

# WORLD TRADE ORGANIZATION

RESTRICTED

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**Committee on Anti-Dumping Practices  
Ad Hoc Group on Implementation**

**COMPILATION OF INFORMATION PROVIDED BY MEMBERS CONCERNING  
HOW DISCLOSURE OF ESSENTIAL FACTS IS ACCOMPLISHED BY  
NATIONAL INVESTIGATING AUTHORITIES**

As requested by the Ad Hoc Group on Implementation at its October 1998 meeting, this document compiles information submitted by Members concerning how their domestic investigating authorities undertake disclosure of essential facts.

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**Document G/ADP/AHG/W/6 (Chile)**

Topic 7 - Provision of essential facts under consideration before making a final determination under Article 6.9

Our practice in this area is based on written notification to the concerned parties of the essential facts of the investigation. The notification summarizes the information in the public record of the investigation. Its purpose is to make known to the concerned parties the background, data and information obtained during the investigation relating to the dumping and the injury it has caused, the source of this information, and the methodology used to calculate the margin of dumping, all of which serves as a basis for the final decision by the investigating authority. This notification is made in writing to the domicile of the concerned parties.

The notification contains three sections:

The first provides general background information relating to the initiation of the investigation, description of the product being investigated, concerned parties, and likeness of the imported product to the domestic product.

The second section concerns dumping and outlines the methodology for the calculation of the dumping margins (including any adjustments) and the source of the data for the normal value and export price.

The third section refers to the injury caused to the domestic industry by the dumping. It contains information on domestic prices, production costs, profit margins, installed capacity and utilization thereof, imports, production, sales, apparent consumption etc., as well as all the economic factors and indices relating to the domestic industry available to the investigation. Where appropriate, reference is made to the type of economic tool or analysis used to evaluate causality and injury (Granger Test, economic modelling and so forth).

With regard to the timing for making the determination of essential facts, it was thought best that this should be done at a date sufficiently close to that of the final determination so that the Commission already possesses virtually all the information needed to reach a decision, while at the same time leaving sufficient time for parties to be able to make their comments, defend their viewpoints and even submit some final information. For this purpose a period of 15 days from the notification is allowed for parties to be able to make their observations.

This practice has resulted in the notification of essential information being a specific and easily identifiable stage within the investigation process. It has meant that the parties know that they have the opportunity to raise the items they consider important for the investigation to reach the right decision, and that with the information available in the public record they can review the calculations and methodology used by the Commission and possibly submit criticisms or corrections thereto.

## **Document G/ADP/AHG/W/18 (Brazil)**

### **Topic 7 - Provision of essential facts under consideration**

In accordance with Article 6.9 of the Anti-Dumping Agreement "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 shall take place with sufficient time for the parties to defend their interests".

Brazil's compliance with this provision is made through the convocation of a final hearing where the essential facts under consideration are provided in written form (this report is annexed to the investigative process). Interested parties have the opportunity to present comments orally and to submit, within 15 days, their views in written form. Information received after the conclusion of this final comment period, which marks the end of the investigation *per se*, is not taken into consideration for purposes of the final determination.

The report of the essential facts under consideration contains the following: a summary of the investigation procedure; a description of the product under investigation and of the like product; a definition of the domestic industry; the degree of representation of the applicant and the degree of support for the application; the elements of dumping (normal value, export price, methodology to calculate dumping margins); data related to the imports that are the object of dumping; the prices and the evolution of the participation of dumped imports in apparent consumption; the data relative to the domestic industry (production, sales, market share, installed capacity, profit margins, employment,

productivity, stocks, exports, economic and financial analysis, among others, and information relative to other factors); the views and allegations of interested parties.

The objective of presenting the essential facts under consideration to the interested parties is to provide transparency to the investigation and to allow parties to comment on the above-mentioned facts, to offer clarifications on specific points, to provide other points of view to the investigative authorities and to comment and, eventually, suggest corrections on calculation and methodology.

The presentation of the essential facts under consideration by the investigative authorities shall not involve an analysis of merit or advance what will be the final determination since this has still not been reached and the comments of the parties may influence final results.

## **Document G/ADP/AHG/W/27 (United States)**

### Introduction

Article 6.9 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-dumping Agreement) provides that, before a final determination is made, authorities shall inform all interested parties in an anti-dumping investigation 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."

The United States Department of Commerce (the Commerce Department or the Department) and the United States International Trade Commission (the Commission), in the interests of transparency, have long maintained procedures for disclosing to parties the facts underlying their anti-dumping determinations. The procedures address the disclosure of essential facts, procedures, and calculations leading to definitive measures in anti-dumping proceedings.

Information that is submitted on a timely basis to the Commerce Department or the Commission is subject to comment by other parties to the proceeding within such reasonable time as the Department or the Commission may provide. Both the Commerce Department and the Commission, before making a final determination, cease collecting information and provide the parties with opportunities to comment on information obtained.<sup>1</sup>

### Department of Commerce Procedures

The Commerce Department, which is charged with calculating the actual margin of dumping in an anti-dumping investigation, acquires most of its factual information in anti-dumping investigations from submissions made by interested parties during the course of the proceedings. Those interested parties are permitted to submit comments on facts provided to them by the Department or other parties in an anti-dumping investigation, up and until seven days prior to verification.<sup>2</sup> In this regard, parties may submit factual information to rebut, clarify or correct factual information submitted by any other interested party at any time prior to this deadline.<sup>3</sup>

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<sup>1</sup>Section 782(g) of the Tariff Act of 1930 ("the Act").

<sup>2</sup>See 19 C.F.R. 351.301(b)(1).

<sup>3</sup>See 19 CFR 351.301(c)(1) (note that if comments on facts provided are submitted less than 10 days before, on or after the deadline (normally only with the permission of the Department), rebuttal comments still may be submitted within ten days after the comments were served on other parties).

Notwithstanding this deadline, the Department may request from any party the submission of additional factual information at any time during an anti-dumping proceeding<sup>4</sup> and, pursuant to Section 782(g) of the Tariff Act of 1930, must provide the parties with the opportunity to comment on any information obtained by the Department upon which they have not previously had such an opportunity to comment.

During an investigation, parties may also comment on facts in the record by submitting written case and rebuttal briefs<sup>5</sup> and participating in a public hearing.<sup>6</sup> In its final determination, the Department must include an explanation of the basis for its determination that addresses relevant arguments made by all interested parties.<sup>7</sup> Within five days of the announcement of its final determination, the Department must disclose to parties the details of its anti-dumping margin calculation. Parties may then submit comments on any errors or, within another five days, reply to comments submitted by others regarding any errors.<sup>8</sup>

An important feature of the way the Commerce Department system ensures that parties obtain all of the relevant case information in as timely a fashion as possible is that parties to the proceeding must serve their information on the other parties to the proceeding at the same time that they file it with the Department. This obviates the need for parties to have to go and inspect (and copy) information from the Department's file. Also, when submitting information to the Department, parties are required to submit the original and six copies of the proprietary version of the document, along with three copies of the public version. One of the public version copies is placed in the public case file, which is open for inspection by the public without appointment during normal hours of operation.

#### International Trade Commission Procedures

The Commission determines whether a United States industry has been materially injured by reason of dumped imports. Therefore, the Commission during the course of an anti-dumping investigation discloses all information obtained before the record is closed and provides parties with opportunities to comment on all information in its record. To illustrate, parties are provided at least seven opportunities to comment on facts provided to them in anti-dumping investigations before the Commission. These opportunities include: (1) a preliminary phase staff conference, (2) a post-conference written brief, (3) written comments on draft questionnaires for the final phase of the investigation, (4) a written prehearing brief, (5) testimony delivered at hearings before the Commissioners and staff, (6) a written posthearing brief, and (7) final written comments on late-arriving information. Moreover, throughout anti-dumping investigations, parties are provided numerous and continuing opportunities to contact Commission investigative staff and provide additional data, comments or corrections on injury issues.

In particular, parties may testify at a staff conference provided for in the Commission's published notice of the institution of its preliminary phase investigation, and they may thereafter file written briefs in which they can comment on the testimony presented at the preliminary phase staff conference, challenge information presented by their opponents, or comment on information that has

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<sup>4</sup>See 19 C.F.R. 351.301(c)(2).

<sup>5</sup>See 19 C.F.R. 351.309(c)(1)(i) and 351.309(d).

<sup>6</sup>See 19 CFR 351.310.

<sup>7</sup>See Section 777(i)(3) of the Act.

<sup>8</sup>See 19 CFR 351.224(c).

been released under the protection of an administrative protection order up to that point in the proceeding.<sup>9</sup>

Later, before questionnaires are issued by the Commission during the final phase of an investigation, parties are again provided an opportunity to comment in writing on the content of those questionnaires.<sup>10</sup> Throughout the final phase of the investigation, interested parties to the investigation are served with submissions made by other parties, and business proprietary information received by the Commission is released to parties under an administrative protective order.

During the final phase of an investigation, Commission staff prepare a prehearing report, summarizing facts and information received by the Commission prior to holding a hearing and permitting the filing of prehearing briefs. That report is released to parties to the investigation, so their prehearing briefs can reflect the most current data practicable.<sup>11</sup> Each party may then file a prehearing brief, attend and present testimony at a hearing before the Commissioners and staff, and respond at the hearing or in a written posthearing brief to arguments of the parties and to questions of the Commission and staff.<sup>12</sup> A final report is then prepared by the staff summarizing information obtained. The final report is releasable to the parties along with any late-arriving information that had not previously been released to the parties. The report is normally released on or about day 265 of the anti-dumping investigation. Parties are provided with a final opportunity to comment on the information prior to the Commission's final vote on injury.<sup>13</sup> After the vote, the Commission then releases to the parties its "final phase" determination and views of the Commission.

#### **Document G/ADP/AHG/W/30 (Canada)**

##### Ad Hoc Group on Implementation – Topic 7

##### Provision of Essential Facts under Consideration Before Making a Final Determination under Article 6.9. - Disclosure of Findings

##### WTO Requirements

Article 6.9 of the WTO Anti-dumping Agreement states:

*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 or not to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.*

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<sup>9</sup>See 19 C.F.R. 207.3 (requirement of parties to serve information submitted on other parties), 207.7(a)(1) (release of business proprietary information under APO), 207.12 (notice of preliminary phase of investigation published), and 207.15 (provision for written briefs and conference).

<sup>10</sup>See 19 C.F.R. 207.20(b).

<sup>11</sup>See 19 C.F.R. 207.22.

<sup>12</sup>See 19 C.F.R. 207.23, 207.24, and 207.25.

<sup>13</sup>See 19 C.F.R. 207.30.

### Canadian Practice

Canada operates a bifurcated anti-dumping system. Revenue Canada is responsible for the receipt and evaluation of anti-dumping complaints, the initiation of investigations and the preliminary determinations of dumping and injury. Once the preliminary determinations are made, the Canadian International Trade Tribunal (Tribunal) assumes authority over the issue of injury. The Tribunal has final authority over matters of injury and Revenue Canada has final authority over the determination of normal values and export prices.

#### *Revenue Canada*

Revenue Canada informs all interested parties of the essential facts under consideration for purposes of the decision whether or not to make a final determination of dumping. The final determination of dumping, in combination with a final determination of injury by the Tribunal, form the basis for the application of definitive measures. Revenue Canada provides interested parties with the relevant information, before the final determination of dumping, in three ways:

Revenue Canada issues a preliminary determination Statement of Reasons (SOR). The SOR provides, inter alia, non-confidential details of the preliminary determinations of dumping and injury, addresses representations made to Revenue Canada during the investigation where comment is warranted and provides notice of the imposition of provisional measures. This public document is provided to all interested parties.<sup>14</sup>

Letters are provided to individual exporters that explain, in detail, the calculations and adjustments made regarding company-specific normal values and export prices based on information received from the individual exporter involved. These letters give exporters an opportunity to review the calculations involved in determining their specific margin(s) of dumping. This process allows exporters to challenge the calculation of normal values and export prices and/or provide additional information relevant to their respective margin(s) of dumping.

Revenue Canada offers to all exporters (and other interested parties) an opportunity to participate in a disclosure meeting with Revenue Canada officials following the preliminary determination. This meeting is designed to provide interested parties with an opportunity to ask questions and to seek further clarification from Revenue Canada officials responsible for the calculation of the margins of dumping and for the overall results of the investigation (while maintaining the confidentiality of information as required).<sup>15</sup> Should any additional information be required, such requirements are explained and arrangements made for follow-up verification meetings. Finally, disclosure meetings are held as soon as possible after the preliminary determination in order to take into account for purposes of whether or not to make a final determination of dumping any representations made to Revenue Canada during the course of the meeting.

Arguments made in relation to the calculation of normal values and export prices are considered by Revenue Canada prior to the decision on whether or not to make a final determination of dumping.

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<sup>14</sup>Interested parties include complainants, all known importers and exporters of the subject goods as well as the governments of the countries of export.

<sup>15</sup>Given that disclosure meetings take place after the preliminary determinations of dumping and injury, when the issue of injury has already been assumed by the Tribunal, the preliminary injury determination is not directly relevant.

*Canadian International Trade Tribunal*

The Canadian International Trade Tribunal (the Tribunal) undertakes four distinct processes by which interested parties are informed of the essential facts under consideration prior to the decision whether or not to make a final determination of injury.

The Tribunal Staff Report, which is issued approximately 50 days after the preliminary determinations of dumping and injury by Revenue Canada, is provided to interested parties. The Report, which is factual in nature, sets-out basic background information (product, markets, trade patterns, etc.).<sup>16</sup> In addition, it addresses the injury indicators outlined in Article 3 of the Anti-dumping Agreement.

In preparing the Staff Report, Tribunal staff undertake various types of research including consulting with domestic producers, importers and purchasers in order to obtain a general understanding of the products and markets involved and to analyse responses to Tribunal questionnaires.

The Staff Report can be revised up to the day that the hearings close because of new and/or corrected information submitted by parties.<sup>17</sup> This process reflects the view that, if the Report is to be used by the Tribunal during its deliberations, it should be subject to comment/testing by the parties involved in the inquiry or review.

Witness statements, which are provided normally 2 to 3 weeks prior to the Tribunal injury hearings, indicate what witnesses intend to state as their testimony.<sup>18</sup> These statements will address the various issues related to the question of injury.

A pre-hearing conference allows parties to meet to resolve procedural and substantive issues prior to the commencement of the injury hearing. In respect of the essential facts under consideration prior to the final determination of dumping, such a conference may be used to determine, for example, the goods, or classes of goods, which will be the subject of the inquiry. A pre-hearing conference is optional and may be held at the request of an interested party or the Tribunal itself.<sup>19</sup>

The Tribunal's injury hearings themselves provide for the consideration of those issues relevant to the final determination of injury. Interested parties may submit information/witnesses which may then be tested/cross examined by parties with opposing interests. Injury hearings focus on the essential facts under consideration for purposes of the final determination of injury.

Throughout the Tribunal's quasi-judicial process, parties may make submissions with respect to the issue of injury focusing on those factors relevant to the case at hand. This process permits all to

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<sup>16</sup>Questionnaire replies from parties used to generate the staff report are part of the official case record maintained by the Tribunal.

<sup>17</sup>New evidence is normally not accepted after the hearings close. However, in exceptional circumstances new or revised information may be accepted. This would only happen where the other parties involved in the inquiry have an opportunity to comment on the new or revised information.

<sup>18</sup>Witness statements are often not formally read during the hearing, but rather are available as part of the official record. Accordingly, it is normal practice for a witness, once sworn-in to testify, to adopt his or her witness statement and then to answer questions.

<sup>19</sup>While usually held in person, these conferences may be held by electronic teleconferencing, where possible.

know and comment on the essential facts under consideration prior to the decision whether or not to make a final determination of injury.

### **G/ADP/AHG/W/35 (Turkey)**

#### **Topic 7 - Disclosure of Essential Facts**

In Turkish practice, two different final disclosure files are prepared:

- (1) For exporters: the disclosure file contains a confidential version of dumping margin calculation (with data set) and a non-confidential version of injury determination (no data set only indexes) plus general information to be released in public notice.
- (2) For domestic industry: the disclosure file contains a non-confidential version of dumping margin calculation (no data set) and a confidential version of injury determination (with data set) plus general information to be released in public notice.

### **G/ADP/AHG/W/36 (Israel)**

#### **Topic 7 - Article 6.9 - Disclosure of Essential Facts**

Upon completing the investigation, the Commissioner submits his findings in the form of an extensive report including an analysis of all the relevant facts, views and arguments raised by the parties during the investigation. The findings of the Commissioner which are submitted to the Advisory Committee, serve as a basis for the formal hearing and as a basis for the Committee's deliberations. The full, non-confidential version of the report, in unabridged form, is simultaneously circulated to the parties, prior to the formal hearing before the Committee. The Committee then submits its recommendations to the Minister of Trade and Industry for his final determination. This system of circulating the full report of the Commissioner's findings prior to the formal hearings, helps to ensure transparency.

### **Document G/ADP/AHG/W/39 (Colombia)**

#### **7.1 Colombian legislation**

Law 170 of 1994, which incorporated the WTO Anti-Dumping Agreement into Colombian law, establishes Article 6.9 of the Agreement as follows: "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 or not to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests".

Decree 299 of 1995, the other piece of Colombian anti-dumping legislation, says nothing in this respect. In the event of a conflict between this Decree and Law 170, the latter takes precedence, both as a law approving an international treaty and hierarchically.

#### **7.2 Colombian practice**

In Colombia, the investigating authority is INCOMEX. The Institute informs the interested parties of the progress of the investigation by the following means:



1. A public record available to anyone from the time of initiation of the investigation;
2. Resolutions published in the "Gaceta" of the Ministry of Foreign Trade which notify the decisions relating to an initiation of an investigation, the preliminary decision and the final determination. These resolutions are communicated to the known interested parties, to the diplomatic authorities of interested countries and the Colombian representatives in those countries;
3. Technical documents evaluating unfair practices, material injury and causal relationship, which are held in the public record. These documents are prepared by INCOMEX in connection with both the initiation of the investigation and the adoption of the preliminary and final decisions;
4. An executive summary summing up the analysis of unfair practices, material injury and causal relationship conducted by INCOMEX in the final technical document of the investigation. This summary is subsequently discussed in the Trade Practices Committee, which makes a corresponding recommendation to the Minister of Foreign Trade who takes the final decision;

After the Trade Practices Committee has met, the executive summary is sent to the interested parties in order to inform them of the essential facts taken into consideration which will serve as a basis for the INCOMEX recommendation on whether or not to adopt definitive measures. When the comments of the interested parties have been received, a new submission is made to the Trade Practices Committee so that it can make a recommendation, based on all the information available, to the Minister of Foreign Trade who takes the decision.

#### **Document G/ADP/AHG/W/40 (Argentina)**

#### **C. Article 6.9 "Provision of Essential Facts"**

##### **C.1 Introduction**

Article 6.9 of the Anti-Dumping Agreement stipulates that "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."

##### **C.2 National Commission for Foreign Trade (CNCE)**

Throughout the injury investigation, the interested parties may follow the proceedings and make any comments with respect to the documentation pertaining to the case or furnish any evidence they consider appropriate.

Similarly, the technical staff may hold meetings with the parties in order to exchange views on the product, its characteristics, its applications, etc., the national and international markets and any other relevant matters.

During the final stage, before the Commission issues its conclusion with respect to injury to the domestic industry, a hearing is held.

Prior to the hearing, the technical staff of the Commission meets with the parties (producers, importers and others) and provides them with synoptic tables of the main economic indicators used to

assess damage to the industry: production, sales, market share, installed capacity, stocks, employment, salaries, growth, investment, etc., so that they may examine the data, make such comments as they deem appropriate and present their counter-arguments as they consider necessary during the hearing. The presentation of this essential data in the synoptic table does not constitute an analysis of the merits of the case, nor does it anticipate the final conclusions of the Commission, since the conclusions may change in response to the submissions of the parties during the hearing or to additional data obtained by the implementing authority.

The parties are given a maximum of five working days following the conclusion of the hearing to provide a written version of their oral submissions made during the hearing and to make their final comments on the case.

## **Document G/ADP/AHG/W/52 (New Zealand)**

### **Topic 7: Provision of Essential Facts**

At no later than day 150 of its investigating process, the Ministry of Commerce produces an Essential Facts and Conclusions Report which is distributed to interested parties for comment, and in order to comply with Article 6.9 of the Agreement. This Report contains the essential facts under consideration which are likely to form the basis for the decision whether to apply definitive measures. There are six sections to this Report under the headings of:

- Proceedings;
- New Zealand Industry;
- Dumping Investigation;
- Injury Investigation;
- Provisional Measures (if applicable); and
- Conclusions.

Each section covers various aspects of the investigation. The type of information included in each section is as follows:

#### **Proceedings**

Information is provided about the proceedings under the New Zealand legislation and the Agreement, interested parties, the imported goods, the treatment of exchange rates and the disclosure of information via a public filing system.

#### **The New Zealand Industry**

This section covers issues such as like goods, record of imports, the New Zealand market and the standing of the applicant.

#### **Dumping Investigation**

The first subsection of this part of the Report deals with the calculation of export prices and records the base prices and adjustments for each company that was subject to a verification visit. The second subsection deals with the normal values established during the verification identifying the methodology used (sales or constructed values) and adjustments made in order to effect a fair comparison. The export prices and the normal values are then compared to establish the margins of dumping.

### Injury Investigation

The Report comments on all aspects considered during the investigation such as: import volumes; price effects such as, including price undercutting, price depression and price suppression; and the economic impact of the dumped goods including actual and potential decline in: output, sales, market share, profits, productivity, return on investments, and utilization of production capacity; any factors affecting domestic prices; the magnitude of the margin of dumping; and if claims are made, actual and potential effects on: cashflow, inventories, employment, wages, growth, ability to raise capital, and investments.

The Report then looks at factors other than the dumped goods that have injured the industry including: the volume and prices of goods that are not sold at dumped prices; contraction in demand or changes in patterns of consumption; restrictive trade practices of, and competition between, overseas and New Zealand producers; developments in technology; the export performance and productivity of the New Zealand producers; and the nature and extent of importations of dumped goods by New Zealand producers of like goods, including the value, quantity, frequency, and purpose of any such importations.

The final subsection aggregates all the conclusions that have been drawn relating to the injury.

### Provisional Measures (if applicable)

This section briefly reports on the consideration and application of provisional measures, where this has taken place.

### Conclusions

This section lists the conclusions reached by the investigating team on the basis of the information available to it during the investigation. It does not go into the details of any proposed remedy that may be imposed at a later date.

## **Document G/ADP/AHG/W/57 (Mexico)**

### Essential facts

- (a) What are the minimum facts that must be described as "essential facts"?

In Mexico, the document by which the parties are informed of the essential facts referred to in Article 6.9 of the Anti-Dumping Agreement is called the preliminary resolution, which is published in the Official Journal within 130 working days following the publication of the initiation. This resolution must contain at least the following elements:

- (i) The normal value and the export price obtained;
- (ii) a description of the methodology used to determine the normal value, the export price and the margin of dumping;
- (iii) the margin of dumping;

- (iv) a description of the injury<sup>20</sup> caused or that could be caused to the national industry;
- (v) the information considered in reaching the above conclusions;
- (vi) the time-limit within which the parties must supply additional information and comments;
- (vii) where appropriate, whether the authority is examining the possibility of applying a duty less than the margin;
- (viii) whatever information the investigating authority considers relevant to the investigation.

As you can see, the purpose of this document is to inform the parties involved in the investigation of the elements that will be taken into account by the investigating authority in issuing its final resolution and of the time-period of 30 days during which the parties may submit their comments in that respect, which will be taken into consideration by the investigating authorities. Thus, the essential facts must be disclosed sufficiently in advance of the issue of the final resolution for the above purposes to be fulfilled. In Mexico, these resolutions are highly detailed, specifying in full the elements referred to above.

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<sup>20</sup>The word "injury" is to be understood as defined in footnote 9 to the Anti-Dumping Agreement.