MEXICO – Definitive countervailing measures on Olive Oil from the European Communities

(WT/DS 341)

Comments
of the European Communities
to the Answers of Mexico to
the Questions
of the Panel
after the Second Substantive Meeting

Geneva 15 November 2007
I. PROCEDURAL CLAIMS

A. Article 13.1 of the SCM Agreement: Invitation to consultations

Question 98 (Mexico)

Do you agree with the EC argument that Article 13.1 of the SCM Agreement requires investigating authorities to send the invitation to consultations sufficiently in advance of initiation so that it would be possible to hold consultations prior to initiation? If not, why not?

1. Regarding the events leading up to the consultation please refer to the EC's answer to Question 101.

Question 101 (Both Parties)

Why were consultations not held between 4 and 16 July?

2. The document referred to by Mexico (CB D (2003) 602) has already been presented to the panel as Exhibit EC-14. This letter agreeing to consultations was sent by the EC and received by Economía on Friday, 11 July 2003 (see the date in the round rubber stamp of the "Secretaría de Economía, Oficialía de Partes" at the right bottom of the EC's letter), rather than 15 July as stated by Mexico in its response to this question. The EC considers that Mexico's distortion of the facts and the evidence on this issue is contrary to Article 3.10 of the DSU, which provides that "all Members will engage in these procedures in good faith".

3. Furthermore, as the EC explained in its answer to this question, the date for consultations was fixed by Mexico on Monday, 14 July 2003 to be held on 17 July 2003 (as evidenced by the EC’s internal communications in Exhibit EC-40). Finally, the EC would like to stress once again that only Mexico was aware of the date of publication.
B. Application by or on behalf of the domestic industry: Article 11.4 of the SCM Agreement

Question 103

The Panel, in Question 17, asked you to detail Economía's efforts to investigate the existence of other producers besides Fortuny prior to initiation. In response, you referenced the application and information attached in the appendices to that application, such as the article in Claridades Agropecuarias. Did Economía look at any other sources or seek any additional information prior to initiation?

4. The EC has no further comments to make on Mexico's answer to this question.

Question 104 (Mexico)

Item L in paragraph 18 of the Initiation notice references letters from the Government of Baja California which were submitted to Economía prior to initiation. Can you please indicate whether these letters are the ones contained in Exhibit MEX-39? If this reference is to letters in addition to or other than the ones contained in Exhibit MEX-39, please provide the Panel with all of the correspondence referenced in Item L of paragraph 18.

5. No comment.

Question 105 (Mexico)

What was Fortuny doing as a business in 2002? Did it continue other activities during April – December 2002, including marketing, distribution, advertising, and maintaining its equipment and/or its olive plantations? Please answer the following questions, unless specified otherwise, for the periods of January – March 2002 and April – December 2002 and indicate whether the information was contained in either the application or Fortuny's response to the Prevencion:

(a) Did Fortuny produce olive oil from November 2001 through March 2002? If yes, what happened to this olive oil?

(b) Did Fortuny make any sales or attempts to sell olive oil during the subsidization POI? Please provide information from the record of the investigation that demonstrates this, or if it is already before the Panel indicate in which exhibits the information is contained.

(c) When exactly did Fortuny approach the retail stores to sell their product? We refer Mexico to paragraphs 321-323 of the Final Resolution.

(d) What happened to Fortuny's inventories of olive oil from April to December 2002 and afterwards?
(e) How many employees did Fortuny retain from April to December 2002 and what were their responsibilities?

(f) Did Fortuny continue to maintain its olive plantations in 2002? What did it do with the olive trees and the fruit from them in 2002?

(g) What steps did Fortuny take with respect to developing a brand name and marketing olive oil during 2002 and when? In March 2002, did Fortuny have its own brand?

(h) In March 2002, did Fortuny have its own bottling facilities and distribution network?

6. In its reply, Mexico confirms that Fortuny was not producing olive oil between April and December 2002 (the period chosen for the investigation on the existence of subsidisation). The EC has highlighted on several occasions the implications of the lack of production on the application to the facts of this case of concepts of domestic industry, injury to the domestic industry, and causation.

7. Focussing on the period of investigation (subsidy), the EC notes that:

1) Fortuny could not constitute "domestic industry". Not only Fortuny was not producing olive oil, but it also brought all of its business activities to a halt. Thus, it also stopped production of table olives, it did not sell olive oil, it did not have stocks of olive oil, it did not have employees, it no longer owned olive groves because of the company split-up and the groves it could buy back were not in good conditions. These elements reinforce the EC's arguments that Fortuny could not constitute domestic industry within the meaning of Article 16 SCM.

2) Under these circumstances, it is impossible to conduct a meaningful analysis of the injury factors listed in Article 15.4 SCM, even assuming (quod non) that imports of olive oil were "subsidised products": there is no production, sales,

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1 See the text corresponding to footnote 5 in Mexico's replies.
2 Mexico's reply to Question 105(b).
3 Mexico's reply to Question 105(d).
4 Mexico's reply to Question 105(e).
5 Mexico reply to Question 105 (f) and references therein.
6 See e.g. EC First Written Submission paras. 161 and following, EC Reply to Question 135.
market share, productivity, return on investment, utilisation of capacity, prices, cash flow, inventories, employment, wages, growth. Mexico therefore failed to make a proper determination of injury in accordance with Article 15.1 and 15.4 SCM.  

8. The EC would like to mark its disagreement with the alleged link between Fortuny's suspension of activities on table olives and the EC aid scheme for table olives. Table olive imports do not fall under the scope of this proceeding, and this allegation is deprived of any evidence. In fact, Fortuny's complete halt of all of its activities seems to point to the existence of overall business problems (probably relating to the split-up of the previous group), rather than specific difficulties in the area of olive oil.

9. Finally, the EC notes that Mexico has not answered the question concerning bottling (question 105(h)), thus raising the doubt that Fortuny did not have its own bottling facilities. This would be consistent with our understanding of the olive oil production chain (EC-32 and answer to question 122), where bottling is not done by producers (mills), and would further reinforce the doubt that Fortuny could not sell olive oil because of endogenous problems.

**C. Article 13(b)(i) of the Agreement on Agriculture**

**Question 106 (Both Parties)**

What effect does the expiration of Article 13(b)(i) of the Agreement on Agriculture during the pendency of the olive oil investigation have on the temporal application of this provision on Mexico's investigation in this case? Is there any public international law with respect to treaty interpretation that is relevant on this issue, i.e. on the applicability of expired treaty provisions to processes that were ongoing at the time of expiry?

10. The EC has no further comments to make on Mexico's answer to this question.

**Question 107 (Mexico)**

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See e.g. EC First Written Submission, paras.177 and following and paras. 211-212; EC Second Written Submission para. 53 and following.
Please explain the legal basis for your interpretation that showing "due restraint" as required by Article 13(b)(i) of the Agreement on Agriculture is no more than what would be required for any initiation of a countervailing duty investigation under Article 11 of the SCM Agreement? If your interpretation is true, what would be the purpose of including the requirement in Article 13(b)(i)?

11. The EC has no further comments to make on Mexico's answer to this question.

**Question 111 (Mexico)**

Please confirm whether you agree with the European Communities' assertion that its domestic subsidies conform fully with Article 6 of the Agreement on Agriculture.

12. The EC takes note of Mexico's answer to this question, which relates to a defence that Mexico has never put forward before the Panel.

**D. Article 12.4.1 of the SCM Agreement – Provision of non-confidential summaries**

**Question 113 (Mexico)**

What is Economía's practice with respect to when an interested party blanks out confidential information, but provides no summary. What steps does Economía take in this situation? Please identify the governing law or regulations with respect to submission of confidential information, the provision of non-confidential summaries, and the assertion of "exceptional circumstances" in the sense of Article 12.4.1.

13. The EC has no comments to make on Mexico's answer to this question.

**Question 114 (Both Parties)**

What is the obligation precisely in Article 12.4.1? What are an investigating Member's obligations under this provision?

14. The EC has no further comments to make on Mexico's answer to this question.
Question 115 (Both Parties)

If interested parties invoke "exceptional circumstances" for each document submitted which contains confidential information is this practice consistent with the letter and spirit of Article 12.4.1?

15. The EC has no further comments to make on Mexico's answer to this question.

E. Article 12.8 of the SCM Agreement – Essential facts

Question 118 (Mexico)

Would Mexico please provide the Panel with its views as to how an investigating authority should distinguish between information constituting an essential fact and information which, as quoted from the Mexican response to question 38, "confirmed the relevance of the essential facts."

16. The EC notes that Mexico does not answer the question.

Question 119 (Mexico)

Were documents gathered after the publication of the Preliminary Resolution, such as the verification report of Fortuny, placed on the record of the investigation? If yes, were the parties allowed to comment on them?

17. The EC notes that Mexico in its reply refers in general terms to "todos los documentos" on which the investigating authority based its conclusions but finally gives evidence of disclosure only for the verification-visit report. The verification report was indeed on the record (MEX-5) and the EC has received it. The EC never said the contrary in any of its submissions to the Panel and did not mention it in its reply to Question 120, where the EC defined and listed essential facts. Mexico's reply confirms that the EC's claim is well-founded.

18. The EC would like to take this opportunity to clarify that the problem with the report of the visit to Fortuny is twofold: it is not sufficiently disclosed and it does not contain all conclusions of the investigating authority. Please note that none of
the documents indicated in the annex list (which contain data on sales, employment, production and the business plan) was summarized and no meaningful justification for the lack of indexation was given. Therefore, it remained unverifiable for interested parties whether the investigation indeed confirmed the information provided by Fortuny and, in particular, whether the installations that Economía has seen effectively produced olive oil and not another type of oil (data on sales refers also to "non investigated products" without any further specification) and which was the origin of the olives. It was not explained which kind of "technical and financial support" Fortuny obtained from a mysterious other company in order to restart production in 2004 and why they needed such support. Further, there was important information missing (the inventories) which was not provided and no indication is given whether Economía has further requested and obtained it. When Economía spotted inconsistencies ("diferencias") with the information previously submitted by Fortuny, it took note without concluding (see volumes of sales in January and March 2002; production in April 2001 and March 2002).

II. CLAIMS CONCERNING THE CONDUCT OF THE INVESTIGATION AND THE FINAL AFFIRMATIVE DETERMINATION

A. Existence of subsidization and calculation of benefit: Article 1.1 and Article 14 of the SCM Agreement

Question 122

In response to Panel question 43, the European Communities stated that the oil obtained by simple crushing is an input into the product finally exported.

(a) Please explain to the Panel how the product which is exported differs from the oil obtained from the simple crushing? (for the European Communities only)

(b) For clarification, what exactly is the product exported to Mexico?

19. The EC draws the attention of the Panel to the explanations given in the EC response to this question, which contain elements, notably in para. 54, which have not been addressed by Mexico in its response.
Question 123 (Both Parties)

Is the olive oil generated by simple crushing of olives within the scope of the Mexican countervailing duty order as set forth in the Final Resolution?

20. The EC has no further comments to make on Mexico's answer to this question.

B. Definition of domestic industry: article VI:6 of GATT 1994 and article 16 of the SCM agreement

Question 128 (Mexico)

In paragraph 168 of your Second Written Submission, you state that the existence of the domestic industry must be determined "on the basis of various factors". Please indicate which "factors", and the legal basis for your conclusion that these are the appropriate factors to be examined pursuant to the SCM Agreement?

21. The EC notes that Mexico has once again failed to provide a legal justification for its notion of domestic industry.

Question 129 (Mexico)

The letter from the government of Baja California in Exhibit MEX-49-D states that there are 2,300 irrigated hectares and 1,700 "temporada" hectares in the agricultural zone, 40% of which are devoted to olive oil. How many tons of olive oil can be produced from 40% of the available hectares? Would such an amount be consistent with the production data provided by Fortuny?

22. The business plan of Fortuny provides for buying the 40% of the olive production of Baja California and Sonora to transform them to olive oil. However Fortuny has only "a plant with capacity for processing the various grades of olive oil: virgin, extra virgin and refined".\(^8\) Therefore, the olives purchased have to be transported to the unique olive mill of Fortuny. The area of Baja California is 69,921 km\(^2\) and that of Sonora 182,052 km\(^2\). The transport by lorry of olives in long distances damages the olives, and to produce edible virgin olive oil the olives have to be treated preferably within 24 hours from harvesting. Under these circumstances it is

\(^8\) Paragraph 189 of the final Resolution.
extremely difficult to get edible virgin olive oil from these olives. This could be the case for the virgin olive oil to be produced by the olive plantation of Fortuny (304 hectares Mexican, according to Mexico's reply to Question n. 131), provided that its mill is located close or in its farm and the olive plantation of Fortuny is not dispersed in many farms/ranchos all around Baja California.

Question 130 (Mexico)

In reference to Exhibit MEX-49-F, please explain the meaning of the numbers in the table on page 3, in the third column entitled "Capacidad de Produccion? The third column includes references to specific number of tons, then the words "aceitunas de mesa" and/or "aceite". Do the references in this chart to "aceite" refer to capacity to produce olives for oil, or to capacity to produce olive oil? Please refer to and provide substantiation from the record for your answer. Is this not a table concerning olive plantations?

23. Mexico's reply to this question does not disprove that there was doubt as to whether there were, or were not, producers of olive oil other than Fortuny in Mexico at the time of the investigation, on the contrary. The second table in this reply, third column shows information received from the Government of Baja California which makes reference to "capacidad de producción" and gives indications for 12 companies, one of which is Fortuny. For six companies, other than Fortuny, tonnages for "aceite y aceituna de mesa" are mentioned in exactly the same way as for Fortuny under this column. What is it that makes these companies different from Fortuny? Why is, based on this information, Fortuny considered a producer, but not the others? The EC also notes that the plain meaning of the expression "aceite y aceituna de mesa" is "oil and table olives". If Baja California meant to indicate table olives and olives for the production of olive oil, it would have said "aceituna de mesa y aceituna de aceite". Although this information and other information obtained from the Government of Baja California in 2003 and 2004 in this context were inconclusive, Mexico did not endeavour to further clarify this crucial issue at the time. The fact that Mexico asked for clarification from the Government of Baja California now, in October 2007(Exhibits MEX-60), clearly shows that the doubt persists until today.

24. Moreover, even if this issue was dealt with adequately during the investigation, Mexico's investigation still would not have been in compliance with WTO
requirements, since according to article 11.4 of the SCM agreement "an investigation shall not be initiated (...) unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry". In short, not only has Mexico performed this examination inadequately, but more importantly, it has done so too late in the proceeding, and thus the initiation of the investigation was in breach of WTO rules.

Question 131 (Mexico)

In the table at page 3 of Exhibit MEX-49-F, Fortuny's capacity to produce is listed as 1,200 tons for "aceite" and "aceitunas de mesa".

(a) How does this figure reconcile with the information provided by Fortuny in the Prevención, that it has the ability to process 120 tons of olives daily with a yield of approximately 22 tons of olive oil?

(b) How does this figure reconcile with the production figures for Fortuny provided in its original application?

(c) Explain how Economía interpreted these documents such that it found no evidence of other olive oil producers? Please refer to and provide substantiation from the record for your answer.

25. The EC refers to its comments to Mexico's answer to the Panel's Question n. 130.

26. Moreover, the EC would like to point out that Fortuny's business plan is based on buying 12,000 tonnes of olives (out of a total of feasible volume of 14,609 tonnes) from Baja California and Sonora in order to produce olive oil. If the "Agro-industrias de Oliva en Baja California" decide to use olives only to produce olive oil, they may sell to Fortuny around 3,300 tonnes of olives. As a consequence the rest of the targeted quantity (around 8,700 tonnes) has to be bought from farms situated outside Baja California. Under these conditions the production of edible virgin olive oil is extremely difficult (see also the EC comments to Mexico's answer to the Panel's Question n. 129).

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9 See table in Mexico's Reply to the Panel's Question n. 130 – assuming (quod non) that these quantities refer only to olives (see EC comment to Question 130 above).
Question 132 (Both Parties)

Please define the terms: "aceite", "aceitunas de mesa" and "aderezo." Are they different products?

27. The EC would just like to point out that the definition of "encurtir" given by the "Diccionario de la Real Academia Española de la Lengua" is not, generally speaking, valid to describe the treatments made to the olives aimed at making them edible. The substance/procedure used normally to treat olives is not vinegar but lactic acid, salt or anaerobic and thermal processes.

Question 133 (Mexico)

What was Ybarra doing during the period of investigation and thereafter? After the split of Fortuny and Ybarra, was Ybarra Fortuny's main competitor?

28. In its reply, Mexico purports Distribuidora as becoming one of Fortuny's competitors as a consequence of the low prices of imports form the EU. This reorientation of Distribuidora's suppliers is then generalised on the entire Mexican market to show that "domestic olive oil was replaced by products from overseas in 2002".

29. The EC disagrees with this picture and with its consequences for the purpose of the olive oil investigation. Economia overlooked the fact that, up to December 2001, Distribuidora and Fortuny were related companies. If Fortuny suffered any injury because of alleged subsidised imports imported by Distribuidora, this injury would be self-inflicted.

30. Concerning the relation between Fortuny and Distribuidora, reference is made to the EC's comments to question 154 below.

Question 134 (Both Parties)

What does the term "established domestic industry" in Article VI:6(a) of GATT 1994 mean? If the industry was producing at some point during the period of investigation would it qualify as an "established" industry for the purposes of this provision?
31. Mexico’s criteria for an ‘established’ industry are actually criteria for the mere existence of an activity (not necessarily involving output). Mexico refers to ‘concrete and evident reality’. If this is the test of an established industry presumably Mexico believes that an entity without a concrete and evident reality may nevertheless constitute an (unestablished) industry, whereas in fact it constitutes no kind of industry at all (please see also EC comments to Question 105).

Question 136 (Mexico)

(deleted for confidentiality reasons)

32. 

C. Determination of injury: Articles 15.1 and 15.4 of the SCM Agreement, and VI:6 of the GATT 1994

Question 137 (Mexico)

Given that the POI for subsidization was April to December 2002 and there was no production during that period, on what basis did you conduct your examination of the effect of the imports found to be subsidized on prices of the domestic like product and the consequent impact on the producers of the domestic like product?

33. Effect on prices is based either on prices anterior to the POI or on projected, potential prices estimated by the applicant and refers to a period in the future, but not to the POI for subsidization from April to December 2002. Therefore the content of the reply to this question itself proves that effects and impacts cannot be shown for the POI of subsidization. All information provided is based on the alleged impediment to restart production and the so called "Project to restart operations".

Question 138 (Both Parties)

What are the types of "effects" and "impacts" that can be examined by an investigating authority in making an injury determination consistent with Articles 15.1 and 15.4 of the SCM Agreement and Article VI:6(a) of GATT 1994? Can the inability to sell at a price that would cover the cost of production, and therefore the inability to currently produce, be a
consequent impact on the producers of the domestic like product from the subsidized imports?

34. Economía clearly indicates that the effects and impacts in Article 15.1 and 15.4 apply to all types of injury, retardation of the establishment and material injury ("no distingue entre los factores a evaluar para uno y otro caso"). This is in line with the fact that there is only one definition of industry (the one of Article 16.1 - which requires output) that applies to both paragraphs. Therefore, as explained in detail in the EC reply to this question and above, the analysis of the effects and impacts is based on the data of a producing industry. Moreover, all the factors (and not just one) contained in Article 15.4 must be evaluated.10

Question 139 (Mexico)

Please indicate what data were used for the determination of the effects and impacts of subsidized imports on Fortuny during the period April-December 2002. Please refer the Panel to where in the administrative record this information can be found, and please provide it to the Panel if it is not already before the Panel.

35. April-December 2002 is the investigating period for subsidisation. The injury period is longer in order to allow the analysis of trends over time. But it is only by comparing the results of the injury and subsidy analysis during a common, overlapping period that any causal link can be established.11 In the case under analysis the subsidisation period starts after the shut-down of Fortuny. Therefore, Economía's reply that it was a "hecho de que debido al precio al que ingresaron a México las importaciones subvencionadas éstas impidieron la reapertura de actividades por parte de Fortuny" lacks any basis.

36. Furthermore, no data were available to make an injury calculation given that, as explained in the reply to Question 138, the injury analysis has to be based on data of a producing industry and prices can not be constructed, as done by Economía. This practice has no basis in the Agreement. The use of projections in the future (business plan), as described by Economía in its reply, cannot substitute data of a

10 Please see EC First Written Submission, paras. 210 and following, relying on the Appellate Body findings in Thailand – H-Beams.
real producing industry. The alleged likelihood of production is not a criterion to establish material injury.

Question 140 (Mexico)

Were the data used to calculate Fortuny's projected costs and prices for the April – December 2002 period adjusted for inflation or any other possible changes in the economic situation from the historical period to 2002?

37. The EC would like to recall that no undercutting calculation was provided for the period April to December 2002.12

Question 141 (Mexico)

Why did Economía select the period April to December 2002 as the POI for subsidization?

38. Mexico argues that there is a presumption in favour of whatever investigation period an authority has selected. Any such presumption amounts to no more than the normal burden of proof that lies on the complainant. As the EC has explained in its First Oral Statement (para. 117), the choice of the length of the investigation period is subject to the general ‘objective examination’ requirement of Article 15.1 of the SCM Agreement. In this case the choice of a nine rather than twelve month period of investigation was a factor contributing to the failure of its injury investigation to satisfy the requirements of the Agreement.

Question 142 (Mexico)

In paragraph 347 of the Final Resolution, Economía refers to declines in total income from olive oil sales from 2000 through 2002. Was there evidence on the record as to whether Fortuny made sales of olive oil during the period April to December 2002? Please provide the relevant citations to the administrative record, and the relevant evidence if not already before the Panel.

39. Please see the EC comments to Question 105.

11 Reference is made to EC Second Written Submission, paras. 57-59.
12 Reference is made to table 6 at para. 313 of the Final Resolution.
D. Causation: Article 15.5 of the SCM Agreement

Question 146 (Both Parties)

How is the world price for olive oil determined? Do the subsidies provided by the EC affect the world price for olive oil? If so, how? If not, why not?

40. The EC refers to its answer to this question and to its submissions in these proceedings.

41. The EC would also underline that, in a free market economy, prices are not determined by the state but by the market. In the particular case of olive oil this is very evident from the wide base of the production structure of the olive oil sector in the EC, the main world olive oil producer. In addition, Spain is the biggest producer in the EC but has the lowest prices because it is an excedentary market like Greece. Italy is a deficitary market and therefore has, in principle, higher prices. This proves that market forces (supply and demand) determine the level of the world price of olive oil, as it has been shown in the price graphs submitted by the EC to the Panel.

Question 148 (Mexico)

After the Preliminary Resolution, what requests for information or additional analysis did you complete with respect to "other known factors" also causing injury to the domestic industry, in particular changes in consumption patterns, fall in demand, and the movement of international prices. Please provide the Panel with references to citations in the Final Resolution or with any internal memoranda that were prepared on this issue.

42. The EC has no further comments to make on Mexico's answer to this question.

Question 149 (Mexico)

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13 See EC First Written Submission, paras. 18 to 22, and EC Replies to the Panel's Questions n. 50 and 51.

14 EC Second Written Submission, pages 19-21, and EC Reply to the Panel's Question n. 146.
For each of the "other known factors" identified by the European Communities in its First Written Submission, explain how you analyzed whether they were causing injury. Please cite to specific paragraphs in the Preliminary and Final Resolutions where these factors were discussed, and provide references to supporting evidence on the administrative record.

43. Mexico's reply shows that some information pointing to other factors was indeed on the record. As the EC has explained in detail in its previous submissions, this information was not adequately analysed and taken into account. Therefore, Economía's conclusion that obvious other factors - such as loss of brand, high production costs, supply of raw material or loss of distribution network - did not have any impact on Fortuny's situation is simply unsustainable, since these factors led to the disappearance of Fortuny even before the investigation period (Fortuny came into existence in October 2001 and stopped production in March 2002). A proper analysis would have shown that the shut-down of Fortuny was due to these other factors and not to the allegedly subsidized imports. Thus, no objective examination was performed.

Question 151 (Both Parties)

Please confirm your statements made at the Second Substantive Meeting that Exhibit EC-31 was not on the record of the investigation.

44. The EC refers to its answer to this Question.

Question 152 (Mexico)

In response to Panel Question 18, you reproduced a graph from paragraph 333 of the Final Resolution, which shows a steep decline in domestic production volume from 1999 through 2002, with zero production for 2003. The EC has confirmed that its subsidy program has existed since the 1960s. What changed between 1999 and 2003 that caused such a decline in domestic production so that that decline can be attributed to injury from the subsidized imports? Please explain with reference to documents on the administrative record, including relevant passages in the Preliminary and/or Final Resolutions.

45. The only element that changed between 1999 and 2003 was the split of Distribuidora and Fortuny as mentioned in Mexico's reply under (c) and (d).

15 EC First Written Submission, para. 221; EC Replies to the Panel's Question n. 90, at para. 127, and EC Second Written Submission, paras. 60-78.
Moreover, Mexico's statement under (a) that the investigating authority had determined that EC imports were subsidized during the period 2000 to 2002 is flawed. The investigation period for subsidisation covered only the months from April to December 2002. Not even during this period did Mexico show that the subsidy paid to the olive growers was reflected in the price of the product exported to Mexico, let alone for the whole period between 2000 and 2002. The investigating authority cannot determine that the imports into Mexico were subsidized simply by stating that the subsidy scheme existed since 1966. A subsidy does not exist in the abstract, and the EC reiterates that Mexico failed to show that the product exported to Mexico was indeed a subsidised product.

Question 153 (Mexico)

What analysis did Economía conduct with respect to the impact of the loss of the "Ybarra" brand and Fortuny's attempts to establish its own brand on Fortuny's ability to sell olive oil during 2002. In your answer please refer to specific record documents. If the documents are not already before the Panel, please provide them.

46. Reference is made to the EC reply to Question 151 and to paras. 71-75 of the EC Second Written Submission.

Question 154 (Mexico)

It is the Panel's understanding from the Final Resolution that Ybarra was purchasing oil from Fortuny up until March 2002. Please explain the following, referring to specific record documents. If the documents are not already before the Panel, please provide them:

(a) Did Ybarra purchase all of the oil produced by Fortuny up until March 2002? What was the volume of oil bought?

(b) Was there any kind of agreement or obligation on the part of Ybarra to purchase oil from Fortuny?

(c) When and why did Ybarra stop purchasing olive oil from Fortuny?

47. The EC notes that Economía until the end has failed to provide a clear picture of the relationship between Ybarra and Fortuny, which reflects the fact that this aspect was disregarded during the whole investigation. In particular, Economía has
never explained the reasons why the two companies have split, and the consequences of this.

48. Economía does not reply to the Panel's question and simply reproduces once again the well known paragraphs of the Final Resolution and avoids any reference to the evidence at its disposal, like the letter of Distribuidora Ybarra dated 9 January 2004 (MEX-43-B and MEX 52-C) which, besides mentioning Fortuny's high prices (which is a fact), also explained the reasons why prices were high (which should be the object of an investigation). Distribuidora Ybarra's contributions to the investigation can be summarised as follows:

1. (deleted for confidentiality reasons)

2. high prices were due to the lack of control over both fixed and variable costs by Fortuny, caused by an inefficient administration of this company ("Lo anterior, consideramos que se debió a la falta de control sobre los costos tanto fijos como variables de Fortuny de México, S.A. de C.V., derivado de una ineficiente administración de dicha empresa"); and

3. the price was excessively high for distributors and retailers especially since the brand "Fortuny" was unknown to the consumers, who as a result did not purchase it ("el precio al cual Fortuny de México, S.A. de C.V., pretendía colocar un producto cuya marca no era conocida por el mercado consumidor, resultaba excesivamente alto para los distribuidores y mayoristas, razón por la cual no adquirieron dicho producto").

49. Without any justification Economía did not take into consideration the above elements which clearly show that Fortuny was suffering from self-inflicted injury due to its own unfortunate economic choices. The EC considers that Economía's analysis of other factors was inconsistent and not objective. Measures therefore were in lack of any basis since the real causes of injury were not adequately investigated.