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GUATEMALA - ANTI-DUMPING INVESTIGATION REGARDING PORTLAND CEMENT FROM MEXICO

REPORT OF THE PANEL

The report of the Panel on Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 19 June 1998. pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

I. INTRODUCTION

1.1 On 15 October 1996, Mexico requested consultations with Guatemala under Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("ADP Agreement") regarding the anti-dumping investigation carried out by Guatemala concerning imports of portland cement from Cooperativa Manufacturera de Cemento Portland la Cruz Azul, SCL, of Mexico ("Cruz Azul") (WT/DS60/1). Mexico's request for consultations preceded Guatemala's final determination of dumping and consequent injury and the imposition of the definitive anti-dumping duty.

1.2 Mexico and Guatemala held consultations on 9 January 1997, but failed to reach a mutually satisfactory solution.

1.3 On 4 February 1997, pursuant to Article 17.4 of the ADP Agreement, Mexico requested the establishment of a panel to examine the consistency of Guatemala's anti-dumping investigation into imports of portland cement from Mexico with Guatemala's obligations under the World Trade Organization ("WTO"), in particular those contained in the ADP Agreement (WT/DS60/2).

1.4 At the meeting of the Dispute Settlement Body ("DSB") on 25 February 1997, Guatemala stated that it could not join the consensus to establish a panel until certain domestic procedures concerning the investigation had been completed. The DSB agreed to revert to this matter at a later date.

1.5 At its meeting on 20 March 1997, the DSB established a panel in accordance with Article 6 of the DSU with standard terms of reference. The terms of reference were:

> "To examine, in the light of the relevant provisions of the covered agreements cited by Mexico in document WT/DS60/2, the matter referred to the DSB by Mexico 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". (WT/DS60/3)

1.6 Canada, El Salvador, Honduras and the United States reserved their rights to participate in the Panel proceedings as third parties.

1.7 On 21 April 1997, Mexico requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. On 1 May 1997, the Director-General composed the following Panel:

Chairman: Mr. Klaus Kautzor-Schröder

Members: Mr. Christopher Norall
Mr. Gerardo Teodoro Thielen Graterol

1.8 Mr. Christopher Norall resigned from the Panel on 27 June 1997. On 11 July 1997 the Director-General, acting on a request from Mexico, appointed a new member to the Panel. Accordingly, the composition of the panel was:

Chairman: Mr. Klaus Kautzor-Schröder

Members: Mr. Gerardo Teodoro Thielen Graterol
Mr. José Antonio S. Buencamino

1.9 The Panel met with the parties on 28/29 July 1997 and 13/14/15 October 1997. It met with third parties on 28 July 1997.

1.10 On 30 July 1997, the Chairman of the Panel informed the DSB that the Panel would not be able to issue its report within six months of the agreement on the composition and terms of reference of the Panel. The reasons for the delay are set out in WT/DS60/5.

1.11 The Panel submitted its interim report to the parties on 23 March 1998. On 3 April 1998, both parties submitted written requests for the Panel to review precise aspects of the interim report. At the request of Guatemala, the Panel held a further meeting with the parties on 16 April 1998 on the issues identified in the written comments. The Panel submitted its final report to the parties on 18 May 1998.

II. FACTUAL ASPECTS

2.1 This dispute concerns the initiation and subsequent conduct by Guatemala's Ministry of Economy ("Ministry") of an anti-dumping investigation against imports of grey portland cement from Cruz Azul, a Mexican producer. Cementos Progreso SA ("Cementos Progreso"), the only cement producer in Guatemala, filed a request for an anti-dumping investigation on 21 September 1995 and a supplementary request on 9 October 1995. On 11 January 1996, based on these requests, the Ministry published a notice of initiation of an anti-dumping investigation regarding allegedly dumped imports of grey portland cement from Cruz Azul of Mexico. The Ministry notified the Government of Mexico of the initiation of the investigation on 22 January 1996. The Ministry requested certain import data from Guatemala's Directorate-General of Customs by letter dated 23 January 1996. On 26 January 1996, the Ministry transmitted questionnaires to interested parties, including Cruz Azul and Cementos Progreso, with a response originally due on 11 March 1996. In answer to Cruz Azul's request, the Ministry extended the deadline for submission of the questionnaire responses until 17 May 1996. Cruz Azul filed a response on 13 May 1996. On 16 August 1996, Guatemala imposed a provisional anti-dumping duty of 38.72% on imports of type I (PM) grey portland cement from Cruz Azul of Mexico. The provisional duty was imposed on the basis of a preliminary affirmative determination of *inter alia* threat of injury. That provisional duty expired on 28 December 1996.

2.2 The original investigation period set forth in the published notice of initiation ran from 1 June 1995 to 30 November 1995. On 4 October 1996, the Ministry extended the investigation period to include the period 1 December 1995 to 31 May 1996. On 14 October 1996, the Ministry issued supplemental questionnaires to Cruz Azul and Cementos Progreso, requesting, *inter alia*, that Cruz Azul provide cost data and provide data for the extended investigation period.

2.3 A verification visit was scheduled to take place from 3 - 6 December 1996. This verification visit was cancelled by the Ministry shortly after it commenced on 3 December 1996.

2.4 On 17 January 1997, Guatemala imposed a definitive anti-dumping duty of 89.54% on imports of grey portland cement from Cruz Azul of Mexico.

III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

3.1 Mexico requests the Panel to make the following rulings, findings and recommendations:

(a) "reject all the preliminary objections raised by Guatemala";

(b) "conclude that the measures adopted by Guatemala, in particular though not exclusively those relating to the initiation of the investigation, are inconsistent with the obligations of that Member country of the WTO under Article VI of GATT 1994

and, at least, Articles 2, 3, 4, 5, 6 and 7 and Annex I of the Anti-Dumping Agreement";

(c) "also conclude that the measures adopted by Guatemala in contravention of its obligations under GATT 1994 and the Anti-Dumping Agreement nullify or impair Mexico's benefits within the meaning of Article XXIII of the GATT 1994"; and

(d) "recommend to the Government of Guatemala that it revoke the anti-dumping duties imposed on Cruz Azul's exports of grey cement to that country and refund the corresponding anti-dumping duties".

3.2 Guatemala asks the Panel to make the following preliminary rulings:

(a) "determine that the Panel does not have the authority to examine the final measure, as the final measure is outside the Panel's terms of reference:"

(b) "determine that the final measure is not within the Panel's terms of reference, taking into account Mexico's recognition of this at the first substantive meeting with the Panel and in its second submission to the Panel"[1];

(c) "reject Mexico's complaint because Mexico does not claim, much less provide evidence, that the provisional measure has had a "significant impact" in conformity with Article 17.4 and because such an impact cannot be demonstrated in this case";

(d) "reject Mexico's complaint, because Mexico does not claim, much less provide evidence, that the provisional measure violates paragraph 1 of Article 7, as required by Article 17.4";

(e) "alternatively, reject the claims made regarding the initiation of the investigation because Mexico failed to claim, much less provide evidence, that Guatemala had violated Article 1 or Article 7.1 by imposing an anti-dumping measure in an investigation that was not initiated properly";

(f) "alternatively, reject all [Mexico's] claims regarding the `final stage of the investigation';

(g) "alternatively, reject the seven individual claims made by Mexico ... [that] ... do not come within the Panel's terms of reference. Also to reject the two individual claims made by Mexico shown on page 32 of the English text of Guatemala's first written submission, which were not raised during the consultations"; and

(h) alternatively, reject the new claims raised by Mexico during the Panel proceedings.

[1] As originally submitted, Mexico's second submission to the Panel stated that "the final measure was not included in the request for the establishment of a panel", and "the final measure in itself is not challenged". Mexico submitted a corrigendum to its second submission, correcting its argument to read "the final determination was not included in the request for the establishment of a panel", and "the final determination in itself is not challenged".

3.3 In the event the Panel does not reject Mexico's claims on the basis of Guatemala's preliminary objections, Guatemala requests the Panel to find that:

(i) "Guatemala initiated the investigation in conformity with the ADP Agreement";

(j) "without prejudice to the foregoing argument, that any alleged procedural errors committed at the time of initiating the investigation do not affect the provisional measure because (a) they do not nullify or impair Mexico's rights under the ADP Agreement; (b) Mexico gave cause for estoppel by failing to submit its arguments in the administrative file on the investigation at the proper time and in due form; and (c) they constituted a `harmless error'";

(k) "Guatemala imposed the provisional measure in compliance with the ADP Agreement"; and

(l) "Guatemala imposed the final measure in compliance with the ADP Agreement".

3.4 In the event the Panel finds that Guatemala acted in a manner inconsistent with the ADP Agreement, Guatemala requests that the Panel:

(m) "recommend that Guatemala bring the allegedly incompatible measure into conformity with the ADP Agreement"; and

(n) "not recommend or suggest any specific or retroactive remedy".

[Parties' arguments in Sections IV and V deleted from this version]

VI. INTERIM REVIEW

6.1 On 3 April 1998, both Mexico and Guatemala requested the Panel to review, in accordance with Article 15.2 of the DSU, precise aspects of the interim report that had been issued to the parties on 23 March 1998. Guatemala requested that the Panel hold a meeting for that purpose. The Panel met with the parties on 16 April 1998 to hear their arguments concerning the interim report. The Panel carefully reviewed the arguments presented by the parties.

6.2 In approaching the interim review, the Panel drew guidance from Article 15.2 of the DSU, which states that "a party may submit a written request for the panel to review precise aspects of the interim report prior to circulation of the final report to Members". While the Panel approached the interim review stage with the broadest possible interpretation of Article 15.2 of the DSU, it was of the view that the purpose of the review meeting was not to provide the parties with an opportunity to introduce new legal issues and evidence, or to enter into a debate with the Panel. The purpose of the interim review, in the Panel's view, was to consider specific and particular aspects of the interim report. In this connection, the Panel noted that much of Guatemala's request for interim review consisted of proposed changes to the text of the findings insofar as they refer to Guatemala's arguments, asserting that the Panel "mischaracterized" its arguments. However, Guatemala did not explain in what respect the Panel's language was a "mischaracterization", and did not cite to any of its submissions or oral statements in support of its allegations. In these circumstances, the Panel found it difficult to evaluate the proposed textual changes. Nonetheless, the Panel considered the entire range of arguments presented by both parties in conducting the interim review.

6.3 Mexico reiterated its previously submitted amendments and additions to the descriptive part of the Report to the extent that such amendments had not been taken into account in the Interim Report. Guatemala repeated suggestions to revise certain aspects of the descriptive part it had previously submitted, and provided sources in support of some of those suggestions. The Panel accepted and introduced in its final report some of these proposed changes.

6.4 Mexico proposed changes to the text of paragraph 7.5. Mexico asserted that the first sentence did not correspond to what was stated by Mexico, but without any supporting reference to its previous submissions. Mexico made no argument in support of the proposed changes to the remainder of paragraph 7.5. The Panel has made some clarifying changes to the text of the paragraph.

6.5 Mexico proposed changes to the text of paragraph 7.39, without any supporting argument or references. The Panel did not accept Mexico's request on this point, concluding that the existing text of paragraph 7.39 reflected the Panel's views.

6.6 Mexico proposed changes to the text of paragraph 8.6. Mexico argued that, taking into account the "general sense" of the Panel's recommendation and its suggestion concerning implementation, certain changes should be made to the text. The Panel did not accept Mexico's request on this point, concluding that the existing text of paragraph 8.6 reflected the Panel's views.

6.7 Guatemala proposed changes to the text of paragraph 7.2 to reflect the fact that the consultations were concluded before the imposition of the definitive anti-dumping duty. The Panel has modified the paragraph accordingly.

6.8 Guatemala proposed changes to the text of paragraph 7.3 to reflect that Mexico's request for establishment of a panel did not identify the final definitive anti-dumping measure. As this fact is stated later, in paragraph 7.19 of the report, the Panel did not accept Guatemala's request.

6.9 Guatemala proposed changes to the text of paragraphs 7.4, 7.6, 7.11, 7.20, and 7.21. These proposals purported to "properly characterize" or "correct mischaracterizations of" Guatemala's arguments, without any stated justification or reference in support of its proposed changes. The Panel accepted in part Guatemala's requests, and has modified these paragraphs accordingly.

6.10 Guatemala proposed changes to the text of paragraphs 7.30 and 7.37 to delete references to the 26 July 1996 letter sent by telefax from the Guatemalan Ministry of Economy, and footnote 224. Guatemala argued that the letter was not transmitted in the course of Guatemala's domestic anti-dumping procedures, and was not included in the administrative record of the investigation, but was part of informal WTO consultations between Guatemala and Mexico, and therefore should not be considered by the Panel in making its findings. Guatemala's arguments in support of the proposed deletion were made during the course of the panel proceedings and rejected by the Panel, as is reflected in footnote 224. Moreover, as the Panel stated in footnote 224, it did not consider this document determinative, but concluded it would not be appropriate to ignore the existence of a document which was transmitted by Guatemala to Mexico during the course of the anti-dumping investigation by one of the Guatemalan Ministry employees conducting the investigation, and which was submitted to the Panel during its proceedings. Therefore, the Panel did not accept Guatemala's request on this point.

6.11 Guatemala proposed changes to the text of paragraph 7.40. Guatemala argues that it provided the Panel with evidence that any delay in providing notice under Article 5.5 did not have any effect on the course of the investigation, and that this evidence was submitted to rebut the presumption of nullification and impairment under Article 3.8 of the DSU. Guatemala did not refer to Article 3.8 of the DSU in any of its submissions, and while it did assert that any delay in notification had no effect on the investigation, this assertion was made only in the context of its argument on the issue of harmless error. The Panel considered that Guatemala did not argue in a clear manner that it had rebutted the presumption of nullification and impairment under Article 3.8 of the DSU during the proceedings, and that it was too late to make this argument at the interim review stage. Accordingly, the Panel did not accept Guatemala's request on this point.

6.12 Guatemala proposed changes to paragraph 7.47, asserting that the Panel "completely mischaracterizes" Guatemala's position, and "ignores Guatemala's explanation of its position in response to the Panel's question cited in footnote [231]". Guatemala has not provided the Panel with any references to its earlier submissions or oral statements in support of its assertions. With regard to the proposed changes to the first two sentences of this paragraph, the Panel considered that the proposed changes altered Guatemala's position from what was argued previously, and the Panel did not accept the request. With respect to the proposal to delete the last sentence of the paragraph, and the text of footnote 231, the Panel notes that Guatemala's position is set out in its answer to the Panel's question 30, which is quoted **in full** in footnote 231. The Panel is unaware of any further "explanation" of this response, and Guatemala has cited to none. Consequently, the Panel did not accept Guatemala's request on the latter point.

6.13 Guatemala proposed changes to paragraph 7.65. The Panel accepted in part Guatemala's request, and has modified the paragraph accordingly.

6.14 Guatemala proposed a change to paragraph 7.68. The Panel accepted Guatemala's request, and has modified the paragraph accordingly.

VII. FINDINGS

A. Introduction

7.1 This dispute arises out of the initiation and subsequent conduct by the Guatemalan Ministry of Economy ("the Ministry") of an anti-dumping investigation concerning imports of portland cement from Mexico. On 21 September 1995, Cementos Progreso SA ("Cementos Progreso"), the sole Guatemalan producer of cement, filed a request for initiation of an anti-dumping investigation. A supplementary request was filed on 9 October 1995. On 11 January 1996, the Ministry published a notice of initiation of an anti-dumping investigation regarding allegedly dumped imports of grey portland cement from Cruz Azul of Mexico. The Ministry notified the Government of Mexico of the initiation of the investigation on 22 January 1996. The Ministry requested certain import data from Guatemala's Directorate-General of Customs by letter dated 23 January 1996. On 16 August 1996, Guatemala imposed a provisional anti-dumping duty of 38.72% on imports of type I (PM) grey portland cement from Cruz Azul of Mexico. The provisional duty was imposed on the basis of a preliminary affirmative determination. On 17 January 1997, Guatemala imposed a definitive anti-dumping duty of 89.54% on imports of grey portland cement from Cruz Azul of Mexico.

7.2 On 15 October 1996, after the imposition of the provisional anti-dumping duty but before the imposition of the definitive anti-dumping duty, Mexico requested consultations with Guatemala under Article 4 of the DSU and Article 17.3 of the ADP Agreement. Consultations were concluded on 9 January 1997, before the imposition of the definitive anti-dumping duty, but the parties failed to reach a mutually satisfactory solution.

7.3 On 13 February 1997, after the imposition of the definitive anti-dumping duty, Mexico requested the establishment of a panel to examine the consistency of Guatemala's anti-dumping investigation with its obligations under the ADP Agreement.

B. Preliminary Issues

1. Whether this dispute is properly before the Panel

7.4 In its first submission, Guatemala raised a number of preliminary issues which we must consider before proceeding to the substantive elements of this dispute, since they relate to our authority to examine the various substantive claims made by Mexico. Guatemala argues, relying on Articles 1 and 17.4 of the ADP Agreement and Articles 4 (consultations), 6.2 (request for establishment), and 19.1 (recommendations) of the Dispute Settlement Understanding ("DSU"), that a Panel may be established only to examine the consistency with WTO obligations of a particular measure or measures, identified in a request for consultations and in the request for establishment of a panel, and to make recommendations concerning such measure or measures. In a dispute involving anti-dumping, Guatemala argues that the measure alleged to be inconsistent with the ADP Agreement must be either a final anti-dumping measure, a price undertaking, or a provisional measure having a significant impact within the meaning of Article 17.4 of the ADP Agreement. Guatemala argues that the final anti-dumping measure imposed on imports of cement from Cruz Azul is not before us, because Mexico did not identify that measure in its request for consultations or in its request for establishment of the Panel. The provisional measure imposed by Guatemala, which was identified in the request for consultations and the request for establishment, is argued not to be before us because Mexico did not assert and demonstrate that it had a "significant impact". There is no price undertaking at issue. Guatemala argues that, because none of these three types of identified "measure" is properly before us, we must reject Mexico's complaint.

7.5 Mexico acknowledges that it has not challenged the final determination *per se*, and that the consistency of that determination with the ADP Agreement is therefore not before us. However, Mexico asserts that having requested and held consultations concerning specific identified "matters"

relating to the initiation of the anti-dumping investigation, the imposition of a provisional measure, and the conduct of the final stage of the investigation by Guatemala, its request for establishment of a panel was proper, and the Panel is therefore required to consider its claims and issue an appropriate recommendation.

7.6 The question we must decide is whether, in a dispute under the ADP Agreement, we are limited to an examination of the consistency with the ADP Agreement of one of the three specific types of "measure" identified by Guatemala - provisional anti-dumping measure, final anti-dumping measure, or price undertaking, or whether the consistency of particular aspects of the initiation and/or conduct of an anti-dumping investigation with the ADP Agreement may themselves constitute a matter susceptible of examination by a panel. In deciding this question, we must consider the provisions of the ADP Agreement concerning dispute settlement, and assess their relationship to the relevant provisions of the DSU.

7.7 In considering the meaning to be given to various provisions of the ADP Agreement, we bear in mind that Article 3.2 of the DSU requires panels to interpret "covered agreements", including the ADP Agreement, "in accordance with customary rules of interpretation of public international law". The rules of treaty interpretation set forth in Article 31 of the Vienna Convention on the Law of Treaties ("Vienna Convention"), have "attained the status of a rule of customary or general international law".[208] Article 31.1 of the Vienna Convention provides:

> "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".

Moreover, Article 31.2 of the Vienna Convention expressly defines the context of the treaty to include the text of the treaty. Thus, it is clear to us that the entire text of the ADP Agreement is relevant to a proper interpretation of any particular provision thereof.[209]

7.8 Our authority in this dispute is governed by the provisions of the ADP Agreement and the DSU. Article 1.2 of the DSU provides in pertinent part that:

> "The rules and procedures of this Understanding [the DSU] shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail".

Appendix 2 identifies Articles 17.4 through 17.7 of the ADP Agreement as among the special or additional rules and procedures referred to in Article 1.2.

7.9 Thus, to the extent that there is a difference between the DSU and Article 17.4 of the ADP Agreement, Article 17.4 prevails. Article 17.4 provides that:

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[208] United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 29 April 1996, p. 17.

[209] We have also kept in mind that, while adopted panel reports are not binding on subsequent panels, they do "create legitimate expectations among WTO Members, and therefore, should be taken into account where they are relevant to any dispute". Japan - Taxes on Alcoholic Beverages WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, pg. 14. Unadopted panel reports, on the other hand, have no legal status in the WTO system, although a panel may find useful guidance in the reasoning of such a report to the extent it is considered relevant. Id. at 14-15.

> "If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the **matter** to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer **such matter** to the DSB". (emphasis added).

7.10 Article 17.4 on its face does not provide that a Panel can be sought with respect only to a specific type of identified "measure". It provides that **if** consultations under Article 17.3 have failed, **and if** a final action to levy definitive anti-dumping duties has been taken or a price undertaking accepted, the "matter" may be referred to the DSB under Article 17.4.[210] Similarly, if a provisional measure has a significant impact, and is considered to have been taken contrary to Article 7.1 of the ADP Agreement, "such matter" may be referred to the DSB.

7.11 The question before us thus is what constitutes the "matter" which may be referred to the DSB under Article 17.4. Guatemala's position is that the "matter" must relate to the consistency of a "measure" - provisional or final, or price undertaking - with the ADP Agreement. We cannot agree with this restrictive interpretation of the term "matter" in Article 17.4. In our view, the "matter" which may be referred to the DSB is that "matter" with respect to which a Member requested consultations under Article 17.3 of the ADP Agreement.

7.12 Article 17.3 itself is not limited to consultations with respect to a specific type of measure, but is much broader in scope. It provides that:

> "If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to reaching a mutually satisfactory resolution of the **matter**, request in writing consultations with the Member or Members in question". (emphasis added).

The text of Article 17.3 does not on its face require that there be a "measure" about which consultations are requested, but only that there be nullification or impairment of some benefit.[211] Such nullification or impairment of a benefit could plainly arise in a situation where a procedural obligation under the ADP Agreement is not respected by the investigating authorities of a Member.

7.13 We recognize that Article 17.3 is not identified as a special or additional rule or procedure on dispute settlement in Appendix 2 of the DSU. However, it is specifically referred to in Article 17.4, which as noted provides that if "the consultations pursuant to paragraph 3 [of Article 17] have failed to achieve a mutually agreed solution..." the matter may be referred to the DSB. In our view, this reference requires that Article 17.3 must be interpreted so as to give effect to the provisions of Article 17.4, which prevail over any inconsistent provisions of the DSU. Thus, if Article 17.3 requires something different from the corresponding Article 4 of the DSU, the provisions of Article 17.3 must prevail, otherwise Article 17.4 would not be given full effect. That is to say, to the extent that Article 17.4 may require different procedures than does the DSU, Article 17.3 must be read so as to give effect to such different procedures.

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[210] Indeed, Article 17.4 does not refer to a "final measure" at all - it refers to whether "final action has been taken ... to levy definitive anti-dumping duties or accept price undertakings...". The only reference to "measure" in Article 17.4 is the reference to "provisional measures" in the second sentence of that Article.

[211] As discussed further below, this language echoes the provisions of Article XXIII of GATT 1994.

7.14 Article 17.3 allows consultations about "matters", without any requirement that a particular type of measure be the subject of consultations. Article 17.4 allows referral to the DSB (that is, a request for establishment of a panel) of any "matter" on which consultations were held under Article 17.3. While Article 17.4 clearly requires that an action to levy definitive anti-dumping duties **have been taken**, (or a provisional measure having significant impact be in place or a price undertaking have been accepted) before a request for establishment can be made to the DSB, it cannot reasonably be read to mean that the **only** "matter" that may be referred to the DSB is a challenge to a specific final or provisional measure or price undertaking.

7.15 Moreover, Article 17.5, which governs the establishment of panels in disputes under the ADP Agreement, does not require that the request for establishment "identify the specific measures at issue", as does its corollary, Article 6 of the DSU. Instead, Article 17.5, which is again a special and additional rule which takes precedence over conflicting provisions of the DSU, provides that:

> "The DSB shall, at the request of the complaining party, establish a panel to examine the **matter** based upon:
>
> (i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, ...". (emphasis added).

This provision is phrased in the same language as Article 17.3, supporting the conclusion that the "matter" consulted about under Article 17.3, the "matter" referred to the DSB under Article 17.4, and the "matter" to be examined by a panel under Article 17.5, is in each instance the same matter, and is not limited to provisional or final measures or price undertakings.

7.16 This interpretation of the provisions of Article 17 provides for a coherent set of rules for dispute settlement specific to anti-dumping cases, taking account of the peculiarities of challenges to anti-dumping investigations and determinations, that replaces the more general approach of the DSU. The ADP Agreement sets forth a series of procedural and substantive obligations on Members in initiating and conducting investigations and imposing measures. In anti-dumping cases, the matter in dispute may not be the final measure in and of itself (or the provisional measure or any price undertaking), but may rather be an action taken, or not taken, during the course of the investigation. Article 17.3 clearly provides for consultations regarding such concerns. Article 17.4 then establishes **when** a Panel may be sought with respect to those concerns - after a final action to levy definitive anti-dumping duties has been taken, after the imposition of a provisional measure having significant impact, or after the acceptance of an undertaking - that is, after there is an affirmative determination in the investigation, resulting in an action whose existence has ongoing trade consequences for the exporting Member.[212]

7.17 By contrast, if there is a negative determination in the investigation, such that no undertaking is accepted, no provisional measure is imposed, or no final action is taken to levy anti-dumping duties, there are no ongoing trade consequences for the exporting Member as a result of an action by the importing Member. Under Article 17.4, no panel can be requested with respect to the matter about which consultations were held. Again, this is logical in the context of anti-dumping proceedings, since the "matter" about which consultations were held will have become moot in the absence of one of these actions.

7.18 Thus, we read Article 17.4 as a **timing** provision, establishing **when** a panel may be requested, rather than a provision setting forth the appropriate subject of a request for establishment of

[212] Thus, the possibility of panel requests on a piecemeal basis, identified by Guatemala and the US as a problem, does not exist, since a Panel can only be sought **after** these specific triggering events.

a panel. In addition to the logic underlying this interpretation, this interpretation also avoids a meaningless and purely formal requirement that a Member seek consultations concerning the final action to levy definitive anti-dumping duties, and wait the requisite time period before requesting establishment of a panel, in those situations where the issues of concern have already been identified and consultations have been held. Of course, if the substance of the final action to levy definitive anti-dumping duties itself is a "matter" concerning the Member, then further or additional consultations would have to be requested and held, before a request for a panel could be made.

7.19 In this case, in its request for consultations, Mexico raised issues concerning the initiation of the investigation by Guatemala, the provisional measure, and various aspects of the investigative process. Certain of these issues were the subject of consultations under Article 17.3. After the consultations failed to achieve a mutually satisfactory result, **and after final action to levy definitive anti-dumping duties was taken** by Guatemala, Mexico referred the matter about which consultations had been held to the DSB, requesting the establishment of a Panel with respect to that matter. Mexico acknowledges that the final determination underlying the definitive anti-dumping duty was itself not the subject of the request for consultations, or of the request for establishment of a panel, and thus is not before us *per se*. Indeed, Mexico indicated at the first hearing that if it wanted to challenge the final determination, it would request consultations regarding it, and request the establishment of a panel to examine that matter.

7.20 Guatemala relies on the references to "measures" in Articles 4 (consultations), 6.2 (request for establishment), and 19.1 (recommendations) of the DSU in support of its position that the "matter" referred to in Articles 1 and 17.4 must be a specific measure. However, the interpretation advocated by Guatemala would not give effect to the language of Articles 17.4 and 17.5 of the ADP Agreement, and thus would not be consistent with Article 1.2 of the DSU, which establishes that primacy must be given to special and additional rules of procedure identified in Article 1.2 and Appendix 2 of the DSU. In addition, if Guatemala were correct in the view that a measure must be in place before consultations leading to a request for establishment can be held, and that the consultations that were held in this dispute, under Article 17.3, could not support a request for establishment, then the specific provisions of Article 17.4 would be rendered meaningless. An interpretation which renders part of the ADP Agreement meaningless, and particularly a part of the Agreement which is identified as a special and additional rule for dispute settlement taking precedence over the DSU, is contrary to rules of customary or general international law of treaty interpretation and thus should be avoided.[213]

7.21 Guatemala asserts that the "matter" referred to a panel under Article 17.4 of the ADP Agreement must be a measure in order for a panel to be able to issue a recommendation under Article 19.1 of the DSU. Article 19.1 provides, in pertinent part:

> "Where a panel ... 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".

Arguably, in the absence of a "measure" in the narrow sense, that is, a final or provisional duty or a price undertaking, before a panel, a panel cannot make a meaningful recommendation in the terms provided for in Article 19.1. Thus, Guatemala argues, in order for a panel to be able to issue a recommendation in terms of Article 19.1, there must be a measure before it, and that measure must have been identified in the request for establishment of a panel. This is clearly in conflict with our conclusion regarding the interpretation of the provisions of the ADP Agreement as **not** limited to disputes involving only specific "measures". A restrictive reading of Article 19.1 would mean that,

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[213] "One of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility". United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 29 April 1996, p. 23.

while the ADP Agreement provides for consultations and establishment of a panel to consider a matter without limitation to a specific "measure", the panel so established is not empowered to make a recommendation with respect to that matter. This would clearly run counter to the intention of the drafters of the DSU to establish an effective dispute resolution system for the WTO. In addition, it would undermine the special or additional rules for dispute settlement in anti-dumping cases provided for in the ADP Agreement. A broader reading of Article 19.1, on the other hand, **would** give effect to the special or additional dispute settlement provisions of the ADP Agreement, by allowing panels in anti-dumping disputes to consider the "matter" referred to them, and issue a recommendation with respect to that matter. As discussed below, the DSU provisions relied on by Guatemala do not, in our view, limit panels to the consideration only of certain types of specified "measures" in disputes.

7.22 Even assuming that the dispute settlement provisions of the ADP Agreement (Articles 17.3, 17.4, and 17.5 in particular) did not represent a coherent dispute settlement scheme which replaces the more general provisions of the DSU, the DSU's references to "measures" do not require the narrow reading given them by Guatemala. The terms of the DSU and GATT 1994 itself, as well as past GATT practice and evolving WTO practice, support the conclusion that the DSU does not preclude a panel from examining whether a Member's initiation and conduct of an anti-dumping investigation is consistent with its WTO obligations.

7.23 Article XXIII of GATT 1994 is the core WTO provision governing dispute settlement. Article XXIII of GATT 1994 sets forth the types of causes of action for which WTO dispute settlement is available to Members. Under Article XXIII:1, a Member is entitled to seek dispute settlement where it considers that:

"any **benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired** or that the attainment of any objective of the Agreement is being impeded as the result of

(a) **the failure of another Member to carry out its obligations under this Agreement**, or

(b) the application by another Member of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation, ..." (emphasis added).[214]

Thus, Article XXIII creates a cause of action wherever the failure of a Member to carry out its obligations results in nullification or impairment of benefits. Nothing in Article XXIII suggests that there is any limitation on a Member's right to pursue dispute settlement in cases where there is a violation of GATT 1994 which gives rise to the nullification or impairment of benefits. Certainly, there is no suggestion in Article XXIII itself that a Member may only seek dispute settlement where a specified "measure", defined in the narrow sense urged by Guatemala, gives rise to nullification or impairment of benefits.

7.24 The question then is whether the references to the term "measure" in various provisions of the DSU should be interpreted as narrowing the rights and causes of action set forth in Article XXIII by limiting the range of alleged violations of the GATT 1994 (and of other WTO Agreements) that could be subject to dispute settlement to those based on specified "measures". There is nothing in the DSU to suggest that the negotiators intended any such narrowing of Members' right to seek dispute settlement. Rather, it seems more likely that the term "measure" should be interpreted broadly in order to give effect to the substantive provisions of the WTO Agreement. To read "measure" narrowly would mean that a variety of violations of obligations which do not involve specified or

[214] The introductory language of Article XXIII:1 is echoed in Articles 17.3 and 17.5(a) of the ADP Agreement.

identifiable measures would be outside the scope of the dispute settlement system. This is not an approach to be taken lightly unless such an intention can be clearly ascertained from the text of the DSU. In our view, no such intention can be drawn from the text of the DSU.[215]

7.25 A broader interpretation of the term "measure" as used in the DSU is also consistent with WTO and GATT practice. Clearly, the WTO Agreements impose obligations on Members which govern "measures" traditionally defined (e.g., a tariff or quantitative restriction), but many other obligations imposed by the Agreements do not apply to or are not implemented in the context of "measures". Examples of the latter include affirmative obligations that require a Member to do something, such as enact domestic law or regulations, undertake some mandatory procedure, or undertake some specified action such as submitting a notification to the WTO. In such cases of affirmative obligations on Members, the failure of a Member to effectuate the obligation by taking necessary action, such as the failure of a Member to enact certain intellectual property protections[216], to open a procurement to public bidding[217], or to make a required notification, can give rise to disputes. Such situations would not involve any type of "measure", and may not even involve any action by the Member. Rather, they would arise in the **absence** of some measure that is required, or the **failure of a Member to act** where required by a WTO Agreement to do so. It is difficult to imagine that the drafters chose to deliberately exclude disputes based on such situations merely by referring to "measures" in the DSU.

7.26 It thus seems clear to us that the use of the term "measure" in the DSU should be understood as a shorthand reference to the many and varied situations in which obligations under the WTO Agreements might not be fulfilled by a Member, giving rise to a dispute, for which a resolution process is provided in the DSU. This would comport with the overall intention of the drafters of the WTO Agreements to create an integrated system governing multilateral trade relations, including an effective system for the settlement of disputes. In this context, a recommendation under Article 19.1 of the DSU to "bring the measure into conformity" with the relevant agreement would be interpreted as referring to whatever actions the Member in question should undertake to ensure that it does fulfil its obligations.[218]

7.27 In view of the above, we reject the argument that a panel may only consider a specific identified "measure" in an anti-dumping dispute.[219] Thus, we conclude that a claim that a Member

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[215] Indeed, Article 3.2 of the DSU, which provides that "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements" suggests the contrary - that the DSU must be available to resolve any and all disputes arising under the covered agreements, as otherwise, Members' rights might be diminished.

[216] India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS50/R, 5 September 1997, para. 8.1. In this case, the Panel determined that India had failed to comply with its obligation under Article 70.8 of the TRIPS Agreement to establish a mechanism that preserves the novelty of applications for pharmaceutical and agricultural chemical product patents during the TRIPS transition period.

[217] Agreement on Government Procurement, Article VII. See Norway - Procurement of Toll Collection Equipment for the City of Trondheim, GPR.DS2/R, adopted 13 May 1992, para. 5.1. In this case, the Panel concluded that the Government of Norway had not complied with its obligations under the Tokyo Round Agreement on Government Procurement in its conduct of the procurement in question in that the single tendering of the procurement in question was not justified under the Agreement.

[218] Thus, for instance, in the India Patents dispute, the Panel recommended that the DSB should "request India to bring its transitional regime for patent protection of pharmaceutical and agricultural chemical products into conformity with its obligations under the TRIPS Agreement". In the Trondheim Toll Equipment case, the Panel recommended that the Tokyo Round Committee on Government Procurement request Norway to "take the measures necessary to ensure that [the relevant Norwegian entities] conduct government procurement in accordance with" the findings of the Panel.

[219] In light of our decision regarding the issue of sufficient evidence to justify initiation, we consider it unnecessary to address the parties' arguments regarding whether the preliminary measure is properly before us, including the arguments concerning "significant impact", as we do not reach the consistency of the preliminary measure with the requirements of the ADP Agreement. As the Appellate Body remarked in United States -

has acted in a manner inconsistent with its obligations under the ADP Agreement may be presented to a Panel for consideration, and therefore that the matters referred to in Mexico's request for establishment of a panel are properly before us.

2. Terms of reference

7.28 Before turning to the substantive aspects of this dispute, we consider Guatemala's arguments addressing whether certain claims are within the terms of reference of this Panel. Guatemala raises three different objections to certain of Mexico's claims: (1) that certain claims were not set forth in the request for establishment and are therefore not properly before us[220], (2) that certain claims were not raised in the request for consultations and are therefore not properly before us[221], and (3) that certain new claims were raised during the course of the Panel proceedings and are not properly before us.[222]

7.29 In this case, we do not reach the substance of the challenged claims mentioned in the previous paragraph. We therefore do not consider it either necessary or appropriate to reach any conclusions regarding whether or not those claims are within our terms of reference.[223]

C. Failure to Notify the Exporting Government in Accordance with Article 5.5

7.30 The relevant facts regarding this issue are not in dispute. On 11 January 1996 the Ministry published a notice of initiation of an anti-dumping investigation regarding allegedly dumped imports of grey portland cement from Cruz Azul of Mexico. The notice provided, in pertinent part:

Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, 25 April 1997, pg. 19, "A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."

[220] Guatemala's objections in this regard relate to the following claims:

- that Guatemala failed to give adequate consideration to the increase in imports from Cruz Azul;
- that Guatemala failed to give adequate consideration to the fall in the price of the domestic product;
- that Guatemala failed to give adequate consideration to the loss of customers;
- that Guatemala failed to give adequate consideration to the likelihood of an imminent increase in Mexican exports to Guatemala;
- that Guatemala violated Articles 6.1, 6.2 and 6.8 of the ADP Agreement by not accepting the technical accounting evidence regarding the normal value and the export price charged by the exporter during the original investigation;
- that Guatemala violated Articles 6.5.1 and 6.5.2 of the ADP Agreement by accepting confidential information from Cementos Progreso without demanding a public version thereof, or the reasons why confidential treatment was required; and
- that Guatemala violated Articles 6.1 and 6.2 of the ADP Agreement by failing to establish specific time-limits for Cruz Azul to submit information in defence of its interests.

[221] Guatemala's objections in this regard relate to the following claims:

- Guatemala violated Article 5.2 of the ADP Agreement by initiating the investigation without having received information on imports from the Directorate-General of Customs; and
- Guatemala violated Article 6.1.3 of the ADP Agreement by failing to provide either Cruz Azul or Mexico with a copy of the full text of the application as soon as Guatemala initiated the investigation.

[222] Guatemala's objections in this regard relate to the following claim:

- that the Ministry had improperly made the preliminary affirmative determination of threat of njury because it did not take into account the fact that from 1994 to 1995 the value of Cementos Progreso's sales increased by 21.9% and its net profits rose by 22.8% in nominal Quetzales, not adjusted for inflation.

[223] United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, 25 April 1997, pg. 19.

> "An invitation is hereby issued to all importers, exporters, representatives of the Government of Mexico and any person claiming to have a legitimate interest in the outcome of this investigation, to appear before the Ministry of the Economy (8a, Avenida, 10-43 zona 1, Guatemala City) **to state their legal interest in the matter and to document same within 30 days as from the publication of this notice**. The same period is given to the interested parties to submit any supplementary arguments and evidence that they may consider relevant". (emphasis added).

The notice was published pursuant to a resolution of the Ministry, dated 9 January 1996, which stated in pertinent part that the Ministry:

> "DECIDES: (1) To declare the initiation of the investigation of the complaint submitted; (2) To make the corresponding notifications through the appropriate channel to Cementos Progreso Sociedad Anónima, Distribuidora Comercial Molina and Distribuidora De Leon, as well as to the Mexican company Cruz Azul S.C.L. through the Ministry of External Relations, for these enterprises, within 30 days following the notification to exercise their rights and appear in the proceedings of the investigation; (3) To give public notice of **said initiation, which shall take effect as from the day on which the notice is published in the official journal**". (emphasis added).

The Ministry notified the Government of Mexico of the initiation of the investigation on 22 January 1996. The Ministry requested certain import data from Guatemala's Directorate-General of Customs by letter dated 23 January 1996. A telefax addressed to Mexico's Department of Trade and Industrial Development from the Ministry, dated 26 July 1996, stated:

> "We sincerely regret that your country was not notified before the publication of the resolution for the initiation of the investigation, and we offer our sincere apologies in that regard. This was due to a slip on the part of the persons responsible for effecting the notifications, as they were not familiar with the provisions applicable to anti-dumping investigation procedures. Once again, please accept our apologies".[224]

7.31 Guatemala acknowledges that the notice of initiation in this case was published before the Government of Mexico was notified, and that the resolution of initiation stated that the initiation would take effect as from the date of publication of the notice. However, Guatemala argues that the date of publication of the notice does not determine the date of initiation in this case, because the Ministry did not undertake any activities in connection with the investigation, and therefore did not "proceed to initiate", until after Mexico had been notified. Guatemala argues that the investigation was not initiated until the first investigative action, the letter to the Directorate-General of Customs requesting certain import data, was taken on 23 January 1997. Moreover, Guatemala maintains that, under its domestic law, initiation cannot take place until after notification, irrespective of the actual date of the decision to initiate or provisions in the published notice.

7.32 Article 5.5 of the ADP Agreement provides:

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[224] Guatemala argues that we should not take this statement into account because it is not included in the administrative file of the investigation. While we accept that the telefax was sent as a gesture of good faith, due to Guatemala's concern at not having observed the courtesy of notifying before publication of the resolution on initiation of the investigation, we do not agree that the telefax has no bearing on the question of whether Guatemala's actions constituted a violation of Article 5.5 of the ADP Agreement. Therefore, while we do not consider it by any means determinative of whether or not there was a violation - it is conceivable that a Member might apologize for some legitimate action - we do not consider it appropriate to simply ignore the existence of a document of this nature.

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

7.33 In order to resolve this issue, we must determine what actions are required by the second sentence of Article 5.5, and when. The meaning of the second sentence of Article 5.5 of the ADP Agreement appears to us to be straightforward. After having received a "properly documented" application, and before proceeding to initiate an investigation, notice shall be provided to the government of the exporting Member. That is, at a point in time between two specified events, notice must be given to the exporting Member.[225] The question that must be answered to resolve the dispute in this case is what is meant by "before proceeding to initiate".

7.34 In our view, footnote 1 to the ADP Agreement is helpful in this regard. Footnote 1 defines the term "initiated" as follows:

> "The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5".

When combined with this definition of "initiated", Article 5.5 requires a Member to notify the government of the exporting Member before proceeding to the "procedural action by which it formally commences the investigation". Thus, our decision in this case requires us to determine the procedural action by which Guatemala formally commenced this investigation. In the circumstances of this case, we conclude that the action by which Guatemala formally commenced the investigation at issue was the publication of the notification on 11 January 1996.

7.35 The 15 December 1995 decision of the Director for Economic Integration underlying the Ministry's resolution to initiate the investigation specifically states that: "The date of the initiation of the investigation shall be considered to be the date on which such notice is published in the Official Journal". The Ministry's 9 January 1996 resolution set forth its decision to "give public notice of said initiation, which shall take effect as from the day on which the notice is published in the official journal". The notice published on 11 January 1996 invites interested parties to state their legal interest in the matter within 30 days of the date of publication of that notice, and to submit any supplementary arguments and evidence within that same period. These facts in our view can only lead to the conclusion that the date of initiation was the date of publication of the notice.

7.36 Guatemala's argument would require us to conclude that a letter from the Ministry to the Directorate-General of Customs requesting information on import volumes constitutes the "procedural action by which [Guatemala] formally commence[d]" the investigation in this case. In our view, this investigative action, taken by staff of the investigating authority, which in all likelihood was unknown to either the parties to the investigation, or to the public, cannot reasonably be interpreted to have been the formal commencement of an investigation. The notice requirements of the ADP Agreement make explicit the importance of **public** notice of the actions of investigating authorities, including initiation. We cannot accept that an event whose date is unknown to the public or the parties can be deemed the initiation of an investigation. Certainly, the Ministry's letter to the Directorate-General of Customs may have been the first step of the investigative process, but that is a different matter entirely from being the formal procedural action by which the investigation is commenced.

[225] We note that the Agreement does not specify the contents of that notice. Mexico has not argued that the substance of the notice given by Guatemala was inadequate. Thus, we reach no conclusions concerning this issue.

7.37 Moreover, there are a number of factors which suggest that Guatemala may not have always held the view that it argued before the Panel. As noted above, the 15 December 1995 decision of the Director for Economic Integration underlying the Ministry's resolution to initiate the investigation specifically states that the date of publication shall be considered the date of initiation. Second, the actual published notice does not state that the investigation would not commence until some point later in time, but rather gives interested parties 30 days from the date of publication to make their interest known and to submit arguments and evidence, which can only be interpreted as indicating that the formal commencement of the investigation was the date of publication of the notice. Finally, the telefax of 26 July 1996 apologises for the belated notification, and explains that the delay was caused by a mistake. Thus, the actions of the Ministry at the time of the initiation and shortly thereafter suggest that, at that time, it had a different view of the matter than has been argued before us. While we do not find this determinative, the apparent contemporaneous interpretation of Guatemala accords with that which we have reached here.

7.38 The argument that Guatemala could not have initiated the investigation until after it had notified Mexico, pursuant to provisions of its own Constitution and laws, does not affect our conclusion in this regard. In acceding to the WTO, Guatemala undertook to be bound by Article 5.5 when initiating anti-dumping investigations. Any failure to respect Article 5.5 may not be justified on the basis of inconsistent provisions of domestic law. Article XVI:4 of the WTO Agreement explicitly provides that each Member "shall ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements". That Guatemala may have felt constrained to refrain from undertaking any investigative acts until after notification, in order to comply with domestic law, does not change the nature of the acts in question so as to render them the formal commencement of an investigation. As Guatemala acknowledges, the resolution to initiate itself fixed a particular date for the initiation of the investigation, i.e. the date of publication. There is in our view no other action which can reasonably be construed as the formal commencement of the investigation in this case.

7.39 Therefore, we conclude that the act by which Guatemala "formally commenced the investigation" in this case was the publication of the notice of initiation of the investigation. We note that we are not concluding that the date of publication of the notice of initiation is, in all cases, the date of the "procedural action by which a Member formally commences" an investigation, merely that it is in this case, in view of the specific facts before us, including statements contained in the resolution of initiation and the concurrent actions of the Ministry. Consequently, by failing to notify Mexico before the date of publication of the notice of initiation, in this case Guatemala failed to act consistently with the requirements of Article 5.5 of the ADP Agreement.

7.40 Guatemala argues that, even assuming there was a violation of Article 5.5, the Panel should conclude that any delay in notification under Article 5.5 was without adverse effects on Mexico's rights and thus constitutes harmless error under customary rules of public international law. Guatemala further argues that the alleged delay did not nullify or impair Mexico's rights under the ADP Agreement.

7.41 We have concluded, as discussed above, that Guatemala failed to carry out its obligation under Article 5.5 to notify the government of Mexico before proceeding to initiate this investigation. Article 3.8 of the DSU provides that there is a presumption that benefits are nullified or impaired when a Member fails to carry out an obligation under a WTO Agreement:

> "In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Member parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge".

In other words, there is a presumption that a violation will entitle a Member to relief, because that violation nullified or impaired a benefit accruing to the complaining Member, that is, "harmed" the complaining Member. Article 17 of the ADP Agreement entitles a Member to relief when benefits accruing to that Member under the ADP Agreement are nullified or impaired. Moreover, while Article 3.8 of the DSU indicates that the presumption of nullification or impairment may be rebutted, GATT panels have consistently found that the presumption is not rebutted simply because the particular violation in question had no or insignificant adverse effects on trade.[226] This approach is supported by the Appellate Body's decision in Japan Alcohol, in which it upheld the Panel's decision not to introduce a trade effects test into the first sentence of Article III:2 of GATT 1994.[227]

7.42 In our view, having found that Guatemala failed to notify the Government of Mexico in a timely fashion, we need not determine that the failure to carry out an obligation had particular or demonstrable adverse trade effects in order to find that the benefits accruing to Mexico under the ADP Agreement were nullified or impaired. Rather, to the extent that the presumption of nullification or impairment may be rebutted in the case of the breach of a procedural obligation, it would be incumbent on the Member that has breached the obligation to demonstrate that its failure to respect the obligation could not have had any effect on the course of the investigation in question. In this case, the procedural obligation breached was the requirement to notify the exporting Member prior to proceeding to initiate an anti-dumping investigation. A key function of the notification requirements of the ADP Agreement is to ensure that interested parties, including Members, are able to take whatever steps they deem appropriate to defend their interests. Where a required notification is not made in a timely fashion, the ability of the interested party to take such steps is vitiated. We cannot now speculate on what steps Mexico might have taken had it been timely notified, and how Guatemala might have responded to those steps.[228] Thus, while it is possible that the investigation would have proceeded in the same manner had Guatemala timely notified Mexico before proceeding to initiate the investigation, we cannot say with certainty that the course of the investigation would not have been different. Under these circumstances, we cannot conclude that Guatemala has rebutted the

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[226] In United States - Taxes on Petroleum and Certain Imported Substances, L/6175 (Adopted 17 June 1987), BISD 34S 136, 157-58, the Panel reviewed previous disputes in which parties had claimed that a measure inconsistent with the General Agreement had no adverse impact and therefore did not nullify or impair benefits accruing under the General Agreement to the contracting party that had brought the complaint. The Panel concluded from its review that,

"while the CONTRACTING PARTIES had not explicitly decided whether the presumption that illegal measures cause nullification or impairment could be rebutted, the presumption had in practice operated as an irrefutable presumption".

Id. at para 5.1.7

[227] Japan - Taxes on Alcoholic Beverages, WT/DS8, DS10, DS11/AB/R, 4 October 1997. We note also the decision of the Panel in Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community, SCM/179, adopted 28 April 1994 at para. 271:

> "It was not incumbent upon a signatory whose procedural rights under Article 2 had been infringed by another signatory to demonstrate the harm caused by such an infringement. The Panel therefore rejected the position of Brazil that it was for the EEC to demonstrate that the results of this investigation would have been different had Brazil not committed its procedural errors. Without wishing to exclude that the concept of "harmless error" could be applicable in dispute settlement proceedings under the Agreement, the Panel considered that this concept was inapplicable under the circumstances of the case before it".

[228] We note Guatemala's argument that, unlike the Agreement on Subsidies and Countervailing Measures, the ADP Agreement does not require Members to afford an opportunity for consultations before initiating an investigation, and that therefore there is no action which would take place after notification but before initiation. Merely that the ADP Agreement does not **require** some action following notification of the exporting Member and before initiation does not mean that nothing useful can take place following a timely notification, or that the exporting Member therefore has no interest in timely notification.

presumption that its failure to carry out its obligation under Article 5.5 consistent with the ADP Agreement nullified or impaired benefits accruing to Mexico under that Agreement.

7.43 With respect to Guatemala's arguments regarding harmless error, the precedents cited - assuming *arguendo* that they reflect customary rules of public international law - relate to the consequences of a violation of a procedural rule, rather than to the existence of a cause of action. Thus, we do not consider that the assertion that an error is "harmless" should prevent us from reaching the issue whether a violation of a provision of the ADP Agreement nullifies or impairs benefits under that Agreement. However, we do not preclude that the notion of "harmless error" could be relevant to the question of what steps a Member should take in order to implement the recommendation of a panel in a particular dispute. Since we do not view the principle of harmless error as one which would prevent us from determining that there was a violation of the ADP Agreement which nullified or impaired benefits under that Agreement, we believe it would be improper for us to fail to make a recommendation under Article 19.1. However, the effects of a particular error may, we believe, be relevant in determining what remedial actions might be appropriate - that is, what if any suggestions a panel might make as to how its recommendation may be implemented.

D. Alleged Violations in the Initiation of the Investigation

7.44 In Resolution No. 2-95 of 15 December 1995, the Director for Economic Integration of the Guatemalan Ministry of Economy concluded that "there exists sufficient evidence to justify the initiation of the investigation into dumping and threat of injury", directed that public notice of the initiation of the investigation be given, and established the date of initiation of the investigation as the date on which such notice was published in the Official Journal. On 11 January 1996, the Ministry published the notice of initiation of the anti-dumping investigation regarding imports of grey portland cement from Cruz Azul of Mexico. Mexico claims that Guatemala violated, *inter alia*, Articles 5.2 and 5.3 of the ADP Agreement by initiating the anti-dumping investigation without sufficient evidence of dumping, threat of injury and causal link, to justify the initiation.

7.45 The ADP Agreement establishes requirements for the initiation of investigations in Article 5. Article 5.1 stipulates that, except as provided in Article 5.7, an investigation "shall be initiated upon a written application by or on behalf of the domestic industry".[229] Article 5.2 requires that:

> "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".

Article 5.2 further requires that the application "shall contain such information as is reasonably available to the applicant" regarding a detailed series of elements. [230] Article 5.3 then provides:

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[229] Article 5.7 allows the authorities, in special circumstances, to initiate an investigation without having received a written application by or on behalf of a domestic industry.

[230] The elements identified in Article 5.2 are:

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

"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".

7.46 Before proceeding to address the factual aspects of Mexico's claim, we must examine the relationship between Article 5.2 of the ADP Agreement, which requires that an application include evidence of dumping, injury, and a causal link, and sets forth in some detail the specific information regarding a series of factors which must be included, and Article 5.3 of the ADP Agreement, which governs the determination by the authorities as to whether the application contains sufficient evidence to justify initiation of an investigation. Specifically, we must determine whether Article 5.3 authorizes an investigating authority to initiate an anti-dumping investigation in any case where an application meets the requirements of Article 5.2 of the ADP Agreement, or whether, to the contrary, Article 5.3 imposes an independent obligation on the investigating authority to assess, once it has determined that the requirements of Article 5.2 are met, whether sufficient evidence exists to initiate an investigation.

7.47 Guatemala's position on this issue is clear: if the information supplied in the application is all that is reasonably available to the applicant as required by Article 5.2, the investigating authority is justified in initiating the investigation. That is, Guatemala conditions the sufficiency of the evidence to initiate on whether the information in the application was all the information reasonably available to the applicant. In response to a question from the Panel, Guatemala explicitly rejected the possibility that even if the evidence before the Ministry was all the information "reasonably available" to the applicant, it might nonetheless be insufficient to justify initiation within the meaning of Article 5.3.[231]

7.48 For Mexico, the fact that the evidence in the application is all the information that is reasonably available to an applicant does not necessarily mean that the evidence is sufficient to justify initiation. In Mexico's view, the evidence in an application may be insufficient to justify initiation,

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(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

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

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

[231] Specifically, the Panel had asked:

"Would the parties agree as a general matter with the proposition that evidence may be relevant to initiation of an investigation without being sufficient to justify initiation? Would they agree that it is possible to conclude, as a legal matter, that the evidence before the Guatemalan authorities was relevant to initiation, and may even have been all the information "reasonably available" to the applicant within the meaning of Article 5.2, third sentence, but that it was insufficient to justify initiation within the meaning of Article 5.3?".

Guatemala replied:

"Guatemala does not agree with these premises. The third sentence of Article 5.2 describes the evidence that must be included in the application. Article 5.3 requires an examination to determine whether the evidence provided in the application is sufficient. The evidence is "relevant" and "sufficient" if the investigating authorities consider that the application includes information reasonably available to the applicant regarding each of the categories of information described in subparagraphs (i) to (iv) of Article 5.2".

even though it is all that is reasonably available to the applicant. An unbiased and objective investigating authority would be justified in initiating the investigation only if it determines that the evidence is sufficient, regardless of whether or not the evidence was all that was reasonably available to the applicant.

7.49 We cannot accept Guatemala's arguments in this regard.[232] In our view, the fact that the applicant has provided, in the application, all the information that is "reasonably available" to it on the factors set forth in Article 5.2(i) - (iv) is not determinative of whether there is sufficient evidence to justify initiation. Rather, Article 5.3 establishes an obligation that extends beyond a determination that the requirements of Article 5.2 are satisfied.

7.50 Article 5.2 sets forth what evidence and information must be in the application: evidence of dumping, injury, and a causal link, and such information as is reasonably available to the applicant on a series of factors. Thus, Article 5.2 is a requirement imposed on the **applicant**, which would, for instance, allow an investigating authority to reject an application on its face as not containing information that the authority judges is reasonably available to the applicant. Article 5.3 on the other hand sets forth what the investigating authority is to do when confronted with an application; it must examine the accuracy and adequacy of the evidence in the application "to determine whether there is sufficient evidence to justify the initiation of an investigation". Thus, Article 5.3 is a requirement imposed on the **investigating authority**: once it has accepted the application, that is, determined that it contains evidence on dumping, injury, and causal link, as well as "such information as is reasonably available to the applicant" on the factors set forth in Article 5.2 (i) - (iv), the investigating authority must undertake a further examination of the evidence and information in the application. If the investigating authority were to determine that the evidence and information in the application was not accurate, or that it was not adequate to support a conclusion that there was sufficient evidence to justify initiation of an investigation, the investigating authority would be precluded from initiating an investigation. Thus, the decision to initiate is made by reference to the objective sufficiency of the evidence in the application, and not by reference to whether the evidence and information provided in the application is all that is reasonably available to the applicant.[233]

7.51 That compliance with the requirements of Article 5.2 does not *ipso facto* mean that there is sufficient evidence to justify initiating an investigation under Article 5.3 can be readily demonstrated by consideration of the following example. With respect to dumping, Article 5.2(iii) requires that an application contain such information as is reasonably available to the applicant regarding "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 ... and ... on export prices". Assume that the application contains all the information reasonably available to the applicant regarding these prices, and that the information is accurate. However, assume further that the information on its face demonstrates that the export price is equal to the normal value. It could be said that the requirements of Article 5.2(iii)

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[232] We recognize the requirements of Article 17.6(ii) of the ADP Agreement, which provides in pertinent part:

> "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".

As discussed in our decision, we do not believe that Articles 5.2 and 5.3 of the Agreement "admit of" the interpretation put forward by Guatemala. This is not to say that we consider that there is only one permissible interpretation of Articles 5.2 and 5.3, however, merely that the interpretation that would be required in order to give credence to Guatemala's position is not a permissible interpretation.

[233] We also note that the second sentence of Article 5.8 of the ADP Agreement requires an investigation to be terminated if the margin of dumping is *de minimis*, or if the volume of imports or the injury is negligible. If an investigation must be terminated if the margin of dumping is *de minimis*, or if the volume of imports or injury is negligible, how can an investigation be initiated when there is not sufficient evidence to justify investigating whether there is a margin of dumping greater than *de minimis*, or whether the volume of imports or injury is more than negligible?

are satisfied. Nevertheless, it could not reasonably be concluded that there was sufficient evidence to justify initiation of an investigation, as the evidence clearly shows no dumping.

7.52 The object and purpose of the initiation requirements of Article 5 as a whole, and of Article 5.3 in particular, is in our view to establish a balance between the competing interests of "the import competing domestic industry in the importing country in securing the initiation of [an] investigation and the interest of the exporting country in avoiding the potentially burdensome consequences of [an] investigation initiated on an unmeritorious basis".[234] Considering the question in light of the object and purpose of these provisions, we conclude that Guatemala's interpretation would undermine the balancing of competing interests in initiation and non-initiation established in Article 5. This can be seen by considering the situation that would entail under Guatemala's interpretation in an extreme factual scenario. Assume a factual situation where an application contains no information on normal value. Under Guatemala's interpretation if the investigating authority concluded that the application contained the information on normal value reasonably available to the applicant, it could properly determine that there was sufficient evidence to justify initiation. However, in our view, in the absence of information on normal value, an investigating authority could not properly determine that there is sufficient evidence of dumping, and therefore an investigation should not be initiated.

7.53 We have concluded that the question whether there is "sufficient evidence" to justify initiation is not answered by a determination that the application contains all the information "reasonably available" to the applicant on the factors specified in Article 5.2 (i) - (iv). This does not, however, mean that investigations may not be initiated in cases where "sufficient evidence" is not "reasonably available" to the applicant. In particular, there is nothing in the Agreement to prevent an investigating authority from seeking evidence and information on its own, that would allow any gaps in the evidence set forth in the application to be filled. We do not suggest that such action by the investigating authority is in any case required by the ADP Agreement. However, if, as in this case, an authority chooses to refrain from such action, the "reasonably available" language in Article 5.2 does not permit the initiation of an investigation based on evidence and information which, while all that is "reasonably available" to the applicant is not, objectively judged, sufficient to justify initiation. Indeed, in this case the applicant requested that the Ministry obtain certain information on import volumes which it was unable to obtain itself. This the Ministry did not do, however, until **after** it had initiated the investigation based on the information in the application.

7.54 What constitutes "sufficient evidence" to justify the initiation of an anti-dumping investigation is not defined in the ADP Agreement. In this case, of course, we are bound by the requirements of Article 17.6(i) of the ADP Agreement as the standard of review applicable to our examination of the Ministry's decision to initiate. Article 17.6(i) provides:

> "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".

7.55 The Panel in United States - Measures Affecting Imports of Softwood Lumber From Canada considered much the same question as faces us here in a dispute challenging the self-initiation of a

[234] United States - Measures Affecting Softwood Lumber from Canada, SCM/162, adopted 27 October 1993, BISD 40S/358, para 331.

countervailing duty investigation, on the basis, *inter alia*, of allegedly insufficient evidence to warrant initiation.[235] The Panel observed:

> "In analyzing further what was meant by the term "sufficient evidence," the Panel noted that the quantum and quality of evidence to be required of an investigating authority prior to initiation of an investigation would necessarily have to be less than that required of that authority at the time of making a final determination. At the same time, it appeared to the Panel that "sufficient evidence" clearly had to mean more than mere allegation or conjecture, and could not be taken to mean just "any evidence". In particular, there had to be a factual basis to the decision of the national investigative authorities and this factual basis had to be susceptible to review under the Agreement. Whereas the quantum and quality of evidence required at the time of initiation was less than that required to establish, pursuant to investigation, the required Agreement elements of subsidy, subsidized imports, injury and causal link between subsidized imports and injury, the Panel was of the view that the evidence required at the time of initiation nonetheless had to be relevant to establishing these same Agreement elements".[236]

7.56 The Panel then addressed the appropriate role of a panel in reviewing whether a decision to initiate an investigation was consistent with the requirements of the Tokyo Round Subsidies Code, and set out the standard it applied in evaluating the issue:

> "The Panel considered that in reviewing the action of the United States authorities in respect of determining the existence of sufficient evidence to initiate, the Panel was not to conduct a *de novo* review of the evidence relied upon by the United States authorities or otherwise to substitute its judgment as to the sufficiency of the particular evidence considered by the United States authorities. Rather, in the view of the Panel, the review to be applied in the present case required consideration of whether a reasonable, unprejudiced person could have found, based upon the evidence relied upon by the United States at the time of initiation, that sufficient evidence existed of subsidy, injury and causal link to justify initiation of the investigation".[237]

7.57 We believe that the approach taken by the Panel in the Softwood Lumber dispute is a sensible one and is consistent with the standard of review under Article 17.6(i). Thus, we agree with the Panel in Softwood Lumber that our role is not to evaluate anew the evidence and information before the Ministry at the time it decided to initiate. Rather, we are to examine whether the evidence relied on by the Ministry[238] was sufficient, that is, whether an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury, and causal link existed to justify initiating the investigation. Moreover, we agree with the view expressed by the Panel in Softwood Lumber that the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation.[239] That is, evidence which would be insufficient, either in quantity or in quality, to justify a preliminary or final determination of dumping, injury or causal link, may well be sufficient to justify initiation of the investigation.

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[235] SCM/162. While the *Softwood Lumber* report analyzed the sufficiency of evidence for the initiation of a countervailing duty investigation, these aspects of the report are equally applicable to anti-dumping investigations.

[236] *Id.*, para. 332.

[237] *Id.*, para. 335.

[238] We note that we are not entirely persuaded that the information in the application was, in fact, all that was reasonably available to the applicant, particularly with respect to the question of threat of material injury. However, for the purposes of our analysis, we have assumed that this was the case.

[239] Softwood Lumber at para. 332.

7.58 While the parties seem largely in accord that the application must contain evidence and information on the essential elements of dumping, injury, and causal link, they disagree on what types of evidence and information are required. Thus, Mexico argues that the substantive provisions governing determinations of dumping and injury in Articles 2.1, 2.4, and 3.7, must be taken into account in evaluating the evidence in an application to determine its sufficiency. Guatemala, on the other hand, argues that Article 2 does not apply to the decision whether to initiate an investigation, but only to the preliminary or final determination of dumping, and that while Articles 3.2 and 3.4 apply to the decision to initiate, by virtue of being referenced in Article 5.2(iv), Article 3.7 is not so referenced, and therefore does not apply to the decision whether to initiate. Thus, Guatemala argues that information of the type referred to in Articles 2 and 3.7 need not be included in the application, and is not relevant to the evaluation of whether there is sufficient evidence to justify initiation. These issues are discussed further below, in connection with our examination of the decision of the Ministry.

7.59 We also considered relevant the provisions of Article 5.8, which provides in pertinent part:

> "An application under paragraph 1 [of Article 5] 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".

We note Guatemala's argument that Article 5.8 applies only to investigations that have already been initiated. This argument is in stark contradiction to the text of Article 5.8 itself, which refers to the **rejection of an application** "as soon as" authorities conclude there is not sufficient evidence of dumping or injury to justify proceeding. In our view, there is no way to interpret this language other than as a statement of the requirement that an investigation may only be initiated if the application contains sufficient evidence of dumping and injury. If an application **shall** be rejected in the circumstances set forth in Article 5.8, how could an investigation be initiated - on the basis of a rejected application? The notion that Article 5.8 refers to the rejection of an application after initiation, in connection with the termination of an investigation, is in our view without support in the text of the Article. Merely that Article 5.8 continues to outline circumstances in which an investigation must be terminated, which presumes that it has been initiated, does not support the conclusion that the Article does not refer to rejection of an application prior to initiation if the authorities conclude that there is not sufficient evidence of dumping and injury.

7.60 Turning to the Ministry's decision that there was sufficient evidence to justify initiating the anti-dumping investigation in this case, we note that there is no discussion or analysis of the evidence and information before the Ministry in the Resolution or in the public notice. However, the 17 November 1995 recommendation of the advisors in the Ministry's Department of Economic Integration sets forth the analysis of the evidence and information presented, and concludes that it was sufficient to justify initiation. We have scrutinized all the information which was on the record before the Ministry at the time of initiation in examining whether an unbiased and objective investigating authority could properly have made the determination that was reached by the Ministry.

1. <u>Dumping</u>

7.61 With regard to dumping, the application states that the retail price of grey portland cement in Mexico ranged between 27 and 28 Mexican new pesos, which was converted at then prevailing rates of exchange to Guatemalen Quetzales ("Q") Q 27.62 per 94-pound sack, and that the cash price of the product imported from Mexico was US$2.57 per 94-pound sack, which was equivalent to Q 14.77 at the time. The price in Mexico was substantiated by two invoices showing the prices for two separate sales in Tapachula, Mexico, in August 1995. One invoice is labelled Cruz Azul, and reflects the sale of one "bto [bulto] cto [cemento] gris" on 26 August 1995 at 28 Mexican pesos. The other invoice is labelled Proveedora de Laminas, and reflects the sale of one "saco cemento Cruz Azul" on 25 August 1995 at 27 Mexican pesos. The price of imported Mexican cement in Guatemala was substantiated by

import certificates, invoices and bills of lading for two transactions on the same date in August 1995.[240] There is no indication that any other information on dumping was available to or considered by the Ministry.

7.62 The two invoices reflect two separate sales at the retail level of one sack of cement of unspecified weight each. The import documents reflect two separate import transactions at the distributor (or wholesale) level of several thousand sacks of cement, each sack weighing 94 pounds (42.6 kilograms). The alleged margin of dumping is calculated in the application by comparing the average retail price for the cement bought in Mexico (converted into Guatemalan Quetzales at then current rates) with the average c.i.f. value of the cement imported into Guatemala (converted into Guatemalan Quetzales at then current rates). The Ministry recommended initiation based on this information. In our view, this comparison ignores obvious problems with the data: (1) the transactions involve significantly different volumes; and (2) the transactions occurred at different levels of trade.

7.63 While in general we agree with Guatemala that there is not a "minimum" of documentation which must be submitted to substantiate an assertion of dumping, this does not mean that any documentation will be sufficient to justify initiation in a particular case. Guatemala also argues that the considerations outlined above are addressed only in Article 2 of the ADP Agreement, which is not referenced in Article 5.2, and are therefore irrelevant to the determination to initiate. We cannot accept Guatemala's interpretation of the ADP Agreement in this regard. In this case, we consider that based on an unbiased and objective evaluation of the information before it, the Ministry could not properly have determined that there was sufficient evidence of dumping to justify the initiation of the investigation.

7.64 In our view, in assessing whether there is sufficient evidence of dumping to justify initiation, an investigating authority may not ignore the provisions of Article 2 of the ADP Agreement. Article 5.2 of the Agreement requires an application to include evidence of "dumping" and Article 5.3 requires a determination that there is "sufficient" evidence to justify initiation. Article 2 of the ADP Agreement sets forth the technical elements of a calculation of dumping, including the requirements for determining normal value, export price, and adjustments required for a fair comparison. In our view, the reference in Article 5.2 to "dumping" must be read as a reference to dumping as it is defined in Article 2. This does not, of course, mean that the evidence provided in the application must be of the quantity and quality that would be necessary to make a preliminary or final determination of dumping. However, evidence of the relevant **type** is, in our view, required in a case such as this one where it is obvious on the face of the application that the normal value and export price alleged in the application will require adjustments in order to effectuate a fair comparison. At a minimum, there should be some recognition that a fair comparison will require such adjustments.

7.65 Guatemala argues that at the time of initiation, it was not possible to make adjustments, as the precise information needed is within the control of the exporting company, which bears the burden of showing that adjustments should be made. We do not accept this position. Article 2.4 provides, in pertinent part:

> "A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory

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[240] The first set of documents comprise an invoice reflecting the sale of 7,035 "bolsas" of "cemento portland gris" (also identified as "cemento portland gris tipo 11 compuzolana en bolsas de 94 libras") at a unit price of US$2.45, to Dist. Comercial Molina by Cruz Azul on 11 August 1995, a bill of lading dated 14 August 1995, and an import certificate dated 15 August 1995. The second set of documents comprise an invoice reflecting the sale of 4,221 "bolsas" of "cemento portland gris" (also identified as "cemento portland compuzolana gris 11 en bolsas de 94 libras") at a unit price of US$2.45, to Distribuidora de Leon on 11 August 1995 by Cruz Azul, a bill of lading dated 14 August 1995, and an import certificate dated 15 August 1995.

> level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[7]
>
> ____________________________
>
> [7]It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision".

In our view, this provision establishes an obligation for investigating authorities to make a fair comparison. Investigating authorities can certainly expect that exporters will provide the information necessary to make adjustments, and demonstrate that particular differences for which adjustments are sought affect price comparability. However, the authorities cannot, in our view, ignore the question of a fair comparison in determining whether there is sufficient evidence of dumping to justify initiation, particularly when the need for adjustments is apparent on the face of the application. Moreover, the exporting country or company may not even be aware that an application has been filed and the initiation of an investigation is being considered, and is in any event generally not a participant in the initiation decision, and can therefore not provide this information prior to initiation. Thus, Guatemala's position would make it more likely that investigations will be initiated on the basis of insufficient or incorrect evidence of dumping.

7.66 In this case it is apparent on the face of the application that the alleged normal value and the alleged export price are not comparable for purposes of considering whether dumping exists without adjustment. The recommendation to the Director of the Department of Economic Integration reflects this lack of comparability when it states that the normal value is the average price "to the final consumer", and the export price is the average of "the c.i.f. values". However, there is no recognition of the need for any adjustments in either the recommendation or the notice of initiation. While we would not expect the authorities to have, at the initiation stage, precise information on the adjustments to be made, we find it particularly troubling that there is not even any recognition that the normal value and export price alleged in the application are not comparable, nor any indication that more information on this issue was requested from the applicant or otherwise sought by the Ministry. When, as in this case, it is evident from the information before the investigating authority that some form of adjustment will be required to make a fair comparison and establish a dumping margin, an unbiased and objective investigating authority could not, in our view, properly determine that there was sufficient evidence of dumping to justify initiation in the absence of such adjustment, or at least without acknowledging the need for such adjustment.[241]

7.67 As noted above, while there is clearly a different standard applicable to making a preliminary or final **determination** of dumping, than to determining whether there is sufficient evidence of dumping to justify initiation of an investigation, we cannot agree with Guatemala's position that Article 2 is irrelevant to the initiation determination. The subject matter, or **type**, of evidence needed to justify initiation is the same as that needed to make a preliminary or final determination of dumping, although the quality and quantity is less. Thus, in our view, based on an unbiased and objective evaluation of the evidence and information before it in this case, the Ministry could not properly have determined that there was sufficient evidence of dumping to justify the initiation of the investigation.

[241] As discussed above, the fact that information necessary to consider such an adjustment might not have been reasonably available to the applicant does not transform a lack of information into sufficient evidence to justify initiation. For instance, the investigating authority might be able to look to the domestic industry's own experience for information on adjustments.

2. Threat of material injury

7.68 The only information before the Ministry on the volume of the allegedly dumped imports consisted of the documentation concerning two importations of cement into Guatemala through a single customs post on the same date in August 1995 referred to above. There were statements in the application that the volume of imports was massive, and that imports may have been entering through other customs posts. In our view, these assertions are unsubstantiated by any relevant evidence in the application. Nor is there any indication in the evaluation prepared by the two advisors, or in the Resolution of the Director, that any evidence or information beyond that contained in the application was considered in making the determination to initiate.[242] Guatemala argued before the Panel that the two import certificates demonstrate that imports were massive in light of the average daily consumption of cement in Guatemala. However, there is no information in the application from which average daily consumption of cement in Guatemala can be determined. Nor is there any indication in the evaluation prepared by the two advisors, or in the Resolution of the Director, that the consumption of cement in Guatemala was either known, or considered, in making the determination to initiate.[243] Thus, there is no indication that the volume of imports represented by the two import certificates was compared to consumption in Guatemala, or that an assessment that those imports were "massive" was made at the time of initiation. Rather, the Ministry appears to have accepted the characterization of the applicant in this regard.

7.69 The remaining information contained in the application concerning the threat of material injury consists of the following:

> "Cementos Progreso, S.A. is being threatened by massive imports of cement from Mexico. By way of evidence, the initial complaint contained two photocopies of import certificates showing imports at prices below the normal retail price in Mexico, and which therefore threatened the company with imminent material injury, as set out below:
>
> "Cement entering Guatemala by land at prices lower than normal value is directly affecting investment planning by the company, specifically for plant improvements and expansion, which would entail:
>
> - Expanding raw material milling facilities at the plant itself;
> - maximizing the efficiency of the plant;
> - building a third kiln at the San Miguel Sanarate plant;
> - restructuring the existing electricity system by converting the plant that presently runs on bunker;
> - the foregoing expansions would call for at least an additional 400 workers, who would no longer be needed if the projects were stopped;

[242] We note that Guatemala asserted that the Ministry "knew" certain information, such as transport costs in Guatemala, information concerning Cementos Progreso and the market for cement in Guatemala, that Mexico was going through a severe recession, particularly in the construction sector, etc., and that such knowledge was brought to bear on its evaluation of the information in the application and together with that information constituted sufficient evidence to justify initiation. Thus, for instance, Guatemala asserted before the Panel that there was sufficient information to establish a presumption that there was excess capacity in Mexico, and a decline in demand for cement in Mexico, which caused Cruz Azul to start exporting to Guatemala in 1995, and indicated that exports would increase. While such facts may have been known to the Ministry, there is no reference to them in the application, in the evaluation prepared by the two advisors, or in the resolution itself. Indeed, there is no reference whatsoever to excess capacity in Mexico, or to a likelihood that imports would increase, in the resolution or the underlying recommendation. Thus, we cannot consider such facts in evaluating whether the Ministry properly concluded that there was sufficient evidence to justify initiation in this case.

[243] Notably, there is no information concerning the existence, or non-existence, of imports of cement from any source other than Cruz Azul. Consumption, of course, cannot be calculated without such information.

- rather than invest in cement at below-cost prices, the company would prefer to cease production and become an importer;
- loss of market shares;
- were the company to become an importer, it would be compelled to dismiss 1,052 workers, with all the attendant social problems;
- the plant would lose its expertise, or what is referred to as technology transfer".

7.70 There is nothing in the application to substantiate these statements. We find this to be particularly troublesome, given that the relevant information, such as information on employment levels and ability to finance expansions and other projects, is exclusively in the hands of the applicant, in whose interest it would be to provide such information to substantiate its claim of threat of injury. We conclude that an unbiased and objective investigating authority could not properly determine that the evidence of threat of injury before the Ministry was sufficient to justify initiation.

7.71 It was suggested that the concerns of domestic producers to keep sensitive business information confidential might explain the fact that the applicant did not provide more specific information concerning its own operations, i.e. sales, financial information, etc., which might substantiate the assertion of threat of material injury. However, both the ADP Agreement and Guatemalan law provide for confidential treatment of information where warranted. Thus, the fact that relevant information is considered confidential does not justify the failure to submit such relevant information with the application to substantiate the assertions therein. Guatemala argued before the panel that an applicant is not required to include "documentary evidence" of the threat of injury. In Guatemala's view, the assertion that Cementos Progreso was facing a threat of material injury was substantiated by the declaration that if dumped imports continued to be sold at dumped prices, Cementos Progreso would have to cancel plans to expand and modernize its production plant. In our view, however, this is not "substantiation" of the assertions, but merely statements of the applicant.[244] "Sufficient evidence to justify initiation" must, in our view, mean something whose "accuracy and adequacy" can be objectively evaluated as required by Article 5.3 of the ADP Agreement. Mere statements do not fall into this category of information. Moreover, there is no indication as to what evaluation was made of the "accuracy and adequacy" of these statements.

7.72 Relevant evidence might have included information on any increase in the volume of imports either in absolute terms or relative to production or consumption in Guatemala, as set forth in Article 3.2 of the ADP Agreement, referenced in Article 5.2(iv). As noted above, the only information on the volume of imports was the documentation reflecting two importations, and assertions concerning possible imports through other customs posts. There was no information in the application, or apparently otherwise available to the Ministry, concerning consumption in Guatemala. The only information in the application concerned the capacity of Cementos Progreso, which was stated to be 1.6 million metric tonnes, and the fact that Cementos Progreso was using 100 percent of its installed capacity operating 3 shifts per day, 24 hours per day. Thus, at the most, it could have been concluded from the face of the application that annual production was 1.6 million metric tonnes.[245] The two sales reflected in the import certificates were for a total of 480,000 kilograms, or 480 metric tonnes, of cement on one day in August 1995. Thus, assuming Guatemalan production equalled capacity, and that production was equal all days of the year 1995, the information in the application might have been interpreted as showing that the imports were equivalent to 11 percent of production (not consumption) for one day in August, or alternatively, that those imports were equivalent to 0.03 percent of annual production of cement in Guatemala. This calculation does not

[244] We note that we do not question the truth of these statements. However, that a statement may be true does not mean that it is substantiated by relevant evidence, or that it is evidence which substantiates other statements.

[245] There is a real question whether such an assumption would have been reasonable, but we are engaged here in evaluating the best possible case scenario for Guatemala's position.

provide any information whether there had been any increase in imports, as there is no information in the application concerning the level of imports at any time other than one day in August 1995.[246] Moreover, as noted above, there is no indication that such a calculation was carried out at the time of initiation. Finally, we note the argument made by Guatemala that, in light of the fact that there were no imports prior to June 1995, any increase in imports from that zero level was massive. We do not accept this conclusion. Indeed, we note that the application does not state that imports were zero before June 1995, and there is no indication in the analysis underlying the decision to initiate that the Ministry knew or considered the volume of imports prior to June 1995 in making its determination.[247] While the application, which was filed in October 1995, did assert that Cementos Progreso had been "for at least three months now ... confronting the unfair business practice known as dumping", this is not the same as a statement that there were no imports before June of 1995. There is simply no discernible basis that was before the Ministry at the time of its initiation determination on which the volume of imports could properly have been characterized as "massive."

7.73 Other evidence might have included information regarding whether there had been significant price undercutting by the dumped imports, or whether the effect of such imports was otherwise to depress prices to a significant degree or prevent price increases which otherwise would have occurred as set forth in Article 3.2 of the ADP Agreement, referenced in Article 5.2(iv). The information on the price of Mexican cement in Guatemala in the application indicates that the c.i.f. price of the cement reflected in the import certificates was Q 14.77. The only information on the price of Guatemalan cement in the application indicates that the average retail price for Guatemalan cement was Q 24 in the capital city, and Q 32 in the Department of El Petén. In our view, these prices are not comparable, and therefore do not shed any light on the effect of dumped imports on prices. C.i.f. prices to distributors as shown in the import certificates cannot properly be compared with retail prices for Guatemalan cement, as the difference in level of sale may have a significant impact on the prices, and thus the comparison.

7.74 Moreover, evidence to substantiate the allegation of threat of material injury might have included information on the relevant economic factors and indices having a bearing on the state of the industry set forth in Article 3.4 of the ADP Agreement, that is, 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. Again, we are particularly troubled by the lack of information provided in this regard, as this information is uniquely within the control of the applicant. The application, as noted above, contains statements concerning some of these factors, but no specific or quantifiable information, except for the statement that the expansion plans called for an additional 400 workers, and should Cementos Progreso cease production entirely, it would be compelled to dismiss 1,052 workers. There is no information in the application concerning the level of sales enjoyed by Cementos Progreso, or its profits. While a statement is made that the allegedly dumped imports were directly affecting investment planning by the company, there is no information concerning ability to raise capital or otherwise fund investments, which might support the statement. In our view, the statements made by the applicant regarding the effects of allegedly dumped imports on investment planning for plant improvements and expansion are unsupported by relevant evidence. We cannot agree that the statements quoted above constitute "evidence" substantiating the assertions in the application.

7.75 Finally, we note that there is no evidence or information in the application on the factors relevant to threat of material injury set forth in Article 3.7 of the ADP Agreement. Guatemala argues

[246] Information on import volumes was requested by the Ministry from the Directorate-General of Customs **after** initiation.

[247] In this regard, we note that the fact that the recommendation was that an investigation of the Mexican company exporting cement to Guatemala **by land** be initiated might be understood to suggest that there were other imports entering Guatemala by sea.

that Article 5.2 "does not require that the application provide information on the four factors set forth in Article 3.7." We recognize that there is no specific reference in Article 5.2 to the factors enumerated in Article 3.7 regarding threat of injury, such as there is to the factors set forth in Articles 3.2 and 3.4 regarding injury. However, we do not accept the view that the lack of a specific reference to Article 3.7 means that an applicant is not required to submit "such information as is reasonably available to the applicant" on the question of threat of material injury, if threat of material injury is alleged in the application. Such an interpretation of the Agreement would, in our view, be entirely impermissible, as it would be inconsistent with the text, as well as the object and purpose, of Article 5.2 as a whole.

7.76 Looking at the text, we note that the chapeau of Article 5.2 provides, in pertinent part:

> "An application under paragraph 1 shall include evidence of ... *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement...".

Article 5.2(iv) explicitly refers to Article 3.2, which elaborates on certain factors to be considered in evaluating "injury". Footnote 9 to Article 3 of the Agreement specifies:

> "Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such and industry and shall be interpreted in accordance with the provisions of this Article".

Thus, the requirements in Article 5.2 regarding "injury" must, in our view, be read to refer to threat of injury in a case where threat of injury is at issue.[248] Consequently, in this case, as the applicant alleged threat of injury, clearly the application must contain evidence of threat of material injury.

7.77 Moreover, while as noted above, there is clearly a different standard applicable to making a preliminary or final **determination** of material injury, including threat of material injury, than to determining whether there is sufficient evidence of material injury, including threat of material injury to justify initiation of an investigation, we cannot agree with Guatemala's apparent position that the factors set forth in Article 3.7 are irrelevant to the initiation determination. We cannot perceive how, in the absence of information pertaining to those factors, an unbiased and objective investigating authority could properly determine that there is sufficient evidence of threat of material injury to justify initiation in a case in which threat of material injury is alleged. In other words, the subject matter, or **type**, of evidence needed to justify initiation is the same as that needed to make a preliminary or final determination of threat of injury, although the quality and quantity is less. Thus, in our view, based on an unbiased and objective evaluation of the evidence and information before it in this case, the Ministry could not properly have determined that there was sufficient evidence of injury, that is threat of injury, to justify the initiation of the investigation.

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[248] Similarly, while Article 3.7 contains factors which must be specifically considered in determining threat of injury, the factors in Article 3.2 remain relevant.

3. Causal link

7.78 Finally, we conclude that an unbiased and objective investigating authority could not properly have determined that there was sufficient evidence of causal link to justify initiation if there was not sufficient evidence of dumping and threat of injury. In this case, having concluded that the evidence of dumping and threat of material injury were insufficient to justify initiation, we also conclude that the evidence of causal link between the dumped imports and the alleged injury was, perforce, not sufficient to justify initiation. The ADP Agreement clearly requires sufficient evidence of all three elements before an investigation may be initiated.

4. Conclusion

7.79 In sum, in our view, based on an unbiased and objective evaluation of the evidence and information that was before it at the time of initiation in this case, the Ministry could not properly have determined that there was sufficient evidence of dumping, threat of injury, and causal link, to justify the initiation of the investigation.

7.80 Therefore, we determine that Guatemala failed to comply with the requirements of Article 5.3 of the ADP Agreement by initiating the investigation on the basis of evidence of dumping, injury and causal link that was not "sufficient" to justify initiation.

VIII. RECOMMENDATION

8.1 Mexico argues that the violations of the ADP Agreement in this case go to the foundations of the anti-dumping investigation conducted by Guatemala, and effectively render the investigation invalid from the outset. Consequently, Mexico argues that the consequences of the invalid initiation must be undone, and requests us to recommend that Guatemala (1) revoke the anti-dumping measure imposed on imports of grey portland cement from Cruz Azul, and (2) refund those anti-dumping duties already collected. This we decline to do.

8.2 Article 19.1 of the DSU is explicit concerning the recommendation a panel is to make in the event it determines that a measure, or in this case, action, is inconsistent with a covered agreement:

> "it shall recommend that the Member concerned bring the measure into conformity with that agreement". (footnotes omitted).

Article 19.1 goes on to provides that:

> "In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations".

Such suggestions on implementation, however, are not part of the recommendation, and are not binding on the affected Member.

8.3 Thus, in a dispute where a panel concludes that a Member has violated the provisions of the ADP Agreement, it is constrained by the language of Article 19.1 to recommend that the Member bring its actions, or its measure, as the case may be, into conformity with the provisions of the ADP Agreement. In addition, the panel could, **at most**, suggest ways in which it believes the Member could appropriately implement that recommendation. In the first instance, however, the modalities of implementation of a panel, or Appellate Body, recommendation are for the Member concerned to determine. This is confirmed by the language of Article 21.3 of the DSU, which provides:

> "At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions

> in respect of implementation of the recommendations and rulings of the DSB". (footnote omitted).

In our view, this language clearly establishes a distinction between the **recommendation** of a panel, and the **means** by which that recommendation is to be implemented. The former is governed by Article 19.1, and is limited to a particular form. The latter may be suggested by a panel, but the choice of means is decided, in the first instance, by the Member concerned. Of course, it is possible that the prevailing Member in the dispute may not be satisfied with the Member's implementation. The DSU recognizes this possibility, and provides for recourse to the dispute settlement procedures to resolve any such disagreements.

8.4 We have concluded in this case that Guatemala violated the provisions of the ADP Agreement by failing to notify the Government of Mexico before proceeding to initiate, as required by Article 5.5. We therefore recommend that the Dispute Settlement Body request Guatemala to bring its action into conformity with its obligations under Article 5.5 of the ADP Agreement. In this case, in view of our suggestion with respect to implementation of our second recommendation, we make no suggestion related to implementation of this recommendation.

8.5 We have also concluded that Guatemala violated the provisions of the ADP Agreement by initiating the investigation when there was not sufficient evidence to justify initiation, as required by Article 5.3. Therefore, we recommend that the Dispute Settlement Body request Guatemala to bring its action into conformity with its obligations under Article 5.3 of the Agreement.

8.6 We have determined 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 conducted by the Guatemalan Ministry of Economy. Thus, the entire investigation rested on an insufficient basis, and therefore should never have been conducted. This is, in our view, a violation which cannot be corrected effectively by any actions during the course of the ensuing investigation.[249] Therefore, we suggest that Guatemala revoke the existing anti-dumping measure on imports of Mexican cement, because, in our view, this is the only appropriate means of implementing our recommendation.

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[249] By contrast, we can envision examples of errors during the course of an anti-dumping investigation which would constitute violations of the ADP Agreement when they occur, but which could effectively be corrected during the subsequent course of the investigation. However, this is not such a case.