

**GUATEMALA – DEFINITIVE ANTI-DUMPING MEASURES
ON GREY PORTLAND CEMENT FROM MEXICO**

Report of the Panel

The report of the Panel on Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 24 October 2000 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 30 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

A. BACKGROUND

1.1 On 5 January 1999, 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 ("AD Agreement") regarding the definitive anti-dumping measure imposed by Guatemala on imports of Portland cement from Cooperativa Manufacturera de Cemento Portland la Cruz Azul, SCL, of Mexico ("Cruz Azul"), as well as the actions that preceded it (WT/DS156/1).

1.2 Mexico and Guatemala held one-day consultations on 23 February 1999, but failed to reach a mutually satisfactory solution.

B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.3 On 26 July 1999, pursuant to Article 17.4 of the AD Agreement and Article 6.2 of the DSU, Mexico requested the establishment of a panel to examine the consistency of Guatemala's definitive anti-dumping measure on imports of Portland cement from Mexico, as well as the actions that preceded it, with Guatemala's obligations under the Agreement Establishing the World Trade Organization ("WTO Agreement"), in particular those contained in the AD Agreement (WT/DS156/2 and WT/DS156/2/Corr.1).

1.4 At the meeting of the Dispute Settlement Body ("DSB") on 26 July 1999, 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 22 September 1999, 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 documents WT/DS/156/2 and WT/DS/156/2/Corr.1, 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".

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

1.7 On 12 October 1999, Mexico requested the Director-General to determine the composition of the Panel, pursuant to Article 8.7 of the DSU. The Director-General composed the following Panel:

Chairman: Mr. Johan Human
Members: Mr. Antonio Buencamino
Mr. Oscar Hernández

C. PANEL PROCEEDINGS

1.8 The Panel met with the parties on 15-16 February 2000 and 12-13 April 2000.

II. FACTUAL ASPECTS

2.1 This dispute concerns the definitive anti-dumping measure imposed by Guatemala's Ministry of Economy ("Ministry"), as well as the actions that preceded it, in particular the 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, and with effect from 28 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 dumping and consequent 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 that Cruz Azul provide cost data and other information 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, in the face of Cruz Azul's refusal to accept named non-governmental experts.

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. The definitive measure was imposed on the basis of a determination of dumping and consequent injury.

III. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

A. MEXICO

3.1 **Mexico** has requested the Panel to find and recommend that:

- (a) the initiation of the investigation by the Ministry of the Economy of Guatemala is inconsistent with Articles 1, 2, 3, 5 and 12 of the AD Agreement;
- (b) Guatemala violated Article 6.1.3 of the AD Agreement by failing to provide Cruz Azul and the Government of Mexico with the full text of the application as soon as it initiated the investigation;
- (c) the provisional anti-dumping measure was imposed in violation of Articles 1, 7, 12 and 18 of the AD Agreement;
- (d) Guatemala committed the following procedural violations:

1. Guatemala did not set a specific period for the gathering, submission and consideration of evidence and did not determine a time limit for the admission and receipt of evidence, in violation of Article 6.1 and 6.2 of the AD Agreement.
 2. Guatemala did not give Cruz Azul the opportunity to examine the evidence used by the Ministry of the Economy in the course of the investigation, thus violating Article 6.1.2, 6.2 and 6.4 of the AD Agreement.
 3. Guatemala did not satisfy itself as to the accuracy of the information provided by Cementos Progreso that formed the basis for its conclusions throughout the various stages of the investigation, failing to comply with its obligations under Article 6.6 of the AD Agreement.
 4. Guatemala extended the investigation period in the ninth month after initiation of the investigation without giving the grounds for the extension, thus violating Article 6.1 and 6.2 and paragraph 1 of Annex II to the AD Agreement.
 5. Guatemala improperly asked Cruz Azul to provide information on production costs corresponding to both investigation periods – the original period and the extended period – in violation of Article 2.1 and 2.2 of the AD Agreement.
 6. Guatemala sought to conduct an on-the-spot investigation without having obtained the express consent of the firm, in violation of several obligations and requirements in Article 6.7, and paragraphs 2, 3, 7 and 8 of Annex I to the AD Agreement.
 7. Guatemala rejected the technical accounting evidence furnished by Cruz Azul on the normal value and the export price during the original investigation period, in violation of Article 6.1, 6.2 and 6.8 and paragraphs 5 and 6 of Annex II to the AD Agreement.
 8. Guatemala admitted confidential information from Cementos Progreso without a public version thereof, did not give the reasons for which it deemed the information confidential and did not promptly give Cruz Azul the documentation provided by Cementos Progreso, in violation of Article 6.1, 6.2, 6.3 and 6.5 of the AD Agreement.
 9. Guatemala did not promptly inform Cruz Azul of the essential facts taken into account for the imposition of the definitive anti-dumping measure, thus violating its right of defence provided under Article 6.1, 6.2 and 6.9 of the AD Agreement.
 10. during the final stage of the investigation, Guatemala changed the determination of threat of material injury made at the initiation of the investigation and when imposing the provisional measure into a determination of material injury. This was done without giving Cruz Azul any opportunity to defend itself or present relevant evidence, in violation of Article 6.1 and 6.2 of the AD Agreement.
- (e) the definitive anti-dumping measure was imposed in violation of Articles 1, 2, 3, 9, 12 and 18 of the AD Agreement and Article VI of the GATT 1994;

- (f) the Guatemalan authority did not adequately establish the elements of fact and law put forward in the investigation and did not make an unbiased and objective evaluation of them;
- (g) where applicable, Guatemala made impermissible interpretations of the AD Agreement and imposed the definitive anti-dumping measure, as well as the action that preceded it, including the provisional measure, on the basis of these impermissible interpretations.

Consequently, on the basis of Article 19.1 of the AD Agreement, Mexico respectfully requests that the Panel:

- (a) recommend that Guatemala bring its measure into conformity with the GATT 1994 and the AD Agreement;
- (b) suggest that Guatemala revoke the anti-dumping measure adopted against imports of Mexican cement and refund the anti-dumping duties collected.

B. GUATEMALA

3.2 **Guatemala** has requested the Panel to make the following rulings:

1. As a preliminary matter the panel is without jurisdiction to consider this dispute

3.3 Guatemala respectfully requests the Panel to find that:

- the Panel is not properly composed, because it includes one of the members of the previous panel which examined the case *Guatemala - Cement I*, a fact which compromises the impartiality of the Panel established to examine this dispute, and rule that this Panel has no jurisdiction to consider the present case;
- the Panel lacks jurisdiction to consider Mexico's complaints concerning the provisional measure, because Mexico did not request consultations in respect of that measure and because in its first submission, Mexico does not prove, as required by Article 17.4 of the Anti-Dumping Agreement, that the said measure has had an enduring significant impact;
- in the alternate, the Panel lacks the jurisdiction to consider Mexico's complaints concerning the provisional measure because the said provisional measure never had a significant impact on Mexico's overall trade interests;
- in view of the findings of the Appellate Body in *Guatemala - Cement I*, the report of the Panel in that case has no value as a precedent and lacks legal value to be invoked by Mexico as a basis for its allegations, and that the Panel should therefore reject those of Mexico's arguments that are based on the said report. Similarly, the Panel should refrain from using the report in the *Guatemala - Cement I* case to substantiate such conclusions and recommendations as it reaches after analysing the present case.

3.4 Guatemala requests the Panel to rule on the preliminary objections separately and before examining the substantive arguments of the parties.

2. The substantive claims of Mexico should be rejected

3.5 If, notwithstanding the solid factual foundations and legal underpinning of Guatemala's preliminary objections, the Panel should decide to proceed to consider the merits of the case, Guatemala requests that the Panel reject Mexico's arguments and petitions and find that:

- Guatemala's definitive anti-dumping measure and the actions that preceded it are fully consistent with the GATT 1994 and the Anti-Dumping Agreement;
- all other aspects of Guatemala's anti-dumping investigation are fully consistent with GATT 1994 and the Anti-Dumping Agreement and, specifically that:
 - Guatemala initiated its investigation in conformity with Article 5 of the Anti-Dumping Agreement;
 - all aspects of the notification of initiation were in compliance with Articles 5, 6 and 12 of the Anti-Dumping Agreement;
 - Guatemala imposed the provisional measure in conformity with the Anti-Dumping Agreement;
 - Guatemala formulated the final affirmative determination in conformity with the Anti-Dumping Agreement.

3.6 If, notwithstanding the solid factual foundations and legal underpinnings of Guatemala's position, the Panel were to decide that in conducting its investigation Guatemala committed procedural or technical errors, Guatemala requests the Panel to find:

- any procedural or technical error that Guatemala may have committed is harmless or was acquiesced in by Mexico;
- Guatemala has rebutted the presumption of nullification or impairment referred to in Article 3.8 of the DSU.

3.7 In the alternative Guatemala requests the Panel to find that any technical error that it may have committed is insufficient to justify the formulation of a recommendation by the Panel under Article 19.1 of the DSU.

3.8 In the further alternative, Guatemala requests that, regardless of what is decided in the present case, the Panel rejects Mexico's request that the Panel should suggest that Guatemala revoke the definitive anti-dumping measure or refund the anti-dumping duties collected.

[Parties' arguments in Sections IV through VI deleted from this version]

VII. INTERIM REVIEW

7.1 On 11 September 2000 both parties submitted written requests for the Panel to review precise aspects of the interim report. Neither party requested a further meeting with the Panel.

7.2 Guatemala notes that in paragraph 8.13 of the interim report the Panel misrepresents Guatemala's position. Guatemala argues that it does not equate the value of the panel report in *Guatemala – Cement I* to that of an unadopted panel report. In consequence, the Panel has decided to strike out the third sentence of paragraph 8.13 of the interim report.

7.3 Guatemala also submits that in paragraph 8.17 of the interim report, the Panel misrepresents Guatemala's position and that the second sentence of this paragraph contains a generalization which does not properly reflect Guatemala's position. We consider that paragraph 8.17 contains an accurate, although not exhaustive, summarization of the arguments presented by Guatemala with respect to Article 17.6(i) of the AD Agreement. We are of the view that the summary in paragraph 8.17 is sufficient for purposes of the findings. Should the reader require a more thorough description of the arguments presented by Guatemala on this matter the reader may refer to the section of the descriptive part where these arguments have been reflected in full.

7.4 Guatemala requests that the findings of the Panel contain a separate section "setting forth Guatemala's position according to which Mexico bears the burden of proof of violation of a WTO Agreement, and to that end, must establish a *prima facie* case of inconsistency with a provision of the AD Agreement or the GATT 1994, and that it must do so before passing on to Guatemala the burden of proving compliance with the provision in question." We are of the view that the question of the burden of proof as presented by Guatemala does not warrant a separate set of findings. Since, Mexico has asserted that it does not deny that as a complainant in this dispute it bears the burden of proof to show that there has been a violation of the AD Agreement by Guatemala⁷⁷⁴.

7.5 Guatemala also requests that section VIII.B.5 titled "Guatemala's defence based on the principle of harmless error, acquiescence or estoppel, and rebuttal of the presumption in Article 3.8", should be relocated so as to follow the Panel's findings (in sections VIII.C.4, VIII.C.5 and VIII.C.6) concerning Articles 5.5, 12.1.1 and 6.1.3. This Guatemala argues that such relocation would make it clear that Guatemala's central argument is that it did not violate the mentioned provisions (Articles 5.5, 12.1.1 and 6.1.3), and that Guatemala's defence based on the principles of harmless error, acquiescence or estoppel, and the rebuttal of the presumption in Article 3.8, is not their only defence. In drafting our report we noticed that Guatemala's defence based on the principle of harmless error, acquiescence or estoppel, and rebuttal of the presumption in Article 3.8 was made as a subsidiary argument under several of the claims of violation made by Mexico. Thus, we decided to deal with such a defence up front as a preliminary issue. This decision regarding the structure of the interim report was made in order to avoid repetition and improve its readability. We see no reason to change the structure of the report at this stage.

7.6 Guatemala also requests that in addressing the subject of harmless error, the review of the Panel should draw a distinction between cases involving measures and cases involving administrative acts in the course of an investigation. We consider that this distinction is akin to the distinction between substantive and procedural violations, this issue is dealt with in paragraph 8.111 of the report.

7.7 Guatemala submits that paragraph 8.27 of the interim report should reflect the arguments made in paragraphs 138 and 139 of its first written submission. Our findings merely contain a

⁷⁷⁴ Mexico second written submission, paragraph 13.

summary of the parties' arguments. Our findings do not repeat fully the arguments of the parties, as this is the function of the descriptive part. In this regard, the reader may refer to the descriptive part for a full description of Guatemala's arguments on this matter. Moreover, the arguments presented by Guatemala in the above-mentioned paragraphs pertain to the question of whether the application contained such information as was reasonably available to the applicant (Article 5.2). We note that in light of our findings under Article 5.3 we decided not to rule on claims regarding Article 5.2.⁷⁷⁵

7.8 Guatemala also claims that the summary set forth in paragraph 8.30 concerning Guatemala's position on the obligation to examine the accuracy and adequacy of the evidence places Guatemala's assertions out of context. To correct this situation Guatemala requests certain changes and additions to paragraph 8.30. In order to accommodate Guatemala's concerns we have decided to make some changes to that paragraph. In the first sentence of the paragraph the phrase "prior to initiation of the investigation" will be added after the words "in the application". With regard to the other changes suggested by Guatemala, we consider that the summarization of the arguments is sufficient to present an overview of Guatemala's position. Should the reader require more detail on the arguments they can refer to the appropriate sections in the descriptive part.

7.9 Guatemala also claims that the summarization of its arguments presented in paragraph 8.34 of the interim report is inaccurate in that the Panel's statement that Guatemala asserted that there was no requirement to provide evidence on possible adjustments of an application is a generalization. Guatemala never made such an assertion. Similarly, Guatemala claims the Panel's summary in that paragraph of Guatemala's position with respect to the relationship of Articles 2 and 3 of the AD Agreement with Article 5 is inaccurate⁷⁷⁶, and in that Guatemala never argued that during the initiation stage, Cruz Azul was required to prove that the difference in levels of trade in any way affected price comparability. We disagree with Guatemala on this point. In our view the summarization presented in the findings is sufficiently accurate, especially since the full extent of Guatemala's arguments are reflected in the descriptive part of the report.

7.10 Guatemala claims that in the last sentence of paragraph 8.44, the Panel distorts Guatemala's position as set forth in its various submissions by giving the impression that Guatemala refused to collect the information from its Customs concerning the volume of imports. We disagree with Guatemala on this point. In our view the summarization presented in the findings is sufficiently accurate, especially since the full extent of Guatemala's arguments are reflected in the descriptive part of the report.

7.11 Guatemala claims that in paragraph 8.49, the Panel makes its own evaluation of the facts and assumes the Ministry's role by establishing what the imports from Mexico amounted to. With respect to Guatemala's comments regarding paragraph 8.49 of the interim report, we wish to clarify that in our findings the Panel does not attempt to substitute itself for the investigating authority. In paragraph 8.49 of the interim report we have examined to what extent the investigating authorities considered the volume of imports relative to domestic production and consumption in Guatemala. In that analysis we conclude that there is no evidence that at the time of investigation the Ministry possessed the necessary information to appropriately consider the increase in the volume of imports relative to domestic production and consumption in Guatemala. In an attempt to ascertain whether there was any factual support for Guatemala's assertion that there was a "massive" increase in the volume of imports relative to domestic production of Guatemalan Cement, taking evidence on the record before the Panel, we put together the information available to the Ministry at the time of initiation and performed the calculation referred to in paragraph 8.49. We found that assertions that imports of Mexican cement were "massive" did not find support in the data available to the Ministry at the time of initiation. The calculation performed by us to verify support for Guatemala's claims of massive imports, does not

⁷⁷⁵ See, *infra* paragraph 8.59.

⁷⁷⁶ Guatemala did, however, maintain that Article 5.8 was not applicable to the initiation stage.

affect our findings that there is no evidence to suggest that, at the time of initiation, the Ministry considered the volume of imports relative to domestic production.

7.12 Guatemala also complains that in paragraph 8.79 of the interim report, the Panel failed to mention that Guatemala maintains that it complied with Article 5.5 of the Anti-Dumping Agreement for the reasons set forth in that paragraph and because if it had proceeded with the investigation without having previously notified Mexico and Cruz Azul, either of them could have brought an "*amparo*" action to annul the investigation, but neither Mexico nor Cruz Azul made use of that remedy. We are of the view that the summary in paragraph 8.79 is sufficient for purposes of the findings. Should the reader require a more thorough description of the arguments presented by Guatemala on this matter the reader may refer to the section of the descriptive part where these arguments have been reflected in full. Moreover, we have addressed this issue and draw Guatemala's attention to our finding in paragraph 8.83 that "whether Mexico choose not to pursue its rights under Guatemalan law is of no concern to us, as this would not affect its rights under the WTO Agreements". With regard to Guatemala's comments on the Panel's treatment of its defence based on the principle of harmless error, acquiescence or estoppel, and rebuttal of the presumption in Article 3.8, we have already addressed this issue in paragraph 7.4 *supra*.

7.13 With regard to Guatemala's claim that the Panel misrepresents its position in paragraph 8.91 of the interim report by stating that Guatemala claimed that the public notice itself provided adequate information, we have decided to change the first sentence of this paragraph. The first sentence of paragraph 8.91 shall now read: "Guatemala responds that the public notice as supplemented by the report of the Directorate of Economic Integration of 17 November 1995 is adequate to fulfill the requirements of Article 12.1.1". Regarding Guatemala's comments on the Panel's treatment of its defence based on the principle of harmless error, acquiescence or estoppel, and rebuttal of the presumption in Article 3.8, we have already addressed this issue in paragraph 7.4 *supra*.

7.14 Guatemala requests changes to the summarization of the arguments in paragraph 8.123, as it considers that the summarization does not record Guatemala's position in full. We are of the view that the summary in paragraph 8.123 is sufficient for purposes of the findings. Should the reader require a more thorough description of the arguments presented by Guatemala on this matter the reader may refer to the section of the descriptive part where these arguments have been reflected in full. Guatemala also points out a slight difference in the punctuation of the second sentence of paragraph 8.123, between the Spanish and the English versions of the interim report. We have changed the English version so it would read exactly as the Spanish.

7.15 Guatemala requests changes to paragraph 8.128 of the interim report consisting of a summary of the arguments presented by Guatemala. We consider that the changes requested are not necessary as the summary of Guatemala's arguments in paragraph 8.128 is sufficient for purposes of the findings. Should the reader require a more thorough description of the arguments presented by the parties it may refer to the section of the descriptive part where these arguments have been reflected in full.

7.16 Guatemala has asked the Panel to include Guatemala's reply to Question 39 from Mexico after paragraph 8.131 of the interim report. According to Guatemala, "[t]his reply provides evidence concerning the probative value of the notarial deed of 4 November". We note that Question 39 from Mexico concerns the status of notarial deeds in Guatemalan law. This is also the context for Guatemala's reply to that question. Since the status, or "probative value", of a notarial deed under Guatemalan law is not relevant to our findings, we decline to make the change requested by Guatemala.

7.17 Guatemala maintains that our summarization of their arguments with respect to the alleged violation of Article 6.1.2. is incomplete and inaccurate. Therefore, it requests the inclusion of a

reference to the rules laid down by the investigating authority for the public hearing. We are of the view that the summary in paragraph 8.143 is sufficient for purposes of the findings. Should the reader require a more thorough description of the arguments presented by Guatemala on this matter the reader may refer to the section of the descriptive part where these arguments have been reflected in full. Guatemala also requests that reference should be made to the fact that Article 6.5 distinguishes between two types of confidential information. We would like to point out that the issue of the types of confidential information provided for in Article 6.5 is explored in depth in paragraph 8.219 of the report.

7.18 Guatemala's requests an expansion of the quotation that appears in the last sentence of paragraph 8.147 of the interim report, in order to make it a complete quotation of the sentence. We wish to highlight that the quotation is made from the second to last sentence of paragraph 294 of Guatemala's first submission and not to the last sentence of that paragraph, as Guatemala seems to believe. The sentence quoted by us in the findings does not contain the words that Guatemala requests us to include, thus, we decline to make the change suggested by Guatemala. Guatemala also requests the Panel to clarify, in paragraph 8.150, that on 17 January 1997 Cruz Azul requested two copies. We would like to point out that the preceding paragraph makes it clear that "On 17 January 1997, Cruz Azul requested that ...". We believe that no further clarification is necessary.

7.19 With respect to the third sentence of paragraph 8.153 of the interim report, Guatemala has asked the Panel to "also indicate that the text of the provision establishing the fee was attached". We are uncertain whether Guatemala asserts that the relevant text was attached to Guatemala's submissions to the Panel, or to the 6 December 1996 Resolution of the Directorate of Economic Integration sent to Cruz Azul. If the former, we fail to see how the provision of the relevant text to the Panel is relevant to our findings in the present dispute. If the latter, we note that Guatemala has failed to adduce any proof that the relevant text was attached to its 6 December 1996 Resolution. In particular, no such text was attached to the copy of the Resolution made available to the Panel during the course of these proceedings (Annex Mexico-36). Nor, indeed, did the 6 December 1996 Resolution contain any reference to that text. Nor has Guatemala adduced any evidence that Cruz Azul was otherwise provided with a copy of the relevant provision. For these reasons, we decline to make the change requested by Guatemala.

7.20 Guatemala points to a typographical error in the second to last sentence of paragraph 8.211. We have accepted the correction suggested by Guatemala and the word "not" has been added in "information was not 'susceptible of summary'".

7.21 Mexico requests us to suggest, in the final report, that Guatemala should refund the anti-dumping duties collected on imports of grey Portland cement from Mexico as a result of an anti-dumping measure which was found to be in violation of the AD Agreement. We see no reason to change our decision not to suggest repayment of the duties.

7.22 Mexico also requests certain changes due to typographical errors and inconsistencies between the Spanish and English versions of the report. We have made the necessary corrections in paragraphs 4.21, 4.97, 6.140, 6.445, 6.1071, 6.1111, 8.49, 8.94, 8.84 and 8.122.

VIII. FINDINGS

A. INTRODUCTION

8.1 This dispute involves the imposition of a definitive anti-dumping measure by the Guatemalan Ministry of Economy ("the Ministry") on imports of portland cement from Mexico. Mexico raises claims concerning the initiation of the investigation, the conduct of the anti-dumping investigation, the imposition of a provisional measure and the imposition of the definitive measure.

8.2 On 21 September 1995, Cementos Progreso S.A. ("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 Cooperativa la Cruz Azul, S.C.L. of Mexico ("Cruz Azul"). 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.

8.3 Guatemala established as the period of investigation the period from 1 June 1995 to 30 November 1995. 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 14 October 1996 Guatemala extended the period of investigation, after the extension the period of investigation covered the period 1 June 1995 to 31 May 1996. On that same date Guatemala provided an additional questionnaire to the parties in the investigation to be responded by 30 October 1996.

8.4 After an exchange of letters between Guatemala, Mexico and Cruz Azul the date for the verification at Cruz Azul was fixed for the week of 3-6 December 1996. The scheduled verification did not take place due to Cruz Azul's objections to the Ministry's intent to: a) verify information concerning the period of 1 December 1996 to 31 May 1996; b) verify information concerning Cruz Azul's cost of production; and c) use certain non-governmental experts.

8.5 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.

8.6 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 AD 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.

8.7 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 AD Agreement. A first panel concerning this matter was established by the DSB on 20 March 1997. The report of the panel was issued on 19 June 1998.

8.8 On 4 August 1998, Guatemala notified the DSB of its intention to appeal certain issues of law covered in the panel report and legal interpretations developed by the panel, and filed a Notice of Appeal with the Appellate Body. The Appellate Body issued its report on 2 November 1998. In its report, the Appellate Body reversed: a) the panel's finding that Article 17 of the *Anti-Dumping Agreement* "provides for a coherent set of rules for dispute settlement specific to anti-dumping cases ... that replaces the more general approach of the DSU"; b) the panel's alternative finding in paragraph 7.26 of the panel report relating to the term "measure"; and c) the panel's conclusion in paragraph 7.27 of the panel report that "the matters referred to in Mexico's request for establishment of a panel" were properly before it. The DSB adopted the report of the Appellate Body on 25 November 1998.

8.9 The Appellate Body's ruling did not concern the substantive question of whether Guatemala's investigation was consistent with the provisions of the AD Agreement. Consequently, on 5 January 1999, Mexico requested consultations with Guatemala under the DSU and the AD Agreement regarding Guatemala's definitive anti-dumping measure on imports of grey portland cement from Cruz Azul as well as the actions that preceded it. Mexico and Guatemala held consultations on 23 February 1999, but failed to reach a mutually satisfactory solution. On 26 July

1999, Mexico requested the establishment of a panel to examine the consistency of the definitive anti-dumping measure, and the actions preceding that measure, with the provisions of the AD Agreement. At its meeting on 22 September 1999, the DSB established a panel in accordance with Article 6 of the DSU with standard terms of reference.

B. PRELIMINARY ISSUES RAISED BY GUATEMALA

1. The Panel was improperly composed and is not competent to review the matter

8.10 Guatemala requests us to rule that the composition of this Panel is inconsistent with WTO and international law principles, and that we therefore lack competence to review the matter before us. Specifically, Guatemala considers that the presence on this Panel of a member who served on a previous panel relating to the same matter ("*Guatemala – Cement I*"⁷⁷⁷) detracts from the objectivity and independence that a panel should have when reviewing a matter brought before it. Mexico requested us to reject Guatemala's preliminary objection, arguing that the Panel was composed in conformity with the DSU, and that we have competence to examine the matter before us.

8.11 Prior to the first meeting of the Panel with the parties, we issued the following preliminary ruling on this issue through a communication addressed to the parties and third parties, dated 24 February 2000:

"1.4 In order to determine whether the substance of Guatemala's preliminary objection is an issue that is susceptible of a ruling by the Panel, we have carefully analysed the provisions of the DSU governing panel composition. It is clear that Article 8.6 of the DSU imposes primary responsibility for panel composition on the parties to the dispute. In cases where the parties are unable to agree on the composition of a panel, such as this one, Article 8.7 of the DSU imposes responsibility for panel composition on the Director General. According to Article 8 of the DSU, therefore, the composition of a panel is determined by the parties to the dispute and, in certain circumstances, by the Director General. Neither Article 8 nor any other provision of the DSU prescribes any role for the panel in the panel composition process. For this reason, we find that we are unable to rule on the substance of the issue raised by Guatemala.

1.5 Should Guatemala persist with its substantive concerns regarding the composition of the Panel, Guatemala may avail itself of the procedure provided for in the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes."

8.12 We are not aware whether Guatemala has decided to avail itself of its right under Article VIII:1 of the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes⁷⁷⁸ to submit evidence of a violation of the obligations of independence or

⁷⁷⁷ *Guatemala - Anti-Dumping Investigation regarding portland Cement from Mexico*, report of the panel, WT/DS60/R, adopted as reversed on 25 November 1998.

⁷⁷⁸ Article VIII:1 of the Rules of Conduct provides:

"1. Any party to a dispute, conducted pursuant to the WTO Agreement, who possesses or comes into possession of evidence of a material violation of the obligations of independence, impartiality or confidentiality or the avoidance of direct or indirect conflicts of interest by covered persons which may impair the integrity, impartiality or confidentiality of the dispute settlement mechanism, shall at the earliest possible time and on a confidential basis, submit such evidence to the Chair of the DSB, the Director-General or the Standing Appellate Body, as appropriate according to the respective procedures detailed in paragraphs VIII:5 to VIII:17 below, in a written statement specifying the relevant facts and circumstances. Other Members who possess or come into possession of such evidence, may provide such evidence to the parties to the dispute in the

impartiality by a panel member to the Chairman of the DSB. As we indicated in our preliminary ruling, we conclude that this would have been the only proper way for Guatemala to raise the issue. In light of this ruling, we also requested the parties not to submit any further arguments on this issue in subsequent stages of the procedure.

2. The panel report from the previous case should not be used as precedent or in any way constitute guidance for the present Panel

8.13 Guatemala requests us not to take into account in our decision the report of the panel in *Guatemala - Cement I*. Guatemala argues that the report of the panel in *Guatemala - Cement I* has no legal status and cannot constitute a valid precedent because the Appellate Body concluded that the panel did not have the mandate to examine the complaints before it. Thus, Guatemala is of the view that recourse to the report issued in *Guatemala - Cement I* as useful guidance in respect of any matter being examined in the present dispute would be a violation of the decision of the Appellate Body. Guatemala equates the value of the previous panel report to that of an unadopted panel report. Guatemala requests that we not take into account in our decision the report of the panel in *Guatemala - Cement I*. Guatemala argues that the previous panel lacked the mandate to review the case. Thus, its opinion on this matter has no legal value as precedent or guidance.

8.14 Mexico considers that: (a) the arguments presented by it in the present dispute are put before the Panel independently of their having been supported, or not, by a previous panel; (b) the panel report in *Guatemala-Cement I* is an adopted panel report; (c) the panel report in *Guatemala - Cement I* was an integral part of the request for establishment of this Panel and as such is part of its mandate; and (d) assuming *arguendo* that the panel report in *Guatemala-Cement I* was not adopted, it nevertheless contains useful guidance pertinent to the issues before us.

8.15 We note that the Appellate Body ruled in *Guatemala - Cement I* that "the dispute was not properly before the Panel", and that it therefore could not consider any of the substantive issues raised in the alternative by Guatemala.⁷⁷⁹ In other words, the Appellate Body found that the panel in *Guatemala - Cement I* should never have reached the substance of the dispute. We therefore consider that the substantive findings of the panel in *Guatemala - Cement I* are in this respect similar to those of unadopted panel reports, i.e., while they have no legal status, they may nevertheless provide useful guidance to the extent that we consider them relevant and persuasive.⁷⁸⁰ We recall in any event Mexico's assertion that its arguments in this dispute are put before us independently of their having been supported, or not, by a previous panel.

3. The Panel lacks an appropriate mandate to review the provisional measure

8.16 Guatemala requests us to rule that the provisional measure and any claims related to it fall outside our terms of reference. In light of our decision to make no substantive rulings regarding the claims relating to the provisional measure for reasons of judicial economy,⁷⁸¹ we consider that we need not decide whether the provisional measure is properly before the Panel.

interest of maintaining the integrity and impartiality of the dispute settlement mechanism. (WT/DSB/RC/1)"

⁷⁷⁹ *Guatemala - Cement I*, Appellate Body report, WT/DS60/AB/R, para. 89.

⁷⁸⁰ *Japan - Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted on 1 November 1996. This conclusion is consistent with that reached by the panel in *Mexico - Anti-dumping Investigation on High Fructose Corn Syrup from the United States (Mexico - HFCS)*, WT/DS132/R, adopted on 24 February 2000, footnote 556.

⁷⁸¹ See, section VIII.F *infra*.

4. Standard of Review Under Article 17.6(i) of the AD Agreement

8.17 Guatemala argues that Article 17.6(i) of the AD Agreement requires the panel to "determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective." Guatemala contends that this provision precludes an independent evaluation of the various pieces of evidence that the Ministry considered. In consequence, the Panel may only reject the factual findings made by the national authorities in special cases, such as where the conclusions drawn by the authorities were not supported by the evidence or where there was clear evidence of bias in their evaluation of the facts.

8.18 Article 17.6(i) of the AD Agreement sets forth the standard of review to be applied by a panel under the AD Agreement when considering issues of fact. That Article provides:

"(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;"

8.19 We consider that it is not our role to perform a *de novo* review of the evidence which was before the investigating authority in this case. Rather, Article 17 makes it clear that our task is to review the determination of the investigating authorities. Specifically, we must determine whether its establishment of the facts was proper and the evaluation of those facts was unbiased and objective.⁷⁸² In other words, we must determine whether an unbiased and objective investigating authority evaluating the evidence before it at the time of the investigation could properly have made the determinations made by Guatemala in this case. In our review of the investigating authorities' evaluation of the facts, we will first need to examine evidence considered by the investigating authority, and second, this examination is limited by Article 17.5(ii) to the facts before the investigating authority. That is, we are not to examine any new evidence that was not part of the record of the investigation.⁷⁸³

⁷⁸² We note that, in the context of safeguard measures, the panel in *Korea – Definitive Safeguard Measure on imports of Certain Dairy Products (Korea – Dairy Safeguard)*, WT/DS98/R adopted on adopted 12 January 2000, said the following of the need for a panel to perform an objective assessment pursuant to Article 11 of the DSU:

"7.30 We consider that for the Panel to adopt a policy of total deference to the findings of the national authorities could not ensure an "objective assessment" as foreseen by Article 11 of the DSU. This conclusion is supported, in our view, by previous panel reports that have dealt with this issue. However, we do not see our review as a substitute for the proceedings conducted by national investigating authorities. Rather, we consider that the Panel's function is to assess objectively the review conducted by the national investigating authority, in this case the KTC. For us, an objective assessment entails an examination of whether the KTC had examined all facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Agreement on Safeguards), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea. Finally, we consider that the Panel should examine the analysis performed by the national authorities at the time of the investigation on the basis of the various national authorities' determinations and the evidence it had collected. [Footnote deleted]"

⁷⁸³ We note that this standard is consistent with the approach followed by the panel in *Guatemala – Cement I* in para. 7.57 of its report. In that instance the panel was of the opinion that its role was:

"... to examine whether the evidence relied on by the Ministry was sufficient, that is, whether an unbiased and objective investigating authority evaluating that evidence could properly have

5. Guatemala's defence based on the principle of harmless error, acquiescence or estoppel, and rebuttal of the presumption in Article 3.8 of the DSU

8.20 As a defence common to Mexico's claims regarding the notification under Article 5.5, public notice of initiation under Article 12.1.1 and the provision of the full text of the application under Article 6.1.3, Guatemala submitted the following arguments.⁷⁸⁴ Guatemala argues that, should we find a violation of Articles 5.5, 12.1.1 and 6.1.3, such violations, that is, delay in notification under Article 5.5, insufficient public notice of initiation or delay in the provision of the full text of the application, did not affect the course of the investigation. Guatemala posits that (a) the alleged violations of Article 5.5, 12.1.1 and 6.1.3 were not harmful to Mexico according to the principle of harmless error, (b) Mexico "convalidated" the alleged violations by not objecting immediately after their occurrence, and (c) the alleged violations did not cause nullification or impairment of benefits accruing to Mexico under the AD Agreement.

8.21 Guatemala first argues that these alleged violations constituted harmless error. Guatemala states that it is a general principle of law that in case of a violation of a procedural rule, prejudice must be shown before a party obtains the right to be compensated for this procedural error. Guatemala refers to certain Members' practice in civil and criminal proceedings in this regard. Guatemala asserts that the International Court of Justice has recognized the concept of harmless error as well. On the basis of this principle, Guatemala argues that the alleged violations of Articles 5.5, 6.1.3, 12.1.1 were of a procedural nature, did not affect Mexico's rights in any way, and thus constituted harmless errors.

8.22 In our view, the GATT panel referred to by Guatemala in support of its position merely stated that it did not wish "to exclude that the concept of harmless error could be applicable in dispute settlement proceedings under the Agreement."⁷⁸⁵ It therefore cannot be concluded that the GATT panel referred to "recognized the principle of harmless error "as alleged by Guatemala."⁷⁸⁶ We do not consider that the concept of "harmless error" as presented by Guatemala has attained the status of a general principle of public international law. In any event, we consider that our first task in this dispute is to determine whether Guatemala has acted consistently with its obligations under the relevant provisions of the AD Agreement. To the extent that Mexico can demonstrate that Guatemala has not respected its obligations under the relevant provisions of that Agreement, we must next consider arguments raised by Guatemala in respect of the nullification or impairment of benefits accruing to Mexico thereunder.⁷⁸⁷ Thus, while arguments regarding the existence and extent of the possible harm suffered by Mexico may be relevant to the issue of nullification or impairment,⁷⁸⁸ we do not consider that an argument of harmless error represents a defence in itself to an alleged infringement of a provision of the WTO Agreement.

8.23 A second argument raised by Guatemala is based on the lack of reaction from Mexico to the alleged late notification, the alleged insufficient public notice and the alleged delay in providing the full text of the application to Mexico and Cruz Azul. Guatemala asserts that, by not reacting at the earliest possible moment, Mexico waived its rights to object to the above-mentioned alleged violations. Guatemala uses both the concepts of "acquiescence" and "estoppel" in support of this argument. We note that "acquiescence" amounts to "qualified silence", whereby silence in the face of

determined that sufficient evidence of dumping, injury, and causal link existed to justify initiating the investigation." (footnote deleted)

⁷⁸⁴ For a full description of the parties' arguments and the substantive findings of the Panel regarding these claims please refer to sections VIII.C.4, VIII.C.5(b) and VIII.C.6 *infra*.

⁷⁸⁵ *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, para. 271.

⁷⁸⁶ Guatemala first submission, para.213.

⁷⁸⁷ See paras. 8.105- 8.112, *infra*.

⁷⁸⁸ Or in the event Article 22 is invoked, to the issues of compensation and/or suspension of equivalent concessions.

events that call for a reaction of some sort may be interpreted as a presumed consent.⁷⁸⁹ The concept of estoppel, also relied on by Guatemala in support of its argument, is akin to that of acquiescence. Estoppel is premised on the view that where one party has been induced to act in reliance on the assurances of another party, in such a way that it would be prejudiced were the other party later to change its position, such a change in position is "estopped", that is precluded.⁷⁹⁰

8.24 Regarding both arguments of acquiescence and estoppel we note that Mexico was under no obligation to object immediately to the violations it now alleges before the Panel.⁷⁹¹ Mexico raised claims concerning Articles 5.5, 12.1.1 and 6.1.3 at an appropriate moment under the dispute settlement procedure envisaged by the AD Agreement and the DSU. Thus, Mexico cannot therefore be considered as having acquiesced to belated notification by Guatemala, to insufficiency in the public notice or to delay in providing the full text of the application, much less to have given "assurances" to Guatemala that it would not later challenge these actions in WTO dispute settlement. Since Mexico raised its claims at an appropriate moment under the WTO dispute settlement procedures, Guatemala could not have reasonably relied upon Mexico's alleged lack of protest to conclude that Mexico would not bring a WTO complaint. In any event, Guatemala has not satisfied us that, had Mexico complained after the fact, but during the course of the investigation, Guatemala could or would have taken action to remedy the situation. Specifically, with respect to the delay in the Article 5.5 notification, Guatemala asserts that had Mexico objected to the notification delay in a timely manner, the Guatemalan authorities would have reinitiated the investigation after presenting Mexico with the notification under Article 5.5. We are of the view that this argument presented by Guatemala is highly speculative and notes that the Panel has been established to rule on the WTO conformity of the actions by Guatemala and not on the WTO conformity of the actions Guatemala alleges it could have taken. In any event, Guatemala states at para. 217 of its first written submission that Mexico first raised the Article 5.5 issue on 6 June 1996, that is at a relatively early stage of the Ministry's investigation, and precedes the Ministry's preliminary affirmative determination. Nevertheless, Guatemala failed to take any steps to address the delayed Article 5.5 notification at that time. Based on these considerations the Panel rejects Guatemala's defence that Mexico "convalidated" the alleged violations of Articles 5.5, 6.1.3 and 12.1.1 of the AD Agreement.

8.25 Finally, Guatemala argues that the presumption of nullification or impairment of Article 3.8 DSU, if a violation is found, is rebuttable, and that none of the alleged violations nullified or impaired benefits accruing to Mexico under the AD Agreement. As noted above, we will address the issue of nullification or impairment after we have considered whether Guatemala has acted consistently with its obligations under the AD Agreement. See paras. 8.105 - 8.112, *infra*.

C. CLAIMS BY MEXICO CONCERNING THE INITIATION OF THE INVESTIGATION

8.26 Mexico asserts that Guatemala's initiation of the anti-dumping investigation at issue in this dispute was inconsistent with Articles 5.2 and 5.3 of the AD Agreement. Mexico considers that the anti-dumping investigation should never have been initiated, and that its initiation and subsequent conduct resulted in the nullification or impairment of benefits accruing to Mexico under the WTO and in particular the AD Agreement. Mexico asserts that the Ministry's decision to initiate the investigation is also inconsistent with Articles 2, 3 and 12 of the AD Agreement.⁷⁹²

⁷⁸⁹ V.D. Degan, *Sources of International Law*, Martinus Nijhoff Publishers, p. 348-349.

⁷⁹⁰ Brownlie, *Principles of International Law*, Clarendon Press, p. 640-642.

⁷⁹¹ Regarding acquiescence we note that the precise scope and applicability of this concept is still a matter of debate, and it is clear that not any silence can be considered to constitute consent.

⁷⁹² In its conclusions presented in Mexico's first submission (see, p. 96), Mexico also requests the Panel to find that the initiation is inconsistent with Article 1 of the AD Agreement. However, since there is nothing in Mexico's submissions to the Panel to substantiate this purported Article 1 claim, we do not consider it necessary to consider this issue further.

8.27 Guatemala considers that the initiation of the investigation was fully in accordance with the requirements of Articles 5.2 and 5.3 of the AD Agreement, with respect to both the procedures and the substance of the initiation determination. Guatemala also argues that, as a result of the scope of application of Articles 2 and 3 of the AD Agreement, an investigating authority's decision to initiate an investigation cannot be found to be inconsistent with those provisions.

8.28 We note that Article 5.2 refers to the contents of the application by the domestic industry requesting the initiation of an investigation, and establishes that the application must include *inter alia* information on certain specific areas to the extent that it is "reasonably available" to the applicant. In this regard, Article 5.2 states that "[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph". Article 5.3 requires the investigating authorities to 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, we are confronted with two issues: whether the application contained such information as was reasonably available to the applicant (Article 5.2), and whether the investigating authority examined the accuracy and adequacy of the evidence to arrive at a justified determination that there was sufficient evidence to justify the initiation of the investigation (Article 5.3). We proceed by examining Mexico's claims under Article 5.3 first.

1. Sufficiency of evidence to Justify Initiation of the Investigation – Article 5.3

8.29 Mexico argues that the Ministry based its initiation decision on insufficient evidence, in violation of Article 5.3 of the AD Agreement. Mexico considers that an unbiased and objective investigating authority examining the evidence that was before the Ministry could not have properly determined that there was sufficient evidence of dumping, still less of the existence of a threat of material injury, and of a causal link between the imports allegedly dumped and the alleged threat of material injury to the Guatemalan domestic industry, to justify initiation of an anti-dumping investigation. Mexico considers that, even if the information provided by Cementos Progreso in its application constituted all the information reasonably available to it, Articles 5.2 and 5.3 cannot acceptably be interpreted to mean that Article 5.3 authorizes an investigating authority to initiate an anti-dumping investigation solely because an application meets the requirements of Article 5.2. Thus, even if one were to suppose that the information needed to be able to determine that there was sufficient evidence to justify the initiation of an investigation was not reasonably available to the applicant, this did not mean that there was sufficient evidence to justify initiation in accordance with Article 5.3 of the AD Agreement. Mexico also argues that Guatemala failed to examine the adequacy and accuracy of the evidence included in the application.

8.30 Guatemala argues that the authorities of the importing country must examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation, as set forth in Article 5.3 of the AD Agreement, but they are not required to carry out any investigation or confirm or verify the claims contained in the application. Referring to the decision in *Softwood Lumber*, Guatemala asserts that we should consider whether "a reasonable, unprejudiced person could have found ... that sufficient evidence existed" to justify initiation, and that the level of "sufficient" evidence to justify initiation is significantly lower than the level of evidence required for a preliminary or final determination. Guatemala argues that the Ministry properly examined the accuracy and adequacy of the evidence submitted with the application, and that we must accept the Ministry's establishment of the fact that there was sufficient evidence, reasonably available to the applicant, to justify the initiation of the investigation. Otherwise, Guatemala asserts, the Panel would be assuming the role of the investigating authority.

8.31 We recall that, in accordance with our standard of review, we must determine whether an objective and unbiased investigating authority, looking at the facts before it, could properly have determined that there was sufficient evidence to justify the initiation of an anti-dumping investigation.

Article 5.3 requires the authority to examine, in making this determination, the accuracy and adequacy of the evidence in the application. Clearly, the accuracy and adequacy of the evidence is relevant to the investigating authorities' determination whether there is sufficient evidence to justify the initiation of an investigation. It is however the sufficiency of the evidence, and not its adequacy and accuracy *per se*, which represents the legal standard to be applied in the case of a determination whether to initiate an investigation.

8.32 With these considerations in mind, we now turn to consider whether Guatemala acted consistently with Article 5.3 in initiating the investigation. We will examine the determination with respect to each of the elements of a dumping investigation, that is, dumping, injury and causation, separately.

(a) Dumping

8.33 Mexico argues that the evidence before the Guatemalan authorities on the question of dumping was insufficient for an initiation of an investigation. Mexico asserts that the only evidence submitted with the application on the question of normal value consisted of two invoices, dated 25 and 26 August 1995, for one bag each of cement, and that the only evidence of export price was two import certificates, dated 15 August 1995,⁷⁹³ for 7,035 and 4,221 sacks of cement. In Mexico's view, this evidence "cannot qualify as adequate and accurate evidence" of normal value and export price. With respect to normal value, Mexico argues that the invoices do not sufficiently specify the product in question, or the amounts or the source, the sales are not representative of sales over the period of investigation, and the sales represent only an insignificant share of Cruz Azul's operations. With respect to export price, Mexico argues that the import certificates are not representative of Mexico's exports to the Guatemalan market, and that the imports occurred on only two days of the period of investigation. Moreover, Mexico argues that the prices reflected in the documents were not comparable within the meaning of Articles 2.1 and 2.4 of the Agreement, and that the Guatemalan authorities did not make any allowances for differences affecting price comparability. Mexico notes that: a) there were differences in the description of product referred to in the invoices; b) the evidence was not representative of the prices in the domestic and export markets; c) there were differences between the volumes presented in the invoices and the export certificates; and d) the transactions taken as evidence of the export price and the normal value were at different levels of trade. In these circumstances, Mexico asserts that, no objective and unbiased authority could properly have determined that the evidence before it was sufficient to justify initiation of an investigation.

8.34 Guatemala argues that the evidence of normal value and export price before its investigating authority was sufficient to justify the initiation of an investigation. Guatemala asserts that the AD Agreement does not require that an application contain information on prices for a particular number of transactions or a particular minimum value or volume of sales, and that there is no requirement to provide evidence on possible adjustments, since the relevant information is not available to applicants. In Guatemala's view, Articles 2.1 (defining dumping), 2.4 (requirement of a fair comparison), and 5.8 (rejection of application and termination of investigation for lack of sufficient evidence) are not applicable to the decision to initiate. Guatemala asserts that it complied with Articles 5.1, (written application), 5.2 (requirement of evidence in application), and 5.3 (examination of accuracy and adequacy of evidence in application to determine sufficiency to initiate), which in its view are the only provisions of the AD Agreement which apply at the initiation stage.

8.35 In light of Guatemala's arguments, we need to examine the relationship between the requirements of Article 5.3 regarding sufficiency of evidence to justify the initiation of an

⁷⁹³ Although the import certificates were both stamped on 15 August 1995, the certificate for 7,035 sacks of cement is also dated 14 August 1995. The Panel understands that it is for this reason that Mexico subsequently referred to the Ministry considering the volume of imports on two days during the period of investigation.

investigation and the substantive provisions in Article 2 regarding dumping. In this respect, we first observe that, although there is no express reference to evidence of dumping in Article 5.3, evidence on the three elements necessary for the imposition of an anti-dumping measure may be inferred into Article 5.3 by way of Article 5.2. In other words, Article 5.2 requires that the application contain sufficient evidence on dumping, injury and causation, while Article 5.3 requires the investigating authority to satisfy itself as to the accuracy and adequacy of the evidence to determine that it is sufficient to justify initiation. Thus, reading Article 5.3 in the context of Article 5.2, the evidence mentioned in Article 5.3 must be evidence of dumping, injury and causation. We further observe that the only clarification of the term "dumping" in the AD Agreement is that contained in Article 2. In consequence, in order to determine that there is sufficient evidence of dumping, the investigating authority cannot entirely disregard the elements that configure the existence of this practice as outlined in Article 2. This analysis is done not with a view to making a determination that Article 2 has been violated through the initiation of an investigation, but rather to provide guidance in our review of the Ministry's determination that there was sufficient evidence of dumping to warrant an investigation. We do not of course mean to suggest that an investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the quantity and quality that would be necessary to support a preliminary or final determination. An anti-dumping investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward. However, the evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 to justify initiation of an investigation.⁷⁹⁴

8.36 We note that Article 2.1 states that a product is to be considered as dumped "if the export price . . . is less than the *comparable* price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." (emphasis added). Other provisions of Article 2 that further elaborate on this basic definition include Article 2.4, which sets forth certain principles regarding the comparability of export prices and normal value. In particular, Article 2.4 specifies that comparisons between the export price and the normal value shall be made at the same level of trade, and that due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in level of trade and quantity. Consistent with our discussion above, we consider that, although these provisions of Article 2 do not "apply" as such to initiation determinations, they are certainly relevant to an investigating authorities' consideration as to whether sufficient evidence of dumping exists to justify the initiation of an investigation.⁷⁹⁵

8.37 Turning to the case at hand, the evidence on normal value relied on by the Ministry for initiation consisted of two invoices from Mexican retailers for one sack of cement each, while the

⁷⁹⁴ On this question we concur fully with the reasoning of the *Guatemala - Cement I* panel when they state that:

"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." *Guatemala - Cement I*, WT/DS60/R, para. 7.64

⁷⁹⁵ We understand Guatemala to agree to our approach concerning the relationship between Article 2 and Article 5.3. At para. 136 of its first written submission, Guatemala asserted that it is "not suggesting that Articles 2 and 3 are totally irrelevant during the initiation phase. Articles 2 and 3 contain definitions which give meaning to the expressions 'dumping', 'injury' and 'causal link' used in Article 5.2. When the authorities examine the accuracy and adequacy of the evidence submitted in the application, those definitions help to establish whether there is 'sufficient evidence' in the meaning of Article 5.3 to justify the initiation of the investigation."

evidence of the export price consisted of two import certificates for 7,035 and 4,221 bags of cement. In our opinion, the evidence on normal value and export prices presents obvious differences with regards to the quantities for the involved transactions and the level of trade of the sales. It is clear on the face of these documents that the invoices reflecting prices in Mexico are for sales occurring at the very end of the commercialisation chain and the import certificates reflect prices at the point of importation which is the beginning of the commercialisation chain for Mexican cement in Guatemala. The existence of these stark differences in quantity and in level of trade, differences of the kind that Article 2.4 of the AD Agreement recognizes may affect price comparability, should have triggered at a minimum some reflection on the part of the investigating authorities as to the possible non-comparability of the sales in question.

8.38 Guatemala argues that there was no indication that the sales were at different levels of trade, nor that any difference in the level of trade affected price comparability. Additionally, Guatemala argues that Cruz Azul never presented any evidence to support its argument that the sales in the domestic market and export market had been conducted at different levels of trade and affected price comparability. In our view, however, the fact that the sales in the Mexican and Guatemalan markets were at different levels of trade was apparent from the application itself, and an unbiased and objective investigating authority should have recognized this fact without the need for it to be pointed out. Nor do we consider that an investigating authority can completely ignore obvious differences that could affect the comparability of the prices cited in an application on the ground that the foreign exporter has not demonstrated that they have affected price comparability. Moreover, at the point where the investigating authority is considering whether there is sufficient evidence to initiate an investigation, potentially affected exporters have not even been notified of the existence of an application, much less been provided a copy thereof. Thus, the logical implication of Guatemala's argument is that an investigating authority need never take into account issues of price comparability when considering whether there is sufficient evidence of dumping to initiate an investigation. We cannot agree with such an interpretation of the AD Agreement, particularly in light of the criteria set out in para. 8.36 above.

8.39 After a thorough review of all the actions by the Ministry leading up to the initiation of the investigation, we find that no attempt was made to take into account glaring differences in the levels of trade and sales quantities and their possible effects on price comparability. Under these circumstances, an unbiased and objective investigating authority could not in our view have concluded that there was sufficient evidence of dumping to justify the initiation of an anti-dumping investigation.

8.40 We would like to emphasize that we do not expect investigating authorities at the initiation phase to ferret out all possible differences that might affect the comparability of prices in an application and perform or request complex adjustments to them. We do however expect that, when from the face of an application it is obvious that there are substantial questions of comparability between the export and home market prices being compared, the investigating authority will at least acknowledge that differences in the prices generate questions with regards to their comparability, and either give some consideration as to the impact of those differences on the sufficiency of the evidence of dumping or seek such further information as might be necessary to do so.

(b) Threat of material injury

8.41 We recall that the Ministry initiated its investigation into imports of cement from Mexico on the basis of an alleged threat of material injury to the domestic industry.

8.42 Mexico argues that the Ministry did not have sufficient evidence of threat of material injury to justify the initiation of an investigation. Mexico asserts that, in order to initiate an anti-dumping investigation on the basis of a threat of injury, the existence of threat of injury must be demonstrated

on the basis of adequate evidence, and not merely on the basis of allegation, conjecture, or remote possibility. In Mexico's view, this requires an applicant alleging threat of injury to provide, at a minimum, evidence with respect to the factors concerning threat of injury set forth in Article 3.7. Mexico asserts that neither Cementos Progreso's original application, nor its supplementary application, contained evidence on any of these factors. Mexico argues that the only evidence on threat of injury was the two import certificates supplied by the domestic producer, which in its view is entirely insufficient to justify the initiation of an investigation.

8.43 Mexico asserts that Guatemala admits that the Ministry "did not need complete information to know that imports were rapidly increasing",⁷⁹⁶ and argues that the Ministry just inferred that Mexican cement producers had excess capacity on the basis of its "knowledge" that Mexico was undergoing a "horrendous recession". Mexico adds that incomplete information and mere knowledge do not constitute evidence, and may not be taken into consideration to arrive at a finding of sufficient evidence of threat of injury to justify the initiation of an investigation.

8.44 Guatemala argues that the allegation of threat of injury was substantiated by adequate evidence. In Guatemala's view, Article 3.7 of the AD Agreement does not apply to an investigating authority's determination as to whether there is sufficient evidence to justify the initiation of an investigation. Guatemala argues that Article 5.2(iv) of the Agreement requires that an application contain such information as is reasonably available to the applicant on the evolution of the volume of imports, their effect on prices of the like product in the domestic market, and the consequent impact on the domestic industry, and refers to Articles 3.2 and 3.4 (which address the factors concerning the evaluation of the volume of imports, their effects on prices, and their impact on the domestic industry), but does not refer to the threat of injury factors set forth in Article 3.7. Guatemala also argues that information on the volume of imports is not available to private parties in Guatemala, and that its authorities were not obliged to obtain information on the volume of imports from the Directorate of Customs prior to initiation.

8.45 In order to review the Ministry's determination that there was sufficient evidence of threat of injury to justify the initiation of an investigation, we must first consider the relationship between Article 5.3 and Article 3. We recall our earlier analysis of the relationship between Article 5.3 and Article 2, and consider that an identical approach should be taken to the relationship between Article 5.3 and Article 3.⁷⁹⁷ Thus, when considering whether there is sufficient evidence of threat of injury to justify the initiation of an investigation, an investigating authority cannot totally disregard the elements that configure the existence of threat of injury outlined in Article 3.⁷⁹⁸ We do not mean to suggest that an investigating authority must have before it at the time it initiates an investigation evidence of threat of material injury within the meaning of Article 3 of the quantity and quality that would be necessary to support a preliminary or final determination of threat of injury. However, the investigating authority must have before it evidence of threat of material injury, as defined in Article 3, sufficient to justify the initiation of an investigation.

8.46 Article 3.1 of the AD Agreement provides that a determination of injury, which is defined in footnote 9 of the AD Agreement to include threat of material injury, "shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the

⁷⁹⁶ Guatemala first submission para. 174.

⁷⁹⁷ See para. 8.35 above.

⁷⁹⁸ We recall that, at para. 136 of its first written submission, Guatemala asserted that it is "not suggesting that Articles 2 and 3 are totally irrelevant during the initiation phase. Articles 2 and 3 contain definitions which give meaning to the expressions 'dumping', 'injury' and 'causal link' used in Article 5.2. When the authorities examine the accuracy and adequacy of the evidence submitted in the application, those definitions help to establish whether there is 'sufficient evidence' in the meaning of Article 5.3 to justify the initiation of the investigation."

consequent impact of these imports on domestic producers of such products." In addition, Article 3.7 contains a number of factors specifically concerning threat of injury. We shall examine to what extent, if any, the Ministry examined these Article 3 factors when determining that there was sufficient evidence of threat of injury to justify the initiation of an investigation.

8.47 Regarding the volume of the allegedly dumped imports, Article 3.2 of the AD Agreement provides that an investigating authority shall consider whether there has been a significant increase in dumped imports, either in absolute terms "or relative to production or consumption in the importing Member". Guatemala asserts in its submissions before us that there was a "massive" increase in the volume of imports of cement prior to initiation. However, Guatemala has failed to demonstrate that there was any evidence on the volume of imports in the Ministry's file at the time of initiation other than two import certificates for 7,035 and 4,221 bags of cement respectively. Both these importations appear to have taken place on the same day, 15 August 1995, at the same (Tecún Umán) customs post.⁷⁹⁹ Other than these two import certificates, Cementos Progreso's application referred only to unsubstantiated "suspicions" that Mexican cement imports may be entering Guatemalan territory through other customs posts.⁸⁰⁰ We fail to see how the data contained in the two aforementioned import certificates, combined with Cementos Progreso's unsubstantiated "suspicions", could properly support a finding by an objective and impartial investigating authority that there was sufficient evidence of threat of injury to justify the initiation of an investigation.

8.48 In support of its argument that the imports referred to in the above-mentioned import certificates represented a "massive" increase in the volume of imports, Guatemala argues that since there were no imports into Guatemala of Mexican cement prior to 1995, any increase in imports from a level of zero would be qualified as "massive". However, there is nothing in Cementos Progreso's application, or in the report to the Director of Economic Integration recommending initiation,⁸⁰¹ or in the Ministry's resolution initiating the investigation, to suggest that at the time of initiation the Ministry had any information regarding the volume of imports of cement from Mexico prior to or after 15 August 1995. Thus, we fail to see how the Ministry could have compared the volume of imports on 15 August 1995 with the allegedly zero volume of imports prior to 1995. In these circumstances, we consider Guatemala's argument that any increase in imports from a level of zero would be "massive" to constitute *ex post* rationalization. Such *ex post* rationalization is irrelevant for the purpose of determining whether, at the time of initiation, the Ministry acted consistent with Article 5.3 of the AD Agreement.

8.49 Given our findings concerning the Ministry's consideration of the volume of imports in absolute terms, we shall now consider to what extent, if any, the Ministry considered the volume of imports relative to production or consumption in Guatemala. There is no evidence before us to suggest that, at the time of initiation, the Ministry had any evidence that imports had increased relative to domestic consumption. Indeed, there is no evidence before us to suggest that, at the time of initiation, the Ministry had any information concerning domestic consumption *per se*. Nor is there any evidence before us to suggest that, at the time of initiation, the Ministry considered the volume of imports relative to domestic production of cement. Even if the Ministry had considered this at the time of initiation, the only weighing of imports against domestic production that could have been inferred from the evidence before the Ministry at the time of initiation derives from the statement in Cementos Progreso's application that the industry was working at full capacity, and that capacity was 1.6 million metric tonnes. Based on this statement, and assuming that capacity utilization was the same for the whole of 1995 and that production equalled capacity, the Ministry could at most have concluded that the evidenced Mexican imports represented only 11 per cent of domestic production

⁷⁹⁹ Both import certificates were stamped on 15 August 1995. However, the certificate concerning 7,035 sacks of cement also contained a reference to 14 August 1995. We are proceeding on the basis of the date on which the import certificates were stamped by the Guatemalan authorities.

⁸⁰⁰ Cementos Progreso's application, Annex Mexico-2, pg.4.

⁸⁰¹ Annex Mexico-4

for one day, or 0,03 per cent of domestic production for one year.⁸⁰² Thus, even if the Ministry had considered this matter, the available evidence was hardly indicative of a "massive" increase in the volume imports relative to domestic production of Guatemalan cement.

8.50 Article 3.2 of the AD Agreement provides that, with regard to the effect of dumped imports on prices, the investigating authority shall consider whether there has been a significant price undercutting by the relevant imports, or whether the relevant imports have depressed domestic prices to a significant degree, or prevented price increases that would otherwise have occurred. There is no evidence before us to suggest that, at the time of initiation, the Ministry considered any of these elements concerning the effect of the relevant imports on Guatemalan cement prices. Even if the Ministry had considered possible price undercutting, for example, the only prices available to the Ministry were not comparable since they concerned transactions taking place at different levels of trade. In this regard, the Ministry could have determined the price of imports of cement from Mexico on the basis of the wholesale price reported in the two import certificates. The Ministry could have determined the price of cement produced in Guatemala on the basis of the price cited in the report recommending initiation⁸⁰³ (*i.e.*, Quetzals ("Q") 26.00). This price is presumably a retail price, given its similarity to the retail prices reported in the application for the Guatemalan product (*i.e.*, Q 24 in Guatemala City and Q 32 in the Department of El Petén). Thus, even if the Ministry had considered whether there was significant price undercutting, it only had access to prices reported for different levels of trade.

8.51 Similarly, there is no evidence before us to suggest that, at the time of initiation, the Ministry considered all of the factors concerning the effect of dumped imports on the domestic industry enumerated in Article 3.4 of the AD Agreement.⁸⁰⁴ It would appear that, once again, the Ministry relied solely on the limited information provided in the application. While the application contains statements which may be relevant to some of the factors enumerated in Article 3.4 (such as "employment" and "investments" for example), it contains no quantifiable information except for some data on the expansion plan and the number of workers to be laid off in case of a shut down of the Guatemalan cement industry.⁸⁰⁵ We consider that statements and assertions unsubstantiated by any evidence do not constitute sufficient evidence of threat of injury to justify the initiation of an investigation.

8.52 We also note that in this case the Guatemalan domestic industry claimed that there was a threat of material injury caused by the allegedly dumped imports. Article 3.7 provides specific guidance on the factors to be considered by an investigating authority when making a determination of threat of injury. Although we do not necessarily believe that an investigating authority must have before it information on all Article 3.7 factors in a case where initiation of an investigation is requested on the basis of an alleged threat of injury, a consideration of those factors is certainly pertinent to an evaluation of whether there was sufficient evidence of threat of material injury to justify the initiation of an investigation. There is no evidence before us to suggest that, at the time of initiation, the Ministry had information concerning any of the four factors listed in Article 3.7. In particular, no such information was contained in the application, or in the aforementioned report to the

⁸⁰² These calculations were also performed by the *Guatemala – Cement I* panel, which also found: "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'". *Guatemala – Cement I*, WT/DS60/R, para. 7.72.

⁸⁰³ Recommendation presented to the Director of Economic Integration on 17 November 1995, Annex Mexico-4

⁸⁰⁴ Article 3.4 identifies the following factors: 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.

⁸⁰⁵ This was also noted by the *Guatemala - Cement I* panel in Para. 7.74.

Director of Economic Integration recommending initiation, or in the Ministry's resolution initiating the investigation. The Panel fails to see how an unbiased and objective investigating authority could properly have found that there was sufficient evidence of threat of injury to justify the initiation of an investigation when no information concerning any of the factors listed in 3.7 was examined.

8.53 Additionally, Guatemala makes some general arguments concerning the evidence required in an application that the Panel wishes to address. In its submissions, Guatemala seeks to characterize Mexico's arguments with respect to the evidence in the application as being that Article 5.2 requires that such evidence be supported by "documentary proof". In our view, however, Mexico is in fact arguing that statements of conclusion unsubstantiated by facts cannot satisfy the requirement of Article 5.3. We agree with Mexico that statements of conclusion unsubstantiated by facts do not constitute evidence of the type required by Article 5.2, and which allows an objective examination of its adequacy and accuracy by an investigating authority as provided in Article 5.3.⁸⁰⁶

8.54 Based on all the considerations detailed above, the Panel is of the view that an objective and unbiased investigating authority could not have properly determined that there was sufficient evidence of threat of injury to justify the initiation of an investigation.

(c) Causation

8.55 Finally, Mexico argues that the Ministry did not have sufficient evidence of a causal link between the alleged dumping and the alleged threat of injury to justify the initiation of the investigation. In Mexico's view, since the application did not contain adequate evidence of dumping or threat of injury, it follows that it did not demonstrate a causal link. Moreover, Mexico asserts that the application and supplement did not contain any argument regarding the existence of a causal link. Thus, Mexico maintains that the Guatemalan authorities did not have any evidence or arguments on this aspect when the investigation was initiated.

8.56 Guatemala asserts that there was adequate evidence to support the claim of the existence of a causal link. In Guatemala's view, Article 5.2 requires only evidence of the factors listed in subparagraphs (iii) and (iv), that is, such information as is reasonably available to the applicant on

⁸⁰⁶ Another argument by Guatemala was that there were certain facts that, even when there was no evidence on them in the application, were "known" to the investigating authority. This same argument was also made before the panel in *Guatemala-Cement I*, the Panel finds that in their comments contained footnote 242 of the report the *Guatemala – Cement I* panel provides useful guidance on this issue:

"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."

According to the standard of review the Panel is to evaluate the considerations of the investigating authority at the time it made its decision on the basis of its determinations and the evidence before it. It is not appropriate for the Panel to take into consideration these facts that were allegedly "known" by the Ministry as it is impossible to evaluate what role they played in their decision to initiate, since there is no mention of them in any of the documentation preceding and supporting the initiation.

prices for the calculation of normal value and export price, and on the evolution of the volume of imports, their effect on prices of the like product in the domestic market, and the consequent impact on the domestic industry. It does not refer to Article 3.5, which Guatemala argues related to the evidence of a causal link required for a preliminary or final determination.

8.57 We are of the view that, having determined that the Ministry did not have sufficient evidence of dumping and injury to justify the initiation of an investigation, it follows logically that there was also insufficient evidence of the causal link between the two to justify initiation.

(d) Conclusion

8.58 For the reasons set forth above, we find that the Ministry violated Article 5.3 of the AD Agreement by determining that there was sufficient evidence of dumping, threat of injury, and causal link, to justify the initiation of an investigation.

2. Sufficiency of the application – Article 5.2

8.59 In light of our finding that the Ministry's determination that it had sufficient evidence to justify the initiation of an investigation was inconsistent with Article 5.3, we do not consider it necessary to rule on Mexico's Article 5.2 claims regarding the sufficiency of Cementos Progreso's application.

8.60 We would note, however, that for the purposes of our analysis of claims under Article 5.3, we assumed that information in the application was, in fact, all that was reasonably available to the applicant. We would like to make clear that this assumption has been made purely for the purpose of analysis, and we are not at all convinced that the information presented in the application was all that was reasonably available to the applicant, especially with regard to evidence of threat of injury.

8.61 Article 5.2(iv) of the AD Agreement provides that an application "shall contain such information as is reasonably available to the applicant on ... the effect of the allegedly dumped imports on prices of the like product in the domestic market, and the consequent impact of allegedly dumped imports on the domestic industry". Such information would normally be in the hands of the domestic industry filing an application for anti-dumping relief. This is even more likely to be the case when the company bringing the application is the sole producer of the domestic product, as in this investigation. Of the specific elements for which information is required in Article 5.2(iv), Cementos Progreso's application contained little evidence on the evolution of the volume of the allegedly dumped imports. It might have been reasonable for the investigating authority not to expect the applicant to provide information on the evolution of the volume of the imports, as a private company might not have easy access to the import statistics kept by the national customs authority. However, regarding the other factors in Article 5.2(iv), concerning information on the effect of the allegedly dumped imports on prices of the domestic like product in the domestic market and consequent impact of the imports on the domestic industry, Cementos Progreso merely makes some allegations. These allegations are not supported by evidence, and in most cases are not quantified. Given that this information should be readily available to the sole domestic producer composing the domestic industry producing cement in Guatemala, this information should have been included in the application.

8.62 It is evident to us that the Guatemalan authorities relied on the same evidence that was presented in the application for purposes of the initiation. We have expressed the view that Articles 5.2 and 5.3 contain different obligations. One of the consequences of this difference in obligations is that investigating authorities need not content themselves with the information provided in the application but may gather information on their own in order to meet the standard of sufficient evidence for initiation in Article 5.3. On this issue we are in full agreement with the reasoning and findings expressed in by the *Guatemala-Cement I* panel which made the following comments:

"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."⁸⁰⁷

3. Simultaneous examination of the evidence and failure to reject the application

(a) Claim under Article 5.7 of the AD Agreement

8.63 Mexico claims that Guatemala violated Article 5.7 of the AD Agreement because, prior to initiation, the Ministry failed to examine the evidence on dumping and injury simultaneously.

8.64 Guatemala argues that Mexico has not discharged its burden of proof as a complainant that there was any violation of Article 5.7. Moreover, Guatemala asserts that the Ministry reviewed the available evidence for both dumping and injury.

8.65 Article 5.7 reads:

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

8.66 We understand Mexico to argue that, because the application contained no evidence on injury and inadequate evidence of dumping, there was no evidence of dumping and injury that could be examined simultaneously by the Ministry at the time of initiation. In other words, we understand Mexico to argue that the initiation of an investigation in the absence of sufficient evidence to justify initiation (contrary to Article 5.3) necessarily constitutes a violation of Article 5.7.

8.67 We do not share the interpretation of Article 5.7 implied in Mexico's argument. We are of the view that Article 5.7 requires the investigating authority to examine the evidence before it on dumping and injury simultaneously, rather than sequentially. We do not consider that the fulfilment of this requirement is conditioned in any way on the substantive nature of that evidence.

8.68 As a result of the nature of its argument, Mexico has not demonstrated that in fact the Ministry failed to examine the evidence on dumping and injury before it simultaneously. We therefore reject Mexico's claim that Guatemala violated Article 5.7 of the AD Agreement.

⁸⁰⁷ *Guatemala – Cement I*, WT/DS60/R, para. 7.53.

(b) Claim under Article 5.8

8.69 Mexico also claims that Guatemala violated Article 5.8 by not rejecting the application made by Cementos Progreso and by not refraining from initiating the investigation due to the lack of sufficient evidence of dumping and threat of injury to justify initiation.

8.70 Guatemala argues that Mexico had failed to meet its burden to prove that there was a violation. Guatemala also argues that Article 5.8 only applies after the initiation of an investigation and that according to the applicable standard of review the Panel could not conclude that the investigation was initiated without sufficient evidence. In support of this argument Guatemala referred to the findings in the *Mexico-HFCS* report at para. 7.99.

8.71 The first question that we need to address on this issue regards the applicability of Article 5.8 before the initiation of an investigation. This Article provides in pertinent part:

"5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case."

8.72 We note that Article 5.8 makes specific reference to the rejection of an application as soon as the authorities conclude that there is not sufficient evidence of dumping or injury to justify proceeding with the case. This language on rejection of an application seems to be in contrast with Guatemala's argument that Article 5.8 applies only after initiation. We are of the view that, if the drafters intended that Article 5.8 apply only after initiation, the reference to promptly terminating an investigation would have sufficed. By referring to the rejection of an application Article 5.8 addresses the situation where an application has been received but an investigation has not yet been initiated. That the text of Article 5.8 continues after the quoted section to describe situations in which an initiated investigation should be terminated, does not support Guatemala's argument that the whole of Article 5.8 applies only after the investigation has been initiated. On the contrary, the second sentence of Article 5.8, by specifying that "there shall be immediate termination in cases" confirms that the first sentence of Article 5.8 expressly contemplates its application pre-initiation by including a reference to the rejection of an application. Otherwise, mere reference to the termination of an investigation, as in the second sentence of Article 5.8, would have been all that was needed in the first sentence to make it clear that it applied once an investigation was underway.

8.73 In our view, the findings in *Mexico-HFCS* on this issue do not support the interpretation that Article 5.8 applies only after an investigation has been initiated. Paragraph 7.99 of the panel report in *Mexico-HFCS*, cited by Guatemala as supporting its views, reads:

"In our view, Article 5.8 does not impose additional substantive obligations beyond those in Article 5.3 on the authority in connection with the initiation of an investigation. That is, if there is sufficient evidence to justify initiation under Article 5.3, there is no violation of Article 5.8 in not rejecting the application. Having determined that the initiation of the investigation was not inconsistent with the requirements of Article 5.3, we further conclude that there was no violation of Article 5.8 of the AD Agreement."⁸⁰⁸

8.74 The panel in *Mexico-HFCS* determined that there had not been a violation of Article 5.3 as there was sufficient evidence to justify initiation. After having made that determination the *Mexico-HFCS* panel proceeded to find that given that there was sufficient evidence to justify initiation under Article 5.3, there was no possible violation of Article 5.8. This in no way detracts from our position

⁸⁰⁸ *Mexico-HFCS*, WT/DS132/R, para. 7.99.

that Article 5.8 applies pre-initiation. The Panel in *Mexico - HFCS* would not have even considered the question of whether rejection of the application was warranted if it had not considered that Article 5.8 applies before initiation.

8.75 Having concluded that Article 5.8 applies prior to initiation, we find that the Guatemalan investigating authorities acted inconsistently with their obligations under Article 5.8 in failing to reject the application in this case. The Panel is of the view that under the applicable standard of review no objective and unbiased investigating authority would have found that there was sufficient evidence to initiate and, in consequence, the Guatemalan authorities should have rejected the application.

4. Notification under Article 5.5

8.76 Mexico argues that Guatemala did not notify the Government of Mexico before proceeding to initiate the investigation, despite being obliged to do so under Article 5.5 of the Agreement, and that the official notification to the Government of Mexico occurred only on 22 January 1996, 11 days after the publication of the notice of initiation of the investigation on 11 January 1996.

8.77 Mexico asserts that Guatemala acknowledged its failure to notify the Government of Mexico prior to initiating, citing a communication from the Ministry to the Mexican Government, which states:

"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 notification, as they were not familiar with the provisions applicable to anti-dumping investigation procedures. Once again, please accept our apologies."⁸⁰⁹

8.78 Thus, Mexico claims that Guatemala clearly failed to comply with the requirements of the AD Agreement under Article 5.5, and has admitted doing so prior to this dispute settlement proceeding.

8.79 Guatemala argues that the effective date of initiation of the investigation was not 11 January 1996 as Mexico alleged. Guatemala argues that according to its own Constitution and legislation the Ministry could not have initiated the investigation until the Government of Mexico had been officially notified. Guatemala also asserts in its defence that Mexico acknowledges in its response to the questionnaire that the investigation was not initiated until 22 January 1996.⁸¹⁰

8.80 Guatemala does not disagree that it was required by the AD Agreement to notify the Government of Mexico before proceeding with the initiation of an investigation, or the timing of the notification. Guatemala's arguments relate to the timing of the initiation of the investigation. Thus, the first question for the Panel to resolve is, what was the actual date of initiation in this case?

8.81 Article 5.5 provides:

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

⁸⁰⁹ Annex Mexico-21

⁸¹⁰ Guatemala also argued that, assuming *arguendo* that it did not notify Mexico before the initiation date of 11 January 1996, this delay in notification did not affect the course of the investigation. Guatemala posits that (a) the alleged delay in notification was not harmful to Mexico (principle of "harmless error"), (b) that Mexico "convalidated" the alleged delay by not objecting immediately after its occurrence, and (c) the alleged delay in notification did not cause nullification or impairment.

initiate an investigation, the authorities shall notify the government of the exporting Member concerned."

8.82 In our view, footnote 1 to the AD Agreement is useful in clarifying what is meant by the term "initiated". 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".

Thus, the date of initiation is the date of the procedural action by which Guatemala formally commenced the investigation. We are of the view that in the case before us the action by which the investigation was formally commenced is the date of publication of the notice of initiation which occurred on 11 January 1996. In this respect, we note that the 15 December 1995 decision of the Director for Economic Integration underlying the Ministry's resolution to initiate the investigation specifically states in paragraph 5 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".⁸¹¹ Subsequently 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". Furthermore, deadlines for interested parties to respond to the initiation were activated on 11 January 1996 the investigation started running as of the publication of the notice, as the notice published on that date invited 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.

8.83 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 the rules contained in the AD Agreement, and our mandate is to review Guatemala's compliance with those rules. The fact that the Constitution of Guatemala mandates that the investigating authorities proceed in a way which is consistent with its international obligations, does not validate the actions actually carried out by those authorities if those actions violate Guatemala's commitments under the WTO. Whether Mexico chose not to pursue its rights under Guatemalan law is of no concern to us, as this would not affect its rights under the WTO Agreements. Guatemala also mentions that in some cases Mexico has failed to notify the government of the investigated exporters in a timely fashion under Article 5.5. We are of the view that Mexico's actions regarding notifications is of no relevance to issues before us in this case, which requires us to review the actions of the Guatemalan authorities.⁸¹²

5. Public notice of initiation Claims under Articles 12.1 and 12.1.1

(a) Claims under Article 12.1

8.84 Mexico claims that Guatemala violated Art. 12.1 by (i) not satisfying itself as to the sufficiency of the evidence before giving notice of the initiation and (ii) not publishing the notice of initiation and notifying Mexico and Cruz Azul when it considered that it was satisfied that there was sufficient evidence for initiation, an event which Mexico argues occurred as early as 15 December 1995. Mexico argued that notice should have been given immediately after 15 December 1995, the date of the report from the Economic Integration Directorate to the Minister containing the recommendation to initiate an investigation, as this constituted the moment when Guatemala had satisfied itself of the sufficiency of the evidence. The public notice of the initiation of the

⁸¹¹ Annex Mexico-5

⁸¹² As for Guatemala's defences claiming acquiescence and estoppel, harmless error or lack of nullification or impairment of a benefit, these issues are addressed in sections VIII.B.5 and VIII.C.7.

investigation was made on 11 January 1996, following the Minister's decision of 9 January 1996 to initiate.

8.85 Guatemala asserts that the competent authority to decide on the initiation was the Ministry and not the Economic Integration Directorate. The 15 December report issued by the Directorate could have been rejected by the Ministry. Also Guatemala asserts that Art 12.1 does not mandate an immediate notification and that it specifies no time periods for the notification to occur but for the mention of "when" the authorities are satisfied.

8.86 We first address Mexico's claim that Guatemala breached Article 12.1 of the AD Agreement by failing to publish a notice of initiation and notify Mexico and Cruz Azul when it was satisfied that there was sufficient evidence of to justify initiation of an investigation. Article 12.1 provides as follows:

"12.1 When the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5, the Member or Members the products of which are subject to such investigation and other interested parties known to the investigating authorities to have an interest therein shall be notified and a public notice shall be given.

8.87 In our view, this provision can most reasonably be read to require notification and public notice once a Member has decided to initiate an investigation. This interpretation is confirmed by the fact that the public notice to be provided is a "notice of initiation of an investigation". We can conceive of no logical reason why the AD Agreement would require a Member to publish a notice of the initiation of an investigation **before** the decision had been taken that such an investigation should be initiated.

8.88 We accept that, the report from the Directorate does not constitute the act by which the Government of Guatemala decided to initiate an investigation. In this respect, we note that the Minister had the discretion not to act as recommended in the Directorate's report. Thus, the Government of Guatemala cannot be considered to have decided to initiate an investigation until the Minister has acted on the Directorate's recommendation.⁸¹³ Accordingly, the Panel rejects Mexico's claim of a violation of Article 12.1 regarding the timing of the notification and public notice of the initiation of an investigation.

8.89 The Panel now turns to Mexico's claim that Guatemala did not satisfy itself as to the sufficiency of the evidence before giving notice of the initiation. Given the function and context of Article 12.1 in the AD Agreement, we interpret this provision as imposing a procedural obligation on the investigating agency to publish a notice and notify interested parties after it has taken a decision that there is sufficient evidence to proceed with an initiation. The Panel is of the view that Article 12.1 is not concerned with the substance of the decision to initiate an investigation, which is dealt with in Article 5.3. By issuing a public notice of initiation in the case before us, the Guatemalan authorities complied with their procedural obligation under Article 12.1 to notify known interested parties and publish a public notice after they had decided to initiate an investigation. Whether or not Guatemala was justified in initiating an investigation on the basis of the evidence before it is an issue governed by Article 5.3. Therefore the Panel rejects Mexico's claim that Guatemala violated Article 12.1 in failing to satisfy itself as to the sufficiency of the evidence before it.

⁸¹³ Guatemala specifically asserts in its first submission that "the "authorities" in charge of the investigation were the Ministry, not the Directorate of Economic Integration ... [t]his is a subordinate directorate and therefore the Ministry could have rejected its report of 15 December".

(b) Claim under Article 12.1.1

8.90 Mexico claims that Guatemala's notice of initiation did not meet the standard of "adequate information" because it did not contain adequate information on the basis on which dumping was alleged in the application nor adequate information summarizing the factors on which the allegation of injury, in this case threat of material injury, was based, as required by Article 12.1.1

8.91 Guatemala responds that the public notice as supplemented by the report of the Directorate of Economic Integration of 17 November 1995 is adequate to fulfill the requirements of Article 12.1.1. Since the file was open to the public Guatemala considered that the report from the Economic Integration Directorate was available to Mexico and contained the relevant information to comply with Article 12.1.1.⁸¹⁴

8.92 Article 12.1.1 provides:

12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report, adequate information on the following:

- (i) the name of the exporting country or countries and the product involved;
- (ii) the date of initiation of the investigation;
- (iii) the basis on which dumping is alleged in the application;
- (iv) a summary of the factors on which the allegation of injury is based;
- (v) the address to which representations by interested parties should be directed;
- (vi) the time-limits allowed to interested parties for making their views known."

8.93 As a threshold matter, we must first consider whether the public notice in and of itself complies with the requirements in 12.1.1. In order to do this it is necessary for the Panel to verify whether all the elements listed in Article 12.1.1 have been included in the public notice. On the first of the factors listed in Article 12.1.1, the notice contains information on the country and the product involved. On the second factor, arguably it could be considered that the date of initiation is the date of the public notice,⁸¹⁵ thus also providing the date for the initiation. Moving on to the third factor, regarding whether the public notice contains the basis on which dumping is alleged in the application, the Panel observes that in section 3 of the initiation notice Guatemala refers to the legal basis for the investigation. However, there is nothing on the factual basis of dumping alleged in the application. The Panel thus finds that the information provided in the public notice is not adequate to fulfill the requirement contained in Article 12.1.1(iii).

8.94 Guatemala argues that whatever the insufficiencies of the public notice itself a separate report was provided which satisfies the requirements of Article 12.1.1. Guatemala asserts that the 17

⁸¹⁴ Moreover, Guatemala also asserted that any alleged deficiency in the public notice was a harmless error, was acquiesced to by Mexico and therefore it is estopped to bring this claim, and did not cause Mexico any nullification or impairment of its rights under the AD Agreement.

⁸¹⁵ The Panel recalls its findings on the claim brought by Mexico under Article 5.5, para. 8.82.

November 1995 technical report of the Directorate recommending the initiation of the investigation constitutes the "separate report" which makes available the information required by Article 12.1.1.

8.95 The issue before us then is whether the public notice of initiation by Guatemala "makes available" through a separate report the information required in Article 12.1.1. There is no reference to a separate report in the public notice of initiation. Under Article 12.1.1, it is the "public notice", and not the Member, that must "make available through a separate report", certain information. We take this to mean that the public notice must at a minimum refer to a separate report. This conclusion is logical in that the separate report is a substitute for certain elements of the public notice and thus should perform a notice function comparable to that of the public notice itself. If there were no reference to a separate report in the public notice, how would the public and the interested parties concerned become aware of its existence? If the public and interested parties do not know of the existence of the report, how can it be considered that the required information was properly made available to them?

8.96 Our view on this issue is confirmed by Footnote 23 of the AD Agreement, which provides:

"²³ Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public."

It cannot be said that the separate report was "readily available" to the public, if the public is not informed about where, when and how to have access to this report, leave alone if they were not even publicly informed of its existence. In conclusion, the Panel is of the view that Guatemala's public notice of initiation fails to meet the requirements under Article 12.1.1 by not providing adequate information on the basis on which dumping is alleged in the application, or otherwise making this information available in a separate report.⁸¹⁶

6. Failure to provide the full text of the application in a timely manner

8.97 Mexico claims that Guatemala failed to provide the full text of the application to either the Mexican producer, or the Government of Mexico "in good time, i.e. as soon as the investigation had been initiated" in violation of Article 6.1.3 of the Agreement. Mexico does not state precisely when, if ever, the full text of the application was provided to the Mexican producer, Cruz Azul, and the Government of Mexico.

8.98 Guatemala asserts that Mexico is mistaken as to the facts. It contends that the Ministry sent the full text of the application, together with the notice of initiation of the investigation, to the Government of Mexico on 22 January 1996. Guatemala further asserts that the full text of the application and the notice of initiation of the investigation were sent to Cruz Azul together with the questionnaires, which Guatemala asserts were received on 29 January. Guatemala provides a copy of the courier invoice dated 4 February 1996 for the posting of the documents to Cruz Azul in support of its assertion.⁸¹⁷ In any event, Guatemala argues that it is clear that Cruz Azul received the application and had sufficient opportunity to defend its interests during the course of the investigation, as evidenced by the arguments it submitted to the Guatemalan authorities.⁸¹⁸

⁸¹⁶ As for Guatemala's defences claiming acquiescence and estoppel, harmless error or lack of nullification or impairment of a benefit, these issues are addressed in sections VIII.B.5 and VIII.C.7.

⁸¹⁷ Annex Guatemala-20

⁸¹⁸ Moreover, Guatemala also asserted that any alleged deficiency in the public notice was a harmless error, was acquiesced to by Mexico and therefore it is estopped to bring this claim, and did not cause Mexico any nullification or impairment of its rights under the AD Agreement.

8.99 Mexico responds that, even if Guatemala's assertion that it provided the full text of the application to Cruz Azul on 29 January 1996 was correct, this would still be 18 days after the initiation of the investigation. Moreover, as the courier invoice indicates Guatemala did not send the documents until 4 February 1996, that is 24 days after initiation. Concerning the provision of the application to the Government, Mexico argues that the letter which Guatemala submits as evidence that Mexico received the application on 22 January 1996, does not state that the application was annexed to the letter. In any case, Mexico argues, provision of the application would still have been done 11 days after the initiation.

8.100 Article 6.1.3 provides:

"6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters and to the authorities of the exporting Member and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5."

8.101 We note that Article 6.1.3 does not specify the number of days within which the text of the application shall be provided. What it does specify is that the text of the application be provided "as soon as" the investigation has been initiated. In this regard, the term "as soon as" conveys a sense of substantial urgency. In fact, the terms "immediately" and "as soon as" are considered to be interchangeable.⁸¹⁹ We do not consider that providing the text of the application 24 or even 18 days after the date of initiation fulfils the requirement of Article 6.1.3 that the text be provided "as soon as an investigation has been initiated."

8.102 We further consider that the timeliness of the provision of the text of the application should be evaluated in the context of its purpose and function. Timely access to the application is important for the exporters to enable preparation of the arguments in defence of their interests before the investigating authorities. Moreover, once the investigation has been initiated the timetable of the investigation commences and the timing for many events in the proceeding are counted from initiation including the 12 or 18 months total for completion of the investigation provide for in Article 5.10. Since deadlines in the timetable of the investigation are counted from the date of initiation it is critical that the investigating authority provide the text of the application "as soon as an investigation has been initiated", for the exporter to be able to devise a strategy to defend the allegations it is being confronted with. Also, Article 7.3 of the AD Agreement allows a Member to impose provisional measures as early as sixty days after the date of initiation of an investigation. Access to the text of the application is crucial for the exporter to prepare its defence, and even more so if the authorities are likely to consider applying a provisional measure which may come as early as 60 days after initiation.⁸²⁰

8.103 With respect to the provision of the application to the Government of Mexico, Guatemala asserts that it provided the application as an annex to a letter addressed to the Mexican Embassy in Guatemala dated 19 January 1996⁸²¹ and received 22 January 1996. Mexico in turn asserts that the letter does not prove that the full text of the application was delivered on that date. The text of the letter refers to the fact that an application for an anti-dumping action against cement from Mexico's

⁸¹⁹ "**Immediately**: Without delay, at once, instantly. B *conj.* at the moment that, as soon as. *The New Shorter Oxford English Dictionary*, Oxford University Press, 1993.

⁸²⁰ On a similar issue the *Korea-Dairy Safeguards* panel found that a 14 day delay on notification to the WTO Safeguards Committee as required by Article 12.1 of the Safeguards Agreement did not satisfy the requirement that the notification be provided "immediately" after initiation. See, *Korea-Dairy safeguards*, para. 7.134.

⁸²¹ This letter was provided by Mexico as Annex Mexico-12.

Cruz Azul has been received by the Ministry of Economy and mentions that the "copy of the pertinent documentation has been annexed". In our view, this reference to the "pertinent documentation" most likely means the application by Cementos Progreso. Mexico has not offered any evidence that would lead us to conclude otherwise. We shall therefore conclude that Guatemala sent the full text of the application on 19 January 1996 and that Mexico received it on 22 January 1996. That is 8 and 11 days respectively after initiation of the investigation.

8.104 Having determined that Guatemala sent the full text of the application at the earliest 8 days after initiation of the investigation. We are of the view that given the nature of the obligation in Article 6.1.3 sending the of the application even 8 days after the initiation of investigation is not adequate to fulfill the requirement that it be done "as soon as an investigation has been initiated". Thus, we find that Guatemala acted inconsistently with its obligation under Article 6.1.3, to provide the full text of the application to Mexico as soon as an investigation was initiated.⁸²²

7. Lack of nullification or impairment

8.105 Guatemala maintains that even if the Panel finds violations in the notification under Article 5.5, the insufficient public notice of initiation and the delay in providing the full text of the application, any such violations did not nullify or impair benefits accruing to Mexico under the AD Agreement.

8.106 Mexico responds that if a violation of an obligation has been found there is a presumption of nullification or impairment and Guatemala has simply not provided evidence to rebut the presumption that there was nullification or impairment of Mexico's rights under the WTO Agreements.

8.107 On the Article 5.5 notification, Guatemala argues that it did not take any steps to begin the investigation until Mexico had been notified, and that it granted Cruz Azul a two-month extension to reply to the questionnaire. Thus, a delay in notification under Article 5.5 did not prejudice Mexico's ability to defend its interests nor affect in any other way Mexico's benefits under the Agreement.

8.108 Article 3.8 of the DSU provides guidance with respect to the issue of nullification or impairment. It provides that:

"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".

Thus, there is a presumption that a violation nullified or impaired a benefit accruing to the complaining Member. Article 17 of the AD Agreement entitles a Member to relief when benefits accruing to that Member under the AD Agreement are nullified or impaired." Article 3.8 of the DSU also provides for the possibility that the Member found to have violated a provision may rebut the presumption.

8.109 This is what Guatemala argues that it has rebutted this presumption. Specifically, Guatemala argues that in the case of the Article 5.5 notification it did not initiate the investigation until after Mexico had been notified and that it granted Cruz Azul an extension to respond to the questionnaire and thus Mexico was not impaired in the defence of its interests. We have already found that the initiation date was 11 January 1996 and thus notification under Article 5.5 was not provided until after

⁸²² As for Guatemala's defences claiming acquiescence and estoppel, harmless error or lack of nullification or impairment of a benefit, these issues are addressed in sections VIII.B.5 and VIII.C.7.

initiation.⁸²³ There is no way to ascertain what Mexico might have done if it had received a timely notification. The extension of time for response to the questionnaire granted to Cruz Azul has no bearing on the fact that Mexico was not informed in time. Thus, we do not consider that Guatemala has rebutted the presumption of nullification or impairment with respect to violations of Article 5.5.

8.110 Regarding the violations we have found of Article 6.1.3 and 12.1 we have found that there is no specific argumentation from Guatemala as to how it rebutted the presumption of nullification or impairment. Therefore, we conclude that Guatemala has not rebutted the presumption of nullification or impairment in this case.

8.111 Guatemala argues that the Panel should examine Guatemala's acts and decide whether the non-fulfilment of a procedural obligation should be overlooked on the grounds that the omission did not prejudice the rights of Mexico or Cruz Azul. We could find no basis for such a distinction in the DSU, as suggested by Guatemala between substantive and "mere" procedural violations. There is no reason to regard violations of procedural obligations differently than obligation of a substantial nature. Compliance with the complete set of procedural rules relating to anti-dumping investigations, including those concerning notification and enhanced transparency, is required. This obligation to comply with all provisions, both procedural and substantive should not be taken lightly if one is not to devoid of all meaning the AD Agreement itself. As detailed in sections 4, 5(b) and 6 above we have found that Guatemala violated Articles 5.5, 6.1.3 and 12.1.1 of the AD Agreement by failing to timely notify Mexico of the decision to initiate an investigation, to timely provide Mexico and Cruz Azul a copy of the application, and to publish an adequate notice of initiation. We consider that a key function of the transparency requirements of the AD Agreement is to ensure that interested parties, including Members, are able to take whatever steps they deem appropriate to defend their interests. Where a required notification is not made in a timely fashion, or the application is not provided in time, or the public notice is inadequate the ability of the interested party to take such steps is vitiated. It is not for us to now speculate on what steps Mexico might have taken had it been timely notified or provided with the application, or had the public notice been adequate, and how Guatemala might have responded to those steps. Thus, while there is a possibility that the investigation would have proceeded in the same manner had Guatemala complied with its transparency obligations, we cannot state with certainty that the course of the investigation would not have been different.⁸²⁴

8.112 Thus, the Panel rejects Guatemala's defence that, concerning the violations of Articles 5.5, 6.1.3 and 12.1.1 of the AD Agreement, it has rebutted the presumption of nullification or impairment established in Article 3.8 of the DSU.

D. ALLEGED PROCEDURAL VIOLATIONS DURING THE COURSE OF THE INVESTIGATION

8.113 Mexico has raised a number of claims concerning alleged procedural violations committed by the Ministry during the course of its investigation. We shall address each of these claims in turn.

1. The submission of evidence

8.114 Mexico has raised claims concerning (a) the alleged failure by the Ministry to set time-limits for the submission of evidence, and (b) the Ministry's treatment of technical accounting evidence submitted by Cruz Azul.

⁸²³ See, para. 8.82.

⁸²⁴ Our finding on this issue is consistent with the view expressed by the panel in *Guatemala – Cement I*, WT/DS60/R, para. 7.42.

(a) Time-limits for the submission of arguments and evidence

8.115 Mexico claims that the Ministry violated Article 6.1 by failing to set a time-limit for the presentation of arguments and evidence during the final stage of the investigation. Mexico asserts that the Ministry fixed a time-limit for the submission of arguments and evidence for the early part of the investigation (in the public notice of initiation), but failed to do so for the latter stage of the investigation (in the public notice of its preliminary determination).

8.116 Guatemala asserts that the Ministry did fix specific periods for the presentation of information. For example, Guatemala claims that the Ministry fixed 17 May 1996 as the last date for replying to the original questionnaire, 30 October 1996 for responding to the supplementary questionnaire, and 19 December 1996 for the final arguments.

8.117 We shall begin by examining Mexico's claim under Article 6.1 of the AD Agreement. Article 6.1 provides:

"All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question."

8.118 We do not consider it necessary to determine whether, in fact, the Ministry did set periods for the presentation of arguments and evidence during the final stage of the investigation. This is because we find Mexico's claim to be without merit as a matter of law. In our view, Article 6.1 of the AD Agreement does not require investigating authorities to set time-limits for the presentation of arguments and evidence during the final stage of the investigation. The only time-limit provided for in Article 6.1 is that contained in Article 6.1.1, whereby exporters shall be given at least 30 days for replying to questionnaires. Mexico does not allege that Cruz Azul was not provided the 30 days provided for in Article 6.1.1.

8.119 Article 6.1 requires investigating authorities to provide interested parties "ample opportunity" to present in writing certain evidence. Article 6.1 does not explicitly require an investigating authority to set time limits for the submission of arguments and evidence during the final stage of an investigation.⁸²⁵ Article 6.1 simply requires that interested parties shall have "ample" opportunity to present evidence and "full" opportunity to defend their interests. Interested parties may have such opportunity without the investigating authority setting time limits for the submission of evidence. In other words, these provisions impose substantive obligations, without requiring those obligations to be met through any particular form (except as provided for in sub-paragraphs 1 through 3 of Article 6.1). What counts is whether, in practice, sufficient opportunity was provided, not whether time limits for the submission of evidence were set. Thus, even if the Ministry had failed to set time-limits for the submission of arguments and evidence during the final stage of the investigation, this would not *ipso facto* constitute a violation of Article 6.1 of the AD Agreement.

8.120 Mexico has argued that the Ministry's public notice of initiation granted interested parties 30 days in which to defend their interests, whereas no such time-limit was included in the public notice concerning the imposition of a provisional measure. We would note that Article 12.1.1(vi) explicitly provides that a public notice of the initiation of an investigation shall include adequate information on the "time-limits allowed to interested parties for making their views known". No such obligation is included in Article 12.2.1, concerning the contents of public notices on the imposition of provisional measures. We consider that Article 12.2.1 constitutes useful context when examining Mexico's claim under Article 6.1. In particular, the fact that there is no requirement for investigating authorities to

⁸²⁵ This does not, of course, preclude an authority from establishing such limits, so long as the basic requirements (such as "ample opportunity", or 30 days in respect of questionnaire replies) are respected.

include time-limits for the submission of evidence in the public notice of their preliminary determinations confirms the conclusion set forth in the preceding paragraph.

8.121 Mexico has also raised a claim (ostensibly in respect of the Ministry's failure to establish time-limits) based on the first sentence of Article 6.2 of the AD Agreement, which provides that "[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests...". Upon closer examination of Mexico's Article 6.2 claim, we note that it relates more to the Ministry's rejection of Cruz Azul's technical accounting evidence, than to the Ministry's failure to set time-limits for the submission of evidence and arguments in the latter stages of its investigation. In this regard, we note that Mexico's Article 6.2 claim is summarised in para. 325 of its first written submission to the Panel:

"The denial of Cruz Azul's right of defence can be seen in the Ministry's rejection of the technical accounting evidence submitted by Cruz Azul on 18 December 1996 and the acceptance of new evidence from Cementos Progreso during the public hearing between the Ministry and the parties. ..."

(b) Refusal of "technical accounting evidence"

8.122 Mexico claims that the Ministry violated Articles 6.1, 6.2, 6.8, and Annex II (5) and (6) of the AD Agreement by rejecting certain technical accounting evidence submitted by Cruz Azul on 18 December 1996, one day before the 19 December 1996 public hearing scheduled by the Ministry. Mexico submits that the technical accounting evidence was prepared by an external accounting firm, to confirm that the information submitted by Cruz Azul during the course of the investigation was complete and taken from Cruz Azul's accounting records.

8.123 Guatemala asserts that the technical accounting evidence was rejected because it was not "verifiable", or "appropriately submitted", within the meaning of Annex II(3). According to Guatemala, the technical accounting evidence was not verifiable because the Ministry was required to cancel the verification visit to Cruz Azul, and it was not appropriately submitted because it was neither requested by the Ministry, nor supplied in a timely fashion. Guatemala asserts that the deadline for the submission of new evidence was 6 December 1996, and that this deadline had therefore expired when the technical accounting evidence was submitted on 18 December 1996. Guatemala argues that the appropriate and timely juncture for submission of the technical accounting evidence would have been the verification visit at Cruz Azul. According to Guatemala, therefore, the Ministry's decision not to accept Cruz Azul's technical accounting evidence was consistent with Article 6.8 and Annex II(3) of the AD Agreement.

8.124 The Ministry's failure to take into account Cruz Azul's technical accounting evidence was clearly linked to the Ministry's cancellation of its verification visit to Cruz Azul. The Ministry stated in its final determination that the technical accounting evidence "could not replace verification".⁸²⁶ Furthermore, the technical accounting evidence was submitted by Cruz Azul in lieu of verification, and would not have been submitted if the Ministry had not cancelled the verification. In our view, we need only address Mexico's claim concerning the Ministry's failure to take into account Cruz Azul's technical accounting evidence, if we find that the Ministry was entitled to cancel its verification visit to Cruz Azul.

8.125 At para. 8.251 below, we state that we do not consider that an objective and impartial investigating authority could properly have found that Cruz Azul significantly impeded its investigation by objecting to the inclusion of conflicted non-governmental experts in its verification team. Accordingly, the Ministry did not act in a reasonable, objective and impartial manner by cancelling its verification visit to Cruz Azul. This is an important consideration for our conclusion

⁸²⁶ Section B.6, page 14, Annex Mexico-41

that the Ministry violated Article 6.8, read in light of Annex II(3), by having recourse to "best information available" for the purpose of determining normal value. Inherent in this finding is the fact that the Ministry reacted unreasonably to reasonable objections raised by Cruz Azul, in that such reasonable objections did not entitle the Ministry to cancel its verification visit to Cruz Azul. In light of these considerations, we do not consider it necessary to address Mexico's claims regarding the Ministry's treatment of technical accounting evidence submitted by Cruz Azul as a result of the cancellation of the verification visit.

2. Cruz Azul's access to evidence

8.126 Mexico claims that the Ministry violated Articles 6.1.2, 6.2 and 6.4 of the AD Agreement by (a) refusing Cruz Azul access to the file in November 1996, and (b) failing to promptly provide Cruz Azul with a copy of a submission made by Cementos Progreso on 19 December 1996. Mexico also claims that the Ministry violated Article 6.4 by (c) failing to provide Cruz Azul with copies of the file, and (d) failing to provide Cruz Azul with a full record of the 19 December 1996 public hearing. We shall now examine each of these claims.

(a) Alleged denial of access to the file

8.127 Mexico claims that the Ministry refused Cruz Azul access to the file on 4 November 1996. Mexico has submitted a notarial deed to that effect, in support of its claim.

8.128 Guatemala argues that Cruz Azul was provided access to the file on 4 November 1996. In this regard, Guatemala asserts that interested parties have a constitutional right (under Guatemalan law) to access to the file in question. However, Guatemala could not prove that access to the file was granted, because the Ministry did not keep a record of interested parties' access to the file. Guatemala argues that the fact that Cruz Azul had timely access to the file is demonstrated by its numerous submissions in which it alludes to evidence in the file. Guatemala also argues that the Ministry was never shown a copy of the 4 November 1996 notarial deed.

8.129 Article 6.1.2 of the AD Agreement provides:

"Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation."

8.130 Article 6.4 of the AD Agreement provides:

"The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information."

8.131 Mexico has provided the Panel with a copy of a notarial deed dated 4 November 1996, according to which Cruz Azul was denied access to the file on 4 November 1996. The circumstances of the alleged denial of access to the file are set forth in that notarial deed:

"FIRST: [Cruz Azul's notary] went to the Department of Economic Integration of the Ministry of the Economy, on the third floor of the Ministry building, and requested to see file number one thousand two hundred and eighty one-ninety five (1281-95), and was told by an official from that Department that the file was under the responsibility of Ms. Edith de Molina, an advisor in that Ministry, on the sixth floor. [Cruz Azul's notary] therefore went to the sixth floor and enquired after Ms. Edith de Molina. [Cruz

Azul's notary] was received by Ms. Gabriela Montenegro, also an advisor in the Ministry, who confirmed to [him] that the file was indeed under the responsibility of Ms. Edith de Molina, but that she was not currently in Guatemala, having left the country for Mexico. SECOND: [Cruz Azul's notary] therefore asked Ms. Gabriela Montenegro to allow [him] to see file one thousand two hundred and eighty one-ninety five (1281-95). [Cruz Azul's notary] was told categorically that that would not be possible, as the only person in the entire Ministry who could permit that was Ms. Edith de Molina, and who was expected back in Guatemala on Thursday the seventh of November of nineteen hundred and ninety six, and that [Cruz Azul's notary] had to make a written request for any information whatsoever concerning the file in question. [Cruz Azul's notary] therefore asked Ms. Montenegro whether, in view of the fact that nobody could show [him] the file on that particular day, [he] could see it on Thursday the seventh of November, when Ms. Edith de Molina was expected to be back in Guatemala. She replied that even then it would not be possible to see the file, as the Ministry first had to evaluate and review the documents in it."

8.132 Thus, it is alleged that the Ministry refused Cruz Azul access to the administrative file because the person responsible for that file was out of the country. It is further alleged that Cruz Azul was told that it could not have access to the file when the responsible person returned to the Ministry, because the Ministry would first have to evaluate and review the documents contained therein.

8.133 Article 6.1.2 of the AD Agreement provides that evidence presented by one interested party shall be "made available promptly" to other interested parties. Article 6.4 provides that an interested party shall have "timely opportunities" to see all information that is relevant to the presentation of its case. On their face, neither Article 6.1.2 nor Article 6.4 necessarily require access to the file. For example, if an investigating authority required each interested party to serve its submissions on all other interested parties, or if the investigating authority itself undertook to provide copies of each interested party's submission to other interested parties, there may be no need for interested parties to have access to the file. If, however, there is no service of evidence by interested parties, or no provision of copies by the investigating authority, access to the file may be the only practical means by which evidence presented by one interested party could be "made available promptly" to other interested parties (consistent with Article 6.1.2), or by which interested parties could have "timely opportunities" to see information relevant to the presentation of their cases (consistent with Article 6.4). Assuming access to the file is the only practical means of complying with Articles 6.1.2 and 6.4, access to the file need not necessarily be unlimited. Nor need the file be made available on demand. Provided access to the file is regular and routine, we consider that the requirements of Articles 6.1.2 and 6.4 would be satisfied.

8.134 There is no evidence to suggest that submissions made to the Ministry by one interested party were "made available promptly" to other interested parties by virtue of intra-party service or the provision of copies by the Ministry.⁸²⁷ Nor has Guatemala argued that this was the case. Accordingly, if Cruz Azul wanted to review evidence submitted by Cementos Progreso, it would have to have access to the file to do so. In these circumstances, regular and routine access to the file is required by Articles 6.1.2 and 6.4.

⁸²⁷ At para. 297, Guatemala asserts that "[d]uring the investigation the Ministry provided the interested parties with a copy of the documents in the file". These "documents in the file" would presumably include [non-confidential versions of) submissions made by interested parties. However, Guatemala has adduced no evidence to that effect. Accordingly, we are not persuaded that Guatemala has demonstrated that copies of interested parties' submissions were provided by the Ministry to Cruz Azul. Indeed, had that been the case, we wonder why the Ministry offered copies of the file to interested parties (at their expense) in a communication dated 6 December 1996 (Annex Mexico-36).

8.135 In the factual circumstances set forth in the notarial deed of 4 November 1996, a denial of access on 4 November 1996 because the relevant official is overseas, followed by a denial of access during the following week because the investigating authority is working on the file, and in the absence of any indication as to when access to the file would be granted, would not be consistent with the need to ensure routine and regular access to the file. We are of the view that these circumstances are indicative of a pattern of behaviour which would prevent regular and routine access to the file, and which would fail to ensure that evidence presented by one interested party would be "made available promptly" to other interested parties (consistent with Article 6.1.2), and which would fail to ensure that interested parties have "timely opportunities" to see information relevant to the presentation of their cases (consistent with Article 6.4).

8.136 For all the above reasons, we find that the pattern of behaviour described in the 4 November 1996 notarial deed establishes a *prima facie* case that the Ministry violated Articles 6.1.2 and 6.4 of the AD Agreement by refusing Cruz Azul access to the file on 4 November 1996. In a bid to rebut that *prima facie* case, Guatemala has asserted that access to the file was not refused on that date. However, Guatemala has not been able to adduce any evidence to that effect. Guatemala has not adduced an affidavit from any Ministry official to the effect that access was granted on 4 November 1996. Similarly, Guatemala has failed to establish that a Cruz Azul representative was granted access to the Ministry building on that date. Guatemala claims that it cannot demonstrate when access to the file was granted, because the Ministry does not keep the appropriate records. In our view, a Member's failure to keep records of who was granted access to the file, and when, provides no basis on which to rebut a *prima facie* case that access was denied on a particular date. Guatemala also seeks to rebut the *prima facie* case by arguing that the fact that Cruz Azul had sufficient access to the file is demonstrated by numerous submissions which refer to evidence in the file. However, the fact that Cruz Azul may have had access to the file on certain occasions does not demonstrate that Cruz Azul had regular and routine access to the file. We do not consider that we are compelled to adopt a different approach simply because Cruz Azul may not have shown the Ministry a copy of the 4 November 1996 notarial deed. The notarial deed is simply a record of fact. Guatemala has adduced no argument why Cruz Azul's record of fact should have been shown to the Ministry.

8.137 At the second substantive meeting with the parties, Guatemala asserted:

"[i]n order to meet its burden, Mexico must establish a *prima facie* case of inconsistency with a provision of the AD Agreement or GATT 1994 that is within the Panel's terms of reference. In case all the evidence and arguments remain equal, the Panel must give the benefit of the doubt to Guatemala, as the defending party."⁸²⁸

This assertion appears to be based on the following statement by the panel in *United States - Sections 301 - 310 of the Trade Act of 1974*:

"Since, in this case, both parties have submitted extensive facts and arguments in respect of the EC claims, our task will essentially be to balance all evidence on record and decide whether the EC, as party bearing the original burden of proof, has convinced us of the validity of its claims. In case of uncertainty, i.e. in case all the evidence and arguments remain in equipoise, we have to give the benefit of the doubt to the US as defending party."

8.138 We make no finding as to whether or not there may be circumstances in which the benefit of any doubt should go to the defending party if all the evidence and arguments "remain in equipoise", or equal. This is because we do not consider that the evidence and arguments adduced by the parties in the present case are equal. Guatemala has failed to adduce any evidence to the effect that Cruz Azul

⁸²⁸ Guatemala's second oral statement, para. 27.

was granted access to the file on 4 November 1996, or to dispute the other facts described in the notarial deed of that date. Accordingly, there is no "benefit of the doubt" for us to give to Guatemala.

8.139 For these reasons, we find that the pattern of behaviour described in the notarial deed of 4 November 1996 constitutes a violation of Articles 6.1.2 and 6.4 of the AD Agreement.

(b) Alleged failure to provide Cruz Azul with a copy of Cementos Progreso's submission of 19 December 1996

8.140 Mexico claims that the Ministry violated Articles 6.1.2 and 6.4 by failing to provide Cruz Azul promptly with a copy of the submission made by Cementos Progreso at the 19 December 1996 public hearing as it was done only on 8 January 1997.

8.141 Guatemala asserts that the Ministry was justified in delaying Cruz Azul's access to Cementos Progreso's submission at the December 1996 public hearing because of the possibility that the submission contained confidential information. Furthermore, Guatemala asserts *inter alia* that any submission prepared by Cruz Azul in response to Cementos Progreso's submission of 19 December 1996 would not have been "practicable", since it would have been submitted too late to be taken into account by the investigating authority (because of the alleged closure of the Ministry's record prior to that date).

(i) *Article 6.1.2*

8.142 Guatemala does not deny that Cementos Progreso's 19 December 1996 submission was not made available to Cruz Azul until 8 January 1997. Thus, there is no dispute between the parties that the Cementos Progreso submission was not made available to Cruz Azul until 20 days after its submission to the Ministry. In principle, we consider that a 20-day delay is inconsistent with the Ministry's Article 6.1.2 obligation to make this submission available to Cruz Azul "promptly".

8.143 Guatemala asserts that "the Ministry had a valid reason for not giving Cruz Azul immediate access to this document".⁸²⁹ In particular, Guatemala argues that "it was reasonable for the Ministry to conclude that the lengthy written submission of 19 December prepared by Cementos Progreso would contain confidential information that "ought not to be revealed to Cruz Azul".⁸³⁰ In this regard, we note that the obligation in Article 6.1.2 is qualified by the words "[s]ubject to the requirement to protect confidential information". In principle, therefore, evidence presented by one interested party need not be made available "promptly" to other interested parties if it is "confidential". However, insofar as confidentiality is concerned, Article 6.1.2 must be read in the context of Article 6.5, which governs the treatment of confidential information. We examine Article 6.5 in detail at paras 8.207 - 8.223 below. We have noted that Article 6.5 reserves special treatment for "confidential" information only "upon good cause shown", and we have determined that the requisite "good cause" must be shown by the interested party which submitted the information at issue. Guatemala has not demonstrated, or even argued, that Cementos Progreso requested confidential treatment for its 19 December 1996 submission, or that "good cause" for confidential treatment was otherwise shown.⁸³¹ The Article 6.1.2 proviso regarding the "requirement to protect confidential information", when read in the context of Article 6.5, cannot be interpreted to allow an investigating authority to delay making available evidence submitted by one interested party to another interested party for 20 days simply

⁸²⁹ Guatemala's first written submission, para. 295.

⁸³⁰ Guatemala's first written submission, para. 296.

⁸³¹ Even if Cementos Progreso had requested confidential treatment, the Ministry should (consistent with 6.5.1) have required it to furnish a non-confidential version thereof which could have been made available to Cruz Azul "promptly", or to provide "a statement of the reasons why [non-confidential] summarization is not possible".

because of the possibility - which is unsubstantiated⁸³² by any request for confidential treatment from the party submitting the evidence - that the evidence contains confidential information. We do not believe that the specific requirement of Article 6.1.2 may be circumvented simply by an investigating authority determining that there is a possibility that the evidence at issue contains confidential information. Such an interpretation could undermine the purpose of Article 6.1.2, since in principle there is a possibility that any evidence could contain confidential information (and therefore not be "made available promptly" to interested parties). Accordingly, we find that the Ministry violated Article 6.1.2 of the AD Agreement by failing to make Cementos Progreso's 19 December 1996 submission available to Cruz Azul until 8 January 1997.

(ii) *Article 6.4*

8.144 Mexico claims that the Ministry violated Article 6.4 by failing to provide Cruz Azul with the submission presented by Cementos Progreso at the 19 December 1996 public hearing until 8 January 1997, only two weeks before the Ministry's final determination. Guatemala claims that the Ministry was not required to provide Cruz Azul with a copy of Cementos Progreso's submission before 8 January 1997, since - because of the closure of the record before that date - it would not have been "practicable" for Cruz Azul to respond to Cementos Progreso's submission. Guatemala also relies on Article 6.14 of the AD Agreement to argue that the Ministry was not required to delay the conclusion of the investigation in order to allow either party to prepare a rejoinder to the 19 December 1996 final submissions of the other party.

8.145 Since we have already found that the facts giving rise to Mexico's Article 6.4 claim constitute a violation of Article 6.1.2, we do not consider it necessary to consider whether those facts also constitute a violation of Article 6.4.

(c) *Alleged failure to provide copies of the file*

8.146 Mexico claims that the Ministry violated Article 6.4 of the AD Agreement by failing to provide Cruz Azul with two copies of the file.

8.147 In response to a question from the Panel, Guatemala asserts that the relevant copies were not provided because Cruz Azul did not pay the required fee, even though the Ministry's 6 December 1996 communication indicated that copies would be at the expense of the party requesting the copy. In its first written submission, however, Guatemala asserts that "Cruz Azul did not request that a copy of any document be supplied at its expense".⁸³³

8.148 We note that the Ministry's 6 December 1996 communication stated, *inter alia*, that:

⁸³² The Cementos Progreso submission at issue was made at a public hearing on 19 December 1996. Guatemala argues that, although the Ministry authorized parties to make submissions in writing, the Ministry had not specified whether such written submissions could contain confidential information or not. According to Guatemala, this justified the Ministry in assuming that the Cementos Progreso submission may contain confidential information. We are not at all convinced by this argument. The instructions issued by the Ministry concerning the public hearing state that "[t]he hearing is being organized for the purpose of receiving the final arguments of the parties, which may submit **a written version thereof**" (emphasis supplied). Thus, any written submission was simply to be a written version of arguments presented orally. Arguments made by a party at a public hearing will presumably not contain confidential information. Similarly, therefore, written versions of arguments presented orally will also not contain information. Thus, to the extent that Cementos Progreso would not have included confidential information in its oral presentation, similarly its written version of that oral presentation also would not have included confidential information. In these circumstances, we fail to see how Cementos Progreso's written submission - which, consistent with the Ministry's instructions, was to be a written version of its oral presentation - could have contained confidential information.

⁸³³ Guatemala's first written submission, para. 294.

"2. The technical study issued by this Directorate will record the facts investigated and the evidence available as well as the results of verifications conducted. These documents form part of the file, and **the parties are free to obtain copies at their own expense.**" (emphasis supplied)

8.149 On 17 January 1997, Cruz Azul requested that:

"in keeping with the appropriate legal procedures and **at the expense of my principal**, the latter be issued with two attestations in regard to or certified copies of all the records contained in the above-mentioned file. This request is based on the articles cited and Articles 28 and 29 of the Political Constitution of the Republic of Guatemala. Five copies of the present submission are included." (emphasis supplied)

8.150 Therefore, as a factual matter, we are in no doubt that Cruz Azul requested two copies of the file. Despite Guatemala's assertion to the contrary (see para. 8.147 above), we are also in no doubt that Cruz Azul offered to pay for those copies.

8.151 There are various ways in which an investigating authority could satisfy the Article 6.4 obligation to provide "whenever practicable ... timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases ...". In the present case, the Ministry chose to offer interested parties copies of the file, against payment of a fee. Mexico does not challenge the Ministry's decision to comply with its obligations under the AD Agreement by offering copies of the file against payment of a fee. Rather, Mexico challenges the Ministry's failure to provide the relevant copies, despite Cruz Azul's offer to pay the relevant fee.

8.152 In our view, the Ministry's reaction to Cruz Azul's request of 17 January 1997 did not "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases". The Ministry could have reacted to Cruz Azul's request in a number of ways.⁸³⁴

8.153 However, there is nothing before the Panel to suggest that the Ministry responded in any way to Cruz Azul's letter of 17 January 1997. There is no evidence to suggest that the Ministry even informed Cruz Azul how much each copy of the file would cost. Guatemala has stated in these proceedings that Cruz Azul would have had to pay the cost of reproducing the file, plus Q 0.30 per page.⁸³⁵ However, there is no evidence to suggest that the Ministry informed Cruz Azul how much it would cost to reproduce the file, or the number of pages in the file. Since Cruz Azul could not, therefore, have known how much each copy of the file would cost (because it did not know the number of pages in the file), we do not consider that an objective and impartial investigating authority seeking to "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases" would have failed to respond to Cruz Azul's request for two copies simply because - in the words of Guatemala - "Cruz Azul did not pay the required fee".⁸³⁶ An investigating authority cannot "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases" if it conditions the provision of copies on the payment of a fee without at least informing the requesting party how much the fee would be, or without at least providing the requesting party with the information it would need (*e.g.*, the number of pages in the file) to calculate the fee for itself.

⁸³⁴ For example, (a) it could have provided the requested copies, and invoiced Cruz Azul for the relevant fee. Alternatively, (b) it could have informed Cruz Azul of the exact fee to be paid, and provided details of the preferred method of payment. There again, (c) it could have arranged for Cruz Azul to collect the copies from the Ministry, and to pay the relevant fee upon collection.

⁸³⁵ In doing so, Guatemala stated that the amount of the fee is regulated by Article 27(c) of Decree 111-96 of the Congress of the Republic of Guatemala.

⁸³⁶ Guatemala's response to question 2 from the Panel.

8.154 In these circumstances, we consider that the Ministry did not comply with its Article 6.4 obligation to "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases". Since there is no evidence to suggest that it was not "practicable" for the Ministry to do so, or that the relevant information was not "used" by the Ministry in its investigation, we find that the Ministry violated Article 6.4 of the AD Agreement by failing to provide the two copies of the file requested by Cruz Azul on 17 January 1997.

(d) Alleged failure to provide a full record of the public hearing

8.155 Mexico claims that the Ministry violated Article 6.4 of the AD Agreement by failing to provide Cruz Azul with a complete copy of the Ministry's record of the 19 December 1996 public hearing. Guatemala does not admit that the copy of the record was incomplete. Even if it were incomplete, Guatemala asserts that Cruz Azul could have requested a complete copy as soon as it realized that there had been an omission. Guatemala also argues that Cruz Azul did not bring this matter to the attention of the Ministry during the investigation, and that this matter was only raised in the present WTO dispute settlement proceedings.

8.156 Evidence before us demonstrates that the record of the 19 December 1996 public hearing provided by the Ministry to Cruz Azul was incomplete. Although the sequential numbers stamped on the pages of the document suggest that the document is complete, it is quite clear to us that at least two pages are actually missing from the document. The words at the beginning of page 02737 do not follow on from the phrase at the end of page 02376. This demonstrates that there is at least one page missing between pages 02736 and 02737. Furthermore, page 02737 refers to a second point ("SEGUNDO"), without any first point identified in the preceding pages of the document. The first point is presumably cited in the first missing page. There is also at least one page missing between pages 02738 and 02739. Again, the wording at the end of page 02738 and at the beginning of page 02739 does not match. In addition, page 02739 refers to "CUARTO" and "QUINTO", while the third point is not included in the document. This third point is presumably cited in the second missing page.

8.157 Despite the factual accuracy of Mexico's argument, we do not consider that it amounts to a violation of Article 6.4 of the AD Agreement, as Mexico has failed to adduce any evidence that the Ministry's failure to provide a full copy of its record of the public hearing was anything other than inadvertent. Although we consider that an interested party is entitled to see a full version of the investigating authority's record of any public hearing, it is not inconceivable that an investigating authority which chooses to provide interested parties with a copy of the record could inadvertently fail to provide a complete copy. In our view, such an inadvertent omission on the part of an investigating authority does not constitute a violation of Article 6.4. Although a violation could arise if an investigating authority failed to correct its omission after having been informed of that omission by an interested party, there is no evidence that Cruz Azul informed the Ministry of its omission in the present case.

8.158 In order to avoid any uncertainty, we wish to emphasize that we do not consider that the inadvertent nature of the Ministry's omission renders that omission "harmless", in the sense of being a defence to a violation of Article 6.4 of the AD Agreement (see para. 8.22). Our position is not that there was a violation of Article 6.4, but that such violation should be disregarded because it was "harmless". Rather, our position is that the factual circumstances before us do not amount to a violation. The question of whether or not any violation is "harmless" therefore does not arise.

3. Interested party's right to defend its interests - Article 6.2

8.159 Mexico claims that the Ministry violated Article 6.2 of the AD Agreement (a) by failing to provide a complete copy of the Ministry's record of the public hearing to Cruz Azul, (b) by failing to grant Cruz Azul access to the file on 4 November 1996, (c) by failing to provide Cruz Azul promptly

with a copy of Cementos Progreso's 19 December 1996 submission, (d) by failing to respond to Cruz Azul's 13 November 1996 request for a non-confidential version of evidence submitted by Cementos Progreso, (e) by failing to provide Cruz Azul with a non-confidential version of the information submitted to the Ministry during its verification visit to Cementos Progreso, (f) by extending the period of investigation, (g) by delaying notification of initiation to Cruz Azul and the Government of Mexico; and (h) by failing to furnish the full text of Cementos Progreso's application for initiation.

8.160 Guatemala asserts that the Ministry complied with Article 6.2 of the AD Agreement by affording Cruz Azul and other interested parties the opportunity to examine the information, arguments and evidence presented during the course of the investigation.

8.161 Article 6.2 of the AD Agreement provides in relevant part:

"Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests...."

8.162 Whereas this provision clearly imposes a general duty on investigating authorities to ensure that interested parties have a full opportunity throughout an anti-dumping investigation for the defence of their interests, it provides no specific guidance as to what steps investigating authorities must take in practice. By contrast, other more specific provisions apply to the facts at hand, in respect of which Mexico has also made claims. Although there may be cases in which a panel will nevertheless need to address claims under Article 6.2, we do not consider it necessary for us to do when we have already made findings concerning the conduct allegedly violating Article 6.2 under other, more specific provisions of the AD Agreement.⁸³⁷

8.163 Accordingly, we shall only consider Mexico's claims under Article 6.2 to the extent that we have not made findings regarding the factual situation at issue under another provision of the AD Agreement which specifically addresses that situation.

8.164 For the most part, we have already made findings regarding the factual situations forming the basis of Mexico's Article 6.2 claim under provisions of the AD Agreement which specifically address those factual situations. Thus, we have made findings concerning item (a) under Article 6.4.⁸³⁸ We have made findings concerning item (b) under Articles 6.1.2 and 6.4.⁸³⁹ We have made findings concerning item (c) under Articles 6.1.2 and 6.4.⁸⁴⁰ We have made findings concerning item (e) under Article 6.5.1.⁸⁴¹ We have made findings concerning item (f) under a number of provisions, including Article 6.2.⁸⁴² We have made findings concerning item (g) under Article 12.⁸⁴³ We have made findings concerning item (h) under Article 6.1.3.⁸⁴⁴ It is only the factual situations identified under

⁸³⁷ In this regard, we recall that the Appellate Body stated in *European Communities - Bananas* that "[a]lthough Article X:3(a) of the GATT 1994 and Article 1.3 of the *Licensing Agreement* both apply, the Panel, in our view, should have applied the *Licensing Agreement* first, since this agreement deals specifically, and in detail, with the administration of import licensing procedures" (WT/DS27/AB/R, para. 204, adopted 25 September 1997). Furthermore, the panel in *United States - Anti-Dumping Act of 1916* stated that "[i]t is a general principle of international law that, when applying a body of norms to a given factual situation, one should consider that factual situation under the norm which most specifically addresses it" (WT/DS136/R, circulated on 31 March 1996, under appeal) (footnote deleted).

⁸³⁸ See paras. 8.155-8.158 above.

⁸³⁹ See paras. 8.140-8.145 above.

⁸⁴⁰ See paras. 8.155-8.158 above.

⁸⁴¹ See paras. 8.209-8.215 below.

⁸⁴² See paras. 8.175-8.179 below.

⁸⁴³ See paras. 8.84-8.96 above.

⁸⁴⁴ See paras. 8.97-8.104 above.

item (d) which are not the subject of findings under provisions of the AD Agreement which specifically address those situations.⁸⁴⁵

8.165 Mexico's claim under item (d) is based on a document dated 13 November 1996, in which Cruz Azul requested "all the information submitted by CEMENTOS PROGRESO S.A. and other interested parties ...".⁸⁴⁶ We are unable to make a finding that Cruz Azul's rights of defence were violated simply on the basis of Cruz Azul's request for information. It is the Ministry's reaction to Cruz Azul's request which is relevant to determining whether Cruz Azul's rights of defence were violated. However, Mexico has not informed the Panel of how, if at all, the Ministry responded to Cruz Azul's request. We therefore reject Mexico's Article 6.2 claim based on its request for information dated 13 November 1996.

4. The Ministry's failure to satisfy itself as to the accuracy of information - Article 6.6 / Annex II(7)

8.166 Mexico claims that the Ministry failed to satisfy itself of the accuracy of the information used by the Ministry in its final determination, contrary to Article 6.6 and Annex II(7) of the AD Agreement. Mexico claims that the Ministry's failure to satisfy itself of the accuracy of the information used to determine normal value violated paragraph 7 of Annex II, since the Ministry failed to act with "special circumspection" with regard to the best information available used as a basis for that determination. Mexico claims that the Ministry's failure to satisfy itself of the accuracy of the information used to determine injury violated Article 6.6, because: (i) the Ministry examined the maximum and minimum amounts of imports during the period of investigation ("POI"), rather than comparing the trend in imports during the POI with the trend in the previous comparable period; (ii) the import data concerning tariff heading 2523.29.00 used by the Ministry includes products other than that under investigation; the import data concerning tariff heading 2523.29.00 includes non-dumped imports from Mexico, and imports from countries other than Mexico.⁸⁴⁷

8.167 With regard to the accuracy of the injury data, Guatemala replies that the Ministry used data supplied by Cruz Azul for calculating the volume of imports. The Ministry therefore did not take into account imports from other countries, or imports of other types of cement not subject to the investigation. With regard to the accuracy of the information used to determine normal value, Guatemala asserts that the Ministry was entitled to use the "best information available", consistent with Article 6.8 of the AD Agreement. As regards that "best information available", Guatemala asserts that the Ministry used four invoices as the basis for its calculations. Furthermore, Mexico did not suggest that those invoices were fraudulent during the course of the Ministry's investigation.

8.168 Article 6.6 of the AD Agreement provides:

"Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based."

8.169 Paragraph 7 of Annex II provides:

"If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in

⁸⁴⁵ Although we have made findings concerning item (f) under Article 6.1 and Annex II(1) of the AD Agreement, we do not consider that those provisions specifically address the extension of the Ministry's period of investigation.

⁸⁴⁶ This document was provided by Mexico in Annex Mexico-54.

⁸⁴⁷ Further details concerning this claim were provided in response to Mexico Question 3 from the Panel.

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

8.170 We shall examine Mexico's claims under Annex II(7) and Article 6.6 separately.

(a) Annex II(7)

8.171 Mexico's claim under Annex II(7) concerns the alleged failure by the Ministry to satisfy itself as to the accuracy of certain information used to determine normal value. This claim is based on paragraph 7 of Annex (II), because the information at issue constitutes "best information available", which the Ministry considered itself entitled to use as a result of the cancelled verification visit to Cruz Azul. We find at section E.1 para. 8.251 that the Ministry's recourse to "best information available" was contrary to Article 6.8 of the AD Agreement, read in light of Annex II(3). Since the Ministry was not entitled to rely on the "best information available" in order to make a final determination of normal value, we see no need to examine whether the Ministry did, or did not, exercise "special circumspection" in respect of that information. Even if the Ministry had exercised "special circumspection" in respect of the relevant "best information available", that would not change the fact that the Ministry was not justified in using that "best information available". The issue of whether or not the Ministry exercised the requisite "special circumspection" is therefore moot.

(b) Article 6.6

8.172 In our view, it is important to distinguish between the accuracy of information, and the substantive relevance of such information. Once an investigating authority has determined what information is of substantive relevance to its investigation, Article 6.6 requires the investigating authority to satisfy itself (except when "best information available" is used) that the substantively relevant information is accurate. Thus, Article 6.6 applies once an initial determination has been made that the information is of substantive relevance to the investigation. Article 6.6 provides no guidance in respect of the initial determination of whether information is, or is not, of substantive relevance to the investigation.

8.173 Whereas Mexico purports to raise issues concerning the accuracy of the import data used by the Ministry, we consider that in fact Mexico is simply questioning the substantive relevance of that data. Mexico argues that the Ministry should have used other data, since the data used by the Ministry were not substantively relevant; Mexico does not argue that the data used by the Ministry are factually inaccurate. For example, Mexico does not argue that the Ministry's data concerning the maximum and minimum amounts of imports during the POI are inaccurate; Mexico simply asserts that the Ministry should have used (what Mexico considers to be) more relevant data, *i.e.*, data concerning the import trend in absolute terms or relative to the previous comparable period. Similarly, Mexico does not argue that the import data concerning tariff heading 2523.29.00 was inaccurate; Mexico simply asserts that such data was not substantively relevant, because it included non-dumped imports from Mexico, and imports from countries other than Mexico.

8.174 In focusing on the substantive relevance of injury data used by the Ministry, Mexico has not demonstrated that the Ministry failed to satisfy itself as to the accuracy of that data. We therefore reject Mexico's claim under Article 6.6 of the AD Agreement. Mexico's claims regarding the substantive relevance of the import data relied on by the Ministry are more properly addressed under the relevant substantive provisions of Article 3 of the AD Agreement.

5. Extension of the period of investigation - Articles 6.1, 6.2, Annex II(1)

8.175 Mexico challenges the Ministry's 4 October 1996 decision to extend the POI from 1 June 1995 - 30 November 1995 to include the period 1 December 1995 - 31 May 1996 as well, because it claims that the extension was not justified in either fact or law. Mexico alleges in particular that Cruz Azul did not know the legal grounds for the extension of the POI, and that the Ministry did not respond to requests for information from Cruz Azul concerning the extension. Mexico claims that, as a result, Cruz Azul was not able to defend its interests in respect of the extension of the POI, contrary to Articles 6.1 and 6.2 of the AD Agreement. Mexico also asserts that the extension of the POI imposed an excessive and unreasonable burden on the exporter. Mexico claims that, since the investigating authority should specify in detail the information required from interested parties "as soon as possible after the initiation of the investigation" (Annex II(1)), investigating authorities are effectively precluded from extending the POI during the course of the investigation. Mexico claims that the extension of the POI during the course of an investigation, and after the imposition of provisional measures, is contrary to the logic of the structure of investigations. Changing the POI between the preliminary and final determinations can completely distort the investigation, because the data used to determine dumping, injury or threat of injury, and causal link in each case will not be the same.

8.176 Guatemala asserts that no provision of the AD Agreement imposes any requirements on the investigating authority with respect to the POI. Guatemala asserts that the investigating authority has absolute discretion regarding the selection of the POI, which it claims will vary from case to case. Concerning Mexico's claim that the extension imposed an excessive and unreasonable burden on Cruz Azul, Guatemala notes that Cruz Azul did not request any extension of the time allowed for responding to the supplementary questionnaire. Guatemala also denies that Annex II(1) of the AD Agreement prevents investigating authorities from extending the POI during the course of the investigation. Guatemala argues that this is an unacceptable proposition, since it would prevent investigating authorities from requesting information in addition to that requested at the time of initiation. Guatemala asserts that such a proposition would render the implementation of Articles 7.4 and 9.1 (lesser duty rule) and 10.2 (post-provisional measure information necessary to determine the effects of imports) more difficult, if not impossible. Guatemala also argues that the AD Agreement recognizes the need to use as much up-to-date information as possible, particularly with respect to threat of injury. Furthermore, Guatemala asserts that the Ministry notified Cruz Azul of the information requested and granted Cruz Azul ample opportunity to submit in writing all the evidence it considered appropriate.

8.177 We are not persuaded that paragraph 1 of Annex II, or any other provision of the AD Agreement, prevents an investigating authority from extending the POI during the course of an investigation. We agree with Guatemala that there may be a number of circumstances in which the investigating authority will need updated information during the course of its investigation. In this regard, we would also note that the extension of a POI may in certain cases lead to negative findings of dumping and/or injury, to the benefit of exporters. The fact that the POI may be extended after the imposition of provisional measures is not necessarily problematic, since even without any extension of the POI there is no guarantee that the factual basis for the preliminary determination will be the same as that of the final determination. The factual basis may change, for example, if a preliminary affirmative determination of injury is made on the basis of data provided by the complainant, and if some (or all) of that data are shown to be erroneous during verification of the domestic industry. Indeed, in such cases differences in the factual bases of the preliminary and final determinations would normally be necessary in order to preserve the integrity of the investigation. Although Annex II(1) provides that interested parties should be informed of the information required by the investigating authority "as soon as possible after the initiation of the investigation", this does not mean that information concerning a particular period of time may only be required if the request for that information is made immediately after initiation. We interpret the first sentence of paragraph 1 of

Annex II to mean that any request for specific information should be communicated to interested parties "as soon as possible". Since Mexico has not advanced any argument that it was possible for the Ministry to have requested information concerning the extended POI before it actually did so, we reject Mexico's claim that the Ministry's extension of the POI violated Guatemala's obligations under paragraph 1 of Annex II of the AD Agreement.

8.178 Mexico claims that the Ministry violated Articles 6.1 and 6.2 by extending the POI, because Cruz Azul was not informed of the reasons for the extension, and was not provided with an opportunity to comment on that extension. In addressing Mexico's Article 6.1 claim first, we consider that Mexico's interpretation of that provision is too expansive. The plain language of Article 6.1 merely requires that interested parties be given (1) notice of the information which the authorities require, and (2) ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation. First, we note that Cruz Azul was given two weeks in which to present data concerning the extended POI. Cruz Azul therefore had two weeks' notice of the information required by the Ministry in respect of the extended POI.⁸⁴⁸ Second, Mexico has made no claim to the effect that Cruz Azul was prevented from adducing written "evidence" concerning the extended POI. Whereas Mexico claims that Cruz Azul was denied any opportunity to comment on the extension of the POI *per se*, Article 6.1 does not explicitly require the provision of opportunities for interested parties to comment on decisions taken by the investigating authority in respect of the information it requires. We therefore reject Mexico's claim that the Ministry's extension of the POI violated Guatemala's obligations under Article 6.1 of the AD Agreement.

8.179 Mexico claims that the Ministry violated Article 6.2 because Cruz Azul was not given any opportunity to comment on Cementos Progreso's request for extension of the POI. There is no evidence before us to suggest that Cruz Azul even knew that Cementos Progreso had requested an extension of the POI. We interpret the first sentence of Article 6.2 of the AD Agreement as a fundamental due process provision. In our view, when a request for an extension of the POI comes from one interested party, due process requires that the investigating authority seeks the views of other interested parties before acting on that request. Failure to respect the requirements of due process would conflict with the requirement to provide interested parties with "a full opportunity for the defence of their interests", consistent with Article 6.2.⁸⁴⁹ Clearly, an interested party is not able to defend its interests if it is prevented from commenting on requests made by other interested parties in pursuit of their interests. In the present case, Cementos Progreso's request for extension of the POI was made on 1 October 1996. The Ministry's decision to extend the POI was made on 4 October 1996, only three days after Cementos Progreso's request. There is no evidence to suggest that the Ministry sought the views of Cruz Azul, or other interested parties, before deciding to extend the POI. Accordingly, we find that by extending the POI pursuant to a request from Cementos Progreso without seeking the views of other interested parties in respect of that request, the Ministry failed to provide Cruz Azul with "a full opportunity for the defence of [its] interests", contrary to Guatemala's obligations under Article 6.2 of the AD Agreement.

⁸⁴⁸ We note that Mexico has not alleged that a failure to provide Cruz Azul with at least 30 days to respond to the Ministry's supplementary questionnaire (which required the provision of data for an additional six-month POI) constitutes a violation of Article 6.1.1 of the AD Agreement. That being the case, we shall refrain from making any findings on this matter.

⁸⁴⁹ We do not consider that the obligation in the first sentence of Article 6.2 is qualified by the second sentence of that provision. Thus, we do not consider that the obligation in the first sentence of Article 6.2 is concerned exclusively with "providing opportunities for all interested parties to meet those parties with adverse interests...". Although the words "[t]o this end" at the beginning of the second sentence suggest that such meetings are one way in which the obligation of the first sentence can be fulfilled, it does not follow that such meetings provide the only means by which the obligation of the first sentence may be fulfilled. If that were the case, there would be no need for the first sentence of Article 6.2.

6. Request for cost data - Articles 2.1 and 2.2

8.180 Mexico claims that the Ministry's request for cost data violated Articles 2.1 and 2.2 of the AD Agreement. Mexico asserts that the request for cost data was not justified because Cementos Progreso's application did not contain any allegation that Cruz Azul was selling below cost, because the Ministry had no information from Cruz Azul to suggest that it was selling below cost, and because the Ministry had imposed a provisional measure on the basis of price data (*i.e.*, on the assumption that there were no sales below cost). Mexico asserts that the Ministry was not justified in requesting cost data in order to make adjustments for differences in physical characteristics initially requested by Cruz Azul, because the Ministry had already rejected those adjustments in its preliminary affirmative determination of dumping.

8.181 Guatemala asserts that Articles 2.1 and 2.2 do not prevent an investigating authority from gathering cost information. Furthermore, Guatemala asserts that cost data was necessary in order to make an allowance for differences in physical characteristics between the cement sold in Mexico and the cement sold in Guatemala, as requested by Cruz Azul.

8.182 Articles 2.1 and 2.2 provide:

"2.1 For the purpose of this Agreement, a product is to be considered as being dumped, *i.e.* introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country⁸⁵⁰, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits."

8.183 We are not persuaded that the Ministry violated Articles 2.1 and 2.2 of the AD Agreement by requesting cost data from Cruz Azul.⁸⁵¹ Nothing in those provisions prevents an investigating authority from requesting cost information, even if the applicant does not allege sales below cost. We

⁸⁵⁰Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

⁸⁵¹ According to Guatemala, the Ministry made two requests for cost data from Cruz Azul: one in its original questionnaire to exporters, and another in its supplementary questionnaire. Although we agree that cost data was requested in the supplementary questionnaire, there is no evidence that cost data was expressly requested in the original questionnaire. Section C of the original questionnaire makes it clear that an exporter need only complete the section on cost of production if the domestic producers' application alleges sales below cost. Section C also states that exporters will be informed - in a notification accompanying the questionnaire - whether the section on cost of production must be completed. In response to a question, Guatemala informed the Panel that the notification accompanying the original questionnaire to Cruz Azul is missing from its file. Thus, there is no evidence that the Ministry actually requested cost of production data from Cruz Azul. In these circumstances, we consider that Cruz Azul would have been entitled to assume that it did not need to provide cost data in response to the Ministry's original questionnaire.

therefore reject Mexico's claim that the Ministry violated Articles 2.1 and 2.2 of the AD Agreement by requesting cost data from Cruz Azul.

7. Verification visit

8.184 Mexico claims that the Ministry's verification visit to Cruz Azul was inconsistent with Article 6.7 and Annex I (2), (3), (7) and (8) of the AD Agreement because the Ministry intended to conduct the verification visit with the participation of non-governmental experts with an obvious conflict of interest, because the Ministry sought to proceed with the verification without the express agreement of Cruz Azul to the terms of the verification, because the Ministry failed to notify the Government of Mexico of the participation of non-governmental experts, and because the Ministry sought to verify information that had not been submitted by Cruz Azul.

8.185 Guatemala asserts that Mexico's claims are without foundation. First, Guatemala argues that Article 6.7 is silent on the permissible scope of a verification, and Annex I(7 and 8) does not support Mexico's position. Guatemala asserts that Cruz Azul's failure to provide the cost data requested by the Ministry would have justified the Ministry in immediately applying the "best information available" rule. Instead, Guatemala states that the Ministry acted in good faith, and provided Cruz Azul with one last chance to supply the cost data during the verification. Guatemala notes that Annex I(7) refers to "any further information which needs to be provided", interpreting this to mean that an investigating authority may seek "further information" during the course of an investigation.

8.186 Second, Guatemala asserts that the Ministry notified the Government of Mexico of its intention to include non-governmental experts in its verification team in a letter dated 26 November 1996 (addressed to Cruz Azul, but copied to the Government of Mexico). According to Guatemala, Mexico acknowledged having received a copy of its letter. Guatemala asserts that it was not required to explain the exceptional circumstances which necessitated the inclusion of non-governmental experts, and that in any event Mexico knew that non-governmental experts were required because this was the Ministry's first investigation.

8.187 Third, Guatemala denies that the non-governmental experts had any conflict of interest, because Cruz Azul was not an interested party in any of the US proceedings in which the non-governmental experts at issue had participated. Guatemala also asserts that the conflict-of-interest issue is in any event irrelevant, since Cruz Azul refused to allow any verification of cost data, whether or not the verification team included non-governmental experts.

(a) Inclusion of non-governmental experts with an alleged conflict of interest in the verification team

8.188 Mexico claims that the inclusion of non-governmental experts with an alleged conflict of interest in the Ministry's verification team constitutes a violation of Article 6.7 and Annex I (2), (3), (7) and (8) of the AD Agreement. In a communication dated 31 October 1996, the Ministry informed Cruz Azul of its intention to conduct a verification visit at Cruz Azul from 18 - 22 November 1996. The Ministry's communication informed Cruz Azul of the identities of three non-governmental experts to be included in the verification team, and of the Ministry's intention to verify certain cost and sales data. Cruz Azul initially responded to this communication on 7 November 1996, in which response Cruz Azul requested rescheduling of the verification visit to 2 - 6 December 1996. Subsequently, in a letter dated 25 November 1996, Cruz Azul objected to the participation of two of the three proposed non-governmental experts, whom Cruz Azul considered to have a conflict of interest as a result of their work as representatives of the US domestic cement industry in the context of a US anti-dumping investigation concerning imports of cement from Mexico.

8.189 We find at para. 8.250 below that it was entirely reasonable for Cruz Azul to object to the inclusion in the Ministry's verification team of two non-governmental experts who had a conflict of

interest. Although we are of the view that an impartial and objective investigating authority would not include non-governmental experts with a conflict of interest in its verification team, none of the provisions cited by Mexico explicitly prohibit such conduct. Accordingly, we are unable to find that the Ministry violated Article 6.7 and Annex I (2), (3), (7) and (8) of the AD Agreement by including non-governmental experts with a conflict of interest in its verification team.

(b) Alleged failure to notify Mexico of the inclusion of non-governmental experts

8.190 Mexico claims that the Ministry violated paragraph 2 of Annex I of the AD Agreement by failing to notify the Government of Mexico of the inclusion of non-governmental experts in the Ministry's verification team, and of the exceptional circumstances justifying their inclusion.

8.191 Guatemala asserts that the Ministry notified the Government of Mexico of its intention to include non-governmental experts in its verification team in a letter dated 26 November 1996. According to Guatemala, Mexico acknowledged having received a copy of its letter. Guatemala asserts that it was not required to explain the exceptional circumstances which necessitated the inclusion of non-governmental experts, and that in any event Mexico knew that non-governmental experts were required because this was the Ministry's first investigation.

8.192 Paragraph 2 of Annex I of the AD Agreement provides:

"If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements."

8.193 According to this provision, therefore, the Ministry was obligated to inform the Mexican authorities of its intention to include non-governmental experts in the verification team for the Ministry's visit to Cruz Azul. The question before us is whether the Ministry did so.

8.194 The Ministry sent a letter to Cruz Azul on 26 November 1996.⁸⁵² The letter informed Cruz Azul of the Ministry's intention to include non-governmental experts in its verification team. The letter even identified those experts by name. The letter ends with the phrase "c.c. Secretaría de Comercio y Fomento Industrial de México" (hereinafter "SECOFI"). In principle, therefore, a copy of the 26 November 1996 letter to Cruz Azul was to have been communicated to SECOFI, and therefore to the Mexican Government. However, Guatemala has not provided any proof that this letter was actually sent, or faxed, to SECOFI. Guatemala asserts that receipt of this letter is demonstrated by the first sentence of a letter from a SECOFI official to the Ministry dated 2 December 1996, in which SECOFI refers to the Ministry's notification of a verification visit at Cruz Azul from 3 - December 1996. In response, Mexico asserts that the notification referred to in the 2 December 1996 letter was a separate notification of 26 November 1996 addressed to Mexico's Ambassador to Guatemala (see Annex Mexico-27). We consider that Mexico's assertion is borne out by the reference in Mexico's 2 December 1996 letter to a "notification to the government of Mexico, through its Ambassador in Guatemala". Furthermore, we note that the second paragraph of Mexico's 2 December 1996 letter states that Cruz Azul provided SECOFI with a copy of the letter it received from the Ministry concerning details of the verification and the names of the persons who would perform the verification. Thus, far from confirming that SECOFI was notified by Guatemala's authorities on 26 November 1996 of the participation of non-governmental experts in the Ministry's verification team, Mexico's letter of 2 December 1996 suggests that (1) it only learnt about the participation of non-governmental experts through a copy of the Ministry's 26 November 1996 letter to Cruz Azul, sent to SECOFI by Cruz Azul, and (2) the only letter dated 26 November 1996 that Mexico received from the

⁸⁵² See Annex Guatemala-57.

Ministry was that sent to Mexico's Ambassador to Guatemala, which did not refer to the participation of non-governmental experts in the Ministry's verification team.

8.195 We recall once again that the panel in *United States - Sections 301 - 310 of the Trade Act of 1974* found that:

"Since, in this case, both parties have submitted extensive facts and arguments in respect of the EC claims, our task will essentially be to balance all evidence on record and decide whether the EC, as party bearing the original burden of proof, has convinced us of the validity of its claims. In case of uncertainty, i.e. in case all the evidence and arguments remain in equipoise, we have to give the benefit of the doubt to the US as defending party."

8.196 In principle, Mexico bears the burden to prove that the Ministry failed to inform it of the inclusion of non-governmental experts in the Ministry's verification team. As a practical matter, this burden is impossible for Mexico to meet: one simply cannot prove that one was not informed of something. Although Mexico cannot establish definitively that it was not informed by the Ministry of the Ministry's intention to include non-governmental experts in its verification team, there is sufficient evidence before us to suggest strongly that it was not so informed. Although an investigating authority should normally be able to demonstrate that it complied with a formal requirement to inform the authorities of another Member, Guatemala has failed to rebut the strong suggestion that it failed to do so. In fact, Guatemala has simply referred to the very letter which suggests strongly that Mexico was not notified by Guatemala.⁸⁵³ In these circumstances, we do not consider that the evidence and arguments of the parties "remain in equipoise". Accordingly, we find that the Ministry violated paragraph 2 of Annex I of the AD Agreement by failing to inform the Government of Mexico of the inclusion of non-governmental experts in the Ministry's verification team.⁸⁵⁴

8.197 Mexico also claims that the Ministry violated Annex I(2) by failing to inform Mexico of the exceptional circumstances which justified the inclusion of non-governmental experts in the Ministry's verification team. Guatemala asserts that Annex I(2) did not require the Ministry to inform Mexico of the exceptional circumstances at issue.

8.198 We agree with Guatemala. Whereas paragraph 2 of Annex I requires the exporting Member to be "so informed", the logical conclusion from the structure of that provision is that the exporting Member need only be informed of the intention to include non-governmental experts in the investigating team. If the intention of the drafters had been to impose an obligation on authorities to inform exporting Members of the "exceptional circumstances" at issue, presumably the first sentence of Annex I(2) would have been drafted in a manner that clearly provided for that obligation. We

⁸⁵³ The fact that the Mexican authorities knew of the inclusion of non-governmental experts in the Ministry's verification team (by virtue of Cruz Azul sending SECOFI a copy of the 26 November 1996 letter Cruz Azul had received from the Ministry) is not relevant to Mexico's claim. This is because Annex I(2) requires that the authorities of the exporting Member be "informed" of the inclusion of non-governmental experts. In our view, the obligation to "inform" is clearly on the authorities of the investigating Member. Those authorities cannot rely on exporters informing their own authorities of the inclusion of non-governmental experts in order to establish compliance with Annex I(2).

⁸⁵⁴ Paragraph 2 of Annex I provides that exporting Members "should" be informed of the inclusion of non-governmental experts in a verification team. It does not provide that exporting Members "shall" be so informed. Although the word "should" is often used colloquially to imply an exhortation, it can also be used "to express a duty [or] obligation" (See *The Concise Oxford English Dictionary*, Clarendon Press, 1995, page 1283). Since Article 6.7 provides in relevant part that the provisions of Annex I "shall" apply, we see no reason why Annex I (2) should not be interpreted in the mandatory sense. In our view, a hortatory interpretation of the provisions of Annex I would be inconsistent with Article 6.7. Furthermore, Guatemala has not argued that paragraph 2 of Annex I is merely hortatory. Accordingly, we proceed on the basis that paragraph 2 of Annex I should be interpreted in a mandatory sense.

therefore reject Mexico's claim that Guatemala violated Annex I(2) by the Ministry's failure to inform Mexico of the exceptional circumstances justifying the need to include non-governmental experts in the Ministry's verification team.

(c) Scope of the verification

8.199 Mexico claims that the Ministry violated Article 6.7 and Annex I(7) of the AD Agreement by seeking to verify certain information (concerning the extended period of investigation) not submitted by Cruz Azul in its questionnaire responses. Mexico asserts that the Ministry should have limited itself to verifying the information submitted by Cruz Azul, and obtaining further details concerning this information. According to Mexico, under no circumstances was the Ministry entitled to require or review additional information. Mexico notes that paragraph 7 of Annex I of the AD Agreement provides in relevant part that "the main purpose of the on-the-spot investigation is to verify information provided or to seek further details". According to Mexico, the "further details" referred to in that provision are details concerning information already "provided" in the questionnaire response.

8.200 Guatemala rejects the argument that a verification must be limited to information already submitted by an exporter in its questionnaire response. Guatemala notes that Annex I(7) refers to "any further information which needs to be provided", interpreting this to mean that an investigating authority may seek "further information" during the course of an investigation.

8.201 In addressing Mexico's claim under Article 6.7 and Annex I(7), we note that Article 6.7 provides that "[t]he procedures described in Annex I shall apply to investigations carried out in the territory of other Members". When examining verification visits scheduled by investigating authorities in the territory of other Members, therefore, it is important to read Article 6.7 and Annex I as a whole.

8.202 We note that Mexico has referred to specific parts of paragraph 7 of Annex I of the AD Agreement. In our view, however, it is important to examine the full text of that provision, which provides:

"As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained." (emphasis supplied)

8.203 Although Annex I(7) provides that the "main purpose" of the verification visit is to verify information already provided, or to obtain further details in respect of that information, it also provides that an investigating authority may "prior to the visit ... advise the firms concerned ... of any further information which needs to be provided". Since there would be little point in advising a firm of "further information ... to be provided" in advance of the verification visit if the investigating authority were precluded from examining that "further information" during the visit, we consider that the phrase "further information ... to be provided" refers to information to be provided during the course of the verification. Mexico's view that an investigating authority may only verify information submitted prior to the verification visit is not consistent with this interpretation of Annex I(7).

8.204 In response to a question from the Panel, Mexico argues that the phrase "any further information ... to be provided" refers to accounting information to be provided by the verified company during verification in order to substantiate the information previously supplied to the

investigating authority. We note, however, that the phrase does not read "any further accounting information ... to be provided". The term "information" is not qualified in any way by the express wording of Annex I(7), and there are no elements in the context which plead for such qualification.

8.205 Furthermore, we note that the last phrase of Annex I(7) refers to on-the-spot requests for further details to be provided in light of "information obtained". Thus, although it should be "standard practice" to advise firms of additional information to be provided in advance of the verification visit, this does not preclude an investigating authority from requesting "further details" during the course of the investigation, "in light of the information obtained". In our view, the reference to "information obtained" cannot mean the information obtained from the exporter in advance of the verification visit, since (consistent with "standard practice") requests regarding that information should be made prior to the visit, and not during the course of the investigation. Accordingly, the "information obtained" must refer to information obtained during the course of the verification visit, since it is only information obtained during the course of a verification visit which may prompt a request for further details during the course of the verification visit. The last phrase of Annex I(7) therefore confirms our understanding that an investigating authority may seek new information during the course of the verification visit.

8.206 We therefore reject Mexico's claim that the Ministry violated Article 6.7 and paragraph 7 of Annex I of the AD Agreement by seeking to verify information not previously submitted in Cruz Azul's questionnaire responses.

8. Confidential treatment - Articles 6.1, 6.2, 6.3, 6.5, 6.5.1 and 6.5.2

8.207 Mexico claims that the Ministry violated Articles 6.1, 6.2, 6.3, 6.5, 6.5.1 and 6.5.2 of the AD Agreement in according confidential treatment to certain information submitted by Cementos Progreso. Mexico's claims concern (1) information submitted during the verification visit at Cementos Progreso, and (2) information submitted by Cementos Progreso at the 19 December 1996 public hearing.⁸⁵⁵

8.208 Guatemala asserts that, in its handling of the information supplied by Cementos Progreso, the Ministry complied with Articles 6.5.1 and 6.5.2 of the AD Agreement. Guatemala asserts that the documents submitted by Cementos Progreso were clearly of a confidential nature and could not be summarized in accordance with Article 6.5.1. Guatemala understands that it is common practice for investigating authorities in other countries not to require public versions of confidential documents obtained during verification visits.

(a) Information submitted during verification

8.209 First, Mexico claims that the Ministry violated Article 6.5.2 by accepting to provide confidential treatment for certain information submitted during the verification visit at Cementos Progreso, despite Cementos Progreso failing to justify its request for confidential treatment. However, Article 6.5.2 does not require any justification to be provided by the interested party requesting confidential treatment. If any such obligation exists, it derives from Article 6.5, not 6.5.2. Mexico has not based this claim on Article 6.5. Article 6.5.2 speaks only to events when "the authorities find that a request for confidentiality is not warranted". Since there is nothing to suggest

⁸⁵⁵ In its second oral statement to the Panel (paras 32 -35), Mexico claimed that the Ministry violated Article 6.5 of the AD Agreement by handing Mr. Cannistra confidential information submitted by Cruz Azul, without Cruz Azul's permission. This claim was not included in Mexico's request for establishment of this Panel (WT/DS156/2 and WT/DS156/2/Corr.1). The only Article 6.5 claims included in Mexico's request for establishment (at section D.8) concern the Ministry's treatment of "information from Cementos Progreso". There is no reference to information submitted by Cruz Azul. Mexico's claim concerning the confidentiality of information submitted to the Ministry by Cruz Azul therefore falls outside our terms of reference.

that the Ministry found that Cementos Progreso's request for confidentiality of the relevant information was not warranted, Article 6.5.2 would appear not to apply in the factual circumstances of this case. We therefore reject Mexico's Article 6.5.2 claim.

8.210 Second, Mexico makes a series of claims under Articles 6.1, 6.2, 6.4, 6.5, 6.5.1 and 6.5.2 of the AD Agreement. Mexico's claims are all based on the fact that either (1) the Ministry failed to require Cementos Progreso to provide non-confidential summaries of information that was "susceptible of summary" (within the meaning of Article 6.5.1), or (2) the Ministry failed to require Cementos Progreso to provide reasons why the information - if it was not "susceptible of summary" - could not be made public.

8.211 Mexico's claims concern the following information submitted by Cementos Progreso during the Ministry's verification visit to that company: technical information on the firm's principal equipment; a contract between Cementos Progreso and F.L. Smith & Co.; and tables used to prepare questionnaires and reconcile the cost structure calculated for production of grey portland cement with the accounting statements. Although Mexico's claim is based in part on an implicit argument that the abovementioned information was "susceptible of summary", Mexico has adduced no evidence to that effect. Mexico has failed to demonstrate how information of the sort enumerated above could be summarized "in sufficient detail to permit a reasonable understanding of the substance" thereof. In our view, information of that sort is not generally capable of summarization "in sufficient detail to permit a reasonable understanding of the substance". In our view, and in the absence of any evidence or argument from Mexico to the contrary, we are not persuaded that an impartial and objective investigating authority could not properly have concluded that the abovementioned information was not "susceptible of summary". For this reason, we reject all of Mexico's claims that are based on Mexico's understanding that the Ministry failed to require Cementos Progreso to provide non-confidential summaries of information that was "susceptible of summary".

8.212 As for Mexico's claims that the Ministry failed to require Cementos Progreso to provide reasons why the information - which was not "susceptible of summary" - could not be made public, we note that Article 6.5.1 provides:

"The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided."

8.213 Thus, Article 6.5.1 generally obliges investigating authorities to require interested parties providing confidential information to furnish non-confidential summaries thereof. However, such non-confidential summaries need not be furnished when, "in exceptional circumstances", the information "is not susceptible of summary". In such cases, "a statement of the reasons why summarization is not possible must be provided". Although Article 6.5.1 does not explicitly provide that "the authorities shall require" interested parties to provide a statement of the reasons why summarization is not possible, any meaningful interpretation of Article 6.5.1 must impose such an obligation on the investigating authorities. It is certainly not possible to conclude that the obligation concerning the need to provide a statement of reasons is an obligation imposed exclusively on the interested party submitting the information, and not the investigating authority, since the AD Agreement is not addressed at interested parties. The AD Agreement imposes obligations on WTO Members and their investigating authorities. Accordingly, in our view Article 6.5.1 imposes an obligation on investigating authorities to require parties that indicate that information is not susceptible of summary to provide a statement of the reasons why summarization is not possible. Guatemala has failed to adduce any evidence that the requisite statement of reasons was provided by

Cementos Progreso, or that the Ministry even required Cementos Progreso to provide such a statement of reasons. We therefore find that the Ministry violated Article 6.5.1 of the AD Agreement by failing to require Cementos Progreso to provide a statement of the reasons why summarization of the relevant information was not possible. In making this finding, we attach no importance whatsoever to Guatemala's assertions concerning the alleged treatment of similar information by other WTO Members. Whether or not other WTO Members act in conformity with Article 6.5.1 is of no relevance to the present dispute, which concerns the issue of whether or not the Ministry acted in conformity with that provision.

8.214 Mexico has also made additional claims concerning the need for a statement of the reasons why the information is not susceptible of summary on the basis of Articles 6.1, 6.2, 6.4, 6.5 and 6.5.2 of the AD Agreement. In our view, the need for a statement of the reasons why the information is not susceptible of summary is specifically addressed by Article 6.5.1. It is not specifically addressed by the other provisions cited by Mexico. Accordingly, having made a finding on the basis of Article 6.5.1, we do not consider it necessary to make additional findings on the basis of Articles 6.1, 6.2, 6.4, 6.5 and 6.5.2 of the AD Agreement.

8.215 Finally, and in the alternative, Mexico refers to the possibility that the Ministry accepted a "verbal justification" from Cementos Progreso concerning the need for confidential treatment of the information at issue. Mexico claims that such acceptance constitutes a violation of Articles 6.1, 6.2, 6.3 and 6.4. However, since there is no evidence before us to suggest that any such "verbal justification" was provided, there is no factual basis for any examination of this claim by the Panel.

(b) Information submitted by Cementos Progreso at 19 December 1996 public hearing

8.216 First, Mexico claims that the Ministry violated Articles 6.1, 6.2 and 6.4 of the AD Agreement by failing to allow Cruz Azul "proper access" to the information submitted by Cementos Progreso at the 19 December 1996 public hearing. We recall that we have already addressed this issue in previous sections of our report (see section 2(b)), where we found a violation of Articles 6.1.2 and 6.4 of the AD Agreement. Since we consider these to be the specific provisions of the AD Agreement governing an interested party's right to information submitted by another interested party, we do not consider it necessary to address Mexico's claims under Articles 6.1 and 6.2. These provisions do not specifically address an interested party's right of access to information submitted by another interested party.

8.217 Second, Mexico claims that the Ministry violated Articles 6.5, 6.5.1 and 6.5.2 of the AD Agreement by granting Cementos Progreso's 19 December 1996 submission confidential treatment on its own initiative. We understand Mexico to claim that the Ministry violated Articles 6.5, 6.5.1 and 6.5.2 by providing confidential treatment without "good cause" having been shown by Cementos Progreso.

8.218 Article 6.5 provides:

"Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it." (footnote deleted)

8.219 The text of Article 6.5 distinguishes between two types of confidential information: (1) "information which is by nature confidential", and (2) information "which is provided on a

confidential basis". Article 6.5 then provides that the provision of confidential treatment is conditional on "good cause" being shown. Logically, one might expect that "good cause" for confidential treatment of information which is "by nature confidential" could be presumed, and that "good cause" need only be shown for information which is not "by nature confidential" (but for which confidential treatment is nonetheless sought). It is presumably for this reason that, in rejecting Mexico's claim, Guatemala argues that the relevant information was "clearly of a confidential nature". While we have some sympathy for Guatemala's argument, given the logical appeal of such an interpretation of Article 6.5, we note that Article 6.5 is not drafted in a way which suggests this approach. Instead, the requirement to show "good cause" appears to apply for both types of confidential information, such that even information "which is by nature confidential" cannot be afforded confidential treatment unless "good cause" has been shown.⁸⁵⁶

8.220 In our view, the requisite "good cause" must be shown by the interested party submitting the confidential information at issue. We do not consider that Article 6.5 envisages "good cause" being shown by the investigating authority itself, since - with respect to information that is not "by nature confidential" in particular - the investigating authority may not even know whether or why there is cause to provide confidential treatment.

8.221 As noted in para. 8.143 above, Guatemala has not demonstrated, or even argued, that Cementos Progreso requested confidential treatment for its 19 December 1996 submission, let alone that Cementos Progreso showed "good cause" for confidential treatment of that submission. Accordingly, we find that the Ministry violated Article 6.5 of the AD Agreement by granting Cementos Progreso's 19 December submission confidential treatment on its own initiative. We note that Mexico has also alleged a violation of Articles 6.5.1 and 6.5.2 of the AD Agreement. Since Article 6.5 specifically addresses the issue of whether or not an investigating authority may grant confidential treatment on its own initiative, and since Articles 6.5.1 and 6.5.2 do not, we do not consider it necessary to address Mexico's claims under the latter provisions of the AD Agreement.

8.222 Third, and in the alternative, Mexico claims that the Ministry violated Articles 6.1, 6.2, 6.3 and 6.4 of the AD Agreement by accepting a "verbal justification" that the information contained in the submission made by Cementos Progreso at the 19 December 1996 public hearing should be considered confidential. As noted above,⁸⁵⁷ there is no evidence that any such "verbal justification" was provided in the present case. It is therefore not necessary for us to address this claim.

8.223 At paras 414 - 416 of its first written submission, Mexico also alleges violation of Articles 6.1, 6.2, 6.3, 6.4, 6.5.1 and 6.5.2 on the basis of "the facts mentioned in section V.A.1(e) and (f), V.A.2, V.B, V.C.3, V.D.1, 2, 4, 9 and 10, E.2 and 4". Since Mexico has made absolutely no effort to link those facts with the aforementioned provisions of the AD Agreement, we are in no position to examine these claims.

9. Essential facts

8.224 Mexico claims that the Ministry did not inform Cruz Azul promptly of the "essential facts under consideration" that would be taken into account for the definitive anti-dumping measure, contrary to Articles 6.1, 6.2 and 6.9.

8.225 Guatemala asserts that the "essential facts under consideration" were disclosed to Cruz Azul. Guatemala asserts that, in a notice dated 6 December 1996, interested parties were informed that the Directorate of Economic Integration would make a technical study on the basis of the evidence in the file, and that copies of the file were available. Guatemala therefore argues that the "essential facts"

⁸⁵⁶ Although we will now consider who must show "good cause", we make no findings as to how "good cause" may be shown in respect of information which is "by nature" confidential.

⁸⁵⁷ See para. 8.215.

were in the file, to which interested parties had access. In addition, Guatemala claims that the "essential facts" were already disclosed in a detailed report setting out the factual basis for the Ministry's preliminary determination, and that the parties could comment on these "essential facts" at the 19 December 1996 public hearing. Guatemala argues that the Ministry was permitted to proceed expeditiously under Article 6.14, rather than delaying the final determination in order to issue "another description of the essential facts".

8.226 Article 6.9 provides:

"The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests."

8.227 We shall first examine Guatemala's argument that the "essential facts" were disclosed to interested parties in a detailed report setting out the Ministry's preliminary findings. In doing so, we note that Guatemala has sought to draw parallels between this alleged disclosure mechanism and that employed by the United States.⁸⁵⁸ We take no view on whether or not the procedure used by the Ministry is similar in any way to that employed by the United States, or whether the US procedure is in conformity with Article 6.9, since the conformity of the United States' procedure with Article 6.9 of the AD Agreement is not at issue in the present dispute.

8.228 In our view, the alleged disclosure by the Ministry of the "essential facts" forming the basis of the Ministry's preliminary determination does not meet the requirements of Article 6.9. Article 6.9 provides explicitly for disclosure of the "essential facts ... which form the basis for the decision whether to apply definitive measures" (emphasis supplied). Disclosure of the "essential facts" forming the basis of a preliminary determination is clearly inadequate in circumstances where the factual basis of the provisional measure is significantly different from the factual basis of the definitive measure. In the present case, the preliminary measure was based on a preliminary determination of threat of material injury, whereas the final determination was based on actual material injury. Furthermore, the Ministry's preliminary determination (16 August 1996) was based on a POI different from that used for its final determination, since the POI was extended on 4 October 1996. Indeed, Guatemala has cited⁸⁵⁹ the United States' assertion that "[i]n the course of an anti-dumping investigation, the bulk of the evidence which forms the basis of the final determination is generally gathered after the preliminary determination".⁸⁶⁰ If the bulk of the evidence which forms the basis of the final determination is generally gathered after the preliminary determination, we fail to see how disclosure of the "essential facts" forming the basis of the preliminary determination could amount to disclosure of the "essential facts" forming the basis of the final determination, since the "bulk" of the "essential facts" underlying the final determination would not yet have been gathered. In these circumstances, we do not consider that the Ministry could satisfy the Article 6.9 obligation to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures" by providing disclosure of the essential facts forming the basis of its preliminary determination.

8.229 We now turn to Guatemala's argument that the Ministry disclosed the "essential facts" by making copies of the file available to interested parties. We note that an investigating authority's file is likely to contain vast amounts of information, some of which may not be relied on by the investigating authority in making its decision whether to apply definitive measures. For example, the file may contain information submitted by an interested party that was subsequently shown to be inaccurate upon verification. Although that information will remain in the file, it would not form the

⁸⁵⁸ Guatemala's first oral statement, para. 62.

⁸⁵⁹ Guatemala's second oral statement, para. 61.

⁸⁶⁰ United States' third party submission, para. 43.

basis of the investigating authority's decision whether to apply definitive measures. The difficulty for an interested party with access to the file, however, is that it will not know whether particular information in the file forms the basis of the authority's final determination. One purpose of Article 6.9 is to resolve this difficulty for interested parties. This has been acknowledged by Guatemala, which has itself asserted that "[t]he object and purpose of Article 6.9 is to allow exporters a fair opportunity to comment on the important issues in an investigation after the record is closed to new facts".⁸⁶¹ An interested party will not know whether a particular fact is "important" or not unless the investigating authority has explicitly identified it as one of the "essential facts" which form the basis of the authority's decision whether to impose definitive measures.

8.230 Furthermore, if the disclosure of "essential facts" under Article 6.9 could be undertaken simply by providing access to all information in the file, there would be little, if any, practical difference between Article 6.9 and Article 6.4. Guatemala is effectively arguing that it complied with Article 6.9 by complying with Article 6.4, *i.e.*, by providing "timely opportunities for interested parties to see all information that is relevant to the presentation of their cases ... and that is used by the authorities ...". We do not accept an interpretation of Article 6.9 that would effectively reduce its substantive requirements to those of Article 6.4. In our view, an investigating authority must do more than simply provide "timely opportunities for interested parties to see all information that is relevant to the presentation of their cases ... and that is used by the authorities ..." in order to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures". In light of these considerations, we do not consider that the Ministry could comply with the requirement to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures" simply by offering to provide interested parties with copies of all information in the file.

8.231 For the above reasons, we find that the Ministry violated Article 6.9 of the AD Agreement by failing to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures".

8.232 Mexico claims that the Ministry's failure to disclose the "essential facts" forming the basis of its final determination also constitutes a violation of Articles 6.1 and 6.2 of the AD Agreement. Article 6.9 is the provision of the AD Agreement which specifically addresses the disclosure of "essential facts". Since we have already found that the Ministry violated the specific obligation provided for in Article 6.9, we do not need to consider whether the Ministry's failure to disclose "essential facts" also constituted a violation of Articles 6.1 and 6.2.

10. Failure to inform cruz azul of changed injury determination

8.233 Mexico claims that the Ministry violated Articles 6.1, 6.2 and 6.9 of the AD Agreement by changing its injury determination from a preliminary determination of threat of material injury to a final determination of actual material injury during the course of the investigation, without informing Cruz Azul of that change, and without giving Cruz Azul a full and ample opportunity to defend itself. Mexico argues that during the course of the investigation and up until the public hearing which the Ministry held with the parties, *i.e.* 11 months after the initiation of the investigation, Cruz Azul did not know that the Ministry had changed the examination and determination of threat of material injury. Mexico asserts that Cruz Azul was therefore denied an opportunity to exercise the right of defence given under Article 6.1, 6.2 and 6.9, including the opportunity to provide relevant information and evidence that might have counteracted the determination of injury by the authority.

8.234 According to Guatemala, Mexico is essentially suggesting that an investigating authority must inform the exporter of its intention to base its final determination on threat of injury or material injury in order that the exporter may have an adequate opportunity to defend its interests. Guatemala asserts

⁸⁶¹ Guatemala's second oral statement, para. 63.

that there is no support for this argument in the AD Agreement. Article 6.1, 6.2 and 6.9 contain nothing to suggest that an investigating authority must inform an exporter of the legal basis for the final determination prior to notice of that determination being given. According to Guatemala, Article 5 of the AD Agreement itself provides the legal basis for a final determination, in that the final determination may be based either on threat of material injury or actual material injury. Thus, Guatemala asserts that an exporter defending an anti-dumping case knows, through Article 5, that to escape unscathed he must show no threat of injury and no material injury. Guatemala submits that Cruz Azul can only blame itself for having failed to mount a defence for material injury, and that it is significant that Mexico does not identify any particular evidence that Cruz Azul would have supplied if it had known that the Ministry was going to find material injury and not threat of injury. Guatemala argues that Cruz Azul never provided any evidence that it had not been engaged in dumping or that Cementos Progreso had not been adversely affected by the dumped imports, and that Mexico has not informed the Panel that Cruz Azul was not engaged in dumping or that Cementos Progreso was not materially injured. All Mexico's arguments before the panel, like Cruz Azul's complaints to the investigating authority, relate to procedural, not substantive issues. According to Guatemala, however, facts are facts: in August 1996, when the preliminary determination was issued it was clear that Cementos Progreso was being threatened with material injury. By January 1997, when the final determination was issued, the files showed that Cementos Progreso had already been injured.

8.235 Mexico does not question the right of an investigating authority to initiate an investigation and make a preliminary affirmative determination on the basis of threat of material injury, and subsequently issue a final determination on the basis of actual material injury. Rather, we understand Mexico to claim that an investigating authority exercising that right should inform exporters accordingly, and provide them with an opportunity to comment. In other words, an investigating authority should inform interested parties when it changes its injury determination from a preliminary, legal determination of threat of material injury to a final, legal determination of actual material injury.

8.236 In addressing this claim, we reject Guatemala's argument that, in order to "escape unscathed", the onus is on the exporter to demonstrate that it has not caused injury through dumping. The onus is not on the exporter to demonstrate a negative. Rather, the onus is on the investigating authority to demonstrate affirmatively that the exporter has engaged in dumping which has caused injury to the relevant domestic industry. Only if the affirmative case of dumping, injury and causal link is proven may anti-dumping measures be imposed. We also attach no importance to Guatemala's assertion that Mexico has failed to deny before the Panel that Cruz Azul had not dumped, and had not caused injury to Cementos Progreso as a result of such dumping. The issue before us is not whether Cruz Azul engaged in dumping which caused injury to Cementos Progreso. That assertion would involve us in a *de novo* examination of the evidence before the Ministry, which we are not prepared to undertake. Rather, the issue is whether the Ministry, in finding that Cruz Azul had engaged in dumping which caused injury to Cementos Progreso, complied with its various obligations under the AD Agreement.

8.237 We do not consider that an investigating authority need inform interested parties in advance when, having issued a preliminary affirmative determination on the basis of threat of material injury, it subsequently makes a final determination of actual material injury. No provision of the AD Agreement requires an investigating authority to inform interested parties, during the course of the investigation, that it has changed the legal basis for its injury determination. Investigating authorities are instead required to forward to interested parties a public notice, or a separate report, setting forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities", consistent with Article 12.2 of the AD Agreement. If decisions on issues of law had to be disclosed to interested parties during the course of the investigation, there would be little need for interested parties to receive the notice provided for in Article 12.2. Furthermore, to the extent that there is any difference between the preliminary determination of injury and the final determination of injury, that change will be apparent to interested

parties comparing the public notice of the investigating authority's preliminary determination with the public notice of its final determination.

8.238 Mexico's claim is based on Articles 6.1, 6.2 and 6.9 of the AD Agreement. We note that Articles 6.1 and 6.9 impose certain obligations on investigating authorities in respect of "information", "evidence" and "essential facts". However, Mexico's claim does not concern interested parties' right to have access to certain factual information during the course of an investigation. Mexico's claim concerns interested parties' alleged right to be informed of an investigating authority's legal determinations during the course of an investigation. As for Article 6.2, we note that the first sentence of that provision is very general in nature. We are unable to interpret such a general sentence in a way that would impose a specific obligation on investigating authorities to inform interested parties of the legal basis for its final determination on injury during the course of an investigation, when the express wording of Article 12.2 only imposes such a specific obligation on investigating authorities at the end of the investigation.

8.239 We therefore reject Mexico's claim that the Ministry violated Articles 6.1, 6.2 and 6.9 by changing its injury determination from a preliminary determination of threat of material injury to a final determination of actual material injury during the course of the investigation, without informing Cruz Azul of that change.

E. ALLEGED VIOLATIONS CONCERNING THE FINAL DETERMINATION

1. Mexico's claims concerning the ministry's final determination of dumping

8.240 Mexico makes a number of allegations concerning the dumping analysis performed by the Ministry in its final determination. Mexico's claims concern the Ministry's calculation of normal value, of the export price, and its comparison of the two. The information used by the Ministry to calculate normal value was the "best information available". Mexico claims that the Ministry's recourse to the "best information available" was inconsistent with Article 6.8 of the AD Agreement. We need only examine Mexico's additional claims regarding normal value and dumping, if the Ministry's use of the "best information available" was consistent with Article 6.8. We shall therefore examine this issue first.

8.241 Mexico claims that the Ministry's use of "best information available" was not justified in the present case, since Cruz Azul did not deny access to the necessary information, nor significantly impede the Ministry's investigation. Mexico also claims that the Ministry violated paragraphs 3, 5 and 7 of Annex II of the AD Agreement in its handling of the "best information available"

8.242 Guatemala asserts that the Ministry was justified in having recourse to the "best information available" for the purpose of calculating normal value, because of Cruz Azul and Mexico's "refusal to cooperate".⁸⁶² In this regard, Guatemala refers to Cruz Azul's refusal to provide cost data, to provide sales data for the period 1 December 1995 - 31 May 1996, and to cooperate during the verification visit.

8.243 Article 6.8 provides:

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

⁸⁶² Guatemala's first written submission, para. 106.

8.244 Article 6.8 therefore permits the use of "best information available" if an interested party (1) refuses access to necessary information, (2) otherwise does not provide necessary information, or (3) significantly impedes the investigation.

8.245 Before determining whether the Ministry was justified in having recourse to the "best information available" for the purpose of calculating normal value, we note that Guatemala's justification for the Ministry's use of "best information available" does not correspond to that provided by the Ministry in its final Resolution of 17 January 1997. In that Resolution, the Ministry considered that:

"the information submitted by the exporter cannot be taken into account when calculating the normal value of the product investigated **because it could not be verified** and the technical accounting evidence submitted by the exporter on 18 December 1996 (confidential information) could not replace verification of the information by the Guatemalan investigating authority, as required by Article 6.6 of the Anti-Dumping Code"⁸⁶³ (emphasis supplied, footnote omitted).

Thus, the Ministry clearly based its recourse to the "best information available" on its inability to verify the data submitted by Cruz Azul. The Ministry did not, according to its final Resolution, rely on the "best information available" because of Cruz Azul's failure to provide certain sales and cost data, as alleged by Guatemala in these Panel proceedings. Even if the additional factors identified by Guatemala before the Panel could justify the use of "best information available", such *ex post* justification by Guatemala should not form part of our assessment of the conduct of the Ministry leading up to the imposition of the January 1997 definitive anti-dumping measure. The issue before us is whether the Ministry complied with the AD Agreement. In examining that issue, we shall confine ourselves to the reasoning provided by the Ministry in its determinations. We note that this approach is similar to that adopted by the panel in *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, which ignored explanatory statements made in Korea's first submission to the panel that were not reflected in the Korean authorities' analysis at the time of the investigation.⁸⁶⁴

8.246 Confining ourselves to the reasoning contained in the Ministry's determination, we shall consider whether the Ministry's inability to verify certain data could properly have justified the Ministry's recourse to the "best information available". In the context of Article 6.8, we must consider whether the Ministry could properly have concluded that Cruz Azul "significantly impede[d] the [Ministry's] investigation" by failing to cooperate with the Ministry's verification visit to its premises.

8.247 In a letter dated 31 October 1996, the Ministry informed Cruz Azul that its verification team would include three non-governmental experts, whose names were also included in that letter. In a letter dated 25 November 1996, Cruz Azul raised concerns regarding the inclusion in the verification team of two of the three non-governmental experts identified by the Ministry. These concerns were based on the fact that the two non-governmental experts at issue had represented the US domestic industry in the context of US anti-dumping proceedings concerning imports of cement from Mexico. Cruz Azul provided the Ministry with copies of the Administrative Protection Orders ("APOs") signed by those individuals in the context of those US proceedings.

8.248 In a letter dated 26 November 1996, the Ministry informed Cruz Azul, *inter alia*, that the non-governmental experts had signed an agreement to protect the confidentiality of all confidential information. The Ministry also informed Cruz Azul that it was up to the investigating authority to determine the composition of its verification team, and that the Ministry would have no choice but to base its final determination on the best information available if Cruz Azul refused to cooperate.

⁸⁶³ See section B.6, page 14, Annex Mexico-41 (translated).

⁸⁶⁴ See *Korea - Dairy Safeguards*, WT/DS98/R, para. 7.67.

8.249 The Ministry's verification team arrived at the offices of Cruz Azul on 3 December 1996. Cruz Azul again claimed that two of the non-governmental experts in the Ministry's verification team had a conflict of interest, referring to their participation in a US anti-dumping investigation against imports of cement from Mexico. Cruz Azul requested that the verification proceed without those two particular non-governmental experts. The Ministry repeated that those experts had signed a confidentiality agreement, and added that Cruz Azul had not been a party to the US anti-dumping proceedings in which the experts had represented the US domestic industry. According to Guatemala, the Ministry therefore had no choice but to inform Cruz Azul and the Mexican Government that their refusal to cooperate would require the Ministry to base its final determination of dumping on the best information available.

8.250 In our view, it was entirely reasonable for Cruz Azul to object to the inclusion in the Ministry's verification team of two non-governmental experts who had represented US cement producers against Mexican cement producers in US anti-dumping proceedings. Although it is true, as argued by Guatemala, that Cruz Azul was not an interested party in those US anti-dumping proceedings, information gleaned by representatives of the US domestic industry could be used to Cruz Azul's disadvantage in the Ministry's proceeding against it. We consider it unlikely that individuals who had acted against Mexican cement producers in the context of the US proceeding could completely detach themselves from their previous functions when conducting a verification at Cruz Azul. In particular, there is no guarantee that the role of the two non-governmental experts in the US proceedings (*i.e.*, to assist US domestic producers in their claims against Mexican cement exporters) would not undermine their objectivity and impartiality during the verification visit to Cruz Azul. The fact that steps may have been taken to ensure that the non-governmental experts did not violate the confidentiality of Cruz Azul's data provides no guarantee that their role in the US proceedings would not undermine their objectivity and impartiality during the verification visit to Cruz Azul, since it is possible to be partial and non-objective while preserving confidentiality.

8.251 In light of these considerations, we do not consider that an objective and impartial investigating authority could properly have found that Cruz Azul significantly impeded its investigation by objecting to the inclusion of non-governmental experts with a conflict of interest in its verification team. We do not consider that a failure to cooperate necessarily constitutes significant impediment of an investigation, since in our view the AD Agreement does not require cooperation by interested parties at any cost. Although there are certain consequences (under Article 6.8) for interested parties if they fail to cooperate with an investigating authority, in our view such consequences only arise if the investigating authority itself has acted in a reasonable, objective and impartial manner. In light of the facts of this case, we find that the Ministry did not act in such a manner.

8.252 Furthermore, Annex II(3) provides that all information which is "verifiable", and "appropriately submitted so that it can be used in the investigation without undue difficulties", should be taken into account by the investigating authority when determinations are made. In other words, "best information available" should not be used when information is "verifiable", and when "it can be used in the investigation without undue difficulties". In our view, the information submitted by Cruz Azul was "verifiable". The fact that it was not actually verified as a result of the Ministry's response to reasonable concerns raised by Cruz Azul does not change this. In addition, there is nothing in the Ministry's final determination to suggest that the information submitted by Cruz Azul could not be used in the investigation "without undue difficulties". Since the information was "verifiable", and since the Ministry did not demonstrate that it could not be used "without undue difficulties", Annex II(3) provides strong contextual support for the above conclusion that the Ministry violated Article 6.8 in using the "best information available" as a result of the cancelled verification visit.

8.253 Accordingly, we find that the Ministry violated Article 6.8, read in light of paragraph 3 of Annex II of the AD Agreement, in having recourse to the "best information available" for the purpose of making its final dumping determination.

8.254 The above finding is based on the Ministry's own justification for recourse to the "best information available" (*i.e.*, that the information submitted by Cruz Azul could not be verified). We do not consider it necessary to make findings on the basis of the *ex post* justification provided by Guatemala in these proceedings (*i.e.*, Cruz Azul's failure to provide sales data for the extended POI, and its failure to provide certain cost data). Even if we did so, however, a similar result would likely ensue. With regard to Cruz Azul's failure to provide sales data for the extended POI, we have found that the Ministry was entitled to extend the POI without informing Cruz Azul of the reasons why it did so. In such circumstances, the Ministry may have been entitled to use the "best information available" for sales data which Cruz Azul failed to submit in respect of the extended POI. However, the Ministry's use of the "best information available" was not restricted to the extended POI. The Ministry also used "best information available" (*i.e.*, two invoices attached to Cementos Progreso's application) concerning the original POI, even though neither the Ministry nor Guatemala has argued that Cruz Azul failed to provide sales data for the original POI. An impartial and objective investigating authority could not properly rely on "best information available" sales data for the original POI, simply on the basis of Cruz Azul's failure to provide sales data for the extended POI. Although we do not consider it necessary to make any finding in this regard, we do not consider that an impartial and objective investigating authority could properly have had recourse to the "best information available" for sales data for the original POI in these circumstances.

8.255 With regard to cost data, we note that the Ministry used "best information available" cost data for the whole POI. However, there is evidence in the record that Cruz Azul submitted cost of production data for its Lagunas plant for the year 1995 (see Annex Mexico-64) in its reply to the Ministry's supplementary questionnaire. The year 1995 covers the original POI, and the first month of the extended POI. Mexico asserts that only the Lagunas plant manufactured cement destined for the Guatemalan market. Guatemala has not disputed that assertion, but has stated that the Ministry required access to cost data from all of Cruz Azul's Mexican production facilities in order to calculate normal value. However, Guatemala has failed to demonstrate that the information could not be used in the investigation "without undue difficulties", within the meaning of Annex II(3) of the AD Agreement. There is no such explanation in the Ministry's January 1997 Resolution. Indeed, the fact that Cruz Azul even submitted this information is not mentioned in the Ministry's final Resolution. It is true that the cost data only covered the original POI and part of the extended POI. Thus, the Ministry may have been entitled to use "best information available" cost data for the remainder of the extended POI. However, the Ministry used "best information available" cost data for the whole POI. As discussed above, failure to provide data for part of the POI cannot justify recourse to "best information available" for the whole POI. Although we do not consider it necessary to make any finding in this regard, we do not consider that an impartial and objective investigating authority could properly have had recourse to the "best information available" to ascertain costs for the whole of the POI in these circumstances.

8.256 In light of our finding that the Ministry's recourse to the "best information available" violated Article 6.8, read in light of paragraph 3 of Annex II, we need not examine Mexico's additional claims concerning the dumping analysis performed by the Ministry.

2. Mexico's claims concerning the ministry's final determination of injury

(a) Change of threat of injury to material injury

8.257 Mexico claims that Guatemala's change of its injury finding from a preliminary determination of threat of material injury to a final determination of material injury gave rise to violations of Articles 6, 12 as well as Article 3.

8.258 To the extent that this claim refers to the issue that Guatemala acted inconsistently with Articles 6 in respect of its extension of the period of investigation and a change from a preliminary determination of threat of material injury to a final determination of material injury, we have already addressed these claims *supra* in sections D.5. and D.10.

8.259 To the extent that Mexico claims that the Ministry's injury determinations were not based on positive or sufficient evidence, contrary to Article 3, this matter is addressed in the following sections.

8.260 To the extent that Mexico claims that the notification under Article 12 of imposition of a definitive anti-dumping measure was insufficient, we address this matter at para. 8.291 below.

(b) Volume of dumped imports

8.261 Mexico claims that the evaluation by Guatemala of the volume of dumped imports was not consistent with Article 3.2 of the AD Agreement for a number of reasons. *First*, Mexico asserts that Guatemala confined itself to considering the maximum and minimum volumes imported during the investigation period. *Second*, Guatemala used a data collection period of one year and failed to compare the volume of dumped imports during that period to earlier periods in order to analyse long-term trends in imports. *Third*, Guatemala erroneously determined the volume of imports of grey portland cement from Mexico by including imports of the product under investigation from sources other than Mexico and by including other types of cement not under investigation, for example, grey cement or slow-setting cement, which are imported under the same tariff heading. *In addition*, Mexico argues that Guatemala violated Articles 3.1, 3.2, and 3.5 by failing to take into account certain imports of the product under investigation imported by MATINSA, an importer associated with the petitioner, Cementos Progreso.⁸⁶⁵

8.262 Guatemala asserts that it examined the volume of dumped imports both in absolute and in relative terms. Guatemala found that during the investigation period imports from Cruz Azul increased from 140 tons in June 1995 to 25,079 tons in May 1996, with a maximum in March 1996 (45,859.31 tons). Cruz Azul's share in domestic consumption went from one per cent of the Guatemalan market (in June 1995) to 21 per cent of the market (May 1996) with a high of 32 per cent in March. Guatemala argues that it properly examined the rate at which import volumes were increasing as required by Article 3.2. Guatemala asserts that there was no need to evaluate import trends for periods prior to 1995 as there were simply no imports of Cruz Azul cement until June 1995. Guatemala also argues that it took MATINSA's imports into account and concluded that they did not weaken its determination of injury caused by cement imports from Cruz Azul. Guatemala also argues that it did not disregard the existence of other types of cement, imported under tariff heading 2523.29.00. In its analysis, the Ministry only considered imports from Cruz Azul. The Ministry noted

⁸⁶⁵ Mexico also asserts that the Ministry did not consider that the change from a threat of material injury to material injury would in any case require an evaluation of the volume of dumped imports in accordance with Article 3.2 of the AD Agreement, as opposed to the analysis of "a significant rate of increase of dumped imports" under Article 3.7(i) carried out in the preliminary determination of threat of material injury. We are of the view that our present task is to consider whether Guatemala's examination of the volume of dumped imports complied with Article whether 3.2, not whether and how it differed from Guatemala's examination of the volume of dumped imports for the purpose of the preliminary determination.

that imports from Cruz Azul represented 91 per cent of total imports of grey cement into Guatemala during the investigation period. The Ministry did not assume that all the imports under this tariff heading were from Cruz Azul.

8.263 Article 3.2 provides that:

"3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance."

8.264 We have based our analysis of Guatemala's compliance with Article 3 on the Ministry's resolution imposing the anti-dumping measure and the Extended Report on Injury⁸⁶⁶ (hereinafter "Injury Report").

8.265 We first examine Mexico's claim that Guatemala's consideration whether there was a significant increase in dumped imports was inconsistent with Article 3.2 because Guatemala confined itself to considering the maximum and minimum imports during the period of investigation. We note that the Ministry did a month by month examination of the total volume of imports of grey portland cement as well as of the volume of Mexican imports.⁸⁶⁷ Although in the text of the resolution Guatemala reported the end to end and highest and lowest point results of their analysis of the volume of dumped imports, it is evident from Table 10 of the Injury Report that the authorities considered the situation during each of the intervening months during the period they chose for data collection. The Panel does not agree with Mexico's assertion that "Guatemala confined itself to maximum and minimum volumes imported during the investigation period". Thus, we do not consider that Guatemala acted inconsistently with Article 3.2 in this respect.

8.266 We next consider Mexico's claim that Guatemala's consideration whether there was a significant increase in dumped imports was inconsistent with Article 3.2 because Guatemala used a data collection period of one year and failed to compare the volume of dumped imports during that period to earlier periods in order to analyse long-term trends in imports. In this regard, we recall that Guatemala chose a period of data collection of one year from June 1995 to May 1996. A recent recommendation of the Committee on Anti-Dumping Practices calls on Members to use a data collection period of at least three years. This recommendation reflects the common practice of Members.⁸⁶⁸ That said, there is no provision in the Agreement which specifies the precise duration of the period of data collection. Thus, it cannot be said *a priori* that the use of a one-year period of data

⁸⁶⁶ Annex Mexico-43

⁸⁶⁷ This can be evidenced in Table 10 of the Ministry's resolution imposing the definitive measure and the extended report on injury.

⁸⁶⁸ The recommendation provides that:

"(c) the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation; "
(Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, adopted by the ADP Committee on 5 May 2000, G/ADP/6).

We note that this recommendation is a relevant, but non-binding, indication of the understanding of Members as to appropriate implementation practice regarding the period of data collection for an anti-dumping investigation.

collection would not be consistent with the requirement of Article 3.2 to consider whether there has been a significant increase in the volume of dumped imports in the circumstances of a particular case. In this case, Guatemala argues that the reason for the short period of data collection was that exports by Cruz Azul did not become significant until 1995. The record of the investigation supports this conclusion.⁸⁶⁹ Under these circumstances, while a longer data collection period might have been preferable, we are unable to find that the use by Guatemala of a one-year data collection period was inconsistent with Guatemala's obligation under Article 3.2 to consider whether there was a significant increase in dumped imports.

8.267 We next turn to Mexico's argument that Guatemala made an erroneous determination of the volume of imports of grey portland cement from Mexico by including imports from sources other than Mexico, and by including types of cement other than the product under investigation, imported under the same tariff heading. Although we note that Mexico has presented evidence indicating the existence of imports of grey cement from sources other than Mexico and of products other than grey portland cement during the period of investigation.⁸⁷⁰ We do not consider that this evidence goes to the question, presented in Mexico's claim, of whether there were any imports other than those of Mexico or of the product under investigations which have been included in the column "Imports from Mexico" in Table 10 of the Injury Report (Annex Mexico-43).⁸⁷¹ The evidence presented by Mexico on this issue does not render the figures included in Table 10 of the Injury Report unreliable. The fact that Mexico has shown that there were imports of grey cement from different sources and that there were imports of other types of cement different from the product under investigation, does not show that the Ministry has erred when calculating the total volume of imports of grey portland cement figures that appear in Table 10 of the injury report. Thus, we find that Mexico has failed to make a *prima facie* case that Guatemala's establishment of the facts was improper and violated Article 3.2 by wrongly including as imports grey portland cement from Mexico, imports from sources other than Mexico and imports of other types of cement not under investigation.

8.268 Finally, we turn to Mexico's claim that Guatemala violated Articles 3.1, 3.2, and 3.5 by failing to take into account certain undumped imports of the product under investigation imported by an importer named MATINSA, which is associated with the petitioner, Cementos Progreso. Although Mexico's arguments on this point are unclear, we understand Mexico to be arguing that Guatemala considered MATINSA's imports to be of non-pozzolanic cement which differed from the like domestic product and thus were not taken into consideration during the investigation. Mexico considers however that the product imported by MATINSA was in fact the same product as that under investigation. In Mexico's view, the failure by Guatemala to correctly characterise the imports by MATINSA carried the following consequences (i) the resulting volume of total imports of the product under investigation was lower; (ii) the share of allegedly dumped imports in total imports of the product under investigation was artificially inflated; (iii) the consideration of a faulty and incomplete figure for total imports of the product under investigation yielded a distorted figure for apparent domestic consumption; (iv) because of this incorrect figure for apparent domestic consumption, the relationship between the increase in dumped imports and consumption was ultimately incorrect; (v) by considering that MATINSA's imports did not concern the product under investigation, the investigating authority failed to assess other factors which were injuring the domestic industry at the same time, such as imports that were not sold at dumped prices.

8.269 The consequences listed as number (i) through (iv) above constitute a violation of Article 3.1 and 3.2 in that an exclusion of MATINSA's imports from the figures for domestic consumption of the like product affects the comparison that is made with the figures for volume of dumped imports for purposes of determining that there has been a significant increase in dumped imports relative to

⁸⁶⁹ See, Table 10 of the Injury Report

⁸⁷⁰ Annex Mexico-41.

⁸⁷¹ We consider Table 10 of the Injury Report to be the basis for Guatemala's analysis under Article 3.2.

domestic consumption in the importing Member.⁸⁷² Item (v) above constitutes a violation of Article 3.5 in that this provision establishes:

"The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices..."

Imports by MATINSA of grey portland cement would constitute the type of imports which are recognized in the AD Agreement as a possible source of injury different from the dumped imports. Thus, a failure to examine such imports as another known factor causing injury would constitute a violation of Article 3.5. We recognize the merit in Mexico's arguments on this issue and to the extent that Mexico presents us with evidence to support the argument it has succeeded in establishing a *prima facie* case that Guatemala has violated Articles 3.1, 3.2 and 3.5. It would be then for Guatemala to rebut the existence of a violation under Articles 3.1, 3.2 and 3.5. We shall now examine whether it has succeeded in doing so.

8.270 Mexico's argument on this issue relies on two factual predicates. The first is that there were imports by MATINSA during the period of investigation of the subject product. To this effect Mexico has presented evidence that shows that during the period of investigation there were imports by MATINSA classified as grey portland cement and type I pozzolanic cement.⁸⁷³ Guatemala did not challenge the validity of such evidence.

8.271 The second factual predicate relied on by Mexico is that Guatemala excluded all imports by MATINSA from the total imports of the like product. On this predicate we note that the evidence is unclear and there are several inconsistencies in Guatemala's argumentation. In its final determination,⁸⁷⁴ injury report⁸⁷⁵ and answer to question 63 from Mexico, Guatemala asserts that imports by MATINSA were not of the like product. In order to clarify this issue the Panel asked Guatemala whether it had included imports by producers other than Cruz Azul in the total volume of Mexican imports shown in Table 10 of the Injury Report. Guatemala failed to directly answer our question and asserts in their answer that:

"The file of the investigation also confirms that the cement investigated was produced by Cruz Azul. The only evidence in the file that remotely suggests otherwise consists of a few imports by the company MATINSA in 1995. However, these transactions concern type I pozzolanic cement which was not produced by Cruz Azul, and represent only 0.003 per cent of MATINSA's total imports, a negligible amount in comparison to total imports from Cruz Azul (i.e. only 348.5 metric tonnes), as Guatemala explained in its reply to question 61 from Mexico following the second substantive meeting. In its reply to question 63 from Mexico, Guatemala explained that the rest of the cement imported by MATINSA was high-resistance cement type 5,000 PSI which was not under investigation by the Ministry of the Economy."

⁸⁷² We note that Guatemala establishes that there was both an increase of the dumped imports in absolute terms and also an increase relative to domestic consumption and production (see Injury Report Table 10 and Guatemala's first submission para. 359). Guatemala relied on both of these findings to determine that there was material injury to the domestic industry. So, to the extent that one of the findings on the increased volume of dumped imports was proved to be inappropriate Guatemala's determination under Articles 3.1 and 3.2 would be inconsistent with its obligations.

⁸⁷³ Annex Mexico-46. This annex consists of a list of import transactions of cement from the official statistics by the Customs Authority of Guatemala.

⁸⁷⁴ Final Determination Section E.2 (Annex Mexico-10).

⁸⁷⁵ Injury Report p. 3 (Annex Mexico-43).

Thus, Guatemala does not deny that there were imports of the like product by MATINSA during the period of investigation. However, this still leaves the issue of their treatment for purposes of the injury determination unclear. Guatemala further argues that imports by MATINSA of the product under investigation were insignificant as they represent only 0.003 per cent of MATINSA's total imports.⁸⁷⁶ We find that there are inconsistencies in this assertion. First, we note that there is an inconsistency as to the total volume of imports during the period of investigation by MATINSA. Guatemala asserts in answer to question 60 from Mexico that total imports by MATINSA for the period of investigation were 117,223.83 tons, while in the Final Determination the figure for total imports by MATINSA is of 79,426 tons.⁸⁷⁷ Second, there is also an inconsistency as to the volume of imports of MATINSA's imports of type I pozzolanic cement. Guatemala asserts that imports of type I pozzolanic cement by MATINSA were 348.5 tons, while the evidence presented by Mexico indicates that these imports were at least 16,766.71 tons during the period of investigation.⁸⁷⁸ Third, even assuming that Guatemala's figures for total imports and type I pozzolanic cement imports by MATINSA were correct, there is also an inconsistency as to the calculation of the proportion of imports of type I pozzolanic cement in MATINSA's total imports. Guatemala asserts that imports of type I pozzolanic cement were 0.003 per cent of total imports by MATINSA. Even assuming that the correct figure for total imports by MATINSA was the higher of the two reported (i.e. 117,223.83 tons), the 348.5 tons imports of type I pozzolanic cement by MATINSA would represent 0.297 per cent of total imports by MATINSA not 0.003 per cent as alleged by Guatemala.

8.272 The issue of Guatemala's treatment of MATINSA's imports of the subject merchandise remains obscure. However, In the face of the inconsistencies of Guatemala's argumentation and taking into account the evidence presented by Mexico, we are of the view that Guatemala has failed to rebut the *prima facie* case of violation of Article 3.1, 3.2 and 3.5 established by Mexico. Thus, we find that Guatemala has violated Articles 3.1, 3.2 and 3.5 as explained above in para. 8.269 by wrongly characterizing some imports by MATINSA as not of the like product and failing to take into account these imports in its determination of injury and causality.

(c) Price effects

8.273 Mexico claims that Guatemala did not comply with Article 3.2 of the AD Agreement because in its final affirmative determination of injury it included a series of assertions concerning the price trends without having any elements to uphold its determination. Specifically Mexico argues Guatemala lacked evidence to: i) support a determination that the price of the grey portland cement imported from Mexico undercut the price of domestic grey portland cement manufactured by Cementos Progreso; ii) substantiate a determination that the effect of the imports on the domestic production had led to a significant reduction or prevented an increase, or; iii) support the finding that the alleged dumping, was the cause of any negative effect on domestic prices and not other elements. Mexico argues that this lack of support is evidenced by the fact that Guatemala did not compare the domestic like product prices for the period of investigation with the prices for the previous year to establish that the dumped Mexican imports were causing the price depression.

8.274 Mexico also claims that the Ministry's analysis of the effect on the prices was erroneously done at the regional level only, and not at the national level in violation of Article 3.2. Mexico bases its claim on the statement in the final determination by Guatemala that the difference between the prices actually charged for the domestic product and the ceiling price fixed by the government was greater in the western region of Guatemala bordering with Mexico.

⁸⁷⁶ We note that the significance of the imports would be more appropriately measured with respect of the total imports of the subject merchandise, not total imports by MATINSA.

⁸⁷⁷ Final Determination, Antecedentes para. 8. (Annex Mexico-10)

⁸⁷⁸ Annex Mexico-46

8.275 Guatemala asserts that it examined information on prices at both wholesale and retail level in Guatemala during the investigation period. This examination revealed significant price undercutting by Cruz Azul at both levels. Then it examined whether imports from Cruz Azul were depressing prices or preventing price increases in Guatemala to a significant degree. Among other things, the Ministry found that "(a) imports from Cruz Azul had an immediate and adverse effect on Cementos Progreso's prices; (b) the dumped imports made a greater impact in the area adjacent to the Mexican frontier (especially in the Departments of San Marcos, Quetzaltenango and Retalhuleu) where Cruz Azul concentrated its sales; (c) despite increases in the maximum price for cement established by the government during the investigation period, Cementos Progreso "undertook a significant number of transactions at below the maximum selling price ..."; and (d) if there had been no imports from Cruz Azul, Cementos Progreso "would have been able to sell at the maximum prices established [by the government]"⁸⁷⁹. Guatemala also argues that Mexico has not shown, as required by the standard of review applicable, that Guatemala's factual findings were not properly established or were biased. Thus, the Panel has no basis to substitute its interpretation of the facts for that of the Guatemalan authorities.

8.276 We shall first address Mexico's argument that Guatemala lacked the elements to support its conclusion that there had been a negative price effect on the prices for the domestic like product by the dumped imports. We note that Mexico's argument on the lack of support for Guatemala's finding on price effect depends on Mexico's assertion that Guatemala should have done a comparison with the prices that the domestic industry charged for a period prior to the period of investigation. We have already found that Guatemala did not violate the AD Agreement in establishing a period of data collection of injury of only one year,⁸⁸⁰ and consequently it was not obliged to review data outside that period. Moreover, Guatemala submitted evidence⁸⁸¹ that was part of the record of the investigation, and that supports the determination that: i) prices for the domestic industry declined after the Mexican imports entered the market, configuring a situation of price depression; ii) that those prices declined to a level below the maximum price authorized by the Government, and; iii) that although the maximum price increased at the end of the period the domestic producer could not increase its prices accordingly, configuring a situation of price suppression.⁸⁸² Based on the evidence of declining prices and inability to achieve established price levels, coinciding with imports at lower prices we find that an objective and unbiased investigating authority could have properly concluded that the dumped imports were having a negative effect on the prices of the domestic industry. Moreover, Mexico did not adduce any evidence to convince us otherwise. Thus, we reject Mexico's claim of an improper and unsupported Article 3.2 analysis by Guatemala.

8.277 We shall now address Mexico's argument that Guatemala improperly conducted a regional evaluation of the effect the dumped imports had on the prices of the domestic like product. The mere fact that Guatemala mentions that the greatest differential between the government fixed ceiling price and the actual price was felt in the Departments of San Marcos, Quetzaltenango and Retalhuleu does not, in our view, mean that the analysis was limited to these regions alone, to the exclusion of Guatemala as a whole. In fact, the mention that these were the departments with the greatest differential indicates to us that other departments were analysed. Moreover, there is only one producer of cement in Guatemala, thus, even if the negative effect of the dumped imports on the prices of the domestic like product was only evidenced in the region bordering Mexico, this could still be viewed as causing injury to Cementos Progreso. Based on these considerations we find that Guatemala acted in accordance with its obligation under Article 3.2 to conduct an examination of the

⁸⁷⁹ Injury Report p. 18-20 (Annex Mexico-43).

⁸⁸⁰ See para. 8.266 *supra*.

⁸⁸¹ Annex Guatemala-68

⁸⁸² Guatemala presented evidence indicating that before the arrival of the imports prices were to the level of the maximum price. We are of the view that as this price is calculated on the basis of costs and inflation it constitutes a reasonable benchmark to establish the price at which the domestic producer of cement in Guatemala could have expected to increase its prices but for the competition from the dumped imports.

effect the dumped imports had on the domestic industry. Therefore, we reject Mexico's claim of violation of Article 3.2 on the basis of an improper regional injury evaluation.

(d) Impact on the domestic industry

8.278 Mexico claims that Guatemala made an incorrect determination of the alleged impact of the dumped imports on sales of grey portland cement by the domestic industry. Among other arguments Mexico asserts that Guatemala has failed to consider whether the domestic industry experienced a decline in their returns on investment and a negative effect on their ability to raise capital.

8.279 Other arguments by Mexico with respect to the adequacy of the examination of the impact of the imports on the domestic industry include Guatemala's failure to consider the potential decline in the factors listed in Article 3.4, as well as, inconsistent and inappropriate comparisons by Guatemala between data pertaining to the period of investigation and data outside the period of investigation.

8.280 Guatemala asserts that it based its final determination on positive evidence and an objective examination of, *inter alia*, the consequent impact of Cruz Azul imports on the domestic industry, in accordance with Article 3.1 and 3.4 of the Anti-Dumping Agreement. Guatemala states that the Ministry's examination revealed that, among other things, Cruz Azul imports had caused:

- (i) Cementos Progreso's sales to decline by 14 per cent between the first quarter of 1995 and the first quarter of 1996. This decline coincided with Cruz Azul's entry into the market;
- (ii) Cementos Progreso to lose customers;
- (iii) domestic cement production to a decline of 14 per cent between the first quarter of 1995 and the first quarter of 1996. This reduction began when Cruz Azul started importing cement into Guatemala;
- (iv) a decline of between 20 and 30 per cent in Cementos Progreso's share of the domestic market;
- (v) a decline in Cementos Progreso's capacity to utilise both clinker and finished cement;
- (vi) a 12 per cent fall in domestic utilization of cement grinding capacity and a 16 per cent fall in domestic utilization of clinker production capacity;
- (vii) Cementos Progreso to experience negative cash flow during the first months of 1996;
- (viii) Cementos Progreso to postpone investment plans to modernize its plant and increase its production capacity; and
- (ix) Cementos Progreso to accumulate excessive inventories as from August 1995.

8.281 Guatemala also argues that the issue before this Panel is whether the establishment of the facts by the investigating authority was "proper" and whether its evaluation of those facts was "unbiased and objective". Guatemala asserts that Mexico has not shown Guatemala to have violated any of these standards.

8.282 Article 3.4 provides:

"3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

8.283 Before turning to Guatemala's analysis with respect to the factors in Article 3.4 we would like to outline what is the task before us in this review. We note that Article 3.4 lists a series of factors which it characterizes as relevant in an examination of whether the dumped imports had an impact on the domestic industry. It also mentions that the list is non exhaustive, in other words, there may also be other factors which although not listed may give guidance on the state of the industry. We also note that Article 3.4 provides that the examination "shall include" all relevant economic factors and indices having a bearing on the state of the industry and specifies that among those factors which are considered relevant are those which listed therein. Thus, it is essential, in order to satisfy the requirements in Article 3.4, to examine each of the factors listed in that provision. In our view Article 3.4 establishes a rebuttable presumption that those factors listed are relevant in giving guidance on whether the dumped imports have had an effect on the domestic industry. It is only after consideration of the listed factors that the investigating authority may dismiss some of them as not being relevant for the particular industry, thus in effect rebutting the presumption established in Article 3.4. We are also of the view that the consideration of the factors in Article 3.4 must be apparent in the determination so the Panel may assess whether the authority acted in accordance with Article 3.4 at the time of the investigation.

8.284 Our interpretation is supported by other panels which have expressed similar views. For example the panel in *Mexico – HFCS* determined:

"In our view, this language makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. In a threat of injury case, for instance, the AD Agreement itself establishes that consideration of the Article 3.7 factors is also required. But consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority."⁸⁸³ (Footnote omitted)⁸⁸⁴

8.285 As a first step in our examination of Guatemala's analysis of the impact of the dumped imports on the domestic industry, we must evaluate whether all the factors listed in Article 3.4 have been considered. In this regard, we note that Mexico argues that Guatemala has failed to consider whether the domestic industry's experienced a decline in return on investment and a negative effect on their ability to raise capital. Paragraph 4.9 of Guatemala's final determination, contains some

⁸⁸³ *Mexico – HFCS*, WT/DS132/R, para. 7.128

⁸⁸⁴ In the context of a safeguard investigation the *Korea – Dairy Safeguard* panel when considering Article 4.2 of the Agreement on Safeguards, which is very similar to Article 3.4 of the AD Agreement, made the following remarks:

"among 'all relevant factors' that the investigating authorities 'shall evaluate', the consideration of the factors listed is always relevant and therefore required, even though the authority may later dismiss some of them as not having a bearing on the situation of that industry". (*Korea-Dairy Safeguard*, WT/DS98/R para. 7.55. See also *Argentina-Safeguard Measures on Imports of Footwear (Argentina-Footwear Safeguard)*, WT/DS121/R adopted on 12 January 2000, para. 8.123.)

That panel also noted that in reviewing the serious injury determination made by the Korean authorities, its task was to examine:

"whether at the time of the determination all factors listed in Article 4.2 were appropriately considered; whether the Korean authorities explained how each factor considered supports (or detracts from) a finding of serious injury; and whether valid reasons have been put forward for dismissing a considered factor as not being relevant to the serious injury determination in this case". (*Korea-Dairy Safeguard*, WT/DS98/R, para. 7.55.)

discussion concerning investment and the risks to investors for the period of investigation. However, this paragraph is just a discussion of the operative balance of Cementos Progreso and does not pertain to the specific factors of return on investment and ability to raise capital. With respect to factors of return on investments and ability to raise capital, we can find no indication in the determination that Guatemala considered these factors in the injury determination. Thus, we find that Guatemala has acted inconsistently with Article 3.4 in its examination of the impact of the dumped imports on the domestic industry, by failing to examine all relevant factors listed in Article 3.4.

8.286 Having found that Guatemala acted inconsistently with its obligations under Article 3.4 in failing to consider all of the relevant factors, we are of the view that it is neither necessary nor appropriate for us to further examine the rest of the arguments put forward by Mexico with respect to the adequacy of the consideration of each of the factors in Article 3.4.

3. Mexico's claims concerning the Ministry's final determination of the existence of a causal link between the dumped imports and the injury to the domestic industry.

8.287 Mexico claims that Guatemala could not have demonstrated the existence of a causal link in compliance with Article 3.5, for the following reasons. First, the investigating authority did not evaluate the alleged impact of the imports investigated on the value and volume of sales, pressure on selling prices, deterioration in the financial situation, market share and employment, as required by Article 3.4 of the AD Agreement. Neither did it make statistically valid comparisons to allow it to undertake an objective examination of the effect of the imports allegedly dumped, as required by Article 3.1 of the AD Agreement. Second, in the final determination, the Ministry recognized that the fixing of a maximum selling price was a disadvantage for the domestic industry in comparison with products imported from any country, but failed to consider fully the injury that may have been caused by this other factor. Third, the Ministry did not evaluate the impact that a commitment by Cementos Progreso to sell the product investigated to the Guatemalan State at a price lower than the selling price to the public might have had on the status of the domestic industry.

8.288 Mexico also claims that the Ministry was not able to establish a causal relationship between the imports of grey portland cement and the alleged injury to the domestic industry because it had not properly determined the existence of material injury.

8.289 In our examination concerning the Ministry's evaluation of the volume of the dumped imports we found that Guatemala acted in violation of Article 3.5 by failing to consider other factors known to the investigating authority which may also be a cause of injury.⁸⁸⁵ In light of that finding, we are of the view that it is neither necessary nor appropriate for us to further consider Mexico's claims concerning a violation of Article 3.5.

4. Claims by Mexico concerning the public notice of imposition of a definitive anti-dumping measure

8.290 Mexico claims that the public notice of conclusion of the investigation, which contained the final affirmative determination on the imposition of definitive anti-dumping duties, published in the *Diario Oficial de Centro América* of 30 January 1997⁸⁸⁶ did not comply with the requirements in Article 12.2 and 12.2.2 of the AD Agreement because it did not contain all the relevant information on the issues of fact and law nor did it include sufficiently detailed explanations of the reasons that led the Ministry to impose the definitive anti-dumping measure nor several of its determinations.

8.291 We are of view that the issue of Guatemala's compliance with the transparency obligations deriving from its decision to impose definitive anti-dumping measures on imports of cement from

⁸⁸⁵ See, *supra* para. 8.272.

⁸⁸⁶ Annex Mexico-11.

Mexico would only be relevant if the decision to impose the measure itself had been consistent with the AD Agreement. Therefore, having found that Guatemala infringed the substantive provisions of the AD Agreement in their decision to impose an anti-dumping measure in this case, we consider that it is not necessary for us to rule on whether Guatemala complied with its transparency obligations under Article 12.2 and 12.2.2 with respect to the imposition of a measure already found not to be consistent with Guatemala's WTO obligations.

5. Claims by Mexico regarding the definitive measure's inconsistency with Articles 1, 9 and 18 of the AD Agreement and Article VI of GATT 1994

8.292 Throughout this dispute Mexico has claimed that Guatemala did not make a valid determination of dumping or injury and also failed to demonstrate a causal relationship between them, as required by Articles 2 and 3 of the AD Agreement. Mexico has also claimed that Guatemala violated Articles 5, 6, 7 and 12 when initiating the investigation and during its course.⁸⁸⁷ Therefore, Mexico claims that Guatemala has also violated Articles 1, 9 and 18 of the AD Agreement and Article VI of GATT 1994, in so far as:

- (a) Guatemala decided to establish definitive anti-dumping duties on grey portland cement from the Mexican firm Cruz Azul without having duly complied with all the requirements for their establishment prescribed by Article 9.1 of the AD Agreement;
- (b) the application of the definitive anti-dumping measure without a valid determination of dumping injury and causal relationship between the two, is contrary to the provisions of Article VI of the GATT 1994 and in turn constitutes a violation of Article 1 and 18 of the AD Agreement.

8.293 Guatemala argues that Article 9.1 does not relate to and in no way incorporates the substantive requirements for the imposition of definitive anti-dumping duties contained in other provisions of the AD Agreement. With respect to claims of violations of Articles 1, and 18 of the AD Agreement and Article VI of the GATT 1994, Guatemala responds that these claims are based on the violation of other articles in the AD Agreement. Since Guatemala maintains that its investigation complied with all the rules in the AD Agreement, therefore, Guatemala asserts these claims lack merit.

8.294 Article 1 and Article 9.1 read:

"1. An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations" (Footnote omitted)

"9.1 The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

⁸⁸⁷ These claims the Panel has resolved *supra* in other sections of this report.

8.295 Although Mexico does not specify exactly which provisions of Article 18 are pertinent to their claim, we believe that as it has been formulated, it can only refer to Article 18.1. This provisions reads:

"18.1 No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

8.296 We note that Mexico's claims under Articles 1, 9 and 18 of the AD Agreement, and Article VI of GATT 1994, are dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement. There would be no basis to Mexico's claims under Articles 1, 9 and 18 of the AD Agreement, and Article VI of GATT 1994, if Guatemala were not found to have violated other provisions of the AD Agreement. In light of the dependent nature of Mexico's claims under Articles 1, 9 and 18 of the AD Agreement, and Article VI of GATT 1994, we see no useful purpose to deciding them. In particular, deciding such dependent claims will provide no additional guidance as to the steps to be undertaken by Guatemala in order to implement our recommendation regarding the violations on which they are dependent.

F. CLAIMS BY MEXICO CONCERNING THE PROVISIONAL ANTI-DUMPING MEASURE

8.297 Mexico has made various claims concerning Guatemala's imposition of a provisional measure, specifically Mexico argues that :

- (i) Guatemala was in breach of its obligations: under Article 7.1 of the AD Agreement, to give Cruz Azul an adequate opportunity to comment on the information provided to the Ministry in reply to a questionnaire it received; and, under Article 2.4 of the AD Agreement, to request from Cruz Azul additional information in order to clarify inaccuracies in Cruz Azul's reply to its questionnaire and to make a fair comparison between normal value and export price.
- (ii) Guatemala's investigating authority never satisfied itself that the volume of sales on the Mexican domestic market of cement like that exported to Guatemala was of a sufficient magnitude to provide for proper comparison with the export price, thus violating Article 2.2 of the AD Agreement.
- (iii) Guatemala's provisional anti-dumping measure was based on an affirmative determination of threat of injury derived from an inadequate and insufficient analysis of the factors in Article 3.7, as well as of the factors in Article 3.2, 3.4 and 3.5.
- (iv) Guatemala violated Article 12.2.1 of the AD Agreement which sets out the requirements to be met by parties in their public notices of preliminary determinations.

8.298 We note that in response to a question from the Panel, Mexico confirms that it has not requested any recommendation from the Panel concerning the provisional measure *per se*.⁸⁸⁸ We also note that Mexico's claims concerning the provisional measure are made in the context of the provisional measure as "an action preceding the definitive anti-dumping measure",⁸⁸⁹ and those claims are made as a challenge to the definitive measure. Mexico therefore requests a ruling concerning the definitive measure, on the basis of claims regarding the provisional measure. At most, Mexico's claims concerning the provisional measure could only result in a ruling with respect to part of the definitive measure insofar as it relates to retrospective collection of the provisional measure (i.e.,

⁸⁸⁸ Oral response provided at the second meeting of the panel with the parties.

⁸⁸⁹ Mexico oral statement at the first meeting of the Panel with the parties, Para.39.

where it is mandated that the "provisional anti-dumping duties collected would remain in favor of the treasury"⁸⁹⁰). Since we have already made findings that give rise to a recommendation concerning the totality of the definitive measure,⁸⁹¹ we do not consider it necessary to further address claims (i.e. concerning the provisional measure) that could only result in a ruling concerning only part of the definitive measure. Accordingly, we do not consider it necessary to address Mexico's claims regarding the consistency of Guatemala's provisional measure with the provisions of the AD Agreement.

IX. CONCLUSIONS AND RECOMMENDATION

9.1 In light of the findings above, we conclude that Guatemala's initiation of an investigation, the conduct of the investigation and imposition of a definitive measure on imports of grey portland cement from Mexico's Cruz Azul is inconsistent with the requirements in the AD Agreement in that:

- (a) Guatemala's determination that there was sufficient evidence of dumping and threat of injury to initiate an investigation, is inconsistent with Article 5.3 of the AD Agreement
- (b) Guatemala's determination that there was sufficient evidence of dumping and threat of injury to initiate an investigation and consequent failure to reject the application for anti-dumping duties by Cementos Progreso is inconsistent with Article 5.8 of the AD Agreement.
- (c) Guatemala's failure to timely notify Mexico under Article 5.5 of the AD Agreement is inconsistent with that provision.
- (d) Guatemala's failure to meet the requirements for a public notice of the initiation of an investigation is inconsistent with Article 12.1.1 of the AD Agreement.
- (e) Guatemala's failure to timely provide the full text of the application to Mexico and Cruz Azul is inconsistent with Article 6.1.3 of the AD Agreement.
- (f) Guatemala's failure to grant Mexico access to the file of the investigation is inconsistent with Articles 6.1.2 and 6.4 of the AD Agreement.
- (g) Guatemala's failure to timely make Cementos Progreso's 19 December 1996 submission available to Cruz Azul until 8 January 1997 is inconsistent with Article 6.1.2 of the AD Agreement.
- (h) Guatemala's failure to provide two copies of the file of the investigation as requested by Cruz Azul is inconsistent with Article 6.1.2 of the AD Agreement.
- (i) Guatemala's extension of the period of investigation requested by Cementos Progreso without providing Cruz Azul with a full opportunity for the defence of its interest is inconsistent with Article 6.2 of the AD Agreement.
- (j) Guatemala's failure to inform Mexico of the inclusion of non-governmental experts in the verification team is inconsistent with paragraph 2 of Annex I of the AD Agreement.

⁸⁹⁰ Guatemala's Final Determination, (Annex Mexico-10).

⁸⁹¹ See sections VIII.E.1 and VIII.E.2 above.

- (k) Guatemala's failure to require Cementos Progreso's to provide a statement of the reasons why summarization of the information submitted during verification was not possible is inconsistent with Article 6.5.1 of the AD Agreement.
- (l) Guatemala's decision to grant Cementos Progreso's 19 December submission confidential treatment on its own initiative is inconsistent with Article 6.5 of the AD Agreement.
- (m) Guatemala's failure to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures" is inconsistent with Article 6.9 of the AD Agreement.
- (n) Guatemala's recourse to "best information available" for the purpose of making its final dumping determination is inconsistent with Article 6.8 of the AD Agreement.
- (o) Guatemala's failure to take into account imports by MATINSA in its determination of injury and causality is inconsistent with Articles 3.1, 3.2 and 3.5 of the AD Agreement.
- (p) Guatemala's failure to evaluate all relevant factors for the examination of the impact of the allegedly dumped imports on the domestic industry is inconsistent with Article 3.4.

9.2 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Guatemala has argued before us that the violations it committed under Articles 5.5, 6.1.3 and 12.1 did not cause nullification and impairment to Mexico. We have addressed this issue in section VIII.C.7 of this report and found that Guatemala failed to rebut the presumption of nullification or impairment in Article 3.8. As for the rest of the violations incurred by Guatemala, we conclude that to the extent that Guatemala has acted inconsistently with the provisions of the AD Agreement, as described in paragraph 9.1 *supra*, it has nullified or impaired the benefits accruing to the Mexico under that agreement.

9.3 The Panel recommends that the Dispute Settlement Body request Guatemala to bring its measures into conformity with its obligations under the WTO Agreement.

9.4 Mexico requests us to make certain specific suggestions on ways in which Guatemala could implement the Panel's recommendation. Specifically, Mexico asks us to suggest that Guatemala "revoke the anti-dumping measure adopted against imports of Mexican cement and refund the anti-dumping duties collected" pursuant to that measure.⁸⁹²

9.5 In considering Mexico's request, we first recall that Article 19.1 of the DSU provides in relevant part that:

"When a Panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned [footnote omitted] bring the measure into conformity with that agreement.[footnote omitted]. In addition to its recommendations, the panel or Appellate Body *may suggest ways in which the Member concerned could implement the recommendations*".(emphasis added).

⁸⁹² Mexico first submission, p. 101.

Therefore, by virtue of Article 19.1 of the DSU, panels have discretion ("may") to suggest ways in which a Member could implement the above recommendation. Clearly, however, a panel is not required to make a suggestion should it not deem it appropriate to do so.

9.6 We have determined that Guatemala has acted inconsistently with its obligations under the AD Agreement in its imposition of anti-dumping duties on imports of grey portland cement from Mexico. We have found these violations to be of a fundamental nature and pervasive. Indeed, in general terms we have found that:

- (a) 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;
- (b) Guatemala conducted the anti-dumping investigation in a manner inconsistent with its obligations under various provisions of the AD Agreement;
- (c) An unbiased and objective investigating authority could not properly have determined that the imports under investigation were being dumped, that the domestic producer of cement in Guatemala was being injured and that the imports were the cause of that injury.

In light of the nature and extent of the violations in this case, we do not perceive how Guatemala could properly implement our recommendation without revoking the anti-dumping measure at issue in this dispute. Accordingly, we suggest that Guatemala revoke its anti-dumping measure on imports of grey portland cement from Mexico.

9.7 In respect of Mexico's request that we suggest that Guatemala refund the anti-dumping duties collected, we note that Guatemala has now maintained a WTO-inconsistent anti-dumping measure in place for a period of three and a half years. Thus, we fully understand Mexico's desire to see the anti-dumping duties repaid and consider that repayment might be justifiable in circumstances such as these. We recall however that suggestions under Article 19.1 relate to ways in which a Member could implement a recommendation to bring a measure into conformity with a covered agreement. Mexico's request raises important systemic issues regarding the nature of the actions necessary to implement a recommendation under Article 19.1 of the DSU, issues which have not been fully explored in this dispute. Thus, we decline Mexico's request to suggest that Guatemala refund the anti-dumping duties collected.
