GUATEMALA – ANTI-DUMPING INVESTIGATION REGARDING PORTLAND CEMENT FROM MEXICO

Report of the Appellate Body
WT/DS60/AB/R

Adopted by the Dispute Settlement Body
on 25 November 1998

Guatemala, *Appellant*
Mexico, *Appellee*
United States, *Third Participant*

Present:
Lacarte-Muró, Presiding Member
Beeby, Member
El-Naggar, Member

INTRODUCTION

1. Guatemala appeals from certain issues of law and legal interpretation developed in the Panel Report, *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico*.[1] That Panel was established by the Dispute Settlement Body (the "DSB") on 20 March 1997 with standard terms of reference[2] based on Mexico's request for the establishment of a panel.[3]

2. The relevant facts are to be found in paragraphs 2.1 to 2.4 of the Panel Report.

3. The Panel considered claims made by Mexico concerning Guatemala's decision to initiate an investigation into allegations of dumping of portland cement from Mexico, Guatemala's conduct of that investigation by its authority leading to the preliminary determination, and its conduct of the final stages of the investigation. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 19 June 1998. The Panel considered that its terms of reference entitled it to examine "the matters referred to in Mexico's request for establishment of a panel".[4] The Panel made the following recommendations:

> We ... recommend that the Dispute Settlement Body request Guatemala to bring its action into conformity with its obligations under Article 5.5 of the ADP Agreement.[5]

1 WT/DS60/R.
2 WT/DS60/3, G/ADP/D3/3, 5 May 1997.
3 WT/DS60/2, G/ADP/D3/2, 13 February 1997.
4 Panel Report, para. 7.27.
5 Panel Report, para. 8.4.

> ... we recommend that the Dispute Settlement Body request Guatemala to bring its action into conformity with its obligations under Article 5.3 of the Agreement.[6]

It also suggested that:

> ... Guatemala revoke the existing anti-dumping measure on imports of Mexican cement ... .[7]

4. On 4 August 1998, Guatemala notified the DSB[8] of its intention to appeal certain issues of law covered in the Panel Report and legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal with the Appellate Body, pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 14 August 1998, Guatemala filed an appellant's submission drafted in Spanish.[9] On 31 August 1998, Mexico filed an appellee's submission also drafted in Spanish.[10] In order to ensure that the third participant would have time to prepare its submission after receiving an English version of the appellant's submission, the Appellate Body granted the United States additional time to file its third participant's submission. The United States filed that submission on 14 September 1998.[11] By our ruling of 31 August 1998, we declined Mexico's request that its appellee's submission be withheld from Guatemala and the United States until the end of the time-period allowed to the United States to file its third participant's submission. The oral hearing, provided for in Rule 27 of the *Working Procedures*, was held on 2 October 1998. At the oral hearing, the participants and the third participant presented their arguments and answered questions from the Division of the Appellate Body hearing the appeal.

II ARGUMENTS OF THE PARTICIPANTS AND THIRD PARTICIPANT

A. Guatemala - Appellant

1. Whether the Dispute was Properly Before the Panel

5. Guatemala argues that the Panel erred in concluding that it could examine Mexico's claims concerning the initiation of the anti-dumping investigation. In this respect, Guatemala asserts that the Panel incorrectly interpreted the relationship between the dispute settlement procedures of the *Anti-Dumping Agreement*

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6 Panel Report, para. 8.5.
7 Panel Report, para. 8.6.
8 WT/DS60/9, 4 August 1998.
9 Pursuant to Rule 21(1) of the *Working Procedures*.
10 Pursuant to Rule 22 of the *Working Procedures*.
11 Pursuant to Rule 24 of the *Working Procedures*.

and those of the DSU. It is clear from the wording of Article 1.2 of the DSU and from the opening clause of Article 17.1 of the *Anti-Dumping Agreement* that the provisions of these two covered agreements are to be applied together unless there is a difference between the special or additional rules and procedures contained in Articles 17.4, 17.5, 17.6 and 17.7 of the *Anti-Dumping Agreement* and the provisions of the DSU. Only in that event do the special or additional provisions prevail. According to Guatemala, since Article 17.3 is not mentioned in Appendix 2 of the DSU as a special or additional rule or procedure, it cannot prevail over the provisions of the DSU and must always be read and applied consistently with the DSU, in particular Article 4.4. The Panel therefore erred in disregarding the requirements of this provision. Article 4.4 requires the complaining Member to identify the "measures" at issue.

6. Guatemala submits that the word "difference" in Article 1.2 of the DSU means "contradiction" or "inconsistency". It is only if the special or additional rules contradict or are inconsistent with the provisions of the DSU that the special or additional rule must "prevail" over the provisions of the DSU. If the special or additional rule simply does not include one of the specific requirements of the provisions of the DSU, there is no conflict since it is possible to comply with both sets of rules at once.

7. According to Guatemala, it therefore follows that the Panel erred in considering that Articles 17.4 and 17.5 replace[12] the corresponding rules of the DSU, in particular Article 6.2, because there is no contradiction or inconsistency between them. The Panel did not explain in what way the provisions of the *Anti-Dumping Agreement* differ from Article 6.2 of the DSU. In Guatemala's view, although Article 17.5 is silent regarding the need to identify the measure at issue, it is not in conflict with Article 6.2 of the DSU. A better interpretation of Article 17.5 is that it is an additional rule that requires the request for the establishment of a panel to include a statement regarding nullification or impairment of benefits that is not required under Article 6.2 of the DSU. Given that there is no conflict between the two provisions, the panel request must also satisfy the requirements of Article 6.2 of the DSU and must therefore identify the measure at issue and give a summary of the legal basis for the claims made.

8. As regards the measures that may be contested in an anti-dumping dispute, Guatemala contends that Article 17.4 of the *Anti-Dumping Agreement* is more than a "timing provision". Rather, it limits the types of measure that may be challenged under the *Anti-Dumping Agreement* to the three measures that are specifically identified in Article 17.4: the provisional anti-dumping duty, the final anti-dumping duty and the acceptance of a price undertaking. Furthermore, a provisional measure can only be challenged if the "significant impact" requirement is satisfied. Guatemala asserts that this interpretation of Article 17.4 is

[12] Panel Report, para. 7.16

borne out not only by its wording, but also by its context, object and purpose and the drafting history of the *Anti-Dumping Agreement*.

9. Articles 1 and 18.3 of the *Anti-Dumping Agreement*, which form part of the context of Article 17.4, draw a distinction between an "anti-dumping measure" and "investigations". Thus, an investigation is not a measure. Furthermore, Articles 3.8, 15 and 17.6(ii) of the *Anti-Dumping Agreement* refer to "measures" as distinct from procedural actions or decisions taken during an investigation. Article 13 also limits the obligation to maintain a system of domestic judicial review to review of the final determination and administrative acts related to it. Guatemala considers that the importance of the word "measure" is further underlined by the fact that it appears in Articles 3.3, 3.7, 4.2, 4.4, 6.2, 10.4, 12.10, 19.1, 21.2, 21.8, 22.1, 22.2 and 22.8 of the DSU.

10. According to Guatemala, a broad interpretation of Article 17.4 of the *Anti-Dumping Agreement* and of the word "measure" in this context would permit a Member to seek consultations and the establishment of panels for alleged violations arising from the hundreds of acts or decisions that are taken during the course of an anti-dumping investigation. This could lead to innumerable proceedings concerning a single investigation, and the consequence would be a waste of resources and a strain on the WTO dispute settlement system, while giving Members a way of utilizing that system to exert influence on domestic anti-dumping investigations. Guatemala argues that the true object and purpose of Article 17 is to provide a coherent set of rules for the settlement of anti-dumping disputes that strikes an appropriate balance between the rights of Members to impose anti-dumping measures and the rights of other Members to challenge those measures.

11. In Guatemala's view, the drafting history of the *Anti-Dumping Agreement* also bears out this interpretation of Article 17.4. During the negotiations leading to the conclusion of the Agreement, several countries proposed permitting a challenge to the decision to initiate itself. These proposals were, however, rejected.

12. In addition, Guatemala believes that several Appellate Body Reports substantiate its argument that anti-dumping disputes should be limited to one of the three measures enumerated in Article 17.4. In *Brazil - Measures Affecting Desiccated Coconut* ("*Brazil – Coconut*")[13], the Appellate Body seems to interpret a countervailing measure as something that results from an investigation. In *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("*United States – Shirts and Blouses*")[14], the Appellate Body considered that procedural actions resulting from a measure are not in themselves "measures". Thus, steps in an investigation that either result from or lead to a "measure" are not in themselves "measures".

[13] Adopted 20 March 1997, WT/DS22/AB/R.
[14] Adopted 23 May 1997, WT/DS33/AB/R.

13. Guatemala submits that a proper reading of Article 17.4 of the *Anti-Dumping Agreement* also means that the Panel's broad reading of the word "measure"[15] is wrong since, in the context of the *Anti-Dumping Agreement*, Article 17.4 defines the types of measure that may be challenged and there is no room for such a broad reading.

14. Guatemala adds that although Article 17.4 of the *Anti-Dumping Agreement* limits the types of "measure" that may be contested, there are no restrictions on the "claims" that may be made concerning such a measure. The claims may, for instance, relate to the initiation and conduct of the investigation. Guatemala considers that different considerations apply to disputes brought pursuant to Article 18.4 of the *Anti-Dumping Agreement* since such disputes concern anti-dumping laws, regulations or administrative procedures and not "anti-dumping measures" of the type covered by Article 17.4 of that Agreement.

15. In conclusion, Guatemala submits that the Panel's interpretation of the dispute settlement provisions in the DSU and the *Anti-Dumping Agreement* is wrong in two ways: (1) the Panel erred in considering that it is not necessary for a Member to identify a specific anti-dumping measure in its request for consultations and in its request for the establishment of a panel; and (2) the Panel erred in concluding that the measure may be any of the hundreds of substantive decisions and procedural actions taken during the course of an anti-dumping investigation.

16. As regards the Panel's terms of reference, Guatemala submits that the Panel could not take the view that it had authority to examine claims relating to the final anti-dumping duty. First, as the Panel found, the "matter" referred to the DSB and the "matter" which was the subject of consultations must be the same "matter".[16] In this case, Mexico could not have identified the final measure in its request for consultations since it had not been adopted at that time. The "matter" referred to the DSB could not therefore include that "measure". Furthermore, according to Guatemala, the request for the establishment of the Panel does not, in any event, identify the final anti-dumping duty as the measure.

17. Guatemala observes that the Panel declined to consider whether the provisional anti-dumping duty was properly before it.[17] The Appellate Body should find, therefore, that the Panel did not have jurisdiction to consider any of the claims made concerning the initiation of the investigation or the notification of that initiation. Alternatively, Guatemala refers the Appellate Body to the arguments it made to the Panel concerning "significant impact". It submits that Article 17.4 of the *Anti-Dumping Agreement* requires the provisional measure to have a "significant impact" and this requirement must be met *before* a complaining Member has the right to refer a provisional measure to the DSB. Guatemala contends that Mexico did not claim, still less prove, that the provisional measure had

[15] See Panel Report, para. 7.24.
[16] Panel Report, para. 7.15.
[17] Panel Report, footnote 219.

a significant impact on its trade interests or competitive position. The Panel did not therefore have any authority to examine either the provisional measure or claims made in relation to it.

2. *Interpretation of Article 19.1 of the DSU*

18. Guatemala submits that the Panel erred in interpreting Article 19.1 of the DSU as permitting it to recommend that Guatemala bring its "action" into conformity with its obligations under Articles 5.3 and 5.5 of the *Anti-Dumping Agreement*. This Panel has broadened the powers of panels by allowing recommendations to be made that refer not only to "measures" but also to any "action" taken during the course of an anti-dumping investigation. The Panel, therefore, has acted contrary to the rules of interpretation set forth in Article 31 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*")[18], as it has imported a concept into Article 19.1 of the DSU that is not part of that provision. In Guatemala's view this reading also violates Article 19.2 of the DSU since panels could make wide-ranging recommendations concerning a variety of procedural actions that were not "measures", thereby limiting the rights of Members to conduct investigations.

19. Guatemala also argues that the Panel's suggestion concerning the implementation of its recommendation on the violation of Article 5.3 of the *Anti-Dumping Agreement* violates Article 19.1 of the DSU. According to Guatemala, "suggestions" must refer to the *same* measure as the one which is the subject of "recommendations". Since the final anti-dumping measure was outside its terms of reference, the Panel could not, according to Guatemala, make any "recommendations" or "suggestions" regarding it. Guatemala contends that the Panel's reading of Article 19.1 would give panels discretion to refer to measures that bear no relation to the dispute, that have not been contested and that lie outside their terms of reference.

3. *Presumption of Nullification or Impairment*

20. Guatemala believes that the Panel's reasoning on this issue starts from a mistaken premise. The Panel considers that it is not necessary for the complaining Member to prove that the failure to fulfil an obligation has particular adverse trade effects. This effectively denies Guatemala the possibility of providing evidence to the contrary and converts the *rebuttable* presumption of nullification or impairment that is set down in Article 3.8 of the DSU into an *absolute* one.

21. Guatemala considers that since it led evidence that Mexico's rights of defence were properly safeguarded, despite the late notification under Article 5.5 of the *Anti-Dumping Agreement*, it was for Mexico to prove any specific adverse

[18] Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; (1969), 8 International Legal Materials, 679.

effects or to show how its rights of defence were in fact prejudiced. Guatemala asserts that a rebuttable presumption does *not* shift the burden of proof, but rather it relieves the claimant of the burden of demonstrating a *prima facie* case in its favour. If the other party leads evidence that casts doubt on what the presumption purports to show, then the complaining party must lead further evidence in order to satisfy the burden of proof. This is the proper interpretation of Article 3.8 of the DSU. The defending party may rebut the presumption by proving that the violation had no adverse impact. Guatemala submits that it did just that in this case.

22. First, the *Anti-Dumping Agreement*, unlike the *Agreement on Subsidies and Countervailing Measures* (the "*Subsidies Agreement*"), does not impose any obligation to seek or hold consultations before initiating an investigation, so the failure to give timely notification did not deprive Mexico of any right to consult. Second, no evidence substantiates the argument that timely notification would have given Mexico any opportunity to reach a compromise prior to initiation of the investigation since Guatemala could have initiated the investigation immediately after notifying Mexico. Third, Guatemala did not undertake any concrete steps in the investigation until Mexico had been notified and it then gave Cruz Azul[19] a further period of two months to reply to the questionnaires. Fourth, even if Mexico had wished to reach a compromise before initiation, it had neither the power, the right nor the proper procedure for doing so, as anti-dumping cases cannot be the subject of transactions between governments. Fifth, Mexico's "acquiescence" in the initiation of the investigation over a period of six months shows that it did not have any interest in reaching a compromise.

23. Guatemala also asserts that the Panel's references to *United States – Taxes on Petroleum and Certain Imported Substances*[20] and *Japan – Taxes on Alcoholic Beverages*[21] are irrelevant in this context. These cases deal with substantive breaches that might have an effect on the levels of trade of Members, whereas the present case deals with the breach of a procedural obligation that has nothing to do with levels of trade. Guatemala argues that the Panel also erred in referring to *Brazil - Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community*[22] because this case does not concern nullification or impairment, but rather the application of the concept of "harmless error", which is, in any event, consistent with the normal rule on the burden of proof.

24. Guatemala therefore submits that the Panel erred in its interpretation of Article 3.8 of the DSU.

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19 The Mexican company which is alleged to have dumped portland cement in Guatemala.
20 Adopted 17 June 1987, BISD 34S/136.
21 Adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R.
22 Adopted 28 April 1994, BISD 41S/467, paras. 270 and 271.

4. *Article 5.3 of the Anti-Dumping Agreement*

25. As regards the obligations imposed by Article 5.3 of the *Anti-Dumping Agreement*, Guatemala considers that if an investigating authority determines that an application made under Article 5.2 of that Agreement complies with the requirements of that latter provision and if the authority examines the "accuracy and adequacy" of the evidence accompanying the application, then the authority has discretion to determine that there is "sufficient evidence" under Article 5.3. Furthermore, a panel may not review the authority's determination on whether that evidence is sufficient. In terms of Article 5.3, Guatemala believes that all that a panel may review is whether or not the authority actually examined the "accuracy and adequacy" of the evidence.

26. Guatemala supports this interpretation by reference to the wording of Article 5.2 as well as its context. Guatemala makes reference in that regard to Articles 5.6 and 5.8 of the *Anti-Dumping Agreement* and to Article 11.2 of the *Subsidies Agreement*. It considers that its interpretation is also consistent with the object and purpose of Article 5.3, as defined by the Panel.[23] Guatemala also derives support for its view from the drafting history of that provision.

27. Guatemala considers that the Panel erred in concluding that Articles 2 and 3.7 of the *Anti-Dumping Agreement* are applicable at the initiation stage of an investigation. Article 5.2 of that Agreement lists the type of information that must be provided in an application and it does not mention Article 2. If considerations were imported into Article 5.2 from Article 2, then the specific requirements of Article 5.2 would be rendered redundant. Likewise, although Article 5.2(iv) does provide that paragraphs 2 and 4 of Article 3 are relevant at the stage of initiation, it does not mention Article 3.7. Article 5.2 does not therefore oblige authorities to take account of the factors and indices mentioned in Article 3.7.

28. The Panel also erred in imposing an obligation on investigating authorities that is not contained in the *Anti-Dumping Agreement*. According to Guatemala, the Panel found that when authorities formulate a recommendation or issue the notice of initiation, they must recognize: (1) that during the course of the investigation, it will be necessary to make the adjustments provided for in Article 2 in order to make a fair comparison, or (2) that an examination has been carried out that goes beyond the evidence or information contained in the application. Guatemala contends that the Panel has erred in reaching this conclusion because the *Anti-Dumping Agreement* does not oblige the investigating authority either to acknowledge the need to make adjustments or to examine evidence not included

[23] Referring to the panel report in *United States – Measures Affecting Softwood Lumber from Canada* ("*United States - Softwood Lumber*"), adopted 27 October 1993, BISD 40S/358, the Panel considered that the purpose of Article 5.3 was to establish a balance between the competing interests of the domestic industry in the importing country and the interest of the exporting country in avoiding investigations (Panel Report, para. 7.52).

in the application. The requirement to make adjustments arises under Article 2 only during the course of an investigation.

29. The fact that Articles 2 and 3.7 are not relevant at the stage of initiation is, in Guatemala's view, borne out by Article 12 of the *Anti-Dumping Agreement*. According to this provision, it is only in the case of preliminary and final determinations that the public notice must include information on the comparison of prices and on the considerations relevant to the determination of injury. The notice of initiation need only provide information concerning the basis of the allegations of dumping and injury.

30. At footnote 242 of its Report the Panel declined to consider certain "additional evidence" that Guatemala alleged was taken into account by the investigating authority when it decided to initiate the investigation. The reason for the Panel's refusal was that it could find no trace of this evidence in any part of the file relating to the decision to initiate. Guatemala submits that the Panel was wrong to refuse to admit this evidence because the *Anti-Dumping Agreement* does not oblige the authority to reveal what additional evidence it may have taken into consideration before taking the initiation decision.

31. Guatemala submits that the Panel's interpretation of the word "evidence" in Article 5.3 of the *Anti-Dumping Agreement* is also flawed. The Panel was wrong to find that "sufficient evidence" means something whose accuracy and adequacy can be "objectively evaluated".[24] The Panel has, in reality, added an obligation to Article 5.2 since, as well as being all that is "reasonably available", information provided in an application must now also be capable of objective evaluation.

32. Guatemala maintains that this interpretation of Articles 5.2 and 5.3 of the *Anti-Dumping Agreement*, which it argued before the Panel, was "permissible" and that the Panel, therefore, erred in rejecting it because Article 17.6(ii) of the *Anti-Dumping Agreement* mandates that the Panel shall find a measure to be consistent with the Agreement if it is adopted on the basis of one permissible interpretation of a provision.

33. As regards the Panel's review of the facts, Guatemala submits that it erred in its interpretation of Article 17.6(i) of the *Anti-Dumping Agreement*. According to Guatemala, that provision requires a Panel to accept the authority's evaluation of the facts unless there is a finding, based on positive evidence submitted by the defending party, of bias or subjectivity. Since there was no such finding in the present case, the Panel should have accepted the Guatemalan authority's evaluation of the facts.

34. However, even if positive evidence of bias or subjectivity were not required, Guatemala argues that the Panel improperly interpreted Article 17.6(i) as permitting it to carry out a *de novo* evaluation of the facts. Furthermore, the

[24] Panel Report, para. 7.71.

Panel was wrong to rely on the panel report in *United States - Softwood Lumber*[25], since that panel was concerned with the provisions of a different agreement, namely the *Agreement on Interpretation and Application of Articles VI, XVI and XXIII* (the "*Tokyo Round Subsidies Agreement*")[26], which has no provision like Article 17.6(i).

B. Mexico - Appellee

1. Whether the Dispute was Properly Before the Panel

35. Mexico endorses the Panel's finding that the term "measure" is not restricted to final anti-dumping measures, provisional anti-dumping measures and acceptance of price undertakings. Since neither the *Anti-Dumping Agreement* nor the DSU contains a definition or a special meaning for the term "measure", it should be interpreted broadly and in accordance with its ordinary meaning. According to Mexico, that meaning includes "any action or act carried out to achieve a particular end". The text and context of the *Anti-Dumping Agreement* and the DSU show that Article 17 of the *Anti-Dumping Agreement* does not support Guatemala's argument that the only measures which may be contested are those enumerated in Article 17.4.

36. Mexico agrees with the Panel that Article 17.4 itself is simply a "timing provision".[27] The provision does not include language that would limit disputes under the *Anti-Dumping Agreement* to three types of measure. Indeed the English version of the provision does not mention final measures at all, but refers only to whether "final action has been taken … to levy definitive anti-dumping duties or to accept price undertakings … ". Article 17.3 also permits, as the Panel found [28], consultations about any "matter" without limit on the types of measure that may be contested. Likewise, Article 17.5 does not specifically make reference to any of the three measures Guatemala cites. It refers simply to the "matter". Mexico adds that it does not consider that the Panel found that Article 17.3 is a special or additional rule. All the Panel stated was that "if Article 17.3 requires something different from the corresponding Article 4 of the DSU, the provisions of Article 17.3 must prevail, otherwise Article 17.4 would not be given full effect".[29]

37. In Mexico's view, Articles 1 and 18.3 of the *Anti-Dumping Agreement* show, at most, that a "measure" is different from an "investigation". But that does not mean that the only measures that may be contested are those mentioned in Article 17.4. Other provisions of the *Anti-Dumping Agreement* confirm the conclusion that, in that Agreement, the word "measure" means more than final anti-dumping measures, provisional anti-dumping measures and acceptance of price

[25] Adopted 27 October 1993, BISD 40S/358.
[26] BISD 26S/56.
[27] Panel Report, para. 7.18.
[28] Panel Report, para. 7.14.
[29] Panel Report, para. 7.13.