example is the case involving valves from the US. The IA therefore considered it appropriate to consult both importers and customs agents.

66. It should also be noted that the IA did not use a range of prices to estimate the volume of Guatemalan pipes and tubes under investigation, but based its estimates on the percentages of such pipes and tubes in Guatemala's total imports under the relevant tariff headings. This was done because the documentation available (import declarations (*pedimentos*) with their corresponding invoices) covered volumes representative of the country's total imports.

67. In order to estimate the volume of pipes and tubes under investigation, the IA applied the minimum and maximum price method for imports of pipes and tubes from countries other than Guatemala. Based on the documents at its disposal, the IA considered that approach to be the most reasonable.

68. Regarding response 79 by Guatemala, Mexico indicated in its own response 79 that the way in which the average prices of subject imports from Guatemala were calculated was different from the way in which the price of those imports was compared with the average domestic sales price of like domestic pipes and tubes. First, the average price of Guatemalan imports was calculated in the manner explained in Mexico's responses 74 and 79, which clearly show that the total volume and

[2] The customs authorities were asked to provide import declarations with the corresponding invoices, but it took about three months (sometimes even longer depending on the relevant department's workload) for the Mexican authority to receive 30 *pedimentos* along with the invoices.

value of the Guatemalan pipes and tubes under investigation were considered, not 17 per cent as erroneously claimed by Guatemala; and secondly, the SE added all the costs to the average price of Guatemalan imports in order to place that price at a level at which it could be properly compared with the domestic price. For that purpose, the point of entry price for subject imports from Guatemala under tariff headings 7306.30.01 and 7306.30.99 was augmented by the corresponding tariff and customs duty, and the cost of transporting the imported product to the importer's warehouse during the investigation period.

69. However, the cost of transporting the imported goods was calculated on the basis of information provided by the importers reported by SICMEX, which responded to the IA's request for information. The importers that supplied information on the cost of transporting the pipes and tubes under investigation from the port of entry into the domestic market to their warehouses accounted for 17 per cent of the subject imports from Guatemala. Consequently, Mexico repeats that Guatemala's assertion on this point is unfounded.

70. Regarding response 80 by Guatemala, it is important to make it clear that, strictly speaking, it is practically impossible for many enterprises to send the IA information at the level of disaggregation specified by Guatemala, as they would have to have information enabling close scrutiny of the behaviour and impact of the sales price of a single product on the overall profits of a multi-product enterprise.

71. Mexico requires domestic producers to provide specific financial information (profits, costs and expenditure) in respect of the like product, with a breakdown of the profits, costs and expenditure associated with other products manufactured by the enterprise. This is done by means of an annex entitled "*Estado de Costos, Ventas y Utilidades de la Mercancía Nacional"* (Statement of Costs, Sales and Profits for the Domestic Product). As the Panel noted at the first substantive meeting, this level of disaggregation requires an enormous effort on the part of the applicant enterprises, in order to make the necessary adjustments for sales costs and operating expenditure incurred exclusively in respect of the like product.

72. Concerning Guatemala's argument that the SE failed to analyse the effect of costs and export sales on the applicant enterprise's profits, we repeat that the main factors in the downward trend of operating profits were the reduction in total sales income and the increase in total operating expenditure, and that is why our first written submission makes no reference to the increase in costs and consequent adverse impact on operating profits, as is indicated by Guatemala. In other words, during the period July-December 2000, the sales costs of Hylsa DAT declined by 13.2 per cent, and this led the SE to consider that the behaviour of sales costs was not a factor influencing the decline in profits over the period in question.

V. ARGUMENTS WITH RESPECT TO CLAIMS RELATING TO PROCEDURAL ASPECTS

73. As regards Mexico's alleged violations of Article 6.5, 6.5.1 and 6.5.2 of the ADA, Guatemala's responses state the following: (a) under the ADA, the mechanism for providing access to confidential information is the submission of non-confidential summaries; (b) Tubac's legal representative was unable to satisfy the conditions laid down by Mexican legislation for accessing confidential information; and (c) notwithstanding the above, the question of whether or not Tubac accessed the confidential information is irrelevant for the purposes of its claims under Article 6.5 of the ADA.

74. In this connection, we note a contradiction in Guatemala's statements concerning Article 6.5 of the ADA. Indeed, on the one hand, by virtue of its rights under the ADA, it claims that public summaries are the mechanism that can be used for accessing confidential information, while on the

other hand, it states that the issue of access to confidential information is irrelevant for the purposes of its claims under Article 6.5 because that Article does not govern access to information.

75. It is strange that Guatemala should claim that it was not granted access to the content of the confidential information and go on to state that the issue of access to confidential information is irrelevant since, irrespective of the question of access, Mexico failed to comply with its obligations under Article 6.5 of the ADA.

76. We have already stated in our rebuttal that, in line with the criterion applied by the Panel in *Argentina – Ceramic Tiles*[3], the purpose of Articles 6.5 and 6.5.1 of the ADA is to provide a mechanism to facilitate ascertainment of the content of confidential information by the parties, while at the same time safeguarding the interests of the parties that supply such confidential data.

77. Thus, given that the primary objective is that the parties should be able to see information supplied on a confidential basis, Mexico considers that the most appropriate approach is to focus on determining whether the rules laid down in Mexican legislation concerning access to confidential information constitute an adequate mechanism to enable the exporter to see that information.

78. In that connection, and assuming, for the sake of argument, that the record of the investigation on standard pipes and tubes contained no public summaries of any data submitted by the applicant (a situation which, as such, did not occur, as is pointed out below), the obligation under Article 6.5 of the ADA would in any event be satisfied since, as explained in our written submissions, the Mexican legal system gives interested parties access to all confidential information.

79. Furthermore, the shift in Guatemala's line of argument, whereby it now claims that access as such is irrelevant, carries with it an implicit acknowledgement that it was in fact possible for the Guatemalan exporter to consult all the confidential information, at any point in the investigation, if it saw fit. Thus, Guatemala accepts that Tubac's defence rights were not undermined, so that any argument to that effect is without foundation.

80. Concerning the question whether Mexican legislation on access to confidential information is sufficient to make known the content of such information to the parties, it is illogical that Guatemala should claim that the Mexican system is not sufficient for that purpose, when it acknowledges in its own responses and in the statement by Ms Mejía that no such access was even requested. It appears to be claiming that the Mexican system does not adequately comply with the ADA because Tubac had no access to confidential information, even though it acknowledges that access was never requested. Furthermore, it maintains that this is a violation of the ADA, attributable to the IA.

81. If an interested party is entitled to exercise a right and fails to do so, the blame for any potential prejudice lies solely with that interested party. Thus, the consequence of not requesting access is solely and exclusively attributable to Tubac. Moreover, Guatemala itself forfeited that argument when it stated that access to confidential information is irrelevant as such for the purposes of its claims. For these reasons, we consider that Guatemala's claims are unfounded.

82. It is also untrue that the SE did not request public summaries from the applicant, since, as was shown in paragraph 209 of our rebuttal, all the submissions of the parties, including those of Hylsa, were accompanied by their public versions, which facilitated a reasonable understanding of the confidential data. Thus, Tubac did have the elements it needed to ascertain the content of the confidential information and the possibility of requesting access in case it needed any of the data or information contained therein. The IA did not deny Tubac the possibility of seeing the information it needed for its defence since – we repeat – public summaries existed of all confidential information and it was possible to access the confidential records themselves.

[3] Paragraph 6.38.

83. Likewise, concerning confidential treatment for Hylsa's submission of 17 September 2002 and the alleged lack of a public summary, contrary to what is asserted by Guatemala, a public summary of that submission did exist. In fact, as is mentioned in our rebuttal, Hylsa sent that summary to the legal representative of Tubac. We therefore request the Panel to dismiss this argument by Guatemala.

84. Thus, given the discrepancies and erroneous assertions in Guatemala's claims, we request the Panel to dismiss those claims in the light of the rebuttals contained herein to each of them, inasmuch as they constitute neither objective evidence nor a *prima facie* case of violation by the SE.

ANNEX D

ORAL STATEMENTS OF THE PARTIES
FIRST AND SECOND PANEL MEETINGS

ANNEX D-1

ORAL SUBMISSION BY GUATEMALA

(20 September 2006)

Initiation of the investigation

1. Mexico is wrong in stating that the information submitted was such as was reasonably available to the applicant, since this did not exempt it from meeting the adequacy, accuracy and sufficiency requirements under Article 5.2 and 5.3 of the Anti-Dumping Agreement.[1] Thus, if the investigating authority finds that the information is insufficient because it is not accurate or relevant, the application should be rejected pursuant to Article 5.8 of the Anti-Dumping Agreement.

2. Mexico fails to take account of the fact that the reliability of the information in the publication *Random Lengths* was not questioned by the parties to that dispute[2] and that, moreover, the information was not sourced from a single transaction but gathered on the basis of a large number of transactions. Furthermore, the information refers to "actual" sales and not, as here, to "potential sales".

3. The invoice submitted at the outset was issued by *Ferretería Ferrominera*, a marketing company that neither produces nor exports the product under investigation. As regards representativeness of the company, Mexico refers to the response of the exporter for the purpose of making these calculations, whereas it did not have that response at the time the investigation was initiated. Neither the invoice nor the price quotation was issued by the single exporter under investigation, both representing a small portion of the products under investigation, and moreover the price quotation refers to a "potential" sale. In any event, there is no record of the applicant having submitted data for the purpose of adjustments that would allow a comparison between the export price and normal value.

4. Nor does Mexico explain how it could ensure that the analysis of import volume under the tariff lines in question (which included products other than that under investigation) was representative of the subset of imports of the product under investigation.[3]

5. Guatemala is not contending that Mexico failed to conduct some "procedure" for examining the accuracy and adequacy of the evidence. It is challenging the substantive aspects of the examination, which are purported to have impeded the initiation of the investigation.

Product under investigation

6. Neither Guatemala nor Mexico disputes that the definition of the product under investigation was altered. Mexico asserts the "likeness" of the products included in each of the definitions, disregarding the fact the scope of Guatemala's claims is outside of that context.

7. Guatemala challenges the arbitrary "way" (*forma*) in which the alterations in question were made[4], which led to the imposition of duties on products that initially were expressly excluded from

[1] Report of the Panel, *Guatemala – Cement II*, paragraph 8.29.

[2] Report of the Panel, *US – Softwood Lumber V*, WT/DS264/R, paragraph 7.104.

[3] First Written Submission of Mexico, paragraph 69.

investigation and that were simply not investigated, i.e. products on which no information was either requested or collected.

8. Mexico states that the Article 3.1 standard of the Anti-Dumping Agreement does not apply to determinations of dumping, which is difficult to understand, because this would imply a double standard: reliance on positive evidence and an objective analysis of the "dumped" imports, and at the same time non-compliance with those requirements (reliance on positive evidence and an objective analysis) in determining whether dumping occurred. Mexico's argument is in contradiction with the case law and disregards the scope of Article 17.6(i) of the Agreement.

9. Whatever defence may have been put forward by the exporter, it does not prejudge Guatemala's right to challenge acts that breach the rules of the Anti-Dumping Agreement.

Facts available

10. Mexico fails to respond to any of Guatemala's factual questions in this connection (in particular regarding paragraphs 80 and 81 of the Final Resolution)[5], and they should therefore be taken as undisputed points. The outcome of the verification visit does not reflect the conditions invoked by Mexico to justify resorting to the facts available[6] and, even assuming the rejected hypothesis that Mexico had some factual justification for doing so, this did not exempt it from meeting various obligations deriving from Article 6.8 of, and Annex II to, the Agreement.

Most recent period under investigation

11. There is nothing in the Anti-Dumping Agreement to support Mexico's attempt to justify using a more remote period of injury investigation on the grounds of excessive administrative burdens. The case law establishes that past information may be used only insofar as it is relevant to an analysis of the current state of the domestic industry and is justified as such in the investigating authority's determinations.

12. Regarding Appellate Body jurisprudence in *EC – Tube or Pipe Fittings*, cited by Mexico to specify that a period of investigation that might be affected by exporters' or importers' actions may not be used, Guatemala notes that the complaint in this dispute concerned the use of information relating to events that occurred after the period of investigation for the purposes of determination of dumping and not determination of the period of investigation. Moreover, the complaint referred solely to dumping and not to injury.

13. Lastly, turning to the alleged differences between the *Rice* case and this dispute: (a) Guatemala considers that although the time-span between the end of the period of investigation and the initiation of the investigation is shorter in the case at issue than in the *Rice* case, it is still long enough to prevent an objective overall view of the current state of the domestic industry, and it was for Economía to explain why it regarded as relevant a period such as the one that was proposed; (b) the fact that an additional request for information was made to the applicant in no way distinguishes the *Rice* case from this dispute; (c) the question of seasonality does not arise in this dispute in relation to the end of the period under investigation but in relation to the use of six-month periods, and it is therefore immaterial to this claim of violation. In any case, Guatemala has already mentioned that Economía was aware that consumption rose in the July-December period, resulting in increased imports.

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[4] First Written Submission of Guatemala, paragraph 92.

[5] First Submission of Mexico, paragraphs 135-152.

[6] See, for example, First Written Submission of Guatemala, paragraphs 198, 201, 212 and 220.

Use of half-year data in the period under investigation

14. Consideration of limited information pertaining to a limited period of each of the years selected, without proper justification, does not constitute the objective evaluation required by Article 3.1 of the Agreement.[7] An investigating authority cannot simply assume that the six-month period proposed by the applicant will provide an accurate picture of the state of the domestic industry.[8] An objective determination cannot be based on an incomplete series of data unless the investigating authority provides a justified explanation for doing so.[9] Furthermore, this case involved seasonal factors – such as higher consumption in December – which led to questioning of the selection of specified six-month periods only.

Use of information by enterprise

15. Articles 4.1 and 5.4 of the Anti-Dumping Agreement refer to the "domestic industry" in different terms. Article 5.4 addresses the "legitimacy" of applying for the initiation of an investigation process, whereas under Article 4.1 the investigating authority is required to define the domestic industry "[f]or the purposes of this Agreement". In other words, once the domestic industry has been defined under Article 4.1, the authority is required to limit itself and confine its analysis to that definition, and the use of partial information pertaining to a portion of the domestic industry is not admissible.

Volume and import price issue

16. According to Mexico, the import declarations (*pedimentos*) that it managed to identify reflected significant volumes and constituted a sufficiently valid sample.[10] Guatemala rejects this argument because it obtained an extremely limited sample averaging no more than 25 per cent (10 per cent for 1998; 17 per cent for 1999; and 48 per cent for 2000). Furthermore, percentages were extrapolated from those partial volumes in order to estimate volumes of the products under investigation for countries that were not investigated. Nowhere does Mexico explain the technical grounds for considering the sample as valid and representative.[11] It is not clear to Guatemala from the text of the Final Resolution that the reference to the 17 per cent figure covers only entry costs and that prices were dealt with using a method providing far wider statistical coverage.

Causation: cost increase

17. Guatemala's position is simple: Economía made no distinction between the injury caused by increased operating costs and the injury allegedly caused by dumping, nor did it ascertain that the injury caused by increased operating costs was not attributed to the dumped imports. To Guatemala's mind, a reading of the relevant paragraphs clearly shows that sales costs and/or operating costs rose while profits declined. Cost increases obviously lead to decreasing profits. Therefore, profit loss resulting from an increase in costs cannot be attributed to the alleged dumping.

[7] Submission of Japan, paragraph 18.

[8] Submission of the United States, paragraph 16.

[9] Submission of the United States, paragraph 19.

[10] First Written Submission of Mexico, paragraph 238.

[11] First Written Submission of Mexico, paragraph 243.

Causation: decline in exports

18. In Mexico's view, Guatemala is wrong in asserting that there was no explanation of the decline in exports as another determining factor of injury. According to Mexico, the Final Resolution in fact indicates that export behaviour could not be a determining factor of injury to the domestic industry, considering the share of exports in domestic production.[12] Mexico nevertheless provides a justification which does not emerge from its Final Resolution and in any case fails to explain why a 2 per cent decrease in sales in production terms (from 7 to 3 per cent for 1999 and from 7 to 5 per cent for 2000) should be considered negligible, whereas similar decreases in domestic sales do have to be taken into account.[13]

Essential facts

19. At no stage in the administrative procedure did Economía identify the facts it regarded as essential for its final determination, in particular the problems with information from the exporter for the determination of dumping and the possibility of altering the definition of the product under investigation to include structural pipes and tubes. Because it had failed to identify the information prior to the final determination, Economía did not provide the exporter with any opportunity to comment thereon.

Confidentiality

20. The confidentiality requirement in Article 6.5 of the Anti-Dumping Agreement is not conditional upon the possibility of acceding to confidential information. The fact that there are domestic legal mechanisms for acceding to confidential information does not exempt a Member from complying with this provision of the Anti-Dumping Agreement. To quote the words of the European Communities, "it is unacceptable that a WTO Member should consider, as Mexico suggests, that its domestic legislation on access to confidential information in the hands of the administration can replace the obligations set forth in Article 6.5 of the AD Agreement".[14]

[12] First Written Submission of Mexico, paragraphs 271-275, 280.

[13] First Written Submission of Guatemala, paragraphs 312-313.

[14] Submission of the European Communities, paragraph 28.

ANNEX D–2

ORAL SUBMISSION BY MEXICO

(12 and 13 November 2006)

MEXICO HAD SUFFICIENT EVIDENCE OF DUMPING AND INJURY WHEN IT INITIATED THE INVESTIGATION

1. Regarding the alleged insufficiency of evidence in the application for initiation of the investigation, we note that Article 5.2 of the Anti-Dumping Agreement provides that an application for initiation shall include such evidence as is reasonably available to the applicant. As other panels have indicated[1], such evidence does not necessarily have to be of the quality required to support a preliminary or final determination. It need not be any more than data or information, a review of which supports the conclusion of a well-founded likelihood of unfair practice.

2. The fact that the invoice and the price quotation submitted by the applicant were not issued by Tubac is not a valid reason for claiming that the application lacked information, since investigations are initiated by a country, not by an exporter. That would be tantamount to requiring the applicant to present the quantity and quality of evidence required to support a determination, which is inadmissible. Moreover, as was recognized by the Appellate Body[2], if a WTO Agreement remains silent on a particular subject, there is a reason for such silence. Thus, it is not tenable that the Anti-Dumping Agreement provides for obligations not mentioned in the text. Accordingly, even if the invoice and quotation were not issued by Tubac, they are sufficient for initiating an investigation.

3. Moreover, according to Article 5.1 of the Anti-Dumping Agreement, the subject of the investigation is alleged dumping. If it were necessary for the applicant to produce evidence of dumping – and not of alleged dumping – initiation would be impossible. A price quotation is an indication of "alleged dumping". This is supported by the final report of the Panel in *US – Softwood Lumber*.

4. Guatemala relies on the final report of the Panel in Argentina – *Poultry Anti-Dumping Duties* to argue that the invoice and quotation concern isolated transactions and that this is not enough for initiation. That case is not applicable to this dispute, since it involved a determination that the Anti-Dumping Agreement had been violated through an incorrect calculation of the margins of dumping, whereas Guatemala claims that there was not enough information to initiate the investigation.

5. Furthermore, the invoice contains data on sales prices for a volume of the investigated product almost five times greater than the average for transactions conducted in Guatemala during the investigation period. The volume recorded in the invoice is sufficient for it to be considered a solid indication of a well-founded likelihood of dumping.

6. Guatemala claims that the application contained no evidence of dumping for the investigated product as a whole. In this connection, we reiterate that the evidence produced was the information reasonably available to the applicant, comprising elements from which it was possible to infer the

[1] *Mexico – Corn Syrup* (paragraphs 7.74 and 7.79), *Guatemala – Cement II* (paragraph 8.35) and *Argentina – Poultry* (paragraph 7.81).

[2] Paragraphs 61, 65 and 69 of the Appellate Body in *US – Carbon Steel*.

likelihood of dumping, in accordance with the Anti-Dumping Agreement and the applicable jurisprudence[3], whereby it was determined that the evidence submitted with the application did not need to be of the same quality and quantity that would be necessary to support a resolution. Moreover, according to the final Panel report in *US – Softwood Lumber*, it is not necessary to produce evidence for every category of the product investigated for purposes of initiation. That would be contrary to the "reasonableness" mentioned in Article 5.2 of the Anti-Dumping Agreement and the above-mentioned criteria relating to the sufficiency of information.

7. Concerning the trend in the volume of imports, it is understandable that the description of the product classified under a tariff line should not tally with the technical description of the product. Consequently, to require the applicant to provide accurate data on the volume of imports would be to impose an unattainable standard and would be at variance with the WTO jurisprudence referred to in paragraph 2 of this submission.

8. Mexico properly examined the accuracy and adequacy of the evidence of dumping and injury. And in fact, as a consequence of that examination, the investigating authority requested additional information from the applicant. Moreover, if the evidence produced in the application for initiation is sufficient to initiate the investigation and the investigation has been initiated, it must be inferred that the investigating authority conducted the accuracy and adequacy examination.[4]

ARGUMENT CONCERNING THE CLAIMS RELATING TO THE PRODUCT UNDER INVESTIGATION AND THE LIKE PRODUCT

9. Guatemala argues that the two clarificatory adjustments made by Mexico, during the investigation, to the definition of the product under investigation were inconsistent with the Anti-Dumping Agreement. In this connection, the Anti-Dumping Agreement contains no guidelines in support of that argument which, therefore, as was pointed out by the Appellate Body[5], is without foundation. Moreover, even if the Anti-Dumping Agreement did provide guidance for determining the product under investigation, it would be unreasonable to prevent possible adjustment to the definition of the product on the basis of evidence submitted by the interested parties or obtained by the investigating authority.

10. Regarding the first clarificatory adjustment, since the investigating authority is not an expert on the product under investigation, its product description in the initiating resolution is based on data supplied for the most part by the applicant. The reference in the preliminary resolution to pipes and tubes of up to six inches in diameter does not alter the description in the initiating resolution and is consistent with the Anti-Dumping Agreement for the following reasons: (A) the description contained in the initiating resolution is not definitive and the Anti-Dumping Agreement contains no guidelines in this respect; (B) an anti-dumping investigation is a process in which the elements necessary to support the determination are assembled gradually; (C) the initiating resolution established that the diameter of the pipes and tubes investigated was basically one half to four inches. It did not state that those diameters were the only ones that could enter the domestic market; (D) a clarificatory adjustment solely in respect of the diameter does not imply "changing" the product description. For certain uses, four inch pipes and tubes could feasibly be substituted with larger diameter pipes and tubes; (E) Tubac failed to make any comment on that adjustment, although it could have done so, thereby tacitly accepting that it was appropriate.

[3] *Guatemala – Cement II, Mexico – Corn Syrup and Argentina – Poultry*.

[4] See final report of the Panel in *EC – Bed Linen.*

[5] Paragraphs 61, 65 and 69 of the Appellate Body report in *US – Carbon Steel*.

11. Thus, in the absence of specific guidelines for defining the product under investigation and given that the ranges indicated in the preliminary resolution were commercially interchangeable with the ranges referred to in the initiating resolution; that the exporter tacitly accepted that change; and that an analysis was made of the specifications and technical characteristics of the product in order to define it properly, Mexico requests that Guatemala's arguments be dismissed.

12. Regarding the second clarificatory adjustment, we reiterate that an anti-dumping investigation is a process in which the elements supporting the determination are assembled at gradually. Since there is nothing in the Anti-Dumping Agreement to prevent it from doing so, the final resolution described the product under investigation on the basis of the facts available, including the technical and commercial interchangeability of standard and structural pipes and tubes.

13. The applicant provided information specifying that the main use of the pipes and tubes under investigation is the conduction of fluids, a use linked to the diameter and thickness of the pipes and tubes, and established that regardless of the type of sheet used for their manufacture and the manufacturing standard, pipes and tubes of certain diameters and thickness could be used for conduction. Galvanized and black structural pipes and tubes of one half to six inches in diameter and of certain wall thicknesses can be used for conduction, as established in the final resolution.

14. According to data assembled by the Ministry of the Economy (SE) pipes and tubes can be used for conduction or structural uses, even without being subjected to a "hydrostatic test". Indeed, structural pipes and tubes have a number of characteristics identical to standard pipes and tubes and are therefore also used for conduction. If standard pipes and tubes are acquired and whether or not they subsequently undergo the aforementioned test, they are marketed as pipes and tubes for conduction. Thus, the analysis of the arguments and evidence submitted in the investigation enabled the SE to describe the pipes and tubes under investigation by their main use and main characteristics, and to conduct an objective examination based on positive evidence in its injury analysis. The scope of the product under investigation was not generically expanded, but was only expanded to cover structural pipes and tubes with the technical and commercial characteristics described in the final resolution, so that they are not different products but the same or a like product.

15. The interested parties had the opportunity to submit evidence, arguments and data. They were requested to provide information, which was taken into account in the determinations of the investigating authority. The on-the-spot investigation confirmed that the information from Tubac could not be considered. During the public hearing and at the pleading stage, Tubac could have expressed its views on the subject. Mexico therefore conducted an unbiased procedure.

16. There is no methodology under the Anti-Dumping Agreement for comparing prices and evaluating price effects, so that WTO Members are free to do so in the manner they deem appropriate, provided that they rely on positive evidence and make an objective examination.

17. Since structural and conduction pipes are included because they are mutually substitutable from a technical and commercial point of view, the SE considered that the variables analysed were applicable to both categories. Thus, the basic premise of the Guatemalan argument (that there was no reason to include structural pipes and tubes in the investigation) is without foundation. Moreover, the exporter could have put forward arguments on the information submitted after the hearing but failed to do so. We also note that Guatemala failed to indicate the differences between standard pipes and tubes and structural pipes and tubes in order to substantiate its argument.

18. The explicit reference to certain structural pipes and tubes was not an essential fact when it came to imposing the definitive measure, since for the purposes of the investigation, it was the same product. Thus, there was no obligation to disclose once again the essential facts set out in the

preliminary resolution and at the hearing. For all these reasons, Mexico contends that it acted in conformity with the Anti-Dumping Agreement.

MEXICO APPLIED THE FACTS AVAILABLE IN CONFORMITY WITH THE ANTI-DUMPING AGREEMENT

19. Article 6.8 of the Anti-Dumping Agreement provides that the investigating authority may use the facts available: (a) when a party refuses access to information; (b) when the party concerned does not provide such information within a reasonable period; or (c) when it impedes the investigation. The Guatemalan exporter did not provide all necessary information. As is accepted by Guatemala, the information submitted in the investigation cannot be considered reliable, complete and precise since, in the on-the-spot investigation, the investigating authority found inconsistencies with the data provided by Tubac (apart from the fact that those data were not drawn from the company's accounting records), and it was not possible to use that information. Thus, given the failure to provide reliable information and to provide it within a reasonable time, thereby significantly impeding the investigation, in accordance with the reports of various panels[6], and in keeping with accepted WTO criteria, the SE made use of the facts available.

CLAIMS RELATING TO THE DETERMINATION OF INJURY

20. The SE acted in conformity with the Anti-Dumping Agreement by using the period from 1 July to 31 December 2000 as the investigation period. Guatemala has not established a prima facie case that the investigation was not as close as practicable, and in that context it is not possible for a panel to rule in favour of a party that has not made such a case. We consider that it is not enough that the same prime facie case is involved as was made by the United States in *Mexico – Rice* (the time span between the investigation period and the initiation was different; in the rice case the parties questioned the investigation period; in this case the investigating authority sent a request for information to the applicant; and in the rice case, there were considerations concerning the level of export penetration). Guatemala's assertion is therefore unfounded.

21. The fact that an investigation period is not immediately prior to the initiation does not mean that the Anti-Dumping Agreement is violated. This is not an obligation under the Anti-Dumping Agreement and it also takes time for the applicant to gather information. Thus, in this case, the investigation period was as close as practicable to the initiation. Moreover, the delay was not such as to cast doubt on the relevance of that period. It is also incorrect to say that the SE simply accepted the period proposed by the applicant. The investigating authority deemed it appropriate to initiate the investigation only after analysing the applicant's response to the request for information. It is thus necessary to examine on a case-by-case basis whether the investigation period is as close as practicable to the initiation.

Mexico conducted an objective examination based on positive evidence in using information from the investigation period, given that Article 3.1 of the Anti-Dumping Agreement provides guidance on the applicability of the data used, and not on the remoteness of the investigation period *per se*, as this is only one factor to be analysed. In its first written submission, Guatemala accepts that it cannot be determined a priori that the remoteness of the investigation period is *per se* a cause of inconsistency with the Anti-Dumping Agreement, but it also failed to provide any evidence to prove that the information in question was not relevant. Mexico therefore requests that this claim be dismissed.

22. The SE also acted in conformity with the Anti-Dumping Agreement by using six-month periods in its injury examination. Guatemala affirms that the fact that the SE acted in this way constitutes prima facie evidence of a Mexican violation and seeks to rely on the Appellate Body report in the *Mexico – Rice* case, wrongly so because the circumstances of that case are totally

[6] *Argentina – Ceramic Tiles* and *Egypt – Steel Rebar*.

different from those of the present dispute. We repeat that, if a WTO Agreement remains silent on a particular subject, there is a reason for such silence. Since there is no indication in the Anti-Dumping Agreement concerning the periods used for the injury analysis, the use of six-month periods in each year does not violate the Agreement. At the same time, comparing the same periods for each year means that the structure is the same, and seasonal or cyclical tendencies in the economic indicators are avoided, besides which the six-month periods are consistent with the investigation period, which also covers six months.

23. Mexico acted correctly in considering some of the financial indicators on an annual basis. Those indicators were obtained from financial statements reported on by an auditor (which are more reliable). In accordance with Mexican accounting practice, such audited financial statements are submitted for the same dates as the information submitted to the tax authorities, which is on an annual basis. They are therefore to be analysed on an annual, not a six-monthly basis. It is clear that affirmative, objective, verifiable and credible evidence was used, and that it was examined objectively. Similarly, because it rests on a permissible interpretation of the provisions of the Anti-Dumping Agreement, pursuant to Article 17.6 (ii) of that Agreement, the measure is consistent with Article 3 of the Anti-Dumping Agreement.

24. In its analysis of the factors of injury to the domestic industry, Mexico acted consistently with Articles 4.1 and 5.4 of the Anti-Dumping Agreement, since if an application is submitted by a domestic producer that represents more than 50 per cent of the totality of domestic producers, expressing either support for or opposition to the application, the investigation shall be considered to have been requested by the domestic industry, and the examination can therefore objectively focus on injury to that producer. The applicant accounted for 53 per cent of total domestic production, so that the investigating authority correctly applied to its analysis financial variables contained in information from the applicant. The analysis conducted was not, therefore, a sectoral one.

25. Similarly, the analysis of the volume of imports from sources other than Guatemala is consistent with the Anti-Dumping Agreement. The investigating authorities use information from the interested parties and other entities (such as customs brokers). However, it is not always possible to obtain all the information requested from the parties concerned. Even Tubac omitted certain estimates of imports from Guatemala, and pointed out that the SE could estimate that volume on the basis of data from customs brokers and importers.

26. However, in the case of imports from Guatemala, Mexico obtained copies of actual import declarations (*pedimentos*) and invoices relating to total imports from Guatemala, through the applicant and through requests for information to customs brokers and importers, because unlike in the case of imports from other sources, the number of transactions or import declarations from Guatemala was not high. Contrary to what Guatemala claims, the SE did not obtain the actual import declarations from the Mexican Trade Information System (SICMEX), since this is a system which shows only an electronic list of import transactions (statistical information) and does not contain the declarations themselves.

27. The number of import transactions from sources other than Guatemala under tariff headings 7306.30.01 and 7306.30.99 was 1,720 in 1998, 1,752 in 1999 and 2,456 in 2000. Given that the Anti-Dumping Agreement provides no guidance in this respect, a sample of import declarations was collected, reflecting significant portions of the total volume imported and the main importing enterprises. Thus, a total of 673 import declarations were seen.

28. In view of the volumes covered by those declarations, and given that Tubac stated that it did not have the relevant data, the SE considered that the available declarations with the relevant invoices and the volumes covered by them represented a valid sample for estimating the range within which the price of imports of the subject product from other sources fluctuated. The criterion used to

estimate the subject product from other sources was the maximum and minimum prices for the imports identified as the product under investigation from other countries. Contrary to what Guatemala claims, Mexico did not assume that the prices of imports from Guatemala and from the countries not investigated were in all instances at the same level.

29. Moreover, in evaluating the impact of the prices of Guatemalan imports on domestic prices, the investigating authority did not rely on a sample of 17 per cent of total imports from Guatemala during the period from July to December 2000. The 17 per cent to which Guatemala refers is a sample of imports from that country, which was used to calculate the cost of transporting the product from the port of entry into Mexico to the importer's warehouse during the investigation period. It does not refer to the average prices of imports from Guatemala. Those average prices were calculated on the basis of value and volume figures for total imports recorded in SICMEX and duly adjusted.

30. It should be pointed out that paragraph 7.115 of the Panel's final report in *Mexico – Rice* is not applicable to the case of Guatemalan pipes and tubes for the reasons previously set out in detail in Mexico's oral submission.

GUATEMALA ERRONEOUSLY CLAIMS THAT THE MINISTRY OF THE ECONOMY (SE) FAILED TO ANALYSE OR VERIFY THE NON-ATTRIBUTION OF INJURY CAUSED BY OTHER KNOWN FACTORS

31. Concerning Guatemala's contention that the investigating authority acted inconsistently with Article 3 of the Anti-Dumping Agreement, it should be pointed out that it is for Guatemala to make a prima facie case for its claims, which cannot validly be done by mere assertions. Guatemala quite plainly asserts, without the slightest proof, that the decrease in the applicant's profits was primarily the result of increased costs. We therefore ask this Panel to dismiss Guatemala's claim, given that it is not possible for a panel to rule in favour of a complaining party that fails to substantiate such a hypothesis.

32. Furthermore, it should be pointed out that the final resolution made no reference to an increase in operating costs. Nor does it state that the injury to the domestic industry was exclusively the result of a decrease in sales revenue. What it establishes is the structure of the analysis conducted in conformity with Article 3 of the Anti-Dumping Agreement. In that connection, the final resolution states that the behaviour of revenue and operating expenses were the factors that influenced the downward trend in operating profits.

33. As if that were not enough, the SE continued to analyse those aspects which according to Guatemala, were disregarded. It was precisely owing to the behaviour of costs that the decline in profits was less substantial. Moreover, the final resolution clearly states that the decrease in profits was a direct consequence of the decrease in sales revenue and not of any identifiable adverse upward trend in sales costs. This is why there is no suggestion that the injury in relation to "profits" was attributable to the behaviour of costs.

34. At the same time, it is not clear whether Guatemala is arguing that Mexico failed to provide an explanation to the effect that the decline in the domestic producer's exports was another determining factor of injury, or that the said decline was another factor of injury and that the SE did not make that finding in its resolution. In this connection: (i) we would like to repeat the points made regarding the obligation to establish a prima facie case of violation attributable to Mexico, and (ii) at the same time, there is, in the final resolution, an explanation as to why the decline in exports was not a determining factor of injury, since despite their decline, exports accounted for only 7 per cent of domestic production in 1998, 3 per cent in 1999, and 5 per cent during the investigation period.

35. Nor did Mexico favour one factor of injury over another. Guatemala assumes that the decline in domestic sales has the same specific weight or impact as the decline in exports, and that it was

therefore wrong to consider one factor and disregard another. However, Guatemala makes no reference to the key aspect, namely domestic sales volumes, which declined by 5 per cent during the investigation period and which had an impact on profits, as was explained in paragraphs 221 to 224 of the resolution.

ARGUMENTS WITH RESPECT TO CLAIMS RELATING TO PROCEDURAL ASPECTS

36. Guatemala apparently considers that an alleged violation of Article 6.9 of the Anti-Dumping Agreement automatically implies a violation of paragraph 6 of Annex II to the Anti-Dumping Agreement. Mexico's view of the matter is that the paragraph in question is not applicable to the disclosure of the essential facts.

37. Moreover, according to the precedent in *Argentina – Ceramic Tiles*, in the absence of any specific indication in the Anti-Dumping Agreement as to how the essential facts are to be disclosed, the investigating authority may do so, *inter alia*, by means of a special document, a verification report, a preliminary determination, etc. In this case, the SE disclosed the facts both in the preliminary resolution and at the public hearing. Consequently, it is wrong to assert that there is no indication in any document that the essential facts were disclosed.

38. Similarly, Tubac is responsible for the fact that the information verified during the on-the-spot investigation was inconsistent with the information it submitted to the investigating authority, with the result that it was decided to use the facts available. Tubac was aware that its information was flawed, so that it was predictable that it would be dismissed.

39. As regards the disclosure of the essential facts through the contents of the record, we submit that Tubac's rights were not affected: contrary to what Guatemala asserts, its defence did have access to the information relating to the case. In Mexico, confidential information may be consulted by the legal representative of any of the interested parties. In fact, there is a record of the fact that Tubac's legal representative accessed the confidential information in question, which proves that it suffered no prejudice.

40. However, as far as Article 12.2 of the Anti-Dumping Agreement is concerned, the resolutions set forth in sufficient detail the findings and conclusions reached by the investigating authority on questions of fact and law, as well as the methodologies used in the calculations of margins and considerations relevant to injury. As is evident from the *considerando* and *resultando* sections, the final resolution contains all relevant information on matters of fact and law which led to the imposition of the final measures. Similarly, regarding the change in the product investigated, if the applicant suggests such a change and the exporter expresses no objection thereto, it is normal that the investigating authority should have no objection to making that change, the assumption being that the interests of the parties are not affected and that the parties in fact agree. At the same time, regarding the adjustments to the product investigated, as there was no objection whatsoever by Tubac, it was considered that its interests were not affected.

41. The exporter was allowed access to the confidential information at any time, since in Mexico such data may be consulted by the legal representatives of the parties. Moreover, the investigating authority conducted an analysis of whether confidential treatment should be afforded to every item of information submitted by the parties, as defined in the administrative arrangement relating to each application. At the same time, the record contains non-confidential summaries of all the documents that were afforded confidential treatment, and there are no such summaries where summarization was impossible, for instance in the case of figures. Even if those summaries had not been provided, Tubac's rights would not have been affected, given the fact that, in Mexico, full access is granted to confidential information.

ANNEX D-3

ORAL STATEMENT OF GUATEMALA
SECOND MEETING

(7 November 2006)

Introduction

1. Mr Chairman, members of the Panel and members of the Secretariat, good morning. It is a pleasure to see you all once again to restart our talks in this dispute. Given the number and level of detail of the Panel's questions to the parties in the wake of the first substantive meeting, and the scope and thoroughness of the responses by both parties, it is obvious that the vast majority of the relevant aspects of the dispute have been covered.

2. It would be pointless to repeat arguments that the Panel has already read in our respective submissions. The Panel will no doubt have many other questions to put to the parties today. Accordingly, Guatemala will confine itself to a brief introduction on certain themes which come up repeatedly in Mexico's arguments in this case.

3. One of the main and recurrent arguments Mexico uses in its defence is that if something is not expressly stated in the Anti-Dumping Agreement, it is because the negotiators so intended and the investigating authority therefore has virtually unlimited discretion. Such an argument is used, for example, to defend the changes made to the definition of the product under investigation[1] and the establishment of the period of investigation.[2] In both cases, what Mexico suggests is that the absence of an explicit rule on such situations allowed Economía to shirk other obligations contained in the Anti-Dumping Agreement, such as the requirement to apply anti-dumping duties solely to products under investigation and for which there have been affirmative determinations of dumping, injury and causal link or an unbiased and objective injury analysis based on positive evidence. Pursuant to Articles 1 and 18.1 of the Anti-Dumping Agreement, an anti-dumping measure may only be imposed only if every single provision of the Agreement has been fulfilled. Mexico uses the idea that Economía enjoys virtually unlimited discretion in order to disregard its obligations under Articles 17.6(i) and 3.1 of the Agreement. These provisions regulate the activity of the investigating authority in all aspects of an anti-dumping investigation.

4. Secondly, in its written submissions and oral statements, Guatemala has made very specific claims with regard to Economía's determinations on dumping, injury, causal link and the procedural aspects of the case. Guatemala is surprised that Mexico has not responded to all these specific claims, but instead has based its defence on general arguments regarding claims not even made by Guatemala. For example, in response to Guatemala's claims that the application lacked sufficient information on dumping, injury and a causal link within the meaning of Article 5.2 and that Economía failed to examine properly the accuracy and adequacy of the evidence as Article 5.3 requires, Mexico

[1] First Written Submission of Mexico, paragraph 85.

[2] First Written Submission of Mexico, paragraph 193.

maintains that an application need not contain all the information *reasonably available to the applicant*.[3]

5. In Guatemala's opinion this is quite simply irrelevant. Mexico has not even explained whether or how Economía took into consideration elements such as (i) the lack of any evidence of dumping in respect of the only exporter mentioned in the application; (ii) the fact that it had evidence of dumping only for firms which were apparently neither producers nor exporters of the product under investigation; (iii) the lack of information on the accuracy and adequacy of the price quote for a sale not confirmed to have taken place; (iv) the fact that the evidence corresponded to barely a single day of the investigation period for galvanized pipes and tubes and black pipes and tubes and to only a limited number of products covered by the definition of the product under investigation; and (v) the fact that the applicant omitted from its application accurate and adequate information on the volumes of the imports to be investigated.

6. As for the change to the definition of the product under investigation, Mexico seems to consider that standard pipes and tubes and structural pipes and tubes are interchangeable in terms of use.[4] As Guatemala has repeatedly explained, this is not the matter at issue in the dispute.[5] The point of the claim is whether Economía was entitled to impose anti-dumping duties on products which were not covered by its investigation and for which there were, therefore, no determinations of dumping, injury or causality. Guatemala notes that Mexico did not refute Guatemala's assertion that its determinations of dumping, injury and causality covered neither structural pipes and tubes nor standard pipes and tubes of four to six inches in diameter.

7. As far as use of the facts available is concerned, Mexico merely asserts that since some of the information supplied by the Guatemalan exporter was not entirely accurate, Economía was entitled to apply this concept to all the information.[6] Mexico has not to date refuted Guatemala's arguments concerning the various reasons adduced to justify the use of the facts available, nor has it explained: (i) how Economía reached the conclusion that the exporter had failed to provide information or how it had significantly impeded the investigation within the meaning of Article 6.8; (ii) whether Economía endeavoured to use all information which is verifiable in the context of paragraph 3 of Annex II; (iii) whether Economía took into consideration that the information should not be disregarded given that the exporter had acted to the best of its ability within the meaning of paragraph 5 of Annex II; (iv) whether Economía informed the exporter and granted it an opportunity to provide further explanations within a reasonable period within the meaning of paragraph 6 of Annex II; and (v) whether Economía exercised special circumspection within the meaning of paragraph 7 of Annex II.[7]

8. As to Guatemala's claims regarding the designation of information as confidential and the submission of non-confidential summaries, Mexico merely states that it granted (or could have granted under its legislation) access to the confidential record, subject to certain conditions.[8] Such limited access is, however, completely irrelevant in the light of Mexico's obligations under Article 6.5

[3] First Written Submission of Mexico, paragraphs 26 and 30.

[4] First Written Submission of Mexico, paragraphs 99, 102 and 106.

[5] First Written Submission of Guatemala, paragraph 92; Oral Submission by Guatemala, paragraph 8.

[6] First Written Submission of Mexico, paragraph 145.

[7] First Written Submission of Guatemala, paragraphs 192 to 230.

[8] First Written Submission of Mexico, paragraph 305.

of the Anti-Dumping Agreement. Mexico fails to demonstrate why it granted confidential treatment to information without good cause being shown or how it fulfilled its obligation to require non-confidential summaries of information classified as confidential. It is worth mentioning here the matter of the invoice and the price quote, raised by Guatemala in previous submissions.

9. In view of the foregoing Guatemala trusts that the Panel's settlement of these issues will focus on Guatemala's specific claims and arguments and the actual text of the Anti-Dumping Agreement rather than heeding the lines of defence adopted by Mexico which rely on Mexican legislation and are immaterial to this dispute.

10. A third kind of defence strategy used on a number of occasions by Mexico is to support Economía in the considerable deference it accords to statements by the applicant at each stage of the investigation. For example, Mexico argues that since the applicant need not provide *all* reasonably available information, whatever information it does submit is bound to be acceptable.[9] Moreover, Mexico states that if the information is incomplete or inaccurate, it may be supplemented during the course of the investigation. Mexico also considers that an examination of the accuracy and adequacy of the information furnished must be conditional on the "good faith" of the applicant.[10] Economía simply preferred not to question the investigation period proposed by the applicant since to do so and to request more up-to-date information would have made the investigation more onerous and obliged the applicant to provide information additional to that contained in the application.[11] Furthermore, Economía made changes to the definition of the product under investigation, simply because it is not an expert in the matter[12] and accepted the arguments put forward by the applicant, with the result that anti-dumping duties were applied to products that were not under investigation.

11. However, contrary to Mexico's apparent understanding of it, the Anti-Dumping Agreement imposes strict obligations which an investigating authority must fulfil and may not disregard merely to avoid inconveniencing the applicant.[13] Determinations by an investigating authority must be appropriate, unbiased and objective. An investigating authority must also fully comply with the letter of the substantive provisions and procedural obligations of the Anti-Dumping Agreement, regardless of their possible impact on the domestic industry.

12. A fourth kind of defence tactic adopted by Mexico is to conclude that if no interested party objects to some administrative act of the investigating authority, it should be understood that the act will stand and so no subsequent claim of a breach of the Anti-Dumping Agreement may be made on that basis.[14] This is to overlook the fact that the Anti-Dumping Agreement imposes specific obligations on investigating authorities whatever arguments exporters or their governments may adduce. Guatemala trusts that the Panel will not entertain an argument which seeks to scale down Mexico's obligations under the Anti-Dumping Agreement.

13. In addition to highlighting these recurrent themes, Guatemala wishes to take this opportunity to respond briefly to a number of erroneous assertions by Mexico in its Second Written Submission of 13 October 2006.

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[9] Rebuttal Submission of Mexico, paragraph 17.

[10] Reply by Mexico to Panel question 9(a).

[11] First Written Submission of Mexico, paragraph 165.

[12] Reply by Mexico to Panel question 99.

[13] Reply by Guatemala to Panel questions 26 and 86.

[14] Reply by Mexico to Panel question 26.

14. Mexico states that Hylsa "never provided evidence of the existence of 132 (66 standard and 66 galvanized) different models of pipe and tube".[15] To address Mexico's assertion, we refer to Hylsa's response of 9 July 2001 to Official Communication UPCI.310.01.1179 of Economía's International Trade Practices Unit[16], in which the applicant clearly specified the size ranges of the subject pipes and tubes for "standard pipes and tubes". As has been shown time and again in the investigation process, standard pipes and tubes can take the form of either "standard black pipes and tubes" or "standard galvanized pipes and tubes". A simple calculation based on Hylsa's data on the dimensions of standard pipes and tubes - 66 different sizes overall, a fact conceded by Mexico - and taking into account that such products exist in both black and galvanized finishes, gives us a total of 132 different product dimensions. It should be made quite clear that at no time has Guatemala suggested that the applicant should submit "132 normal value references" for these products. Guatemala is of the opinion that, in the light of the text of the Anti-Dumping Agreement as interpreted in the case law, a single piece of evidence for standard black pipes and tubes and a single piece of evidence for standard galvanized pipes and tubes, which respectively cover an insignificant subset of models falling under the definition of the product under investigation (3 and 6 respectively), without any further explanation being given, cannot be considered "sufficient" within the meaning of Article 5.2 of the Anti-Dumping Agreement. Neither therefore is it true, as Mexico mistakenly states, that Guatemala is making an allegation similar to that of Canada in the dispute *US - Softwood Lumber VI*. Quite the contrary: in that dispute Canada did not argue that the evidence amounted to an "insignificant subset" of the product under investigation, which is what Guatemala has done in this case and as is reflected in its submissions and responses to the Panel's questions.[17] The "insignificant" nature of the product subset used as evidence of dumping is, in any case, just one of a number of factors which render the dumping evidence "insufficient".

15. As to the facts available, Mexico misappraises the facts in stating that the verification problems "were conveyed to Tubac's representatives, and it was the exporters who failed to take any remedial measures to bring their data into conformity so that the IA could make use of the information."[18] This is at odds with the detailed record of the verification visit which states, as Guatemala explained in its First Written Submission, that Tubac's representatives corrected a number of errors found in the data, and it was this revised information which was *verified* by the investigating authority.[19] An admission by Mexico that the detailed record does not accurately reflect the verification visit would call into question every action Mexico took in the investigation process.

16. Lastly, Mexico misinterprets Guatemala's assertion that access or the possibility of access by the parties to confidential information is irrelevant to its claims under Article 6.5 of the Anti-Dumping Agreement. First, Mexico wrongly infers that Guatemala would be withdrawing its claim that Economía undermined the exporter's ability to defend itself against the allegations of dumping.[20]

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[15] Second Written Submission of Mexico, paragraph 34.

[16] Exhibit GTM-3.

[17] Oral Submission by Guatemala, paragraph 4(d); Response by Guatemala to Panel question 7; Rebuttal Submission of Guatemala, paragraphs 38 and 39.

[18] Second Written Submission of Mexico, paragraph 125.

[19] First Written Submission of Guatemala, paragraphs 192 to 218; Exhibit GTM-15.

[20] Rebuttal Submission of Mexico, paragraph 201.

17. Guatemala's claim, however, is that, irrespective of access or possibility of access for interested parties to the confidential record, the requirement for Economía to grant confidential treatment applies only to information for which the applicant shows good cause and non-confidential summaries are furnished in sufficient detail to permit a reasonable understanding of the substance of the information. Economía simply disregarded this obligation.

18. Guatemala considers that Mexico is endeavouring to convince the Panel that its legal system, which access to the confidential record may be allowed, is "equivalent" to its obligations under Article 6.5 of the Anti-Dumping Agreement. Without prejudice to the legal considerations set out by Guatemala in its second submission, including those relating to the fact that domestic law may not conflict with an international obligation[21], Guatemala notes that Mexico's approach is not only WTO-inconsistent, but also poses problems in terms of practical application, such as what happens if an interested party fails to meet the requirements for accessing the confidential record, as could well occur were a small exporter unable to pay the bond required by Economía, or, if a government of an exporting country finds itself unable to bear the considerable expense of hiring a Mexican lawyer or sending someone to Mexico City to satisfy the conditions under Mexican law for securing access to the confidential record. Guatemala trusts that the Panel will disregard particularities of Mexican legislation that are immaterial to Mexico's obligations under Article 6.5 of the Anti-Dumping Agreement.

19. Thank you, Mr Chairman and members of the Panel. Guatemala remains at your disposal should you have any further question.

[21] Rebuttal Submission of Guatemala, paragraph 162.

ANNEX D-4

ORAL STATEMENT OF MEXICO
SECOND MEETING

(7 November 2006)

LIST OF ABBREVIATIONS IN ALPHABETICAL ORDER

Abbreviation	Full name/title
AB	Appellate Body
ADA	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
EC	European Communities
IA	Investigating authority
LCE	*Ley de Comercio Exterior de México* (Mexican Foreign Trade Law)
SE	*Secretaría de Economía* (Ministry of the Economy)
SICMEX	*Sistema de Información Comercial de México* (Mexican Trade Information System)
TIGI	*Tarifa de la Ley del Impuesto General de Importación de México* (Tariff established under Mexico's General Import Duty Law)
TIGIE	*Tarifa de la Ley de los Impuestos Generales de Importación y Exportación de México* (Tariff established under Mexico's General Import and Export Duty Law)
Tubac	Tubac, S.A. (Guatemalan exporter)
US	United States of America
WTO	World Trade Organization

INTRODUCTION

1. Representatives of the Guatemalan Government and distinguished members of the Panel, good morning. On behalf of the Mexican Government and on our own account, we wish to thank you for the opportunity to present Mexico's views at this stage of the dispute.

2. Once again, it is not Mexico's intention in this oral statement to give a detailed presentation of the lines of argument already set out in its Second Written Submission, but to highlight a number of points which we feel to be of the utmost importance.

MEXICO INITIATED THE INVESTIGATION WITH SUFFICIENT EVIDENCE OF DUMPING AND INJURY, CONSISTENT WITH ARTICLE 5.2, 5.3 AND 5.8 OF THE ANTI-DUMPING AGREEMENT

3. Before reiterating the reasons why we consider Guatemala's claims under Article 5.2, 5.3 and 5.8 of the ADA to be unfounded, we feel it worthwhile to refer briefly to the general way in which an anti-dumping investigation is structured. As we see it, an investigation consists essentially of two stages: (a) the pre-initial stage; and (b) the investigation *sensu stricto*.

4. As far as the pre-initial stage is concerned, the guidelines to be followed include Article 5.1, 5.2, and 5.3 of the ADA. Also relevant is the WTO case-law (the final panel reports in the disputes *Mexico - Corn Syrup*, *Argentina – Poultry Anti-Dumping Duties* and *Guatemala –- Cement II*), which has established that evidence in the application does not have to be of the quality and quantity necessary to support a preliminary or final determination.

5. It should be noted in this context that:

i. Article 5.1 of the ADA clearly states that the purpose of an investigation is to determine the existence, degree and effect of any alleged dumping. Mexico considers this to be entirely consistent with the above, in the sense that evidence provided in the application does not have to be of the quality and quantity necessary to support a determination of unfair practice and the application of an anti-dumping duty, but to initiate an investigation. Thus, the information in the application need be no more than a mere indication of "alleged dumping". We point out that if the domestic industry had to produce evidence of dumping – rather than of alleged dumping – initiation would be practically impossible and initiating an investigation process would to some extent be divested of meaning.

ii. Furthermore, Article 5.2 of the ADA states that an application for the initiation of an anti-dumping investigation must include evidence reasonably available to the applicant of dumping, injury and a causal link between the dumped imports and the alleged injury. The points made above on "alleged dumping" thus also apply to "alleged injury". Moreover, the obligation for the applicant is to submit information which is reasonably available to it and which it deems necessary for substantiating its case for the need to initiate an investigation.

iii. Similarly, Article 5.3 of the ADA establishes that the IA must examine the accuracy, adequacy and sufficiency of the evidence provided in the application to determine whether or not to initiate an investigation. This would imply that, as established with regard to "alleged dumping" and "alleged injury", evidence in the application need only be sufficient for the IA to determine objectively that there is a well-founded probability of dumping, injury and a causal link between the two. An applicant cannot be required to present evidence of the quality and quantity necessary to support a preliminary or final determination, but only indications of alleged dumping

and alleged injury. For this reason, during the investigation, which "is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually" (see the Panel report in *Guatemala –- Cement II*), the IA assembles the evidence it needs to determine whether dumping, injury and a causal link do indeed exist.

6. In that context, the Mexican IA considered that the application submitted by the domestic industry for initiation of an investigation included reasonably available information and sufficient evidence of dumping, injury and a causal link between the two.

7. With regard to evidence in the application concerning normal value, we feel particular attention should be drawn to the following:

i. By definition, the normal value of a product has to be linked not to a specific exporter but to the domestic market. We cannot find a single ADA Article which suggests that normal value must be determined on the basis of documents issued by the exporters specified in the application. Guatemala's argument to that effect is without merit.

ii. In reply to a specific question from the Panel, Guatemala stated that, at the pre-initial stage, it did have to use information on normal value from Tubac to determine whether or not to initiate the investigation, because it is the exporters – not the countries – which provide information on their sales, and that, in accordance with Article 6.10 of the ADA, dumping margins are calculated on an individual basis. However, Article 6.10 relates not to the pre-initial stage but to calculation of dumping margins during the investigation itself, that is to say, the second stage. Dumping margins are, indeed, calculated on an individual basis during the investigation, but this is unrelated to the documents on normal value taken into consideration prior to the initiation of the investigation. To assert that information on normal value at the pre-initial stage has to come from the exporters specified in the application is tantamount to saying that the application has to include evidence of dumping in the quantity and quality necessary to support a preliminary or final determination, since every exporter's data is required for the calculation of its own individual margin of dumping during the investigation.

iii. As to Guatemala's contention that the evidence on normal value was not sufficient because it was not representative of the full range (that is to say, all categories or codes) of the product under investigation, it should be pointed out that, as the panel in *US – Softwood Lumber* rightly held, in order to initiate an investigation, there is no need for specific evidence for each category of product included in the scope of the subject product. This is consistent with the aforementioned criteria for the evidence required at the pre-initial stage.

iv. Furthermore, Guatemala's standard is at odds with the Panel's finding in *Guatemala – Cement II* that more detailed information can be assembled during the investigation – the process where certainty on the existence of injury is reached gradually – in order to issue a determination.

8. With regard to the data provided in the application on import volumes, the following is worthy of special mention:

i. Guatemala questions whether the volume of allegedly dumped imports cited by the applicant corresponded to all imports under tariff subheadings 7306.30.01 and 7306.30.99 of the Tariff established under Mexico's General Import Duty Law (*Tarifa*

de la Ley del Impuesto General de Importación, TIGI), yet it acknowledges that other types of pipes and tubes which could also enter the country under these subheadings were excluded from the investigation.

ii. Given the way in which goods are classified under the Harmonized System or a system with more digits (up to eight in the case of Mexico), it is perfectly understandable that the technical descriptions of a product may not correspond entirely to the tariff descriptions. In other words, it is impossible to have a tariff subheading for each specific product. For this reason, the information available at the pre-initial stage of an investigation corresponds to the volumes of goods imported under each tariff subheading. Requesting that such information be presented in any other way would render initiating an investigation virtually impossible.

iii. At the pre-initial stage of the Guatemalan pipes and tubes case, Mexico had information on the volume of imports under tariff subheadings 7306.30.01 and 7306.30.99 of the TIGI and stated that there were sufficient indications of "alleged injury" according to Article 5.2 of the ADA and that they were relevant in terms of reflecting the trend in the volume of allegedly dumped imports, in accordance with the standard established in Article 5.1 of the ADA. To submit that information on import volumes has to be as detailed at the pre-initial stage as Guatemala asserts also amounts to stating that the application has to include evidence of injury in the quantity and quality necessary to support a preliminary or final determination, contrary to the WTO case-law and all logic.

iv. The proper approach therefore is to assemble sufficient information to determine whether there are indications of alleged injury; and to gather more detailed information during the investigation – the process where certainty on the existence of injury is reached gradually – in order to issue a determination. For this reason, the standard advocated by Guatemala is also at odds with the ruling by the panel in *Guatemala - Cement II*, as mentioned above.

9. Accordingly, the evidence and data provided in the application constitute the information which is reasonably available to the applicant and can indeed constitute elements from which alleged dumping and alleged injury by Guatemalan exporters and the causal link between the two can be inferred, which meets the standard provided for in the ADA itself and the relevant WTO case-law.

10. Regarding examination of the evidence in the application the following should be noted:

i. As stated in the Panel report in *EC – Bed Linen*, there can be no claim of breach of Article 5.3 of the ADA for failure to examine the accuracy and adequacy of evidence in an application if the information in the application was sufficient to initiate the investigation. The reason is that Article 5.3 of the ADA says nothing of the nature of the examination or the procedures it must follow. Consequently, if the evidence in the application is sufficient to initiate an investigation and the investigation is subsequently initiated, it should be inferred that the IA did examine the accuracy and adequacy of the evidence.

ii. It should also be pointed out that the SE, in reviewing the data and evidence provided in the application, saw fit to issue a request for further information from the applicant ("*prevención*"), in order to clarify and/or supplement certain information required under Article 5.2 of the ADA. This request, made on 11 June 2001 by means of Official Communication UPCI.310.01.1179/2[1], required the applicant to submit

[1] See Official Communication UPCI.310.01.1179/2. Exhibit GTM - 2 submitted by Guatemala.

information which the IA felt was necessary to determine whether or not the initiation of an investigation was appropriate.

iii. In other words, there are no grounds for asserting that the IA failed to examine the accuracy and adequacy of the evidence in the application when the evidence actually was sufficient and when, moreover, the IA issued the above-mentioned "prevención".

iv. In the case of the pipes and tubes from Guatemala, for the reasons set out in the previous paragraphs, Mexico considers that the evidence in the application and the response to the "prevención" was indeed sufficient to demonstrate alleged dumping, alleged injury and a causal link between the two. The examination of accuracy and adequacy should therefore be considered to have been carried out properly.

11. Mexico notes that, in its responses to the Panel's questions following on from the first substantive meeting, Guatemala argues that its claims under Article 5.8 of the ADA derive from those made under Article 5.2 and 5.3 of the ADA, considered both individually and as a whole. In Guatemala's view, Article 5.2 lays down obligations relating to the content of an application while Article 5.3 refers to the examination of evidence. Therefore, it says, if an application fails to meet the requirements of Article 5.2 and the IA initiates an investigation, this will be contrary to Article 5.2 and 5.3 of the ADA and consequently Article 5.8 as well.

12. In Mexico's view it follows from the above reasoning that Guatemala's claim regarding these Articles taken as a whole would be groundless if it were demonstrated that neither Article 5.2 nor Article 5.3 of the ADA has been violated. Accordingly, in the light of our arguments we respectfully request that if Mexico demonstrates the foregoing, the Panel deem this part of Guatemala's claim to be without foundation.

13. In Mexico's view, an IA cannot be charged with breach of Article 5.2 of the ADA. Article 5.2 is an exception within the ADA, since it establishes obligations for the applicant for an investigation – not for an IA. Mexico therefore fails to understand how Guatemala can claim that it has violated Article 5.2 of the ADA. In interpreting and applying the law it must be made clear to whom the provision imposing an obligation applies. In this case, there is no onus whatever on the IA, so it cannot be argued that some non-existent obligation has been breached.

14. Furthermore, it is important to bear in mind that the obligation Article 5.2 imposes on the applicant is to provide such information "as is reasonably available". Guatemala has failed to demonstrate that the information provided in the application was not the information reasonably available to the applicant. We fail to see how such a claim can be upheld, and without a shred of evidence to boot. In this case it is for Guatemala, as complainant, to prove its claim.

15. We must point out that we disagree with Guatemala's interpretation of the scope of Article 5.3 of the ADA. In our view, an IA may indeed gather additional information to that provided in the application in order to establish the factual basis on which to make its determinations. In fact, the only way in which an IA can verify the accuracy, adequacy and sufficiency of the information provided in the application is precisely by gathering additional data, for example, from the SICMEX as Mexico did here.

16. Besides, even though there are no specific guidelines as to when the application should be deemed to contain such information as is "reasonably" available to the applicant, we repeat that such evidence clearly need not necessarily have to be of the quality that would be necessary to support a preliminary or final determination. It is also clear that such evidence need be no more than data or information, that is, indications that support the allegations of dumping, injury and causal link and which prove on review, conducted pursuant to Article 5.3 of the ADA, to be sufficient for the IA to

initiate an investigation, given that such indicators form the basis for initiating an investigation, not imposing anti-dumping duties.

ARGUMENTS IN SUPPORT OF THE CLAIMS RELATING TO THE PRODUCT UNDER INVESTIGATION AND THE LIKE PRODUCT

17. Mexico regards the fact that Tubac did not object to the inclusion of pipes and tubes of up to six inches in diameter as an important point. As stated in our rebuttal, if an interested party gave express consent to or tacitly accepted an assertion, circumstance or determination, the IA should treat such acceptance as valid. With tacit endorsement of the definition of the product at issue, the IA had no reason to disregard pipes and tubes of up to six inches in diameter.

18. In any case, consent from the interested parties lends greater objectivity and relevance to the definition in question. Concerning the above, it is important to emphasize that, in paragraph 100 of its responses, Guatemala indicates that "Article 2.1 of the Agreement does not prohibit minor changes to the product at issue during the course of the investigation", which bears out Mexico's interpretation.

19. Mexico respectfully requests that the Panel find that Guatemala is pressing a number of arguments on non-existent grounds. Since the ADA provides no specific guidance on certain points, these, it must be assumed, are open to more than one valid interpretation. We therefore consider that the IA acted in conformity with the ADA.

20. Mexico also emphasizes once again that Tubac had the opportunity to supply additional information in its replies to the IA's requests for information, which Mexico took into account in its preliminary and final resolutions and in the on-the-spot investigation, the public hearing and the stage of the pleadings.

21. As regards Guatemala's Article 1 and Article 18.1 claims, Mexico considers that there was no violation of the provisions in question. On the other hand, even assuming for the sake of argument that there had been some contravention of these Articles, this would not necessarily imply that Mexico had to revoke the measure since, in Mexico's view, the Panel should leave it up to the Member which implemented the inconsistent measure to choose how it will bring its measure into conformity with the WTO Agreements, in accordance with Article 17.6(ii) of the ADA.

MEXICO APPLIED THE FACTS AVAILABLE IN CONFORMITY WITH THE ANTI-DUMPING AGREEMENT

22. With regard to the use of the facts available, it is not worth recalling that the data submitted by the exporter in the investigation could not be considered reliable, complete, accurate and precise, because in the on-the-spot investigation the IA found inconsistencies with the data previously supplied by Tubac, which made the company's information virtually unusable.

23. Regarding Guatemala's response to Panel question 103 that "on that assumption Economía would be acting in a manner inconsistent with Article 6.7 of the Agreement", Mexico is of the opinion that Article 6.7 of the ADA requires only that the results of the on-the-spot investigation be made available to the parties or that the parties to be informed thereof; it does not require the information disclosed to the parties concerning the on-the-spot investigation to contain the IA's full analysis of the investigation proceedings.

24. The detailed record refers to what occurred during the on-the-spot investigation but not to the IA's evaluation and analysis of all the information verified. It certainly does not constitute a thorough and exhaustive analysis of that information.

25. Accordingly, if Tubac knew that there were discrepancies between the data it had submitted to the IA and those obtained in the on-the-spot investigation but did nothing to clarify the information, it was logical for the IA to proceed on the basis of the facts available as indicated in the detailed record of the on-the-spot investigation.

26. There are consequently no grounds for contending that the SE acted inconsistently with Article 6.7 of the ADA, since there are no inconsistencies between the final resolution and the outcome of the on-the-spot investigation as Tubac was duly advised of the discrepancies in its data and warned of the possibility of the facts available to the IA being used.

27. Mexico fails to understand how the claims under Article 6.7 of the ADA can be subsidiary to those under Article 6.8 of the ADA since we see no connection whatsoever. Guatemala's claim is therefore unclear and consequently we request that it be dismissed.

28. We also find quite implausible Guatemala's excuse of an "involuntary error" in respect of the request by Tubac's legal representative for access to the confidential version of the record.

29. Furthermore, Guatemala has submitted no evidence that Tubac's representative was denied access to the confidential record and even asserts that access was never requested. If Guatemala is contending that access is not in itself material since Mexico did not comply with Article 6.5 of the ADA, we can assume that it is dropping its claim that the SE undermined the exporter's ability to defend itself against the allegations of dumping.

30. If we assume for the sake of argument that Tubac never did request access to the confidential version of the record, then Tubac would have no grounds for pleading impairment of its right to defence because in such case it would be Tubac that failed to assert its right.

31. Reverting to Guatemala's argument that the exporter was not notified that its information had been rejected, we believe it important to refer to Mexico's explanation regarding the content of the record of the verification visit, because that is where the exporter was advised of the use of the facts available.

32. We emphasize that since Annex II to and Article 6.9 of the ADA contain separate obligations, it cannot be taken that there was a cumulative breach of both provisions. We would add that Tubac did not provide access to the necessary information, let alone provide information within a reasonable period, which significantly impeded the investigation. Consequently, the IA had to make use of the facts available; this has nothing to do with Article 6.9 and is not a breach of paragraph 6 of Annex II to the ADA.

CLAIMS RELATING TO THE DETERMINATION OF INJURY

CHOICE OF THE PERIOD OF INVESTIGATION

33. We emphasize that, as said in our written submissions, the rice case was based on entirely different considerations from those analysed here, so Guatemala's assertion is without foundation. Since the assumptions are entirely different and Guatemala has provided no new arguments, it has failed to make a *prima facie* case of violation by Mexico in the terms indicated.

34. Solely for the purpose of making matters clearer for the Panel as to why it should consider that Tubac did not object to the choice of the period of investigation, it should be noted that, contrary to what occurred in *Mexico – Rice*, Tubac had no objection to the choice made and requested only that the IA clarify that the investigation period did indeed span the period from 1 July to 31 December 2000. This should be regarded as consent on the part of the exporter.

35. In Mexico's view, this is an issue which the Panel could well take into account, because an IA is required to evaluate all evidence that comes to light in the course of an anti-dumping investigation and to use it as the basis for its determination. Various ADA Articles give preference to first-hand information, which is precisely that provided by the parties (see paragraph 7.238 of the final Panel report and paragraphs 288 and 289 of the AB report in *Mexico -- Rice*). The fact that acceptance by an interested party is an element that cannot be challenged must therefore be taken into account. It is a general principle of law that there is no reason to disregard a party's consent. Since there was tacit agreement to the choice of the investigation period, the IA saw no reason to change it.

36. Furthermore, the circumstances set forth in our written submissions were genuine impediments to the use of a more recent period of investigation. If we look at the time-frame of the sequence of events, the delay that Guatemala alleges is a breach of the ADA was perfectly reasonable. The investigation period was indeed as close as practicable to the initiation date. And the lapse of time between the period under investigation and the initiation does not amount to a delay such as to cast doubt on the relevance of the investigation period. If the problem with the remoteness of data is that they may no longer be relevant, it must be demonstrated on a case-by-case basis that the data cannot be used. Guatemala has produced not the slightest evidence of a *prima facie* presumption of violation, but merely unfounded assertions. Nor has it substantiated its allegation that the applicant could have presented more recent information, as we pointed out in our rebuttal.

37. With all due respect, we would consider it most unfortunate for the dispute settlement system if this Panel were to find a *prima facie* case of violation without one iota of supporting evidence.

CHOICE OF HALF-YEAR PERIODS FOR THE PURPOSES OF INJURY ANALYSIS

38. We consider that the use of comparable periods for the purposes of injury analysis eliminated any potential distortions, and the SE was thus able to make a proper comparison of the information relating to the investigation period and that pertaining to previous comparable periods. A reading of the final resolution shows that consumption of the product under investigation basically depends on performance in the construction and manufacturing sectors (which very probably depends to a large extent on growth in expenditure and investment in the domestic economy). It is therefore difficult to foresee a pre-defined pattern (as is possible with, say, agricultural products, including rice) for the second half-year period of each year. In order to avoid seasonal or cyclical tendencies or fluctuations in economic indicators (such as price indexes or GDP), it is customary to compare identical periods which are consistent with the period of investigation as well.

39. Thus, if the SE had found that the indicators for July-December 1998, 1999 and 2000 showed a negative trend in the domestic industry but had been identical (with no variations), a determination of injury would not have been made, even if the period from July to December had been less favourable for the domestic industry than January to June.

40. Regarding the level of import penetration for each of the six-month periods of each year, it is not right in Mexico's view to say that the July-December period of each year is that of maximum penetration. We repeat that it is necessary to take a thorough look at the resolutions of the investigation, which show that dumped imports were definitely on the rise, including after a purging of data in favour of more accurate information. Hence there was no bias in the "selection" of half-year periods for the purposes of injury analysis. In Mexico's opinion, Guatemala has no objective grounds for suggesting, let alone claiming, that the periods were "selected". This would be tantamount to assuming that the SE knew beforehand that, once it had obtained the import declarations (*pedimentos*) and invoices for the imports from Guatemala for the six-month periods of the three years under analysis, the results of the analysis would reveal a significant growth in imports, or that the outcome of all the inquiries conducted throughout the course of the investigation would confirm injury to the domestic industry, which is practically impossible.

41. Confirmation of Guatemala's lack of evidence can be found in response 40 to the Panel, in which Guatemala acknowledges that it has no data for performance of the industry or imports in the first six months of each year used for the purposes of injury analysis. In other words, it does not know whether there actually was higher or lower import penetration and hence whether or not the analysis was objective in this respect. Therefore, it has no evidence to support its claim and has not established a *prima facie* case of violation by Mexico.

DOMESTIC INDUSTRY

42. According to Article 4.1 of the ADA, there are two ways of complying with the obligation to examine the domestic industry: by examining the producers as a whole, or by examining a significant portion of the producers.

43. Article 5.4 of the ADA provides guidance for determining whether the domestic producers as a whole that apply for initiation of an investigation can be considered sufficient for the application to be regarded as having been made "by or on behalf of the domestic industry". Thus, if an application is filed by a domestic producer accounting for more than 50 per cent of total production expressing either support for or opposition to the application, the investigation shall be considered to have been requested by the domestic industry, and the full examination for the purposes of injury determination can therefore focus exclusively on that producer without this being regarded as a lack of objectivity.

44. Guatemala appears to contend that under Article 4.1 of the ADA, once it has been determined whether the producers as a whole or a significant portion thereof are to be regarded as the domestic industry, the IA should strictly confine itself to the data concerning the producers as a whole or, as the case may be, the significant portion of the producers. In fact, there is nothing in the ADA to support Guatemala's interpretation. Such a rigid approach would actually imply that if the domestic industry were made up of a significant portion of the producers, and data were subsequently obtained concerning the domestic industry as a whole, the additional data would have to be disregarded, which is unacceptable.

VOLUME AND PRICE EFFECT OF THE IMPORTS UNDER INVESTIGATION

45. Guatemala starts from the premise that, as far as it understands, the SE had two sources for obtaining positive evidence on the volume of imports, namely the importers and customs, and that by opting not to use the second source, Mexico acted in a manner inconsistent with the ADA, as the importers did not send all the information requested by the IA. We emphasize that it is wrong to say that the importers alone were asked by the SE to provide data on the volume of imports, because the SE also requested documents from customs agents. It is not true that the IA used only one source of information and disregarded the other available source; Guatemala's assertion is therefore unfounded.

46. In an investigation, the IA has to find the most appropriate way of collecting information. One of the key factors in this process is objectivity on the part of the IA, which has to determine whether certain decisions are appropriate in the light of their likely consequences, relying for this on its practical experience.

47. In this case, the IA decided not to request information from the customs authorities, because it knew from long-standing experience that it would take too long to receive a reply, which would have affected the time-frame of the investigation with the attendant risk of violating Article 5.10 of the

ADA. A case in point is the dispute involving brushes from China.[2] Another is that involving valves from the US. The IA therefore considered it appropriate to consult both importers and customs agents.

48. With regard to the financial analysis conducted by the IA, the main factors in the downward trend of operating profits were the reduction in total sales income and the increase in total operating expenditure, and that is why our First Written Submission makes no reference to the increase in costs and consequent adverse impact on operating profits, as is indicated by Guatemala. In other words, during the period July-December 2000, for Hylsa DAT the cost of goods sold declined by 13.2 per cent, and this led the SE to consider that the behaviour of these costs was not a factor influencing the decline in profits over the period in question.

ARGUMENTS IN SUPPORT OF PROCEDURAL CLAIMS

49. With regard to the procedural claims, we are struck by the factual and legal contradictions and inaccuracies in Guatemala's replies.

50. As far as Mexico's alleged violations of Article 6.5, 6.5.1 and 6.5.2 of the ADA are concerned, Guatemala, in its responses, now states that, under the ADA, the mechanism for providing access to confidential information is the submission of non-confidential summaries; that Tubac's legal representative was unable to satisfy the conditions laid down by Mexican legislation for accessing confidential information; and that, notwithstanding the above, the question of access to confidential information is immaterial to its claims under Article 6.5 of the ADA.

51. We note here a contradiction in Guatemala's statements concerning Article 6.5 of the ADA. On the one hand, by virtue of its rights under the ADA, it claims that the provision of public summaries is the mechanism that can be used for accessing confidential information, while on the other hand, it states that the issue of access to confidential information is irrelevant for the purposes of its claims under Article 6.5 because that Article does not govern access to information.

52. It is strange that Guatemala should claim that it was not granted access to the content of the confidential information and then go on to state that the issue of access to confidential information is irrelevant since in any event, the question of access apart, Mexico failed to comply with its obligations under Article 6.5 of the ADA.

53. As we already pointed out in our rebuttal, as the Panel held in *Argentina – Ceramic Tiles*, paragraph 6.38, the purpose of Articles 6.5 and 6.5.1 of the ADA is to provide a mechanism that allows the parties to be informed of the content of confidential data, while at the same time safeguarding the interests of the parties that supply such data.

54. Thus, since the primary objective is that the parties should be acquainted with information supplied on a confidential basis, the best approach in Mexico's view is to focus on determining whether the rules laid down in Mexican legislation concerning access to confidential information constitute an adequate mechanism for exporters to acquaint themselves with the information.

55. In that connection, and assuming, for the sake of argument, that the record of the investigation on standard pipes and tubes contained no public summaries of any information submitted by the applicant (which, as pointed out below, is not the case), the obligation under Article 6.5 of the ADA would in any event be satisfied since, as explained in our written submissions, the Mexican legal

[2] The customs authorities were asked to provide import "pedimentos" with the corresponding invoices, but it took about three months for the Mexican authority to receive 30 "pedimentos" along with the invoices (such requests can take even longer depending on the relevant department's workload).

system gives interested parties access to all confidential information, provided that the requirements laid down for granting such access are met.

56. Furthermore, the shift in Guatemala's line of argument, whereby it now claims that access as such is irrelevant, carries with it an implied acknowledgement that it was in fact possible for the Guatemalan exporter to consult all the confidential information and data, at any point in the investigation if it saw fit in the interests of a proper defence. This means that Tubac's defence rights were not undermined. Any argument to that effect is therefore without foundation.

57. As to whether Mexican legislation on access to confidential data allows the parties to be informed of the data's content, it is illogical that Guatemala should find the Mexican system to be wanting in that respect, when it acknowledges in its own responses and in the statement by Ms Mejía that no such access was even requested. It thus appears to be arguing that the Mexican system falls short of the ADA because it had no access to confidential information – not having sought access – and that this is a violation of the ADA for which the IA is to blame.

58. An interested party which, having a right, fails to exercise it will alone bear the blame for any resulting injury. Thus, the consequence of not requesting access is entirely of Tubac's making. Moreover, Guatemala itself forfeited that argument when it stated that access to confidential information is irrelevant as such for the purposes of its claims. For these reasons, we consider that Guatemala's claims are devoid of all merit and therefore respectfully ask the Panel so to determine.

59. We are also struck by Guatemala's assertion that Economía did not request non-confidential summaries from the applicant, since, as was shown in paragraph 209 of our rebuttal, all the submissions of the parties, including those of Hylsa, were accompanied by their non-confidential versions, thereby enabling the parties to see the contents of the evidence and submissions of the other parties and what information was classified as confidential. Thus, Tubac did have the elements it needed to ascertain the content of the confidential information and the possibility of requesting access in case it needed any of the data or information contained therein. The IA did not deny Tubac the possibility of seeing the information it needed for its defence since public summaries existed of all confidential information and it was possible to access the confidential records.

60. Likewise, concerning confidential treatment for Hylsa's submission of 17 September 2002 and the alleged lack of a public summary, contrary to what is asserted by Guatemala, a non-confidential summary of that submission did exist, in addition to which, as mentioned in our rebuttal, Hylsa sent that summary to Tubac's legal representative. We therefore request the Panel to dismiss this argument by Guatemala.

61. Furthermore, it should be noted that, throughout this dispute, Guatemala has repeatedly assumed (see, for example, points 251 and 260 of its First Written Submission and Reply 23) that because some factual aspects of the investigation into Guatemalan pipes and tubes are similar to those examined in other disputes to which Mexico has been a party it is enough merely to cite the AB and Panel reports in those cases to demonstrate that Mexico acted in a manner inconsistent with the ADA.[3] A number of concerns must be raised in this connection:

62. Firstly, it is a matter of some concern that Guatemala does not wish this Panel to conduct an "unbiased and objective evaluation" of the facts of this case. As the Panel is aware, the fundamental principle of law that "the burden of proof lies with the party making the assertion" has been applied

[3] This has been pointed out by Mexico on a number of occasions, see, for example, its oral statement at the first meeting.

on more than one occasion by the AB. By way of example we cite *US – Shirts and Blouses* (WT/DS33/AB/R)[4], *EC – Hormones*[5] and *Japan – Agricultural Products II.*[6]

63. From this it ensues that it is not permissible to contend before this Body, by way of a mere syllogism, that a certain investigation was illegal and because the present investigation is similar, it too is illegal. The facts of this case must be examined and assessed on their own merits. In this dispute, however, Guatemala has failed to produce a single piece of evidence to sustain its assertions.

64. We therefore consider that to accept Guatemala's argument would be to set a dangerous precedent whereby an IA that has been the subject of an unfavourable dispute settlement ruling would thereafter be considered a "systematic offender" against the ADA.

65. Guatemala is hoping to obtain a favourable ruling, not only by seeking to prevent the Panel from making an objective assessment of the challenged measure, but also by using arguments which simplify to an extreme the similarities between the above-mentioned investigations. As we have repeatedly pointed out in our written and oral submissions, this investigation into steel pipes and tubes is not the same as the investigation into rice and certainly not the same as that conducted by Guatemala into Mexican cement. The following points illustrate this:

(a) In the US rice case, the lapse of time between the end of the investigation period and the initiation of the investigation was 15 months. Here, it was only eight months, which, as has already been explained, is not such a time span as to give rise to a presumption that the data from the investigation period are no longer relevant (in addition to which Guatemala has not submitted data which suggest that the information corresponding to the investigation period was no longer useable);

(b) In the rice case, in its analysis of the information in the application for initiation of an investigation the SE was not as exhaustive as it was in the Guatemalan pipes and tubes case. This is reflected by the fact that – as has already been stated – saw a need to issue a request "prevención" for the applicant to submit the technical information the IA deemed necessary to determine the feasibility of initiating the investigation; and

[4] " ... the party who asserts a fact, whether the claimant or the respondent, is responsible for providing proof thereof. ... the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."

[5] "109. In accordance with our ruling in *United States – Shirts and Blouses*, the Panel should have begun the analysis of each legal provision by examining whether the United States and Canada had presented evidence and legal arguments sufficient to demonstrate that the EC measures were inconsistent with the obligations assumed by the European Communities under each Article of the *SPS Agreement* addressed by the Panel, i.e., Articles 3.1, 3.3, 5.1 and 5.5. **Only after such a *prima facie* determination had been made by the Panel may the onus be shifted to the European Communities to bring forward evidence and arguments** to disprove the complaining party's claim." (Citations omitted.) (Emphasis added.).

[6] "129. Article 13 of the DSU and Article 11.2 of the *SPS Agreement* suggest that Panels have a significant investigative authority. However, **this authority cannot be used by a Panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it.** A Panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU and, in an SPS case, Article 11.2 of the *SPS Agreement*, to help it to understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party". (Emphasis added.)

(c) As stated in the preceding paragraph, no "prevención" or other request for information or any other kind of administrative act was issued by the SE in the rice case. Such matters are time-consuming and are therefore partly responsible in the present case for the time span between the end of the investigation period and the initiation of the investigation being slightly longer. And unlike in the Guatemalen pipes and tubes dispute, in the rice case there was no need to establish a time limit for the applicants to respond to a "prevención" for the SE to analyse that response.

66. In the rice case, the AB found that Mexico had acted inconsistently with the ADA in that it had accepted the period of investigation proposed by the applicants in the knowledge that this period had been proposed because it allegedly reflected the highest penetration of exports.

67. Mexico seeks only procedural justice. We would ask that the Panel determine a *prima facie* case of violation by Mexico only if Guatemala demonstrates cogently that the IA failed to establish the facts or misconstrued the ADA and if, in addition, Mexico is unable to refute such claims. Needless to say, not a single Guatemalan claim fulfils this requirement.

68. We therefore request that, in view of the discrepancies and erroneous assertions in Guatemala's pleadings, the Panel dismiss Guatemala's claims in the light of Mexico's present rebuttal of each and every one of them, since they constitute neither objective evidence nor *prima facie* presumptions of violation by the SE.

69. For the above reasons, we consider that Guatemala's claims regarding the definitive anti-dumping measure imposed on imports of steel pipes and tubes from Guatemala must be dismissed and therefore request that this Panel confirm that the anti-dumping investigation and the initiating, preliminary and final resolutions in this case were issued in conformity with the ADA.

70. Lastly, we remain at your disposal to answer any further questions you may have and thank you once again for your attention.

ANNEX D-5

CLOSING STATEMENT OF GUATEMALA
SECOND MEETING

(9 November 2006)

Introduction

1. Mr Chairman, members of the Panel and members of the Secretariat, we wish to thank you for affording us the opportunity to deliver this closing oral statement.

2. Without prejudice to Guatemala's rebuttals of Mexico's arguments during these proceedings, we should like to take this opportunity to clarify some issues addressed by Mexico in its oral statement yesterday.

3. With regard to the examination of the accuracy and adequacy of the evidence provided in the application, Mexico submits that the fact that Economía issued a *prevención* (request for further information) indicates that it assessed the accuracy and adequacy of the evidence submitted.[1] As far as Guatemala is concerned, the mere fact of requiring information by means of a *prevención* is not in itself proof that such an examination was carried out. Thus, for example, the *prevención* to which Mexico refers contains not only requirements relating to the evidence provided in the application for initiation of an investigation, but other provisions that have to be met such as furnishing non-confidential summaries of information submitted in confidence.[2] It should also be pointed out that, in the light of a number of questions in the *prevención* regarding the accuracy and adequacy of the evidence provided in the application[3], Economía could have been expected, in its Initiation Resolution, to confirm the evaluation of such accuracy and adequacy on the basis of Hylsa's responses to this *prevención*. Economía, however, made no determination on the sufficiency of the evidence in this sense.

4. Mexico states that an investigating authority may indeed gather additional information to that provided in the application in order to establish the factual basis on which to make its determinations.[4] Guatemala wishes to clarify that there is a difference between (i) gathering information to *verify* the accuracy and adequacy of the evidence provided in the application and (ii) using this information to *remedy* factual deficiencies in such evidence. Guatemala is of the opinion that the latter would not be permitted under the Anti-Dumping Agreement.

5. Mexico also states that, given Tubac's tacit endorsement of the definition of the product at issue, Economía had no reason not to consider pipes and tubes of up to six inches in diameter[5], and that Guatemala indicates that Article 2.1 of the Agreement does not prohibit minor changes to the

[1] Second Oral Statement of Mexico, paragraphs 10(ii) and (iii).

[2] Official Communication UPCI.310.01.1179/2 of 11 June 2001 (Exhibit GTM-2).

[3] Ibid., questions 3 and 4 with regard to information on the import volumes under investigation and questions 17 to 21 with regard to evidence on the normal value of the products under investigation.

[4] Second Oral Statement of Mexico, paragraph 15.

[5] Ibid., paragraph 17.

product at issue during the course of the investigation, which shows that Mexico's interpretation in this respect was correct.[6] In Guatemala's view, it is plain from Mexico's argument that the decision to include standard pipes and tubes of up to six inches in diameter was based on statements by the parties (a mere assertion by the applicant and the absence of any objection by the exporter) and not on the facts or *positive evidence* in the record. Furthermore, the fact that Article 2.1 of the Agreement does not prohibit minor changes to the definition of the product does not exempt Economía from issuing questionnaires and requesting information enabling it to examine the products subsequently included in the scope of its investigation.

6. With regard to use of the facts available, Guatemala would like to comment briefly on Mexico's response to Panel question 107, for which a blank space had been left on pages 79 and 80 of the document dated 3 October 2006 containing Mexico's responses to the questions posed by the Panel, and which was finally circulated at the beginning of this meeting. Given the late submission of this response, Guatemala would like to reserve its right to make further comments thereon on a future occasion.

7. Guatemala has already explained in sufficient detail that the record of the verification visit contradicts the reasons adduced by Economía in paragraph 80 of its Final Resolution as the basis for its rejection of all the information submitted by the exporter and for its use of the facts available to determine the various dumping margins for the exporter under investigation.[7] In its response to question 107, Mexico gives cross references to parts of the verification visit record and its assertions in paragraph 80 of the Final Resolution. However, a review of the references merely confirms Guatemala's argument that the verification visit record does in fact contradict Economía's findings in paragraph 80 of its Final Resolution.

8. Annex 1 to this oral statement contains a table detailing the references provided by Mexico. What can be ascertained from this table is that there is no finding in the verification visit record to support the first reason adduced by Economía for rejecting the information provided by the exporter. With regard to the other grounds given in paragraph 80, the table reveals that, contrary to what is stated in paragraph 80, Economía's verification team found no or only minimal inconsistencies and, where inconsistencies were found, the exporter was able to review and rectify the information to the satisfaction of the verification team.

9. Thus, for example, in its response to question 107, Mexico refers in particular to the discrepancies found in the physical difference adjustment figures. But it fails to mention that according to page 10 of the verification visit record, "the SE requested that *calculations in relation to cost differences be based on the cost sheets that had been validated and used for constructed value. The company used this methodology to calculate the new figures for physical differences* …"[8] This suggests that Economía had at its disposal reliable information on the physical difference adjustment, as verified by the investigation team during the inspection visit. Furthermore, Mexico fails to explain how it conducted, or which part of the inspection visit record contains, its assessment of the relevance of using the exporter's information for goods for which there were domestic sales of products with identical codes and for which there was therefore no need for physical difference adjustments.

10. Moreover, Mexico has implied that the calculations for physical differences were based on new information which was not provided by the exporter in its responses to the exporters'

[6] Ibid., paragraph 18.

[7] First Written Submission of Guatemala, paragraphs 191-218.

[8] Exhibit GTM-15, page 10.

questionnaire. However, we note that the paragraph to which Mexico refers clearly states that these calculations were based, at Economía's request, on the cost sheets that had been validated and used for constructed value. It is clear from what the verification visit record says on constructed value (pages 14 and 15) that this information was that originally submitted by the exporter and verified without any problem by Economía.

11. Lastly, in its oral statement at the beginning of this meeting, Mexico suggested that the exporter was warned in the detailed record of the verification visit that the facts available could be used if it failed to provide the relevant clarifications within five days of the record being issued. Page 16, paragraph 1, of the record to which Mexico was apparently referring (i) makes no mention of any finding by Economía during the verification visit which indicates that the exporter either did not cooperate or failed to furnish the necessary information; and (ii) seems to use the standard wording of all verification visit records prepared by Economía. The exact same wording is in fact used at the end of the record of the verification visit to the Hylsa facilities, which will be submitted by Guatemala with its responses to the Panel questions at this second meeting.

12. As Guatemala has explained, Article 6.8 of and Annex II to the Anti-Dumping Agreement lay down very strict rules as to when and how the investigating authority can apply the facts available.[9] Mexico's reply to question 107 provides no justification whatsoever for Economía's actions in any of the aspects on which recourse to the facts available was based.

13. Mexico states that Guatemala has not presented *prima facie* evidence that the periods selected for injury analysis are inappropriate.[10] Guatemala considers Mexico's assertion to be quite simply wrong. According to the legal standard for determining the investigation period, either the most recent such period must be used or else the investigating authority must explain why use of the most recent period would not be feasible or appropriate.[11] The burden of proof for a complainant consists in demonstrating that the investigating authority has not used the most recent period on which information was available or that the investigating authority failed to establish the reasons why recourse to this period would not be feasible or appropriate. Guatemala has succeeded in demonstrating both aspects.[12] It has therefore managed to establish a *prima facie* case of violation of Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement relying on the use of a remote investigation period.

14. The legal standard here is not, as Mexico claims, conditional upon the complainant's demonstrating how the outcome would have differed had injury information relating to the most appropriate period been used. To require a complainant to gather its own information on injury in order to demonstrate the inappropriateness of a remote period would be an unsustainable demand.

15. With regard to the definition of the domestic industry, Mexico states that if an application is filed by a domestic producer accounting for more than 50 per cent of total production expressing either support for or opposition to the application, the full examination for the purposes of injury determination can focus exclusively on that producer without this being regarded as a lack of objectivity.[13] Guatemala, however, notes that Economía did not define the domestic industry on the

[9] First Written Submission of Guatemala, paragraphs 174 to 187.

[10] Second Oral Statement of Mexico, paragraphs 36 and 37.

[11] Article 3.1 of the Agreement as clarified by the Appellate Body in its Report on *Mexico - Anti-Dumping Measures on Rice*, paragraph 165.

[12] First Written Submission of Guatemala, paragraphs 245 to 254, and Response by Guatemala to Panel question 23.

[13] Second Oral Statement of Mexico, paragraph 43.

basis of the applicant *alone*, but also included in its definition the other three companies which made up the domestic industry as a whole. Furthermore, even assuming that it had so defined the domestic industry, Economía's injury analysis did not focus solely on this one producer; in some instances, Economía also used different segments of the domestic industry as a basis, as Guatemala illustrated in its first written submission.[14]

16. With regard to the claim relating to confidentiality of information, Mexico states that all the submissions of the parties, including those of Hylsa, were accompanied by their non-confidential versions, thereby enabling the parties to see the contents of the evidence and submissions of the other parties, as well as what information was classified as confidential.[15]

17. In this particular instance, Mexico has made a general and unfounded assertion, but failed to show where the non-confidential summaries of the information on normal value, namely the invoice and price quote, are to be found.

18. Guatemala, for its part, claims that Economía has systematically violated the obligation to require the submission of adequate non-confidential summaries whenever confidential information is provided. This claim refers specifically to the failure to provide non-confidential summaries of the information in the invoice and the price quote submitted by the applicant prior to the initiation of the investigation[16], to Hylsa's reasons as to why structural pipes and tubes should not form part of the investigation[17], and to the evidence and information relating to the inclusion of structural pipes and tubes in the scope of the anti-dumping duty.[18]

19. It is clear from a simple review of the administrative record that a blank sheet does not contain sufficient detail to "permit a reasonable understanding of the substance of the information submitted in confidence". By way of example, some of the parts which were left blank and for which no corresponding non-confidential summary was provided are outlined below:

(a) Annexes 4, 4.1, 5.A, 5.A.1, 5.B, 5.B.1, 6, 7, 8 and 8.A to the application for initiation of an investigation.[19]

(b) Response 3 to Economía's request for further information (*prevención*) by means of Official Communication UPCI.310.01.1179/2, in which the applicant put forward "positions and points of view exclusively specific to the company" in relation to whether or not structural pipes and tubes should be included in the scope of the investigation.[20]

(c) Similarly responses 7, 8, 9, 11, 12, 13, 14 and 15 to the same Official Communication UPCI.310.01.1179/2.[21]

[14] First Written Submission of Guatemala, paragraph 274.

[15] Second Oral Statement of Mexico, paragraph 59.

[16] Application by Hylsa for the initiation of an investigation, Exhibit GTM-1.

[17] Response by Hylsa to Official Communication UPCI.310.01.1179/2, Exhibit GTM-3.

[18] Exhibit GTM-31.

[19] Exhibit GTM-1.

[20] Exhibit GTM-3.

[21] Exhibit GTM-3.

20. The Panel can see from these examples (which are not the only ones) that no "reasonable understanding" of the contents of the information classified as confidential is possible. Guatemala therefore sees no need to repeat the arguments on non-confidential summaries that it adduced in its various submissions and answers to the Panel's questions.

21. Mr Chairman and members of the Panel, thank you. Guatemala hopes that, through its statements, it has been able to provide you with elements that will prove useful to you in reaching an appropriate decision.

Annex

Final Resolution	**Reference provided by Mexico** 7 November	**Reference provided by Mexico** 8 November	**Reference provided by Guatemala**
Paragraph 80-A	None	None	**On the *prueba de totalidad* ("completeness test"):** Page 12, paragraph 4: "No significant differences were found and the explanation and supporting documentation for the figures *were to the satisfaction of the verification team*" (emphasis added); Page 13, paragraphs 1-4: "No significant differences were found." (See paragraphs 192-194 of the First Written Submission of Guatemala.)
Paragraph 80-B	Page 11, paragraph 1, and page 12, paragraph 4	Page 12, paragraph 2; Page 13, paragraph 6; Page 12, paragraph 4; Page 14, paragraph 1	Page 12, paragraph 4: "No significant differences were found and the explanation and supporting documentation for the figures *were to the satisfaction of the verification team*" (emphasis added); Page 14, paragraph 2: "The verification team established that the overall total in the credit note daily log tallied with the accounting records ... and that individual credit note data corresponded to those in the credit note daily log."
Paragraph 80-C	Page 10, paragraph 1	Page 11, paragraph 2	Page 11, paragraph 2. While this paragraph suggests that some problems were encountered with the reporting of domestic sales, Economía subsequently stated, under the title "Prueba de totalidad" (page 12, paragraphs 4-6, and page 13, paragraphs 1-4), that it was able to verify all reported sales without any significant differences being found. Page 10, paragraph 1. This paragraph does not refer to the data reported for four product codes as indicated in paragraph 80-C of the Final Resolution. However, as Guatemala explained in paragraphs 201-202 of its First Written Submission, Mexico has not specified whether problems were encountered in respect of constructed value for the other 28 product codes.
Paragraph 80-D	Page 7, paragraphs 2 and 7	Page 7, paragraph 6, and page 8,	Mexico fails to refer to page 8, paragraph 1, with regard to freight: "The review found no inconsistencies between the information

		paragraph 3	reviewed and that entered in the company's accounting system."
			Page 8, paragraph 3: "a sample of 15 invoices was reviewed ... the figure in US dollars per tonne ... was used to obtain a simple average for freight cost. This figure should replace the average figure for freight reported in the database, *since it corresponds to verified data*."
Paragraph 80-E	Page 8, paragraph 1		Page 8, paragraph 3, see above. Page 9, paragraph 1: "with regard to freight to Costa Rica ... Although the differences between the data are minimal, *the correct information is that which has been verified*" (emphasis added).
Paragraph 80-F	Page 9, paragraph 3	Page 9, paragraph 3	**On insurance**: page 10, paragraphs 1-2: "The endorsements submitted by the two insurance companies establish the amount of the premium applied to the value of the goods transported ... Furthermore [the exporter] reported the value of the sales … to confirm that the sum of the amounts insured with the two companies was similar to the total monthly sales of Tubac S.A." **On physical differences**: page 10, paragraph 3: "the SE requested that calculations in relation to cost differences be based on the cost sheets that had been validated and used for constructed value. *The company used this methodology to calculate the new figures for physical differences* …" (emphasis added).
Paragraph 80-G	Page 9, paragraph 7, and page 10, paragraph 1	Page 11, paragraphs 1-2	**On production:** page 10, last paragraph: "The verification team compared the production volume stated in the production reports with that on the worksheet provided for the verification visit *without finding any differences*. Likewise, the figures for production by product group were checked against the general ledger, *without any differences being found*" (emphasis added). **On installed capacity, domestic sales and export sales to third countries:** See paragraph 217 of the First Written Submission of Guatemala.