

**MEXICO – ANTI-DUMPING INVESTIGATION OF HIGH FRUCTOSE  
CORN SYRUP (HFCS) FROM THE UNITED STATES**

**REPORT OF THE PANEL**

The report of the Panel on Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 28 January 2000 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 30 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.



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## I. INTRODUCTION

1.1 On 8 May 1998, the United States requested consultations with Mexico pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article 17.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the AD Agreement) regarding the anti-dumping investigation of high-fructose corn syrup (HFCS) grades 42 and 55 from the United States conducted by the Secretariat of Commerce and Industrial Development (SECOFI) of the Government of Mexico, the 23 January 1998 notice of final determination of dumping and injury in that investigation and the consequent imposition of definitive anti-dumping measures on imports of HFCS grades 42 and 55 from the United States.<sup>1</sup> The United States and Mexico held consultations on 12 June 1998, but failed to reach a mutually satisfactory solution.

1.2 On 8 October 1998, pursuant to Article 6 of the DSU, Article XXIII:2 of GATT 1994 and Article 17 of the AD Agreement, the United States requested the establishment of a panel to examine the consistency of Mexico's final anti-dumping measure, including actions preceding this measure, with Mexico's obligations under the AD Agreement and Article VI of GATT 1994.<sup>2</sup>

1.3 At its meeting on 25 November 1998, the Dispute Settlement Body (DSB) established a panel pursuant to the above request.<sup>3</sup> At that meeting, the parties to the dispute agreed that the Panel should have standard terms of reference. The terms of reference were:

"To examine, in light of the relevant provisions of the covered agreements cited by the United States in document WT/DS132/2, the matter referred to the DSB by the United States in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.4 Jamaica and Mauritius reserved their rights as third parties to the dispute.

1.5 On 13 January 1999, the Panel was constituted as follows:

Chairman: H.E. Mr. Christer Manhusen  
Members: Mr. Gerald Salembier  
Mr. Edwin Vermulst

1.6 The Panel met with the parties on 14-15 April 1999 and 25-26 May 1999. It met with the third parties on 15 April 1999.

1.7 The Panel submitted its interim report to the parties on 6 October 1999. On 20 October 1999, the United States and Mexico submitted written requests for the Panel to review precise aspects of the interim report. At the request of Mexico, the Panel held a further meeting with the parties on 9 December 1999 on the issues identified in the written comments. The Panel submitted its final report to the parties on 21 January 2000.

## II. FACTUAL ASPECTS

2.1 This dispute concerns the imposition of definitive anti-dumping duties by SECOFI on imports of high-fructose corn syrup, grades 42 and 55, originating in the United States.

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<sup>1</sup> WT/DS132/1.

<sup>2</sup> WT/DS132/2.

<sup>3</sup> WT/DS132/3.

2.2 On 14 January 1997, Mexico's National Chamber of Sugar and Alcohol Industries (Sugar Chamber) filed an application for an anti-dumping investigation with SECOFI complaining that imports of HFCS from the United States were being exported to Mexico at dumped prices and threatened Mexico's sugar industry with material injury. On 27 February 1997, SECOFI published a notice in Mexico's *Diario Oficial* announcing the initiation of an anti-dumping investigation on imports of HFCS, grades 42 and 55, originating in the United States.<sup>4</sup> SECOFI established the period from 1 January 1996 to 31 December 1996 as the period of investigation. Parties filed responses to investigation questionnaires and requests for supplementary information in April and May 1997. On 25 June 1997, SECOFI published a notice announcing a preliminary determination imposing provisional anti-dumping duties ranging from 66.57 to 125.30 U.S. dollars per metric ton in the case of imports of HFCS grade 42, and 63.42 to 175.50 dollars per metric ton in the case of imports of HFCS grade 55.<sup>5</sup>

2.3 SECOFI held disclosure meetings with parties regarding the preliminary determination in June and July 1997. Parties filed further submissions and replied to requests for supplementary information from July to October 1997. SECOFI verified the information submitted by the Sugar Chamber and several importing and exporting companies during September-November 1997. SECOFI held a public hearing concerning the investigation on 3 December 1997.

2.4 On 1, 2 and 10 December 1997, one importing company (Almex) and the United States Corn Refiners Association (CRA), an association of U.S. producers of corn products, including HFCS, requested SECOFI to terminate the investigation, arguing that an alleged agreement between Mexican sugar producers and soft-drink bottlers, dating from September 1997, restraining the latter's consumption of imported HFCS eliminated any threat of injury. The CRA did not provide SECOFI with a copy of the alleged agreement. On 11 December 1997, SECOFI made an inquiry to the Sugar Chamber regarding the existence of the alleged agreement. On 15 December 1997, the Sugar Chamber replied to SECOFI's inquiry, denying the existence of the alleged agreement.

2.5 On 23 January 1998, SECOFI published a notice announcing the final determination imposing definitive anti-dumping duties ranging from 63.75 to 100.60 U.S. dollars per metric ton in the case of imports of HFCS grade 42, and 55.37 to 175.50 dollars per metric ton in the case of imports of HFCS grade 55.<sup>6</sup> The notice entrusted the Ministry of Finance and Public Credit with collecting the

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<sup>4</sup> *Resolución por la que se acepta la solicitud de parte interesada y se declara el inicio de la investigación antidumping sobre las importaciones de jarabe de maíz de alta fructosa, mercancía clasificada en las fracciones arancelarias 1702.40.01, 1702.40.99, 1702.60.01 y 1702.90.99 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia.* (Decision to accept the request of the interested parties and to declare the initiation of the antidumping investigation of high fructose corn syrup imports, merchandise classified in tariff classifications 1702.40.01, 1702.40.99, 1702.60.01 and 1702.90.99 of the Schedule to the General Import Duties Act, originating in the United States of America, irrespective of the country of export.) US-3, MEXICO-1 (Initiation Notice).

<sup>5</sup> *Resolución preliminar de la investigación antidumping sobre las importaciones de jarabe de maíz de alta fructosa, mercancía clasificada en las fracciones arancelarias 1702.40.01, 1702.40.99, 1702.60.01 y 1702.90.99 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia.* (Preliminary determination in the antidumping investigation of high fructose corn syrup imports, merchandise classified in tariff classifications 1702.40.01, 1702.40.99, 1702.60.01 and 1702.90.99 of the Schedule to the General Import Duties Act, originating in the United States of America, irrespective of the country of export.) US-2, MEXICO-2 (Preliminary Determination).

<sup>6</sup> *Resolución final de la investigación antidumping sobre las importaciones de jarabe de maíz de alta fructosa, mercancía clasificada en las fracciones arancelarias 1702.40.99 y 1702.60.01 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia.* (Final determination in the antidumping investigation of high fructose corn syrup imports, merchandise classified in tariff classifications 1702.40.99 and 1702.60.01 of the Schedule to the General Import

definitive anti-dumping duties, levying such duties retroactively to the imposition of the provisional duties.

### **III. PREVIOUS WTO DISPUTE SETTLEMENT PROCEEDINGS BETWEEN THE PARTIES WITH RESPECT TO THE SAME OR RELATED MATTERS**

3.1 On 4 September 1997, the United States had requested consultations (WT/DS101/1) with Mexico pursuant to Article 4 of the DSU and Article 17.3 of the AD Agreement regarding the provisional anti-dumping measure, including actions preceding this measure, imposed by Mexico on 25 June 1997 on imports of HFCS, grades 42 and 55, originating in the United States. The United States and Mexico held consultations on 8 October 1997, but failed to reach a mutually satisfactory solution.

### **IV. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS**

4.1 Mexico respectfully requests the Panel to reach the following conclusions:

- (a) That the United States did not comply with the obligation to present the problem clearly, as required by DSU Article 6.2.
- (b) That the United States did not properly present to the Panel a matter, as established by DSU Article 7 and Article 17.4 of the AD Agreement.
- (c) That, since no properly identified "matter" has been identified, it is impossible for the Panel to discharge a mandate.
- (d) That the United States did not comply with the requirements of Article 17.5 of the AD Agreement, more especially because it did not indicate how a benefit accruing to it, directly or indirectly, under the AD Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded.
- (e) That the consequence of the foregoing is that there is no basis on which the Panel can examine the matter. That, in view of this, the Panel is not empowered to examine and rule on the merits of this dispute.

4.2 If the Panel should decide to examine the merits of the United States allegations, in a subsidiary manner and without prejudice to its rights under the DSU, Mexico respectfully requests the Panel:

- (a) That the references made by the United States to the procedure being carried out under Chapter 19 of the NAFTA were improperly presented and, therefore, should be rejected.
- (b) That the references made by the United States to the consultations were improperly presented and contravened the United States obligation of confidentiality, and therefore should also be rejected.
- (c) That the United States allegations under Article 7.4 of the AD Agreement are inappropriate, since the provisional measure lies outside the Panel's mandate.

- (d) That Mexico's interpretations in applying the AD Agreement are admissible, for which reason the final anti-dumping measure is consistent with that Agreement.
- (e) That the initiation of the anti-dumping investigation into HFCS imports from the United States was consistent with the relevant provisions of Articles 1, 2, 3, 4 and, in particular, Article 5 of the AD Agreement.
- (f) That the public notice of initiation of investigation fulfilled the requirements of Articles 12.1 and 12.1.1 of the AD Agreement.
- (g) That the final determination of threat of material injury to the domestic sugar industry was made in conformity with the relevant provisions of Article 3 of the AD Agreement.
- (h) That the imposition of definitive anti-dumping duties on HFCS imports from the United States was consistent with Articles VI:1 and VI:6 of the GATT 1994.
- (i) That the extension of the duration of the provisional measure was in conformity with the provisions of Article 7.4 of the AD Agreement.
- (j) That the imposition of anti-dumping duties retroactively to the period of application of the provisional measure is in conformity with Article 10.2 of the AD Agreement.
- (k) That, in imposing the final anti-dumping measure, Mexico fulfilled the requirements of Articles 12.2 and 12.2.2 of the AD Agreement.
- (l) That the final anti-dumping measure imposed by Mexico was adopted in the circumstances provided for in Article VI of the GATT 1994 and in accordance with Articles 1 and 18, *inter alia*, of the AD Agreement.

4.3 Consequently, Mexico respectfully requests the Panel to conclude that the final anti-dumping measure adopted by SECOFI on HFCS imports from the United States, and the actions preceding it, are consistent with the obligations incumbent on Mexico under the AD Agreement, in particular Articles 1, 2, 3, 4, 5, 7, 10, 12 and 18, and the GATT 1994.

4.4 In turn, the United States respectfully requests the Panel to find that:

- (a) SECOFI neither initiated nor conducted the anti-dumping investigation on imports of HFCS from the United States in accordance with the provisions of the AD Agreement, and therefore its application of a final anti-dumping measure violates Article 1 of the AD Agreement.
- (b) SECOFI's initiation of an anti-dumping investigation on imports of HFCS from the United States was inconsistent with Articles 5.1, 5.2, 5.3, 5.4 and 5.8 of the AD Agreement.
- (c) SECOFI's initiation notice was inconsistent with Articles 12.1 and 12.1.1 of the AD Agreement.
- (d) SECOFI's final determination of threat of injury was inconsistent with Articles 3.1, 3.2, 3.4 and 3.7 of the AD Agreement.
- (e) SECOFI's imposition of anti-dumping duties on imports of HFCS from the United States was inconsistent with Articles VI:1 and VI:6 of the GATT 1994.



- (f) SECOFI's application of provisional anti-dumping measures on imports of HFCS from the United States in excess of six months was inconsistent with Article 7.4 of the AD Agreement.
- (g) SECOFI's imposition of final anti-dumping duties during the period of application of provisional measures was inconsistent with Articles 10.2 and 10.4 of the AD Agreement.
- (h) SECOFI's final determination was inconsistent with Articles 12.2 and 12.2.2 of the AD Agreement.

4.5 Accordingly, the United States respectfully requests that the Panel recommend that Mexico, pursuant to Article 19.1 of the DSU, bring SECOFI's final anti-dumping measure into conformity with the AD Agreement and GATT 1994.

## V. ARGUMENTS OF THE PARTIES

### A. STANDARD OF REVIEW

5.1 Mexico recalls that Article 17.6 of the AD Agreement reads as follows:

"17.6 In examining the matter referred to in paragraph 5:

- (i) in its assessment of the facts of the matter, the Panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the Panel might have reached a different conclusion, the evaluation shall not be overturned;
- (ii) the Panel shall interpret the relevant provisions of the Agreement in accordance with the customary rules of interpretation of public international law. Where the Panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the Panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations" (emphasis added by Mexico).

5.2 According to Mexico, the first submission of the United States contains various assertions to the effect that Mexico did not fulfill its obligations under the AD Agreement because SECOFI did not proceed in the manner in which the United States interprets that the provisions of the AD Agreement should be applied. In addition, the submission asks the Panel to agree with the United States' interpretations as if these were the sole permissible interpretations.<sup>7</sup>

5.3 Mexico argues that, in taking this position, the United States forgets that it was the United States itself which proposed, during the corresponding round of negotiations, the inclusion of Article 17.6 of the AD Agreement with the intention of recognising the discretionary power of the investigating authority when the AD Agreement itself does not establish a single interpretation with respect to one or more provisions of the Agreement. Consequently, any interpretation of the AD Agreement which is permissible is equally valid; there is no "quality standard" that determines varying "degrees of permissibility". What is important is that an interpretation is or is not permissible, regardless of whether some interpretations may appear, in the eyes of the United States or the Panel itself, more permissible than others. If the interpretation is permissible, the measure should

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<sup>7</sup>See United States first submission, para. 156.

be declared compatible with the AD Agreement. If the interpretation is not permissible, an explanation must be given of why that is so.

5.4 Mexico further argues that, consequently, when the United States considers that Mexico should have proceeded in a manner that is not clearly established in the AD Agreement, it is up to the United States to show that the manner in which SECOFI proceeded does not correspond to a permissible interpretation of the AD Agreement.

5.5 Mexico also contends that, on the basis of this provision of the AD Agreement, Panels should follow the same line of conduct even though in their opinion one permissible interpretation may seem more appropriate than another permissible interpretation. Where a panel determines that an interpretation is not permissible, it is obliged to set out the factual and legal reasons for not accepting that interpretation.

5.6 Mexico points out that the United States did not respond to and, in fact, ignored Mexico's objection that SECOFI's interpretations of the AD Agreement were "permissible" within the meaning of Article 17.6. When the United States was asked at the first hearing whether it had presented evidence regarding this issue, it simply replied that Article 17.6 of the Anti-Dumping Agreement imposes an obligation on the Panel.

5.7 Mexico holds that, in this connection, it is worth referring once again to *Guatemala–Cement*, where the United States maintained the following position:

"In the view of the United States, Mexico has not made the requisite showing under the pertinent standard of review that the factual findings reached by Guatemala were either not properly established or were biased. Although Mexico alleges that the factual determinations in issue were biased and not impartial, no evidence has been provided to support such claims".<sup>8</sup>

5.8 Mexico submits that the determination as to "whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective" forms part of Article 17.6 in the same way as the obligation to determine whether the measure adopted by the authority rests upon a permissible interpretation. Both provisions come under the same heading ("chapeau"). Why then does subparagraph (i) constitute a "pertinent standard of review" which requires a Member to present specific evidence, while subparagraph (ii) is an obligation on the Panel?

5.9 Mexico submits further that, whatever the answer to this question may be, it is clear that the United States has maintained diametrically opposite positions to suit its convenience. In any event, the United States reply implies that it did not argue that Mexico had made interpretations of the AD Agreement that were not permissible, and therefore acknowledged that all of Mexico's interpretations were permissible.

5.10 The United States is of the view that, since Mexico violated certain provisions of the AD Agreement by improperly interpreting those provisions, Mexico's interpretations are not permissible. None of Mexico's interpretations might be considered as constituting the "one-of-more-than-one" permissible interpretations allowed by Article 17.6(ii) of the AD Agreement.<sup>9</sup>

## B. OBJECTIONS

5.11 Mexico submits for consideration by the Panel various objections that it states need be raised at the outset as they are critical for this dispute settlement proceeding. According to Mexico, the

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<sup>8</sup>See *Guatemala-Cement Panel Report*, para. 5.53.

<sup>9</sup>See Answers of the United States to questions no. 42 and 43 by Mexico, 6 May 1999.

request for the establishment of the Panel submitted by the United States does not meet the requirements laid down in the AD Agreement and the DSU, which are indispensable for determining the Panel's authority and terms of reference, and therefore the request must be rejected.

5.12 Mexico asserts that its objections relate in particular to the improper references by the United States to the submission presented by Mexico in an ongoing proceeding under Chapter 19 of the North American Free Trade Agreement (NAFTA); as well as the incorrect and tendentious references made by the United States concerning Mexico's replies provided during the consultations held on 12 June 1998. Mexico also maintains that the references to the provisional measures in the United States' submission should also be rejected because they lie outside the Panel's terms of reference.

**1. Alleged Failure to Properly Identify Claims Under Article 6.2 of The DSU and Alleged Failure to Properly Present a "Matter" Under Article 17.4 of the AD Agreement**

5.13 Mexico submits that the request for the establishment of a panel submitted by the United States<sup>10</sup> does not fulfil the requirements laid down in Article 6.2 of the DSU and it should therefore be rejected. In particular, Mexico argues that the request in question does not provide a summary of the legal basis of the complaint sufficient to present the problem clearly.

5.14 Mexico recalls that Article 6.2 of the DSU establishes that a request for the establishment of a panel shall identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Mexico holds that, in the present dispute, the United States' request does not contain a brief summary of the legal basis sufficient to present the problem clearly.

5.15 Mexico contends that the United States infringed the provisions of Article 6.2 in two ways:

- (a) firstly, the United States failed to comply with Article 6.2 because it did not provide a brief summary of the legal basis sufficient to present the problem clearly; and
- (b) secondly, the failure of the United States is not confined to the fact that it did not present the problem clearly. In formulating its request in the terms in which it was submitted, the United States in fact failed to duly bring any "matter" before the Panel.

5.16 Mexico notes that, in the introductory part of the fourth paragraph of the *Request for Establishment*, the United States stated that "SECOFI's final anti-dumping measure, including actions by SECOFI preceding this measure, is inconsistent with the obligations of Mexico under Articles 1, 2, 3, 4, 5, 6, 7, 10 and 12 of the AD Agreement and Article VI of the GATT 1994". Subsequently the United States confined itself to presenting a number of alleged actions or omissions by SECOFI. However, at no time did it indicate what the relationship was between the provisions cited and the alleged acts or omissions of SECOFI.

5.17 According to Mexico, the United States' request is extraordinarily confused. For example: Is the United States trying to argue that, with respect to determining whether to apply a lesser duty, SECOFI acted inconsistently with Articles 1, 2, 3, 4, 5, 6, 7, 10 and 12 of the AD Agreement and Article VI of the GATT 1994? If not, which provisions did SECOFI violate and which did it not? Furthermore, are we to understand that one Article is applicable to only one indent or to more than one of them, and in any case to which? Are the Articles applicable in their totality or only partly? The United States' request certainly does not contain the answers to these questions.

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<sup>10</sup>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (Mexico–HFCS), WT/DS132/2 (Request for Establishment), 14 October 1998.

5.18 Mexico submits that the obligation to present the problem clearly is not a mere formality. Mexico recalls that Article 6.2 of the DSU is an obligation for the complainant. Its purpose, *inter alia*, is to safeguard the rights of the other WTO Members to decide whether they should participate as interested third parties, and more importantly, of the actual Member whose measure has been challenged so that it can defend itself properly. Furthermore, as is well known, the request for the establishment of a panel constitutes the basis of the panel's terms of reference.<sup>11</sup>

5.19 Mexico argues that the United States not only did not present the problem clearly but also did not allow the "matter" to be duly constituted.<sup>12</sup> In other words, for the Panel to be able to examine a "matter", the United States should have indicated in its request for the establishment of a panel the factual and legal grounds for each of its assertions. The panel in *EC-Yarn* stated:

"There could be more than one legal basis for alleging a breach of the same provision of the Agreement and that, accordingly, a claim in respect of one of these would not also constitute a claim in respect of the other. A separate and distinct claim would be required"<sup>13</sup> (emphasis added by Mexico).

5.20 Mexico contends that United States did not indicate which legal basis corresponded to which alleged violation. In fact, the United States' request does not contain "claims". The most it contains is "assertions" or, in any case, "reasonings". Mexico recalls once again in this connection the panel in *EC-Yarn*, which stated that:

"A claim was the specification of the particular legal and factual basis upon which it was alleged that a provision of the Agreement had been breached".<sup>14</sup>

5.21 Mexico maintains that, to understand the problem better, it is important to analyse the United States' omission in the light not only of Article 6.2 of the DSU, but also of Article 7 of the DSU and 17.4 of the AD Agreement. Mexico holds that, in the absence of "claims", which is one of the essential elements of the "matter" referred to by Article 7 of the DSU and of the "matter" referred to in Article 17.4 of the AD Agreement, it is not possible to speak of a "matter" since it has not been properly constituted.<sup>15</sup>

5.22 Mexico argues that, in *Guatemala-Cement*, the Appellate Body (AB) confirmed this obligation, indicating that the matter referred to the DSB consisted of (i) the specific measures at issue; and (ii) the claims.<sup>16</sup> The Appellate Body also stated:

"A distinction is therefore to be drawn between the "measure" and the "claims". Taken together, the "measure" and the "claims" made concerning that measure

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<sup>11</sup>In the case *United States – Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway (United States-Salmon)*, ADP/87 (*United States-Salmon Panel Report*), adopted 27 April 1994, para. 336, the Panel considered that the terms of reference served two purposes: definition of the scope of a panel proceeding and provision of notice to the defendant party and other parties that could be affected by the Panel decision and the outcome of the dispute.

<sup>12</sup>See Article 7 of the DSU.

<sup>13</sup>*EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil (EC-Yarn)*, ADP/137 (*EC-Yarn Panel Report*), adopted 30 October 1995, para. 445.

<sup>14</sup>*Id.* para. 444 (reasoning repeated in paragraph 459 of the same report).

<sup>15</sup>The Spanish term "*asunto*" and "*cuestión*" contained in Article 6.2 of the DSU and 17.4 of the AD Agreement respectively, are both translated in the same way in English as "*matter*" and in French as "*question*".

<sup>16</sup>*Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico (Guatemala-Cement)*, WT/DS60/R (*Guatemala-Cement Panel Report*), WT/DS60/AB/R (*Guatemala-Cement AB Report*), adopted 25 November 1998, para. 72.

constitute the "matter referred to the DSB", which forms the basis for a panel's terms of reference".<sup>17</sup>

5.23 Mexico further argues that the claims must be contained in the request for the establishment of a panel and not in another document, and therefore the United States cannot remedy this omission. The Panel in *EC-Yarn* stated that:

"For a claim to be before a panel, it would have to be specified in the document requesting establishment of a panel".<sup>18</sup>

5.24 Mexico notes that, in *Guatemala-Cement* as well, the Appellate Body, after having clarified the components of the "matter", reiterated the obligation that such components must be included in the request for the establishment of a panel:

"The word "matter" ("*cuestión*" or "*asunto*") has the same meaning in Article 17 of the Anti-Dumping Agreement as it has in Article 7 of the DSU. It consists of two elements: the specific "measure" and the "claims" relating to it, both of which must be properly identified in a panel request as required by Article 6.2 of the DSU"<sup>19</sup> (emphasis added by Mexico).

"The "matter" referred to the DSB for the purposes of Article 7 of the DSU and Article 17.4 of the Anti-Dumping Agreement must be the "matter" identified in the request for the establishment of a panel under Article 6.2 of the DSU".<sup>20</sup>

5.25 In Mexico's view, the foregoing has several consequences:

- (a) in terms of Article 6.2 of the DSU, the United States' request does not present the problem clearly and hence prevents Mexico and the other WTO Members, in particular those that are interested third parties, from being able to defend their rights properly;
- (b) in terms of Article 17.4 of the AD Agreement, the United States has not correctly submitted the "matter" to the DSB and hence the DSB never had nor could have the "matter" before it; and
- (c) in terms of Article 7 of the DSU, the United States did not submit a matter correctly, and therefore the Panel cannot fulfil its terms of reference.

Mexico submits that, accordingly, the Panel report should indicate that the United States' request does not fulfil the requirements laid down in Articles 6.2 and 7 of the DSU and in Article 17.4 of the AD Agreement.

5.26 The United States disputes Mexico's argument that the request for establishment fails to comply with Article 6.2 of the DSU. According to the United States, Mexico argues that the request for establishment was inconsistent with Article 6.2 of the DSU, because the United States did not explicitly link up the legal claims it identified in the chapeau of paragraph 4 of its *Request for Establishment* -- Articles 1-7, 10 and 12 of the AD Agreement and Article VI of the GATT 1994 -- with the amplified description of those claims as contained in paragraphs 4(a)-(k) of the request.

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<sup>17</sup>*Id.* para. 73.

<sup>18</sup>*See EC-Yarn Panel Report*, para. 450.

<sup>19</sup>*See Guatemala-Cement AB Report*, para. 76.

<sup>20</sup>*Id.* para. 72.

Mexico asserts that all the United States' claims in this Panel should be dismissed because Mexico has allegedly been unable to defend itself adequately in the absence of such a link. In the view of the United States, Mexico's arguments are baseless and should be rejected.

5.27 The United States submits that its request for establishment far exceeds the minimum Article 6.2 requirement, *i.e.*, it sets forth the measure (SECOFI's final anti-dumping measure) and identifies legal claims (AD Agreement Articles 1-7, 10 and 12, and Article VI of the GATT 1994). This minimum standard was established by the panel and Appellate Body reports in *European Communities-Bananas*. In *European Communities-Bananas*, Mexico (and the other complaining parties) made a request for establishment containing a summary paragraph listing various GATT 1994 and WTO Agreement Articles (the legal claims) which the request alleged were violated by the European Communities' banana regime measures.<sup>21</sup> The request for establishment in *European Communities-Bananas* did not amplify any of the various legal claims with summary arguments. Nor did it link up the identified measures with the legal claims. The *European Communities-Bananas* panel found that Mexico's complaint met the requirements of Article 6.2. On appeal, the European Communities raised a very similar argument to that now raised by Mexico -- that the request violated Article 6.2 because the complaining parties should have linked up legal claims with specific aspects of measures of the EC.<sup>22</sup> The Appellate Body rejected the EC's argument and found that no such linking requirement existed:

"[I]t was sufficient for the Complainant Parties to list the provisions of the specific agreement alleged to have been violated without setting out detailed arguments as to which specific aspects of the measure at issue related to which specific provisions of those agreements".<sup>23</sup>

5.28 The United States argues that, using the Mexican request for establishment in *European Communities-Bananas* as a minimum standard guide,<sup>24</sup> there can be no doubt that the United States' request in this dispute complies with Article 6.2. First, the United States' request, like the Mexican *European Communities-Bananas* request, identifies the specific "measure" at issue -- SECOFI's final anti-dumping measure. Second, the United States' request, like the Mexican *European Communities-Bananas* request, lists each of the claims which form the legal basis of the complaint by citing the provisions in the AD Agreement and the GATT 1994.<sup>25</sup> As Mexico successfully argued in *European Communities-Bananas*, there is no additional requirement to link up the legal claims with the specific measures at issue.

5.29 The United States asserts that, in the present dispute, the United States did not stop at the *minimum* requirements for a request for establishment. Unlike the *European Communities-Bananas* request, the United States' request for establishment in this dispute made a linkage between the specific measures and the various claims. It described in detail the problems which the United States

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<sup>21</sup>*European Communities - Regime for the Importation, Sale and Distribution of Bananas (European Communities-Bananas)*, WT/DS27/R (*European Communities-Bananas Panel Report*), adopted 25 September 1997, para. 7.23.

<sup>22</sup>*European Communities-Bananas*, WT/DS27/AB/R (*European Communities-Bananas AB Report*), adopted 25 September 1997, para. 18: "The EC submits further that the request for establishment of a panel must at the very least make a link between the specific measure concerned and the Article of the specific agreement allegedly infringed thereby in order to give both the defending party and prospective third parties a clear idea of what the alleged infringements are".

<sup>23</sup>*See id.* para. 141.

<sup>24</sup>The United States notes that Mexico structured its request for establishment in this fashion in the *Guatemala-Cement* dispute (*i.e.*, the request listed the legal bases of Mexico's complaint in a chapeau paragraph, followed by narrative amplifications that did not themselves refer to the legal bases previously cited (US-24).

<sup>25</sup>*See Request for Establishment*, para. 4.

has experienced with the Mexican measure. Thus, paragraphs 4(a)-(k) of the *Request for Establishment* described those problems using the language in the cited provisions of the AD Agreement. Mexico's assertion that it is hopelessly confused about which AD provisions apply to these paragraphs simply lacks credibility. For example, paragraph 4(e) identified SECOFI's final threat of injury determination and explains that SECOFI failed to examine the likely impact of dumped imports on the domestic industry. Only one provision of the AD Agreement relates to a determination of injury and threat -- AD Agreement Article 3. Similarly, other sub-paragraphs relate to other provisions of the AD Agreement. They thus provide summary arguments of the United States' legal claims, and significantly assist in describing the problems faced by the United States.

5.30 The United States observes that a request for establishment fails to be "sufficient to state the problem clearly" in accordance with DSU Article 6.2 if the request is so flawed that the defending party's rights of defense are being prejudiced.<sup>26</sup> However, Mexico cannot demonstrate that any imperfections in the United States request for establishment rise to that level. The Appellate Body analysed an alleged Article 6.2 violation in *European Communities-Computer Equipment*.<sup>27</sup> The European Communities argued in that dispute that the United States' request had not properly identified the products and the measures at issue, and that it was denied its due process right to be aware of the case against it.<sup>28</sup> In affirming the panel's finding that the United States' request met the requirements of Article 6.2, the Appellate Body examined whether the European Communities' rights of defense had been prejudiced by the alleged inadequate description of the products and measures. It found that the European Communities had clearly been actually aware of the problems described by the United States, as well as the measures and products at issue in the United States' request as early as the consultation stage of the proceedings.<sup>29</sup> The Appellate Body concluded by stating:

"We do not see how the alleged lack of precision of the terms, LAN equipment and PCs with multimedia capability, in the request for the establishment of a panel affected the rights of defence of the European Communities in the course of the panel proceedings. As the ability of the European Communities to defend itself was not prejudiced by a lack of knowing the measures at issue, we do not believe that the fundamental rule of due process was violated by the Panel".<sup>30</sup>

5.31 The United States maintains that its request for establishment "states the problem clearly" in describing the factual and legal issues raised by Mexico's actions in its anti-dumping investigation of HFCS. In addition, the Panel should be aware that during the consultations which preceded the request for establishment, the United States posed a long list of detailed written questions to Mexico, and discussed them at length during the consultations. The written questions track both the legal claims as well as the arguments raised in the United States' request and in the United States' first submission.<sup>31</sup> In light of the text of the request for establishment, the questions submitted to Mexico and the issues actually raised in the consultations, Mexico simply cannot claim that it was surprised or incapable of defending itself in this dispute. Moreover, while the United States does not agree with many of Mexico's arguments made in its first submission, it is undeniable that this submission as well as Mexico's participation in the first meeting of the Panel with the parties demonstrate that Mexico's

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<sup>26</sup>Article 6.2 of the DSU; see *European Communities - Customs Classification of Certain Computer Equipment (European Communities-Computer Equipment)*, WT/DS62/AB/R (*European Communities-Computer Equipment AB Report*), adopted 22 June 1998, paras. 68-70.

<sup>27</sup>*Id.*

<sup>28</sup>*Id.* para. 10.

<sup>29</sup>*Id.* para. 70.

<sup>30</sup>*Id.*

<sup>31</sup>US-8.

rights of defense have not been impeded to any extent in the course of the panel proceeding -- let alone to an extent rising to a denial of due process.

5.32 The United States disputes Mexico's argument that its request for establishment does not contain claims, but rather assertions or reasonings. This formalistic argument reflects a fundamental misapprehension of the requirements of Article 6.2 as articulated by the Appellate Body. In *Guatemala-Cement*, the Appellate Body reiterated the distinction it had made in *European Communities-Bananas* between specific measures on the one hand, and the legal basis for the complaint or "claim" on the other.<sup>32</sup> It found that in an anti-dumping context, there were only three types of "specific measures" as set forth in Article 17.4. As noted above, the United States' request identifies SECOFI's final anti-dumping order as the "specific measure". The Appellate Body in *Guatemala-Cement*, *India-Patents*, and in *European Communities-Bananas* stated that "claims" or the "legal basis for the complaint" may be set out in a very summary fashion -- the minimum requirement being to simply list provisions of a WTO agreement.<sup>33</sup> In the U.S. request, these claims are set forth in the chapeau of paragraph 4 of the request, and include AD Agreement Articles 1-7, 10 and 12 and Article VI of the GATT 1994. These claims are further described and amplified in paragraphs 4(a)-(k) of the request. Whether this amplification constitutes "argument" or additional information describing the problems which the United States has with the Mexican measure is not legally significant in light of the facts and the Appellate Body precedent cited *supra*.

5.33 Finally, the United States recalls that, in arguing that the United States did not present the problem clearly pursuant to Article 6.2 of the DSU, Mexico refers to the dispute Brazil brought on the European Communities' imposition of anti-dumping measures on cotton yarn.<sup>34</sup> That dispute, however, concerned the European Communities' objections that Brazil had not included two particular claims at all in its request for the establishment of a panel. It did not concern, and the panel there did not address, whether the EC's narrative descriptions of the problems themselves needed to specifically mention the provisions in the AD Agreement Article alleged to have been violated.

5.34 In summary, the United States argues that its request for establishment includes the legal provisions in the specific agreements on which its complaint is based, and, as such, satisfied the requirements of Article 6.2 of the DSU. The United States' request for establishment also went beyond this minimum requirement by including detailed expositions of the problems engendered by Mexico's measures on HFCS, expositions which tracked the language of the cited provisions of the AD Agreement.

5.35 The Panel asked the United States whether it would agree with the decision of the Panel in *EC-Yarn* that even a sub-paragraph of an Article of the AD Agreement could be the basis for several claims?

5.36 The United States replied that it agreed with the panel in *EC-Yarn* that a particular sub-paragraph of the AD Agreement could potentially involve more than one claim. However, the *EC-Yarn* decision must be read in light of the Appellate Body decision in *European Communities-Bananas*. There the Appellate Body held that the "claims, but not the arguments must all be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint".<sup>35</sup> In *European Communities-Bananas*, the request for establishment specified a number of general GATT 1994 and WTO Agreement Articles but did not specify which (or how) particular sub-Articles had been violated. For example,

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<sup>32</sup> *Guatemala-Cement AB Report*, para. 72.

<sup>33</sup> See *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products (India-Patents)*, WT/DS50/AB/R (*India-Patents AB Report*), adopted 16 January 1998, paras. 88-91.

<sup>34</sup> See *EC-Yarn*.

<sup>35</sup> *European Communities-Bananas AB Report*, p. 143.



Article III of the GATT 1994 was alleged to have been violated without specifying which particular language or sub-paragraph of Article III was being violated.<sup>36</sup> The Appellate Body's decision affirmed the panel's finding that the request for establishment was consistent with Article 6.2, *i.e.*, the listing of entire GATT Articles without further specification of the particular sub-Articles at issue. This fact demonstrates the summary nature of the legal claims that can be made under Article 6.2. Indeed, the observation of the panel in *EC-Yarn* would be just as correct regarding Article III -- there could be more than one legal claim encompassed within that provision.

5.37 In addition, the United States observed that nothing would prevent the listing of various violations of specific sub-paragraphs of the AD Agreement as particular claims. However, in light of *European Communities-Bananas*, there is no requirement to do so. The United States' request for establishment goes far beyond the minimum requirements set forth in *European Communities-Bananas*. The United States' request uses language from the AD Agreement in paragraphs 4(a)-(k), thereby effectively linking the claims to specific provisions of the AD Agreement. As the *EC-Yarn* panel indicated, it is possible to have multiple violations of a particular sub-paragraph of the AD Agreement. For example, the United States' request in paragraphs 4(b) and (c) contain separate descriptions of how Article 5.3 was violated in two different ways. Similarly, paragraphs 4(d) and (e) contain two different descriptions as to how Article 3.4 was violated, and paragraphs 4(g) and (j) describe two ways that SECOFI violated Article 7.4.<sup>37</sup> Finally, Mexico has not demonstrated that any alleged lack of clarity in the United States' request has negatively impacted their due process rights in this proceeding. Without such a showing, there can be no finding of a violation of Article 6.2 or 17.5.<sup>38</sup>

5.38 According to Mexico, the United States argues that it is enough to mention an Article by its number for there to be a "claim". Mexico contends that, in response to a question from a panellist at the first meeting, the United States replied that each of the lettered indents of its request for establishment of a panel constituted a "claim". Mexico observes, however, that the indents of the United States request do not cite to any article. Mexico questioned how the United States could reconcile these two positions?

5.39 Mexico holds that, even assuming *arguendo* that the United States' request did contain "claims", the problem was not presented clearly and hence the United States failed to comply with Article 6.2 of the DSU. The United States' request failed to comply with Article 6.2 of the DSU to such an extent that at the first meeting of the Panel with the parties it was evident that neither Mexico nor the Panel nor the United States itself knew for sure what the claims in the United States' request are. If the United States itself cannot identify its claims, how can it expect Mexico to do so? How can it expect the Panel to carry out its terms of reference?

5.40 Mexico argues that the statements by Mauritius and Jamaica were also very revealing. Neither Mauritius nor Jamaica were affected by Mexico's investigation, but even so they reserved their rights as third parties. Furthermore, they addressed a problem that is completely different from the one raised in this dispute. This is yet another demonstration that the United States did not present the problem clearly and failed to comply with Article 6.2 of the DSU.

5.41 Mexico states that the obligation to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" is not a mere formality. Mexico stresses that Article 6.2 pursues two objectives: first, it enables the Member whose measure has been challenged to defend itself properly, apart from serving to safeguard the rights of other WTO Members who could be affected by the outcome of the proceeding; second, the request for establishment of a panel

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<sup>36</sup> See *European Communities-Bananas Panel Report*, para. 7.23.333

<sup>37</sup> The United States withdrew the lesser duty aspect of its Article 7 claim.

<sup>38</sup> See Answer of the United States to question no. 29 by the Panel, 6 May 1999.

constitutes the basis for a panel's terms of reference. Mexico asserts that it drew the United States' attention to this concern even before the Panel was set up.<sup>39</sup>

5.42 In Mexico's view, it is evident that:

- (a) Mexico's concerns about the lack of clarity in the United States' request for the establishment of a panel were voiced from the start; in other words, this is not an argument prepared following the establishment of the Panel in order to complicate matters;
- (b) Mexico's concerns were expressed when there was still time to remedy the lack of clarity of the United States' request for establishment without affecting the work of a panel already established; and
- (c) the United States decided to do nothing, even though Mexico drew its attention, as well as that of the Dispute Settlement Body, to this problem in due time.

5.43 Mexico reiterates that, as established by Article 7 of the DSU (and in this case Article 17.4 of the AD Agreement too), for a panel to comply with its terms of reference to examine a "matter", the request for establishment has to be submitted properly. That is to say, it must comply, *inter alia*, with the requirements of Article 6.2 of the DSU. This position has been confirmed by various panels and the Appellate Body in a number of cases.<sup>40</sup>

5.44 Mexico submits that the request for the establishment of a panel must indicate the essential requirements to constitute a "matter". For there to be a "matter", it is necessary that the request for establishment contain the following:

- (a) the specific matters at issue; and
- (b) a summary of the legal basis of the complaint (or claims) sufficient to present the problem clearly.

5.45 Mexico recalls that "to speak of a claim, it was necessary to specify the specific factual and legal basis upon which it was asserted that a provision of the Agreement had been breached".<sup>41</sup> Thus, to meet the requirements of Article 6.2 of the DSU, the United States had to specify the particular legal and factual basis upon which it was alleged that a provision of the Agreement had been breached, and should have correlated each allegation with a specific violation. The United States' request does not do so. It contains a heading which mentions various numbers of articles, followed by a series of lettered indents with alleged actions or violations attributed to SECOFI.

5.46 Mexico observes that it is important for the Panel to see that, unlike Article 6.2 of the DSU, Article 4.4 of the same Agreement (on requirements for requests for consultations) only requires that there is an indication of "the measures at issue and an indication of the legal basis for the complaint". However, at no time is it required that the latter be sufficient to present the problem clearly. Article 6.2 of the DSU contains a specific obligation for requests for the establishment of a panel. Failure to fulfil this obligation directly impacts Article 7 of the DSU and 17.4 of the AD Agreement

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<sup>39</sup> See MEXICO-44.

<sup>40</sup> See *EC-Cotton Yarn and Guatemala-Cement*.

<sup>41</sup> See *Guatemala-Cement*.

and cannot be cured subsequently.<sup>42</sup> Neither the United States first submission nor its subsequent actions in the present proceeding would remedy this error.

5.47 In connection to the references cited by the United States as precedents, Mexico recalls the Appellate Body Report in *Japan-Alcoholic Beverages*:

"Adopted panel reports [...] should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute"<sup>43</sup> (emphasis added by Mexico).

5.48 In the view of Mexico, the above statement allows clarifying two things: first, contrary to what the United States argues, in the WTO there is no notion of "jurisprudence" as a source of law, so that there is no requirement to cite a specific case to support an assertion,<sup>44</sup> much less to establish methods of interpretation;<sup>45</sup> second, there is no point in referring indiscriminately to all of the cases brought before the dispute settlement system. Only those which "are relevant to any dispute" are of use.

5.49 In Mexico's opinion, the above demonstrates that the precedents put forward by the United States in connection with these violations are irrelevant, given that they are not "pertinent to this dispute", since they do not refer to "the allegations", but to the "specific measures at issue" which, according to *Guatemala-Cement*, are governed by a special logic in anti-dumping cases.

5.50 According to Mexico, with respect to the first violation, the United States asserts that "a panel request fails to be sufficient to state the problem clearly in accordance with DSU Article 6.2 if the request is so flawed that the defending party's rights of defence are being prejudiced", relying on paras. 68 to 70 of the Appellate Body Report in *European Communities-Computer Equipment*. However, this Appellate Body Report merely refers to "the alleged lack of precision of the terms "LAN equipment" and "PCs with multimedia capability" in the request for the establishment of a panel" in relation to the specific measures at issue.<sup>46</sup> In other words, this quotation does not address the concept of "claims". As the concept of measure in anti-dumping cases is very restricted, that there can be no analogy between the two cases.

5.51 In Mexico's view, to support its assertion that it has met the minimum requirements of Article 6.2 of the DSU, the United States refers to paragraph 18 of the Appellate Body Report in *European Communities-Bananas*, in which the European Communities argue that the request for the establishment of a panel must make a link between the specific measure concerned and the article of the specific agreement allegedly infringed thereby.<sup>47</sup> Mexico points out, however, that its argument does not refer to the link between the specific measure concerned and the article of the specific agreement. Rather, its argument is that the United States did not properly link the elements making up a "claim". Mexico did not go into the link between the measures and the articles. In light of *Guatemala-Cement*, which explains that with respect to anti-dumping there are only three types of specific measures at issue, it would have been pointless for Mexico to make such an argument.

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<sup>42</sup>In its report on *European Communities-Bananas*, para. 143, the Appellate Body stated that "if a *claim* is not specified in the request for the establishment of a Panel, then a faulty request cannot be subsequently "cured" by a complaining party's argumentation in its first submission to the Panel or in any other submission or statement made later in the Panel proceeding".

<sup>43</sup> *Japan – Taxes on Alcoholic Beverages (Japan-Alcoholic Beverages)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (*Japan-Alcoholic Beverages AB Report*), adopted 28 November 1996.

<sup>44</sup> United States second submission, paras. 24 and 35.

<sup>45</sup> See Answer of the United States to question no. 29 by the Panel.

<sup>46</sup> See *European Communities-Computer Equipment AB Report*, para. 70.

<sup>47</sup> See United States second submission, footnote 4.

5.52 With respect to the references made by the United States to *India-Patents*, Mexico observes that not only do the paragraphs cited refer to the limitation on the findings that a Panel may make on issues that have been submitted to it by the parties to the dispute,<sup>48</sup> but the Appellate Body merely reached the conclusion that "a claim *must* be included in the request for establishment of a panel in order to come within the panel's terms of reference in a given case",<sup>49</sup> which does not conflict with what Mexico said. In the opinion of Mexico, this reference bears no relation to the case at issue except to the extent that it shows that the United States failed to comply with Article 7 of the DSU in the past.

5.53 Finally, Mexico maintains that the specific reference by the United States to *Guatemala-Cement* is simply inappropriate. Paragraph 72 of the Appellate Body Report (which the United States quotes) states that "the '*matter*' referred to the DSB", therefore, consists of two elements: the specific *measures* at issue and the *legal basis of the complaint* (or the *claims*)" (emphasis in original). This proves that the "specific measures at issue" is a legal concept distinct from "claims".

## **2. Alleged Insufficiency of The Request For Establishment Under Article 17.5 of The AD Agreement**

5.54 Mexico argues that the United States' request for establishment of the Panel also failed to fulfil the requirements of Article 17.5 of the AD Agreement. Mexico recalls that Article 17.5 of the AD Agreement provides:

"The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

- (i) A written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement, has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded; and
- (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member" (emphasis added by Mexico).

5.55 According to Mexico, the Appellate Body in *Guatemala Cement* perfectly delimited the meaning of Article 17.5 by stating that:

"When a '*matter*' is referred to the DSB by a complaining party under Article 17.4 of the Anti-Dumping Agreement, the Panel request must meet the requirements of Articles 17.4 and 17.5 of the Anti-Dumping Agreement as well as Article 6.2 of the DSU"<sup>50</sup> (emphasis added by Mexico).

5.56 Mexico states that at least the following conclusions can be drawn from the foregoing:

- (a) Articles 6.2 of the DSU and 17.4 and 17.5 of the AD Agreement are complementary and must be applied together;<sup>51</sup> and

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<sup>48</sup> *India-Patents AB Report*, para. 85.

<sup>49</sup> *Id.* para. 89.

<sup>50</sup> See *Guatemala-Cement AB Report*, para.75.

<sup>51</sup> In its report, the Appellate Body which examined the *Guatemala-Cement* dispute said the following: "In our view, there is no inconsistency between Article 17.5 of the Anti-Dumping Agreement and the provisions of Article 6.2 of the DSU. On the contrary, they are complementary and should be applied together". Furthermore, in paragraph 64 it stated that "the Anti-Dumping Agreement is a covered Agreement listed in

- (b) the requirements of Articles 17.4 and 17.5 (which serves as the basis for a panel to examine a matter) of the AD Agreement and 6.2 of the DSU must be met in the request for the establishment of a panel.

5.57 Mexico reiterates its view that the request for establishment submitted by the United States does not fulfil the requirements of Article 17.5. In Mexico's opinion, it is particularly noteworthy that the United States at no time indicates how its benefits under the AD Agreement were nullified or impaired or the achieving of the objectives of the Agreement were being impeded. The United States' request does not even mention the terms "nullification", "impairment", "benefit" or "achieving of objectives". Mexico submits that, since the United States did not make such a statement, and given that the Panel has to examine the "matter" on the basis of such a statement, in the present dispute the Panel does not have any "basis" for examining the "matter". Moreover, the "matter" was likewise not duly constituted. Consequently, the United States' request does not fulfil the requirements to be submitted to a panel.

5.58 Mexico recalls that the United States itself, in its submission to the Appellate Body in *Guatemala-Cement*, put forward the argument that many panels have applied the principle of judicial economy<sup>52</sup> *inter alia* in cases where a complainant did not specify what benefit or provision of the 1947 General Agreement was nullified or impaired.

5.59 The United States disputes Mexico's statement that its request for establishment is inconsistent with Article 17.5 of the AD Agreement because that request did not specifically use the specific terms "nullification", "impairment", "benefit", or "achieving of objectives".<sup>53</sup> In the view of the United States, this assertion should be rejected because it completely ignores the extensive nature of its request, and is inconsistent with the text and context of Article 17.5. The United States clearly provided a written statement of how benefits under the AD Agreement were being nullified or impaired when it provided its statement detailing the various breaches of the AD Agreement and Article VI of the GATT 1994 by Mexico's measures.

5.60 The United States notes that the Appellate Body in *Guatemala-Cement* discussed the text and requirements of Article 17.5 as follows:

"Article 17.5 does not expressly require the complaining Member's request for the establishment of a panel to identify the 'specific measure at issue' or 'to provide a brief summary of the legal basis of the complaint'. Indeed, Article 17.5 contains none of the explicit, detailed procedural requirements that Article 6.2 of the DSU imposes on a request for the establishment of a panel. All that Article 17.5 requires is that a request by a complaining party contain:

- (i) a written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded; and

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Appendix 1 of the DSU; the rules and procedures of the DSU, therefore, apply to disputes brought pursuant to the consultation and dispute settlement provisions contained in Article 17 of that Agreement".

<sup>52</sup> This would be consistent with WTO practice. It should be recalled that in *Guatemala-Cement* the Appellate Body reversed the Panel's conclusion that the matter referred to in Mexico's request for establishment were properly before it, on the grounds that Mexico had not identified a specific measure at issue. See *Guatemala-Cement AB Report*, para. 90(c).

<sup>53</sup> Mexico first submission, para. 35.

- (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member".<sup>54</sup>

5.61 The United States notes further that the text of Article 17.5(i) is phrased in the disjunctive. Thus, the United States' request would have to indicate either (a) how a benefit accruing to it, directly or indirectly, under the AD Agreement has been nullified or impaired, *or* (b) that the achieving of the objectives of the Agreement is being impeded. The terms "nullification and impairment" and "benefit" used in the first part of 17.5(i) have a particular meaning in GATT jurisprudence. Article 17.5(i) is the anti-dumping counterpart to Article XXIII:1 of GATT 1994. Both provisions relate to the initiation of dispute settlement provisions by a written statement and both use terms such as "nullification or impairment", "benefit" or "objectives". GATT panels and the subsequent GATT interpretations of the language of Article XXIII:1 of GATT 1994 have not required the use of particular "magic" language to initiate a dispute. Rather, in a case such as this one involving a covered agreement (*i.e.*, the AD Agreement and Article VI of GATT 1994) what is required to initiate a case of nullification and impairment is the allegation that the GATT 1994 or the WTO Agreement has been violated by another Member.

5.62 The United States recalls that in a 1962 panel report on *Uruguayan Recourse to Article XXIII*, the panel noted that

"... in cases where there is a clear infringement of the provisions of the General Agreement, or in other words, where measures are applied in conflict with the provisions of GATT and are not permitted under the terms of the relevant protocol under which the GATT is applied by the contracting party, the action would, *prima facie*, constitute a case of nullification and impairment ...".<sup>55</sup>

5.63 The 1979 Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, adopted 28 November 1979, also adopted a similar interpretation of Article XXIII:1 as have a number of subsequent GATT panel reports.<sup>56</sup> This concept is embodied in the DSU in Article 3.8:

"In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on the other Members parties to that covered agreement..".

5.64 According to the United States, the presumption of nullification and impairment from a violation of GATT provisions has been described by one panel as operating "in practice as an irrefutable presumption".<sup>57</sup> Indeed, to date, no GATT or WTO panel has ever found a party to have successfully rebutted the presumption that a measure infringing obligations causes nullification and impairment. This is because the absence of any adverse impact cannot operate so as to negate a finding of nullification or impairment as long as an agreement is found to be violated.<sup>58</sup> Thus, complaining parties alleging violations of the GATT 1994 and WTO agreements are, by definition, alleging that their benefits under those agreements are being nullified and impaired. The same is true

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<sup>54</sup>*Guatemala-Cement AB Report*, para. 74.

<sup>55</sup>L/1923, adopted 16 November 1962, 11S/95, 99-100, para. 15.

<sup>56</sup>26S/216, para. 5. See Analytical Index, Guide to GATT Law and Practice, Vol. II, p. 655, footnote 60.

<sup>57</sup>*United States - Taxes on Petroleum and Certain Imported Substances*, L/6175, adopted 17 June 1987, 34S/136, 155, para. 5.1.3.

<sup>58</sup>*Id.* para. 5.1.7.

in the case of Article 17.5(i). The interpretation of Article 17.5 offered by Mexico -- that it can only be invoked if the exact words in the text of Article 17.5 are invoked -- would be inconsistent not only with the text of Article 17.5, but also with these long-standing interpretations of Article XXIII:1 of GATT 1994 which now apply to all of the agreements annexed to the WTO Agreement, by virtue of Article 3.8 of the DSU.

5.65 The United States contends that this interpretation is supported by other aspects of the text of Article 17.5(i). Article 17.5 requires that complaining parties provide a written statement "indicating how a benefit has been directly or indirectly nullified or impaired, or the achieving of the objectives of the Agreement is being impeded". An "indication" is distinct from a detailed discussion and suggests that examination of the entire context of the request is important, not simply whether certain magic words have been invoked. The phrase "indicating how" suggests that something more than simply using the words "nullify and impair" (as Mexico appears to claim) is required, because it asks for a description of "how" benefits have been nullified or impaired. In this regard, the text of Article 17.5 is similar to the language in Article 6.2 of the DSU requiring Members to submit "a brief summary of the legal basis sufficient to present the problem clearly". In finding "no inconsistency" between Article 17.5 of the AD Agreement and the provisions of Article 6.2 of the DSU the Appellate Body in *Guatemala-Cement* recognized this. Thus, any request (concerning a claim under the AD Agreement) which satisfies DSU Article 6.2 also satisfies AD Agreement Article 17.5. The Appellate Body has confirmed this point in characterizing Article 17.5 as requiring none of the detail that Article 6.2 requires.

5.66 The United States submits that its request sets forth a number of legal claims alleging violations of various provisions of the AD Agreement and Article VI of GATT 1994. Such allegations -- translated into the language of GATT 1994 and AD Agreement Article 17.5(i) -- constitute allegations that United States benefits under the AD Agreement and Article VI of GATT 1994 are being nullified and impaired. Moreover, the United States' request provides information "indicating how" the U.S. benefits under the AD Agreement have been nullified and impaired. Such indications are found in the fourth paragraph of the request, and in particular in the detailed information and summary arguments found in paragraphs 4(a)-(k).

5.67 Finally, the United States observes that it suggested at the first panel meeting with the parties that Mexico's Article 17.5 argument appeared to lead to a requirement that Members using the AD Agreement had to demonstrate trade damage in fact. Mexico's preliminary response was that Article 17.5 does not require submission of a written statement quantifying an "impact" or "effect" of the violations of the AD Agreement. The United States agrees with Mexico. As the Appellate Body stated in *European Communities-Bananas* in rejecting the European Communities' challenge to the right of the United States to bring claims under the GATT 1994:

"Neither Article 3.3 nor 3.7 of the DSU nor any other provision of the DSU contain an explicit requirement that a Member must have a 'legal interest' as a prerequisite for requesting a panel. We do not accept that the need for a 'legal interest' is implied in the DSU or in any other provision of the WTO Agreement"<sup>59</sup> (emphasis added by the United States).

5.68 In sum, in the view of the United States, all that a party making a written statement under Article 17.5(i) must do is describe how a violation of the Agreement (*i.e.*, nullification or impairment) has taken place. This written statement was clearly made in the request for establishment.

5.69 The United States recalls that a Member is in compliance with both Article 6.2 of the DSU and Article 17.5 of the AD Agreement when its request for establishment provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" (DSU, Article 6.2), and "a

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<sup>59</sup>*European Communities-Bananas AB Report*, para. 132

written statement ... indicating how a benefit ..., directly or indirectly, has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded" (AD Agreement, Article 17.5). The request for establishment met these requirements. Therefore, this matter is properly before the Panel under Article 17.4 of the AD Agreement and Article 7 of the DSU.

5.70 Mexico asked the United States how many alleged "claims" the request for the establishment of a panel by the United States contained and what they were? The United States replied that the claims are set forth in the chapeau to paragraph 4 of the *Request for Establishment*. These claims are amplified and further described in subparagraphs 4(a)-(k) to the *Request for Establishment*.<sup>60</sup>

5.71 In response to a question from the Panel, the United States said that complaining parties in anti-dumping disputes normally formulate their requests for establishment in a way which identifies their problem(s) with the anti-dumping measure in question, and that this is an approach which normally is sufficient to "present the problem clearly" for purposes of Article 6.2 of the DSU and "indicate how" benefits are being nullified and impaired for purposes of Article 17.5 of the AD Agreement. Thus, such requests for establishment normally will meet the requirements of both of these provisions. This is the case with the request for establishment of the United States in this dispute.

5.72 In addition, the United States acknowledged that the Appellate Body in *Guatemala-Cement* stated that Article 17.5 of the AD Agreement contains "additional requirements". The United States did not disagree with this statement. The Appellate Body did not elaborate further on what it meant by this statement than to say that "Article 17.5 contains none of the explicit, detailed procedural requirements that Article 6.2 of the DSU imposes on a request for the establishment of a panel". It then concluded that there is "no inconsistency" between Article 6.2 of the DSU and Article 17.5 of the AD Agreement, and that these provisions are "complementary and should be applied together". In the opinion of the United States, it was not clear whether, in the Appellate Body's view, the existence of non-conflicting language in AD Article 17.5 and DSU Article 6.2 meant that anti-dumping complainants do or do not always need to include additional information in their requests for establishment than complainants in non-anti-dumping matters, in order to satisfy the additional requirements of AD Article 17.5. It was possible that, with respect to particular claims in an anti-dumping matter, the simple citation of a provision of the AD Agreement could be sufficient to present a problem clearly and indicate how a benefit is being nullified or impaired. At least the Appellate Body did not rule this out for all circumstances. However, the United States recognized that simple citation will not necessarily always be sufficient.

5.73 The United States submitted that, in this instance, the United States took special care in formulating its request for establishment to ensure that no matter how AD Article 17.5 and DSU Article 6.2 are interpreted, the request would comply with both of these provisions. The chapeau language in paragraph 4 of the U.S. request identifies the specific Articles in the AD Agreement that the United States maintained were violated by SECOFI's final anti-dumping measure, and paragraphs 4(a)-(k) provide detailed amplifications which ensure that the request sufficiently describes the U.S. problems with that measure and indicate how a benefit is being nullified or impaired. As such, the request for establishment satisfies the requirements of Article 6.2 of the DSU and Article 17.5 of the AD Agreement, reading these provisions consistently with one another in this case.<sup>61</sup>

5.74 Mexico reiterates that Article 17.5 of the AD Agreement is an essential requirement for a panel to be able to examine a matter. In fact, the language of Article 17.5 itself makes it clear that it is the "basis" for examining the matter. Mexico also reiterates that in *Guatemala-Cement* the Appellate

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<sup>60</sup>See Answer of the United States to question no. 8 by Mexico, 6 May 1999.

<sup>61</sup>See Answer of the United States to question no. 1 by the Panel, 22 June 1999.



Body made it clear that Article 17.5 of the AD Agreement and Article 6.2 of the DSU are "complementary and should be applied together". It stated that the request for the establishment of a panel must comply with the requirements of Article 6.2 of the DSU as well as Articles 17.4 and 17.5 of the AD Agreement.

5.75 Mexico submits therefore that requests for establishment concerning anti-dumping matters have further requirements in addition to those of the DSU. In other words, in order to be able to submit a "matter" for a panel to examine it, it is not enough to "identify the specific measures at issue" and "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". It is also necessary that the Member make a written statement indicating "how a benefit accruing to it, directly or indirectly, under the Agreement, has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded".

5.76 Mexico recalls that, at the first meeting of the Panel with the parties, the United States argued in its statement that its panel request "also provided the indication that Article 17.5 of the Anti-Dumping Agreement requires of how a benefit has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded. Mexico's contention that the United States actually had to use the precise terms in Article 17.5, conflicts with the basic GATT tenet, embodied in Articles 3.1 and 3.8 of the DSU, that infringements of obligations under the WTO Agreement *prima facie* nullify or impair benefits".<sup>62</sup> Subsequently, at the same meeting the United States maintained that its request implicitly fulfilled the requirements of Article 17.5.

5.77 According to Mexico, it may be gathered that: (i) the United States recognizes the obligations imposed on it by Article 17.5 of the AD Agreement; (ii) the United States recognizes that this obligation has to be fulfilled in the request for the establishment of the panels; (iii) the United States maintains that its request implicitly fulfilled this obligation by virtue of the very existence of Articles 3.1 and 3.8 of the DSU; and (iv) the United States considers that having to use the terms of Article 17.5 of the AD Agreement conflicts with Articles 3.1 and 3.8 of the DSU.

5.78 In the opinion of Mexico, the foregoing arguments by the United States are unsatisfactory. Furthermore, all that they show is that the United States request did not fulfill the obligations of Article 17.5 of the AD Agreement. Besides, the obligations of Article 17.5 cannot be fulfilled implicitly. Mexico's position is supported by the following considerations:

- (a) the actual text of Article 17.5, by establishing the obligation to "indicate how a benefit ... has been nullified or impaired ...", implies that this obligation must be fulfilled explicitly; otherwise, this obligation would have no sense or purpose, since all requests for establishment would automatically fulfil the requirement regardless of whether or not they indicated "how a benefit ... has been nullified or impaired ...".
- (b) moreover, Article 17.5 of the AD Agreement is listed in Appendix 2 of the DSU, which contains the "special or additional rules and procedures contained in the covered agreements". In other words, the special or additional rules or procedures which, in case of conflict or discrepancy, prevail over the general provisions of the DSU (which include Articles 3.1 and 3.8 of the DSU). To assert, as the United States does, that an obligation of this kind may be fulfilled implicitly reverses the relationship that should exist between a special or additional obligation and those of the DSU, making the latter prevail over the special or additional ones, which is contrary to Article 1.2 of the DSU.

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<sup>62</sup>Oral statement of the United States at the first meeting of the Panel with the parties, 14 April 1999, para. 55.

5.79 Mexico also asserts that invocation by the United States of Articles 3.1 and 3.8 of the DSU is likewise invalid and groundless for the following reasons, *inter alia*:

- (a) The request for establishment does not even mention Articles 3.1 and 3.8 of the DSU, which shows that the United States is either making an *ex post facto* argument to justify its failure to fulfil its obligation under Article 17.5 of the AD Agreement; or believes that a special or additional obligation in Appendix 2 of the DSU may be fulfilled by a doubly implicit deduction; or else considers that a doubly implicit deduction is sufficient to present a problem clearly as required under Article 6.2 of the DSU.
- (b) The reference to Article 3.1 of the DSU is not related to the fulfilment or non-fulfilment of Article 17.5 of the AD Agreement. Article 3.1 of the DSU simply affirms the adherence of WTO Members to the dispute settlement principles. Strictly speaking, if this provision had any relationship with the point at issue, it would mean that the adherence mentioned in Article 3.1 confirms once again that the United States should have complied with the provisions of Article 17.5 of the AD Agreement and not the contrary.
- (c) Article 3.8 of the DSU contains nothing more than a "presumption", in other words a fact awaiting future corroboration. The United States cannot validly argue that a presumption may replace a written statement indicating "how a benefit has been nullified or impaired", in other words a fact that has already happened and may be corroborated at present. In fact, the term "normally" included in the second sentence of Article 3.8 of the DSU means that the "presumption" referred to in this Article may be confirmed or not depending on each case. Hence, there is no automatic relationship between mere presumption and a fact such as that nullification or impairment exists or that the achievement of the objectives of the Agreement has been impaired.
- (d) The concepts of "nullification or impairment" and of "achieving of the objectives of the Agreement" are much broader than that of "non-fulfilment of obligations" or even "violation". Article XXIII of the GATT 1994 itself distinguishes three circumstances in which there may be nullification or impairment or impeding of the achievement of the objectives of the Agreement, namely:

"the failure of another contracting party to carry out its obligations under this Agreement; or the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement; or

the existence of any other situation".

5.80 Hence, in Mexico's view, even if the United States had mentioned Article 3.8 of the DSU, this would not have been enough to satisfy the requirements of Article 17.5 of the AD Agreement. To assert otherwise would be tantamount to saying that Article 17.5 is not applicable to the non-violation disputes referred to in Article 26 of the DSU. According to Mexico, the United States agrees that its alleged compliance with Article 17.5(i) requirements was not explicit. Although in its reply a question by Mexico,<sup>63</sup> the United States maintains the contrary (there is nothing "implicit" in alleging violations), in its reply to a question by the Panel,<sup>64</sup> the United States openly recognizes that, in its opinion, there is no need to comply with the requirements of Article 17.5(i) of the AD Agreement

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<sup>63</sup> Answer of the United States to question no. 11 by Mexico, 6 May 1999.

<sup>64</sup> Answer of the United States to question no. 46 by the Panel, 6 May 1999.

explicitly ("The United States does not believe that an explicit statement that benefits are being nullified or impaired under the AD Agreement is required under Article 17.5(i). To satisfy Article 17.5(i), it is sufficient for the panel request to state a claim of violation of the AD Agreement by an anti-dumping measure").

5.81 Mexico holds that it is not true that the United States implicitly complied with the requirements of Article 17.5(i). In paragraph 6 of its second submission, the United States asserts that it made a linkage between the specific measures and the various claims using the language in the provisions of the AD Agreement. If this assertion, added to the contention in paragraph 17 of the same second submission of the United States (that the United States provided information "indicating how" its benefits under paragraphs 4(a)-(k) of its request for the establishment of a Panel had been nullified and impaired) were correct, then the United States would at least have had to use the language of Article 17.5(i) for that requirement to be implicitly included in its request for the establishment of a Panel. However, the text of the request shows that the United States never did so. Furthermore, in paragraph 15 of its second submission, the United States contends that there is no need to invoke the "exact words" of Article 17.5(i).

5.82 In other words, Mexico maintains that, if what the United States says in paragraphs 6 and 17 of its second submission is true, then the United States did not include compliance with Article 17.5(i) in its request. Moreover, if what the United States contends in paragraph 15 of the same submission is correct, then it is not true that the use of the language contained in the provisions of the AD Agreement suffices to fulfill the obligations set forth in Article 6.2 of the DSU. It is not reasonable to argue that using the language of the AD Agreement is sufficient in some cases, and argue that, in other cases, where the United States happens to have committed an error, it is not necessary.

5.83 Mexico argues that the existence of Articles 3.1 and 3.8 of the DSU and of Article XXIII:1 of the GATT 1994 does not indirectly and automatically ensure fulfilment of the Article 17.5(i) requirements. In its second submission, Mexico explains the inadmissibility of this line of argument by the United States. However, it should also be born in mind that: (a) in its reply to question 22 of Mexico, the United States explicitly recognizes and accepts that Article 3.8 of the DSU "is not sufficient" to meet the requirements of Article 17.5(i), and that (b), unlike other covered agreements, the AD Agreement does not mention Article XXIII because, as stated by the Appellate Body in *Guatemala-Cement*, the AD Agreement has its own special or additional rules and procedures for the settlement of disputes. Consequently, none of these provisions is sufficient or applicable in meeting the requirements of Article 17.5(i).

5.84 Mexico maintains that, as in the case of non-fulfilment of Article 6.2 of the DSU mentioned above, Mexico voiced its concerns as to the non-fulfilment of the obligations under Article 17.5 of the AD Agreement to the United States and also to the DSB prior to the establishment of the panel.<sup>65</sup> However, once again the United States decided to do nothing in this regard.

5.85 Mexico concludes that the failure to fulfil the obligations of Article 17.5 of the AD Agreement in the request for the establishment of a panel is an error that cannot be remedied in later stages. Consequently, Mexico submits that the United States' request must be rejected, as was done by the Appellate Body in *Guatemala-Cement*.

5.86 In response to a question from the Panel, Mexico stated that the indication as to how a Member's rights have been nullified or impaired, or that the achieving of the objectives of the agreement is being impeded, should be made explicit. The Appellate Body in *Guatemala-Cement* acknowledged that this was not an obligation to be fulfilled implicitly through compliance with Article 6.2 of the DSU, and made the following observation:

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<sup>65</sup>See MEXICO-44.

"The fact that Article 17.5 contains these additional requirements, which are not mentioned in Article 6.2 of the DSU, does not nullify, or render inapplicable, the specific requirements of Article 6.2 of the DSU in disputes brought under the *Anti-Dumping Agreement*. In our view, there is no *inconsistency* between Article 17.5 of the *Anti-Dumping Agreement* and the provisions of Article 6.2 of the DSU. On the contrary, they are complementary and should be applied together. A Panel request made concerning a dispute brought under the *Anti-Dumping Agreement* must therefore comply with the relevant dispute settlement provisions of both that Agreement and the DSU. Thus, when a "matter" is referred to the DSB by a complaining party under Article 17.4 of the *Anti-Dumping Agreement* the panel request must meet the requirements of Articles 17.4 and 17.5 of the Anti-Dumping Agreement as well as Article 6.2 of the DSU"<sup>66</sup> (emphasis added by Mexico).

5.87 With regard to the second element of Article 17.5 (i) of the AD Agreement, Mexico stated that the United States at no time argued that it was in compliance with the obligation to indicate that the achieving of the objectives of the Agreement was being impeded. In its oral presentation at the first meeting of the Panel with the parties, the United States expressly referred to Articles 3.1 and 3.8 of the DSU in order to substantiate its argument that it did identify the manner in which its benefits accruing under the AD Agreement have been nullified or impaired. In addition, it admitted in its rebuttal that the indication that benefits have been nullified or impaired differs from the indication that the achieving of the objectives of the Agreement has been impeded.<sup>67</sup> In Mexico's view, the United States acknowledged that these are different, albeit alternative obligations, and admitted that it did not indicate that the achieving of the objectives of the AD Agreement is being impeded. The United States' argument is therefore confined to the first part of Article 17.5(i), which, as was seen above, was also not complied with. Mexico stated further that, if Article 17.5 were automatically complied with, its provisions would be inoperative. The fact that the indication that "the achieving of the objectives of the Agreement is being impeded" is an alternative to the indication concerning nullification or impairment does not alter the fact that that indication must be made explicitly. In addition, Mexico asserted that, in the present Panel, even assuming *arguendo* that the presumption contained in Article 3.8 of the DSU could take precedence over the special or additional obligation under Article 17.5 of the AD Agreement, the United States does not make any reference to that Article of the DSU.<sup>68</sup>

5.88 In response to the same question from the Panel, the United States asserted that an explicit statement that benefits are being nullified or impaired under the AD Agreement was not required under Article 17.5(i). To satisfy Article 17.5(i), it is sufficient for the request for establishment to state a claim of violation of the AD Agreement by an anti-dumping measure. With respect to the phrase in 17.5(i) "that the achieving of the objectives of the Agreement is being impeded" the United States noted that, during the negotiation of the present AD Agreement in the Uruguay Round, there was a sharp division of views concerning what the "objectives of the Agreement" are or should be. While the preamble of an agreement often provides guidance as to its objectives, that division of views led to omission of any preambular language. However, clearly the objectives of the AD Agreement – or any covered agreement – are impeded if the various provisions of the agreement are not respected. Indeed, from the principle of effective treaty interpretation (*ut res magis valeat quam pereat*) it follows that whenever the Agreement is violated, *ipso facto* the achieving of its objectives is impaired. Thus, an allegation (such as that made in the request for establishment) that

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<sup>66</sup> *Guatemala-Cement AB Report*, para. 75.

<sup>67</sup> United States second submission, para. 14.

<sup>68</sup> See Answer of Mexico to question no. 46 by the Panel, 6 May 1999.

certain provisions of the AD Agreement are being violated through the application of an anti-dumping measure would be sufficient to comply with this aspect of Article 17.5(i).<sup>69</sup>

### **3. Allegedly Improper References to The Mexican Submission In On-Going NAFTA Proceedings**

5.89 Mexico notes that, in its first submission, the United States makes various references to the submission SECOFI presented in a proceeding that is currently being conducted under Chapter 19 of the North American Free Trade Agreement.<sup>70</sup> Mexico requests the Panel not to take these references into account. Mexico states that NAFTA is a totally different forum, deriving from the commitments bilaterally established among the parties, in this case Canada, the United States and Mexico. Consequently, its proceedings are governed by different rules from those of WTO panels. Mexico observes that the NAFTA Chapter 19 proceeding is intended to replace the domestic review mechanism that would be carried out by the authorities of the party in which an anti-dumping or countervailing duty investigation had been carried out, and therefore the proceeding and its effects should not be aired before the WTO and still less before a DSB Panel.

5.90 Mexico recalls that Article 1904 of that Agreement establishes the right to submit to a binational panel a final measure imposed by a party "to determine whether such determination was in accordance with the anti-dumping or countervailing-duty law of the importing party". It also provides that "[t]he anti-dumping or countervailing-duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents". Mexico asserts that it is therefore obvious that the arguments which parties present to a binational panel set up under NAFTA Article 1904 are influenced by the legal order applicable to that forum, which is different from the set of WTO rules. Hence, those arguments do not necessarily correspond to those that would be used before this Panel.

5.91 Mexico also recalls that under NAFTA Article 1904.5, parties may request establishment of a panel on request of a person who would otherwise be entitled under the law of the importing party to commence domestic procedures for judicial review of that final determination. Thus, the rights protected under NAFTA are not necessarily the same as those which this Panel has to examine. In fact, the industry concerned is involved in that forum, which is not the case in WTO proceedings.

5.92 Mexico states that, therefore, it is not within the competence of the WTO or the DSB to consider such proceedings or the submissions and documents that are, have been or may have been submitted in such a proceeding. The references made by the United States in that connection shall be settled by the panel set up in accordance with the rules and procedures established by NAFTA. Moreover, the United States neglects to mention that the binational panel established under the NAFTA has not yet delivered its decision; therefore, the proceeding to which the United States refers is *sub judice* and thus pending. It is currently being handled through the appropriate channels and by the relevant bodies. Hence, the information submitted in that forum should not have any evidentiary validity for this panel.

5.93 Mexico argues that, in addition, this Panel's terms of reference are confined to the AD Agreement and GATT 1994. Any assertions made by the United States concerning the NAFTA proceedings should be rejected. The GATT and WTO have constantly adhered to the practice of not examining other agreements except in cases where they are *per se* violations of the WTO Agreements.<sup>71</sup> Mexico submits that taking a contrary position would entail serious dangers for the

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<sup>69</sup> Answer of the United States to question no. 46 by the Panel, 6 May 1999.

<sup>70</sup> See United States first submission, paras. 99, 100, 108 and 117.

<sup>71</sup> Analytical Index, Guide to GATT Law and Practice, Vol. II, p. 799 refers to an arbitration award between Canada and the European Communities in which the arbitrator found that "[i]n principle a claim based on a bilateral agreement cannot be brought under the multilateral dispute settlement procedures of the GATT".

relationship between this Organization and other bilateral, plurilateral and multilateral agreements. Is a panel empowered to analyse a Member's statements made in the context of the Maastricht Agreement? Can a WTO Panel examine a Member's statements made in an APEC form and base its conclusions on such statements? Can draft decisions of the LAIA be the subject of a panel? The reply to all these questions can only be "no". Otherwise, the Panel would be going beyond its terms of reference and applying the WTO agreements outside their scope. Accordingly, Mexico requests the Panel to disregard the statements made by the United States that are based on the proceeding that is taking place under the NAFTA.

5.94 The United States disputes Mexico's argument that references by the United States to Mexico's submissions in the parallel NAFTA Chapter 19 proceeding should be excluded from consideration by the Panel. In the United States' view, Mexico's objections, which seek to *exclude* the receipt by this Panel of evidence of SECOFI statements and documents produced in the NAFTA proceedings, are without merit. The Panel should accept and give significant weight to this relevant evidence.

5.95 The United States notes that the NAFTA Chapter 19 panel will be reviewing SECOFI's final anti-dumping measure regarding HFCS from the United States, which is also being challenged in this WTO proceeding.<sup>72</sup> Many of the issues being challenged in the two proceedings are identical, involve the same law (the AD Agreement), and are based upon the same administrative record compiled by SECOFI during the anti-dumping investigation. Because of the identity of issues in the two parallel proceedings, the United States has cited both to the administrative record in that proceeding as well as to the main public brief filed by SECOFI, in an effort to aid the Panel in understanding certain legal arguments in this case.

5.96 The United States observes that there are two types of NAFTA-related evidence that the United States has proffered to the Panel in this proceeding. First, citations to SECOFI's administrative record, as compiled by SECOFI and filed with the NAFTA panel, represent references to the contemporaneous record as developed by the investigating authority, during the anti-dumping investigation.<sup>73</sup> This is evidence which the Panel may evaluate, pursuant to Article 17.6(i), in determining whether SECOFI's establishment of the facts, during the anti-dumping investigation, was proper, and its evaluation of them unbiased and objective. Indeed, Mexico has likewise cited to documents from SECOFI's administrative record in support of its arguments. Both the United States and Mexico have attached these documents to their respective submissions.<sup>74</sup> As a result, they are

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<sup>72</sup>The issues before the NAFTA Chapter 19 panel have been fully briefed; the parties are awaiting completion of the panel formation process, so that the five-member panel may hear argument and begin review of the case.

<sup>73</sup>Article 1911 of NAFTA defines the administrative record as: all documentary or other information presented to or obtained by the competent investigating authority in the course of the administrative proceedings, including any governmental memoranda pertaining to the case, and including any record of *ex parte* meetings as may be required to be kept; a copy of the final determination of the competent investigating authority, including reasons for the determination; all transcripts or records of conferences or hearings before the competent investigating authority; and all notices published in the official journal of the importing Party in connection with the administrative proceeding.

<sup>74</sup>The documents to which the United States cites are from SECOFI's administrative record, as filed in the NAFTA proceeding, and are found at: US-1-7, 9, 11-20, 23, 34 and 38. Similarly, nearly all of the documents to which Mexico cites in its first submission, and attaches to that submission, are from SECOFI's administrative record. The United States has objected to the inclusion of only one of these documents, MEXICO-13, because it does not appear to be in SECOFI's record, nor did SECOFI make it accessible at initiation to interested parties.

part of the Panel's record in this WTO dispute. Mexico does not appear to be disputing the United States' inclusion of these documents.<sup>75</sup>

5.97 The United States observes further that the second type of NAFTA-related evidence consists of statements made in SECOFI's public brief filed in the NAFTA proceeding.<sup>76</sup> These statements are SECOFI's post-investigation justifications of its positions before the NAFTA panel. Therefore, they do not represent evidence which the Panel can or may consider in evaluating SECOFI's factual determinations, pursuant to Article 17.6(i). Instead, the United States offers them as authentic statements (and, in the United States' view, admissions) of the Government of Mexico which are relevant to demonstrate inconsistencies between Mexico's position on the same issues in this dispute and in the NAFTA dispute. Specifically, the excerpts from SECOFI's NAFTA brief which the United States included address SECOFI's arguments in that forum pertaining to its initiation of this investigation under Article 5 and its threat of injury analysis under Article 3 of the AD Agreement.<sup>77</sup>

5.98 The United States contends that Mexico cites to no WTO rules or jurisprudence in support of its position that all NAFTA evidence should be excluded from WTO proceedings and asserted that there is none. In fact, the Appellate Body in interpreting the fact-finding role of panels has made it clear that "[i]t is particularly within the province and the authority of a panel ... to ascertain the acceptability and relevancy of information and advice received, and to decide what weight to ascribe to that information or advice or to conclude that no weight at all should be given to what has been received".<sup>78</sup> According to the United States, the issue, therefore, is not whether the Panel may accept the NAFTA evidence proffered by the United States. There is no question that it has the power to do so pursuant to Article 13 of the DSU as set forth in the *United States-Shrimp* decision. Rather, the issue is whether the Panel should do so, and how much weight the Panel should give to this evidence.<sup>79</sup> In the view of the United States, the Panel should accept and give considerable weight to both types of evidence proffered by the United States.

5.99 The United States contends that there is no question that the documents concerning the first type of NAFTA-related evidence are authentic. Indeed, Mexico itself has attached to its first submission many documents from SECOFI's administrative record. These documents were generated during the course of SECOFI's anti-dumping proceeding and were subsequently compiled and filed with the NAFTA Chapter 19 panel, in accordance with its rules. In fact, neither the United States nor Mexico is objecting to inclusion of these documents in this proceeding, with the exceptions noted in

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<sup>75</sup>The United States noted that Mexico may be objecting to the inclusion of an excerpt from a transcript from a public hearing held before SECOFI, during the administrative proceeding, US-20. See Mexico's first submission at footnote 25, citing to para. 117 of the U.S. first submission. The United States argued that, if Mexico intends to object to the inclusion of this transcript from SECOFI's own administrative proceeding, and which is part of its administrative record, Mexico's objection must be rejected by this Panel. Similarly, to the extent that Mexico may have objected to the United States' proffering of the index to its administrative record before the Panel at the first panel meeting, that objection must be rejected for the same reasons.

<sup>76</sup>See Brief of the Investigating Authority (SECOFI) before the Binational NAFTA Panel, NAFTA Secretariat File No. MEX-USA-98-1904-01, 21 August 1998, US-27(a) and (b) and US-29(a) and (b) and US-33,35 and 36.

<sup>77</sup>See US-10(a) and (b), cited at paras. 99 and 108 of the U.S. first submission, US-27 (a) and (b), cited at footnotes 65, 74 and 78, and US-29(a) and (b) cited at para. 119 of the U.S. second submission. See also Mexico's first submission at footnote 25, citing to these paragraphs of the U.S. first submission. Mexico also cites to para. 100 of the U.S. first submission, which continues the analysis of para. 99 but does not cite further to SECOFI's NAFTA brief.

<sup>78</sup>See *United States - Import Prohibition of Certain Shrimp and Shrimp Products (United States-Shrimp)*, WT/DS58/AB/R (*United States-Shrimp AB Report*), adopted 6 November 1998, paras. 104-106.

<sup>79</sup>The United States asserts that, consistent with the Appellate Body's decision in *United States-Shrimp*, it could attach as an exhibit to its rebuttal submission the phonebook of Mexico City. The issue would not be its admissibility, but rather what evidentiary weight the Panel should attach to the information in the phone book.

notes 30 and 31 of the U.S. second submission. The Panel may therefore give full weight to the evidence in these documents, when conducting its review pursuant to Article 17.6(i).

5.100 The United States maintains that the second type of NAFTA-related evidence -- the admissions of SECOFI in its brief before the Chapter 19 panel -- is also highly relevant. In its brief, SECOFI argued that it was not obligated to consider any Article 3.4 factors regarding injury -- a position different from that which it is taking in this proceeding.<sup>80</sup> The Panel may take into account these discrepancies in considering what weight to accord Mexico's arguments in this proceeding regarding these issues.

5.101 The United States contends that none of the arguments made by Mexico refute the WTO rules and jurisprudence permitting the acceptance and consideration of the evidence proffered by the United States. While the United States views all of these arguments as irrelevant on this basis, it makes the following comments:

- (a) The United States disputes Mexico's argument that WTO panels cannot consider government statements, made in other international fora (such as APEC), without going outside their terms of reference. International tribunals are sometimes called upon to consider statements made by government officials. While there are no hard and fast rules, the overarching approach has not been to find such statements inadmissible, as Mexico advocates, but rather to determine their probative value based on whether "enough evidence is produced in order to prove that the statements at issue were in fact made by the official to whom they are attributed".<sup>81</sup> Mexico's categorical response of "no" to the question of whether panels can consider statements made by a government in other international contexts in a WTO dispute settlement proceeding is incorrect. The United States does not offer these public statements as factual evidence which pertains to the Panel's obligation, pursuant to Article 17.6(i), to assess SECOFI's evaluation of the facts. Rather, they are offered to assist the Panel in assessing the strength and credibility of Mexico's legal arguments. As such, the Panel may give them as much weight as it deems appropriate.
- (b) The United States notes that filings by parties in NAFTA Chapter 19 proceedings are public.<sup>82</sup> Therefore, contrary to Mexico's arguments, there is no bar to Mexico's submissions in the Chapter 19 dispute being properly before the Panel, insofar as these filings are public under the NAFTA rules. In the United States' view, reference to such public filings is no different than reference to public briefs filed before a national court or to parties' submissions as summarized in GATT or WTO panel reports. The fact that the NAFTA proceeding is ongoing, and that no NAFTA panel report has yet been issued, is not relevant, because the United States cited SECOFI's filings in the NAFTA case to demonstrate Mexico's public position on certain issues, not to demonstrate the NAFTA panel's ruling on those issues.

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<sup>80</sup>See US-10(a) and (b) and discussion in U.S. first submission, paras. 99-100; US-29(a) and (b). See also US-27(a)-(c).

<sup>81</sup>See *Burdens of Proof and Related Issues*, M. Kazazi (1994), p. 217. Mexico has not contended that the briefs from the NAFTA proceeding to which the United States has cited are not, in fact, SECOFI's briefs. That is, Mexico has not contested the authenticity of those briefs.

<sup>82</sup>NAFTA panel rules provide for filing under seal information which is proprietary or privileged. See Part IV, "Proprietary and Privileged Information", NAFTA Panel Rules. The United States notes that it is not privy to that information and has not cited to it.



- (c) The United States also notes that Mexico points to NAFTA as being a different legal order from the WTO, because NAFTA panels assess whether national anti-dumping determinations are in accordance with the anti-dumping laws of the importing party.<sup>83</sup> In the view of the United States, Mexico, however, fails to mention that, in the Mexican legal order, treaties (including the AD Agreement) are the supreme law of the land, on a par with the Mexican Constitution and laws enacted by the Mexican Congress. In the event of a conflict between the Mexican Foreign Trade Law and the AD Agreement, Article 2 of the Mexican Foreign Trade Law dictates that the provisions of the AD Agreement prevail. Thus, in Mexico's own legal order, the AD Agreement forms part of the Mexican legal system.<sup>84</sup>
- (d) Finally, the United States disputes Mexico's contention that the United States is making a claim before the Panel under another international agreement, and that the Panel must reject information submitted by Mexico in a parallel proceeding under that other agreement, otherwise the Panel will be going beyond its terms of reference in this dispute. First, the United States is not asking this Panel to make findings on claims under NAFTA Chapter 19. The United States is merely bringing to the Panel's attention inconsistencies in Mexico's positions on certain legal issues also before the NAFTA panel.<sup>85</sup> Second, the fact that the AD Agreement is relevant law in a NAFTA proceeding does not change this. If anything, it reinforces the importance of bringing inconsistencies in Mexico's positions to the attention of this Panel.

5.102 The United States concludes that Mexico was aware when it undertook its commitments in the NAFTA of the potential for parallel WTO and Chapter 19 dispute settlement proceedings on the same issues. Its arguments that the Panel should discard the views Mexico expresses in the NAFTA proceeding have no basis, and the Panel should reject them.

5.103 In response to a question from the Panel, the United States asserted that the Panel may take into account inconsistencies between Mexico's arguments made in its submissions in this proceeding in contrast to its submissions in the NAFTA proceeding in considering what weight to accord Mexico's arguments in this proceeding. The Panel may conclude that such inconsistencies undermine the credibility of Mexico's arguments in this proceeding. For example, in its submission to the NAFTA panel, SECOFI argued that an evaluation of the economic factors and indices in Article 3.4 is not relevant to a determination of threat of material injury. Yet, in its first submission before this Panel, Mexico argued the opposite – that SECOFI's final determination of threat of injury was based on an assessment of the various economic factors set forth in Article 3.4 as well as related provisions. The conclusion which the Panel should draw from this inconsistency is that Mexico's argument before this Panel on this point is *post hoc* rationalization and not to be accorded serious weight.<sup>86</sup>

5.104 Mexico reiterates its position that WTO and NAFTA panel proceedings differ significantly in a number of ways. Mexico notes first that the subject or matter for review by a binational panel under

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<sup>83</sup>Mexico first submission, para. 47.

<sup>84</sup>See, e.g., Replies to Questions posed by the United States Concerning the Notification of Mexican Laws and Regulations, G/ADP/W/64-G/SCM/W/73, 25 October 1995 (replies to questions 1 and 2), US-26(a); Replies to Questions Posed by Canada Concerning the Notification of Mexican Laws and Regulations, G/ADP/W/68-G/SCM/W/77, 17 October 1995 (reply to question 1), US-26(b).

<sup>85</sup>According to the United States, Mexico recognizes that, as the AD Agreement is part of Mexican law, NAFTA panels must take it into account. See Replies to Oral Questions Posed by the United States Concerning the Notification of Laws and Regulations of Mexico, G/ADP/W/257-G/SCM/W/267, 16 January 1996, US-26(c).

<sup>86</sup>See Answer of the United States to Question no. 2 by the Panel, 22 June 1999.

Chapter 19 of NAFTA is different from a matter submitted to a WTO panel. Under NAFTA Chapter 19, requests for review may concern:

- (i) the final determination of the investigating authorities of the importing countries; and
- (ii) amendments of anti-dumping or countervailing duty statutes.<sup>87</sup>

On the other hand, a Panel established by the WTO may only examine "the specific measures at issue" taken by a Member in the light of the covered agreements, in accordance with the complaining party's request. Mexico recalls in this connection that, regarding the AD Agreement, as stated by the Appellate Body in the *Guatemala-Cement*, the "specific measure at issue" must necessarily be:

- (i) a definitive anti-dumping duty;
- (ii) the acceptance of a price undertaking; or
- (iii) a provisional measure.<sup>88</sup>

5.105 Mexico also notes that the terms of reference of panels established under NAFTA Chapter 19 are completely different from those of a Panel set up in the WTO. The terms of reference of a NAFTA Chapter 19 panel involve consideration of the conformity of a final determination by the investigating authority in the light of the "relevant statutes, legislative history, regulations, administrative practice and judicial precedents, to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority".<sup>89</sup> In contrast, the terms of reference of a WTO Panel are confined to the consideration of a specific measure at issue in the light of specific provisions of the covered WTO Agreements, as set forth in the request for establishment of the panel or as agreed by the parties, as the case may be.

5.106 Mexico notes next that Mexico's Foreign Trade Act recognizes the binding nature of the WTO agreements. Mexico observes that, under the Mexican Constitution, the WTO Agreements, as international treaties, were incorporated into national legislation upon ratification. For this reason, if there are any inconsistencies between the WTO Agreements and the Foreign Trade Act, they may be raised before the Mexican courts. However, Mexico points out that the various domestic anti-dumping laws of WTO Members, while being compatible with the AD Agreement, are usually much more detailed and specific than the AD Agreement itself. This is the case with the Mexican Foreign Trade Act and the regulations thereto.

5.107 In Mexico's view, the above implies that, even though the AD Agreement forms part of the Mexican legislation under which a NAFTA panel examines a final anti-dumping determination, the

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<sup>87</sup>Article 1903 of NAFTA Chapter 19 .

<sup>88</sup>*Guatemala-Cement AB Report*, para. 79.

<sup>89</sup>Article 1904.2 of NAFTA, which reads:

"An involved Party may request that a panel review, based on the administrative record, a final anti-dumping or countervailing duty determination of a competent investigating authority of an importing Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority. Solely for purposes of the panel review provided for in this Article, the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time, are incorporated into and made a part of this Agreement".

review carried out by a NAFTA Chapter 19 panel is much broader, since it goes beyond the provisions of the AD Agreement in order to analyse the conformity of the determination with the more detailed provisions of the Foreign Trade Act and the regulations thereto, among others, in accordance with the provisions of NAFTA Article 1904.2

5.108 Mexico further notes that the standard of review for a NAFTA Chapter 19 panel also differs from the standard of review for a WTO panel in anti-dumping cases. In the case of NAFTA Chapter 19, and in accordance with Annex 1911 thereto, the standard of review for Mexico is governed by the provisions of Article 238 of the Federal Fiscal Code,<sup>90</sup> while in the WTO reference must be made to the requirements of Article 17.6 of the AD Agreement.

5.109 Mexico also reiterates that, pursuant to NAFTA Article 1904.5, the parties that may request the establishment of a panel are those which would otherwise be entitled to commence domestic procedures for judicial review of a final determination. In other words, this is a dispute settlement mechanism between private parties (domestic producers, importers and exporters) and the Government (investigating authority) of the importing Party (private party – State). At the first meeting of the Panel with the parties, the United States accepted that its Government is not a party to the proceedings currently being aired before NAFTA.<sup>91</sup>

5.110 Mexico concludes that, if the subject of the dispute is different, if the terms of reference of the NAFTA Chapter 19 panels differ from those of WTO panels, if the standard of review is governed by different provisions and has a different scope, and if the parties in each of these proceedings are not the same, then it is clear that Mexico will put forward neither the same arguments nor the same information. Mexico observes that what the United States refers to as a public position on the part of Mexico are the arguments put forward against a number of exporters and importers. It is not a line of argument intended to demonstrate to another Member that Mexico's final measure is consistent with the requirements of the AD Agreement.

5.111 Mexico asserts that the two fora are separate and independent, for which reason each of them should be evaluated in its own context. A WTO panel could never formulate its findings on the basis of a proceeding that has nothing to do with the WTO, for the simple reason that this cannot form part of its terms of reference. Furthermore, as this is the first case introduced simultaneously in both these fora (WTO and NAFTA), the objections raised by Mexico must be examined with particular care, given the weighty implications of this twofold action instituted by the United States.

5.112 Mexico submits that the panel must also take particular account of the references made and information provided by the United States concerning the submission presented by Mexico in a proceeding which is pending before another panel in a forum different from the WTO. Not only does this affect Mexico's rights under the WTO Agreements (the DSU in particular), because it is not covered by the terms of reference laid down for this WTO proceeding, but it may also seriously affect Mexico's interests before the binational panel established under NAFTA, which has not yet issued its decision.

5.113 Mexico argues finally that, in view of the reasons set out above, the Panel should totally disregard all the references made and exhibits submitted by the United States in connection with the submission presented by Mexico in the proceeding pending before the binational panel established under NAFTA Chapter 19.

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<sup>90</sup>See MEXICO-45.

<sup>91</sup>In accordance with NAFTA Article 1904.5, the establishment of a NAFTA Chapter 19 panel is invoked by the Parties. However, they need not take part in its proceedings.

#### 4. Allegedly Improper References to Consultations

5.114 Mexico notes that the United States' first submission makes various references to the consultations held between Mexico and the United States.<sup>92</sup> According to Mexico, the United States makes two general statements:

- (a) it asserts that Mexico replied in a specific way to the questions posed by the United States during the consultations. Furthermore, as evidence that Mexico replied as the United States alleges, the latter submits a list of questions raised on 12 July 1998.
- (b) it invokes the right to use information obtained in the consultations. To support this, it refers to the panel report in *Korea-Alcoholic Beverages*.<sup>93</sup>

5.115 Mexico contends that, apart from some factual statements, everything the United States asserts that Mexico said is false or, in the best of cases, an incorrect interpretation. In Mexico's view, the United States had an idea of what it thought Mexico would say and on that basis framed its questions. However, as the Mexican replies were not what the United States wanted, the United States adapted the replies to its needs, in the belief that, as these alleged replies matched its questions, it would not be difficult for the Panel to believe these assertions; hence the utility of submitting the questions as evidence of what Mexico replied.

5.116 Mexico contends further that the fact that the United States has annexed a list of questions raised at the consultation meeting does not in any way demonstrate that Mexico replied to the questions in the way asserted by the United States. Such list should not be used by the United States to "put words in Mexico's mouth". That is, the United States cannot seek to have the Panel accept its assertions as evidence of what Mexico said during the consultations. Accordingly, Mexico requests that the Panel should not take into account the United States assertions of what it supposedly said during the consultations.

5.117 Mexico argues that an issue of even greater sensitivity is that the United States seeks to bring before the Panel information provided in consultations that are not part of the present dispute; in particular, the questions put to Mexico on 8 October 1997. This not only lacks any basis but is also wholly irrational. The 1997 consultations were carried out when Mexico had not even imposed the definitive measure. The WTO Secretariat itself recognized that these were two different cases, which is why it gave the second case a different document symbol.<sup>94</sup>

5.118 Mexico asserts that the United States' reference to *Korea-Alcoholic Beverages* is not even applicable to this case, since what was claimed in that case was the violation of the confidentiality provisions of Article 4.6 of the DSU.<sup>95</sup> In this dispute, however, the basic problem lies in the fact that what the United States asserts Mexico said is wrong and has no basis whatsoever.

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<sup>92</sup> In particular, Mexico points to paras. 8, 20, 25, 32, 35, 46, 62, 99, 113, 123, 124, 126, and footnotes 21, 36 and 178, of the United States first submission.

<sup>93</sup> See *Korea – Taxes on Alcoholic Beverages (Korea-Alcoholic Beverages)*, WT/DS75/R, WT/DS84/R (*Korea-Alcoholic Beverages Panel Reports*), adopted 17 February 1999, which states, in para. 10.23, "in our view, the very essence of consultations is to enable the parties to gather correct and relevant information, for purposes of assisting them in arriving at a mutually agreed solution, or failing which, to assist them in presenting accurate information to the Panel".

<sup>94</sup> The consultations requested on 4 September 1997 were given the symbol WT/DS101/1 and G/ADP/D7/1 whereas those requested on 8 May 1998 were given the symbol WT/DS132/1 and G/ADP/D10/1.

<sup>95</sup> Article 4.6 of the DSU provides: "Consultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings".

5.119 Mexico also asserts that, without prejudice to the above, in the present dispute the United States is clearly violating its confidentiality obligations by having transmitted its submission to third parties in this dispute, Mauritius and Jamaica. The confidentiality obligation of Article 4.6 "requires parties not to disclose information obtained in them to parties not participating in the consultations" (emphasis added by Mexico). To be able to use this information, even assuming it were correct, both Jamaica and Mauritius would have had to be joined in the consultations. Since that was not the case, the information should not have been transmitted to them.

5.120 In Mexico's view, this is not at all to say that Mexico wishes to contest the right of those countries as third parties to this dispute to have all the information supplied by the parties in their first submissions. However, since this is a proceeding in which third parties did not participate in the consultations, the United States should not at any time have referred to those consultations in its first submission. Accordingly, this strengthens the view that this information must not be taken into account, and therefore the Panel should disregard any references made to the consultations.

5.121 The United States disputes Mexico's argument that the Panel cannot consider the United States' statements about what occurred at the 12 June 1998 consultations. While there may be issues of fact as to what was said at the consultations, the Panel should reject Mexico's claim that it is incompetent to consider evidentiary references to the consultations and decide what weight to give them.

5.122 The United States notes that neither the DSU nor the Working Procedures preclude parties from submitting information to panels regarding what occurred at the consultations. Mexico also cites no authority for the position it takes. If the Panel considers it important to resolve issues of fact regarding what occurred at consultations, the Panel has discretion to probe the issue with the parties, either in written or oral questions. In *Korea-DRAMS*, for example, the panel asked the parties written questions in order to resolve issues of fact relevant to events that occurred at the consultations.<sup>96</sup>

5.123 According to the United States, Mexico argues that the *Korea-Alcoholic Beverages* panel report is "not even applicable to this case, since what was claimed in that case was the violation of the confidentiality provisions of Article 4.6 of the DSU". Mexico then appears to argue just that in asserting that the United States breached its confidentiality obligation by transmitting its first submission, including references to the consultations contained therein, to Mauritius and Jamaica, the third parties in this dispute. The United States asserts that, contrary to Mexico's characterizations, *Korea-Alcoholic Beverages* is relevant, because the panel there addressed the substantive need for information acquired by parties during the consultations to be able to be disclosed by them in dispute settlement proceedings. The *Korea-Alcoholic Beverages* panel stated, "it would seriously hamper the dispute settlement process if the information acquired during consultations could not subsequently be used by any party in the ensuing proceedings".<sup>97</sup>

5.124 The United States further argues that the Appellate Body in *India-Patents* emphasized that fact-finding is a major function of the consultation process:

"All parties engaged in dispute settlement under the DSU must be fully forthcoming from the very beginning as to the claims involved in a dispute and as to the facts relating to those claims. Claims must be stated clearly, facts must be disclosed freely. This must be so in consultations as well as in the more formal panel proceedings. In

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<sup>96</sup>See *United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) on One Megabit or Above from Korea (Korea-DRAMS)*, WT/DS99/R (*Korea-DRAMS Panel Report*), adopted 19 March 1999, paras. 6.7-6.8.

<sup>97</sup>*Korea-Alcoholic Beverages Panel Reports*, para. 10.23.

fact, the demands of due process that are implicit in the DSU make this especially necessary during consultations"<sup>98</sup> (emphasis added by the United States).

5.125 In the view of the United States, Mexico's "top-secret" approach to consultations is inconsistent with these panel and Appellate Body rulings. It is difficult to imagine how a defending party can be required under due process notions to freely disclose facts in consultations and then seek to prohibit the complaining party from using the information during panel proceedings. Moreover, the facts that are obtained through the consultation process are in many instances those which are provided in oral responses to written questions. While it would have been more helpful had Mexico provided written answers to these questions as requested by the United States, the United States should not be prohibited from using these oral responses. According to Mexico's unsupported logic, the United States would not be able to use written answers provided by Mexico in response to U.S. questions in a panel proceeding so long as these answers were requested during the consultation process.

5.126 According to the United States, the inappropriateness of Mexico's efforts to limit the use of facts obtained in consultations is particularly evident in its argument that third parties should not receive access to facts and information provided during consultations. This position is inconsistent with the reports cited above. It is also inconsistent with the mandate in Article 10.1 of the DSU that third party interests "be fully taken into account". Moreover, the Working Procedures of the Panel facilitate this by instructing parties to serve their submissions on third parties and allow third parties to be present "during the entirety of the session".<sup>99</sup> The United States notes that third parties, like parties to panel proceedings, are required to maintain the confidentiality of the proceedings.

5.127 The United States observes that it is not entirely clear what Mexico is arguing regarding the written questions from the 8 October 1997 consultations concerning SECOFI's provisional measure.<sup>100</sup> The United States did not submit to the Panel the written questions from the 8 October 1997 to which the "incorporation by reference" statement in the written questions for the 12 June 1998 consultations refers. Therefore, it is unclear how the panel could consider at all, let alone attach any weight to, a document that is not at its disposal. In response to a question put by the Panel, the United States maintains that regardless of how Mexico's argument may be labelled, the relief that Mexico appears to be seeking is the Panel's blanket exclusion from the record and/or its consideration in this proceeding of any and all information obtained by the United States from Mexico during the course of the consultations. Such a result is at odds with the DSU's goals of resolving disputes and the notion of due process, stressed by the Appellate Body in the *India-Patents* dispute. The *Korea-Alcoholic Beverages* Panel recognized that it is imperative for panel proceedings not to be hampered by parties' inability to make known information about what occurred at the consultations.<sup>101</sup> That panel's reasoning is equally applicable to the question of whether the United States has breached its Article 4.6 requirements in this dispute by providing the entirety of its first submission to the third parties, including references to information obtained at the consultations. Article 18.2 of the DSU provides that "[w]ritten submissions to the panel or the Appellate Body shall be treated as confidential", and paragraph 3 of the Appendix 3 Working Procedures of the DSU provides that "the documents submitted [to the Panel] shall be kept confidential". Nothing in these provisions exempts third parties from their confidentiality obligations. DSU Article 10.3 requires that the third parties "shall receive the submissions of the parties to the dispute to the first meeting of the panel". This

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<sup>98</sup>*India-Patents AB Report*, para. 94.

<sup>99</sup>See DSU, Appendix 3, para. 6.

<sup>100</sup>Mexico's first submission, para. 53.

<sup>101</sup>*Korea-Alcoholic Beverages Panel Reports*, para. 10.23.

right is not qualified to permit receipt of only those portions of the submissions which refer to information not obtained during consultations.<sup>102</sup>

5.128 The United States concludes that it was appropriate for it to provide its full first submission to the third parties, and that the United States has not breached its confidentiality obligation by so doing. The United States also notes that, to the extent that Mexico is requesting the Panel to make finding and conclusions on this point, this claim is not within the Panel's terms of reference.

5.129 Mexico asked the United States whether its recognition that there may be genuine differences in the recollection of what was said in the consultations of 12 June 1998 meant that the United States recognized that the references to the consultations mentioned may be incorrect?

5.130 The United States noted that Mexico had declined to provide written answers to the questions the United States made during the consultations. Accordingly, there is no agreed written record of what Mexico said during the consultations. The United States recognizes that the recollection of parties can differ as to what occurred in consultations held some time before panel proceedings. It is the recollection of the United States delegation, as supported by the actual questions posed at the consultations, that the Mexican delegation provided the information in response to these questions as noted earlier by the United States. Moreover, the United States' references to the consultation for the purposes of its Article 6.2 argument are not dependent on the answers provided by the Mexican delegation. The mere posing of the questions is sufficient to provide Mexico with notice and information concerning the various "problems" that the United States had with the Mexican final anti-dumping order. In its first submission, the United States used the statements Mexico provided at the consultation for the limited purpose of anticipating Mexico's arguments in this proceeding.<sup>103</sup>

5.131 Mexico also asked the United States what, in its opinion, the confidentiality obligation referred to in Article 4.6 of the DSU consists of? The United States replied that it was of the view that facts provided in response to questions or in statements made during consultations are not immune from disclosure and use during subsequent related dispute settlement proceedings. The only exception to this would involve the subsequent disclosure of offers of settlement made and discussed during the course of consultations. Such offers of settlement should not be disclosed or used in further proceedings under the DSU or in any other way. Parties should be encouraged to use consultations as a vehicle for the exploration of various ways of achieving a settlement of their differences. Thus, a distinction needs to be made between such settlement discussions and the collection and exchange of factual information during consultations. In sum, the term "confidential" in DSU Article 4.6 would (1) limit the attendees of the consultation -- only the delegations of the parties to the proceedings and third parties admitted pursuant to DSU Article 4.11; (2) prohibit the disclosure of any settlement offers made during the consultations; and (3) limit the use of facts obtained during consultations to use in further panel, AB, and related arbitration proceedings.<sup>104</sup>

5.132 Mexico reiterates that its objections to the references made by the United States to what the United States asserts Mexico said in the consultations concern two aspects: first, the United States' assertions are false; and second, in fulfilling its obligations towards third parties, the United States violated its obligation to maintain confidentiality.

5.133 Mexico does not dispute that the United States had an obligation to present its first submission in its entirety to third parties. However, as the third parties were not present at the consultations, the references made by the United States in this connection are inconsistent with the obligation placed upon it by Article 4.6 of the DSU. Mexico asserts that it is concerned that it may become generalized WTO practice that parties freely disclose information exchanged during consultations. In the context

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<sup>102</sup>See Answer of the United States to question no. 3 by the Panel, 22 June 1999.

<sup>103</sup>See Answer of the United States to question no. 34 by Mexico, 6 May 1999.

<sup>104</sup>See Answer of the United States to question no. 35 by Mexico, 6 May 1999.

of consultations, the standards observed by parties are relatively flexible,<sup>105</sup> the aim being that parties are unrestrained to reach a mutually satisfactory solution. However, although consultations constitute an "informal" stage between the parties, the requirements applicable to participation by third parties are much stricter than in a panel proceeding. Specifically, in order to be entitled to join in the consultations, a Member must have a substantial trade interest, and its request may be rejected by a party to the consultations. Conversely, for a Member to participate in panel proceedings as a third party, it need only have a substantial interest and notify that interest to the Dispute Settlement Body, with no possibility of rejection.

5.134 Mexico also asserts that the flexibility that prevails between the parties to consultations enables them to express themselves freely on the measures at issue or on possible proposed solutions. There is no doubt that there are some aspects of the consultations which only the parties and Members with a substantial trade interest, as demonstrated to the parties, are entitled to know.

5.135 Mexico notes that, irrespective of the fact that the references made by the United States to what Mexico supposedly said during the consultations are false, it has no wish to see exposed arguments that it might have put forward, or proposals it might have made in these or in other consultations, because this could reveal information which Mexico wishes to keep confidential or weaken its negotiating position *vis-à-vis* other Members. In any event, Mexico reiterates its objection to the United States seeking to prove that Mexico said something, basing its assertions on some questions that the United States itself drew up.

5.136 Mexico disputes the argument by the United States that Mexico fails to cite an authority in support of its position that the Panel should disregard any references to the consultations. An argument does not need to be based on a precedent in jurisprudence to be valid. Apart from this, the United States' statements with respect to what Mexico allegedly said in the consultations do not conform to the basic principle of procedural law that "the burden of proof lies with the party making the assertion".

## **5. References to The Provisional Measure**

5.137 Mexico recalls that the United States requests the Panel to find that SECOFI's application of provisional anti-dumping measures on imports of HFCS from the United States was inconsistent with Article 7.4 of the AD Agreement. In turn, Mexico requests the Panel to reject all references by the United States to the provisional measure. Mexico argues that, because the United States did not identify the provisional measure as the "specific measure at issue", the provisional measure lies outside the Panel's terms of reference. In this regard, Mexico cites the AB's statement in *Guatemala-Cement*:

"We find that in disputes under the Anti-Dumping Agreement relating to the initiation and conduct of anti-dumping investigations, a definitive anti-dumping duty, the acceptance of a price undertaking or a provisional measure must be identified as part of the matter referred to the DSB pursuant to the provisions of Article 17.4 of the Anti-Dumping Agreement and Article 6.2 of the DSU"<sup>106</sup> (emphasis added by Mexico).

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<sup>105</sup>There is no specific procedure for consultations, nor any time-limit. No records are kept of what is said in them and they may in fact be held, as is normally the case, outside the WTO building.

<sup>106</sup> *Guatemala-Cement AB Report*, para. 80.



Mexico notes that the United States' request for the establishment of the Panel only refers to "SECOFI's final anti-dumping measure, including actions by SECOFI preceding this measure".<sup>107</sup> The United States at no time identified the "provisional anti-dumping measure".

5.138 Mexico observes that both Article 7 and Article 17.4 of the AD Agreement use the expression "provisional measure(s)". In view of what was said by the Appellate Body in *Guatemala-Cement*, it is clear that the provisional measure is not a "preceding action" but rather a "measure" *per se*. This is sufficient to determine that the United States did not identify the provisional measure as a specific measure at issue.

5.139 Mexico holds that the terms of reference of the Panel are delimited by the actual United States' request. If that request does not challenge the provisional measures, the Panel cannot examine such measures, because they lie outside its terms of reference.

5.140 According to Mexico, the United States acknowledges that it had already requested consultations with Mexico concerning the provisional anti-dumping measure (to use the words of the request for establishment) and decided not to pursue them. Thus, the present dispute (WT/DS132/2) is distinct from the earlier one (WT/DS101/1). Mexico contends that, if the "specific measure at issue" is one of the essential elements of the "matter" referred to by Article 7 of the DSU and Article 17.4 of the AD Agreement, it is clear that the United States could not have properly referred the "matter" relating to the provisional anti-dumping measures. Therefore, Mexico requests the Panel to reject all references to the provisional measure.

5.141 The United States disputes Mexico's argument that the provisional measure was not identified as a "specific measure at issue" in the United States' request for establishment. The United States contends that Mexico's reading of Article 17.4 of the AD Agreement -- on which its Article 7.4 argument is based -- is incorrect. Article 17.4 allows for challenges to provisional measures only where the complaining party alleges that the provisional measures were taken in violation of Article 7.1 of the AD Agreement. The United States recalls that Article 17.4 states, *inter alia*:

"When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB" (emphasis added by the United States).

5.142 The United States notes that Article 17.4, therefore, limits challenges to provisional measures only where the claim involves a violation of Article 7.1 (and the provisional measure has a significant impact). Hence, when a complaining Member considers that another Member violated Article 7.4 by applying provisional measures beyond the time limits therein, it can only refer a matter to the DSB under Article 17.4 "if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings". Read together with Article 6.2 of the DSU, the only "specific measure at issue" which can be identified is either a final action to levy anti-dumping duties or an undertaking.

5.143 The United States submits that not only is the text of Article 17.4 clear in what it mandates, the structure is also logical. Violations of Article 7.4 do not occur at but rather after the imposition of provisional measures. Thus, a Member challenging the application of provisional measures during the time between the date on which the violation commenced and the date of the final measure would logically only know at the time of the final measure (and identify that measure as the "specific measure at issue" under Article 6.2 of the DSU).

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<sup>107</sup>See *Request for Establishment*, para. 4.

5.144 In the view of the United States, Mexico's argument that the Panel should reject all references to the provisional measure appears to misunderstand the nature of the United States' position. The United States is presenting the violation of Article 7 not as a "measure" but rather as one of its "legal claims" related to the measure at issue in this dispute -- SECOFI's final anti-dumping measure. SECOFI's application of provisional measures beyond six months, from 26 December 1997 to 23 January 1998, violated Article 7.4 of the AD Agreement. This legal claim was raised in paragraph 4 of the *Request for Establishment* (as further articulated in paragraph 4(g)) and therefore remains properly before the Panel.

5.145 Mexico asked the United States whether it considered that it had identified only one "final anti-dumping measure" as "the specific measure at issue", and if so, whether the provisional measure formed part of the "actions" preceding the final anti-dumping measure. The United States replied that it did not understand what Mexico meant by the term "actions". One of the "claims" asserted by the United States in its request includes Article 7 of the AD Agreement relating to provisional measures as further articulated in paragraph 4(g) of the *Request for Establishment*.<sup>108</sup>

5.146 Mexico notes that the United States' request for establishment makes reference to "SECOFI's final anti-dumping measure". The request is worded in the singular, which clearly shows that the United States only challenged one specific measure, at issue, namely the final anti-dumping measure. Mexico recalls that the report of the Appellate Body in *Guatemala-Cement* stated that:

"... we conclude that its panel request did not identify the final anti-dumping duty as the "specific measure at issue", as is required by Article 6.2 of the DSU. Mexico's panel request refers only to the three actions taken during the course of the investigation by the Guatemalan authority as the "matters in issue, and does not specifically identify the final, definitive anti-dumping duty".<sup>109</sup>

In Mexico's view, the above denotes a very clear distinction between the "specific measure at issue" and the "actions which preceded it". The United States identified only one measure in its request. If a provisional measure constitutes a "specific measure at issue", as was also affirmed by the AB, then by definition that measure cannot constitute an action. Measures are measures and actions are actions. A measure cannot at the same time be an action, and vice versa.

5.147 Mexico also recalls that the Appellate Body in *Guatemala-Cement* ruled that the requirement to identify a specific anti-dumping measure at issue in a request for establishment in no way limits the nature of the claims that may be brought.<sup>110</sup> Mexico concludes that any claims that may be brought must concern a specific measure at issue. Since specific measures at issue and actions are mutually exclusive, claims concerning a final anti-dumping measure could address any type of action carried out during the investigation, except for the provisional anti-dumping measure or a price undertaking. In order for a panel to be able to investigate a provisional anti-dumping measure, that measure must have been identified as a specific measure at issue.

5.148 In addition, Mexico states that in the hypothetical event that the United States had identified the provisional measure as a specific measure at issue, according to what the United States said in *Guatemala-Cement*, that country would be obliged, under Article 17.4 of the DSU, to demonstrate that the measure in question had a "significant impact", which it did not do in its request for establishment of a panel. Mexico recalls that in *Guatemala-Cement* the United States made the following statement:

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<sup>108</sup> See Answer of the United States to question no. 39 by Mexico, 6 May 1999.

<sup>109</sup> *Guatemala-Cement AB Report*, para. 86.

<sup>110</sup> *Id.*, para. 79.

"Mexico has requested the establishment of a panel in respect of one measure, Guatemala's provisional anti-dumping measure ... . Mexico also did not identify Guatemala's final action as a measure in its request for the establishment of a panel. Therefore, Mexico cannot challenge Guatemala's final anti-dumping measure before this Panel. Mexico has neither claimed nor demonstrated that Guatemala's provisional measure has a "significant impact" as required by Article 17.4 of the ADP Agreement. Consequently, according to the United States, this dispute is not properly before the Panel".<sup>111</sup>

5.149 Mexico asserts that, if the United States had challenged the provisional anti-dumping measure, as it alleges in its submissions to the panel, the United States' request for establishment of a panel would have had to:

- (a) identify the provisional anti-dumping measure as a specific measure at issue distinct from the final anti-dumping measure;
- (b) avoid confusing the provisional anti-dumping measure with the actions which preceded the final anti-dumping measure;
- (c) distinguish between actions which preceded the provisional anti-dumping measure and actions which preceded the final anti-dumping measure; and
- (d) in accordance with the position taken by the United States in *Guatemala-Cement*, demonstrate that the provisional anti-dumping measure had a significant impact.

C. ALLEGED VIOLATIONS IN THE INITIATION OF THE INVESTIGATION

**1. Alleged Insufficiency of the Information in the Application (Claims under Article 5.2)**

5.150 The United States argues that SECOFI did not have sufficient evidence of threat of material injury to the Mexican sugar industry from allegedly dumped imports of HFCS from the United States, or of a causal link between the allegedly dumped imports and the alleged threat, to justify initiation of the investigation. Contrary to the requirements of Article 5.2 of the AD Agreement, the application filed by the Sugar Chamber requesting the initiation of an anti-dumping investigation did not contain sufficient evidence of threat of material injury, because it lacked sufficient information regarding the likely impact on the domestic industry from allegedly dumped HFCS imports and the attendant relevant economic factors and indices bearing on the likely state of the domestic industry. In addition, the application did not contain sufficient evidence regarding the causal link between the allegedly dumped imports and the alleged threat of injury. However, SECOFI did not reject the application under Article 5.8 and decline to initiate the investigation. Nor did SECOFI independently gather sufficient evidence to justify initiation of the investigation or request that the Sugar Chamber submit additional information. Instead, contrary to Articles 5.2, 5.3, and 5.8 of the AD Agreement, SECOFI accepted the application and initiated the investigation in the absence of sufficient evidence.

5.151 The United States describes the facts relating to the filing of the application as follows. HFCS is a sweetener normally sold in liquid form in two concentrations of fructose: grade 42 and grade 55. U.S. exporters began exporting HFCS to Mexico in the early 1990s. In Mexico, as elsewhere, HFCS is used extensively by the beverage industry. On 14 January 1997, the Sugar Chamber filed its application for an anti-dumping investigation with SECOFI complaining that imports of HFCS from the United States were being dumped in Mexico and threatening the Mexican sugar industry with material injury. The application followed the format outlined by SECOFI in its "Application Form for

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<sup>111</sup> *Guatemala-Cement Panel Report*, para. 5.18.

Manufacturing Companies Requesting Initiation of Investigation for Price Discrimination Practices" (the application form).<sup>112</sup> The application form directed that "all questions, without exception, must be answered. If the answer . . . is not applicable, use 'n/a', if it is not available, use 'n/d' ".<sup>113</sup>

5.152 According to the United States, the application stated that the Sugar Chamber represented all but two of the 61 sugar mills in Mexico, or 98 per cent of Mexican sugar production.<sup>114</sup> In addition, the application alleged that, in the U.S. beverage industry, HFCS had replaced sugar as a sweetener; that the U.S. HFCS producers had installed capacity and increased production, specifically for the purpose of exporting to Mexico; that U.S. HFCS exports had increased dramatically in the previous three years; and that the demand for HFCS would grow in tandem with Mexican population growth.<sup>115</sup> The application therefore concluded that the Mexican sugar industry was threatened with material injury, and would have to reduce production and sales by 50 per cent, impairing job generation in the Mexican countryside.<sup>116</sup>

5.153 The United States holds that the application further asserted that the goal of U.S. HFCS producers was to "seize the consumer market for sugar", and that the introduction of HFCS prevented sugar from reaching its maximum price level, also exerting a downward pressure on sugar prices that nullified the market forces leading to an increase in sugar prices.<sup>117</sup> It was necessary for sugar to be at its maximum price level in order to service the industry's debt and meet investment goals.

5.154 The United States maintains that the application also stated that it was not necessary to provide economic indicators, such as value and volume of the product under investigation (HFCS), because "there is no domestic production" (emphasis added by the United States).<sup>118</sup> Later, the application stated again that production of HFCS in Mexico was "non-existent",<sup>119</sup> and, later still, "practically non-existent".<sup>120</sup> Separately, the application noted that Arancia CPC, S.A. (Arancia, a Mexican majority owned company formed in affiliation with CPC International) was expected to begin operations in the last quarter of 1996, and that Almidones Mexicanos, S.A. de C.V. (Almex, a Mexican joint venture whose shares are owned equally by Archer Daniels Midland Company (ADM) and A.E. Staley) had completed construction of a "distribution" facility in Guadalajara, Mexico.<sup>121</sup>

5.155 According to the United States, the exhibits to the Sugar Chamber's application, however, contain articles which indicate that there was Mexican HFCS production, as early as 1995. For example, a conference presentation by Stephen Vuilleumier "World Outlook for High Fructose Syrup to 2000", World Sugar and Sweetener Conference, 26-29 March 1996, is referenced on page 22 (footnote 10) of the application, wherein Mr. Vuilleumier reports that Almex had begun production. In addition, there is a 21 March 1996 article in *Milling & Baking News*, which refers to a statement by Mr. Vieulleumeir at a sweetener colloquium that Almex would have production of HFCS at its Guadalajara plant in 1996 (also footnote 10). Further referenced is "Corn Sweeteners: Recent Developments and Future Prospects", prepared by Peter Buzzanell for a "Azucar '95 Foro Internacional" conference in Guadalajara on 10 October 1995, in which the author indicates that there has been "negligible" Mexican HFCS production (page 37, footnote 25 of the application). In addition, Mr. Vuilleumier's presentation at a London sweetener symposium (February 1996) is

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<sup>112</sup> In Spanish, "Formulario para Empresas Solicitantes de Inicio de Investigacion por Practicas de Discriminacion de Precios". See US - 5 (5(a)- English, 5(b)-Spanish).

<sup>113</sup> *Id.* para. 1.6.

<sup>114</sup> Application at 9 (section 2.5), US-4, *see also Initiation Notice*, para. 4, US-3.

<sup>115</sup> Application at 29 (section 4.3(ii)) , US-4.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* p. 32.

<sup>118</sup> *Id.* p. 36 (section 4.17).

<sup>119</sup> *Id.* p. 41.

<sup>120</sup> *Id.* p. 45.

<sup>121</sup> *Id.* p. 41.

annexed and indicates that Almex began production in October 1995 and that Arancia was expected to start production in late 1996 (page 28, footnote 19).<sup>122</sup>

5.156 In the view of the United States, in a number of instances, the Sugar Chamber failed to provide information in its application as required by SECOFI's application form: i) information on damage to the domestic industry, threat of damage, and the causal relationship between imports and damage or threat of damage to the domestic industry (section 4.5); ii) information regarding principal clients (section 4.12) and data regarding clients lost to HFCS (section 4.13 (appendix 4.3v)) and information regarding sales policies (section 4.14 (appendix 4.14)).<sup>123</sup> The Sugar Chamber simply deemed this information "N/A -- not applicable".

5.157 The United States maintains that, as to the application form's request for information from sugar mills regarding production, sales, inventory, and employment, the response from the Sugar Chamber was: "not appropriate because there is no domestic production of HFCS" (section 4.17).<sup>124</sup>

5.158 The United States also maintains that, at the 12 June 1998 consultations between the United States and Mexico, the United States asked Mexico in writing whether the Sugar Chamber had provided SECOFI with any information prior to initiation other than that contained in the application. Mexico replied that SECOFI obtained no information prior to initiation from the Sugar Chamber other than that which was contained in the Sugar Chamber's application.<sup>125</sup>

5.159 The United States notes that, on 27 February 1997, SECOFI published a notice in the *Diario Oficial* announcing the initiation of an anti-dumping investigation based on the Sugar Chamber's application.<sup>126</sup> The notice established an investigation period of 1 January - 31 December 1996. In the third paragraph and in the section of the initiation notice entitled "product description" SECOFI stated:

"Having examined the administrative record . . . I issue this Decision in accordance with the following:

In regard to the nationally produced product, the requester pointed out that in the United Mexican States, high fructose corn syrup is not produced and that the similar good which is affected is sugar or saccharose, this is a disaccharide composed of two simple sugars, glucose and fructose, is obtained from sugar cane and is considered the principal caloric sweetener in the Mexican market"<sup>127</sup> (emphasis added by Mexico).

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<sup>122</sup> These articles are annexed to the United States first submission at US-7 as follows: (a) Mr. Vuilleumier's 26-29 March 1996 presentation (p. 271); (b) *Milling & Baking News*; (c) Mr. Buzzanell's presentation (p. 10); and (d) Mr. Vuilleumier's February 1996 presentation (p. 55). The Sugar Chamber also appended a chart to their application entitled "Estimated Production Capacity of HFCS 42 and 55" showing installed capacity to produce HFCS in both the United States and Mexico. See US-6.

<sup>123</sup> Application at 35, US-4; see also application form at 12, US-5.

<sup>124</sup> Application at 36, US-4.

<sup>125</sup> The United States provided Mexico with written questions for the 12 June 1998 consultations (*U.S. Written Question*). See *U.S. Written Question* 4.2, US-8. The panel in *Korea-Alcoholic Beverages*, recently confirmed the right of a party to a WTO dispute to use information learned in consultations in panel proceedings. The panel concluded: "It would seriously hamper the dispute settlement process if the information acquired during consultations could not be subsequently used by any party in the ensuing proceedings". para. 10.23.

<sup>126</sup> *Initiation Notice*, second para. (unnumbered) and para. 1, US-3. Mexico notified the United States on 27 January 1997 that it had received a properly documented application for initiation of an anti-dumping investigation of HFCS imports from the United States.

<sup>127</sup> *Id.* third para. (unnumbered) and para. 7.

5.160 According to the United States, in that notice SECOFI indicated that sugar and HFCS had a similar [chemical] composition since both contain a high concentration of glucose and fructose.<sup>128</sup> The section of the initiation notice entitled "Domestic Production" discusses Mexican sugar producers only.<sup>129</sup> The section of the initiation notice entitled "Importers and Exporters" identifies Almex and Arancia as importers of HFCS.<sup>130</sup> Nowhere does the initiation notice conclude that Almex and Arancia were also domestic HFCS producers.<sup>131</sup> SECOFI determined that the Sugar Chamber had the legal capacity to request an anti-dumping investigation.<sup>132</sup>

5.161 The United States holds that the initiation notice repeats the Sugar Chamber's assertion that growing HFCS imports from the United States under unfair conditions were threatening to cause injury to the national sugar industry.<sup>133</sup> As the HFCS imports were claimed to be particularly affecting the industrial segment of the sugar industry (soft drink bottlers were buying more HFCS than had previously been the case), the initiation notice states that it considered the Sugar Chamber's threat of injury allegations in respect only of the industrial segment of the industry. To do this, the notice states that SECOFI considered only industrial consumption of sugar, and examined the increase in HFCS imports in respect of these isolated consumption figures.<sup>134</sup> The notice also discusses the recent increase in U.S. producers' plant capacity, their high export potential, and publications from the United States Department of Agriculture ("USDA") which reported that a significant part of U.S. HFCS exports were destined for Mexico.<sup>135</sup>

5.162 The United States also holds that, in its preliminary determination, SECOFI responds to the U.S. industry's objections regarding SECOFI's determination that the Sugar Chamber had standing. The preliminary determination first explains that the Sugar Chamber provided the information that was reasonably available to it regarding domestic production of HFCS.<sup>136</sup> It then states that the exhibit annexed to the Sugar Chamber's application entitled "Estimated Production Capacity of HFCS 42 and 55" contains only an estimate of "installed capacity" and "cannot be used to determine the existence of domestic production".<sup>137</sup> Finally, paragraph 62(B) of the *Preliminary Determination* states that Almex and Arancia themselves stated that "they are producers of high fructose corn syrup" and "are themselves the principal importers".<sup>138</sup> It then concludes that: "Therefore the Department [SECOFI] determined that for purposes of the request for the initiation of an investigation, there was no domestic production of an identical good".<sup>139</sup>

5.163 The United States maintains that, at the 12 June 1998 consultations between the United States and Mexico, the United States asked Mexico in writing in which documents Almex and Arancia had made the statements SECOFI referenced in paragraph 62(B) of the *Preliminary Determination*. Mexico responded that the statements of Almex and Arancia referred to in paragraph 62(B) of SECOFI's *Preliminary Determination* are contained in the questionnaire responses that Almex and

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<sup>128</sup> *Id.* para. 9.

<sup>129</sup> *Id.* paras. 54-55.

<sup>130</sup> *Id.* para. 13.

<sup>131</sup> The "export capacity" section of the initiation notice, repeats other information in the application to the effect that Arancia negotiated with CPC International to install a plant "estimating" the start of operations in mid-1996, that Almex had completed construction of a "distribution center" in Mexico, and that Cargill had established two storage centers. *Initiation Notice*, paras. 89-90, US-3.

<sup>132</sup> *Id.* para. 25.

<sup>133</sup> *Id.* para. 20.

<sup>134</sup> *Id.* paras. 68-69.

<sup>135</sup> *Id.* paras. 20, 81-87.

<sup>136</sup> See *Preliminary Determination*, para. 61, US-2.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* para. 62(B).

<sup>139</sup> *Id.*

Arancia filed with SECOFI after initiation.<sup>140</sup> SECOFI's record also contains no representations by Almex and Arancia prior to their respective 22 April 1997 and 15 April 1997 responses to SECOFI's questionnaire.

5.164 According to the United States, in its final determination, SECOFI states that it established standing in its preliminary determination: "The Ministry established that the petitioner had the legal capacity to petition for the initiation of an anti-dumping investigation in paragraph 62 of the *Preliminary Determination* concluding the meritorious phase of the investigation".<sup>141</sup> The final determination then states something different a few paragraphs later, namely that SECOFI knew before initiation from the Sugar Chamber's application and from data from the Mexican Trade Information System that Almex and Arancia were the only domestic producers of HFCS, and, on that basis, had decided to exclude them. Paragraph 113 of the *Final Determination* states:

"113.

A. The Ministry learned of the existence of domestic producers of HFCS in reviewing the information presented by the [Sugar Chamber] in its petition for the initiation of the investigation. However, in examining the data furnished by the Mexican Trade Information System, by the Ministry of Finance and Public Credit and by the petitioner per se, it observed that the only domestic manufacturers of the product under investigation during the period from January 1 through December 31, 1996 were the two leading importers of such products, namely Arancia CPC, S.A. de C.V. and Almidones Mexicanos, S.A. de C.V.

B. In light of this fact, the Ministry felt that, as the country's only two manufacturers of HFCS were also its leading importers of this product, they should be excluded from the definition of domestic production".

Then paragraph 113(C) goes on to state that: "During the preliminary phase of the investigation, based on information supplied by the parties to these proceedings, the Ministry established that the only domestic manufacturers of HFCS were the country's two leading importers of this product".

5.165 The United States holds that the Sugar Chamber's application alleging threat of injury to the sugar industry provided a discussion of the enumerated factors set forth in Articles 3.7(i)-(iv) of the AD Agreement concerning significant increases in dumped imports, substantial increases in exporters' capacity, domestic price depression or suppression from allegedly dumped import prices, and inventories of the allegedly dumped imports.<sup>142</sup> The application, however, contained little evidence of the likely impact of allegedly dumped HFCS imports on the domestic sugar industry. Indeed, the Sugar Chamber's application did not respond to the pertinent questions of SECOFI's application form requesting such information.

5.166 The United States further holds that paragraph 4.1 of SECOFI's application form states that the applicant must provide clear evidence of injury or threat of injury and that "the competent authority will deny the petition presented ... and will terminate the investigation without delay as soon as it has been established that there is insufficient evidence of dumping or of the damage [i.e., injury] which justifies the continuation of the process relative to the case". Additionally, section 4.2(iii) of the application form states that the applicant must demonstrate injury through evidence of "negative effects on production, such as on sales, market participation, benefits, productivity, return on investments, utilization of installed capacity, cash flow, supplies, employment, salaries, growth, the

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<sup>140</sup> The record shows no reference to such documents. Furthermore, Mexico confirmed at the consultation that there were no such documents. See U.S. Written Question 3, US-8.

<sup>141</sup> See *Final Determination*, para. 109, US-1.

<sup>142</sup> See application pages 18-34 (paras. 4.3(i)-(iv)), US-4.

ability to gather capital or investment". In the application, the Sugar Chamber's response to both of these paragraphs of the application form was "N/A" (i.e., not applicable).<sup>143</sup>

5.167 The United States observes that the only information that the application contained concerning the likely economic impact of HFCS imports on the domestic industry were assertions regarding: (1) the sugar industry's possible cash flow problems with respect to the renegotiation of the industry's loans with Nacional Financiera Azucarera (the development bank for the Mexican sugar industry), and (2) possible effects on some sugar refiners' future investment projects (apparently detailed in a confidential exhibit).<sup>144</sup> The application also alleged that the domestic industry's sugar sales to industrial consumers would likely decline as a result of the influx of HFCS imports.<sup>145</sup> However, the application did not indicate the imports' effect (if any) on the industry's overall sales, and disclosed that overall domestic sugar consumption was increasing in pace with Mexican population growth.<sup>146</sup>

5.168 The United States further observes that the Sugar Chamber also did not respond to the specific questions in the application form requesting evidence of a causal link between the allegedly dumped HFCS imports and the alleged threat of material injury. Section 4.1 of SECOFI's application form required the application to contain "proof of the existence of ... a causal relationship between the imported goods which are the object of dumping, and the supposed damage [i.e., injury]". Likewise, section 4.2(iv) instructed the applicant to "demonstrate damage or prejudice to domestic production ... in the following terms: ... establish a causal effect of damage [i.e., injury]". The Sugar Chamber's response to both of these paragraphs was "N/A" (i.e., not applicable). Accordingly, the application contained no discussion of evidence of causal link.

5.169 The United States recalls that Article 5.2 of the AD Agreement provides that an application requesting the initiation of an investigation "include evidence of ... injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and ... a causal link between the dumped imports and the alleged injury". Because the AD Agreement defines the term "injury" to include threat of material injury<sup>147</sup>, evidence both of threat of material injury and of a causal link between the allegedly dumped imports and the alleged threat of material injury is required where, as here, an application alleges threat of material injury. The panel in *Guatemala-Cement* recently reached this very conclusion: "Thus, the requirements in Article 5.2 regarding 'injury' must, in our view, be read to refer to threat of injury in a case where threat of injury is at issue. Consequently, in this case, as the applicant alleged threat of injury, clearly the application must contain evidence of threat of material injury".<sup>148</sup> Significantly, *Guatemala-Cement*, like the instant investigation, involved the initiation of

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<sup>143</sup> The Sugar Chamber also answered "N/A" in response to the application form's request for any "additional information on injury, threat of injury ...". See application form, section 4.5, US-5; application p. 35 (para. 4.5), US-4.

<sup>144</sup> See, *id.* at 33; see also *Initiation Notice*, paras. 2, 21-22, 74, 91-96.

<sup>145</sup> See application at 34 (para. 4.3(v)), US-4. SECOFI's initiation notice also noted receipt of a letter from one member of the Sugar Chamber regarding sales lost to HFCS imports. *Initiation Notice*, para. 58, US-3 (noting that the applicant had provided SECOFI with a letter from one member of the Sugar Chamber regarding the loss of customers to lower-priced HFCS imports).

<sup>146</sup> See, e.g., application at 32 (para. 4.3(iii)), US-4 ("national consumption of sugar maintains its traditional growth level at the rhythm of population growth, the effect of which is to raise prices"); see also exhibit 4.19- 4.22 to application, US-9 (chart of domestic sugar consumption indicating an increase in consumption equal to Mexican population growth).

<sup>147</sup> See AD Agreement, footnote 9.

<sup>148</sup> *Guatemala-Cement Panel Report*, para. 7.76 (footnote omitted). The United States notes that, because the Appellate Body did not adopt the panel's decision on other grounds, it reached no conclusion regarding the panel's finding that Guatemala's initiation of the investigation was inconsistent with the AD Agreement and that the application failed to contain the required information regarding threat of material injury and causal link. See *Guatemala-Cement AB Report*, para. 89. The panel's conclusions regarding the evidence on threat of injury are nevertheless in agreement with Mexico's argument in that dispute. See, e.g.,



an anti-dumping investigation on the basis of allegations of threat of material injury, and its conclusions are therefore particularly relevant to this dispute.<sup>149</sup>

5.170 The United States further recalls that the AD Agreement requires that, in order to initiate the investigation, the investigating authority must find that there is sufficient evidence regarding threat of material injury and causal link. Article 5.3 of the AD Agreement provides: "The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation". In addition, Article 5.8 states that "[a]n application ... shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury [including threat of material injury, *see* AD Agreement, note 9], to justify proceeding with the case". Therefore, the AD Agreement required SECOFI to find sufficient evidence of both threat of material injury and causal link in order to initiate the investigation. As the *Guatemala-Cement* panel stated, "The ADP Agreement clearly requires sufficient evidence of all three elements [*i.e.*, dumping, threat of material injury, and causal link] before an investigation may be initiated".<sup>150</sup>

5.171 The United States contends that the Sugar Chamber's application should have contained sufficient evidence of the likely impact on the domestic industry from allegedly dumped HFCS imports and on the economic factors and indices bearing on the state of the domestic industry contained in Article 3.4 of the AD Agreement. The application, however, did not contain such evidence. Nor did SECOFI independently gather sufficient evidence that would have justified the initiation of an investigation or request that the applicant supply the missing information. Therefore, upon examination, SECOFI should have rejected the application and should not have initiated this investigation.

5.172 The United States notes that Article 5.2 requires an application to contain "evidence of ... injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement" (emphasis added by the United States). In turn, the AD Agreement defines the term "injury" to include threat of material injury:

"Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of [Article 3]".<sup>151</sup>

Article 5.2(iv) further provides:

"The application shall contain such information as is reasonably available to the applicant on the following: ... information on the evolution of the volume of the allegedly dumped imports, the effect of those imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3" (emphasis added by the United States).

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*Guatemala-Cement Panel Report*, paras.4.139 ("Mexico submits that [the] application did not contain sufficient, relevant evidence of threat of injury to meet the requirements of Article 5.2 of the ADP Agreement".) and 4.150 ("Mexico contends that all applications must contain evidence of dumping, injury and a causal link between the dumped imports and the injury or threat of injury, failing which they should be rejected by the investigating authority").

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* para. 7.78.

<sup>151</sup> AD Agreement, footnote 9 (emphasis added by the United States).

5.173 The United States notes further that Article 3.4 provides that the examination of the impact of imports on the domestic industry must include:

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

5.174 According to the United States, an evaluation of the economic factors and indices of Article 3.4 is required in an investigation based on allegations of threat of material injury to a domestic industry, just as such an evaluation is required in investigations based on allegations of material injury. Article 5.2(iv) by its terms sets forth the type of information required of all applications, regardless of the type of "injury" alleged - *i.e.*, material injury, threat of material injury, and/or material retardation of the establishment of a domestic industry.<sup>152</sup>

5.175 The United States recalls that, as the *Guatemala-Cement* panel stated, "evidence to substantiate the allegation of threat of material injury might have included information on the relevant economic factors and indices having a bearing on the state of the industry set forth in Article 3.4.." <sup>153</sup> That panel's conclusion was in accord with Mexico's contentions in that dispute that the economic factors bearing on the likely state of the domestic industry set forth in Article 3.4 were relevant to the decision whether to initiate the anti-dumping investigation, and hence should have been included in the domestic industry's application claiming that Mexican imports threatened the domestic industry with material injury.<sup>154</sup> Given Mexico's arguments in *Guatemala-Cement*, it is difficult to understand why SECOFI initiated this investigation, in view of the insufficiency of evidence in the Sugar Chamber's application on the likely state of the domestic industry and the relevant economic factors set forth in Article 3.4.

5.176 The United States submits that Article 3.4 is itself framed in terms of an "actual and potential decline in sales, profit, output, market share, [etc.]" (emphasis added by the United States), and "actual and potential negative effects on cash flow, inventories, employment, [etc.]" (emphasis added by the United States). The use of the word "potential" necessarily implies a prospective, or future-looking, analysis of the economic factors, which is the touchstone of a threat of material injury analysis.<sup>155</sup> Hence, the AD Agreement clearly required that the petitioner's application contain

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<sup>152</sup>See *Guatemala-Cement Panel Report*, para. 7.76 ("Thus, the requirements in Article 5.2 regarding 'injury' must, in our view, be read to refer to threat of injury in a case where threat of injury is at issue. Consequently, in this case, as the applicant alleged threat of injury, clearly the application must contain evidence of threat of material injury. (footnote omitted)").

<sup>153</sup>*Id.* para. 7.74.

<sup>154</sup>*Id.* paras. 4.127, 4.154.

<sup>155</sup>Obviously, in addition to historical trends, future projections regarding the relevant economic factors set forth in Article 3.4 are relevant to an assessment of threat of material injury for purposes of initiating an investigation. A threat analysis is, by its very nature, forward-looking and involves a likely projection of future events if dumping continues. Accordingly, Article 3.7, which sets forth the factors that authorities should consider in making a determination of threat of material injury, states that: (1)"[t]he change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent" (emphasis added by the United States); and (2) the investigating authorities must conclude that "further dumped exports are imminent and that, unless protective action is taken, material injury would occur" (emphasis added by the United States). See also *Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States (Korea-Resins)*, BISD 4DS/205 (*Korea-Resins Panel Report*), adopted 27 April 1993, para. 271 ("a proper examination of whether threat of material injury was caused by dumped imports

evidence of threat of material injury, evidence of the impact (or the likely impact) on the domestic industry from allegedly dumped imports, and a discussion of the attendant economic factors set forth in Article 3.4.

5.177 In the view of the United States, the Sugar Chamber did not provide in its application information reasonably available to it regarding likely impact and relevant economic factors. The Sugar Chamber's failure to provide such evidence in the application is particularly difficult to understand, given that most of this information is uniquely within the applicant's control. The Sugar Chamber alleged in the application that it represented all but two domestic sugar mills, and, as SECOFI stated in the initiation notice, its membership collectively accounted for 98 per cent of domestic sugar production. Accordingly, information regarding the likely impact on the domestic industry and relevant economic factors was clearly and uniquely within the applicant's control. Moreover, as the *Guatemala-Cement* panel noted: "we are particularly troubled by the lack of information provided [regarding relevant economic factors set forth in Article 3.4], as this information is uniquely within the control of the applicant".<sup>156</sup>

5.178 According to the United States, the Sugar Chamber did not even bother to respond to the pertinent questions in SECOFI's application form requesting such information. Section 4.1 of SECOFI's application form closely tracks language contained in Articles 5.2 and 5.8 of the AD Agreement. That section states that the applicant must provide clear evidence of injury or threat of injury and that "the competent authority will deny the petition presented ... and will terminate the investigation without delay as soon as it has been established that there is insufficient evidence of dumping or of the damage [*i.e.*, injury] which justifies the continuation of the process relative to the case". Additionally, section 4.2(iii) of SECOFI's application form requires language that closely tracks Article 3.4 of the AD Agreement that the applicant demonstrate injury through evidence of "[n]egative effects on production, such as on sales, market participation, benefits, productivity, return on investments, utilization of installed capacity, cash flow, supplies, employment, salaries, growth, the ability to gather capital or investment". In its application, the Sugar Chamber's response to both of these paragraphs of the application form was "N/A" (*i.e.*, not applicable).<sup>157</sup> In effect, by answering "N/A", the Sugar Chamber was stating to SECOFI its belief that the likely impact on the industry and the attendant economic factors set forth in Article 3.4 were not relevant to the initiation of an investigation on the basis of allegations of threat of material injury.

5.179 The United States maintains that the Sugar Chamber's application contained no meaningful analysis of the likely effect (if any) that allegedly dumped HFCS imports would have on the domestic industry. The application could have discussed several economic factors that were clearly relevant to an assessment of the prospective impact of dumped imports on the domestic industry in this investigation. Factors that could have been discussed include the domestic industry's capacity utilization, overall capacity trends, and projections of future capacity, including whether the domestic industry's production capacity or capacity utilization would likely decline as a result of the influx of allegedly dumped HFCS imports; or whether the domestic industry would likely maintain stable, or

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necessitated a prospective analysis of a present situation with a view to determining whether a 'change in circumstances' was 'clearly foreseen and imminent'" (emphasis added by the United States); *id.* at para. 273 (noting that "the Panel ... examined whether the [investigating authority's] determination [of threat of material injury] included an analysis of relevant future developments regarding the condition of the domestic industry and the volume and price effects of the imports under investigation") (emphasis added by the United States).

<sup>156</sup>*Guatemala-Cement Panel Report*, para. 7.74; *see also id.* para. 4.154 (noting Mexico's argument that "[t]he applicant is ... in a privileged position to provide information on the [Article 3.4] factors"). *See also* application, p. 9, para. 2.5, US-4; *Initiation Notice*, para. 4, US-3.

<sup>157</sup>The Sugar Chamber also answered "N/A" in response to the application form's request for any "additional information on injury, threat of injury ...". *See* application form, para. 4.5, US-5; application, p. 35, para. 4.5, US-4.

increase, capacity utilization levels by increased production and sales to household customers (where the application acknowledged that HFCS imports did not compete with sugar).<sup>158</sup>

5.180 The United States holds that the Sugar Chamber similarly could have provided a discussion of employment trends and projections within the domestic industry in the application. The application's only statements regarding employment are conclusory, passing references, which, as conclusory statements unsupported by relevant evidence, are not sufficient to meet the requirements of Article 5.2. For example, the Sugar Chamber stated that "it is clear that an old established industry in Mexico, like the sugar industry, as has been shown, is threatened with being seriously affected and having to reduce its production and sales by more than 50% of what it is currently producing, furthermore losing job generation opportunities in the Mexican countryside" (emphasis added by the United States).<sup>159</sup> The Sugar Chamber further claimed that "[t]he depressing effect on prices from HFCS, will result in this maximum level of sugar prices not being achieved, and consequently, in the industry's inability to meet its payment commitments. The industry will find itself forced to close down the operation of the least profitable sugar mills, unleashing negative repercussions in the employment of cane field workers, factory workers, day workers, transporters and other indirect employment" (emphasis added by the United States).<sup>160</sup> But the application simply did not discuss any of these issues.

5.181 The United States also maintains that the application contained no meaningful discussion of any "actual and potential decline[s] in the domestic industry's sales, profits, output, [and] market share".<sup>161</sup> The application contains no discussion at all of the domestic industry's profits, output, or market share. Additionally, while the application alleges that the domestic industry's sugar sales to industrial consumers would likely decline as a result of the influx of HFCS imports, and the initiation notice noted receipt of a letter from one member of the Sugar Chamber regarding sales lost to HFCS imports<sup>162</sup>, it does not discuss either the sugar industry's overall sales and projections of sales, or sales and projections of sales to other customers (*e.g.*, household consumers). The application's statement that the sugar industry's sales to industrial customers were likely to decrease as a result of increasing HFCS sales to these customers is not in itself meaningful in assessing the likely impact of imports on the industry as a whole.

5.182 The United States asserts that the application also disclosed that overall domestic sugar consumption was increasing in pace with Mexican population growth.<sup>163</sup> Given this acknowledgement, it appears speculative that increasing HFCS imports would adversely affect the domestic industry's overall sales in the imminent future. The application failed to address whether the industry's sales to other customers were likely to increase in an amount equal to or exceeding the

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<sup>158</sup>See, *e.g.*, application, pp. 18-19, section 4.3, US-4.

<sup>159</sup>*Id.* p. 33 (para. 4.3(iii)); *see also id.* p. 29 (paras. 4.3(ii)).

<sup>160</sup>See Exhibit 4.19-4.22, at second page, US-9 (listing the number of "economic dependents" of the "sugar industry", including cane field workers, harvesters, day labourers, transporters, union employees, pensioners, relatives, etc.). In addition, the statements regarding cane field workers, transporters, pensioners, etc., clearly do not relate to employment in the pertinent domestic industry defined by SECOFI. Finally, the list of "economic dependents" appears to be a static number (apparently for the current year or at the time of the filing of the application) and does not indicate employment levels in prior years or estimates of employment levels in future years.

<sup>161</sup>See AD Agreement, Article 3.4.

<sup>162</sup>See application, p. 34 (section 4.3(v)), US-4; *Initiation Notice*, para. 58, US-3 (noting that the applicant had provided SECOFI with a letter from one member of the Sugar Chamber regarding the loss of customers to lower-priced HFCS imports).

<sup>163</sup>See, *e.g.*, application, p. 32 (section 4.3(iii)), US-4 ("national consumption of sugar maintains its traditional growth level at the rhythm of population growth, the effect of which is to raise prices"); *see also* US-9 (chart of domestic sugar consumption indicating an increase in consumption equal to Mexican population growth).

decline in sales to industrial customers. The application itself therefore did not seek to provide a basis for concluding that the sugar industry's overall sales were likely to decline.

5.183 In the view of the United States, the only information that the application does contain concerning the likely economic impact of HFCS imports on the domestic industry are assertions regarding (1) the sugar industry's possible cash flow problems with respect to the renegotiation of the industry's loans with Nacional Financiera Azucarera (the development bank for the Mexican sugar industry); and (2) possible effects on some sugar refiners' future investment projects.<sup>164</sup> Even apart from the absence of allegations on other factors, these two allegations did not establish the likely impact of dumped imports on the domestic industry sufficiently to justify initiation of the investigation. The application did not address whether, and to what extent, a downturn in one market served by the sugar industry (*i.e.*, in sales to soft drink manufacturers) would impede the domestic industry's overall cash flow and ability to pay its debts. Nor does the application give any reason why such a downturn in one market would impair some members' future investment projects, much less why an effect on only some producers would impact the industry as a whole.<sup>165</sup> This lack of information is all the more telling in that the application's inadequate analysis of overall sales left it entirely likely that the domestic sugar industry would maintain stable, or even increasing, profitability and cash flow, by increasing sales and/or prices to household customers, despite decreasing sales to one segment of industrial customers.

5.184 The United States concludes that the Sugar Chamber's application contained insufficient evidence regarding threat of material injury, including the likely impact of dumped imports on the domestic sugar industry, and the attendant economic factors set forth in Article 3.4 of the AD Agreement.

5.185 The United States argues that, in light of the absence of sufficient evidence in the application to justify initiation of the investigation, SECOFI should not have accepted the application and initiated the investigation. As Articles 5.3 and 5.8 of the AD Agreement state, "[t]he authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify initiation of an investigation", and "[a]n application ... shall be rejected and an investigation shall be terminated as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case". An application that fails to address at all the likely impact on the domestic industry from allegedly dumped imports and numerous economic factors and indices enumerated in Article 3.4, when the relevant information is readily available to the applicant, could hardly be regarded as adequate. Indeed, SECOFI's acceptance of the application and initiation of the investigation, despite the absence of sufficient evidence in the application regarding likely impact and relevant economic factors, equates to an agreement with the petitioner's response of "N/A" to the pertinent application form questions, which indicated the petitioner's belief that such information was not relevant to the initiation of an investigation based on allegations of threat of material injury. Whatever the case, SECOFI clearly violated the AD Agreement in accepting the Sugar Chamber's deficient application

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<sup>164</sup>See, *e.g.*, application, p. 33, US-4; *Initiation Notice*, paras. 2, 21-22, 74, 91-96, US-3. Although the application contains a few broad, unsupported, and conclusory statements regarding the alleged threat of material injury to the domestic industry from allegedly dumped HFCS imports (*see, e.g.*, application, pp. 29-30 (section 4.3(ii)), US-4, clearly such statements do not meet the AD Agreement's evidentiary requirements. *See* AD Agreement, Article 5.2 ("Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph").

<sup>165</sup>Under the AD Agreement, the term "domestic industry" means "the domestic producers as a whole of the like products or ... those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products..." (Article 4.1) (emphasis added by the United States). Hence, "[t]he examination of the impact of the dumped imports on the domestic industry concerned" (Article 3.4) (emphasis added by the United States) requires an examination of the impact on the domestic industry as a whole, or a major proportion thereof.

and initiating an investigation in the absence of sufficient evidence concerning relevant economic factors and the likely impact on the domestic industry from the allegedly dumped HFCS imports.<sup>166</sup>

5.186 The United States recalls that the AD Agreement requires that applications contain evidence of a causal link between the allegedly dumped HFCS imports and the alleged threat of material injury to the domestic industry. In addition, the AD Agreement requires investigating authorities to examine the sufficiency of such evidence in determining whether to initiate the investigation. Neither the application nor the initiation notice contain such information, however. Therefore, by accepting an application that failed to contain such evidence, and by initiating an investigation in the absence of such evidence, SECOFI violated the AD Agreement.

5.187 The United States contends that because neither the initiation notice nor the application contained sufficient evidence of threat of material injury to justify initiation, obviously SECOFI also did not have (and the application did not contain) sufficient evidence of causal link between the allegedly dumped imports and the alleged threat of material injury. Logically, sufficient evidence of causal link must be lacking if there is insufficient evidence of either or both of the events between which there must be a causal nexus.<sup>167</sup>

5.188 According to the United States, the Sugar Chamber did not provide evidence in the application as required by Article 5.2 of the AD Agreement by failing to include in the application any information regarding causal link.<sup>168</sup> Indeed, as with the Sugar Chamber's response to the application form questions regarding impact on the domestic industry and relevant economic factors, the Sugar Chamber did not respond to the specific questions in the application form regarding causal link. Section 4.1 of SECOFI's application form—in language that closely tracks Article 5.2 of the AD Agreement -- requires that the application contain "proof of the existence of ... a causal relationship between the imported goods which are the object of dumping, and the supposed damage [*i.e.*, injury]". Likewise, section 4.2(iv) instructs the applicant to "demonstrate damage or prejudice to domestic production ... in the following terms: ... establish a causal effect of damage [*i.e.*, injury]".

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<sup>166</sup>The United States notes that the initiation notice only recited the same information that the application contained. *See Initiation Notice*, paras. 2, 21-22, 58, 74, 91-96. Moreover, SECOFI's record does not reflect that it obtained additional information through its own efforts that would have justified initiating the investigation. The United States does not suggest that authorities, when faced with the absence of sufficient information in an application, are obligated to attempt to gather it themselves. Rather, authorities may, but are not required, to do so. *See Guatemala-Cement Panel Report* para. 7.53. Thus, the United States asserts that, by failing to provide adequate information regarding the relevant economic factors bearing on the state of the domestic industry and the likely impact of the allegedly dumped imports, SECOFI's initiation notice did not meet the requirements of Articles 12.1 and 12.1.1(iv) of the AD Agreement.

<sup>167</sup>As the *Guatemala-Cement* panel stated :

"[A]n unbiased and objective investigating authority could not properly have determined that there was sufficient evidence of causal link to justify initiation if there was not sufficient evidence of dumping and threat of injury. In this case, having concluded that the evidence of dumping and threat of material injury were [*sic*] insufficient to justify initiation, we also conclude that the evidence of causal link between the dumped imports and the alleged injury was, perforce, not sufficient to justify initiation. The ADP Agreement clearly requires sufficient evidence of all three elements before an investigation may be initiated". (*Guatemala-Cement Panel Report*, para. 7.78)

*See also id.* paras. 4.191 ("The members of the panel could not but share Mexico's opinion that it was materially impossible to try to establish a causal link between two elements if, as in the case at point, the existence of either one, much less both, had not been properly demonstrated".), and 4.150 (noting Mexico's argument that "there can never be a causal link without either dumping or injury, much less in the absence of both").

<sup>168</sup>As previously discussed, Article 5.2 of the AD Agreement mandates that an application contain evidence of "a causal link between the dumped imports and the alleged injury".

The Sugar Chamber's response to both of these paragraphs was "N/A" (*i.e.*, not applicable). By answering "N/A", the Sugar Chamber effectively stated to SECOFI its belief that information regarding causal link was not relevant to the initiation of an investigation on the basis of allegations of threat of material injury. Accordingly, the application contains no explanation or discussion of causal link. Because the application did not contain sufficient evidence regarding causal link, the investigating authorities should have rejected the application and not have initiated the investigation.<sup>169</sup> In addition, like the application, the initiation notice does not contain an explanation or discussion of causal link.

5.189 Finally, the United States contends that, given that the application did not contain any meaningful analysis of relevant economic factors and indices having a bearing on the state of the domestic industry, the application also did not contain any analysis of correlations or trends between and among those factors and indices, which might have tended to show whether or not there was a causal link between the allegedly dumped imports and the threat of injury to the domestic industry. Accordingly, there were a number of issues concerning causal link that could have been (but were not) discussed in the application. For example, given the absence of any discussion of the domestic industry's production capacity and capacity utilization, the application did not discuss whether or not the domestic industry's capacity utilization rate was declining or was likely to decline as import volumes increased. Similarly, the application did not discuss whether or not employment levels in the domestic industry were declining or were likely to decline as import volumes increased. The same reasoning applies to whether or not there were correlations between declines, or the likelihood of declines, in the domestic industry's sales, profits, output, and market share, and a concomitant increase in import volumes. Since the AD Agreement clearly requires the applicant to provide evidence regarding causal link, the application's failure to provide any information regarding causal link clearly violated the AD Agreement.

5.190 The United States concludes that, for all of the foregoing reasons, because SECOFI did not have sufficient evidence regarding either the alleged threat of material injury (including the likely impact on the domestic industry and relevant economic factors) or the causal link between the allegedly dumped imports and the alleged threat, SECOFI violated the AD Agreement by not rejecting the petitioner's application and instead initiating an investigation.

5.191 The United States argues that SECOFI's initiation of this investigation must stand or fall on the basis solely of the evidence on its record at initiation. Under the AD Agreement, as previous panels have found, an authority's failure to have sufficient evidence to justify initiation and failure to properly determine an application was made by or on behalf of the domestic industry are violations which cannot be cured at a later date.<sup>170</sup> Therefore, even assuming *arguendo* that SECOFI's final

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<sup>169</sup>As previously discussed, "[t]he AD Agreement clearly requires sufficient evidence of all three elements [*i.e.*, dumping, threat of material injury, and causal link] before an investigation may be initiated". *Guatemala-Cement Panel Report*, para. 7.78. *Guatemala-Cement*, like the instant investigation, involved the initiation of an investigation on the basis of allegations of threat of material injury.

<sup>170</sup>The *Guatemala-Cement* panel found that, due to Guatemala's flawed initiation, "the entire investigation rested on an insufficient basis, and therefore never should have been conducted. This is, in our view, a violation which cannot be corrected effectively by any actions during the course of the ensuing investigation". See *Guatemala-Cement Panel Report*, para. 8.6. Certain GATT panels also addressed this issue when it arose under the Tokyo Round Agreement on the Implementation of Article VI of the GATT. See also, *e.g.*, *United States – Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden (United States-Steel Hollow Products)*, ADP/47 (*United States-Steel Hollow Products Panel Report*), issued 20 August 1990, unadopted, para. 5.20 (stating that "there was no basis to consider that an infringement of this provision could be cured retroactively"), and *United States – Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico (United States-Cement and Clinker)*, ADP/82 (*United States-Cement and Clinker Panel Report*), issued 7 September 1992, unadopted, para. 5.37 (stating that "a failure to observe the requirements of Article 5 could not be remedied by action subsequent to the initiation of the investigation".)

determination contains reasoning that would justify initiation, it does not show that SECOFI had the necessary evidence or made the necessary findings at the time of initiation. Any such *post hoc* justification is legally irrelevant and cannot cure SECOFI's erroneous initiation.

5.192 Mexico submits that the application filed by the Sugar Chamber was consistent with the requirements of Article 5.2 of the AD Agreement and that SECOFI properly and validly determined that there was sufficient evidence of threat of injury and of a causal relationship to justify the initiation of an investigation under Article 5.3 of the AD Agreement.

5.193 Mexico recalls that Article 5.2 of the AD Agreement stipulates that the application for initiation of an anti-dumping investigation shall contain such information as is reasonably available to the applicant on the existence of dumping, injury and a causal relationship between the dumped imports and the injury.

5.194 In Mexico's view, the application submitted by the Sugar Chamber contained the information that was reasonably available to it and such information included sufficient information concerning dumping, threat of injury and a causal relationship between the two, as well as evidence concerning the factors and indices mentioned in Article 5.2(i) to (iv) of the AD Agreement.

5.195 Mexico relates specific provisions under Articles 5.2(i) to (iv) of the AD Agreement to specific sections of the application submitted by the Sugar Chamber:

(a) Article 5.2(i) of the AD Agreement:

- Identity of the applicant: paragraphs 2.1, 2.2 and 2.3 of the application;<sup>171</sup>
- description of the volume and value of the domestic production of the like product: paragraphs 4.15 and 4.16 of the application and Annex 6A thereto;<sup>172</sup>
- list of domestic producers of the like product: paragraph 2.4 of the application and Annex 2.4.<sup>173</sup>

(b) Article 5.2(ii) of the AD Agreement:

- Complete description of the dumped product: Section B3 of the application and Annexes 2.10, 2.15 and 4.3(iii) thereto. See also a comparative study conducted by an academic institution of the characteristics and composition of HFCS and sugar, and various specialized publications in the field of sweeteners which reveal a diversity of uses and applications among the product investigated as well as their commercial substitutability;<sup>174</sup>

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<sup>171</sup>See the application for initiation of the investigation submitted by the Sugar Chamber, MEXICO-16.

<sup>172</sup>Application for initiation of the investigation submitted by the Sugar Chamber, MEXICO-16. See Annex 6A and the monthly national balance, MEXICO-17.

<sup>173</sup>See the application for initiation of the investigation submitted by the Sugar Chamber, MEXICO-16. See Annex 2.4 to the application for initiation of the investigation, MEXICO-18.

<sup>174</sup>See the application for initiation of the investigation submitted by the Sugar Chamber, MEXICO-16, Annex 2.10 to the application for initiation, MEXICO-19, Annex 2.15 to the application for initiation, MEXICO-20 and Annex 4.3 (iii) to the application for initiation, MEXICO-21.



- The names of the country or countries of origin or export in question: Section B3, paragraph 2.13 of the application and Annexes 3.4 and 3.6;<sup>175</sup>
- Identity of each known exporter or foreign producer and list of importers of the investigated product: Section B2, paragraphs 2.7, 2.8 and 2.9 of the application and Annexes 2.15, 3.15, 3.16 and 4.3(i) as well as Table 2.9;<sup>176</sup>

(c) Article 5.2(iii) of the AD Agreement:

Data concerning the normal value and the export price of the like product: paragraph 2.6 and Section C of the application, Annexes 3.1, 3.4 and 3.6, 3.12, 3.15 and 3.16;<sup>177</sup>

Information on prices at which the investigated product is sold when destined for consumption in the domestic market of the country of origin or export and information on export prices: paragraph 2.6 and Section C of the application, and Annexes 3.4 and 3.6, 3.12, 3.15 and 3.16 thereto.<sup>178</sup>

(d) Article 5.2(iv) of the AD Agreement:

Information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry: Section D of the application, and Annexes 3.4 and 3.6, 4.3(i), 4.3(ii), 4.3(iii), 4.3(v), 4.9, 4.12 and 4.14, 4.22, 4.23, 4.24 and 6-A to the same document.<sup>179</sup>

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<sup>175</sup>See the application for initiation of the investigation submitted by the Sugar Chamber, Exhibit MEXICO-16 and Annexes 3.4 and 3.6 to the application for initiation of the investigation, MEXICO-10.

<sup>176</sup>See the application for initiation of the investigation submitted by the Sugar Chamber, MEXICO-16, Annex 2.15 to the application for initiation of the investigation, MEXICO-20, Annexes 3.15 and 3.16 to the application for initiation of the investigation, MEXICO-22, Annex 4.3(i) to the application for initiation of the investigation, MEXICO-23 and Table 2.9 of the application for initiation of the investigation, MEXICO-24.

<sup>177</sup>See the application for the initiation of the investigation submitted by the Sugar Chamber, MEXICO-16, Annex 3.1(i) of the application for the initiation of the investigation, MEXICO-25, Annexes 3.4 and 3.6 of the application for the initiation of the investigation, MEXICO-10, Annex 3.12 to the application for the initiation of the investigation, MEXICO-26 and Annexes 3.15 and 3.16 to the application for the initiation of the investigation, MEXICO-22.

<sup>178</sup>See the application for initiation of the investigation submitted by the Sugar Chamber, MEXICO-16, Annexes 3.4 and 3.6 to the application for initiation of the investigation, MEXICO-10, Annex 3.2 to the application for initiation of the investigation, MEXICO-26 and Annexes 3.15 and 3.16 to the application for initiation of the investigation, MEXICO-22.

<sup>179</sup>Application for initiation of the investigation submitted by the Sugar Chamber, MEXICO-16, Annexes 3.4 and 3.6 to the application for initiation of the investigation, MEXICO-10, Annex 4.3(i) to the application for initiation of the investigation, MEXICO-23, Annex 4.3(ii) to the application for initiation of the investigation, MEXICO-7, Annex 4.3(iii) to the application for initiation of the investigation, MEXICO-21, Annex 4.3(v) to the application for initiation of the investigation, MEXICO-27, Annex 4.9 to the application for initiation of the investigation, MEXICO-28, Annexes 4.12 and 4.14 to the application for initiation of the investigation, MEXICO-29, Annex 4.22 to the application for initiation of the investigation, MEXICO-30, Annex 4.23 to the application for initiation of the investigation, MEXICO-31, Annex 4.24 to the application for initiation of the investigation, MEXICO-32 and Annex 6-A to the application for initiation of the investigation, MEXICO-17.

5.196 According to Mexico, it can be concluded therefore that the application for initiation submitted by the Sugar Chamber met all of the requirements laid down in Article 5.2 of the AD Agreement since it was based on the information appearing in the text as well as the annexes, which contain a range of relevant documentary evidence, and not merely simple assertions.

5.197 Mexico argues that, to reach the conclusion that the application for initiation of the investigation submitted by the Sugar Chamber met the requirements laid down in Article 5.2 of the AD Agreement, SECOFI carried out a comprehensive analysis of the information submitted, as duly established in very clear terms in the *Initiation Notice*, more specifically in paragraphs 24 to 99 thereof.

5.198 Further, Mexico contends that the application did contain precise and relevant information concerning the impact of the dumped imports on the national sugar industry, information which was considered sufficient to initiate the investigation. It was considered sufficient following an extensive analysis thereof in accordance with Article 5.3 of the AD Agreement, and that analysis appears in the notice of initiation, specifically in paragraphs 61 to 98.

5.199 Mexico recalls that Article 5.2(iv) of the AD Agreement expressly stipulates that the information must refer to factors and indices that are relevant. In Mexico's view, the requirement laid down in Article 5.2(iv) leaves the investigating authority with a range of evaluative powers to determine the relevant indices and factors by which the consequent impact of the dumped imports can be quantified. Thus, it is up to the investigating authority to decide whether the information submitted with the application for the investigation concerns relevant factors and indices.

5.200 Mexico recalls further that Article 5.2(iv) also speaks of "the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3" (emphasis added by Mexico). Mexico states that if the terms "relevant" and "such as" in Article 5.2(iv) are interpreted according to their ordinary meaning, it is clear that the above requirement is not a strict one as regards the factors and indices. The reference to Articles 3.2 and 3.4 of the AD Agreement is simply illustrative. Thus, Mexico concludes, the information to be included in the application to demonstrate the impact of the imports may cover some of the factors and indices mentioned in Articles 3.2 and 3.4 of the AD Agreement that the investigating authority considers relevant to the demonstration of such impact.

5.201 According to Mexico, the obligation laid down in Article 5.2(iv) of the AD Agreement is that the application for the initiation of an anti-dumping investigation must contain sufficient information on the effect of the dumped imports on prices of the like product in the domestic market, and on the consequent impact of the imports on the domestic industry, and that this must be demonstrated by relevant factors and indices which could be all or some of those set forth in Articles 3.2 and 3.4 of the AD Agreement.

5.202 According to Mexico, SECOFI's anti-dumping practice provides that, in the "Application for Producing Enterprises Requesting the Initiation of a Dumping Investigation", for purposes of the determination of threat of injury, the applicant must furnish information concerning economic and financial indicators, installed capacity and investment projects, and such additional information as the applicant considers relevant. The application at issue contained all of the relevant information for initiating the investigation, since it enabled SECOFI to assess the impact and the sensitivity of the national sugar industry resulting from dumped HFCS imports.

5.203 Mexico holds that, while it is true that in certain parts of the application the Sugar Chamber indicated that the question was not applicable (N.A.), this was not because the required information was irrelevant in supporting the alleged threat of injury, but because the Sugar Chamber, following the order of the application, incorporated the information in other sections. Likewise, the assertion by

the United States that the application did not contain information indicating the loss of sales as a result of the HFCS imports is irrelevant, given that the information is incorporated in the application and was analysed by SECOFI in paragraphs 57 and 58 of the notice of initiation.<sup>180</sup>

5.204 In Mexico's view, it is clear that the United States reviewed the application for initiation in a biased, incorrect and tendentious manner, since such application contained the information reasonably available to the Sugar Chamber concerning the relevant factors and indices having a bearing on the state of the domestic sugar industry, including some of those listed in Articles 3.2 and 3.4 of the Anti-Dumping Agreement. Specifically, (i) domestic sugar market indicators, in thousands of tonnes, for production, sales, exports, imports, consumption, inventories and employment;<sup>181</sup> (ii) financial indicators (cash flow statement, financial statement, income statement, statement of production costs and financial ratios);<sup>182</sup> (iii) installed capacity of each mill and the methodology used to determine the installed capacity;<sup>183</sup> (iv) investment projects in the sugar industry;<sup>184</sup> (v) HFCS import statistics and annual statement of imports drawn up by the applicant with information from the SHCP;<sup>185</sup> and (vi) list of average weighted market prices according to the category of sugar and the supply centre.<sup>186</sup> Consequently, SECOFI determined that the application for initiation contained the information reasonably available to the applicant on the factors and indices mentioned in Articles 3.2 and 3.4 of the AD Agreement, which were relevant and had a bearing on the state of the domestic industry.

5.205 Mexico argues that the United States misunderstands Article 3.7 of the AD Agreement. Mexico recalls that Article 3.7 of the AD Agreement states the following:

"... In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as:

- (i) A significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;
- (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports;
- (iii) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

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<sup>180</sup>See the application for initiation of the investigation, MEXICO-16 and Annex 4.3(v) to the application for initiation of the investigation, MEXICO-27.

<sup>181</sup>See the application for initiation of the investigation, MEXICO-16 and Annex 6-A to the application for initiation of the investigation, and the national balance for sugar, MEXICO-17.

<sup>182</sup>See the application for the initiation of the investigation, MEXICO-16 and Annexes 4.19, 4.20 and 4.21 of the application for initiation of the investigation, MEXICO-33.

<sup>183</sup>See the application for initiation of the investigation, MEXICO-16 and Annex 4.22 of the application for initiation of the investigation, MEXICO-30.

<sup>184</sup>See the application for initiation of the investigation, MEXICO-16 and Annex 4.24 to the application for initiation of the investigation, MEXICO-32.

<sup>185</sup>Application for initiation of the investigation, MEXICO-16, Annex 4.3(i) of the application for initiation of the investigation, MEXICO-23 and Annex 3.16 of the application for initiation of the investigation, MEXICO-22.

<sup>186</sup>See the application for initiation of the investigation, MEXICO-16, Annex 4.3(iii) of the application for initiation of the investigation, MEXICO-21 and the information collected by SECOFI which appears in the injury investigation file, MEXICO-34.

- (iv) inventories of the product being investigated.

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur".

5.206 According to Mexico, this specific provision of the AD Agreement sets forth the factors which an investigating authority must take into account in determining whether there is a threat of injury; in other words, in the case of an application for initiation of an investigation specifically relating to threat of injury, the investigating authority must consider, in particular, the factors indicated in Article 3.7 of the AD Agreement.

5.207 Mexico submits that this does not prevent an investigating authority from analysing the factors and indices that it considers relevant including those identified in Articles 3.2 and 3.4 of the AD Agreement. This is clearly demonstrated by the fact that SECOFI considered all the factors indicated in Article 3.2 and the relevant factors in Article 3.4 of the AD Agreement to determine that the information contained in the application submitted by the Sugar Chamber concerning the impact of dumped HFCS imports on the domestic sugar industry was sufficient clearly demonstrates this fact. It is also extremely important to point out that the application contained information on the totality of the factors indicated in Article 3.7 of the AD Agreement.

5.208 Mexico argues that Article 5.2(iv) of the AD Agreement in no way requires that the investigating authorities limit themselves to determining that the information contained in an application for initiation concerning the relevant factors and indices, and the examination thereof, concern only the factors and indices identified in Articles 3.2 and 3.4 of the AD Agreement or the totality of such factors and indices. First, it is up to the authorities to decide which of the above-mentioned factors and indices should be taken into account, and second, the references to Articles 3.2 and 3.4 in Article 5.2(iv) are illustrative. This is clear from the text of Article 5.2(iv), as it would be entirely illogical to endorse the interpretation that because the factors in Article 3.7 (which refer to an investigation concerning threat of injury) are not expressly mentioned in Article 5.2, the authority should ignore them or minimize their importance. In other words, it is evident that the factors indicated in Article 5.2(iv) are merely illustrative; and indeed, the fact that this provision does not mention those identified in Article 3.7 does not mean that they should be ignored in a case involving threat of injury.

5.209 Mexico asserts that it is odd for the United States to interpret Article 5.2(iv) of the AD Agreement so strictly, when in fact it has taken a different position in other cases. For example, in *Guatemala-Cement*, the United States stated the following:

"5.43... The applicant contended that if the massive imports of cement continued to be sold at the indicated prices, both the domestic industry's planned expansion and capital improvements would have to be cancelled and existing production facilities would be closed with a concomitant loss in employment. According to the United States, this information, while limited in scope, appears to minimally satisfy the requirements of Article 5.2(iv) relating to injurious price data and threat of injury. The United States considers it important to note, moreover, that the applicant alleged a threat of injury by virtue of the imports from Mexico, and did not assert the existence of present injury. The nature of information relevant for a threat case may be substantially different from that which is pertinent in a present injury case. Article 3.7 acknowledges this distinction in connection with determinations involving threat of injury. For the United States, it is only logical that the same distinction be recognized in terms of the information that is considered to be "reasonably available" to an applicant in requesting the initiation [*sic*] of an anti-dumping investigation. An

applicant must still provide information, and not mere speculation, to support allegations of threat of injury. However, the United States suggests that the information may be different in kind than that which would be considered "reasonably available" in the context of an application involving present injury, if for no other reason than that threat of injury involves an incipient event".<sup>187</sup>

5.210 According to Mexico, the above shows that on other occasions, the United States has agreed that a distinction must be drawn, both during the initiation and during other stages, between the information to be taken into account in an investigation of present injury, and in an investigation of threat of injury. The United States expressly refers to the factors in Article 3.7, which indeed are not mentioned in Article 5.2(iv), showing that the nature of the information required in the application is different in a case involving threat of injury from a case involving present injury, and that the factors indicated in Article 3.7 are of greater relevance in a case involving threat of injury.

5.211 In Mexico's view, this completely contradicts the assertion made by the United States that the Sugar Chamber's application allegedly contained "little evidence" of the likely impact of dumped HFCS imports on the domestic sugar industry. Indeed, on other occasions the United States has considered that little evidence or evidence of limited scope sufficed to meet the minimum requirements of Article 5.2(iv). This, in turn, contradicts the argument made by the United States that the application contained no evidence concerning certain elements substantiating the threat of injury.

5.212 Mexico recalls that in *Guatemala-Cement* the United States also asserted:

"5.52 ... Thus, the United States considers it difficult to reconcile Mexico's assertions that Guatemala failed to give consideration to the factors in Articles 3.4 and 3.7 with the explicit discussion of these factors in the preliminary determination by Guatemala. Furthermore, while Guatemala's preliminary determination did not address all of the factors in Articles 3.4 and 3.7, the United States suggests that it was not necessary to do so. Neither of those Articles requires discussion of all of the listed factors in an injury or threat of injury determination. Moreover, the United States recalls that each Article also specifically includes the proviso that the lists are not exhaustive and no single factor or group of factors is decisive, recognizing the ability of national authorities to discern the relative importance of each factor in the particular circumstances of each investigation ..."188 (emphasis added by Mexico).

5.213 Thus, according to Mexico, the United States has previously recognized the investigating authority's power to decide which factors, depending on the investigation, should be taken into account in the analysis leading to the initiation of an investigation, *i.e.* that the investigating authority is under no obligation to consider the totality of such factors.

5.214 Similarly, Mexico submits, the United States has recognized that in cases involving threat of injury, a distinction must be drawn in deciding which factors are relevant to determining when there is sufficient information to initiate an investigation.

5.215 Mexico asserts that this is reaffirmed in the conclusions of the Panel in *Guatemala-Cement*,<sup>189</sup> which state that:

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<sup>187</sup>See *Guatemala-Cement Panel Report*, para. 5.43.

<sup>188</sup>*Id.* para. 5.52.

<sup>189</sup>*Id.* paras. 7.75, 7.76 and 7.77.

"7.75 ... However, we do not accept the view that the lack of a specific reference to Article 3.7 means that an applicant is not required to submit 'such information as is reasonably available to the applicant' on the question of threat of material injury, if threat of material injury is alleged in the application. Such an interpretation of the Agreement would, in our view, be entirely impermissible, as it would be inconsistent with the text, as well as the object and purpose, of Article 5.2 as a whole (emphasis added by Mexico).

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

7.77... Moreover, while as noted above, there is clearly a different standard applicable to making a preliminary or final determination of material injury, including threat of material injury, than to determining whether there is sufficient evidence of material injury, including threat of material injury to justify initiation of an investigation, we cannot agree with Guatemala's apparent position that the factors set forth in Article 3.7 are irrelevant to the initiation determination" (emphasis added by Mexico).

5.216 Mexico notes that, in footnote 248 of the Panel report in *Guatemala-Cement*, the Panel expressly recognizes the importance of the factors in Article 3.7 in cases of threat of injury:

"Similarly, while Article 3.7 contains factors which must be specifically considered in determining threat of injury, the factors in Article 3.2 remain relevant".<sup>190</sup>

5.217 Mexico considers therefore that the application was consistent with Article 5.2(iv) of the AD Agreement since it contained the information that was reasonably available to the Sugar Chamber on the relevant factors contained in Articles 3.2, 3.4 and 3.7 of the AD Agreement. These factors were duly analysed, as can be verified by reading the application and the extensive notice of initiation of the investigation, specifically paragraphs 57-58 and 91-96 thereof.<sup>191</sup>

5.218 Again, Mexico maintains that SECOFI reached the above conclusion after having extensively analysed the accuracy and adequacy of the information contained in the application and determined that the sufficiency requirement for initiating the investigation had been met.

5.219 Mexico observes that there are differences in the degree of complexity and the scope of the information required in different stages of an investigation. That is, the information on threat of injury required for the initiation of an investigation is not the same as that required for the preliminary or final determination. This argument is supported by statements made by the United States itself and various panels that have interpreted the matter.

5.220 In this connection, Mexico recalls that the *Guatemala-Cement* panel report<sup>192</sup> stated that:

"5.35 ... However, the United States submits that logic directs that the quantum and quality of information required for the initiation of an investigation must be less than

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<sup>190</sup>*Id.* footnote 248.

<sup>191</sup>Mexico recalls that in *Guatemala-Cement*, the United States considered that the information submitted by Guatemala, specifically concerning the investment projects factor, although limited, met the requirements of Article 5.2. (*Id.* para. 5.43.)

<sup>192</sup>*Id.* paras. 5.35 and 5.39.

that necessary for a preliminary or final determination that is reached after a full investigation is conducted".

"5.40 ... The United States suggests that information sufficient to prove the existence of dumping or to conclude that the domestic industry in Guatemala was threatened with injury by reason of the imports from Mexico was certainly not required for purposes of initiation" (emphasis added by Mexico).

5.221 Mexico recalls further that footnote 168 of the same report reads:

"The United States notes that, in the conduct of anti-dumping investigations, investigating authorities are routinely confronted with complex factual situations. It would be impossible to state with complete confidence at the outset of an investigation precisely all of the information that will be necessary to reach a final determination ... "<sup>193</sup> (emphasis added by Mexico).

5.222 Mexico states that, similarly, the panel report in *United States-Lumber* made the following observation:

"In analysing further what was meant by the term 'sufficient evidence', the Panel noted that the quantum and quality of evidence to be required of an investigating authority prior to initiation of an investigation would necessarily have to be less than that required of the authority at the time of making a final determination ... "<sup>194</sup> (emphasis added by Mexico).

5.223 Mexico notes that, in support of the above, the panel report in *Guatemala-Cement* stated in its conclusions that:

"7.57... Moreover, we agree with the view expressed by the Panel in *Softwood Lumber* that the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation. That is, evidence which would be insufficient, either in quantity or in quality, to justify a preliminary or final determination of dumping, injury or causal link, may well be sufficient to justify initiation of the investigation"<sup>195</sup> (emphasis added by Mexico).

5.224 Thus, Mexico is of the view that the information submitted in the application, specifically as regards Article 5.2(iv), permitted the investigation to be initiated, the more so since the scope and complexity of evidence required for the initial stage of the investigation is less than for other stages. This is not to say that the information submitted was meagre – on the contrary, it was sufficiently comprehensive to substantiate the threat of injury to the domestic sugar industry.

5.225 Mexico notes that Article 5.2 of the AD Agreement expressly states that the application must contain such information as is reasonably available to the applicant on the points mentioned in Articles 3.2 and 3.4. Therefore, the applicant is not required to submit more information than is reasonably available to it, and no investigating authority can require of an applicant more than Article 5.2 of the AD Agreement indicates. While additional information may exist, both in terms of volume and complexity, the intention of this provision is to limit somehow the investigating authority's power to impose too heavy a burden on the applicant by requiring an unreasonable effort

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<sup>193</sup>*Id.* footnote 168.

<sup>194</sup>*See United States – Measures Affecting Imports of Softwood Lumber from Canada (United States-Lumber)*, SCM/162 (*United States-Lumber Panel Report*), adopted 27 October 1993, para. 332.

<sup>195</sup>*See Guatemala-Cement Panel Report*, para. 7.57.

which could impede the initiation of an investigation when there is sufficient information, even though it is always possible to obtain further information.

5.226 Mexico contends that this argument is supported by statements made by the United States itself in connection with other cases, particularly, *Guatemala-Cement*.<sup>196</sup> The report of the Panel in *Guatemala-Cement* illustrates the lack of consistency in the United States' arguments.

"5.44 ... In the view of the United States, the question that the Panel must have answered by the parties is whether the application contained the information reasonably available to the applicant respecting dumping and import volume. While more information certainly would have been useful in the application, this is likely to always be the case, and is not the issue here. For the United States, the issue is whether the applicant provided the information reasonably available to it as required by Article 5.2(iii) and (iv) of the ADP Agreement" (emphasis added by Mexico).

"5.39 ... The United States notes that "... in this regard, the language in Article 5.2 directing that an 'application shall contain such information as is reasonably available to the applicant' is intended to prevent the imposition of unreasonable information requirements that go beyond not only the normal capacity of a private entity to develop, but also beyond those of a particular applicant in a given case" (emphasis added by Mexico).

5.227 Mexico concludes that the application contained all of the information reasonably available to the Sugar Chamber on the elements set forth in Article 5.2 of the AD Agreement, and that this information was sufficient to initiate the investigation.

5.228 Mexico contends that the United States' allegations with respect to Articles 5.3 and 5.8 of the AD Agreement are based on the prior argument that the application did not contain sufficient information under Article 5.2(iv). Since this argument, in Mexico's view, has no support, it cannot be asserted either that SECOFI did not conduct the examination concerning the accuracy and adequacy of the evidence submitted by the Sugar Chamber, or that the application should have been rejected.

5.229 Mexico asserts that evidence indicating that SECOFI examined the accuracy and adequacy of the evidence submitted by the Sugar Chamber to determine that it was sufficient to initiate the investigation can be found in paragraph 99 of the *Initiation Notice*.

"On the basis of the information, arguments and evidence submitted by the National Chamber of Sugar and Alcohol Industries and the information collected by the Ministry, we conclude that there are reasonable indications that during the period of investigation, the United States imports entered the Mexican market in alleged conditions of price discrimination and threatened to cause injury to the national sugar industry...".

5.230 Mexico submits that the evidence provided by the Sugar Chamber and the examination of the information undertaken by SECOFI are specifically recorded, at length, in paragraphs 20 to 23 and 42 to 98 of the *Initiation Notice*. In various parts of the notice of initiation, SECOFI notes that its findings were drawn from information submitted by the Sugar Chamber, or from information submitted by the Sugar Chamber together with information collected by SECOFI itself. SECOFI's analysis is described in detail in paras. 62 to 98 of the *Initiation Notice*. As an integral part of this examination and in exercise of its investigatory powers, SECOFI collected a set of evidence which, together with the information in the application, could be considered as accurate, adequate and sufficient to justify the initiation of the investigation. It is clear, therefore, that Mexico complied

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<sup>196</sup>*Id.* paras. 5.44 and 5.39.



with Article 5.3 of the AD Agreement. Mexico submits further that, in view of these considerations, there was no violation of Article 5.8 of the AD Agreement.

5.231 With respect to the causal relationship between the dumped imports and the threat of injury to the domestic sugar industry, Mexico argues that, on the basis of the information described above and contained in Section 4.3 of the application with its annexes,<sup>197</sup> as well as information appearing in the bibliographical files,<sup>198</sup> SECOFI determined that there were sufficient elements to substantiate the existence of threat of injury as a result of the dumped HFCS imports on domestic production.

5.232 Mexico contends that the establishment of this causal link can be seen throughout the analysis referred to above, and more specifically and extensively, in paragraphs 61 to 98 of the *Initiation Notice*. The applicant stated and provided evidence in support of the allegation that as a result of the dumped HFCS imports the national sugar industry was threatened.

5.233 According to the United States, Mexico invokes two basic defences to the arguments of the United States. First, Mexico argues that the Sugar Chamber's application contained "precise and relevant information" concerning the impact of the HFCS imports on the Mexican sugar industry.<sup>199</sup> Second, Mexico contends that the scope of "relevant" information for purposes of an application alleging threat of material injury is more circumscribed in nature than "relevant" information for purposes of an application alleging material injury and in any event is more circumscribed than that advocated by the United States. Mexico's arguments are without merit.

5.234 In the view of the United States, Mexico's characterization of the information contained in the application about the likely impact of the imports on the domestic industry is incorrect. The confidential material in the annexes to the application that Mexico accuses the United States of disregarding is simply historical statistical information submitted by the petitioner concerning a variety of indices of industry performance.<sup>200</sup> Indeed, this is precisely how SECOFI describes the material in its initiation notice.<sup>201</sup>

5.235 The United States contends that the Sugar Chamber nowhere attempted to explain how the historical data it submitted were pertinent to its theory of threat of material injury. The Sugar Chamber consistently declined to explain the implications of the data it furnished by stating in its application that questions seeking information on the negative effect of HFCS imports on the domestic industry were not applicable.

5.236 According to the United States, the data that the Sugar Chamber submitted were insufficient to satisfy the requirements of Article 5.2(iv) with respect to an application alleging threat of material injury. Article 5.2 requires that an application for anti-dumping duties contain "information on the

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<sup>197</sup>See Annex 4.3(i) to the application for initiation of the investigation MEXICO-23, Annex 4.3(ii) to the application for initiation of the investigation, MEXICO-7 and Annex 4.3(iii) to the application for initiation of the investigation, MEXICO-21.

<sup>198</sup>See bibliographical information, MEXICO-8.

<sup>199</sup>See Mexico first submission, paras. 128, 134-37.

<sup>200</sup>Indeed, the annexes are confidential documents whose content Mexico revealed for the first time when it filed its first submission. SECOFI relied on these confidential documents notwithstanding that the Sugar Chamber neither furnished a non-confidential summary of them nor stated that the information was not susceptible of summary. Such action was contrary to Article 6.5.1, which states that "[t]he authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof", except in "exceptional circumstances" when the party submitting the information indicates that it is not susceptible of summary. Consequently, SECOFI should neither have accepted this information nor relied on it in its initiation decision. Likewise, the Panel may not consider this information in assessing whether SECOFI had sufficient evidence of threat of injury to justify initiation.

<sup>201</sup>See *Initiation Notice*, para. 23, US-3.

evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of these imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3". In turn, Article 3.4 identifies factors to be evaluated in examining the impact of dumped imports on the domestic industry. This includes such factors as "actual and potential declines in sales, profits, output, market share, productivity, return on investments" and "actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments" (emphasis added by the United States).

5.237 The United States is of the view that, because threat of material injury focuses on the imminent future, the potential declines in the factors specified in Article 3.4 are of particular relevance in threat cases. Although historical data alone may be sufficient to show actual declines in Article 3.4 factors, they will ordinarily be insufficient to show potential declines. Instead, there must be some empirical or narrative information that would demonstrate how one can project a potential decline from the historical data. The need for further information is particularly acute where, as here, an applicant does not contend that there are actual declines in the Article 3.4 indicators sufficient to constitute material injury. In this case, the Sugar Chamber was not claiming that the statistical data it furnished in the annexes showed that the HFCS imports to date had caused material injury. In such circumstances, the applicant must provide some explanation of how further imports are likely to cause the industry's current condition to change. Certainly some understanding of why an applicant believes it is likely to experience material injury in the imminent future is information that is reasonably available to the applicant. Such information is also critical to a respondent importer's presentation of its case. Article 5.2, properly understood, does not permit silence on this point, and Article 5.3 precludes authorities from finding such silence to be sufficient to justify initiation.

5.238 The United States contends that the Sugar Chamber was silent on this point, however. It did not provide any information in either its application form or annexes on potential declines in the factors specified in Article 3.4. In light of this, the Sugar Chamber's repeated "N/A" responses on its application form must be taken at face value and considered to be evidence of the petitioner's belief that it did not have any response to the questions. There is no basis for interpreting the "N/A" responses, as did Mexico at the first panel meeting, to signify that the information was not provided on the application form because it could be found in other materials that the petitioner submitted.

5.239 The United States acknowledges that the standard for information in an application should be considerably lower than the requirement for explanation in a final determination imposing duties. It does not dispute the statement of Mexico — or Mexico's quotations of arguments that the United States submitted to the *Guatemala-Cement* panel — that "the information on threat of injury required for the initiation of an investigation is not the same as that required for the preliminary or final determination".<sup>202</sup>

5.240 The United States contends that, even when the annexes are taken into account, the Sugar Chamber's application failed to provide *any* information why it believed there would be potential declines in such critical factors as capacity, employment, or financial performance. Consequently, the application contained insufficient evidence regarding threat of material injury, including the likely impact of dumped imports on the domestic sugar industry, and the attendant economic factors set forth in Article 3.4 of the AD Agreement.

5.241 The United States disputes the statement made by Mexico that SECOFI's initiation notice demonstrates that the application contained the requisite information about the impact of the dumped imports and the economic factors set forth in Article 3.4 of the AD Agreement.<sup>203</sup> Mexico is

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<sup>202</sup> Mexico's first submission, paras. 153-57.

<sup>203</sup> See *id.* para. 151.

incorrect. SECOFI's initiation notice contains no more information concerning these matters than did the application.

5.242 The United States argues that the portions of the initiation notice cited by Mexico in paragraph 151 of Mexico's first submission recite allegations: (1) that imported HFCS competes with domestically-produced sugar in the Mexican soft drink market;<sup>204</sup> (2) that HFCS imports have caused price depression and lost sales for one producer;<sup>205</sup> and (3) that future HFCS imports will make it difficult for domestic producers to engage in several investment projects.<sup>206</sup> None of these allegations provide any information about important indicators such as capacity, production, market share, employment, and financial performance. Moreover, the discussion in the initiation notice about investment projections, although purportedly addressing the potential impact of the future imports, does not in fact do so. There is no allegation, much less discussion, of how or why further HFCS imports are likely to affect the sugar industry's future investment—only a conclusory statement that "investment projects undertaken by the [sugar] industry could suffer, should the growing trend of corn sweeteners under unfair competition continue", which itself alleges not that an event is imminent or even likely, but only that it "could" happen.<sup>207</sup> Consequently, the allegations in question provide no information concerning the alleged nexus between future HFCS imports and the potential foregone investment projects.

5.243 The United States disputes the argument made by Mexico that, to the extent that the application did not contain information concerning the impact of dumped imports or the attendant economic factors set forth in Article 3.4 of the AD Agreement, such information was not required because it was not "relevant". The United States also disputes the arguments made by Mexico that an application for anti-dumping duties premised on threat of material injury is required to contain information on only those factors specified in Article 3.7 of the AD Agreement, and that information on factors specified in Articles 3.2 and 3.4 need only be included in such an application to the extent it is relevant.

5.244 According to the United States, Mexico's legal arguments, taken in conjunction with the material SECOFI cited in its initiation notice, negate any possible inference that when SECOFI examined the application it reviewed the statistical data and concluded that the material in the annexes provided "sufficient evidence" justifying initiation of an investigation alleging threat of material injury, as required by Article 5.3. Rather, Mexico's argument supports the conclusion that SECOFI interpreted the applicant's "N/A" responses as meaning questions asking for allegations of harm were not relevant to a threat case, and that the investigating authorities agreed.

5.245 The United States contends that Mexico's argument is premised on a theory, which Mexico develops in more detail in the portion of its first submission defending SECOFI's affirmative threat determination, that an investigating authority has the discretion to decide which of the Article 3.4 factors it will consider in the context of a threat determination and which it will ignore. Mexico's argument conflicts with language in Article 3 of the AD Agreement and with the conclusions previous panels have reached.

5.246 The United States maintains that Mexico's argument is also directly contrary to the language of Article 5 of the Agreement. Article 5.2(iv) requires the applicant to provide "information reasonably available" to it concerning "relevant factors and indices having a bearing on the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3" (emphasis added by the United States). This mandatory language applies to all applications, including those alleging threat of

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<sup>204</sup>Initiation Notice, para. 57, US-3.

<sup>205</sup>Id. para. 58.

<sup>206</sup>Id. paras. 91-96.

<sup>207</sup>Id. para. 92.

material injury.<sup>208</sup> Consequently, the Agreement clearly contemplates that an application will contain information concerning the factors specified in Article 3.4.

5.247 The United States argues that nothing in the Agreement would support providing the applicant with the discretion to determine which Article 3.4 factors it will discuss in its application and which it will not. Otherwise, the applicant would have the power to determine the terms of the investigation and what information would be adequate to support a petition. Such a conclusion would be irreconcilable with Article 5.3, which instructs the investigating authority to determine the accuracy and adequacy of the evidence provided in the application.

5.248 In response to a question put by the Panel, the United States said that, while every application must contain reasonably available information concerning the Article 3.4 factors pertaining to the impact of the dumped imports on the domestic industry, this does not necessarily mean that every application must contain information concerning every specific factor in Article 3.4. In some cases, information concerning a specific 3.4 factor might not be reasonably available to the applicant. In other cases, it may be clear from whatever conditions of competition applicable to the industry that are described in an application that a specific 3.4 factor is not pertinent to the industry. For example, industries that do not maintain inventories should not be required in an application to provide information on inventories. In the current proceeding, however, there is no indication that the information not provided in the Sugar Chamber's application concerning potential declines in the sugar industry in such factors as capacity, employment, or financial performance was not reasonably available to it. Nor is there any basis for a conclusion that potential declines in a factor such as financial performance is not pertinent to the sugar industry. Indeed, Mexico has repeatedly declined to make such an argument.<sup>209</sup>

5.249 In the view of the United States, Mexico's relevance argument therefore cannot change the conclusion that the application failed to contain the information reasonably available to the applicant concerning threat of material injury required by Article 5.2(iv) of the AD Agreement. Additionally, because the application contained no information concerning the alleged threat of material injury, the application also failed to contain sufficient evidence of causal link between the allegedly dumped imports and the alleged threat of material injury.<sup>210</sup>

5.250 The United States submits that SECOFI's initiation of an investigation on the basis that the application contained sufficient information on threat of material injury violated Article 5.3.<sup>211</sup> This provision requires authorities to examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation. Had SECOFI conducted the required examination, it should have determined that the information provided in the application did not constitute information reasonably available to the Sugar Chamber concerning the potential effect of further dumped imports. Alternatively, it should have determined that the evidence in the application on threat of material injury was in any event inadequate to justify initiation. Failing to do either, Article 5.8 required SECOFI to reject the application and terminate the investigation.

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<sup>208</sup>See AD Agreement, Article 5.2 and Article 3, footnote 9.

<sup>209</sup>See Answer of the United States to question no. 5 by the Panel, 22 June 1999.

<sup>210</sup>United States first submission, paras. 90-96. Mexico's principal response to this argument is that the causal link is discussed generally in the application and annexes and "specifically and extensively" in the 38 paragraphs of the initiation notice purporting to describe the Sugar Chamber's threat allegations. Mexico first submission, paras. 144-45. Mexico provides no specific citations or examples of discussion of causal link. In fact, none exist.

<sup>211</sup>*Initiation Notice*, para. 98. The United States maintains that, although the notice references "information collected by the Ministry" as well as the information provided by the applicant as a basis for initiation, Mexico has not identified any information on threat of material injury other than that provided by the Sugar Chamber in its application and annexes on which it relied in making its initiation decision.

5.251 The United States concludes that, consequently, because of the lack of sufficient information in the application on the alleged threat of material injury and the alleged causal link between the allegedly dumped imports and the alleged threat of material injury, SECOFI violated Articles 5.2, 5.3, and 5.8 of the Agreement by its initiation of an anti-dumping investigation.

5.252 Mexico argues that the application submitted by the Sugar Chamber contained a variety of information on the factors and indices set forth in Articles 3.2 and 3.4 of the AD Agreement, concerning the impact of the dumped imports in the domestic sugar industry. Mexico reiterates that the application contained, *inter alia*, information on the following factors:

- (a) domestic sugar market indicators concerning production, sales, exports, imports, consumption, inventories, employment, apparent national consumption (market share) and production/employment data allowing the calculation of a productivity index;<sup>212</sup>
- (b) financial indicators including cash-flow statement, financial statement, income statement – containing data on profits-, production costs and financial ratios;<sup>213</sup>
- (c) installed capacity for each sugar mill and the methodology used to determine installed capacity;<sup>214</sup>
- (d) investment projects in the sugar industry (return on investments),<sup>215</sup>
- (e) HFCS import statistics and annual statement of imports compiled by the applicant on the basis of information from the SHCP;<sup>216</sup>
- (f) list of weighted average market prices by sugar category and distribution centre;<sup>217</sup>
- (g) size of the margin of dumping.<sup>218</sup>

5.253 Mexico concludes that the application contained the information reasonably available to the petitioner concerning the factors and indices listed in Articles 3.2 and 3.4 of the AD Agreement that were relevant and had a bearing on the state of the domestic industry.

5.254 Mexico submits that the United States makes an impermissible interpretation of Article 5.2(iv), plainly ignoring the existence of Article 3.7 even though the investigation concerned was initiated on the basis of threat of injury. In addition, in Mexico's view, the United States is in

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<sup>212</sup>See the application for initiation of the investigation, MEXICO-16 and Annex 6.A, as well as the monthly national sugar balance from the application for initiation of the investigation, MEXICO-17.

<sup>213</sup>See the application for the initiation of the investigation, MEXICO-16 and Annexes 4.19, 4.20 and 4.21 of the application for initiation of the investigation, MEXICO-33.

<sup>214</sup>See the application for initiation of the investigation, MEXICO-16 and Annex 4.22 of the application for initiation of the investigation, MEXICO-30.

<sup>215</sup>See the application for initiation of the investigation, MEXICO-16 and Annex 4.24 of the application for initiation of the investigation, MEXICO-32.

<sup>216</sup>See the application for initiation of the investigation, MEXICO-16 and Annex 4.3(i) of the application for initiation of the investigation, MEXICO-23 and Annex 3.16 of the application for initiation of the investigation, MEXICO-22.

<sup>217</sup>See the application for initiation of the investigation, MEXICO-16, Annex 4.3(iii) of the application for initiation of the investigation, MEXICO-21 and the information obtained by SECOFI appearing in the injury investigation file, MEXICO-34.

<sup>218</sup>See MEXICO-25 and MEXICO-26.

error when suggesting that the application should have contained information concerning the totality of the factors set forth in Articles 3.2 and 3.4 of the AD Agreement.

5.255 Mexico argues that Article 5.2(iv) makes it clear that the references to the factors and indices listed in Articles 3.2 and 3.4 are illustrative, since it is understood that the investigating authority has the power to determine which of them are to be considered relevant according to its bearing on the state of the relevant domestic industry, and nothing requires the applicant to provide information on the totality of these factors and indices.

5.256 Mexico also argues that the fact that Article 5.2(iv) does not mention the factors and indices indicated in Article 3.7 is additional proof that Article 5.2(iv) is illustrative and not limitative as to the factors that may be considered by the investigating authority in determining the impact of imports on the domestic industry and that none of the cited provisions require an exhaustive examination of the factor and indices indicated therein.

5.257 Mexico asserts that, in a threat of injury investigation, the factors indicated in Article 3.7 of the AD Agreement take on greater importance. Article 3.7 was specially included in the AD Agreement for the purpose of establishing the factors that must be considered specifically in a threat of injury case. The application submitted by the Sugar Chamber contained the information that was reasonably available to it concerning the factors and indices mentioned in Articles 3.2, 3.4 and 3.7 of the AD Agreement, which was considered sufficient to initiate the investigation.

5.258 Mexico disputes the statement by the United States that the annexes to the application containing information on threat of injury, having been classified as confidential information, were revealed for the first time in Mexico's first submission. Under Mexico's anti-dumping practice, there is a system which gives the interested parties in an investigation access to confidential information provided that they meet the requirements established to safeguard the confidential nature of such information. In the case at issue, Mexico submitted to the Panel a document indicating the number of occasions on which interested parties were given access to confidential information during the investigation.<sup>219</sup> This clearly shows that anyone who met the applicable requirements could have had free access to such information, as happened in many instances. In other words, the information in question was not revealed for the first time in Mexico's first submission.

5.259 Mexico disputes the argument made by the United States that the application submitted by the Sugar Chamber failed to provide explanations, discussion or analysis of the impact of imports on the domestic sugar industry. This obligation is nowhere to be found in the AD Agreement. The United States suggests that the applicant was under an obligation to present an analysis of the information contained in the application and its annexes. However, under Article 5.2 of the AD Agreement, the applicant is only required to submit such information as is reasonably available to it on the items indicated in Article 5.2, which nowhere requires the applicant to provide the investigating authority with "explanations, discussion or analysis" of the information contained in the application. Moreover, the only examination of the information in the application required under Article 5 of the AD Agreement is the examination mentioned in Article 5.3, which is the express responsibility of the investigating authority. In other words, the United States seems to be confusing the obligations of the applicant or imposing a burden that it is not for the applicant to carry. The phrase "reasonably available to the applicant" in Article 5.2 is highly significant, since its purpose is to avoid the imposition of excessive obligations on the applicant. The United States' interpretation is therefore entirely unacceptable.

5.260 Mexico also disputes the statement by the United States that the Sugar Chamber's application violated Article 5.2 in that it provided insufficient information concerning the causal link between the allegedly dumped imports and the alleged threat of injury –because there was insufficient information

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<sup>219</sup>See MEXICO-51.

concerning injury, there also was insufficient information concerning causal link. In the view of Mexico, this allegation is groundless since it has been shown that the application contained sufficient information concerning threat of injury.

5.261 Mexico disputes as well the United States' allegation that the application contained no information concerning causal link because certain items in the application were marked as "not applicable" (N/A). Mexico notes that the AD Agreement does not impose a specific structure regarding the formal aspects of the preparation of an application, and as long as all the information required under Article 5.2 is included, its actual location within the application is irrelevant.

5.262 Mexico asserts that information on causal link appears throughout the application, and while it may not appear in the form that the United States would have preferred, this does not imply that the AD Agreement has been violated. For instance, in item 4.3(i), in the indications provided in the conclusion to item 4.3(iii), pages 32 and 33 specifically, and in the final part of item 4.3(v) of the application,<sup>220</sup> the Sugar Chamber expressly points out that the threat of injury facing the domestic sugar industry was the consequence of dumped HFCS imports.

5.263 Mexico reiterates that, as the Sugar Chamber's application was shown to meet all of the requirements set forth in Article 5.2 of the AD Agreement in that it contained sufficient information on dumping, threat of injury and causal link, there was no reason to apply Article 5.8 of the AD Agreement and to reject such application.

## **2. Alleged Insufficiency of The Examination of The Information And Alleged Insufficiency of The Evidence to Justify Initiation (Claims Under Article 5.3)**

5.264 The United States argues that the initiation of the investigation was inconsistent with Article 5 of the AD Agreement. Contrary to Article 5.2 of the AD Agreement, the application submitted by the petitioner contained self-contradictory information, including the unsubstantiated, simple assertion that HFCS was not being produced in Mexico. By accepting the accuracy of this assertion and initiating in accordance with it, SECOFI violated Article 5.3 of the AD Agreement, which requires an authority to "examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation". SECOFI's failure to examine the evidence regarding the threshold issue of like product, necessarily also prevented it from determining that the application was made "by or on behalf of the domestic industry", in violation of Articles 5.1 and 5.4 of the AD Agreement.<sup>221</sup> Without sufficient evidence to justify initiation and without determining that the application had been made by or on behalf of the domestic industry, SECOFI should have rejected the application. Its failure to do so violated Article 5.8 of the AD Agreement.

5.265 The United States maintains that the Sugar Chamber's application contained contradictory information as to whether HFCS was being produced in Mexico during the period of investigation. SECOFI could not have examined the adequacy and accuracy of the evidence in the application and determined that such evidence was sufficient to justify initiation without resolving the contradictions in the Sugar Chamber's application. Under the circumstances, SECOFI could not, consistent with its obligations to examine the sufficiency of the evidence presented, rely, as its initiation notice did, on a simple acceptance of the unsupported allegation that there was no Mexican HFCS production. So far

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<sup>220</sup>See the application for the initiation of the investigation, MEXICO-16.

<sup>221</sup>In response to questions put by the Panel, the United States said that "before an authority can determine which domestic producers may be appropriate for exclusion under Article 4.1(i), it must first ascertain who the domestic producers are. The authority cannot know who the domestic producers are, however, until it defines the like product". The United States also asserted that "an authority must first determine the like product and only then proceed to determine the composition of the domestic industry". See, respectively, Answers of the United States to questions no. 33 and 35 by the Panel, 6 May 1999.

as can be ascertained from any contemporaneous record, SECOFI did not resolve the contradictory information submitted to it, and therefore improperly initiated this investigation.

5.266 According to the United States, the application filed by the Sugar Chamber alleged that there was no domestic HFCS production, and the authorities initiated this investigation "in accordance with" this allegation. The application also alleged that HFCS production was "practically non-existent". However, the application also contained information, referenced in its narrative and included in its annexed exhibits, that reported domestic production of HFCS during the period of investigation (1996) and from as early as 1995. Yet, neither the initiation notice nor documents contemporaneous with the pre-initiation time period, demonstrate that SECOFI examined the accuracy and adequacy of the Sugar Chamber's contradictory information, or that SECOFI determined on what basis it found the application to contain sufficient evidence to justify initiation.

5.267 The United States notes that, under Article 5.3 of the AD Agreement, the investigating authority must "examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation". As the exhibits to the application contained contradictory information regarding Mexican HFCS production, these exhibits provided more than adequate reason to conclude that the application's flat denial of such production was neither accurate nor adequate on issues essential to the decision whether to initiate an investigation. Whether there was such production was directly relevant to several questions that an application containing sufficient evidence to initiate an investigation needed to address.

5.268 The United States recalls that Article 5.1 requires, *inter alia*, that an investigation "shall be initiated upon a written application by or on behalf of the domestic industry". A domestic industry is defined as the domestic producers of the like product.<sup>222</sup> Article 5.4 further directs: "An investigation shall not be initiated pursuant to paragraph 1 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". An application's allegations concerning what product corresponding to the subject imports is produced in the importing country are thus critical to the threshold questions of like product and domestic industry, and therefore also critical to the question of whether an application provides a sufficient basis for initiating an investigation. This is all the more important where, as here, an industry complains about imports of a product it does not produce.

5.269 The United States notes further that Article 5.2 requires, therefore, that an applicant must provide evidence reasonably available to it describing the volume and value of domestic production of the like product. This provision necessarily entails that the applicant must provide evidence of what the like product is and who produces it. So far as the initiation notice and the pre-initiation record disclose, SECOFI made no effort to determine whether additional evidence concerning production of HFCS in Mexico was available to the Sugar Chamber. The United States maintains that Mexico confirmed this at the 12 June 1998 consultations with the United States, indicating that the only information the Sugar Chamber provided to SECOFI prior to initiation was the information contained in its application.

5.270 The United States maintains that even if additional information would not have been available to the Sugar Chamber, Article 5 does not countenance the initiation of an investigation based on allegations that are unsupported by evidence. Article 5.2 admonishes, "Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph". This admonition is supported by Article 5.3's requirement that the authorities must "determine whether there is sufficient evidence to justify initiation of an investigation". In this case, the application's statement that there was no domestic production of HFCS was a simple assertion

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<sup>222</sup>See AD Agreement, Article 4.1.



unsubstantiated by relevant evidence. Indeed, it was an assertion that other information in the application's annexed exhibits contradicted.

5.271 In addition, the United States submits that an authority fails to comply with Article 5 when, faced with contradictory information concerning a threshold issue bearing on the decision to initiate, no contemporaneous information reveals how the authority resolved the conflict. Article 12 requires that adequate information to reflect such a resolution appear in the initiation notice. Article 5 necessarily implies that it will be reflected at least in some contemporaneous record.<sup>223</sup> Absent such a contemporaneous record, there can be no basis for concluding that the authority in fact conducted the examination required by Article 5.3. In the investigation in question, the only contemporaneous indication – the initiation notice – reflects on its face a lack of examination.<sup>224</sup>

5.272 According to the United States, Mexico was well aware of its obligation to examine the accuracy and adequacy of the information provided by the petition. In *Guatemala-Cement*, Mexico had argued that "the evidence in an application may be insufficient to justify initiation" and that "an unbiased and objective investigating authority would be justified in initiating the investigation only if it determines that the evidence is sufficient...".<sup>225</sup> Mexico took the position that "the national authorities should be obliged to establish the truth and relevance of the information [submitted by the applicant] prior to initiation".<sup>226</sup> The Panel agreed with Mexico and stated:

"Article 5.3 is a requirement imposed on the investigating authority: once it has accepted the application, that is, determined that it contains evidence on dumping, injury and causal link, as well as "such information as is reasonably available to the applicant" on the factors set forth in Article 5.3(i)-(v)(*sic*), the investigating authority must undertake a further examination of the evidence and information in the application".<sup>227</sup>

5.273 In the view of the United States, the *Guatemala-Cement* Panel articulated a standard for an investigating authority's Article 5.3 analysis: "Thus, the decision to initiate is made by reference to the objective sufficiency of the evidence in the application, and not by reference to whether the evidence and information provided in the application is all that is reasonably available to the applicant".<sup>228</sup> Accordingly, the AD Agreement requires a finding by the investigating authority that

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<sup>223</sup>In response to a question from the Panel, the United States asserted that "[T]here has to be some indication on SECOFI's administrative record that it examined the information before it and made a determination to exclude Almex and Arancia from the domestic industry prior to initiation, regardless of whether its initiation notice had to contain some indication of its like product and domestic industry determinations". See Answer of the United States to question no. 39 by the Panel, 6 May 1999.

<sup>224</sup>Critical facts and analysis must be included in the record of the investigation, in order that they may be evaluated by the reviewing panel. See *Guatemala-Cement Panel Report*, para. 7.68, footnote 242. See also *Brazil – Imposition of Provisional and Definitive Countervailing Duties on Milk Powder and Certain Types of Milk from the European Economic Community (Brazil-Milk Powder)*, SCM/179 (*Brazil-Milk Powder Panel Report*), adopted 28 April 1994, para. 294 (stating "the lack of explanation of the reasons for this finding made it impossible for the Panel to effectively review this finding in the light of the relevant requirements of the Agreement"). In addition, when faced with the absence of sufficient evidence in an application to justify initiation of an investigation, investigating authorities may (but are not required to) attempt to gather it themselves. See *Guatemala-Cement Panel Report*, para. 7.53, and see also footnote 111.

<sup>225</sup>See *Guatemala-Cement Panel Report*, para. 7.48.

<sup>226</sup>*Id.* para. 4.163.

<sup>227</sup>*Id.* para. 7.50. See also *United States-Salmon Panel Report*, para. 360 (authority must take steps that could reasonably be considered sufficient to ensure that the request was made with the industry's approval or authorization); and *United States-Lumber Panel Report*, para. 332 (mere allegation is not sufficient).

<sup>228</sup>*Guatemala-Cement Panel Report*, para. 7.50. Moreover, the Panel warned: "The object and purpose of the initiation requirements of Article 5 as a whole, and of Article 5.3 in particular,

there is objectively sufficient evidence to justify initiation, not simply a finding that the information contained in the application is all that is reasonably available to the applicant. Therefore, SECOFI could not simply initiate the instant investigation – given that the information in the application regarding Mexican HFCS production was hopelessly contradictory – by simply accepting the allegation regarding HFCS production that was most favorable to the Sugar Chamber.

5.274 The United States argues that past panels have properly regarded it as essential to reviewing a member's compliance with its obligations that there be an adequate contemporary record of that compliance. Mexico's subsequent statements, both in SECOFI's final determination and in its first submission here, cannot provide that record. As we have shown, Mexico's current assertions do not in fact support that its authority conducted the required examination at the time. Even if Mexico's current assertions were more probative, post hoc assertions cannot substitute for a contemporary record. Otherwise, obligations like that of Article 5.3, which requires an examination by a national authority at a particular time, would be utterly unenforceable. This is particularly so when, as we have discussed earlier, other provisions require a national authority to publish a notice at the time that reflects the basis for its action.

5.275 The United States contends that, even if the Sugar Chamber provided in the application all the information reasonably available to it regarding the existence of Mexican HFCS production, that information, being self-contradictory, was insufficient to justify the initiation of an investigation.<sup>229</sup> Under Articles 5.1 and 5.4 of the AD Agreement, SECOFI was required to determine whether the

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is in our view to establish a balance between the competing interests of the import competing domestic industry in the importing country in securing the initiation of [an] investigation and the interest of the exporting country in avoiding the potentially burdensome consequences of [an] investigation initiated on an unmeritorious basis". *Id.* para. 7.52 (citing to *United States-Lumber Panel Report*, para. 331).

Furthermore, the *Guatemala-Cement* Panel adopted the reasoning of the panel in *United States-Lumber*, respecting the sufficiency of information for initiation: "In analysing further what was meant by the term "sufficient evidence", the Panel noted that the quantum and quality of evidence to be required of an investigating authority prior to initiation of an investigation would necessarily have to be less than that required of that authority at the time of making a final determination. At the same time, it appeared to the Panel that "sufficient evidence" clearly had to mean more than mere allegation or conjecture, and could not be taken to mean just "any evidence". In particular, there had to be a factual basis to the decision of the national investigating authorities and this factual basis had to be susceptible to review under the Agreement. Whereas the quantum and quality of evidence required at the time of initiation was less than that required to establish, pursuant to investigation, the required Agreement elements of subsidy, subsidized imports, injury and causal link between subsidized imports and injury, the Panel was of the view that the evidence required at the time of initiation nonetheless had to be relevant to establishing these same Agreement elements". *Id.* para. 7.55 (citing to *United States-Lumber Panel Report*, para. 332).

<sup>229</sup> Mexico places explicit reliance on official U.S. Department of Agriculture publications as supporting SECOFI's purported determination that there was HFCS production in Mexico. In the view of the United States, the trouble with this contention is that no U.S.D.A. publication before SECOFI definitively made any such statement. The U.S.D.A. publications, like the Sugar Chamber's narrative application, suggest there would be production of HFCS in the future. They do not reflect any current production. There are two documents in the materials that the Sugar Chamber submitted to SECOFI that reflect actual production in Mexico. Those documents are not, however, documents from the United States Department of Agriculture. They are presentations, not U.S.D.A. publications, made by a representative of a private company. Even these documents, however, that Mexico does not specifically mention, cannot be cited to support the conclusion that Mexico claims SECOFI reached. In its final determination, SECOFI stated that it knew at the time of initiation that Almex and Arancia were producing HFCS in Mexico. These documents only state that Almex had begun production, and that Arancia was expected to begin production before the end of the year. They therefore cannot support the conclusion that SECOFI initiated the investigation based on an examination of them.

application was made by or on behalf of the pertinent domestic industry, as part of its examination whether there was sufficient evidence of injury to justify initiation of an investigation under Article 5.3. Since the evidence presented by the Sugar Chamber regarding the existence of Mexican HFCS production was self-contradictory, no "reasonable, unprejudiced person" could have concluded, without further examination, that the application had been made by or on behalf of the domestic industry. Instead, a "reasonable, unprejudiced person" would have examined the accuracy and adequacy of the application's self-contradictory allegations regarding such production and would have attempted to resolve them. There is no contemporary evidence that such an examination was actually conducted; in view of the information on the record, no authority could initiate consistent with the AD Agreement based on the allegations recited in the initiation notice.

5.276 Finally, the United States asserts that SECOFI also violated Article 5.8 of the AD Agreement. Article 5.8 provides, *inter alia*, that "an application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or injury to proceed with the case". The application did not contain sufficient evidence of whether HFCS was being produced in Mexico or not, and SECOFI did nothing of its own accord to resolve this issue. Thus, SECOFI had no choice but to reject the application. Its failure to do so violated Article 5.8.

5.277 Mexico argues that, while it is true that the application for initiation contained indications that there was no domestic production of HFCS or that such production was "practically" non-existent, it cannot be implied from these indications that the Sugar Chamber was either affirming or "flatly denying" the existence of such production, as the United States suggests, since as the United States itself points out, the annexes of the application contained information concerning the existence of domestic production of HFCS during the period of investigation<sup>230</sup>, which was examined by SECOFI together with the rest of the information in the application, in conformity with Article 5.3 of the AD Agreement.

5.278 Mexico further argues that, even if SECOFI did not consider the annexed document entitled "Estimated Production Capacity of HFCS 42 and 55" as decisive<sup>231</sup> with respect to the existence of domestic production of HFCS, SECOFI did consider as decisive other information contained in various Articles and papers annexed to the application, which clearly pointed to the involvement of the companies Almex and Arancia in the production of HFCS in Mexico; particularly, information published by the United States Department of Agriculture (USDA) concerning, *inter alia*, the establishment of HFCS distribution centres and manufacturing plants in Mexico. The latter was considered to be a most reliable piece of information since it came from a government source, which was not trying to demonstrate any particular trend.

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<sup>230</sup>Mexico points to Annex 4.3(ii) to the application for initiation of the investigation. These annexes consist of a document entitled "Estimated Production Capacity of HFCS 42 and 55" containing an estimate of the "installed capacity" of various companies for 1995 and 1996, including the Mexican companies Almex and Arancia, MEXICO-7. Mexico also refers to the bibliographical information annexed to the application, containing various articles and papers by experts on the subject of sweeteners, which also refer to the production of HFCS in Mexico by those companies. Importantly, it also includes data published by the United States Department of Agriculture (USDA) pointing, *inter alia*, to the establishment of HFCS distribution centres and manufacturing plants in Mexico by those companies, MEXICO-8.

<sup>231</sup>With respect to the document entitled "Estimated Production Capacity" of HFCS 42 and 55 in particular, Mexico argues that in its first submission the United States tries to distort, or to suggest an erroneous reading of, what SECOFI states in paragraph 61 of the *Preliminary Determination* by stating that in that notice, "...SECOFI rejects A.E. Staley's argument that the chart annexed to the Sugar Chamber's application entitled 'Estimated Production Capacity of HFCS 42 and 55' could have any relevance for the purpose of demonstrating the existence of HFCS production". In fact, what SECOFI stated in response to the argument of Staley and the CRA was that it did not consider the said document to be decisive with respect to the existence of HFCS production since it only contains an estimate of installed capacity for 1995 and 1996. See para. 61 of the *Preliminary Determination*, MEXICO-2.

5.279 Thus, Mexico holds that, even if SECOFI concluded in its analysis of the application that the Sugar Chamber's allegation was not very clear with respect to the existence of domestic HFCS production, certain information included in the annexes to the application provided sufficient indications for SECOFI to know of the existence of HFCS production by the Mexican companies Almex and Arancia during the period of investigation.<sup>232</sup>

5.280 Mexico observes that, in conformity with Article 5.2 of the AD Agreement, the Sugar Chamber also provided, as part of its application for initiation, information containing import statistics by company, obtained from the Ministry of Finance and Public Credit (SHCP)<sup>233</sup>, and copies of the corresponding import documentation and invoices.<sup>234</sup> Thus, while realizing that Almex and Arancia were HFCS producers in Mexico, SECOFI became aware at the same time, when examining the other items of evidence in the application for initiation, that these two companies were also the leading importers of the product subject to investigation. In other words, while examining the accuracy and adequacy of the evidence submitted in the application as required of the investigating authority under Article 5.3 of the AD Agreement, SECOFI learned in parallel that the companies Almex and Arancia had produced HFCS in Mexico during the period of investigation and that these two companies had become the leading importers of the allegedly dumped product.

5.281 Mexico maintains that, on the basis of official import statistics, SECOFI confirmed that, from January to December 1996, *i.e.* the period of investigation, the two domestic producers of HFCS, Almex and Arancia, had, in fact, become the leading importers of the subject product. The documents showing that prior to the initiation of the investigation SECOFI had learned of the existence of a domestic production of HFCS in Mexico by the companies Almex and Arancia, and confirming that SECOFI had collected and examined information in addition to that provided by the Sugar Chamber, in order to verify that these companies were the leading importers of HFCS, in particular MEXICO-13, appear in the administrative file under the title "Working Papers", classified as confidential information. Mexico submitted these documents to the Panel with the request that their confidentiality be respected, in accordance with paragraph 3 of the Working Procedures established for this dispute on 29 January 1999. In response to a question put by the Panel, Mexico stated that MEXICO-13 constitutes SECOFI's determination with respect to the definition of the domestic industry and the exclusion of domestic producers of HFCS from this concept.<sup>235</sup>

5.282 Mexico disputes the argument made by the United States that SECOFI failed to examine the information contained in the application regarding the existence of HFCS production in Mexico, and that this necessarily prevented SECOFI from determining that the application was made "by or on behalf of the domestic industry", which allegedly involved a violation of Articles 5.1 and 5.4 of the AD Agreement. In this regard, Mexico notes that the finding of greater relevance arising from the examination under Article 5.3 of the Agreement conducted prior to the initiation of the investigation

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<sup>232</sup>Mexico asserts that the obligation imposed on the investigating authority in Article 5.3 of the AD Agreement is to examine the accuracy and adequacy of the evidence provided in the application and not of the allegations, which, although considered by the authority, may indeed vary as a result of such examination to be conducted by the investigating authority to determine the sufficiency of the evidence justifying the initiation of an investigation. Thus, when the investigating authority, in examining the evidence in the application, encountered a contradiction or inconsistency between one of the allegations of the Sugar Chamber and the information supplied by the Sugar Chamber in respect of that allegation, it gave preference to the information and evidence provided by the Sugar Chamber, which pointed with greater reliability and certainty to the existence of HFCS production in Mexico, over any allegation by the Sugar Chamber that there was no such production, or practically no such production, in Mexico.

<sup>233</sup>See the information provided by the applicant containing import statistics by enterprise, obtained from the SHCP, MEXICO-9.

<sup>234</sup>See the documentation and invoices in annexes 3.4 and 3.6 of the application for initiation, MEXICO-10.

<sup>235</sup>See Answer of Mexico to question no. 6 by the Panel, 22 June 1999.

was that, according to the information included in the application and the information collected by SECOFI, the domestic producers of HFCS were themselves the leading importers of the subject product. After having examined the evidence in the application concerning the involvement of Almex and Arancia in the production of HFCS in Mexico, but above all, after having simultaneously verified the status of those two companies as the leading importers, SECOFI considered excluding the HFCS producers from the definition of the relevant domestic industry. The United States argument that there is no indication that SECOFI obtained information on whether the Mexican HFCS producers could be excluded from domestic industry is therefore entirely false.<sup>236</sup>

5.283 Mexico argues further that, in accordance with Article 4.1(i) of the AD Agreement, SECOFI found that Almex and Arancia could not be considered as the relevant domestic industry, since both companies had become the leading importers of the allegedly dumped product. Consequently, SECOFI excluded them, and determined therefore that the relevant domestic industry for the purposes of the investigation was made up of the sugar producers represented by the Sugar Chamber, since this was the industry producing the like product with closely resembling characteristics. This determination conforms fully with Article 2.6 and 4.1 of the AD Agreement.

5.284 Mexico recalls that Article 4.1 of the AD Agreement reads as follows:

"For the purposes of this Agreement, the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like product for those of them whose collective output of the product constitutes a major proportion of the total domestic production of those products, except that:

- (i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term 'domestic industry' may be interpreted as referring to the rest of the producers" (emphasis added by Mexico).

This provision of the AD Agreement is in its turn closely related to the definition of "like product" in Article 2.6 of the AD Agreement which stipulates that:

"Throughout this Agreement the term 'like product' (*produit similaire*) shall be interpreted to mean a product which is identical i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration" (emphasis added by Mexico).

5.285 Mexico submits that these two provisions of the AD Agreement show that the definition of the relevant "like product" is closely linked to the determination of the "domestic industry", including within the meaning of Article 4.1(i) which permits the exclusion of importers and related parties.

5.286 In response to a question by the Panel as to whether the concept of "injury" required defining the relevant like product and domestic industry in order to specify the subject of the injury alleged, Mexico stated that, on the one hand, while it is true that under the AD Agreement there is a clear relationship between the determination of the domestic industry in accordance with Article 4.1 and the definition of the relevant like product in accordance with Article 2.6, it is also true that the Agreement does not establish or require a specific obligation of sequentiality between those articles. On the other hand, in anti-dumping practice the obligation concerning the determination of the relevant domestic industry for purposes of an investigation arises *a priori*, because the investigating authority, before taking the decision to initiate, must ascertain whether an application for initiation submitted to it has been made by or on behalf of the industry actually entitled (in terms of standing) to apply for such

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<sup>236</sup>See United States first submission, para. 65.

initiation. In this connection, while the AD Agreement does not lay down a required sequence, anti-dumping practice makes it necessary for an investigating authority at the outset to analyse the question of the relevant domestic industry, in order as a first step to establish whether the domestic industry which submitted an application for initiation has the requisite standing for that purpose, as a result *inter alia* of being a producer of a like product within the meaning of Article 2.6 and whether, as such, it may be the industry actually affected or threatened by dumped imports (*i.e.* the domestic industry subject to the alleged injury or threat of injury).<sup>237</sup>

5.287 In Mexico's view, Article 2.6 of the AD Agreement, when defining the term "like product" as a product which, although not identical to the subject product (*i.e.* alike in all respects), "has characteristics closely resembling" those of the subject product, suggests that for the purposes of Article 4.1(i) the term "domestic industry" can be interpreted as referring to the "rest of the producers" of like products with closely resembling characteristics, if the producers of the like product that is identical to the imported product cannot be considered as representing the relevant domestic industry, on account of their being importers of the allegedly dumped product, as is the case in this dispute.

5.288 Mexico contends that, while it is true that in an anti-dumping investigation, the identification of the relevant like product and the identification of the relevant domestic industry form part of the analysis leading to the determination of injury to a given domestic industry<sup>238</sup>, for the purposes of defining the relevant domestic industry, HFCS could not be identified as the relevant like product in this investigation, since Almex and Arancia, although manufacturers of the identical like product, were the leading importers of the allegedly dumped product and therefore could not also be taken as the domestic industry that could be affected or threatened by the dumped HFCS imports. It would have been absurd to conclude that the two producers - leading importers of HFCS - could be taken as the domestic industry affected and therefore the relevant domestic industry in this investigation, disregarding that, as the main parties engaged in the importation of HFCS, Almex and Arancia were directly benefitting from the imports of the allegedly dumped product.

5.289 Mexico observes that SECOFI went on to determine, in accordance with the AD Agreement, whether the sugar producers, represented by the Sugar Chamber as applicant, could be considered as representing the relevant domestic industry, understood as referring to the producers of the "like product with closely resembling characteristics", and to assess whether the sugar producers could be the domestic industry affected or threatened by HFCS imports. SECOFI proceeded to analyse whether the product manufactured by such industry - sugar - could be considered as a "like" product with characteristics closely resembling those of HFCS within the meaning of Article 2.6 of the AD Agreement. Having done so, and having established through a detailed analysis<sup>239</sup> that HFCS and sugar qualified as like products with closely resembling characteristics, SECOFI determined, on the basis of Articles 2.6, 4.1, 5.1 and 5.4 of the AD Agreement, that the relevant domestic industry for

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<sup>237</sup> See Answer of Mexico to question no. 10 by the Panel, 6 May 1999.

<sup>238</sup> In fact, Mexico notes, it has been recognized that the definition of the like product at issue in any anti-dumping case has an immediate bearing on the determination of dumping and injury or threat of injury. See Stewart, Terence, *The GATT Uruguay Round: A Negotiating History (1986-1992)*, Vol. II, Kluwer, USA, 1993, p. 1672, MEXICO-14.

<sup>239</sup> The elements which led to the determination that the products were indeed like products included, in particular: the fact that both are organic compounds made of carbon, hydrogen and oxygen, belonging to the sub-group of saccharides whose basic characteristic is a sweet taste; that they are nutritive or caloric sweeteners; that they have common physical properties, such as the absence of a perceptible smell, and are soluble in liquids; that their composition is similar - high concentrations of glucose and fructose - and that they are used as sweeteners in the production process of various industries, in particular beverages, processed food, preserves, confectionery, pastry, bread and dairy products.

the purposes of the investigation was indeed the sugar industry as represented by the Sugar Chamber.<sup>240</sup>

5.290 Mexico recalls the United States assertion that "as previous panels have found, an authority's failure to have sufficient evidence to justify initiation and failure to properly determine an application was made by or on behalf of the domestic industry are violations which cannot be cured at a later date". Mexico states that this, precisely, has been Mexico's position in various panel procedures.<sup>241</sup> In the view of Mexico, as SECOFI complied with all of its obligations under the AD Agreement in initiating the investigation, in particular the initiation provisions in Article 5 of the Agreement, by determining that the application for initiation had been submitted by or on behalf of the relevant domestic industry, and by determining that there was sufficient evidence to justify the initiation of the investigation, there was no violation whatsoever that might need to be cured following the initiation, as the United States argues.

5.291 The United States argues that the following issues/facts before the Panel have been clarified:

- First, the United States and Mexico agree that in order for the initiation to have been proper, SECOFI needed to define the domestic industry, as required by Articles 5.1 and 5.4 of the AD Agreement, prior to initiation.
- Second, the United States and Mexico agree that, to define the domestic industry, SECOFI had to have conducted an examination under Articles 5.3 and 5.4 of the information in the application (provided under Article 5.2 by the Sugar Chamber ).
- Third, the United States and Mexico agree that SECOFI needed to make a determination prior to initiation to exclude the domestic producers of HFCS, Almex and Arancia, from the domestic industry under Article 4.1(i) in order to initiate an investigation with sugar as the like product.

Thus, in the opinion of the United States, the issue for the Panel to determine is whether there is sufficient evidence in the record of an administrative proceeding establishing that SECOFI conducted an examination of the domestic industry and made a determination to exclude Almex and Arancia from the domestic industry prior to initiation (emphasis added by the United States).

5.292 The United States argues that the legal basis requiring the authorities to make a determination defining the domestic industry prior to initiation is set forth in the following provisions of the AD Agreement. Article 5.1 of the AD Agreement requires that applications be filed "by or on behalf of the domestic industry" (emphasis added by the United States). Article 5.4 of the AD Agreement also makes clear that authorities must conduct an examination and determine that the application has the requisite support of domestic producers of the like product, in order to find that an application has been made by or on behalf of the domestic industry as required by Article 5.1. Article 5.4 states, "An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed, that the application has been made by or on behalf of the domestic industry" (emphasis added by the United States, footnotes omitted). Article 5.3 of the AD Agreement states, "The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether

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<sup>240</sup>The Sugar Chamber represents some 98 per cent of the domestic industry producing sugar, the good found to be a like product to imported HFCS. See paras. 25, 54 and 55 of the *Initiation Notice*, MEXICO-1.

<sup>241</sup> See *Guatemala-Cement Panel Report*, paras. 4.402 and 4.404. See also *United States-Cement and Clinker Panel Report*, para. 5.37 (the Panel examined this question in the framework of the Tokyo Round Anti-Dumping Code. It is important to note that during this last Panel, the United States in fact adopted a different position).

there is sufficient evidence to justify the initiation of an investigation" (emphasis added by the United States).

5.293 The United States submits that the importance of making a determination regarding domestic industry prior to initiation is also reflected in the text of AD Article 5.2. Article 5.2 requires that an application "shall contain evidence of ... injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement". The Agreement defines "the term 'injury' ... to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry" (Article 3, footnote 9, emphasis added by the United States). Therefore, in order to determine whether the evidence alleging threat of material injury is sufficient, an authority must conclude that those allegations concern a properly defined industry. In this case, whether the Sugar Chamber's allegations of a threat of injury to the sugar industry were relevant depended on whether the sugar industry was the appropriate domestic industry.

5.294 The United States concludes that, in light of the above-referenced provisions, in those cases where an authority exercises its discretion to exclude domestic producers of the like product from the domestic industry pursuant to Article 4.1(i), it must make a determination to satisfy the requirements of this provision prior to initiation.

5.295 Thus, in the view of the United States, in order for Mexico to satisfy its obligations under Articles 5.1, 5.2, 5.3, and 5.4 of the AD Agreement, the Panel must be able to determine from the administrative record that the authorities made the following determinations prior to initiation: (a) that the application was filed by or on behalf of the domestic industry; and (b) that the producers of HFCS were excluded by SECOFI from the domestic industry.

5.296 The United States argues that the type of material in an administrative record which suffices for an investigating authority to determine it has sufficient evidence to justify initiation and to determine that the application is filed by or on behalf of the domestic industry is not unduly burdensome. For example, a short memorandum in the record examining the issues together with a summary mention in the initiation notice as to how the issues were resolved in a particular way could have been sufficient. There did not need to be a lengthy analysis of all of the contradictions in the Sugar Chamber's application and annexes as to production in Mexico of HFCS. Nor did the initiation notice need to contain an extensive discussion of whether there was HFCS production and whether to exclude those producers and why. But, there did need to be some determination somewhere in SECOFI's record of these issues and how they were resolved.<sup>242</sup> Moreover, this determination needed to be accessible to the parties.

5.297 The United States observes that Mexico claims that it made such an examination and made such a determination.<sup>243</sup> Mexico asserts that HFCS would have been the identical like product,<sup>244</sup> but that SECOFI excluded Almex and Arancia from the domestic industry under Article 4.1(i) prior to initiation and found sugar to be the product closely resembling HFCS, *i.e.*, the like product.<sup>245</sup> However, Mexico's argument has an inherent factual flaw—there is no contemporary evidence on SECOFI's administrative record demonstrating that SECOFI conducted this examination and made a

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<sup>242</sup>The United States notes in this connection that in rejecting the sufficiency of Guatemala's evidence regarding initiation, the *Guatemala-Cement* Panel stated, "there is no discussion or analysis of the evidence and information before the Ministry in the Resolution or in the public notice". (*Guatemala-Cement Panel Report*, para. 7.60).

<sup>243</sup>Mexico's first submission, *see e.g.* paras. 97, 102; *See also* Mexico's first submission, paras. 85, 97, 99, 101-106, 112-144 and footnote 69.

<sup>244</sup>*Id.* para. 108, *Final Determination*, para. 441, US-1.

<sup>245</sup>Mexico's first submission, para.103.



determination to exclude these companies from the domestic industry prior to initiation.<sup>246</sup> In response to a question put by the Panel, the United States asserts that "no evidence on SECOFI's record establishes that it examined whether Almex and Arancia were producers (or even potential producers) of HFCS, and no evidence establishes that SECOFI defined the domestic industry for injury purposes at initiation by excluding Almex and Arancia from the domestic industry. This violated Article 5.3, as well as Articles 5.1, 5.2, 5.4 and 5.8".<sup>247</sup> In response to another question from the Panel, the United States also asserts that "SECOFI did nothing ... that was available on the record, thus leaving its determination clearly outside the bounds of Article 5.3, even when reviewed under the standards of Article 17.6".<sup>248</sup>

5.298 The United States contends that, to fill the evidentiary gap, Mexico appears to be claiming that the Panel can *infer* that it made the required determination prior to initiation. Mexico has referred to scattered references to production/potential production of HFCS contained in the documents appended to the Sugar Chamber's application. Mexico suggests that SECOFI's initiation with sugar as the like product must have been based on a decision to exclude Almex and Arancia from the domestic industry. Such "inferences" and "implicit findings" do not substitute for actual decisions. The issue is not whether SECOFI could have found sufficient information to justify initiation. Rather, it is whether there is an adequate basis for the Panel to conclude that SECOFI did in fact conduct such an examination and make a determination to exclude these companies pursuant to Article 4.1(i). These determinations must affirmatively be made and duly recorded.

5.299 The United States disputes the argument by Mexico that SECOFI's examination of the Sugar Chamber's information regarding production is evidenced in paragraphs 89 and 90 of the *Initiation Notice*. The United States maintains that these paragraphs cannot support the contention that SECOFI conducted the required examination, much less that SECOFI actually made a decision to exclude Almex and Arancia from the domestic industry. They merely repeat the Sugar Chamber's information that (a) production is probable "at a given moment" (although it would take several years to become significant) (para. 89) and (b) that Almex had constructed a distribution center, and that Arancia would commence operations at a plant in mid-1996 (para. 90). The Sugar Chamber, however, had submitted that information as consistent with its allegation that there was no current production of HFCS in Mexico. While the United States agrees that the information in the application's annexes should have cast doubt on this allegation, nowhere does SECOFI indicate that it took the necessary steps to resolve the question. Moreover, nothing in these two paragraphs indicates that there was actually production in 1996. It is not even clear whether Arancia's plant would distribute or produce HFCS. Therefore, there is no indication in SECOFI's administrative record of an examination for this Panel to review. There is especially no evidence that any such examination involved a decision to exclude Almex and Arancia from the domestic industry.

5.300 The United States argues that none of the paragraphs to which Mexico points in the *Initiation Notice* as evidencing its standing and like product determinations (not paragraphs 89 and 90, not paragraph 25, not paragraphs 54 and 55) reflects a determination to exclude the HFCS producers from the domestic industry. In short, although the application provided plentiful reason to doubt the accuracy and adequacy of the Sugar Chamber's allegation of no domestic HFCS production, the initiation notice nowhere reflects a resolution of whether that allegation was wrong. Neither does the initiation notice state that SECOFI excluded Almex and Arancia from the domestic industry.

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<sup>246</sup>The United States points out that, in its submission to the NAFTA panel, SECOFI refers to Almex and Arancia as "supposed" producers, thus indicating that, in its view, there was no need to resolve the question of whether these companies were or were not producing HFCS at the time of initiation. See SECOFI NAFTA Brief, pp. 119, 127 cited in Rebuttal Brief in Support of Complainant Submitted on Behalf of the Corn Refiners Association, 7 September 1998, pp. 10, 11. See also SECOFI's brief, pp. 119-135, US-27(a), (b); Corn Refiners Association's rebuttal brief, US-27(c) (English only).

<sup>247</sup>See Answer of the United States to question no.53 by the Panel, 6 May 1999.

<sup>248</sup>See Answer of the United States to question no. 52(c) by the Panel, 6 May 1999.

Exclusion pursuant to Article 4.1(i) is a discretionary decision. Under Article 4.1(i), an investigating authority may interpret the domestic industry as excluding producers that import the subject merchandise, but it need not do so (emphasis added by the United States). Some affirmative indication of this decision is therefore required.

5.301 The United States is of the view that, because Mexico has not provided any contemporary evidence establishing that SECOFI examined and excluded Almex and Arancia from the domestic industry prior to initiation, the Panel must find that the authority did not properly conclude that it had sufficient evidence that the application was brought by or on behalf of the domestic industry in order to justify initiating this investigation. On this basis, the Panel must conclude that SECOFI's failure to take the necessary steps to properly initiate this investigation violated Articles 5.1, 5.2, 5.3, 5.4 and 5.8 of the AD Agreement.

5.302 The United States recalls that the absence of — or flaws in — other pre-initiation domestic industry determinations was addressed in three GATT Panel reports.<sup>249</sup> The *United States-Steel Hollow Products* Panel examined whether the United States had properly verified whether a request for initiation had been filed on behalf of the domestic industry. The Panel concluded that these provisions must be read together, and that it could not find that the United States had, prior to initiation, "taken steps which could reasonably be considered to be sufficient to ensure" that it satisfied itself that the request for initiation had been made on behalf of the domestic industry".<sup>250</sup> Moreover, "the Panel considered, in light of the nature of Article 5.1 as an essential procedural requirement, that there was no basis to consider that an infringement of this provision could be cured retroactively".<sup>251</sup>

5.303 The United States notes that the *United States-Cement and Clinker* Panel similarly found that "the investigating authorities had to satisfy themselves, prior to initiating the investigation, that the petition was made with the the [*sic*] authorization or approval of producers of all or almost all of the production within such market" <sup>252</sup> (citing *United States-Steel Hollow Products*). In that dispute, Mexico argued, and the Panel agreed, that the United States had not complied with Article 5.1 because it had not satisfied itself prior to initiation under Article 4.1(ii) that the application was on behalf of producers of all or almost all of the production in the regional market in that case.<sup>253</sup> The United States had evidence on its administrative record, at initiation, demonstrating that a majority of the producers in the region supported the application.<sup>254</sup> The Panel rejected this evidence as

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<sup>249</sup>See *United States-Hollow Products*; *United States-Cement and Clinker*, and *United States-Salmon*. Articles 5.2-5.4 were added during the Uruguay Round and Articles 4.1 and 5.1 were amended. Article 5.4 makes clear that an authority must decide what the like product is, in order to determine whether, under Articles 5.4 and 5.1, the application was brought by or on behalf of the domestic industry. Article 4.1 begins with the language "For the purposes of the Agreement ...", making clear that it applies for all purposes of the Agreement, including initiation. Article 4.1 of the AD Code contained the language "In determining injury ...". Even on that language, however, and prior to the existence of Articles 5.2-5.4, both the *United States-Steel Hollow Products* and *United States-Cement and Clinker* panels found that investigating authorities must make a determination as to domestic industry in accordance with the provisions in Article 4.1(i)-(ii), as applicable, in order for an application under Article 5.1 to properly be brought by or on behalf of the domestic industry. Citing *United States-Steel Hollow Products*, the *United States-Salmon* Panel determined that for an application to be "by or on behalf" of the domestic industry, it had to have the authorization or approval of the industry in question.

<sup>250</sup>*United States-Steel Hollow Products Panel Report*, para. 5.19. (emphasis added by the United States)

<sup>251</sup>*Id.* para. 5.20.

<sup>252</sup>See *United States-Cement and Clinker Panel Report*, paras. 5.32, 5.34.

<sup>253</sup>See *United States-Cement and Clinker Panel Report*, para. 5.34. See generally also *id.* paras. 5.14-34.

<sup>254</sup>*Id.* para. 5.32.

insufficient to demonstrate support for the application by "all or almost all" of the relevant producers. Here, the investigating authority had no information on its administrative record at initiation that the producers of HFCS supported the application (emphasis added by the United States). Neither, however, did SECOFI's record contain any evidence - let alone sufficient evidence - that it made a decision under Article 4.1(i) to exclude these producers from the domestic industry prior to initiating the investigation with sugar as the like product.<sup>255</sup>

5.304 The United States notes further that, in *United States-Salmon*, the Panel looked at the question of whether the United States "had evaluated that the written request for the initiation of this investigation had been made with the authorization or approval of the industry in question".<sup>256</sup> After examining the facts that had been before the US investigating authority<sup>257</sup>, the Panel examined whether "the United States had taken such steps as could reasonably be considered sufficient to ensure that the written request for initiation of an investigation had been made with the authorization or approval of the industry affected"<sup>258</sup> (emphasis added by the United States). Finding that the United States had not missed any steps in determining that the salmon producers supporting the application had standing, the Panel concluded that the United States properly determined that the application had been brought by or on behalf of the domestic industry. In that case, the United States had carefully ensured that the application had the requisite support of the domestic salmon industry.

5.305 The United States holds that, by contrast, Mexico has been unable in this case to produce facts which establish that the investigating authorities conducted the required examination of whether the domestic producers of HFCS should be excluded from the domestic industry, much less any facts which establish that the investigating authorities actually made a determination in this regard. SECOFI's failure to take these necessary steps was fatal to its ability to properly determine that the Sugar Chamber's application was made on behalf of the relevant domestic industry.<sup>259</sup>

5.306 The United States asserts that, since there is no evidence in its administrative record or in the initiation notice indicating the required determination was made prior to initiation, Mexico attempts to rely on a confidential working paper, MEXICO-13. Mexico claims that this document supports the conclusion that the investigating authority considered there to be HFCS production in Mexico and excluded the producers because they were importers. The United States argues that the Panel should attach no relevance to this document.

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<sup>255</sup>The United States notes that, in SECOFI's Brief before the NAFTA Panel, SECOFI attempts to distinguish *United States-Cement and Clinker* as irrelevant because "it was a matter of a problem relating to the degree of support (representivity) of the United States cement industry". This view plainly ignores the fact that, here, SECOFI neither excluded Almex and Arancia from the domestic industry prior to initiation, nor sought out their views as to whether they supported the application. US-27(a) and (b), at 134-135.

<sup>256</sup>*United States-Salmon Panel Report*, para. 359.

<sup>257</sup>*Id.* paras. 355 and 361.

<sup>258</sup>*Id.* para. 360.

<sup>259</sup>The United States asserts that, in SECOFI's Brief before the NAFTA Panel, SECOFI mischaracterizes what the *United States-Salmon* Panel said in paragraph 360 of its report. SECOFI states that the Panel "acknowledges that there exists no specific guideline to determine the form in which an investigating authority must carry out the analysis prior to the initiation of an administrative investigation, and grants these authorities discretionary power to decide on the form of doing so". See US-27(a) and (b), pp. 133-134 (emphasis in original). The *United States-Salmon* Panel did not acknowledge that Members have complete discretion at initiation. Rather, the Panel made it clear that authorities have to take the proper procedural steps when they initiate an investigation, and that "how this requirement is to be met depends on the circumstances of each particular case". In contrast to the extensive factual record of the United States' authorities demonstrating that they had taken appropriate steps to ensure that the application was made by or on behalf of the domestic industry before them, the facts of this case are that there is nothing in SECOFI's record competent to demonstrate that it conducted an examination and made a determination to exclude Almex and Arancia from the domestic industry.

5.307 The United States argues that it is well-settled that investigating authorities cannot base their determinations on "extra-record" documents that are not shared with the parties to an anti-dumping investigation. Article 17.6(i) requires the Panel to assess the facts on the basis of "whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective". Even before this standard of review was incorporated into the AD Agreement, panels found that they could not base their findings and conclusions on even publicly available facts, when these facts were not before the investigating authority during the investigation.<sup>260</sup>

5.308 The United States recalls that in *Guatemala-Cement* the Panel decided that it could not take into account in its evaluation of whether there was sufficient evidence to justify initiation, certain information which informed the investigating authority's initiation decision, but was not shared with parties:

"We note that Guatemala asserted that the Ministry "knew" certain information, such as ... and that such knowledge was brought to bear on its evaluation of the information in the application and together with that information constituted sufficient evidence to justify initiation. While such facts may have been known to the Ministry, there is no reference to them in the application, in the evaluation prepared by the two advisors, or in the resolution [of initiation] itself. ... Thus, we cannot consider such facts in evaluating whether the Ministry properly concluded that there was sufficient evidence to justify initiation in this case".<sup>261</sup>

5.309 According to the United States, in that dispute Mexico took the position that the panel should ignore the information that had not been on Guatemala's administrative record.

5.310 The United States notes that, in the appeal of *Guatemala-Cement*, Mexico argued that:

"... the Panel refused to take [the information] into consideration not because, as Guatemala claims, it was not mentioned in the public notice, but because the Panel could find no trace of this information anywhere in the administrative record for the investigation. Guatemala's claim that it is not necessary for an authority to reveal what additional evidence it may have taken into consideration amounts to a flagrant violation of the principles of procedural transparency and legal security. Affected parties would not have the slightest idea of the basis on which decisions were taken, and investigations could be commenced groundlessly in the knowledge that errors and omissions could be rectified subsequently".<sup>262</sup>

5.311 The United States contends that it is ironic that Mexico is seeking to have this Panel accept similar types of assertions as sufficient evidence of SECOFI's actions.

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<sup>260</sup>See *United States - Anti-Dumping Duties on Imports of Stainless Steel Plate from Sweden (United States-Stainless Steel Plate)*, ADP/117 (*United States-Stainless Steel Plate Panel Report*), issued 24 February 1994, unadopted, para. 374 (panel declined to consider statistics submitted by Sweden, because "these data were not part of the information submitted by the Swedish exporter in support of the request for a review"); see also *Korea-Resins Panel Report*, paras. 19, 24, 27, 207-209 (The United States challenged, *inter alia*, the public notice of a finding of injury. Korea sought to use a previously secret transcript of a meeting of its trade commission (KTC) in which the determination of material injury was made, to further explain its reasons for the determination (to show that the KTC had considered all the relevant issues). The Panel decided that it could not issue its findings based on reasons which had not been articulated in the public notice. The Panel also found that the possibility of interested parties being able to obtain a non-confidential summary of the transcript did not absolve Korea of its obligation to publish its reasons in a public notice. *Id.* para. 206.)

<sup>261</sup>*Guatemala-Cement Panel Report*, para. 7.68, footnote 242.

<sup>262</sup>*Guatemala-Cement AB Report*, para. 44.

5.312 Moreover, according to the United States, in Mexico's answers to questions put by the Panel, Mexico now claims that MEXICO-13 constitutes a "finding" and part of the "determination" of SECOFI concerning the issue of the domestic industry.<sup>263</sup> Mexico also asserts that MEXICO-13 was part of the administrative record. Significantly, in its second submission and in an answer to a question put by the United States, Mexico states that MEXICO-13, has been classified as "privileged information" and has been submitted as such to the NAFTA panel.<sup>264</sup> Mexico still maintains that this document is privileged.

5.313 In the view of the United States, these are very significant statements by Mexico. They raise serious systemic concerns for the operation of the AD Agreement as well as the Dispute Settlement Understanding. Mexico's argument regarding MEXICO-13 amounts to an assertion that Mexico made an initiation determination under Article 5 of the AD Agreement concerning standing and the domestic industry -- but that determination was kept secret. This "finding" and "determination" has never been made available to the interested parties in SECOFI's investigation, it has never been published, it was not detailed in the public notice of initiation, it was never disseminated outside the Mexican government until Mexico's first submission in this dispute, and it was never mentioned during two rounds of consultations with the United States even though the United States specifically requested all documents relating to such determinations.

5.314 The United States argues that, in light of Mexico's new admissions, the key issue is not whether MEXICO-13 is part of the administrative record. Mexico has not rebutted evidence that it is not part of its administrative record. Rather, the key issue is what should permissibly constitute the basis for the Panel's examination of whether Mexico has complied with Article 5 of the Anti-Dumping Agreement. More specifically, under the Agreement, can this Panel rely on MEXICO-13 as a basis for reviewing SECOFI's alleged Article 5 determinations to exclude Almex and Arancia from the domestic industry -- when that determination was and is maintained as privileged, in a secret document, and not made available to the parties during the investigation (or even thereafter)?

5.315 The United States submits that a panel cannot use or rely on secret documents to determine whether a Member has complied with Article 5 (or any other provision of the AD Agreement). A review of what SECOFI did to satisfy its Article 5 requirements under Article 17.6 must be based on what was in the administrative record available to the parties. The record evidence of determinations of standing (*i.e.*, that the application was duly filed by or on behalf of the domestic industry) under Article 5.4 must have been in the record and available for review by interested parties pursuant to Article 6.4 at initiation. In other words, from 27 February 1997, when SECOFI's initiation notice was published, the interested parties had to be able to see and find the "finding" and "determination" regarding the domestic industry which Mexico now claims is set forth in MEXICO-13.

5.316 The United States recalls that Article 6.4 of the AD Agreement sets forth the requirements for disclosure of information to interested parties during anti-dumping investigations. It provides as follows:

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

5.317 The United States notes that Article 6.4 uses the term "shall". The text of Article 6.4 provides that authorities shall allow interested parties to "see all information that is relevant to the presentations

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<sup>263</sup> See Answers of Mexico to questions no. 6 and 7 by the Panel, 6 May 1999.

<sup>264</sup> See Mexico's second submission, para. 150. See also Answer of Mexico to question no. 8 by the Panel, 6 May 1999.

of their cases". There can be no question that the pre-initiation decision to exclude Almex and Arancia, the two leading producers of HFCS, from the domestic industry is one which was "relevant" to both Almex and Arancia, as well as to the United States exporters. Moreover, Article 6.4 is applicable to SECOFI's pre-initiation decision regarding the domestic industry because that decision was used by SECOFI in an anti-dumping investigation.

5.318 The United States also notes that the object and purpose of Article 6.4 as determined from its text and context is to provide due process rights to interested parties during the course of an investigation to be able to see and comment on the evidence which investigating authorities are "using" in conducting their analyses. This object and purpose would be frustrated if the investigating authorities could make secret determinations at the initiation stage of the proceedings and keep them secret from the parties thereafter. Initiation determinations – or the lack of such determinations – can constitute violations of "essential procedural requirements". Permitting these determinations to remain secret could stop Members and interested parties from protecting their procedural rights to contest such determinations by preventing them from knowing their content. Such a result is fundamentally at odds with the object and the purpose of the due process rights protected by Article 6.4.

5.319 The United States draws the Panel's attention to the report of the Panel in *Korea-Resins*, which also rejected the use in panel proceedings of secret documents offered *post hoc* as evidence of the existence of the legal pre-requisites for an anti-dumping determination. The document in the *Korea-Resins* case was a transcript of the voting session of the Korean Trade Commission ("KTC") regarding a KTC determination of injury. The transcript was part of the administrative record and undoubtedly supported Korea's arguments, but the *Korea-Resins* Panel excluded the transcript because the transcript's contents had not been made available to the parties.<sup>265</sup> The *Korea-Resins* Panel read its standard of review responsibilities in conjunction with the Tokyo Round Code's transparency requirement, and concluded that it could not properly take the transcript into account as a further explanation of the reasons upon which the determination was based. The United States argues that the relevant features of the situation in the *Korea-Resins* case also apply here. It would undermine the purposes of the Anti-Dumping Agreement, and the WTO dispute settlement system, if Members can "hide the ball" during the actual investigation and fail to produce key documents until challenged in dispute settlement.

5.320 The United States asserts that these are not just theoretical concerns. SECOFI's secret pre-initiation determination negatively affected the interested parties during the investigation. SECOFI's secret determination has also negatively affected these dispute settlement proceedings. During the consultations in this dispute, the United States asked Mexico a number of questions -- set out in US-8. In particular, "What steps, if any, did SECOFI take, prior to initiation, to determine whether there was domestic production of HFCS in order to comply with the obligations in Articles 5.3 and 5.4 of the WTO Anti-dumping Agreement? What record evidences, outlines or discusses these steps? Please also identify to which documents in the index to SECOFI's record prepared for the NAFTA Chapter 19 proceedings the documents correspond".

5.321 The United States contends that Article 6.4 would be rendered a nullity if Members could make secret pre-initiation decisions which affect the entire course of the investigation -- such as the standing decision in this dispute. Moreover, to the extent that such determinations may be properly made -- but remain secret -- this could result in one Member misleading -- either intentionally or inadvertently -- other Members concerning the basis for determinations. The result could be an enormous waste of dispute settlement resources. Mexico's refusal and/or inability to provide information concerning MEXICO-13 in response to U.S. consultation questions is a good example of this.

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<sup>265</sup> See *Korea-Resins Panel Report*, paras. 206-213.

5.322 The United States observes that Mexico submits MEXICO-13 as proof that SECOFI "knew", before initiation, that there was domestic HFCS production, that SECOFI made a valid decision to exclude related parties, and that SECOFI therefore fulfilled its Article 5.1, 5.3 and 5.4 obligations.<sup>266</sup> Regardless of whether these assertions are true, this document cannot be used by Mexico in this proceeding to prove that SECOFI met its obligations under the AD Agreement, because, *inter alia*, there is no indication that this document was actually part of the administrative record in this investigation.

5.323 The United States argues that, by its own terms, MEXICO-13 is called a working paper, and there is no evidence that the document's ideas were given any consideration by anyone else. The document is merely a paper summarizing the thinking of a staff member on 20 January 1997 about what the investigating authorities might do.<sup>267</sup>

5.324 The United States submits that the argument that the document in question was not part of the investigation's administrative record is independently substantiated by the administrative record that Mexico submitted to the NAFTA panel that is also reviewing SECOFI's determination. An examination of SECOFI's index to its administrative record, prepared for the NAFTA proceeding, does not reveal its existence. Indeed, there is no document on the record for 20 January 1997.<sup>268</sup> Under Article 1904.14 of the NAFTA, SECOFI was required "to transmit to the panel the administrative record of the proceeding". Annex 1911 of that Agreement defines the "administrative record" to include "any governmental memoranda pertaining to the case". Therefore, under the NAFTA, SECOFI was required to include this working paper, if it existed in the investigation as a government memorandum, in its administrative record. The index to SECOFI's administrative record transmitted to the NAFTA panel did not include this document. Thus, SECOFI's own actions demonstrate that this document was not the basis for its decision. Accordingly, it cannot support the conclusion that "the authority" relied on its reasoning to conduct the examination required by Articles 5.3 and 5.4 in order to determine that the application was by or on behalf of the domestic industry as required by Articles 5.1 and 5.4, in accordance with the definition of the domestic industry in Article 4.1(i).

5.325 The United States maintains that there is good reason intrinsic to the working paper itself why the investigating authorities would not have relied on its logic. Like the initiation notice, the working paper reflects that there was capacity to produce HFCS in Mexico. From this, the working paper concludes that the two Mexican companies were producing HFCS in Mexico. This is a leap in logic that there is no evidence that SECOFI itself ever made.

5.326 The United States argues that the Panel should not use Exhibit MEXICO-13 in reviewing SECOFI's initiation. Mexico asserts that this exhibit is part of a larger group of documents placed on the administrative record on 4 February 1997, that is, not listed separately in the index by its own date, 20 January 1997.<sup>269</sup> It is difficult to comprehend how such a crucial document would not have its own entry on SECOFI's administrative record, especially as the NAFTA Rules of Procedure,

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<sup>266</sup>According to the United States, MEXICO-13 makes the following points: (i) on the basis of information from the Sugar Chamber's application, and information gathered by SECOFI from within the Mexican government, "the following was observed", (ii) Almex, Arancia and Cargill were the leading importers, and (iii) the Sugar Chamber supplied information regarding productive capacity which showed that Almex and Arancia had productive capacity in 1996. The document concludes that since the principal importers, Almex and Arancia, are producers, SECOFI may judge that there is no domestic production of the product identical to the imported one. See MEXICO-13, US-26.

<sup>267</sup>See *id.*

<sup>268</sup>See US-23 (index to NAFTA administrative record).

<sup>269</sup>See Answer of Mexico to question no. 6 by the Panel, 6 May 1999. See also Mexico's second submission, paras. 139, 142 and 150-52.

rule 41(b) specifically, require a descriptive list of all items on the administrative record.<sup>270</sup> Mexico explains that Exhibit MEXICO-13 was submitted to the NAFTA Panel as privileged information.<sup>271</sup> Yet when SECOFI identified the privileged documents to the NAFTA Panel, Exhibit MEXICO-13 was not listed. US-35 is SECOFI's opposition to a motion by the U.S. exporters seeking disclosure of the privileged documents SECOFI provided to the NAFTA panel.<sup>272</sup> This SECOFI opposition exhibit has no reference to any document dated 20 January 1997 (the date of the MEXICO-13 document) and no document dated 4 February 1997 (the date of the entry in the NAFTA index referring to a set of working papers including the MEXICO-13 document). In short, none of the privileged documents SECOFI provided to the NAFTA panel were dated or created during the period before initiation.

5.327 The United States concludes that Articles 5.1 and 5.4 require applications for the initiation of investigations to be filed by or on behalf of the domestic industry, which the investigating authority must determine under Articles 5.3 and 5.4 in examining whether the application contained sufficient evidence to justify initiation. Likewise, an Article 5.3 examination cannot find injury allegations under Article 5.2 adequate unless they relate to an appropriate industry. Mexico's hollow assertions in this proceeding that SECOFI excluded Almex and Arancia from the domestic industry prior to initiation cannot provide that record. Nor can Exhibit MEXICO-13 provide the basis for such a determination. Without sufficient evidence establishing that the investigating authorities examined and resolved the status of Almex and Arancia under Article 4.1(i) prior to initiation, a reasonable, unprejudiced person cannot conclude that the investigating authorities examined the matter and made a determination to exclude them from the domestic industry prior to initiation. Consequently, SECOFI's failure to properly determine that the Sugar Chamber's application was filed by or on behalf of the domestic industry violated Articles 5.1, 5.2, 5.3 and 5.4 of the AD Agreement, and the investigating authorities should have rejected the application pursuant to Article 5.8.

5.328 Mexico submits that the arguments presented by the United States clearly show a confusion between the obligations deriving from the various provisions of Article 5 of the AD Agreement with the requirements established under Article 12.1 and 12.1.1 of that Agreement concerning the required content of notices of initiation of an investigation.

5.329 Mexico asserts that the purpose of Article 5 of the AD Agreement is to "ensure that certain conditions be met before the initiation [of an investigation] was decided upon"<sup>273</sup> (emphasis added by Mexico). The objective of Article 12.1.1 is to ensure that, once the investigating authority has determined that such conditions exist and has decided to initiate an investigation, it formally does so by issuing a public notice, the content of which must meet the requirements of Article 12.1.1.

5.330 Mexico states that, given the purpose of Article 5, the obligations arising from this provision have a different scope from the requirements for the content of notices of initiation under Article 12.1.1. In particular, the notice of initiation in an investigation is published once compliance with the conditions or prerequisites set forth in Article 5 have been examined and the decision has been taken to initiate; but it does not necessarily have to reflect all of the actions performed or the conclusions or decisions reached by the investigating authority in conformity with the obligations imposed by the various provisions of Article 5 of the AD Agreement.

5.331 Therefore, in Mexico's view, the fact that the public notice did not contain the information that the United States would have liked it to contain concerning the determination of the relevant domestic industry does not imply that the investigating authorities did not examine the evidence

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<sup>270</sup> See Answer of the United States to question no. 51 by the Panel, 6 May 1999.

<sup>271</sup> See Mexico's second submission, para 150.

<sup>272</sup> See US-33 (exporters' motion) and MEXICO-48 (SECOFI's 21 August 1998 letter providing privileged documents to the NAFTA Panel, the English version of which is in US-36).

<sup>273</sup> See *United States-Cement and Clinker Panel Report*, para. 5.37.



contained in the annexes to the petitioner's application pointing to HFCS production in Mexico during the period of investigation.

5.332 Mexico disputes the argument made by the United States that the information that SECOFI had before it prior to initiating the investigation cannot support the decision to exclude HFCS producers from the definition of the domestic industry for the purposes of this investigation. Mexico also disputes the argument made by the United States that the references made by Mexico to USDA publications in determining that there was domestic production of HFCS suggest that the relevant materials in the application had not been examined thus far.

5.333 Mexico argues that, with respect to the existence of HFCS production in Mexico, SECOFI considered as decisive not an isolated piece of information, but the information contained in the Sugar Chamber's application as a whole. What Mexico in fact said in its first submission was that SECOFI had attached more importance to the information published by the USDA because it came from an official source, which in no way implies that SECOFI did not examine other information. On the contrary, as stated by Mexico on various occasions, SECOFI took account of the totality of the information contained in the application, as well as other information that the SECOFI collected on its own.

5.334 According to Mexico, the fact that SECOFI considered the information published by USDA, concerning, *inter alia*, the establishment of distribution centres and plants for the domestic manufacture of HFCS, as the most reliable information, given that it came from a government source, in no way implies that SECOFI at any time disqualified the information contained in the Articles by two of the leading experts in the field of sweeteners, which formed part of the bibliographical files submitted as annexes to the application and provided evidence of the involvement of the companies Almex and Arancia in the domestic production of HFCS during the period of investigation.

5.335 In Mexico's view, these Articles show that Almex had already begun manufacturing HFCS in Mexico in 1995 and Arancia would begin sometime in 1996, the year encompassing the period of investigation. The United States attempts to ignore the fact that, in paragraph 17 of its first submission and paragraph 32 of its oral statement at the first meeting of the Panel with the parties, it stated that this evidence in the application reflected HFCS production in Mexico. The evidence in question was included in MEXICO-8. This makes it clear that, while some of the documents annexed to the application showed that not only would there be HFCS production in the immediate future, and that the companies Almex and Arancia already had the capacity to produce HFCS in Mexico, other documents showed that there had in fact been production during the period of investigation. One way or another, all of this information taken together showed that there had been production capacity in Mexico since 1995, and both the information published by the USDA and the information provided by the leading experts in sweeteners irrefutably pointed to the concrete fact that these companies were in fact producing HFCS in Mexico during the period of investigation. Mexico argues that SECOFI had no obligation under the AD Agreement or under Mexican law to consider the exact production data concerning Almex and Arancia, since for the purposes of this investigation, they could appropriately be excluded as a possible relevant industry. Hence, there was no obligation to delve deeper or seek to obtain further information with respect to their production. In fact, the United States tries to impose obligations on Mexico beyond what the AD Agreement itself stipulates. Further, the United States' position ignores or minimizes the fact that Almex and Arancia, although HFCS producers in Mexico, were also the leading importers,<sup>274</sup> and as such, it could at least be presumed that they were the main beneficiaries of the alleged dumping. The fact that they were themselves the leading importers is the determining factor in a case of exclusion under Article 4.1(i) of the AD Agreement. Thus, it was perfectly valid to exclude them and consider the sugar industry represented by the Sugar Chamber as actually having the standing to request the initiation of the investigation and being the domestic industry that could in fact be affected by the dumped imports. It is also illogical

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<sup>274</sup>Concerning the information examined by SECOFI on imports, *see* MEXICO-11 and MEXICO-12.

for the United States to assert that SECOFI "had no information on its administrative record at initiation that the producers of HFCS supported the application"<sup>275</sup> since they were not the ones that submitted the application and it was clear that as the leading importers, and hence the leading beneficiaries of the dumping, it was not at all in their interest to support the application for initiation of an anti-dumping investigation.

5.336 Further, Mexico disputes the argument of the United States that the confidential staff working paper (MEXICO-13) in which SECOFI determined the sugar industry to be the relevant domestic industry is not included in the administrative record submitted to the NAFTA Panel. The Rules of Procedure for Chapter 19 of NAFTA include rules governing the classification of information submitted to the Panel in that proceeding. The Rules of Procedure for NAFTA Article 1904 (Rules of Procedure) establish different categories into which the importing party under the proceeding may classify the information contained in the administrative record, and according to that classification, the importing party presents a copy of the record held by the investigating authority for review by the binational panel.

5.337 According to Mexico, under Rules of Procedure 3 and 41, non-public information from the administrative record that the importing party submits to the Chapter 19 panel may be classified in three categories: proprietary, privileged and government information.

5.338 Mexico observes that Rule 3 (under the section "Definitions and Interpretation") expressly states that:

"3. For the purposes of these Rules, ...

privileged information shall mean:

(a) With respect to a panel review of a Final Determination made in Mexico,...

(ii) internal communications between officials of the Secretaría de Comercio y Fomento Industrial in charge of antidumping and countervailing duty investigations or communications between those officials and other Government officials ...".

5.339 Mexico also observes that Rule of Procedure 41 (under the heading "Record for Review") expressly states that:

"41. (1) The investigating authority whose Final Determination is under review shall, within 15 days after the expiration of the time period fixed for filing a Notice of Appearance, file with the responsible Secretariat

(a) nine copies of the Final Determination, including reasons for the Final Determination;

(b) two copies of an Index comprised of a descriptive list of all items contained in the administrative record, together with proof of service of the Index on all participants; and

(c) subject to subrules (3), (4) and (5), two copies of the administrative record.

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<sup>275</sup> United States second submission, para. 62.

- (2) An Index referred to in subrule (1) shall, where applicable, identify those items that contain proprietary information, privileged information or government information by a statement to that effect.
- (3) Where a document containing proprietary information is filed, it shall be filed under seal in accordance with Rule 44.
- (4) No privileged information shall be filed with the responsible Secretariat unless the investigating authority waives the privilege and voluntarily files the information or the information is filed pursuant to an order of a panel ...".

5.340 Mexico notes that, on the basis of Rule 41, there is an obligation to submit proprietary information, but the investigating authority reserves the right to decide on the voluntary submission of privileged information. In addition, according to this Rule of Procedure, while the index to be submitted to the Panel in a NAFTA procedure must list the documents in the administrative record, there is no obligation under the Rules of Procedure to submit the information that the authority identifies in the index as privileged information or government information. Thus, the index submitted to the binational panel lists information (non-proprietary, proprietary, privileged and government information) on the understanding that privileged information does not necessarily have to be included in the copy of the record that is submitted to this Panel.

5.341 Mexico asserts that the document submitted as Exhibit MEXICO-13 to this Panel was indeed submitted to the binational panel under NAFTA Chapter XIX as "privileged information", given that it was a working document of the investigating authority (*i.e.* an internal communication between SECOFI officials in charge of anti-dumping investigations), and Mexico voluntarily decided to submit to the NAFTA panel the working papers of the Deputy Directorate-General for Injury and Safeguards.<sup>276</sup> Thus, the working paper submitted to this Panel as Exhibit MEXICO-13 does form part of the administrative record submitted to the NAFTA binational panel, and does form part of the administrative file of the investigation.

5.342 In response to a question put by the Panel, Mexico acknowledged that the interested parties in the investigation did not have access to Exhibit MEXICO-13 given that this was a confidential government document. However, interested parties did have access to the information submitted in the Sugar Chamber's application showing not only that Arancia and Almex had productive capacity and had engaged in production, but also that these companies had become the leading importers of HFCS.<sup>277</sup>

5.343 Mexico contends that the reference by the United States to *Guatemala-Cement* is out of context, since the facts in that case were completely different. In *Guatemala-Cement*, the investigating authority was unable to prove that certain information was part of the administrative record. In this case, Mexico has established that the working paper submitted as MEXICO-13 did form part of the administrative file.

5.344 Mexico disputes the argument by the United States that MEXICO-13 is a working document which, at most, "contains a staff person's thoughts", and that "even if the working paper had been transmitted to others, there is no reason to believe that its suggestions were adopted". Under Mexican practice, a working paper by SECOFI constitutes analytical work undertaken by the investigating authority in conformity with its obligations within the applicable legal framework. In particular, MEXICO-13 contains an analytical table of the share of imports by company in the total volume

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<sup>276</sup>See MEXICO-48.

<sup>277</sup>See Answer of Mexico to question no. 5 by the Panel, 22 June 1999.

imported from the United States, and it is a working paper by SECOFI reflecting its analysis and setting forth its conclusions on the volume of imports investigated by company, the production capacity of HFCS during the period of investigation, and the determining fact that Almex and Arancia, although producers, were also the leading importers. Since Exhibit MEXICO-13 reflects the examination and the conclusions of officials of a Deputy-Directorate General of SECOFI regarding the above matters, and was directed to the officials of another Deputy-Directorate General at the same Ministry, this document should be regarded with all seriousness. Mexico also disputes the argument by the United States that working documents are inadequate to support the examination, conclusions or decisions of an investigating authority conducting an anti-dumping investigation, when in fact, there is no provision in the AD Agreement which prevents the issue of this kind of document. On the contrary, in procedures of this kind it is perfectly acceptable, not only in Mexican administrative practice, but also in administrative practices of other WTO Members, to produce working papers and analyses that are transmitted from department to department between officials responsible for anti-dumping investigations; and it is perfectly valid that such documents reflect the actions and conclusions supporting the decisions of the investigating authority. Even the Rules of Procedure (Rule 3) of NAFTA Chapter 19 recognize this. Thus, the United States' argument has no foundation in the AD Agreement and in anti-dumping practice.

5.345 Mexico reiterates that the decision to exclude Almex and Arancia from the definition of the relevant domestic industry for the purposes of the investigation was based on the determining fact that these two companies were the leading importers, and hence the main beneficiaries of the allegedly dumped imports. This fact was duly established not only in the analytical table of imports by company and the working documents submitted to the Panel as Exhibit MEXICO-13, but also in a number of other analytical tables, which likewise showed that SECOFI had examined and substantiated of the status of Almex and Arancia as leading importers by analysing their share in HFCS imports by company. These analytical tables are submitted to the Panel so that the Panel is able to review them.<sup>278</sup>

5.346 Mexico argues that SECOFI's examination and determination concerning the exclusion of Almex and Arancia and the consideration of the sugar industry as the relevant domestic industry should be considered in the light of the various elements taken as a whole, in their totality, including the information contained in the application and the information that SECOFI itself obtained, as well as the analytical tables and working documents establishing SECOFI's actions and conclusions, and supporting its decision.

5.347 Mexico also reiterates that the analysis and determination of the relevant domestic industry for the purposes of an investigation arises, in practice, from the obligation of the investigating authority to determine, prior to the initiation, whether an application for initiation has been submitted by the industry that has standing to request such initiation. In this context, the examination conducted and the conclusions reached by SECOFI prior to the initiation of the investigation, set forth in its analytical tables and working documents, formed the basis for SECOFI's determination in accordance with which the investigation was initiated with the sugar industry as the relevant domestic industry, and the Sugar Chamber's standing to apply for the investigation was established in paragraph 25 of the *Initiation Notice*.

5.348 Mexico contends that, as the standing of the Sugar Chamber was established in the notice of initiation as a result of the investigative authority's prior determination concerning the relevant industry, the parties, including Almex and Arancia, had ample opportunity to defend themselves and to present their arguments in this respect, as they indeed did throughout the investigation. Their claims and arguments were duly answered during the different stages of the procedure and in the subsequent public notices. In other words, the United States' argument concerning the alleged lack of

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<sup>278</sup> See MEXICO-49.

defence opportunities due to the fact that the notice of initiation did not contain an explanation of how the investigative authority reached its determination is unfounded.

5.349 The United States disputes Mexico's argument that it "confuses" the obligations under Articles 5 and 12. This argument is apparently based on Mexico's mistaken assumption that evidence of the Article 5 examination must be contained in the initiation notice.<sup>279</sup> Yet the United States has never argued for such an interpretation of Articles 5 and 12. Rather, the United States has argued that SECOFI's Article 5.3 and 5.4 examinations and determinations must be found in the record, and must be based on documents which were available to interested parties at the time of the initiation of the investigation. The initiation notice is a central part of the administrative record. It is often the first exposure interested parties have to a foreign anti-dumping authority's decision to initiate. As such, it is a logical place for an authority to set out the key elements regarding its determination to initiate an investigation. But it is not the only place an authority can do so. Wherever the decision is located, it must be accessible to the interested parties.

5.350 The United States also disputes Mexico's argument that SECOFI's examination can be discerned from the "totality" of the information in the administrative record.<sup>280</sup> Yet such an assertion contradicts the major emphasis which Mexico places on MEXICO-13, as seen in Mexico's answers to questions put by the Panel.<sup>281</sup> Mexico's "totality" argument would imply that the Panel should conduct a *de novo* review of the information at SECOFI's disposal prior to initiation, even though Mexico has not given the Panel any evidence that SECOFI conducted the required examination itself. The Panel would presumably piece together information from disparate sources which, in its totality, would demonstrate whether the basis for a "determination" existed before 27 February 1997. Yet it was the responsibility of SECOFI at the pre-initiation stage, not the Panel in this dispute, to conduct this synthesis and make a determination of whether the finding was one of production or potential production (and, in this latter case, address the basis for this leap in logic rather than presume it irrelevant because there was importation). It was also SECOFI's responsibility to make a record determination to exclude Almex and Arancia from the domestic industry under Article 4.1(i). Bits and pieces of information produced *post hoc* -- particularly when what Mexico now claims is a major bit is a secret document -- do not evidence the required examinations or constitute such determinations.

### **3. Alleged Insufficiency of The Notice of Initiation (Claims Under Article 12)**

5.351 The United States argues that SECOFI's initiation notice did not meet the stringent notice requirements of Articles 12.1 and 12.1.1 of the AD Agreement. In its initiation notice, SECOFI states that it commenced this investigation based on the Sugar Chamber's allegation that HFCS was not produced in Mexico during the period of investigation.<sup>282</sup> Even the preliminary determination does not state that SECOFI was aware of domestic HFCS production at the time of initiation. In that determination, SECOFI notes that it had become aware of production by Almex and Arancia from the information these companies had submitted. However, these companies did not submit this information until after initiation.<sup>283</sup> Further, SECOFI's preliminary determination rejects A.E. Staley's argument that the chart annexed to the Sugar Chamber's application entitled "Estimated Production Capacity of HFCS 42 and 55" could have any relevance for purposes of demonstrating the

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<sup>279</sup> See Mexico's second submission, paras. 76, 107, 111-12, 120-22.

<sup>280</sup> See Mexico's second submission, paras. 126-27, 133 and 161.

<sup>281</sup> See Answers of Mexico to questions no. 6 and 7 by the Panel, 6 May 1999.

<sup>282</sup> See *Initiation Notice*, in which SECOFI Secretary Blanco Mendoza states, "I issue this Decision in accordance with the following:" and ... "In regard to the nationally produced product, the requester pointed out that in the United Mexican States, high fructose corn syrup is not produced ..". (emphasis added by the United States), respectively, at third para. (unnumbered), and para. 7, US-4.

<sup>283</sup> See United States first submission, paras. 24-25.

existence of HFCS production.<sup>284</sup> The question thus arises: on what basis could SECOFI have known about HFCS production in Mexico prior to initiation to assess whether to exclude Almex and Arancia at that time from the domestic industry?

5.352 According to the United States, in its final determination SECOFI states unequivocally for the first time that it had known of domestic HFCS production prior to initiation. SECOFI then suggests that it had conducted some sort of pre-initiation analysis in order to exclude Almex and Arancia from the definition of the domestic industry.<sup>285</sup> This, the United States asserts, contradicts SECOFI's stated basis for initiating an investigation at the time of initiation — the Sugar Chamber's allegation that there was no domestic production of HFCS.

5.353 The United States submits that identifying the relevant like product and consequently the relevant domestic industry are essential factors on which any allegation of injury must be based. As footnote 9 of the AD Agreement states, "Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry..". (emphasis added by the United States). Thus, the term "injury" as used in Article 12.1.1(iv) incorporates as an essential element the definition of "domestic industry".<sup>286</sup> Article 4.1, in turn, provides, "[f]or the purposes of this Agreement, the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products...". Any decision regarding injury must therefore begin by defining, as an essential factor, the like product.

5.354 The United States contends that the information that SECOFI provided as to the allegation of injury here both failed to summarize the factors on which the allegation was based and failed to provide adequate information thereon. Whether by accident or design, SECOFI repeats in its initiation notice the Sugar Chamber's statement that there was no domestic production of HFCS; whereas its final determination states that SECOFI knew the opposite to be true at the time of initiation.<sup>287</sup> Assuming this later representation to be true, the initiation notice failed to provide adequate information summarizing the factors relevant to the allegations concerning the relevant domestic industry on which SECOFI decided to initiate. SECOFI's initiation notice represented that the Sugar Chamber had alleged that there was no domestic HFCS production, as a basis for its allegation that the relevant like product was sugar, and that SECOFI issued its decision to initiate in accordance with this application. Since, however, the Sugar Chamber's application contained other information that apparently convinced SECOFI of the opposite conclusion, SECOFI's repetition of that simple allegation failed to summarize the allegations on this factor.<sup>288</sup> Articles 12.1 and 12.1.1 cannot reasonably be interpreted to mean that when an application makes multiple contradictory allegations, an initiation notice adequately summarizes the allegations when it states only the allegation that the authority has concluded are untrue.

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<sup>284</sup>See *Preliminary Determination*, para. 30(B), US-2 (A.E. Staley's argument) and para. 61 (SECOFI's rejection).

<sup>285</sup>See *Final Determination*, para. 113, US-1.

<sup>286</sup>Article 12.1.1(iv) requires that when investigating authorities are satisfied that there is sufficient evidence to justify initiation, a public notice shall be given: "A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report, adequate information on ... (iv) a summary of the factors on which the allegation of injury is based ...".

<sup>287</sup>See *Final Determination*, para. 113, US-1.

<sup>288</sup>Nor did SECOFI provide a separate report available to the public that contained such a summary. See AD Agreement footnote 23 ("Where authorities provide information and explanations under the provisions of [Article 12] in a separate report, they shall ensure that such report is readily available to the public").

5.355 The United States maintains that the requirement of Article 12.1 to provide "adequate information" on the factors enumerated in its subparts presumes that there will be occasions in which a simple recitation of the application's allegations will be inadequate. SECOFI's statements in its final determination establish that it must have initiated the investigation on the basis of an understanding of the facts contrary to the allegation regarding domestic production that its initiation notice recited. Far from crediting the Sugar Chamber's allegation that there was no domestic production of HFCS, SECOFI states in the final determination that it reached the opposite conclusion.

5.356 The United States is of the view that, in these circumstances, SECOFI's simple recitation of the Sugar Chamber's allegation necessarily misled the public, the respondents and the United States, the Member whose product was the subject of the investigation, as to both the information in the application and the basis on which SECOFI initiated the investigation. Under no fair reading of the requirements of Article 12.1 can such a misleading notice constitute "adequate information". The requirement that such a notice issue arises under Article 12.1: "[w]hen the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5". A notice cannot provide "adequate information" when, as here, it affirmatively directs the public and interested parties away from the bases on which the authorities were satisfied that there was sufficient information to justify an investigation. Otherwise, investigating authorities could conceal the true bases for commencing investigations, unfairly forcing parties to engage in guesswork to challenge them.

5.357 The United States asserts that, because SECOFI failed to disclose its later-stated knowledge of domestic HFCS production, its initiation notice was also misleadingly silent on the factors that might have led it to conclude that there was sufficient information to initiate an investigation. As is reflected in SECOFI's final determination, in order to determine that the sugar industry was the relevant domestic industry, it needed to reach a resolution of the status of those companies who were producing HFCS in Mexico prior to initiation. Once SECOFI concluded, in reviewing the application, that there was domestic production of HFCS, it needed to consider whether the producers of HFCS in Mexico should be included within the industry producing the like product. In a case such as this, in which the complaining industry admittedly does not produce the product under investigation, it is all the more imperative for the investigating authority to apply the requirements of Article 4.1.1 and footnote 11 (which govern the exclusion of importers and producers from the domestic industry) with care, and provide adequate information about what it did.<sup>289</sup> The application contained no allegations relevant to this matter, and SECOFI's initiation notice also provided no information — let alone adequate information — summarizing the factors upon which SECOFI excluded those HFCS producers.

5.358 According to Mexico, the United States misreads the notice of initiation. The fact that the Sugar Chamber's allegation was reproduced by SECOFI in the notice of initiation in no way signifies that this was the basis for initiating the investigation.

5.359 Mexico submits that the United States' argument rests on an excessive interpretation of Article 12.1.1(iv) of the AD Agreement. This provision, however, does not require the notice of initiation to contain information concerning the factors considered by the investigating authority in defining the relevant domestic industry, as the United States alleges. In conformity with Article 12.1.1(iv), the notice of initiation contained the required information summarizing the factors on which the allegation of threat of injury to the domestic sugar industry, the domestic industry defined as relevant prior to the initiation of the investigation, was based.

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<sup>289</sup> Article 4.1(i) provides that "when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term 'domestic industry' may be interpreted as referring to the rest of the producers" (emphasis added by the United States).

5.360 Mexico argues that, while paragraph 7 of the *Initiation Notice* does reflect the Sugar Chamber's allegation that there was no HFCS production in Mexico, this in no way signifies, as the United States suggests, that this paragraph was the basis on which SECOFI decided to initiate the investigation, given that it does not present a statement by the investigating authority.

5.361 Mexico argues further that this misreading of the notice of initiation is a demonstration of bad faith and feigned or intentional lack of understanding by the United States regarding the structure of public notices in Mexican legal practice, despite the fact that during the consultations held with the United States on 12 June 1998, Mexico explained the importance and implications of this structure for a correct reading and clear understanding of the content of the notice in question.

5.362 Mexico notes that in Mexican legal practice, public notices are divided into three sections: (1) *Resultandos*, (2) *Considerandos* and (3) *Resolución*, each of which has a specific purpose and content. The three sections taken together comprise a public notice complying strictly with all of the requirements of Article 12 of the AD Agreement.

5.363 Mexico notes further that, in the context of public notices of initiation of anti-dumping investigations, the *Resultandos* section, which includes the above-mentioned paragraph 7, contains only a certain amount of general factual data and the description, transcription or synthesis, as appropriate, of the allegations, arguments, information and evidence submitted by the applicant with respect to the alleged dumping, the alleged injury or threat of injury and the causal relationship between them. The analysis of these *Resultandos* comes under the *Considerandos* section, which addresses the examination of the allegations, information and evidence submitted by the applicant, and of the information obtained by the investigating authority itself, with respect to dumping, injury or threat of injury and the causal relationship between them.

5.364 Mexico observes that, once the grounds for the initiation of the investigation are established (in the *Considerandos* section), the final section constitutes the *Resolution* of the investigating authority by which the initiation of the investigation is decided, through the so-called *Puntos Resolutivos*, accepting the application and establishing the concrete steps to be taken by the investigating authority and interested parties: e.g. establishment of the deadlines for the interested parties to submit their opinions, the address to which the representations by the parties should be directed, the date of the public hearing, the date of entry into force, the order to notify the interested parties and the exporting member, etc.

5.365 Mexico observes further that the purpose of this structure is to distinguish the simple description or transcription of general data and the allegations, information and evidence submitted by the applicant (*Resultandos*) from, on the one hand, the examination or analysis of all of the allegations, information and evidence obtained (*Considerandos*)<sup>290</sup> and, on the other hand, the so-called "Puntos Resolutivos" in which the investigating authority actually decides to initiate the investigation, by means of accepting the application and determining the concrete steps that the investigating authority and the interested parties must take as of the initiation of the investigation (*Resolución*).

5.366 Mexico notes that paragraph 7 of the *Initiation Notice* appears in the initial section of the notice, i.e. the *Resultandos* section. Consequently, that paragraph, as part of the *Resultandos*, simply repeats or reproduces in the notice of initiation an allegation made by the Sugar Chamber in its application that there was no HFCS production in Mexico, this is also true of many other paragraphs

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<sup>290</sup>This can be appreciated by observing, for example, that although references are made to the evidence in the various sections of the *Initiation Notice*, paras. 16-23, which form part of the *Resultandos* section, simply reproduce the list of evidence submitted by the Sugar Chamber in its application for initiation, while paras. 30, 32, 34-37, 40, 41, 50, 68, 69, 70, 77, 86, 97, 98, *inter alia*, which form part of the *Considerandos* section, contain the evaluation and analysis by SECOFI of the listed evidence.



of the *Resultandos* section with respect to other allegations, information and evidence contained in the application.

5.367 Mexico contends that the United States refers only to paragraph 7 of the *Initiation Notice*, omitting any reference to, or mention of, other paragraphs, in particular a number of paragraphs in the *Considerandos* section, which in fact reflect what SECOFI itself considered as the reasons or the basis for its determination to initiate the investigation. It is in the *Considerandos* section, and not in the *Resultandos* section, that the investigating authority actually conducts its analysis and provides the grounds which justify its determination to initiate the investigation.

5.368 In Mexico's view, it is particularly significant that the United States fails to mention paragraphs 89 and 90 of the *Initiation Notice* - which show that SECOFI, prior to the initiation of the investigation, examined the evidence and information supplied by the Sugar Chamber<sup>291</sup> establishing the existence of HFCS producers in Mexico, giving greater importance to the information published by the USDA as shown in paragraph 90 of the *Considerandos* section - when in fact these are the paragraphs which effectively establish the grounds for initiating the investigation.<sup>292</sup> Generally speaking, the *Considerandos* section in this notice of initiation comprises paragraphs 24 to 99, which include an extensive analysis of the alleged dumping, threat of injury and causal relationship between the allegedly dumped imports and the threat of injury to the domestic industry. Paragraph 99 states, in conclusion:

"99. In accordance with the information, arguments and evidence submitted by the National Chamber of Sugar and Alcohol Industries and the information collected by the Ministry, we conclude that there are reasonable grounds for considering that during the investigation period, the United States imports entered the Mexican market under alleged conditions of price discrimination and threatened to cause injury to the domestic sugar industry, and therefore, pursuant to Article 52, Part I of the Foreign Trade Act and Article 80 of the Regulations thereto, we issue the following [RESOLUTION]".

5.369 In Mexico's opinion, it is clear from the above that SECOFI's decision to initiate the investigation was the result of an extensive analysis of the arguments, evidence and information submitted by the Sugar Chamber, as well as the information collected by SECOFI itself, and thus, the basis for the determination to initiate the investigation was absolutely not the allegation by the Sugar Chamber that there was no domestic HFCS production, as the United States suggests.

5.370 Mexico contends that United States arguments referred to above are unfounded, and are in fact contradictory. In particular, the United States erroneously asserts that SECOFI stated that the basis for initiating its investigation was the Sugar Chamber's allegation that there was no domestic production of HFCS<sup>293</sup>, when in fact, neither in paragraph 7 or in any other paragraph of the *Initiation*

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<sup>291</sup>In particular the document entitled "Estimated Capacity of Production of HFCS 42 and 45".

<sup>292</sup>As mentioned above, although the allegation by the applicant transcribed in para. 7 of the notice and the information and evidence contained in the application contradict each other as to the operations of the manufacturing companies, SECOFI examined the information available and decided that the most reliable information in this respect was the data published by the USDA, as a governmental source. Consequently, in para. 89 of the *Initiation Notice*, SECOFI adopts as part of the *Considerandos* the claim by the applicant that the United States corn sweeteners industry made investments in different parts of the Mexican market in order to be able to manage the importation, distribution and, at some point, the production of HFCS, which would take a few years to become significant. Para. 90, also part of the *Considerandos* section of the public notice, takes as evidence of this the information published by the USDA concerning various operations by Almx, Arancia and Cargill in Mexico which was submitted in Annex to the application for initiation. See paras. 93 and 115 of Mexico's first submission.

<sup>293</sup>See United States first submission, paras. 50, 51, 54 and 57-59.

*Notice* did SECOFI made a statement or assertion that "the fact that there was no domestic production of HFCS in Mexico constituted the basis or grounds for initiating the investigation". Moreover, according to Mexico, the United States itself recognizes in its first submission that paragraph 7 simply repeats or reproduces<sup>294</sup> in the *Initiation Notice* an allegation made by the applicant that there was no HFCS production in Mexico.

5.371 Mexico also disputes the United States argument that the notice of initiation failed to meet the requirements of Article 12.1.1 of the AD Agreement, in particular those of subparagraph (iv) thereof. Mexico observes that, in paragraph 53 of its first submission, the United States asserts that "... the initiation notice failed to provide adequate information summarising the factors relevant to the allegations concerning the relevant domestic industry on which SECOFI decided to initiate ...". In the view of Mexico, the United States makes an excessive interpretation of the requirements of Article 12.1.1(iv) of the AD Agreement.

5.372 Mexico submits that Article 12.1.1(iv) of the AD Agreement requires that notices of initiation contain the necessary information summarising the factors on which the allegation of injury or threat of injury is based, but does not further require that such notices provide adequate information summarizing the factors relevant to the allegations concerning the relevant domestic industry on which it was decided to initiate, let alone the adequate information summarizing the factors upon which SECOFI excluded the HFCS producers.

5.373 In response to a question by the United States with respect to this issue, Mexico observed that SECOFI's public notice contained adequate information on all the requirements expressly laid down in Article 12.1.1. Indent (iv) of this Article only requires a summary of the factors on which the allegation of injury is based, which in no way implies that the totality of the pieces of evidence available to the investigating authority should be included in a notice of initiation, much less the considerations and evidence taken into account for the determination of the relevant industry for purposes of the investigation, which takes place prior to the initiation of the investigation and in the context of Article 5 of the AD Agreement, not Article 12.1.1.<sup>295</sup>

5.374 Mexico also holds that, although the identification of the relevant like product in an anti-dumping investigation determines the domestic industry in respect of which the allegation of injury must be made, this does not mean that Article 12.1.1 of the AD Agreement can be interpreted as requiring that the notice of initiation must contain information concerning "factors relevant to the allegations concerning the relevant domestic industry".

5.375 Mexico asserts that the definition of the relevant domestic industry is established prior to the initiation of an investigation, and that it is in accordance with this prior determination that it is decided to initiate the investigation and issue the corresponding public notice, which must include the information summarising the grounds for the allegation of injury to the domestic industry previously defined as relevant.

5.376 Mexico argues that, as SECOFI established prior to the initiation of the investigation that the two companies producing HFCS in Mexico were also the leading importers of the allegedly dumped product,<sup>296</sup> the status of those companies as domestic HFCS producers lost all significance, and SECOFI excluded them from the definition of the relevant domestic industry under Article 4.1(i) of the AD Agreement. As SECOFI also determined that HFCS and sugar qualified as like products with closely resembling characteristics under Article 2.6 of the AD Agreement, SECOFI considered that, for the purposes of the investigation, the relevant domestic industry was made up of the sugar

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<sup>294</sup> See United States first submission, paras. 53-55.

<sup>295</sup> See Answer of Mexico to question no. 12 by the United States, 6 May 1999.

<sup>296</sup> Mexico cites in this respect MEXICO-13.

producers as represented by the Sugar Chamber. Thus, such producers constituted the domestic industry defined as relevant for the purposes of the investigation and which could be affected or threatened by the allegedly dumped imports.

5.377 Mexico argues further that, in accordance with the AD Agreement, the identification of the relevant like product - *i.e.* sugar, as the like product with closely resembling characteristics - and the consequent definition of the relevant domestic industry, determined that the grounds for the allegation of threat of injury, and ultimately the summary of the factors on which that allegation was based, required under Article 12.1.1(iv) of the AD Agreement, related strictly to the sugar producers represented by the Sugar Chamber.<sup>297</sup>

5.378 Mexico observes that, since the national sugar producers as represented by the Sugar Chamber constituted the domestic industry defined as relevant for the purposes of the investigation, SECOFI decided to initiate the investigation and issue the public notice of initiation under those terms, in strict compliance with all of the requirements of Article 12.1.1 of the AD Agreement, including the requirement to provide the necessary information summarizing the factors on which the allegation of threat of injury to the domestic sugar production was based.

5.379 Mexico disputes the argument by the United States, referring to paragraphs 198 to 200 of Mexico's first submission, that it took the position that the decision to exclude Almex and Arancia "did not need to be disclosed to the public". Mexico maintains that it never indicated that the purpose of not including such information was to conceal the facts from the public, as the United States suggests, much less to mislead anyone. Simply, there was no provision in the AD Agreement which imposed this legal requirement to include information on a determination made prior to the initiation of the investigation. Mexico observes that, in paragraph 87 of its second submission, the United States asserts that SECOFI's notice of initiation did not provide adequate information and makes an excessive interpretation of Article 4.1(i) of the AD Agreement to the effect that determinations under this provision must appear in the notice. Mexico submits that the notice of initiation complied fully with Article 12.1.1, specifically by including the required information in connection with the summary of factors on which the allegation of injury was based.

5.380 In support of the above arguments, Mexico states that the notice of initiation contained adequate information on the following:

- (a) the name of the exporting country and the product involved, which are clearly indicated even in the heading of the notice;<sup>298</sup>
- (b) the date of initiation of the investigation, set forth in paragraph 109;<sup>299</sup>
- (c) the address to which representations by interested parties should be directed, which is indicated in paragraph 104;<sup>300</sup>

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<sup>297</sup>See Article 4.1 of the AD Agreement which states that, for the purposes of the AD Agreement, [including the determination of injury or threat of injury], the term "domestic industry" shall be interpreted as referring to domestic producers as a whole of the like products, which can be identical or have closely resembling characteristics under Article 2.6 of the AD Agreement; in Mexico's view in this case the domestic sugar industry corresponds to the latter of these two definitions. Moreover, Article 5.1 of the Tokyo Round Anti-Dumping Code states that "an investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry affected..." (emphasis added by Mexico). In this respect, the Panel in the *United States-Cement and Clinker* case pointed out that applications for initiation must be submitted by or on behalf of the industry affected. See *United States-Cement and Clinker Panel Report*, paras. 5.17 and 5.20. See also footnote 72 in Mexico's first submission.

<sup>298</sup>Article 12.1.1(i) of the AD Agreement.

<sup>299</sup>Article 12.1.1(ii) of the AD Agreement.

- (d) the time-limits allowed to interested parties for making their views known, indicated in paragraph 103;<sup>301</sup>
- (e) the basis on which dumping is alleged in the application, appearing in paragraphs 27-41;<sup>302</sup> and
- (f) a summary of the factors on which the allegation of injury was based, which appears in paragraphs 61 to 98.<sup>303</sup>

5.381 Mexico contends that, contrary to the arguments of the United States, paragraphs 61 to 98 of the *Initiation Notice* contain a summary of the factors on which the allegation of threat of injury to the domestic sugar industry was based, as required under subparagraph (iv) of Article 12.1.1 of the AD Agreement, including a summary of the information concerning such factors as increase in dumped imports, real and potential decline in sales, price effects, export capacity, investment projects, return on investments, utilization of installed capacity and inventories of the investigated products, concluding (causal relationship) that, in view of the high growth rate of HFCS imports from the United States, the price at which the imports were taking place and the increase in installed capacity, there were reasonable indications of threat of injury to the domestic sugar industry.

5.382 Mexico disputes the United States' argument that the notice of initiation did not meet the requirements of Articles 12.1 and 12.1.1 of the AD Agreement. The investigation was initiated considering the relevant domestic industry as consisting of the domestic producers of the like product with closely resembling characteristics, and not the HFCS-producing companies in Mexico, which were excluded prior to the initiation of the investigation on the grounds that they had become the leading importers of the allegedly dumped product, in conformity with Articles 2.6 and 4.1 of the AD Agreement.

5.383 Mexico also disputes the argument by the United States that there is a contradiction between the notice of initiation and the notices of imposition of provisional anti-dumping measures and of imposition of definitive anti-dumping duties.

5.384 Mexico observes that the standing of the Sugar Chamber was established in the *Initiation Notice*, paragraph 25,<sup>304</sup> given that the definition of the relevant domestic industry – the domestic sugar industry – was established prior to the initiation of the investigation. In Mexico's view, Article 12.1.1 of the AD Agreement does not in any way require, as the United States alleges, that notices of initiation contain a detailed explanation of how the determination of the relevant domestic industry, on the basis of which the standing of the Sugar Chamber to apply for the initiation of the investigation was established in the notice at issue, was reached.

5.385 Mexico also observes that, in response to the arguments put forward by the importing and exporting companies during the preliminary stage of the investigation concerning the standing of the applicant, and pursuant to Article 12.2.1 of the AD Agreement,<sup>305</sup> which lays down the obligation for

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<sup>300</sup> Article 12.1.1(v) of the AD Agreement.

<sup>301</sup> Article 12.1.1(vi) of the AD Agreement.

<sup>302</sup> Article 12.1.1(iii) of the AD Agreement.

<sup>303</sup> Article 12.1.1(iv) of the AD Agreement.

<sup>304</sup> See also paras. 54 and 55 of the *Notice of Initiation*.

<sup>305</sup> Article 12.2.1 reads as follows:

"A public notice of the imposition of provisional measures shall set forth ... sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to matters of fact and law which have led to arguments being accepted or rejected ... " (emphasis added by Mexico).

a notice of the imposition of provisional anti-dumping measures to refer to the matters of fact and law which have led to the arguments of the interested parties being accepted or rejected, SECOFI determined, in paragraph 62 of the *Preliminary Determination*, that the Sugar Chamber had standing to request the initiation of the investigation. Thus, the preliminary determination concerning the standing of the Sugar Chamber referred to in paragraph 62 of the corresponding notice was in fact made in connection with the arguments of some of the interested parties<sup>306</sup> and on the basis of the information submitted by them during the preliminary stage of the investigation, with reference, as provided for in Article 12.2.1 of the AD Agreement, to the matters of fact and law which led to the arguments of the importing and exporting companies concerning the alleged lack of standing of the applicant being rejected.

5.386 Mexico disputes the argument by the United States that it was on the basis of information supplied by Almex and Arancia, provided after the initiation of the investigation, that SECOFI established the standing of the Sugar Chamber. The preliminary finding concerning the standing of the applicant in paragraph 62(b) of the *Preliminary Determination* is simply intended to fulfil the requirement laid down in Article 12.2.1 of the AD Agreement by establishing, among other matters of fact and law that must be included in the corresponding public notice, that the companies Almex and Arancia had declared that they were producers of HFCS in Mexico, that they were linked to the United States exporters, and that they themselves were the leading importers of HFCS. These statements were made by Almex and Arancia in their replies to the official questionnaire for importers filed during the preliminary stage of the investigation, in which they themselves repeat the fact already known to SECOFI before the initiation of the investigation that they were producers and leading importers, and in which they declare, in addition, their status as parties related to the exporters.

5.387 Mexico asserts, therefore, that the information provided by Almex and Arancia during the preliminary stage of the investigation became a matter of fact and law which, *inter alia*, added elements to SECOFI's analysis leading to the rejection of the arguments by the importing and exporting companies that questioned the standing of the Sugar Chamber, permitting SECOFI to confirm, as part of its preliminary determination, the standing of the Sugar Chamber established in paragraph 25 of the *Initiation Notice*. This was, in turn, consistent with the definition of the relevant domestic industry established prior to the initiation of the investigation.

5.388 Mexico asserts further that, in conformity with the requirements of Article 12.2.2 of the AD Agreement and without any incompatibility in respect of the previous public notices, paragraphs 113 and 430 to 441 of the *Final Determination* duties carefully set forth the grounds on which the investigating authority rejected the arguments presented during the course of the investigation by the importing and exporting companies, as well as by the exporting Member, concerning the standing of the applicant and the prior determination of the relevant domestic industry.<sup>307</sup> To that end, the above-mentioned paragraphs explain in greater detail the reasons why

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<sup>306</sup>Paragraph 62 of the *Preliminary Determination* states that:

"In connection with the arguments of the importing and exporting companies that the applicant does not have standing in that it does not represent the domestic producers of the identical product given that during the period investigated there was a domestic production of high fructose corn syrup, this Ministry determined that the National Chamber of Sugar and Alcohol Industries does have the standing to request the initiation of the investigation for the following reasons ... " (emphasis added by Mexico).

<sup>307</sup>Mexico maintains that the United States attempts to find a contradiction between SECOFI's statements in the initiation notice, in the preliminary determination, and in the final determination, concerning the reasons for excluding Almex and Arancia as the relevant domestic industry. In support of this contention, SECOFI refers to the incomplete quotation of paragraph 113(c) of the *Final Determination*. The complete text of this paragraph makes it perfectly clear that, during the preliminary stage of the investigation, Almex and Arancia provided information according to which SECOFI not only confirmed that these companies were

SECOFI, prior to the initiation of the investigation, had decided to exclude Almex and Arancia from the definition of the relevant domestic industry, and define that industry as the domestic sugar industry represented by the Sugar Chamber, which was consequently established as having the standing to apply for the initiation of an investigation as from the notice of initiation.

5.389 Mexico submits therefore that the United States is in error when arguing that there were inconsistencies between the information set forth in the final determination showing that SECOFI knew of the existence of domestic HFCS production at the time of initiation, and what the United States wrongly considers to be the alleged grounds "stated" by SECOFI in the notice of initiation; that is, "... the Sugar Chamber's allegation that there was no domestic production of HFCS ...",<sup>308</sup> contained in paragraph 7 of the *Initiation Notice* which, as Mexico has pointed out and the United States has recognized,<sup>309</sup> simply repeats one of several allegations by the applicant<sup>310</sup> reproduced in the *Resultandos* section, in accordance with the established structure of public notices. This does not in any way imply, however, that SECOFI stated that the allegation was the basis for initiating the investigation. Mexico states that, even if Articles 12.2.1 and 12.2.2 of the AD Agreement do not require that preliminary determinations and final determinations contain an explanation of the investigating authority's definition of the relevant domestic industry either, they do require that such notices contain an explanation of the grounds for accepting or rejecting the arguments of the exporters and importers, which was done in this case in respect of the standing of the Sugar Chamber. Thus, it was pursuant to the requirements laid down in Articles 12.2.1 and 12.2.2 of the AD Agreement concerning the required content of preliminary determinations and final determinations that the respective notices in this investigation contained, as an expression of the preliminary and final findings of SECOFI, the reasons for rejecting the arguments of the interested parties questioning the Sugar Chamber's standing established in the initiation notice and which was consistent with the determination of the relevant domestic industry made prior to the initiation of the investigation.

5.390 The United States submits that, once an investigating authority determines that there is sufficient evidence to initiate an anti-dumping investigation, Article 12.1.1 imposes the obligation to publish "adequate information" about what it found sufficient in a way which summarizes "the factors on which the allegations of injury is based". This obligation can be satisfied through the publication of a public notice, or by making a separate report containing "information and explanations" available publicly.

5.391 The United States contends that SECOFI's initiation notice found sugar to be the like product,<sup>311</sup> and that Mexico acknowledges that SECOFI repeated the Sugar Chamber's allegation that there was no Mexican production of HFCS.<sup>312</sup> Nothing, however, in SECOFI's initiation notice contains any indication that SECOFI excluded Almex and Arancia as domestic producers of the like product in order to find sugar to be the like product. Mexico's frequent statements regarding paragraph 25 of the *Initiation Notice* entitled "Legal Capacity" cannot transform its content into a determination to exclude Almex and Arancia from the domestic industry pursuant to Article 4.1(i).

5.392 The United States disputes Mexico's argument that, while Article 12.1.1(iv) requires that an investigating authority summarize the factors on which the allegation of injury is based, this does not require a summary of allegations with respect to the relevant domestic industry, "let alone adequate

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producers and at the same time the leading importers of HFCS, but also learned that such companies were related to the United States' exporters.

<sup>308</sup> See United States first submission, para 51.

<sup>309</sup> See United States first submission, paras. 52 and 54.

<sup>310</sup> See Mexico's first submission, footnote 68.

<sup>311</sup> *Initiation Notice*, para. 50, US-3.

<sup>312</sup> Mexico's first submission, paras. 183 and 189, *Initiation Notice*, para. 7, US-3.

information summarizing the factors upon which SECOFI excluded the HFCS producers".<sup>313</sup> In the United States' view, Mexico's assertion that SECOFI's initiation notice need not address the question of domestic industry is belied by the fact that the initiation notice includes a lengthy discussion of like product. This demonstrates that SECOFI considered that the requirement to provide "adequate information" on the "factors" pursuant to Article 12.1.1(iv) can, and in this case did, include the agency's like product determination. There is no textual or logical reason why it should not also have included the standing and domestic industry determination.

5.393 According to the United States, Mexico's interpretation of Article 12.1.1 is not permissible.<sup>314</sup> Mexico's interpretation of the obligation to provide "adequate information" on a "summary of the factors on which the allegation of injury is based" is that SECOFI did not need to provide any information or explanations regarding its definition of the domestic industry, either in a public notice or a separate report. Mexico draws an impermissible distinction between the terms "injury" and "domestic industry" to support its position that the concept of "domestic industry" is not a factor on which allegations of "injury" are based.

5.394 The United States asserts that under the scheme of Article VI of GATT 1994 and the AD Agreement, "injury" does not occur in the abstract. Injury is what occurs to a "domestic industry". The term "injury" itself is defined using the term "domestic industry". Article VI makes this clear in two places. Article VI:1 states that dumping "is to be condemned if it causes or threatens material injury to an established industry..". Article VI:6(a) states that "No contracting party shall levy any anti-dumping ... duty ... unless it determines that the effect of the dumping ... is such as to cause or threaten material injury to an established domestic industry..". Likewise, the AD Agreement specifically defines "injury" as something which occurs "to a domestic industry".<sup>315</sup> If the concept of domestic industry were not a factor on which allegations of injury must be based, industries could complain about imports which they do not produce and which are not "like" the products they produce. For this reason, in view of the fact that the Sugar Chamber's members did not produce HFCS, it was especially important for SECOFI to provide notice that there either were no HFCS producers or that the HFCS producers were being excluded as related parties. By publishing the former when it found the latter, SECOFI did not provide "adequate information" on an important factor on which the allegation of injury was based.

5.395 The United States asserts further that providing the requisite notice on "domestic industry" normally is not complicated. The investigating authority, conducting its examination under Articles 5.3 and 5.4, normally has sufficient evidence from the applicant, provided pursuant to Article 5.2, demonstrating that it or its members do produce the complained about product. This was not the case here. The Sugar Chamber undisputedly did not produce HFCS, and plainly alleged that there was no HFCS production. Regardless of whether that was all the information that was reasonably available to the Sugar Chamber, SECOFI did not accept this allegation. It decided that the domestic industry was the sugar industry not because the sugar producers also produced HFCS, but because it found HFCS to be the like product, but then excluded the producers of HFCS as related parties under Article 4.1(i). This was a factor on which the allegation of injury was based, and under Article 12.1.1, adequate information (*i.e.*, some statement) summarizing this needed to be in the initiation notice. There was no such statement.<sup>316</sup>

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<sup>313</sup> See Mexico's first submission, paras. 180, 187.

<sup>314</sup> The United States cites in this regard Article 17.6 (ii) of the AD Agreement.

<sup>315</sup> AD Agreement, Article 3, footnote 9.

<sup>316</sup> The United States disputes Mexico's argument that two paragraphs of the *Initiation Notice* (89 and 90) reflect SECOFI's determination that there was domestic HFCS production (Mexico's first submission, notes 58 and 60, and para. 191). Notably, Mexico never argues that these paragraphs demonstrate that SECOFI made a determination to exclude Almex and Arancia from the domestic industry. These paragraphs reflect that information submitted by the Sugar Chamber showed that Mexican companies had or

5.396 The United States submits that a Member's actions cannot be consistent with the notice requirements in Article 12.1.1 when the Member chooses to publish one of the applicant's allegations regarding production by the domestic industry, but the Member actually initiated on the basis of other -- directly contrary -- information in the application as to production by the domestic industry.<sup>317</sup> Consistent with the rules of treaty interpretation, SECOFI could not interpret its Article 12.1.1 obligation as allowing it to publish the information it found unreliable and omit the information it relied upon. This interpretation of "adequate information" is inconsistent with the ordinary meaning of that term, its context and in light of the object and purpose of the AD Agreement.<sup>318</sup>

5.397 The United States submits further that an inaccurate statement cannot provide "adequate information", and that a misleading statement cannot be made in good faith. Article 31(1) of the *Vienna Convention on the Law of Treaties*<sup>319</sup> (the Vienna Convention) states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose". Consistent with Article 12.1.1, SECOFI could not interpret this obligation as allowing it to publish the information it found unreliable and omit the information it relied upon. This interpretation of "adequate information" is inconsistent with the ordinary meaning of that term.

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would have the capacity to produce HFCS. Neither of those statements indicates that SECOFI concluded -- contrary to the affirmative allegation of the Sugar Chamber -- that there was HFCS production in Mexico at the time of initiation. In addition, despite ambiguous references to various other paragraphs of the *Initiation Notice* (for example, 25, 54 and 55), there is absolutely no mention in any of these paragraphs of a decision to exclude the domestic producers of HFCS from the domestic industry. Mexico argues that because this decision was made prior to initiation, the actual status of Almx and Arancia as producers of HFCS "lost significance" and did not need to be disclosed to the public. The United States asserts that this explanation as to why SECOFI did not include any statement relating to this factor on which the allegation of injury was based lacks complete merit and should be rejected by the Panel.

<sup>317</sup>The United States argues that, by publishing any of the Sugar Chamber's allegations regarding the production of HFCS, SECOFI itself acknowledged that it needed to address the issue of what domestic industry the applicant was seeking to represent.

<sup>318</sup>The Panel requested parties' comments on whether it can be argued that Article 6.2 of the AD Agreement requires investigating authorities to make public any determinations made prior to initiation where such determinations are or may be relevant to a party's arguments during the course of the investigation. In response to this request, the United States recalled paragraph 26 of its statement at the first panel meeting:

"The notice requirement of Article 12.1.1, in the context of the Agreement as a whole, is designed to ensure that all parties have a full opportunity for the defense of their interests [Article 6.2], including seeing all information that is relevant to the presentation of their case [Article 6.4]. Under the interpretation that Mexico would give to Article 12.1.1, an initiation notice would have exactly the opposite effect. Rather than reflecting that the authority rejected certain allegations of the applicant as insufficient, an initiation notice could, on Mexico's theory, simply repeat those allegations and hide the actual facts that the authority found to be sufficient. It is difficult to conceive of information that interested parties would find more relevant to the presentation of their case. Under Mexico's theory, an initiation notice may be a device for misleading respondents and their governments. This is a result that the Agreement does not countenance".

In the view of the United States, SECOFI's inaccurate initiation notice affirmatively directed the parties and the public away from the bases on which SECOFI was satisfied that there was sufficient evidence to initiate an investigation. SECOFI's decision to publish the Sugar Chamber's allegation of "no production" in the notice, and conceal both its knowledge of HFCS production and its determination to exclude those producers from the domestic industry, meant that the U.S. respondent parties had to - and continue to - engage in guesswork to challenge SECOFI's actions. Thus, as indicated early on in this proceeding, SECOFI's misleading initiation notice prevented the parties from having a full opportunity to defend their interests. *See Answer of the United States to question no. 7 by the Panel, 22 June 1999.*

<sup>319</sup>Vienna Convention, done at Vienna, 23 May 1969, 1155 U.N.T.S. 221; 8 International Legal Materials 679 (1969).



5.398 The United States argues that, if the requirement to provide "adequate information" is interpreted as Mexico urges, then an authority may find certain information to be "sufficient" for purposes of initiating an investigation under Article 5, but publish notice of completely different information as "adequate" under Article 12.1.1. Rather than reflecting that the authority rejected certain allegations of the applicant as insufficient, an initiation notice could, on Mexico's theory, simply repeat those allegations and omit the actual facts that the authority found to be sufficient for initiation. Mexico's argument ignores the plain language of the Agreement.

5.399 The United States also argues that, in addition to the terms of a treaty, Article 31(1) of the Vienna Convention calls for consideration of the context of treaty terms. In this case, other subsections of Article 12, as well as a number of other notice provisions in the Agreement, support the conclusion that the drafters did not intend for Members to be able to make misleading statements when providing public notification or when notifying parties under the provisions of the Agreement. The United States, in this regard, points to the following:

- Article 12.2* - Public notices of preliminary and final determinations.
- Article 12.2.3* - Public notice of the termination or suspension of an investigation.
- Article 12.3* - Public notice of initiation and completion of reviews under Article 11.
- Article 12.3* - Public notice of decisions to apply anti-dumping duties retroactively under Article 10.
- Article 5.5* - An initiating government must notify the government of the exporting party after receipt of a properly documented application and prior to proceeding to initiate.
- Article 6.1.3* - Authorities must provide the application to the known exporters and to the authorities of the exporting Member.
- Article 6.1* - Interested parties shall be given notice of the information which the authorities require.
- Article 2.4* - The authorities must indicate to the parties in certain circumstances what information is needed to ensure a fair comparison.
- Annex I(1)* - Investigating authority should inform the authorities of the exporting Member of its intention to carry out on-the-spot investigations.
- Annex I(4)* - Investigating authority should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.
- Annex I(5)* - Sufficient advance notice should be given exporting firms before on-the-spot visits are made.
- Annex II(6)* - Authorities should inform the supplying party if its evidence or information is not accepted and provide the reasons.

5.400 The United States concludes that, as can be seen from this illustrative list, the AD Agreement has numerous notice requirements, be they public notice requirements or requirements to notify the parties, including the exporting Members, either of actions the authority is considering taking or information that the authority requires. Viewed in the context of the AD Agreement, the notice requirement in Article 12.1.1 is thus part of a broad scheme to ensure that anti-dumping measures are imposed under conditions that are transparent for the parties, including the exporting Member, and that public notices actually provide accurate information to the parties and the public.

5.401 The United States notes that Article 12 is a new provision in the AD Agreement. It was added in the Uruguay Round, amending and elaborating upon other public notice requirements that were contained in the Tokyo Round Anti-Dumping Code. The negotiating history of this provision reflects that equity and fairness of process, in respect of the public notice requirements, was a concern of the drafters. In 1983, long before the completion of the Uruguay Round, Members were already clear on the need for enhanced public notice requirements, including those relating to initiation notices. They reflected this in a 1983 recommendation of the Committee on Anti-Dumping Practices, whose content, in very large part, formed the basis of Article 12. The recommendation states:

"The Committee recognizes that in order to ensure that anti-dumping investigations are conducted on a fair and equitable basis, and to enable parties to consider the possibility of legal recourse, it is essential that any decision taken by the investigating authority should be published together with the reasons which led to it. Publication shall be obligatory at the time of the initiation of an investigation, the application of provisional measures and the conclusion of the investigation (by the imposition of definitive duties, the acceptance of price undertakings or a negative finding)".<sup>320</sup>

5.402 Thus, in the view of the United States, the negotiating history of the AD Agreement confirms that its drafters intended that public notices, including notices of initiation, contain, at a minimum, accurate reflections of the decisions taken, otherwise, they would prevent parties from participation in the investigation on a fair and equitable basis.

5.403 The United States contends that SECOFI's initiation notice achieved precisely the opposite result of what the drafters intended and what the terms of the Agreement to provide "adequate information" on a "summary of the factors on which the allegation of injury is based" require. First, SECOFI's initiation notice did not include any statement documenting the determination Mexico claims SECOFI made to exclude Almex and Arancia from the domestic industry. Determinations under Article 4.1(i) are discretionary, and, therefore, when Members make them under Articles 5.1 and 5.4 (assessing under Article 5.3 the application's information provided under Article 5.2) in order to define the domestic industry for injury purposes at initiation, the initiation notice needs to state that such a determination was made. On the facts of this case, such a statement was required. Second, in this case, SECOFI's initiation notice was affirmatively misleading. Under no circumstances can a misleading initiation notice provide "adequate information" as required by Article 12.1.1. By publishing the Sugar Chamber's allegation of no production, and not publishing any statement about what information in the application it relied upon, SECOFI misinformed the parties and the public of the basis of a key factor on which it determined the allegation of threat of injury was based.

5.404 The United States asserts that the violation of Article 12.1.1 was borne out by the events of the investigation. The record shows that Almex and Arancia spent months and money trying to convince SECOFI that it improperly initiated the investigation because they were domestic producers of HFCS. These companies argued through the preliminary stage that SECOFI had made the wrong like product and domestic industry determinations, only to learn in the notice of preliminary determination that SECOFI had known, prior to initiation (and in spite of the Sugar Chamber's allegation which SECOFI published), that indeed there were domestic producers of HFCS, but that SECOFI had excluded them from the domestic industry as related parties.<sup>321</sup> Had SECOFI's initiation notice fulfilled the requirements of Article 12.1.1, this expenditure of time and resources would have been unnecessary.

5.405 The United States argues that the language of Article 12.1.1 is not neutral - it requires an investigating authority to provide adequate information on the factors on which the allegation of injury is based: "A public notice of the initiation of an investigation shall contain...".<sup>322</sup> If the objectives of the AD Agreement are to be achieved, investigating authorities must abide by all of its provisions. SECOFI's decision to choose not to respect Article 12.1.1 because it decided to exclude Almex and Arancia from the domestic industry "prior to" initiation is not permissible. Nor is its decision to publish the facts which it rejected and omit the facts on which it decided to initiate.

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<sup>320</sup>See Committee on Anti-Dumping Practices: Recommendation Concerning Transparency of Anti-Dumping Proceedings, ADP/17, adopted 15 November 1983, BISD/30S, 24, 26.

<sup>321</sup>Ironically, Arancia ultimately succeeded in getting SECOFI to find that it *was* an embryonic producer of HFCS. Notably, however, SECOFI did not treat Arancia as an industry member for purposes of conducting an injury determination under Article 3 of the AD Agreement.

<sup>322</sup>See AD Agreement, Article 12.1.1 (emphasis added by the United States).

5.406 Mexico disputes the argument made by the United States that the essential problem with the initiation notice was that it did not indicate the basis for initiating the investigation, because the notice contained no explanation concerning the determination of the relevant domestic industry. Mexico argues that it should be made clear that it was prior to the initiation of the investigation, not "in initiating" or "at the time of initiation", that SECOFI concluded that the relevant domestic industry for the purposes of the investigation was the sugar industry.

5.407 Mexico states that the United States' position is absurd since it seeks to draw a parallel between the definition of the relevant domestic industry and the "basis" for the initiation of an anti-dumping investigation.

5.408 Mexico contends that the determination of the relevant domestic industry is a determination to be made by the investigating authority prior to the initiation of an investigation in the context of the obligations derived from Article 5 (paragraphs 1 and 4 in particular).

5.409 Mexico recalls in this connection that the Panel which examined the *United States-Cement and Clinker* case found that the very purpose of Article 5 of the AD Agreement is "to ensure that certain conditions be met before the initiation was decided upon"<sup>323</sup> (emphasis added by Mexico). This finding together with anti-dumping practice actually suggest that this is a determination which must be made by the authorities prior to the decision to initiate, since basically it is made in order to ascertain whether the application was submitted by or on behalf of the relevant domestic industry, that is to say, whether or not the party applying for an investigation is in principle entitled in terms of standing to apply for such initiation.

5.410 In Mexico's view, what this implies is that the determination concerning the domestic industry, rather than constituting the "basis" for the initiation decision, is a necessary precondition for establishing the grounds for initiation in the light of the existence of dumping, threat of injury and the causal link.

5.411 According to Mexico, it also follows that an essential requirement of Article 12.1.1 is that the notice of initiation should contain the basis on which dumping is alleged in the application (subparagraph (iii)) and a summary of the factors on which the allegation of injury is based (subparagraph (iv)).

5.412 Mexico reiterates that the argument developed by the United States to the effect that the notice of initiation did not comply with the requirements of Article 12.1.1(iv) of the AD Agreement is based on an excessive and impermissible interpretation of the requirements of subparagraph (iv), relying on a false interpretation of the scope of footnote 9 of the AD Agreement.

5.413 Mexico states that it does not deny the scope of footnote 9. However, the true scope of that footnote implies that, pursuant to subparagraph (iv) of Article 12.1.1, the notice of initiation must contain a summary of the factors on which the allegation of material injury, threat of material injury or material retardation – as the case may be – is based, in respect of the domestic industry previously defined as relevant. However, interpreting the term "injury" in subparagraph (iv) of Article 12.1.1 to create or impose on Mexico obligations which the AD Agreement itself does not establish with regard to the content of notices of initiation is definitely and unduly excessive.

5.414 Mexico contends that, if the intention of the negotiators of this provision had been to impose the obligation that initiation notices contain information concerning the determination of the relevant domestic industry, that would have been reflected in the drafting of subparagraph (iv) of

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<sup>323</sup>This was the finding of the Panel which examined the case *United States-Cement and Clinker*. See *United States-Cement and Clinker Panel Report*, para. 5.37.

Article 12.1.1, or the inclusion of another subparagraph along the same lines would have been considered. But that was not the case.

5.415 Mexico notes that, on the contrary, the obligation laid down by Article 12.1.1(iv) was clearly limited to the inclusion in initiation notices of a summary of the factors on which the allegation of injury or, as in this case, of threat of injury is based, in accordance with the scope of footnote 9. This provision does not require that initiation notices should contain information on the "factors" considered in defining the relevant domestic industry alleged to be injured.

5.416 Mexico is of the opinion that an investigating authority in a specific country can decide that its initiation notices contain information relating to its determination concerning the relevant domestic industry, if that investigating authority so wishes, but no such obligation is contained in the AD Agreement.

5.417 Mexico contends that the definition of the relevant domestic industry is made prior to the initiation of an investigation and that, even before the decision to initiate is taken, it is in the light of that prior determination that the grounds are established which, at a given point in time, might justify the initiation, on the basis of an examination of the information and evidence contained in an application concerning dumping, threat of injury and the causal link, and the corresponding publication of notice of initiation. The notice in question should include the information summarizing the basis on which injury is alleged, in the relevant terms and only in those terms, *i.e.* injury to the domestic industry previously defined as relevant and alleged to have been injured.

5.418 According to Mexico, the argument by the United States that the initiation notice does not comply with the requirements of Articles 12.1 and 12.1.1 is inappropriate and out of place, since it erroneously relies on a clearly excessive and impermissible interpretation of the AD Agreement. Given the obligations imposed on Mexico by Article 12, there was no reason for the notice of initiation to include information on the determination of the relevant industry. The summary of the factors on which the allegation of threat of injury was based was related to the sugar industry – the domestic industry previously defined as relevant. Consequently, paragraphs 61 to 98 of the *Initiation Notice* contain the summary required by subparagraph (iv) of Article 12.1.1, which shows that the domestic sugar industry could be affected by allegedly dumped imports.

5.419 Mexico reiterates that it is important to clarify the distinction between the allegations of the applicant, which are simply reproduced or repeated in the "*Resultandos*" section of an initiation notice (as in the case of paragraph 7) and other matters which, on being substantiated by adequate information and evidence, may be adopted by SECOFI in the "*Considerandos*" section, where the grounds for the initiation are established, relating basically to the standing of the applicant, the period investigated, the analysis of dumping and the analysis of injury and causal link. Thus, paragraph 7 of the public notice of initiation simply repeats or reproduces a claim made by the Sugar Chamber as was done in many other paragraphs of the *Resultandos* section with respect to other claims, information and evidence contained in the application. The foregoing may be illustrated by reference to paragraphs 2, 13-16, 18, 20, 22 and 23 of the notice of initiation, which, like paragraph 7 of the notice, simply repeat or reproduce in the same *Resultandos* section various points concerning other claims, information and evidence produced or provided by the applicant.

5.420 Mexico disputes the United States' argument that the interpretation of Article 12.1.1 suggested by Mexico would imply that information found to be sufficient for purposes of initiation under Article 12.1 may lead to the publication of a notice containing information "completely different" from that considered as sufficient. What Mexico argues is simply that the obligations derived from the various provisions of Article 5 are different in scope from the requirements regarding the content of initiation notices under Article 12.1.1 of the AD Agreement.

5.421 In the view of Mexico, it is true that the Article 12.1 requirement to issue a notice of initiation arises when the investigating authorities are satisfied that there is sufficient evidence to justify the initiation of an investigation pursuant to Article 5. However, the United States confuses the obligations derived from the various provisions of Article 5 of the AD Agreement with the provisions of Article 12.1 and, in particular, with the requirements under Article 12.1.1 of the AD Agreement with regard to what should be contained in public notices of initiation of an investigation.

5.422 Mexico reiterates that the purpose of the provisions of Article 5 of the AD Agreement is "to ensure that certain conditions be met before the initiation [of an investigation is] decided upon" (emphasis added by Mexico). Further evidence that the suggestions made by the United States are inconsistent with the legal requirement contained in Article 12.1.1 can be found in the text of a draft recommendation, not yet adopted, concerning matters to be included in preliminary affirmative determinations, which was recently proposed at the Ad Hoc Group on Implementation of the Committee on Anti-Dumping Practices, which is submitted to the Panel for consideration as Exhibit MEXICO-57. This draft recommendation reads as follows:

"The Committee considers that guidelines for the matters to be included in such preliminary affirmative determination would be useful. The Committee recognizes that Article 12.2 of the Agreement specifies the contents of the public notice of a preliminary affirmative determination. This recommendation concerning matters to be included in preliminary affirmative determinations is without prejudice to the question of contents of the public notice of such determination (emphasis added by Mexico).

In light of the foregoing considerations, the Committee recommends that, as a general rule, preliminary affirmative determination should include the following matters: One, "the name(s) of the domestic producers submitting the application, the names of other domestic producers, and the names of the importers and the exporters of the product".; and two, the "information concerning the domestic like product and industry, including if relevant information regarding the exclusion of any related producers" (emphasis added by Mexico).

5.423 Mexico observes that, in paragraph 85 of its second submission, the United States cites a recommendation adopted in 1983 by the Committee on Anti-Dumping Practices and remarks that its content, in very large part, formed the basis for Article 12. This recommendation states that: "Publication shall be obligatory at the time of the initiation of an investigation ...", which indicates that Mexico's obligation to publish the decisions of the investigating authority begins with the initiation of the investigation, *i.e.* the decisions taken prior to initiation do not need to be included in the notice of initiation if the AD Agreement does not so require. Thus, the recommendation cited by the United States supports Mexico's position that Article 12 did not require SECOFI to include in the notice the decision to exclude Almex and Arancia from the relevant domestic industry since it was a determination made prior to the decision to initiate the investigation. According to Mexico, the purpose of Article 12.1 is to establish the point in the procedure at which the initiation notice should be published, and that point is reached precisely once the authority has satisfied itself as to the sufficiency of evidence to justify the initiation pursuant to Article 5 and once it has decided, on the basis of such sufficiency, to initiate an investigation. On the other hand, Article 12.1.1 of the AD Agreement lists the specific elements required to be contained in the public notice of initiation, which include, *inter alia*, the basis on which dumping is alleged in the application and a summary of the factors on which the allegation of injury is based.

5.424 Mexico asserts that the notice of initiation of an investigation is published once it has been ascertained that there is sufficient evidence to justify initiation and after the decision to initiate has been taken. In this connection, the obligation to make sure of the sufficiency of the evidence, pursuant to Article 5, is a prerequisite for proceeding to publish an initiation notice, the content of

which must basically comply with the requirements laid down in Article 12.1.1. This by no means reflects any "duplicity", nor does it suggest that a notice should be published containing "completely different" information from that found to be sufficient under Article 5.

5.425 Mexico also asserts that the scope of Article 5 should not be confused with that of Articles 12.1 and 12.1.1. The text, context, object and purpose of the latter in no way imply that the initiation notice must necessarily reflect all the actions, findings or decisions of the authority, set forth in the various provisions of Article 5 of the AD Agreement, nor even that the initiation notice should reproduce all the information provided in the application. This follows from the actual wording of Article 12.1.1 of the AD Agreement; for example, in the use of the word "summary".

5.426 Mexico disputes the argument by the United States that the position taken by Mexico in relation to Article 12.1.1 would result in parties not having a full opportunity to defend their interests by making the following points. First, the *Initiation Notice*, in accordance with Mexican practice, was remarkably full and detailed, informing the interested parties of the grounds justifying initiation of the investigation, including details of the standing of the Sugar Chamber (paragraph 25) and the period of investigation, as well as, inter alia, the basis on which dumping was alleged in the application and a summary of the factors on which the allegation of threat of injury to the sugar industry was based, in accordance with the content requirements set out in Article 12.1.1 of the AD Agreement. Second, there is no basis for affirming that the parties were unaware of the grounds on which SECOFI initiated the investigation, since the interested parties had every opportunity to defend their interests. In fact, from the time of publication of the initiation notice and throughout the various stages in the procedure, the parties submitted all the arguments and claims they considered relevant to their defence, and SECOFI duly responded to them, as is clear from the administrative file and the subsequent public notices concerning the investigation. At the same time, the parties had every opportunity to take cognizance of and access the information contained in the administrative file, for the purpose of devising an adequate defence of their interests.<sup>324</sup>

5.427 Finally, Mexico asserts that it has never suggested that Exhibit MEXICO-13 is a separate report under Article 12. Mexico's position is that Article 12 does not require the public notice of initiation to contain information on the determination of the relevant domestic industry.

5.428 The United States points out that the recommendation of the Ad Hoc Group on Implementation of the WTO Committee on Anti-Dumping Practices is only an unadopted draft currently under discussion about which numerous Members, including the United States, have indicated concerns.

#### D. ALLEGED VIOLATIONS REGARDING THE FINAL DETERMINATION

##### 1. Consideration of Article 3.4 Factors In A Threat of Injury Determination

5.429 The United States notes that, in the final determination, SECOFI concluded that the Mexican sugar industry was threatened with material injury because of dumped HFCS imports from the United States.<sup>325</sup> SECOFI based this conclusion upon the growth in imports relative to domestic consumption, "giving [SECOFI] reasonable cause to expect a sharp rise in these imports in the immediate future".<sup>326</sup> In addition, SECOFI stated that increasing HFCS capacity and production in the United States and "steady growth in the local soft drink market" gave SECOFI "reasonable cause to expect a large hike in exports dumped on the Mexican market at discriminatory prices".<sup>327</sup> Finally, SECOFI found that, because HFCS imports significantly undersold "locally manufactured products",

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<sup>324</sup> In this regard, Mexico cites MEXICO-46.

<sup>325</sup> *Final Determination*, para. 552, US-1.

<sup>326</sup> *Id.* paras. 468-70.

<sup>327</sup> *Id.* paras. 486-87.

there would be "a jump in the demand for additional imports at these same discriminatory prices in the immediate future, forcing sugar prices downward".<sup>328</sup> However, aside from an unsupported assertion regarding the domestic industry's potential cash flow and loan repayment problems if dumping were to continue<sup>329</sup>, SECOFI's threat determination does not assess the likely economic impact of HFCS imports on the domestic sugar industry.

5.430 According to the United States, SECOFI argued in its First NAFTA Panel Submission that while the economic factors and indices of Article 3.4 of the AD Agreement are relevant to a determination of material injury, they are not relevant to a determination of threat of material injury. The United States asserts that during the 12 June 1998 consultations with the United States, Mexico expressed the same view.<sup>330</sup>

5.431 The United States disputes that Article 3.7 of the AD Agreement is more specifically addressed to a threat determination than Article 3.4. The United States also disputes that the economic factors and indices in Article 3.4 need not be evaluated in a threat determination. Article 3.4 is itself framed in terms directed to a threat determination. It refers to an "actual and potential decline in sales, profit, output, market share, [etc.]" and "actual and potential negative effects on cash flow, inventories, employment, [etc.]" (emphasis added by the United States). The use of the word "potential" necessarily entails a prospective, or future-looking, analysis of the economic factors, which is the touchstone of a threat of material injury determination. Obviously, in addition to historical trends, future projections regarding the relevant economic factors set forth in Article 3.4 are relevant to a threat determination. Neither SECOFI's determination nor its assertions in the NAFTA dispute can be reconciled with the text of the AD Agreement, which required SECOFI to consider the likely condition of the domestic industry, including the economic factors set forth in Article 3.4, in making its threat of material injury determination.

5.432 The United States argues that SECOFI's proposed narrow reading of the AD Agreement ignores the fact that the AD Agreement defines the term "injury" broadly to include threat of material injury:

"Under this Agreement the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of [Article 3]".<sup>331</sup>

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<sup>328</sup>*Id.* para. 527. SECOFI concluded that available inventories of HFCS from the United States were not significant to its analysis of threat of material injury, since the physical and chemical characteristics of HFCS prevented its long-term storage. *Id.* para. 528.

<sup>329</sup>*Id.* para. 531. Additionally, although SECOFI noted that it had some information showing a potential impact from dumped imports on the future investment projects of some sugar mills, it concluded that "it did not [have] sufficient information at its disposal to evaluate the overall status of investment projects in the sugar industry". *See id.* paras. 529-30.

<sup>330</sup>*See* US-8. SECOFI based this argument on the general principle that specific legal guidelines take precedence over general legal guidelines. Given that Article 3.7 of the AD Agreement provides for the evaluation of certain specific factors in a threat determination, while Article 3.4 in its view does not specifically indicate that the economic factors and indices set forth therein must be evaluated in a threat determination, SECOFI reasoned that Article 3.4 must be read as pertaining only to an injury determination and not to a threat determination. Accordingly, SECOFI concluded that, in order to make a threat determination, the investigating authority needed only consider the specific "threat" factors of Article 3.7 and needed not consider the economic factors of Article 3.4. *See* Brief of the Investigating Authority (SECOFI) Before the Binational NAFTA Panel, NAFTA Secretariat File No. MEX-USA-98-1904-01, 21 August 1998, at Part 12(D), pp. 481-82 (English Translation and Spanish original), US-10(a).

<sup>331</sup>AD Agreement, footnote 9 (emphasis added by the United States).

Accordingly, Article 3.4, which by its terms sets forth the impact factors for purposes of a determination of "injury" (Article 3.1), also applies on its face to a determination of threat of injury.

5.433 The United States further argues that, even if Article 3.4 addressed only "material injury", rather than "injury" defined to include threat, and even if Article 3.4 did not on its face speak to "potential" impacts, the terms of Article 3.7 itself would still require an examination of the likelihood of future "material injury" and the imminent prospects for the kinds of effects that would give rise to a current material injury determination. Article 3.7 states that: (1) "[t]he change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent" (emphasis added by the United States); and (2) the investigating authorities must conclude that "further dumped exports are imminent and that, unless protective action is taken, material injury would occur" (emphasis added by the United States).<sup>332</sup> SECOFI could not reach either of these conclusions in the absence of an analysis of the economic factors set forth in Article 3.4. In short, Article 3.7 by its own terms refers to the standards for determining material injury. Such an inquiry could not in principle be undertaken without examination of the factors set forth in Article 3.4.

5.434 The United States contends that SECOFI's proposed interpretation of the AD Agreement ignores the nonexclusive terms of Article 3.7 itself. Article 3.7 only states that in making a threat determination the investigating authority "should consider, *inter alia*, such factors as" the enumerated factors set forth in Article 3.7(i)-(iv). The use of permissive, rather than mandatory, language (*i.e.*, "should consider"), and of the Latin term "*inter alia*" (*i.e.*, "among other things"), clearly implies that a number of factors other than those specifically enumerated may also be relevant to a threat determination. Furthermore, the use of permissive language in Article 3.7 (*i.e.*, "should consider"), in contrast to the mandatory language of Article 3.4 (*i.e.*, "The examination of the impact of the dumped imports on the domestic industry concerned shall include.."). (emphasis added by the United States)), indicates that Article 3.7 is meant to complement Article 3.4, rather than to apply in isolation. Accordingly, Article 3.7 by its own terms does not "trump" Article 3.4 and cannot mean that the investigating authority is not to consider other relevant economic factors, such as those set forth in Article 3.4, in making a determination of threat of material injury.

5.435 The United States asserts that the foregoing reasoning is consistent with that of the *Guatemala-Cement* panel, which found, at Mexico's urging, that the likely condition of the industry is relevant to an assessment of threat of injury in an anti-dumping investigation.<sup>333</sup> Although that panel's findings related to an assessment of threat of injury for purposes of initiation, its reasoning -- that the economic factors set forth in Article 3.4 are relevant to an assessment of threat of injury -- is equally, if not more, applicable to an assessment of threat of injury for purposes of a final determination, because the evidentiary standard for a final determination is higher than for initiation.<sup>334</sup> The *Guatemala-Cement* panel's finding was consistent with Mexico's contentions in that dispute that the economic factors bearing on the likely state of the domestic industry set forth in Article 3.4 were relevant to the decision whether to initiate the anti-dumping investigation, and hence should have been included in the domestic industry's application claiming that Mexican imports

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<sup>332</sup>See also *Korea-Resins*, para. 271 ("a proper examination of whether threat of material injury was caused by dumped imports necessitated a prospective analysis of a present situation with a view to determining whether a 'change in circumstances' was 'clearly foreseen and imminent'") (emphasis added by the United States); *id.* para. 273 (noting that "the Panel ... examined whether the [investigating authority's] determination [of threat of material injury] included an analysis of relevant future developments regarding the condition of the domestic industry and the volume and price effects of the imports under investigation") (emphasis added by the United States).

<sup>333</sup>See *Guatemala-Cement Panel Report* para. 7.74.

<sup>334</sup>*Id.* para. 7.57 ("the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation"); accord *United States-Lumber Panel Report*, para. 332.



threatened the domestic industry with material injury.<sup>335</sup> Given Mexico's arguments before the *Guatemala-Cement* panel, it is difficult to understand why Mexico now maintains that the likely state of the domestic industry and the relevant economic factors set forth in Article 3.4 are not relevant to a threat determination.

5.436 In the view of the United States, SECOFI's assertion - that a determination of threat of material injury does not require an assessment of the likely impact of imports and the relevant economic factors set forth in Article 3.4 - is clearly not what the AD Agreement intended. If this reading of the AD Agreement were correct, then an investigating authority could merely evaluate the likely trends in, and projections of, volume increases, capacity increases, prices, and increases in inventories with respect to the dumped imports (*i.e.*, the four specific threat factors set forth in Article 3.7(i)-(iv)), without ever considering whether those imports would have any impact whatsoever on the pertinent domestic industry. Such a result is contrary to the plain language of both Articles 3.4 and 3.7.

5.437 The United States also holds that failure to consider the likely effect of dumped imports on the pertinent domestic industry in determining threat of material injury violates Article VI of GATT 1994. Article VI:6(a) of that agreement provides:

"No contracting party shall levy any anti-dumping ... duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping ... is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry" (emphasis added by the United States).

In addition, Article VI:1 of GATT 1994 provides that "[t]he contracting parties recognize that dumping ... is to be condemned if it causes or threatens material injury in the territory of a contracting party or materially retards the establishment of a domestic industry" (emphasis added by the United States). In light of the foregoing discussion, a contracting party cannot determine that the dumped imports "threaten material injury" (emphasis added by the United States) to a domestic industry without examining their likely impact on the domestic industry.

5.438 The United States argues that, although SECOFI concluded that dumped imports would increase, it did not meaningfully analyse the likely effect (if any) that this increase would have on the domestic industry. SECOFI could have examined several economic factors that were clearly relevant to an assessment of the impact of dumped imports on the domestic industry in this investigation. But it did not. For instance, SECOFI did not evaluate any actual and potential decline in the domestic industry's return on investments. Furthermore, the final determination contains no discussion of the domestic industry's capacity utilization, overall capacity trends, and projections of future capacity, including whether the domestic industry's production capacity or capacity utilization would likely decline as a result of increasing HFCS imports; or whether the domestic industry would likely maintain stable or increasing capacity utilization levels by increased production and sales to household customers (where no one disputes that HFCS imports do not compete with sugar).<sup>336</sup>

5.439 The United States also argues that SECOFI did not provide any discussion of employment trends and projections within the domestic industry either. In paragraph 443 of the *Final Determination*, SECOFI notes that the petitioner indicated "direct employment for approximately 385,000 workers [in the sugar cane industry], including sugar cane planters, day labourers, crop harvesters, mill workers, confidential clerks, drivers and pensioners". This passing reference to data provided by the petitioner, while interesting, has little probative value, inasmuch as: (1) it does not

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<sup>335</sup> See *Guatemala-Cement Panel Report*, paras. 4.127, 4.154.

<sup>336</sup> See, e.g., *Final Determination*, para. 463, US-1 (noting that "household consumption ... was never threatened by the presence of imports of HFCS from the United States of America").

address the question of actual and potential negative effects on employment due to dumped imports; and (2) the domestic industry defined by SECOFI clearly did not encompass sugar cane planters, harvesters, and pensioners. Accordingly, SECOFI failed to evaluate the "actual and potential negative effects on ... employment", in accordance with Article 3.4 of the AD Agreement, within the relevant domestic industry arising from the impact of dumped imports. Finally, the list of "economic dependents" in Exhibit 4.3(iii) of the Sugar Chamber's application, from which SECOFI obtained the figure of 385,000 workers, appears to be a static number (apparently for the current year or at the time of the filing of the application) and does not indicate employment levels in prior years or estimates of employment levels in future years. Indeed, in its First NAFTA Panel Submission, SECOFI conceded that it did not conduct an analysis of the domestic industry's employment and that it was simply quoting the Sugar Chamber's application at this point in the final determination.<sup>337</sup>

5.440 Additionally, the United States observes that SECOFI provided no meaningful discussion in the final determination of any "actual and potential decline[s] in the domestic industry's sales, profits, output, [and] market share". While paragraph 521 of the *Final Determination* notes that the domestic industry's "sugar sales to industrial consumers on the domestic market in 1996 were down from the previous year", SECOFI did not describe the domestic industry's sales during other years and periods, much less projections of likely sales trends in the future. Nor did SECOFI discuss the sugar industry's sales to other customers (e.g., household consumers). Accordingly, SECOFI's statement that the sugar industry's sales to industrial customers "in 1996 were down from the previous year" is largely meaningless in assessing the impact of imports on the industry. Even in 1996, it is entirely possible that the sugar industry's overall sales may not have declined (or may have even increased), because its sales to other customers may have increased in an amount equal to or exceeding the decline in sales to industrial customers.

5.441 Furthermore, the United States argues that, as a consequence of SECOFI's failure to provide an evaluation of the domestic industry's sales, profits, output, and market share, SECOFI also failed to discuss overall trends in, and projections of, consumption of sweeteners (both HFCS and sugar) in Mexico.<sup>338</sup> While SECOFI discussed domestic consumption and market share for sales to industrial sugar consumers,<sup>339</sup> it did not address overall consumption levels. Again, therefore, SECOFI's analysis of consumption in the portion of the industry serving the industrial sugar market is largely meaningless in assessing the overall impact of imports on the domestic industry. As with SECOFI's analysis of sales, it is entirely possible that the domestic industry's share of total domestic consumption would not decline as a result of increasing HFCS imports, if the domestic industry increased its sales to other customers, such as household consumers of sugar.<sup>340</sup> Indeed, the Sugar

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<sup>337</sup>See SECOFI NAFTA brief Part 12(D)(e), p. 490 (English Translation) and Spanish original, US-10(b).

<sup>338</sup>Obviously, domestic consumption is a function of overall sales (plus any internal transfers that are captively consumed) by the domestic industry and importers, minus exports.

<sup>339</sup>See, e.g., *Final Determination*, paras. 461, 464-65, 468, US-1.

<sup>340</sup>Although consumption itself is not one of the economic factors and indices specifically enumerated in Article 3.4, as previously noted, it is a function of economic factors (i.e., sales) that are specifically enumerated in that Article. In addition, market share, which is specifically mentioned in Article 3.4, is a function of consumption and sales. Moreover, other paragraphs of Article 3 specifically mention consumption as a relevant economic factor and hence support the conclusion that SECOFI should have evaluated the overall levels of sugar consumption in assessing the impact of imports on the domestic industry. Article 3.5 of the AD Agreement notes that an analysis of "contraction in demand or changes in the patterns of consumption" (emphasis added by the United States) may be relevant to determining whether the requisite causal nexus exists between the dumped imports and the injury. Since the AD Agreement defines the term "injury" as including threat of injury (see AD Agreement, footnote 9) and Article 3.7 states that "The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent" (emphasis added by the United States), a consideration of whether dumped imports are causing threat of injury to the domestic industry is clearly essential to a determination of threat of injury. In addition, Article 3.2 provides that, "With regard to the volume of the dumped imports, the investigating authorities shall consider

Chamber's application requesting the initiation of this investigation states that "national consumption of sugar maintains its traditional growth level at the rhythm of population growth, the effect of which is to raise prices".<sup>341</sup> Given the applicant's acknowledgement that overall sugar consumption was growing in pace with Mexican population growth, it is speculative that increasing HFCS imports would have affected the domestic industry's total share of consumption and would likely do so in the imminent future.

5.442 In the view of the United States, although SECOFI noted that the domestic industry might experience cash flow and loan repayment problems if dumping were to continue (*see Final Determination*, para. 531), SECOFI's findings were clearly insufficient to establish the likely impact of dumped imports on the domestic industry. SECOFI did not analyse whether, and to what extent, a downturn in one market served by the sugar industry (*i.e.*, in sales to industrial customers) would impede the domestic industry's cash flow and ability to pay its debts. Moreover, as with SECOFI's inadequate analysis of overall sales and consumption, it is entirely possible that the domestic sugar industry would maintain stable, or even increasing, profitability and cash flow, by increasing sales and/or prices to household customers, despite decreasing sales to industrial customers.

5.443 Accordingly, the United States contends that SECOFI violated Articles 3.1, 3.4 and 3.7 of the AD Agreement in performing its threat of material injury analysis by failing to analyse a number of the relevant economic factors that were clearly relevant in this investigation bearing on the likely condition of, and the potential adverse impact from imports on, the domestic industry.

5.444 Mexico disputes the argument by the United States that SECOFI did not assess the likely impact of HFCS imports on the domestic sugar industry, that it did not consider the economic factors set forth in Article 3.4 of the AD Agreement; and that it did not make an exhaustive analysis of those factors.

5.445 Mexico maintains that SECOFI's final determination of threat of injury was based on an assessment of the impact of dumped HFCS imports on the domestic sugar industry, including an assessment of the various economic factors set forth in Articles 3.2, 3.4 and 3.7 relevant to this case in particular, on account that they had a crucial bearing on the state of that industry.

5.446 Mexico notes that the relevant economic factors that enabled SECOFI to examine the impact of dumped HFCS imports on the domestic sugar industry and the imminence of future dumped imports include:<sup>342</sup>

- (a) the rate of increase of dumped imports, the effects on the domestic market, and the likelihood of an increase in such imports in the future;
- (b) the exporter's freely disposable capacity and the likelihood and imminence of further exports to Mexico, considering the availability of other markets to absorb such exports;
- (c) the prices of the imports, the likely effect on domestic prices and the likelihood that in the future the dumped prices would increase the demand for future imports;
- (d) HFCS inventories;
- (e) domestic sales;

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whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member" (emphasis added by the United States).

<sup>341</sup>Application, p. 32, US-4.

<sup>342</sup>*See Final Determination*, paras. 448-550, MEXICO-6.

- (f) increasing market share of the imports under investigation;
- (g) factors affecting domestic prices;
- (h) magnitude of the margin of dumping;
- (i) return on investments; and
- (j) cash flow.

5.447 Mexico argues that a cumulative assessment of all these factors led SECOFI to the well-founded conclusion that, since imports were dumped and in view of their consequent effects on the domestic sugar industry (the impact of the imports), and future imports at dumped prices were imminent, a change in circumstance was clearly foreseeable and would produce a situation in which, unless anti-dumping duties were imposed, material injury to the domestic industry would occur. In other words, Mexico holds that, from a comprehensive examination of all the factors deemed relevant by the investigating authority, it was clear that during the period of investigation there had been a threat of injury to the domestic sugar industry and that, unless an anti-dumping measure was adopted, imports at dumped prices would continue and cause material injury to that domestic industry. Mexico asserts that the analysis of each of these factors is contained in the final determination. As observed in the notice, SECOFI's analysis involved various factors set forth both in Article 3.7 and in Articles 3.2 and 3.4 of the AD Agreement.

5.448 In response to a question from the United States, Mexico stated that factors cited by the United States, such as capacity, production, market share, employment and industry profitability, as well as other factors set forth in Article 3 of the AD Agreement, may be relevant in conducting a threat of injury analysis. However, in Mexico's view, this examination must take into account the peculiarities of each investigation in order that the investigating authority determines which factors have a bearing on the state of the domestic industry and should be taken into consideration in reaching the final determination.<sup>343</sup>

5.449 In response to another question from the United States, Mexico asserted that SECOFI does not have the practice to include in its final determinations a specific section, establishing in advance which of the factors of Article 3 of the AD Agreement will or will not be taken into account in its analysis of injury or threat of injury. The AD Agreement does not lay down any specific obligation in this respect. Thus, SECOFI's practice is to include directly in its final determinations the analysis and conclusions concerning the factors that were in fact considered in conformity with the AD Agreement.<sup>344</sup>

5.450 Mexico states that it is important to note that the points cited by the United States from the report of the *Korea-Resins* Panel do not in any way establish that the investigating authority must, as the United States alleges, assess all of the factors set forth in Article 3.4 of the AD Agreement. In fact, the Panel in question ruled that there are differences between the criteria for affirmative determinations of injury and threat of injury, and emphasized that a distinctive feature of the latter analysis was the assessment of the clearly foreseeable and imminent existence of a change in circumstances. Similarly, that Panel confirmed that a threat of injury determination was subject, in

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<sup>343</sup>See Answer of Mexico to question no. 2 by the United States, 6 May 1999.

<sup>344</sup>See Answer of Mexico to question no. 4(c) by the United States, 6 May 1999.

particular, to the requirements of Article 3.6 of the Anti-Dumping Code,<sup>345</sup> i.e. Article 3.7 of the present AD Agreement.

5.451 According to Mexico, it is totally out of order for the United States to suggest to this Panel that, in making its threat of injury determination, SECOFI should have made an exhaustive analysis of the factors mentioned in Article 3.4 of the AD Agreement,<sup>346</sup> especially in view of what the United States has regarded as sufficient and consistent with the requirements of the AD Agreement in other panels.

5.452 Mexico asserts that it is difficult to reconcile the stance the United States now takes in this Panel proceeding with the position the United States adopted in *Guatemala-Cement* regarding the scope of the analysis that should be performed by investigating authorities in a threat of injury case. Mexico observes that, in *Guatemala-Cement*, the United States argued that, for the purpose of a either an injury or a threat of injury determination, the AD Agreement does not require an analysis of all the factors enumerated in Articles 3.4 and 3.7 and that, on the contrary, the actual text of those Articles acknowledges the ability of investigating authorities to discern the comparative importance of each factor, depending on the particular circumstances of the case involved:

"5.52 ... while Guatemala's preliminary determination did not address all of the factors in Articles 3.4 and 3.7, the United States suggests that it was not necessary to do so. Neither of those Articles requires discussion of all of the listed factors in an injury or threat of injury determination. Moreover, the United States recalls that each Article also specifically includes a proviso that the lists are not exhaustive and no single factor or group of factors is decisive, recognizing the ability of national authorities to discern the importance of each factor in the particular circumstances of each investigation".<sup>347</sup>

Accordingly, in the view of Mexico, for the United States an affirmative threat of injury determination under the AD Agreement does not require an exhaustive analysis of the factors mentioned in Articles 3.4 and 3.7 of the AD Agreement.

5.453 Mexico notes further that the United States also contended in the same Panel that:

"The nature of information relevant for a threat case may be substantially different from that which is pertinent in a present injury case. Article 3.7 acknowledges this distinction in connection with determinations involving threat of injury..."<sup>348</sup>

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<sup>345</sup>Article 3.6 of the Tokyo Round Anti-Dumping Code stated: "A determination of a threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent".

In this regard it is relevant to point to the conclusion reached by the Panel in question, which said the following: "The Panel observed that apart from the requirements of Article 3.1 regarding positive evidence and an objective examination of certain factors, a determination of a threat of material injury was in particular subject to the requirements of Article 3.6 ..." (emphasis added by Mexico). Contrary to the United States suggestion, the Panel, by interpreting Article 3.6 in conjunction with Article 3.1, also added that a determination of a threat of material injury required an analysis of relevant future developments with regard to the volume and price effects of the dumped imports and their consequent impact on the domestic industry. See *Korea-Resins Panel Report*, para. 271.

<sup>346</sup>See United States first submission, paras. 100-102.

<sup>347</sup>See *Guatemala-Cement Panel Report*, para. 5.52.

<sup>348</sup>*Id.* para. 5.43.

In Mexico's opinion, it is clear from the above that, in drawing this distinction, the United States was referring in general to both the relevant information that should be included in the application and to the information to be taken into account for preliminary and final determinations, recognizing that the latter may be different in a threat of injury case from a present injury case. Indeed, in the same paragraph the United States went on to say:

"For the United States, it is only logical that the same distinction be recognized in terms of the information that is considered to be "reasonably available" to an applicant in requesting the initiation of an anti-dumping investigation. An applicant must still provide information, and not mere speculation, to support allegations of threat of injury. However, the United States suggests that the information may be different in kind than that which would be considered "reasonably available" in the context of an application involving present injury, if for no other reason than that threat of injury involves an incipient event"<sup>349</sup> (emphasis added by Mexico).

5.454 Mexico maintains that there is a clear inconsistency between the excessive interpretation the United States is trying to make in this Panel proceeding of Article 3 of the AD Agreement, and the interpretation the United States has regarded as admissible – in panels examining similar issues - in connection with the requisite characteristics of a threat of injury determination.

5.455 Mexico contends that the United States' present attitude in this Panel disregards the power or ability that the importing Member's investigating authority should have in order to decide, in the light of the particular circumstances of each case, what the various relevant factors should be for an injury or threat of injury determination.

5.456 Mexico holds that the United States' argument is groundless, since SECOFI properly established the factors to be used as a basis for examining the impact of the dumped imports. In doing so, SECOFI gave greater relative weight to those mentioned in Article 3.7 of the AD Agreement, because they were fundamental factors in concluding that there were convincing reasons to find that in the immediate future HFCS imports at dumped prices would substantially increase, thus creating a situation in which the dumping would cause injury. However, SECOFI also assessed the factors in Article 3.4 of the AD Agreement that were considered relevant and arrived at an affirmative determination of threat of injury.

5.457 Mexico concludes that it follows from the above that SECOFI's final determination of threat of injury, and the consequent application of definitive anti-dumping duties on HFCS imports from the United States, were consistent with the obligations set out in Article 3 of the AD Agreement and in Article VI of the GATT 1994 respectively.

5.458 The United States argues that SECOFI's threat determination lacks a meaningful examination of the nature of the anticipated impact of HFCS imports from the United States on the Mexican sugar industry. Article 3.4 states that "[t]he examination of the impact of the dumped imports on the domestic industry shall include an evaluation of all relevant factors and indices bearing on the state of the industry" and lists several factors for investigating authorities to consider. By contrast, SECOFI's determination was premised on findings: (a) that the volume of HFCS imports from the United States had steadily increased over the period of investigation;<sup>350</sup> (b) the US HFCS producers had significant freely available capacity that would enable them to increase exports to Mexico further;<sup>351</sup> and (c) that imported HFCS undersold domestically-produced sugar in the Mexican market.<sup>352</sup> SECOFI nowhere

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<sup>349</sup>*Id.*

<sup>350</sup>*Final Determination*, para. 453, US-1.

<sup>351</sup>*See e.g., id.* paras. 479-80, US-1.

<sup>352</sup>*See e.g. id.* paras. 499-500, US-1.

discussed the likely sales volumes, profitability, output, or market share of the domestic sugar industry, notwithstanding that sales, profits, outputs, and market share are the first four specific factors listed under Article 3.4, and notwithstanding that examination of these factors was critical to any understanding of whether further imports would in fact injure the Mexican sugar industry.

5.459 According to the United States, Mexico acknowledges that SECOFI's threat analysis focused on trends in import volume, foreign capacity, and prices, corresponding to the factors listed in Articles 3.7(i)-(iii). The United States also observes that Mexico states that "SECOFI gave greater weight to those [factors] mentioned in Article 3.7 of the AD Agreement, because they were fundamental factors in concluding that there were convincing reasons to find that in the immediate future HFCS imports at dumped prices would substantially increase, thus creating a situation in which the dumping would cause injury".<sup>353</sup>

5.460 The United States contends that Mexico's argument misunderstands the meaning of Article 3.7. Article 3.7 does identify four factors that investigating authorities should consider in deciding whether there is a threat of material injury that pertain generally to the question of whether increased imports are likely. Although these factors are tools for the investigating authority to use in considering whether there is a threat of material injury, nothing in Article 3.7 indicates that the threat analysis encompasses only these factors. Instead, "the totality of the factors considered must lead to the conclusion that further dumped imports are imminent and that, unless protective action is taken, material injury would occur".

5.461 The United States argues that whether "further dumped imports are imminent" will be determined principally by reference to the four enumerated factors in Article 3.7. By contrast, whether "material injury would occur" requires reference to the factors indicated in Article 3.4. Consequently, the investigating authority must refer to the factors identified in Article 3.4 in making a threat of material injury determination.

5.462 The United States further argues that it is inherent that in any determination of threat of material injury an investigating authority must analyse whether there is some clear and imminent change in the industry's current condition giving rise to the threat of material injury.<sup>354</sup> To be able to conduct such an examination, the investigating authority must know not only information about trends in import volumes and prices. It must also know sufficient information about the domestic industry's current condition to enable it to ascertain whether further imports are likely to cause that condition to change and whether that change will lead to material injury to the domestic industry.<sup>355</sup>

5.463 Consequently, in the opinion of the United States, an investigating authority must examine the Article 3.4 factors to enable it to ascertain that any conditions giving rise to the likelihood of increased imports that it identified in its examination of factors under Article 3.7 will in fact result in material injury. Mexico's own argument confirms that SECOFI failed to do this. Indeed, Mexico contends that under Article 3.4 SECOFI had the discretion to "decide, in the light of the particular circumstances of each case, what the relevant factors should be for an injury or threat of injury decision".<sup>356</sup>

5.464 According to the United States, Mexico acknowledges that it did not consider all factors listed in Article 3.4. Indeed, in paragraph 230 of its first submission, Mexico states that the only Article 3.4 factors it examined were domestic sales, increasing market share of the imports under investigation,

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<sup>353</sup> See Mexico's first submission, para. 245.

<sup>354</sup> For a panel statement to this effect, see *Korea-Resins Panel Report*, para. 271.

<sup>355</sup> Mexico has recognized this principle in other contexts. See *Guatemala-Cement Panel Report*, para. 4.248 (indicating that Mexico had argued that although cement exports from Mexico had increased, "what is really important is whether these exports really affected Guatemala's domestic industry").

<sup>356</sup> See Mexico's first submission, para. 244.

factors affecting domestic prices, return on investments, and cash flow.<sup>357</sup> Thus, even assuming *arguendo* that the record before SECOFI contained information concerning other Article 3.4 factors, SECOFI by its own admission did not consider them.

5.465 In the view of the United States, Mexico's defense of SECOFI's examination of a very limited number of Article 3.4 factors, on the basis that SECOFI had the discretion to choose which factors it would consider and which it would ignore, cannot be reconciled with anything in the text of Article 3.4. Article 3.4 states that its list of factors "is not exhaustive, nor can one or several of these factors necessarily give decisive guidance". Mexico's argument, however, is that several factors - although it has never identified which ones - can give decisive guidance, and others may simply be disregarded by an investigative authority.

5.466 The United States submits that such a construction is contrary not only to the language of Article 3.4, but also to findings and conclusions of prior panels. In *Korea-Resins*, the panel rejected the type of approach espoused by Mexico here. In a decision construing the predecessor provision in the AD Code to Article 3.4 in the context of a threat determination, the Panel concluded that the investigating authority could not focus solely on factors supporting a conclusion that the domestic industry would likely encounter difficulties while disregarding other factors.<sup>358</sup> Similarly, in *United States-Salmon*, the panel emphasized that Article 3 required investigating authorities to "examine[d] all relevant facts before them".<sup>359</sup> In upholding the determination of the US International Trade Commission (ITC), the panel emphasized that the ITC had considered and explained not only factors indicating difficulties that the domestic industry was experiencing, but also those indicators, such as employment and production, where the domestic industry's performance had improved.<sup>360</sup>

5.467 The United States further submits that SECOFI could not simply focus on factors that the applicant believed supported a determination of threat of material injury without considering the other factors. Nor could SECOFI reach an affirmative threat determination without consideration of the factors of profits, sales, output, or capacity utilization that are specified in Article 3.4 and were essential to any understanding of the current condition of the Mexican sugar industry. Because it lacks any meaningful analysis of the industry's current condition, SECOFI's determination fails to articulate how future HFCS imports would cause any change in circumstances to that condition which would lead to material injury.

5.468 The United States asserts that nowhere in its determination does SECOFI present any data or analysis which would enable one to ascertain whether the increased volumes of dumped imports of

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<sup>357</sup>Moreover, the United States asserts that SECOFI did not in fact examine domestic sales or factors affecting domestic prices, because its analysis disregarded a substantial proportion of domestic sugar production. Further admissions by SECOFI on the Article 3.4 factors it did not consider are presented in its NAFTA submissions. SECOFI acknowledged in its NAFTA submission that it did not in fact consider such Article 3.4 factors in its final determination as declines in profits and sales (*id.* pp. 483-87), productivity (*id.* pp. 487-88), return on investments (*id.* pp. 488, 490-493), and employment (*id.* pp. 489-90). *See also id.* p. 495 ("it is important to point out to this Panel [*i.e.*, the NAFTA Panel] that the investigating authority did not base its determination of the threat of injury on factors such as the decline in profits, sales, productivity, and investment yield .... In fact, nowhere in the conclusions section of paragraph 551 of the final determination is it stated that these elements have been considered by the investigating authority in concluding that HFCS imports risk producing injury to the sugar industry, in view of the fact that the articles applicable to the assumption of the threat of injury do not mention these factors".).

<sup>358</sup>*Korea-Resins Panel Report*, paras. 274-76, 287. *See also Brazil-Milk Powder Panel Report*, para. 333 (Under the provision of the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT equivalent to current AD Agreement Article 3.4, an investigating authority could not consider only one economic factor of its own selection; the provision required a comprehensive evaluation).

<sup>359</sup>*United States-Salmon Panel Report*, para. 492.

<sup>360</sup>*Id.* paras. 536-39.



HFCS that SECOFI concludes are likely will cause Mexican sugar producers to produce less, will affect their sales revenues, will cut their market share, or will cause their operations to be less profitable. In essence, SECOFI concludes that increased volumes of dumped imports threaten injury *per se*. Such a threat determination not only cannot be reconciled with Article 3.4, it also reads out the requirement of Article 3.1 that any injury determination (including one based on threat) be based on an objective analysis not only of the import volume and price effects, but also of the likely impact of the imports on domestic producers.

5.469 The United States disputes Mexico's argument that this position is inconsistent with the position that the United States took in its third-party submission before the *Guatemala-Cement* panel. In that proceeding, the United States made the following point.

"The United States considers it difficult to reconcile Mexico's assertions that Guatemala failed to give consideration to the factors in Articles 3.4 and 3.7 with the explicit discussion of these factors in the preliminary determination by Guatemala. Furthermore, while Guatemala's preliminary determination did not address all of the factors in Articles 3.4 and 3.7, the United States suggests that it was not necessary to do so. Neither of those Articles requires discussion of all of the listed factors in an injury or threat of injury determination".<sup>361</sup>

Thus, noting that Guatemala appeared to have considered the Article 3.4 factors, the United States argued that an injury or threat of injury determination does not require discussion of all factors listed in Article 3.4 and 3.7, and that authorities had the discretion to determine which of the factors required more extensive discussion in a particular determination. For example, it may be apparent from the face of an authority's final determination why the authority did not give weight to specific factors that the determination did not discuss. The United States, however, did not argue that investigating authorities were not obliged to consider the Article 3.4 factors in making their determination critical to an understanding of the domestic industry's condition, or that authorities had the discretion to consider some Article 3.4 factors and disregard others.<sup>362</sup> Here, there is no reason apparent from the face of SECOFI's determination why SECOFI would not accord weight to factors such as profitability, sales, and output. Indeed, it is difficult to see how these factors would not be worthy of discussion. In any event, as discussed above, Mexico has disavowed even having examined these factors.

5.470 The United States concludes that SECOFI's selective and incomplete consideration of economic factors for purposes of its threat of material injury analysis cannot be reconciled with either the language of the Agreement or pertinent, past panel decisions. Mexico's failure to consider the impact of dumped imports on the domestic industry violates Articles 3.1, 3.4, and 3.7 of the AD Agreement and Article VI of GATT 1994.

5.471 Mexico disputes the argument by the United States that, in a threat of injury case, the applicability of Article 3.4 of the AD Agreement is determined by the inclusion or use of the term "injury" in Article 3.7. Mexico submits that the applicability of Article 3.4 to threat of injury cases is clearly determined by the scope of footnote 9 of the AD Agreement and not by the inclusion of the term "injury" in Article 3.7. Mexico recalls that, according to footnote 9 of the AD Agreement, the investigating authority must take into account the factors set forth in Article 3.4 of the AD Agreement in cases involving injury, threat of injury and even material retardation of the establishment of an industry.

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<sup>361</sup>*Guatemala-Cement Panel Report*, para. 5.52.

<sup>362</sup>In response to a question made by Mexico with respect to this issue, the United States asserted that Mexico misstated the United States position in *Guatemala-Cement* and that they did not argue that investigating authorities could pick and choose which Article 3.4 factors they would consider in issuing a threat determination. See Answer of the United States to question no. 59 by Mexico, 6 May 1999.

5.472 According to Mexico, the misreading by the United States of these provisions has serious implications as regards the correct interpretation of Article 3 of the AD Agreement. Firstly, it implies that, in cases involving material injury, the factors listed in Article 3.7 must also be examined merely because of the inclusion or use of the term "injury" in Article 3.7. Secondly, and more importantly, it reflects an excessive and impermissible interpretation of Article 3.4, since it suggests that in a threat of injury case, the factors required for a determination of material injury must necessarily be examined in an exhaustive manner, disregarding the fact that the standard in a threat of injury case may be different from the standard in a present injury case. Thirdly, the above interpretation over-minimizes the importance of Article 3.7. In Mexico's view, the United States' interpretation is diametrically opposed to what could be considered a permissible and reasonable interpretation of Articles 3.4 and 3.7 of the AD Agreement.

5.473 Mexico submits that Article 3.7, unlike Article 3.4, was specially included in the AD Agreement and indeed, even in the Tokyo Round Anti-Dumping Code (Article 3.6), for the purpose of establishing the factors that in fact did have to specifically and necessarily be taken into consideration in a threat of injury case. Article 3.4, on the other hand, is applicable to any of the three notions of injury including threat of injury in accordance with footnote 9 of the AD Agreement, and consequently, not all of such factors necessarily have to be taken into consideration. The consideration of these factors is different according to whether the case is one of present injury, threat of injury or material retardation in the establishment of an industry depending on their relevance, *i.e.* their impact or their direct and decisive bearing on the state of the domestic industry in the light of the particular circumstances of each investigation.

5.474 Mexico submits further that this is confirmed by Article 3 itself, which clearly uses different language for paragraph 4 and paragraph 7:

"3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant factors and indices having a bearing on the state of the industry, including ... This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.7 ... In making a determination regarding the existence of a threat of material injury, the authorities should consider, *inter alia*, such factors as: [i-iv]

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur" (footnote omitted by Mexico).

5.475 Mexico argues that, in the light of the last sentence of Article 3.7 of the AD Agreement, it is particularly obvious that the United States has made an excessive and impermissible interpretation of Article 3, particularly when it states that "unless it examined the factors required for a finding of material injury, SECOFI could not reach the conclusion required by Article 3.7"<sup>363</sup> (emphasis added by Mexico). The language of the final sentence of Article 3.7 expressly establishes that it is the totality of "these" factors, *i.e.* the factors listed in indents (i)–(iv) of Article 3.7, that must lead the investigating authority to the conclusion that further dumped imports are imminent and that unless an anti-dumping measure is adopted, material injury will occur.

5.476 Mexico also argues that the interpretation that the United States has proposed for these provisions in this dispute is thoroughly inconsistent with the interpretation that the United States itself

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<sup>363</sup> See the oral statement of the United States at the first meeting of the Panel with the parties, 14 April 1999, para. 10.

supported as a third party in *Guatemala-Cement*, either for systemic reasons or for reasons of self-interest, as the United States stated at the first meeting of the Panel with the parties, without making clear what was meant by the term "self-interest" and wrongly alleged that in that case the United States had problems of timely access to the translations of the parties' submissions.

5.477 Mexico asserts that SECOFI did not ignore in its injury analysis the "critical factors" referenced in Article 3.4, as the United States contends. In fact, as part of its administrative practice, SECOFI stipulated in its application for producing enterprises requesting the initiation of dumping investigations that, for the purpose of the determination of threat of injury, the applicant must provide information concerning the factors referenced in Article 3.4 of the AD Agreement, *inter alia*.

5.478 Mexico also asserts that, contrary to what the United States contends, SECOFI did not reach the conclusion that the increase in volume of dumped imports threatened to cause injury *per se*. This reductionist interpretation disregards SECOFI's whole discussion of the various economic factors which were decisive in determining the existence of a threat of injury. In this regard, the Panel is referred to the previously mentioned points in Mexico's submissions and Mexico's replies to the Panel's questions, and to the final determination. SECOFI's final determination of threat of injury did in fact consider the various factors set forth in Article 3.4 in a manner consistent with the AD Agreement. Mexico rejects the contention by the United States that in order to be consistent with the relevant multilateral disciplines, this assessment would have had to conform to the format used by the United States International Trade Commission (USITC).

5.479 Mexico states that there is evidence both in the administrative record of the investigation and in working papers<sup>364</sup> in support of SECOFI's analysis of the behaviour of the factors and indices that have a bearing on the state of the domestic industry. This evidence is as follows:

- (a) Production. During the period of investigation (1996), sugar production for the industrial sector increased by 5 per cent as compared to the previous comparable period, while production for the domestic market decreased by 12 per cent during the same period.
- (b) Sales. This indicator decreased by 5 per cent during the period of investigation as compared to 1995. It should be stressed that the decline in sales had the effect of displacing domestic sugar production in the market, given that the share of investigated imports increased in the apparent domestic consumption.
- (c) Share in the Mexican market of sugar production directed to the industrial sector. This indicator fell from 95 per cent in 1995 to 87 per cent in the period of investigation i.e. there was a loss in market share of 8 per cent during that period. Moreover, upon analysing the growth in HFCS imports from the United States in relation to apparent domestic consumption, SECOFI observed that such imports had a growing share from 1994 onwards.
- (d) Inventories. During the period of investigation, total inventories of sugar increased by 3 per cent over the previous comparable period. It should be stressed that while there was an increase in sugar production, the domestic industry was unable to make sufficient sales, and this was reflected in the mentioned increase in inventories.
- (e) Return on investments. On the basis of the information concerning the investment projects of certain mills forming part of the domestic sugar industry, SECOFI determined that, while a project proposed by one of the mills was feasible, in event of

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<sup>364</sup>See MEXICO-52.

HFCS imports at dumped prices the future cash flow for that project would be affected. As regards other projects, SECOFI observed that the information provided was essentially qualitative, and therefore determined that it did not have sufficient elements to conclude whether they would be affected by imports.

- (f) Employment and productivity. On the basis of the information provided by the applicant, SECOFI calculated the per capita productivity index for the period of investigation.
- (g) Size of the margin of dumping. On the basis of the margins of dumping determined during the final stage of the investigation, SECOFI calculated what the prices of imports would be once the possible anti-dumping duties were applied and compared them with the domestic sugar prices.
- (h) Ability to raise capital and cash flow. With respect to the financial situation, SECOFI obtained the liquidity and leverage ratios in order to determine the sensitivity of the domestic sugar industry to adverse situations. Having determined that the high leverage made the industry more sensitive, the investigating authority deemed that it was unnecessary to estimate the ability to raise capital and the cash flow, since the level of indebtedness of the sugar industry was such that financial institutions were not prepared to grant it additional credit.

In other words, SECOFI considered that, owing to their high level of indebtedness, domestic sugar producers did not have the ability to raise capital or sufficient capital flow; so that this was not the result of the entry of HFCS imports into the Mexican market. Thus, SECOFI did not attribute this situation to dumped imports. Nevertheless, one should emphasise that the financial decline affecting the domestic sugar industry had an impact on the industry's sensitivity to the kind of adverse events that it could face in the future.

5.480 Mexico disputes the United States' contention that Mexico relies on the theory that the investigating authority has the "discretion" to decide which of the Article 3.4 factors it will consider. This is a misinterpretation of what Mexico argues. What Mexico argues is that the investigating authority has the power to decide what the relevant factors are, not at its "discretion" ("*libremente*") as the United States contends, but in accordance with their impact or influence on the relevant domestic industry. This is recognized by the United States itself in para 5.52 of the Panel Report in *Guatemala-Cement*, where the United States recognises "the ability of national authorities to discern the relative importance of each factor in the particular circumstances of each investigation". This shows that, again, the United States contradicts its own position and distorts Mexico's.

5.481 Mexico argues that, in its threat of injury determination, SECOFI evaluated all of the economic factors set forth in Article 3.7 of the AD Agreement, and hence was able to examine the imminence of further dumped imports. Mexico asserts that SECOFI fully complied therefore with the obligations set forth under Articles 3.1, 3.4 and 3.7 of the AD Agreement, and that the United States' assertions are groundless. Indeed, the overall evaluation of the factors described above led SECOFI to the substantiated conclusion that, in view of the dumped imports and their effects on domestic sugar production (impact of imports), and in view of the imminence of further imports at dumped prices, a change in circumstances giving rise to a situation in which, unless anti-dumping duties were introduced, there would be material damage to the domestic industry, was clearly foreseeable.

5.482 According to the United States, Mexico asserts that SECOFI considered the factors of sales and output and argues that this is confirmed by Exhibit MEXICO-52.<sup>365</sup> This is inconsistent with

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<sup>365</sup> See Mexico's second submission, para. 208.

Mexico's previous submissions before the Panel.<sup>366</sup> Even if this inconsistency were disregarded, the Panel should reject Mexico's new argument.

5.483 In the view of the United States, Exhibit MEXICO-52 does not, as Mexico contends, reflect "SECOFI's analysis of the behaviour of the factors and indices that have a bearing on the state of the domestic industry". Exhibit MEXICO-52 reflects no analysis at all. This is apparent from the face of the document, which states that it is a report of a verification visit "to confirm that the information submitted by the Chamber during the course of the administrative procedure is correct, complete, and consistent". The purpose of the report is to assess the accuracy of the Sugar Chamber's data, not its significance.

5.484 The United States observes that at several points the verification report emphasizes that SECOFI was verifying information that the Sugar Chamber had submitted in its application. However, as already explained, the application failed to provide information concerning several critical factors mentioned in Article 3.4, and concerning the causal nexus between the dumped imports and the alleged threat of material injury. In this respect, it is hardly surprising that nothing in Exhibit MEXICO-52 reflects consideration of the purported "financial decline" of the sugar industry. The only material in the MEXICO-52 report even referencing data of a financial nature concerns debt restructuring costs; there is nothing addressing any other aspect of industry financial performance. Consequently, Exhibit MEXICO-52 cannot serve to negate Mexico's prior assertions, both before this Panel and in the NAFTA proceedings, specifying the factors that SECOFI did and did not consider in its final determination.

5.485 The United States further observes that, even if Exhibit MEXICO-52 did reflect a discussion or "analysis" of the factors listed at paragraph 208 of Mexico's second submission, Mexico's reliance on the document is inconsistent with Article 12.2 of the Agreement. Article 12.2 states that each notice of a final determination "shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". The final determination's silence on the issues of the Mexican sugar industry's sales, output, or financial decline, together with its failure to reference Exhibit MEXICO-52 with respect to these factors, only supports the conclusion that SECOFI made a deliberate decision not to analyze these factors as part of the basis for its determination. Moreover, under paragraph 212 of the *Korea-Resins* panel decision, SECOFI may not point to the administrative record as evidencing a decision with respect to findings never actually discussed in its determination or a separate report.

5.486 The United States finally notes that, even if the Panel should accept both Exhibit MEXICO-52 and Mexico's characterization of what Article 3.4 factors SECOFI considered, Mexico still has not contended that SECOFI considered Article 3.4 factors such as profitability or capacity utilization. Instead, Mexico continues to argue that SECOFI was not required to consider all factors relating to the examination of the impact of dumped imports on the domestic industry listed in Article 3.4. In paragraphs 200-203 of its second submission, it maintains that it may select which of the Article 3.4 factors it considers relevant in a particular investigation and which it does not.

## **2. Determination of Injury On The Basis of A Specific Market Sector Rather Than On The Basis of The Whole Industry**

5.487 The United States notes that SECOFI concluded in the final determination that the relevant domestic industry for purposes of its determination of threat of material injury consisted of Mexican sugar producers.<sup>367</sup> Given this conclusion, SECOFI's analysis of threat of injury was fundamentally

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<sup>366</sup> See Mexico's first submission, para. 230.

<sup>367</sup> See *Final Determination*, para. 426, US-1. Although SECOFI concluded that HFCS and sugar were similar products, it ultimately decided that only sugar producers made up the relevant domestic industry for

flawed, because it looked solely to a portion of the industry's production serving a sub-market to assess the impact of imports and never considered their impact on the domestic industry as a whole, as the AD Agreement requires.

5.488 The United States submits that, under the terms of the AD Agreement, an assessment of material injury or threat thereof must be based upon the impact of dumped imports on the entire domestic industry (or a substantial portion thereof). Article 4.1 defines "domestic industry" (absent certain exceptions not relevant here) as "the domestic producers as a whole of the like products or...those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products". The AD Agreement explicitly provides for two circumstances when it may be relevant to examine less than the entire domestic industry: (1) exclusion of related parties; and (2) division of the Member's territory into smaller competitive regions.<sup>368</sup> Neither of these exceptions was relevant to SECOFI's decision to focus its threat analysis in the final determination solely on the part of the domestic industry's production serving the industrial sugar market. In addition, it should be noted that Article 3.6 of the AD Agreement does not permit an examination of less than the whole domestic industry. Rather, that Article only permits the assessment of a broader base of production that includes the pertinent domestic industry, when it is impossible to obtain financial and production information that is specific to the domestic industry.<sup>369</sup> Data from the entire domestic industry (or a major proportion thereof) must therefore form the foundation of an assessment of material injury or threat thereof under Articles 3.2, 3.4, and 3.7 of the AD Agreement, because the meaning of each of these substantive "Determination of Injury" Articles turns upon the definition of "domestic industry".

5.489 The United States further submits that threat of material injury requires a determination of whether "further dumped imports are imminent and that, unless protective action is taken, material injury would occur".<sup>370</sup> In turn, the AD Agreement provides that "the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of [Article 3]".<sup>371</sup> Similarly, Article 3.4 mandates an

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purposes of its threat determination, because of its decision to exclude all HFCS producers. SECOFI excluded one domestic HFCS producer (Almex) because it was a related party and the other producer (Arancia) because it had only engaged in "embryonic" production during the investigation period. *See id.* paras. 430-41. According to the United States, SECOFI acted contrary to the AD Agreement in excluding the "embryonic" production of Arancia. Nothing in the AD Agreement authorizes excluding "embryonic" production of a domestic producer. To the contrary, under footnote 9 of the AD Agreement "the term 'injury' shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article" (emphasis added by the United States). Indeed, the reference to "material retardation" indicates the particular susceptibility of an industry that has not fully established production to being injured by reason of dumped imports. Consequently, "embryonic" producers, as well as "established" producers, must be treated as industry members for purposes of conducting an injury determination under Article 3 of the AD Agreement.

If Arancia's HFCS production was embryonic, as SECOFI found, SECOFI should not have excluded that production. Paragraph 441 of the *Final Determination* indicates that if SECOFI had found there to be Mexican production of HFCS, it would have defined the domestic like product as HFCS. Accordingly, Article 3 of the AD Agreement required SECOFI not to exclude Arancia's production, but instead to determine whether imports of HFCS from the United States materially retarded the establishment of a domestic HFCS industry in Mexico consisting of Arancia's "embryonic" production.

<sup>368</sup> See AD Agreement, Article 4.1(i)-(ii).

<sup>369</sup> See AD Agreement, Article 3.6 (stating that if "separate identification of [domestic production of the like product] is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided") (emphasis added by the United States).

<sup>370</sup> AD Agreement, Article 3.7 (emphasis added by the United States).

<sup>371</sup> AD Agreement, note 9 (emphasis added by the United States).

"examination of the impact of the dumped imports on the domestic industry concerned" (emphasis added by the United States). Finally, Article 3.1 provides in part that "[a] determination of injury [which is defined to include threat of injury to the domestic industry]... shall be based on positive evidence and involve an objective examination of ... the volume of the dumped imports and the ... consequent impact of these imports on domestic producers of such products" (emphasis added by the United States). Article 3.2 elaborates on Article 3.1 by providing that "[w]ith regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member". Hence, Article 3.2, like Articles 3.4 and 3.7, turns on the definition of "domestic industry", by elaborating on Article 3.1, where the terms "injury" and "domestic producers" obviously rely on the definition of domestic industry. Articles 3.2 and 3.4 are clearly relevant to a threat determination. Article 3.4 applies for the reasons discussed above. For similar reasons, as the *Guatemala-Cement* panel noted "the factors in Article 3.2 remain relevant" to an analysis of threat of injury.<sup>372</sup>

5.490 The United States contends that, instead of heeding the AD Agreement's mandate to examine the impact of dumped imports on the domestic industry as a whole, SECOFI limited its threat analysis to the part of the domestic industry's production serving the industrial sugar market and completely ignored the fact that the same producers shipped the same product (*i.e.*, sugar) to the household market. Indeed, throughout the final determination, SECOFI frankly acknowledged that it was limiting its evaluation of the impact of imports to only a portion of the domestic sugar industry's production. For instance, SECOFI stated that it "assessed the specific impact of the imports under investigation on the industrial sector, estimating the share of domestic sugar production earmarked for household use at 47 per cent and the share earmarked for industrial use at 53 per cent, of which 29 per cent was for bottling plants and 24 per cent for other industries".<sup>373</sup> Thus, even if SECOFI's estimate was accurate, SECOFI simply disregarded nearly half of the pertinent domestic industry's production. While the AD Agreement does not preclude an analysis of a particular market served by a domestic industry in the context of an examination of "all relevant economic factors and indices having a bearing on the state of the industry" (Article 3.4), it does not permit a determination of material injury or threat thereof to a part of the domestic industry's production to be equated with injury or threat to the industry as a whole.<sup>374</sup>

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<sup>372</sup>*Guatemala-Cement*, para. 7.76, footnote 248. As previously discussed, while the *Guatemala-Cement* panel was considering the requirements of an assessment of threat of injury for purposes of the initiation of an investigation, its reasoning is equally, if not more, applicable to a final determination of threat of injury.

<sup>373</sup>*Final Determination*, para. 465 (emphasis added by the United States).

<sup>374</sup>The United States asserts that, clearly, SECOFI was not considering whether there was threat of material injury to a "major proportion" of the "domestic industry" by only considering the part of the industry's production serving the industrial market. AD Agreement, Article 4.1. Nowhere in the final determination did SECOFI state that it was doing this. Nor was this a case in which SECOFI was unable to obtain information from some producers and therefore could not make a determination concerning the industry as a whole. See *Final Determination*, para. 7 (noting that the Sugar Chamber represented 98 per cent of domestic sugar production). In any event, SECOFI could not have actually divided the domestic industry along industrial versus household lines, because the same domestic producers, producing on the same equipment and with the same employees, apparently sold to both markets and often did not know whether their sales to intermediate distributors ultimately went to household or industrial users. See Transcript referenced in CRA First NAFTA Submission, p. 86, footnote 109 (noting that domestic sugar producers at the public hearing stated that they "cannot be certain if the sugar they sell to wholesale marketers will be allocated to industrial or household consumption"), US-20. Moreover, Article 4.1 of the AD Agreement states that "domestic industry" means "the domestic producers as a whole of the like products or ... those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products" (emphasis added by the United States). Thus, the AD Agreement is phrased in terms of the total production of those domestic producers that constitute a major proportion of domestic production, rather than simply a major proportion of domestic production by all producers. Accordingly, SECOFI's own estimate that it was considering 53 per cent of the

5.491 The United States argues that SECOFI's analysis of domestic consumption is particularly egregious. SECOFI analysed apparent domestic consumption as consumption earmarked for industrial use, rather than total sugar consumption, regardless of the sugar's ultimate use.<sup>375</sup> Obviously, this constriction of the denominator of consumption greatly exaggerated the level of import market share. SECOFI estimated the "share of domestic sugar production earmarked for household use at 47 per cent and the share earmarked for industrial use at 53 per cent".<sup>376</sup> The 53 per cent/47 per cent estimate used by SECOFI is itself a static number, rather than a breakdown of consumption from year to year or a projection for future years. Despite this shortcoming, however, SECOFI used this estimate to determine the HFCS imports' share of industrial sugar consumption from 1994 to 1996.<sup>377</sup> SECOFI stated that this estimate was "furnished to the Ministry by the petitioner [*i.e.*, the applicant] in tables labelled 'sugar consumption'" and was consistent with other information of record in the investigation.<sup>378</sup> There is no evidence in the final determination, however, that SECOFI either had or sought any information regarding the relative levels of growth in the industrial and household portions of the overall sugar market. Given that SECOFI used without further inquiry a static estimate and breakdown of consumption destined for sale to industrial users, SECOFI did not make an objective examination of whether there was a significant increase in imports relative to consumption, as specified in Article 3.2; a decline in market share by the domestic industry as a result of dumped imports, as specified in Article 3.4; or a "change in the pattern of consumption", in accordance with Article 3.5. Even assuming *arguendo* that this percentage breakdown between household and industrial sugar use was accurate, SECOFI's manipulation of the denominator resulted in nearly doubling the computation of import market share. Pursuant to the AD Agreement, however, SECOFI should have considered total sugar production (*i.e.*, both industrial and household uses) as the denominator for consumption.<sup>379</sup>

5.492 The United States also argues that SECOFI's utter failure to consider the entire sugar industry was by no means limited to its assessment of consumption levels. Rather, this fundamental error infected the entire threat analysis, including the assessment of sales trends,<sup>380</sup> price comparisons,<sup>381</sup> and the analysis of the channels of distribution of the imported and domestic article.<sup>382</sup> The following paragraphs of the final determination are representative of this error:

- SECOFI "examine[d] apparent domestic consumption by the industrial sector" based upon the petitioner's argument that HFCS imports targeted industrial rather than household users.<sup>383</sup>
- SECOFI rejected "a general assessment of the threat of injury to all sugar production" because that "would also include production earmarked for household consumption,

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industry's total production, apparently by all producers, could not, under any reading, suffice to fall within the "major proportion" language of Article 4.1 of the AD Agreement. *Final Determination*, para. 465, Exhibit US-1.

<sup>375</sup> See *Final Determination*, paras. 461, 465, US-1.

<sup>376</sup> *Id.* para. 465.

<sup>377</sup> *Id.* para. 469.

<sup>378</sup> *Id.* para. 466.

<sup>379</sup> The United States notes that, although consumption itself is not specifically enumerated in Article 3.4, it derives from factors that are set forth therein and is, in turn, used to derive market share, which is specifically mentioned in Article 3.4. Moreover, Articles 3.2 and 3.5 do specifically mention consumption as a relevant economic factor.

<sup>380</sup> See *Final Determination*, paras. 521, 525(ii), US-1.

<sup>381</sup> *Id.* paras. 498, 500.

<sup>382</sup> *Id.* paras. 446-47.

<sup>383</sup> *Id.* para. 461.



which was never threatened by the presence of imports of HFCS from the United States of America ...".<sup>384</sup>

- SECOFI "decided to assess the impact of the imports under investigation taking into account the specific nature of competition within this industry and, thus, to pinpoint domestic production threatened by the presence of imports of HFCS from the United States of America, finding that it had sufficient information at its disposal to isolate the industrial segment of the domestic market for purposes of its investigation ...".<sup>385</sup>
- SECOFI "calculated apparent domestic consumption based on domestic sugar production earmarked for the industrial sector, which it added to the value of domestic HFCS production as an integral part of the demand for nutritional sweeteners with comparable sweetening power ...".<sup>386</sup>
- "The data used as the basis for calculating domestic sugar prices was deemed by [SECOFI] to be representative, in that it reflected 55 per cent of all domestic sales to the industrial sector during the period under investigation".<sup>387</sup>
- SECOFI "compared the prices paid for both products based on data solicited from industrial consumers ...".<sup>388</sup>
- SECOFI noted "sugar sales to industrial consumers on the domestic market in 1996 were down from the previous year, while the imports under investigation accounted for an increasingly large share of apparent domestic consumption ...".<sup>389</sup>
- In discussing the channels of distribution for imported HFCS and domestic sugar, SECOFI concluded that "both ... are distributed to industrial plants specializing in the manufacturing of processed foods, beverages, canned goods, pastries, candy, bakery products, dairy products, pharmaceutical products, etc., either directly or through distributors" and that this conclusion was confirmed by "information supplied by industrial consumers of HFCS and sugar ...".<sup>390</sup>

5.493 According to the United States, SECOFI's focus solely on the portion of the industry's production serving the industrial market compounded its error in failing to ground its analysis on the economic factors set forth in Article 3.4. During the course of its threat analysis, SECOFI did not even mention a number of overall trends and projections affecting the likely condition of, and the impact of imports on, the entire domestic industry, including profit levels, market share, return on investments, capacity utilization, and growth. Likewise, there is no analysis of the extent to which the domestic industry is insulated from threat of material injury by imported HFCS, based upon the fact that imports do not compete for sales in the household market.

5.494 The United States holds that SECOFI also did not evaluate relative trends in, and projections of, overall consumption for sugar for all uses and within the household and industrial portions of the

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<sup>384</sup>*Id.* para. 462.

<sup>385</sup>*Id.* para. 467.

<sup>386</sup>*Id.* para. 468.

<sup>387</sup>*Id.* para. 498.

<sup>388</sup>*Id.* para. 500.

<sup>389</sup>*Id.* para. 521.

<sup>390</sup>*Id.* paras. 446-47.

market. It is entirely possible, for example, that, as imports obtained an increasing market share of sales to the bottling industry, domestic producers sold more of their production to other industrial users or to household users, if consumption in these other portions of the industry was increasing. Although paragraph 486 of the *Final Determination* notes "the steady growth in the local soft drink market", such determination lacks any discussion of growth trends and projections in the other industrial and household markets. Likewise, paragraph 469 notes that imports have increased their share of domestic consumption of sugar for industrial use, but the final determination lacks any discussion of consumption levels, trends, and projections for household use.

5.495 In the view of the United States, even within the portion of the domestic industry's production serving the industrial market, SECOFI improperly focused its analysis solely on use by the beverage and bottling industry and largely ignored other industrial uses, such as the baking and confection industry. To be sure, SECOFI noted that, within the industrial market, the large majority of imports were sold to the bottling industry.<sup>391</sup> SECOFI also estimated that 55 per cent of domestic sugar production for industrial use was sold to bottling plants, while the remaining 45 per cent was sold to other industries.<sup>392</sup> Yet SECOFI focused the analysis on trends and projections in the soft drink industry and did not evaluate any data regarding the sales trends and projections for other industrial uses.<sup>393</sup> Accordingly, not only did SECOFI fail to assess the impact of imports on the domestic industry as a whole (*i.e.*, both industrial and household uses of sugar), but it also did not adequately assess the impact of imports across the entire portion of the industry's production serving the industrial market.

5.496 The United States argues that not only did SECOFI violate the AD Agreement in failing to assess the impact of dumped imports on the domestic industry as a whole, but it also violated the GATT 1994. Article VI:6(a) of GATT 1994 requires, in order to levy an anti-dumping duty, a determination "that the effect of the dumping is such as to cause or threaten material injury to an established domestic industry ..."; and Article VI:1 of GATT 1994 recognizes that "dumping is to be condemned if it causes or threatens material injury in the territory of a contracting party or materially retards the establishment of a domestic industry". Since SECOFI did not assess the impact of the dumped imports on the domestic industry as a whole, it did not properly determine threat of material injury to the domestic industry. Therefore, its imposition of final anti-dumping measures violated Article VI of GATT 1994.

5.497 The United States asserts that, contrary to what SECOFI actually said in the final determination, Mexico stated at the 12 June 1998 consultations with the United States that SECOFI had determined that there were two separate domestic industries: sugar production for industrial use and sugar production for household use. If this is in fact what SECOFI determined, there is no discussion of it in the like product or domestic industry sections, or indeed anywhere else in the final determination. Since Article 12.2 of the AD Agreement requires the investigating authorities to provide public notice setting forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material", and Article 12.2.2 requires public notice of "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures", SECOFI's failure to disclose such a fundamental decision regarding the identity of the relevant domestic industry clearly would have violated the AD Agreement.

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<sup>391</sup>*Id.* para. 464 ("the beverage industry generated the largest share of demand, accounting for 81 per cent of all sales, with the remaining 19 per cent going to plants manufacturing bakery products, processed food products, daily [sic] products, pharmaceutical products, candy, etc., based on data supplied by importers on their sales of imported products on the Mexican market").

<sup>392</sup>*Id.* para. 465. These estimates are static numbers and hence are subject to the same objections previously discussed regarding the breakdown of overall sugar consumption into household and industrial uses.

<sup>393</sup>*See e.g. id.* paras. 481(i)-(ii), 486.

5.498 In the view of the United States, if SECOFI in fact determined that there were two domestic sugar industries (*i.e.*, one serving industrial uses and the other serving household uses), this finding would be utterly inconsistent with its determination that sugar and HFCS were similar. Article 4.1 of the AD Agreement provides that "the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products..". Therefore, if SECOFI determined that there were two separate domestic sugar industries, it would have had to find that sugar for industrial use and sugar for household use were separate like products. However, this like product finding would have been inconsistent with the reasoning that SECOFI used to find that sugar and HFCS were similar, which would apply *a fortiori* to sugar for industrial use and sugar for household use. In analysing the similarity of sugar and HFCS, SECOFI determined that, while not identical in all respects, they are commercially interchangeable and have very similar compositions, physical properties, sweetening power, nutritional properties, energy-yielding properties, and functions. These same considerations lead inevitably to the conclusion that sugar for industrial use and sugar for household use are similar. Obviously, both are sugar, and each is by definition only distinguishable by its ultimate end use. It is in fact the same sugar and therefore has the same chemical composition, physical properties, sweetening power, nutritional properties, energy-yielding properties, and function.<sup>394</sup> Indeed, the same domestic producers, production facilities, equipment, and workers produce the sugar, regardless of whether it is later consumed for industrial or household uses. Accordingly, by misdefining the "domestic industry" under Article 4.1 to include only sugar production for industrial use (rather than all sugar production regardless of use), SECOFI rendered its determination of threat of material injury inconsistent with Article 3 of the AD Agreement.<sup>395</sup>

5.499 Finally, the United States observes that the AD Agreement required SECOFI to assess the impact of imports on, and the likely condition of, the domestic industry as a whole in making its determination of threat of material injury. Assuming *arguendo* that SECOFI was correct in its statements at consultations with the United States that it determined two separate domestic industries (*i.e.*, sugar production for industrial and household uses), then there is no indication that the cash flow and loan repayment problems mentioned in paragraph 531 of the *Final Determination* were specifically tied to sugar for industrial uses, rather than simply relating to the entire sugar industry. Similarly, outside of the soft drink market, SECOFI did not consider trends in, or likely projections of, sales and consumption levels for other industrial uses within the industrial market. If sales and consumption of sugar for other industrial uses was also growing (as the soft drink market apparently was), it is entirely possible that the domestic sugar industry sold an equal or greater amount of product to these customers, as the domestic industry's share of sales to the beverage and bottling industry decreased.

5.500 Mexico rejects the argument by the United States that SECOFI violated Articles 3.1, 3.2 and 3.4 of the AD Agreement by failing to analyse the impact of dumped imports on the entire domestic sugar industry, alleging a supposed inconsistency between SECOFI's analysis and the determination of the similarity between HFCS and sugar.

5.501 Mexico also disputes the statement by the United States that in the consultations on 12 June 1998 Mexico said it had determined the existence of two separate industries. This statement is utterly incorrect, since Mexico did not say any such thing in the consultations, nor can anything along those lines be inferred from any of the public notices of the investigation.

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<sup>394</sup>Clearly, household sugar and industrial sugar are also commercially interchangeable, given that domestic sugar producers can "earmark" their shipments to either industrial or household customers. *See e.g. id.* paras. 465, 468.

<sup>395</sup>*See Final Determination*, paras. 423-425.

5.502 According to Mexico, what it said in the consultations was that, from the outset of the investigation, two clearly defined sectors could be distinguished in the industry concerned according to the type of consumer: the sector consuming sugar for household use and the sector using sugar for industrial purposes.<sup>396</sup> In response to a question by the Panel, Mexico stated that the distinction between sugar for household and sugar for industrial use was drawn from the "sugar consumption tables". According to these data, the relative shares of sugar for household use and sugar for industrial use are 47 and 53 per cent, respectively.<sup>397</sup> In response to another question by the Panel, Mexico also asserted that the destination of sales by the sugar industry could also be tracked on the basis of the sales invoices provided by the sugar mills to SECOFI during the course of the investigation. This information was referred to in paragraphs 49(I) and 94(C) of the *Final Determination*.<sup>398</sup>

5.503 Mexico states that SECOFI determined in its threat of injury analysis that a significant portion of the production of all sugar producers was being threatened and established that this analysis encompassed 100 per cent of all sugar producers. Consequently, out of the total volume of sugar produced by the 61 mills making up the domestic industry, SECOFI identified the production that competed directly with the imports under investigation.

5.504 According to Mexico, SECOFI found that the sales of HFCS by importing firms in the Mexican market are destined for the industrial sector. Consequently, HFCS imports were directly competitive with sugar production only in that sector and not in the household sector.

5.505 Mexico observes that, as established in the section concerning "Product Likeness Analysis" of each of the investigation's public notices, SECOFI determined that sugar and HFCS are like products with closely resembling characteristics. Sugar, in turn, is a product that can be distinguished by end-use, that is, sugar destined for household use and sugar destined for the industrial sector. SECOFI had sufficient information to analyse both sectors separately. Nevertheless, in view of the direct competition of HFCS with sugar destined for the industrial sector, SECOFI decided to analyse chiefly this sector. In other words, SECOFI considered in its analysis all sugar producers and, in view of the specific competition with HFCS imports, separately identified the production intended for the industrial sector from the production consumed by the household sector.

5.506 Mexico argues that paragraphs 461 to 469 of the *Final Determination* fully substantiate in economic terms the distinction drawn between the two sectors making up the sugar market. Accordingly, SECOFI had sufficient information for the separate identification of domestic sugar production destined for the industrial sector and production destined for household use, as established in Article 3.6 of the AD Agreement. In response to a question from the Panel, Mexico reiterated its opinion that SECOFI's determination of threat of injury considering the industrial sector separately is supported by Article 3.6 of the AD Agreement.<sup>399</sup>

5.507 Mexico argues further that, to assess the threat of injury to the industry concerned, SECOFI took account of the following:

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<sup>396</sup>Paragraph 68 of the *Initiation Notice* says: "The applicant stated that virtually all imports of high-fructose corn syrup are intended for the industrial sector and not the household sector, for which reason the Ministry considered apparent domestic consumption specifically for the industrial sector, since sugar demand in this sector is the one that would in principle be threatened by high-fructose corn syrup imports from the United States. In making this estimate, account was taken of the "sugar consumption" tables provided by the applicant, and only the percentages of sugar serving the industrial sector were taken into consideration; they were used to estimate relevant domestic production for the purposes of the threat of injury analysis". MEXICO-1.

<sup>397</sup>See Answer of Mexico to question no. 15 by the Panel, 6 May 1999.

<sup>398</sup>See Answer of Mexico to question no. 16 by the Panel, 6 May 1999.

<sup>399</sup>See Answer of Mexico to question no. 18 by the Panel, 22 June 1999.

- (a) The information contained in the administrative file, which indicated that virtually all HFCS imports were earmarked for the industrial sector and not for the household market.<sup>400</sup>
- (b) In the light of this information, SECOFI estimated the relevant domestic production for the purpose of threat of injury analysis on the basis of the sugar consumption tables.<sup>401</sup> This made it possible to pinpoint, from 100 per cent of the output - involving 61 sugar mills - the amount of domestic sugar production serving each sector.<sup>402</sup>
- (c) By means of analysing the destination of the sales of the imported product (HFCS) in the Mexican market,<sup>403</sup> SECOFI verified that 100 per cent of such sales were observed in the industrial sector, with 81 per cent accounted for by the soft drinks industry; and the remaining 19 per cent accounted for by other industries, such as processed foods, preserves, confectionery, bakery and dairy products, among others.<sup>404</sup>

5.508 In Mexico's view, therefore, SECOFI had sufficient information to estimate apparent domestic consumption specifically for the industrial sector and this did not involve any inconsistency between the determination of the likeness of HFCS and sugar and the determination of threat of injury to the relevant domestic production.

5.509 Mexico disputes the statements by the United States that SECOFI's breakdown between sugar destined for the industrial sector and sugar destined for household use is a static number rather than a projection, and that this estimate was used to determine the share of HFCS imports in the consumption of industrial sugar for the years 1994 to 1996. According to Mexico, the United States neglects that SECOFI had information regarding the shares of the industrial sector and household use for the years 1990 to 1996 and that for calculating consumption by the industrial sector SECOFI used data corresponding to each of those years. Hence, this was in no sense a static estimate, as the United States maintains.<sup>405</sup>

5.510 In addition, Mexico disputes the argument by the United States that the effect of calculating domestic consumption by taking account only sugar production destined to the industrial sector was to double import penetration ratios. This is a tendentious argument since it suggests that, had SECOFI considered both consumption for industrial and for domestic use when calculating apparent domestic consumption, the conclusion of a threat of injury to the domestic sugar industry would not have been reached. In response to questions by the United States and by the Panel, Mexico stated that SECOFI's

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<sup>400</sup>See the arguments on the destination of HFCS imports contained in para. 4.3 of the application for initiation of the investigation, MEXICO-16.

<sup>401</sup>See sugar consumption tables contained in the application for initiation of the investigation, MEXICO-36.

<sup>402</sup>See *Final Determination*. Paras. 465 to 468 describe the methodology and the percentages used in the calculations by SECOFI, as established in para. 466, the percentages were corroborated, MEXICO-6. See submission by Refrescos del Bajío Azteca, SA de CV, of 6 August 1977 and "Forecasts of trends in sweetener demand in the food and soft drinks industry in Latin America" by Peter Buzzanell, MEXICO-37.

<sup>403</sup>See Annex 22 of the reply to the request for information by Almex 19 May 1997, MEXICO-38, and analysis of sales of HFCS imports on the Mexican market, MEXICO-39.

<sup>404</sup>See *Final Determination*, para. 464, MEXICO-6.

<sup>405</sup>See sugar consumption tables contained in the application for initiation of the investigation, MEXICO-36.

calculations taking into account all domestic sugar consumption, independently of the sector, were available in the form of working documents.<sup>406</sup>

5.511 Mexico asserts that, regardless of the share of imports in industrial sector consumption, the following factors were undeniably present in the period of investigation: a significant rate of increase in imports; sufficient freely disposable capacity of exporters; and import prices significantly lower than those of the like product, among other reasons, indicating a well-founded likelihood that in the immediate future HFCS imports would substantially increase,<sup>407</sup> displacing Mexican sugar production, with the consequent effect on the domestic sugar industry's economic and financial indicators. Accordingly, SECOFI's affirmative threat of injury determination would not have involved a substantial change if household consumption had also been taken into consideration.

5.512 Mexico argues that, when making the above argument, the United States refers to import penetration in relative terms and fails to comment on the sharp increase of imports in absolute terms, which SECOFI discussed at length in the final determination (section on "imports subject to price discrimination"), demonstrating that aggregate HFCS imports from the United States, in absolute terms, showed an upward trend in recent years.<sup>408</sup>

5.513 According to Mexico, the United States seeks to minimize the impact of HFCS imports on the domestic sugar industry, affirming that Mexican sugar producers could have increased their sales to industries other than the soft drinks industry. Even if, as the United States suggests, consumption by industries other than the soft drinks industry had increased, and even if the increase had been covered not by HFCS imports but by sales of domestic sugar, the loss of sales to the soft drinks industry as a result of dumped HFCS imports was one of the factors SECOFI assessed in determining the state of the domestic industry, and it is a fundamental aspect of the conclusion about a decline in potential sales of sugar, that would create a situation in which the dumping would cause injury to that industry.

5.514 Lastly, Mexico states that SECOFI had sufficient information to identify the sector in which the HFCS was in direct competition with sugar, affecting the 61 sugar mills that make up the domestic industry. Thus, in the final determination of threat of injury to the domestic sugar industry and the consequent imposition of definitive anti-dumping duties, Mexico fully complied with all of its obligations under Article 3 of the AD Agreement and Article VI of the GATT 1994 respectively.

5.515 In the view of the United States, Mexico's response to its argument that SECOFI failed to assess the impact of the subject imports on the appropriate domestic industry is that SECOFI obtained data from all 61 Mexican sugar producers and thus "the analysis encompassed 100 per cent of sugar producers". Consequently, Mexico reasons, its analysis satisfied Article 2.6 and Article 4.1. Mexico emphasizes that SECOFI found only one domestic like product, sugar.<sup>409</sup>

5.516 According to the United States, Mexico's argument misunderstands the pertinent requirements of the AD Agreement. Article 4.1 states that "the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products ...". Consequently,

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<sup>406</sup>See Answer of Mexico to question no. 5 by the United States, 6 May 1999, and Answer of Mexico to question no. 15 by the United States, 22 June 1999.

<sup>407</sup>See sugar consumption tables contained in the application for initiation of the investigation, MEXICO-36.

<sup>408</sup>In 1994 the volume of imports was 60,996 tonnes, in 1995 it was 90,824 tonnes and, in the period under investigation, 192,906 tonnes, a situation that marks a percentage increase in those years over the same period in the preceding year of the order of 49 per cent in 1995 and 112 per cent in 1996. See import statistics tables in the injury investigation file, MEXICO-40.

<sup>409</sup>The United States noted that, consequently, there was no need for it to pursue the argument that was raised in its first submission that Mexico could not treat sugar for industrial use and sugar for household use as separate like products.

the focus is on the production of the like products, not on the identity of the producers. This is confirmed by the language of Article 3.1, which requires an objective examination of, *inter alia*, the "effect of the dumped imports on prices in the domestic market for like products", and Article 3.6, which states that "[t]he effect of the dumped imports shall be assessed in relation to the domestic production of the like product ...". The requirement to analyse the domestic industry cannot be satisfied when the investigating authority examines all producers of the like product, but only some of their production of that product. Instead, the investigating authority must analyse those operations of the domestic industry corresponding to the production of the domestic like product.<sup>410</sup>

5.517 In the United States' view, Mexico does not contest that SECOFI failed to do this. Mexico acknowledges that SECOFI's analysis focused exclusively on that portion of the domestic like product directed to the industrial market.

5.518 According to the United States, Mexico contends that its focus on the industrial market was justified because this was the market in which all imports of HFCS competed. While it is not improper *per se* for an investigating authority to examine a particular market served by the domestic industry, SECOFI did more than examine a specific market sector. It essentially premised its determination on threat of injury to the sector of the sugar industry serving the industrial market rather than finding threat of material injury to the Mexican sugar industry as a whole.

5.519 In the opinion of the United States, Mexico's argument that SECOFI's "affirmative threat of injury determination would not have involved a substantial change if household consumption had also been taken into consideration" merely underscores SECOFI's failure to take into account all production of the domestic like product in its threat analysis. In any event, Mexico's argument is baseless for the following reasons:

- (i) It is true, as Mexico argues, that the rate at which HFCS imports would be likely to increase may be the same regardless of what domestic production is analysed.<sup>411</sup> Nevertheless, the market penetration of the imports would have been considerably lower if SECOFI had considered all domestic sugar production; consequently, the impact on the domestic industry's market share would have been mitigated. Nowhere in its final determination did SECOFI consider this question.
- (ii) Because consumption of sugar in the household market is, by Mexico's own analysis, not subject to competition from imported HFCS, there is no reason to assume that whatever price effects HFCS might have on sugar sold in the industrial market will carry over to sugar sold in the household market. Consequently, there is no basis for Mexico's speculation that price effects in the industrial sector attributable to imported HFCS would be reflected in the performance of the industry as a whole.
- (iii) Mexico's argument that imports of HFCS would have a likely impact on the domestic industry's financial and economic indicators is sheer speculation. SECOFI failed to make any findings on pertinent financial and economic indicators even with respect to the industrial sector of the sugar industry.

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<sup>410</sup>Although Article 3.6 permits the investigating authority to examine a broader category of products than the like product under circumstances not applicable here, there is no provision authorizing the investigating authority to examine a narrower category of products than the like product. *See* United States first submission, para. 115 and footnote 139.

<sup>411</sup>Indeed, this is the only "finding" of those described in para. 260 of Mexico's first submission for which Mexico can provide a citation to SECOFI's final determination. The remaining "findings" in para. 260, as explained below, are simply *post hoc* argumentation.

(iv) Even on those factors on which SECOFI purported to make findings, its focus on the industrial sector meant that it did not in fact address the issue of the likely impact of imports on the industry as a whole. For example, SECOFI's final determination suggests that price pressures resulting from increased HFCS imports would impair the sugar producers' ability to repay debt.<sup>412</sup> Sales of sugar to the household sector, however, will not be affected by increased HFCS imports and, as far as one can ascertain from the determination, may be increasing. Without analysis of the likely trends in the sugar producers' cash flow and income from all sugar sales, SECOFI could not reasonably draw a conclusion on those producers' likely cash flow and ability to pay debt in the imminent future.

5.520 Therefore, the United States concludes that SECOFI's failure to take into account the impact of the imports on the entire domestic industry violated Articles 3.1, 3.2, and 3.4 of the AD Agreement and Article VI of GATT 1994.<sup>413</sup>

5.521 According to Mexico, the United States erroneously suggests that a determination of threat of injury cannot be based on an evaluation of the impact of imports on a majority of domestic production. Mexico reiterates that SECOFI's affirmative determination of threat of injury began and ended with the analysis of all domestic sugar production by the 61 mills, directed to both the industrial sector and the household sector. However, that when evaluating the impact of imports as part of the analysis of threat of injury, special consideration had to be given to the specific conditions of competition in the domestic sugar industry with respect to HFCS imports.

5.522 Mexico contends that such conditions were determined by the fact that, although domestic sugar producers produced for both the industrial and household sectors, upon evaluating the impact of HFCS imports, SECOFI found that 100 per cent of these imports were destined to the industrial sector where they competed directly with sugar destined towards industrial use, while imports did not compete directly with sugar destined towards household use. Consequently, the logical method for evaluating the impact of HFCS imports was to identify the portion of sugar production where 100 per cent of such imports had an effect, *i.e.* the industrial sector, where HFCS imports competed directly with the sales of domestically produced sugar.

5.523 Mexico states that, in this particular case, it would have been thoroughly illogical to analyse the impact of HFCS imports on the household sector given that HFCS imports are not destined for this sector and they do not compete in it. In other words, SECOFI began by analysing domestic production as a whole, but upon evaluating the impact of HFCS imports, it became obvious that such imports were destined in their totality for the industrial sector and not for the household sector. Thus, the assessment of the impact of imports was conducted in the light of the specific conditions of competition between HFCS imports and sugar destined to the industrial sector. But since there is in fact only one domestic industry, given that sugar firms produce for both the industrial sector and the household sector, the impact of HFCS imports upon a majority of production represented, in effect, a threat of injury to the entire domestic sugar industry.

5.524 In response to a question from the Panel as to whether sales of sugar in the household market affected the condition of all the domestic industry producing sugar, Mexico asserted that SECOFI's point of departure was to analyse all sugar production but this analysis led it to consider the industrial market separately, given that this is the sector where sugar competes directly with HFCS imports. Thus, after considering the industrial market separately and determining the effects of HFCS imports in this sector, SECOFI concluded that such effects could be generalized to the production of sugar as a whole. In response to a further question as to whether SECOFI collected any information on prices, or other events or circumstances concerning the household sector and whether such information was

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<sup>412</sup>*Final Determination*, para. 531, US-1.

<sup>413</sup>*See id.* para. 123.



referred to in the final determination, Mexico stated that SECOFI clearly did have information on prices and other elements concerning the household sector as of the initiation of the investigation, since it had enough elements to distinguish in the overall information the economic indicators referring to the industrial sector from those referring to the household sector, which was taken into account for issuing the affirmative determination of threat of injury to the domestic sugar industry. The information for both the industrial sector and for the household sector appeared in the working papers and in the administrative record of the investigation. This information was referred to in the *Initiation Notice*, in the section "Arguments and Evidence", paragraph 23, as well as in Mexico's first submission, paragraph 125(c). SECOFI had considered this information from the initiation of the investigation until reaching the final determination, so that there was not necessarily a section in the final determination setting out this fact. However, as proof of the fact that this information had been taken into account, SECOFI referred to the verification visit to the Sugar Chamber which was recorded in paragraphs 101B and 102 of the *Final Determination*.<sup>414</sup>

5.525 The Panel also asked Mexico whether SECOFI's final determination establishes a connection between the effects of the dumped HFCS imports in the industrial sector and the effects of such imports in the domestic sugar industry as a whole. Mexico's response was that, although this connection is laid out in the *Final Determination* in its entirety, it was illustrated particularly in a number of paragraphs in that determination relating to the margin of dumping (paragraphs 228, 282, 318 and 327), the world market (paragraph 427), the domestic market (441, 442 and 445 through 447), "likeness" analysis between products (paragraphs 423 through 426), dumped imports (paragraph 470), export capacity (paragraph 487), pricing analysis (paragraph 527), other indicators (paragraphs 531 through 533), additional elements (paragraphs 541 through 544), and conclusions (paragraphs 551).<sup>415</sup>

5.526 Mexico concludes that SECOFI's determination of threat of injury satisfies the requirements laid down in Articles 3.1, 3.2 and 3.4 of the AD Agreement, since threat of injury affects the entire domestic sugar industry, produced for both the industrial sector and the household sector by all domestic producers.

### **3. Insufficient Determination of The Likelihood of Substantially Increased Imports**

5.527 The United States submits that an additional flaw in SECOFI's threat determination stems from its failure to resolve an argument concerning whether Mexican soft drink bottlers had entered into an agreement which would have had the effect of limiting their future purchases of HFCS. Specifically, the importers argued before SECOFI that there was no basis for finding a threat of material injury in light of an alleged agreement between Mexican sugar refiners and Mexican soft drink bottlers. The alleged agreement was designed to increase the use of sugar and accordingly limited the bottlers' use of HFCS.<sup>416</sup> Because of this failure, SECOFI did not properly perform the analysis required by Art. 3.7(i) of the AD Agreement on the likelihood of substantially increased imports.

5.528 According to the United States, in September 1997, U.S. exporters participating in the investigation learned of the existence of an agreement between sugar producers and soft drink bottlers to limit the bottlers' purchase of HFCS. At a pre-final hearing conference on 24 November 1997, a representative of the Sugar Chamber confirmed to the U.S. participants the existence of a restraint agreement.

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<sup>414</sup>See Answer of Mexico to question no. 15 by the Panel, 22 June 1999.

<sup>415</sup>See Answer of Mexico to question no. 12 by the Panel, 22 June 1999.

<sup>416</sup>See *Final Determination*, para. 28L.

5.529 The United States holds that, on 1 December 1997, Almex filed a submission requesting that the proceedings be terminated due to the existence of this restraint agreement.<sup>417</sup> The CRA, representing U.S. HFCS producers and exporters collectively, as well as exporters and an importer individually, also filed a submission requesting termination of the investigation for this reason.<sup>418</sup> These submissions were put on the investigation record on 2 December 1997.<sup>419</sup> Although there was a hearing on 3 December 1997, the U.S. producers were not allowed to address questions to the Sugar Chamber regarding the restraint agreement because SECOFI ruled such questions irrelevant to the investigation. In its 10 December 1997 post-hearing brief, CRA advised SECOFI of SECOFI Secretary Herminio Blanco Mendoza's statement before the Mexican Senate on 23 September 1997 that he took great satisfaction in the restraint agreement between the sugar producers and the bottlers:

"I have been informed, and it has also given me great satisfaction, that the sugar mills and soft-drink producers have reached a private arrangement among themselves by which integration is achieved in the chain of production, as the soft-drink producers have made a commitment not to increase their consumption of fructose and as the sugar mills have made a commitment to charge increasingly competitive prices, and in more competitive conditions of supply, for the soft-drink bottlers".<sup>420</sup>

5.530 The United States also holds that, after SECOFI's ruling at the 3 December hearing that the restraint agreement was irrelevant to the investigation, SECOFI sent a letter to the Sugar Chamber on 11 December 1997 to inquire into the existence of such a restraint agreement.<sup>421</sup> On 15 December 1997, the Sugar Chamber responded to SECOFI's inquiry and denied that a restraint agreement existed but indicated that the sugar industry and the soft drink industry had held meetings for the purpose of improving relations between the two industries.<sup>422</sup>

5.531 The United States observes that, in its final determination, SECOFI responded to the U.S. industry's contentions concerning the restraint agreement between Mexican sugar refiners and Mexican soft drink bottlers. The U.S. industry had asserted that the refiners and bottlers had agreed to boost the use of sugar and restrict HFCS consumption. The U.S. industry contended that the investigation should be terminated because the restraint agreement effectively eliminated any alleged threat of injury.<sup>423</sup> Among the materials that the U.S. industry provided in support of its argument were official and newspaper accounts in which Secretary Blanco Mendoza was quoted as stating that the agreement afforded protection to the Mexican sugar market by limiting the acquisitions of fructose.<sup>424</sup>

5.532 The United States also observes that, in response, SECOFI stated that the U.S. industry had not produced a copy of the agreement and that the Sugar Chamber maintained that there was no agreement of the type asserted by the U.S. industry.<sup>425</sup> The final determination, however, did not address the U.S. industry's arguments that the existence of the agreement had been publicly disclosed by Secretary Blanco Mendoza. In fact, the determination did not resolve the issue of whether there was such an agreement.

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<sup>417</sup> See US-11.

<sup>418</sup> See US-12.

<sup>419</sup> See *Id.* and US-11.

<sup>420</sup> See US-13(a).

<sup>421</sup> See US-14.

<sup>422</sup> See US-15.

<sup>423</sup> *Final Determination*, paras. 28 L, 545, US-1.

<sup>424</sup> See US-13.

<sup>425</sup> See *Final Determination*, para. 546, US-1. The Sugar Chamber acknowledged that it had conducted meetings with the soft drink industry. It maintained, however, that there was no "September 1997 agreement between sugar mills and soft drink companies to restrict the use of HFCS". *Id.*, para. 95; see also US-20.

5.533 According to the United States, SECOFI concluded instead that, even if such an agreement existed, it would not eliminate the threat of injury. In support of this conclusion, SECOFI stated that any agreement "does not rule out the possibility of these bottling plants as well as other industries using HFCS for a number of different applications, continuing to purchase the imported product at discriminatory prices as a sugar substitute".<sup>426</sup>

5.534 The United States observes that SECOFI declined to find that a restraint agreement existed solely on the basis of the importers' contentions.<sup>427</sup> If its failure to find that the agreement existed had been SECOFI's basis for disposing of the importers' argument, such a basis would have been plainly inadequate because it mischaracterized the record. That record contained more than simple assertions by the importers. Instead, it included evidence showing that SECOFI Secretary Blanco had knowledge of the agreement and characterized it publicly as restraining purchases of fructose.<sup>428</sup>

5.535 The United States also observes that SECOFI did not reject the relevance of a restraint agreement, however, simply by characterizing it as an inadequately substantiated contention by the importers. Instead, SECOFI determined that it did not need to resolve whether a restraint agreement in fact existed. It concluded that even if such an agreement existed, it would not eliminate the threat of injury to the Mexican sugar industry. SECOFI explained that the existence of a restraint agreement "does not rule out the possibility of these bottling plants and other industries using HFCS for a number of different applications, continuing to purchase the imported product at discriminatory prices as a sugar substitute".<sup>429</sup>

5.536 In the view of the United States, SECOFI did not identify the "different applications" for which it believed bottlers might purchase HFCS if they had in fact agreed to restrict the amount of HFCS they used in their production of soft drinks or that other industries would have for HFCS. To the contrary, SECOFI's affirmative threat determination was premised on findings that the use of subject imports in Mexican production of soft drinks was likely to increase substantially:

- (a) The finding that the beverage industry accounted for 81 per cent of sales of subject imports during the period of investigation.<sup>430</sup>
- (b) The finding that the Mexican beverage industry was an attractive market for US exporters of HFCS in light of its size and the substantial per capita beverage consumption in Mexico.<sup>431</sup>
- (c) The finding that "a large share of the freely available capacity of the US [HFCS] industry will be trained on the Mexican market in the near future" because of, *inter alia*, "the steady growth in the local soft drink industry".<sup>432</sup>

5.537 The United States contends that all of these findings assumed that the bottlers had taken no action that would restrict their future use of HFCS. If in fact a restraint agreement did exist, as the US importers alleged, it would severely limit, if not eliminate, bottlers' ability to increase their HFCS purchases. There would be no reason for bottlers to purchase HFCS if they could not use it to sweeten beverages. Moreover, in light of SECOFI's finding that the beverage industry accounted for 81 per cent of consumption of US HFCS imports, if bottlers' purchasers of HFCS did not increase

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<sup>426</sup> *Id.* para. 547.

<sup>427</sup> *Id.* para.546.

<sup>428</sup> *See* US-13.

<sup>429</sup> *Final Determination*, para. 547, US-1.

<sup>430</sup> *Id.* para. 464.

<sup>431</sup> *Id.* para. 481.

<sup>432</sup> *Id.* para. 486.

significantly, SECOFI's own findings indicated that it would be very unlikely that overall purchases of HFCS in Mexico would increase significantly.

5.538 Consequently, the United States argues that SECOFI's finding that Mexican users of HFCS would continue to purchase imported product at dumped prices whether or not a restraint agreement was in effect cannot be reconciled with SECOFI's rationale concerning why the imports were threatening material injury to the Mexican sugar industry. Because of this failure, SECOFI's determination of threat of material injury by reason of the allegedly dumped US HFCS imports does not satisfy the requirements of Article 3.7 of the AD Agreement.

5.539 The United States recalls that Article 3.7 of the AD Agreement instructs investigating authorities to consider several factors in determining whether there is a threat of material injury. The first factor of this provision directs authorities to consider whether there is "a significant rate of increased in dumped imports into the domestic market indicating the likelihood of substantially increased importation". As explained above, determining whether a restraint agreement in fact existed was critical in this case to making a conclusion of whether a significant rate of increased dumped imports is likely. If such an agreement were in effect, the amount of imported HFCS purchased by soft drink bottlers would not increase significantly. Instead, it would stabilize or decrease. Because the bottlers account for the overwhelming proportion of subject HFCS imports, overall subject imports would similarly stabilize or decrease if a restraint agreement were effective.

5.540 The United States is of the view that SECOFI's determination did not resolve this issue. SECOFI's finding of likelihood of substantial increases in subject imports was premised on bottlers' not being restrained from purchasing additional quantities of HFCS. SECOFI, however, never squarely found that no restraint agreement existed, deciding that reaching a definitive conclusion on the issue was unnecessary.

5.541 According to the United States, SECOFI cannot justify its failure to make a finding on the grounds that it hypothesised what bottlers might do even if a restraint agreement were in effect. SECOFI's finding in paragraph 547 of the *Final Determination* that a restraint agreement "does not rule out the possibility of these bottling plants ... using HFCS for a number of different applications..." has no basis in the record. Even if it did, a hypothesis that there is a "possibility" of future purchases cannot satisfy the requirement of Article 3.7(i) of the AD Agreement that there be a likelihood of substantially increased importation. Moreover, basing a threat determination on a speculative hypothesis contravenes the requirement of Article 3.7 of the AD Agreement that "[a] determination of threat of material injury shall be based on facts and not merely on allegation, conjecture, or remote possibility".

5.542 The United States recalls that Article 3.7 also requires that there must be facts supporting a finding that "further dumped imports are imminent". Because SECOFI did not make a conclusion as to whether a restraint agreement existed, its record contained insufficient information to support such a finding.

5.543 Mexico disputes the argument by the United States that SECOFI did not solve the matter of the existence of an alleged agreement between sugar producers and soft drink bottlers to limit consumption of HFCS and that it thus violated Article 3.7(i) of the AD Agreement.

5.544 Mexico observes that, even though the importers and exporters argued in the final stage of the investigation that there was an alleged restraint agreement potentially limiting HFCS consumption, the information provided in this regard by the CRA to SECOFI, and referred to by the United States in this proceedings, was submitted extemporaneously on 22 January 1998. In other words, the information in question was filed with SECOFI not only after the public hearing had been held and allegations submitted, but also after the decision to impose a final anti-dumping measure had been

taken and the final determination had been sent for publication in the Official Journal, which took place on 23 January 1998.<sup>433</sup>

5.545 Mexico disputes the argument of the United States that SECOFI decided that there was no need to determine whether such a restraint agreement actually existed. In reality, SECOFI did not reject considering the importers' and exporters' arguments,<sup>434</sup> and, in fact, it did analyse the possible effects of the alleged agreement.

5.546 Mexico holds that, while it is true that SECOFI did not resolve whether the alleged agreement existed, because this was not within its powers as the anti-dumping authority and because it had not received any suitable evidence to prove the existence of the alleged agreement, SECOFI did bear in mind the exporters' and importers' arguments in this connection. Indeed, assuming that such an agreement existed, SECOFI made an analysis of the potential effects that the alleged agreement could have on the imminence of a substantial increase in dumped imports, as required by Article 3.7(i) of the AD Agreement.<sup>435</sup>

5.547 Mexico observes that SECOFI referred to the alleged agreement in paragraph 547 of the *Final Determination*, concluding that the arguments submitted by the importers and exporters (Almex and CRA) were not sufficient to establish that the alleged agreement would forestall an imminent and substantial increase in dumped HFCS imports.

5.548 Mexico also observes that SECOFI's conclusion was that, even under the non-proven assumption that Mexican bottlers would limit their consumption of HFCS, the threat of injury to the domestic industry was not removed. This conclusion was based on the following considerations:

- (a) On the basis of the information in the administrative file, SECOFI analysed whether HFCS imports showed a significant rate of increase indicating a well-founded likelihood that in the future there would be a substantial increase, and reached the conclusion that, together with other factors - such as low prices, increasing substitution, freely disposable and increasing capacity of the exporting country,

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<sup>433</sup>In response to a question from the Panel, Mexico confirmed that the statement by SECOFI's Secretary Blanco before the Mexican Senate regarding imports of HFCS was filed with SECOFI on 22 January 1998. See Answer of Mexico to question no. 16(b) by the Panel, 22 June 1999. The statement acknowledged the existence of an agreement restraining imports of HFCS by soft-drink bottlers. Mexico also confirmed that, prior to this date, parties had filed with SECOFI allegations concerning the existence of the restraint agreement which, however, were unaccompanied by any supporting documentation. See Answer of Mexico to question no. 16(d) by the Panel, 22 June 1999. In response to questions by the Panel, the United States confirmed that exporters raised the argument about the existence of the restraint agreement in submissions filed with SECOFI on 2 December 1997, two days before the public hearing, and 10 December 1997. See, respectively, Answer of the United States to question no. 54 by the Panel, 6 May 1999; and Answers of the United States to questions by the Panel, Note, 22 June 1999. In response to a further question from the Panel as to whether SECOFI attempted to verify the allegation about the existence of the restraint agreement made in a post-hearing brief, Mexico stated that SECOFI made an inquiry in this regard with the Sugar Chamber, one of the parties presumably involved in the alleged agreement, and that this inquiry was provided to the Panel as MEXICO-4. See Answer of Mexico to question no. 16(c) by the Panel, 22 June 1999. Mexico notes that, in its reply to SECOFI's inquiry, the Sugar Chamber denied the existence of the alleged agreement.

<sup>434</sup>Proof that SECOFI did not reject the importers' and exporters' arguments is that on 11 December 1997 it requested the Sugar Chamber to report to it regarding the existence of the alleged restraint agreement, MEXICO-4.

<sup>435</sup>Article 3.7(i) of the AD Agreement establishes that, in determining the existence of threat of injury, consideration should be given to the rate of increase of dumped imports indicating the likelihood of substantially increased importation in the future.

Mexico as a genuinely important destination for United States exports - such a situation had occurred during the period of investigation.<sup>436</sup>

- (b) Mexico's threat of injury determination was based on information for 1996, the period of investigation. In addition, from January to September 1997 HFCS imports rose 75 per cent over the same period in 1996.<sup>437</sup> Accordingly, SECOFI's conclusion concerning a well-founded likelihood of a substantial increase in the imports under investigation was fully demonstrated.
- (c) Other industries, in addition to the soft drinks industry, use imported HFCS in their activities and would be under no restriction whatsoever to increase consumption of this product as a sugar replacement. These industries accounted for approximately 46 per cent of the industrial sector's total sugar consumption.<sup>438</sup>
- (d) Both the soft drinks industry and the other industries could purchase the imported product at low prices as a result of the dumping, thereby causing the price of sugar to deteriorate.

5.549 Thus, Mexico states that, to comply with Article 3.7(i) of the AD Agreement, SECOFI examined whether, if the use of HFCS was limited, as the exporters and importers argued, the alleged agreement between the soft drink bottlers and the sugar mills would remove the likelihood of substantially increased imports, and it concluded that even if HFCS use by soft drink bottlers was limited, it would not remove the likelihood that the same bottlers and other industries which use HFCS in many applications would continue to purchase the dumped imported product as a replacement for sugar.

5.550 Mexico disputes the statement by the United States that SECOFI did not identify the various applications, other than soft drinks, for which the bottlers could purchase HFCS. Mexico argues that the United States incorrectly interprets Mexico's analysis by confusing the soft drink bottlers sector with the beverages industry as a whole, and fails to take into consideration that the latter consists both of producers of bottled soft drinks and of producers of other beverages such as juices, tonics for athletes and prepared infusions. Mexico also argues that the United States disregards that, to arrive at its conclusion, SECOFI also considered HFCS consumption by other non-beverage industries using HFCS in many applications, such as processed foods, preserves, confectionery, bakery products, dairy products, etc. In the view of Mexico, it is clear from SECOFI's determination that not only could soft drink bottlers continue to purchase HFCS at dumped prices as a substitute for sugar, but also other sectors in the beverage industry, together with other non-beverage industries using HFCS in many applications, such as processed foods, preserves, confectionery, bakery products and dairy products, would continue to purchase the imported product, gradually displacing their consumption of sugar.

5.551 Mexico argues that the United States does not make the above distinction, suggesting that SECOFI's determination was based on the erroneous assumption that 81 per cent of HFCS sales on the Mexican market went to soft drink bottlers. Paragraph 464 of the *Final Determination*, however, clearly states that the beverages industry – not merely the soft drink bottlers – purchased 81 per cent of HFCS sales.<sup>439</sup>

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<sup>436</sup>See *Final Determination*, para. 470, MEXICO-6.

<sup>437</sup>See the import statistics tables in the injury investigation file, MEXICO-40.

<sup>438</sup>See *Final Determination*, para. 465, MEXICO-6.

<sup>439</sup>See Working Papers on the Analysis of Sales of HFCS Imports on the Mexican Market, MEXICO-39.

5.552 Mexico observes that, as the bottled soft drink sector accounts for only part of the 81 per cent of HFCS sales accounted for the beverages industry, even if HFCS imports for that sector were to remain at the level they had already reached,<sup>440</sup> the alleged agreement would not prevent other sectors in the beverages industry from increasing their own purchases of the imported HFCS, with the consequent displacement of domestic sugar production and effect on prices. The alleged agreement, therefore, would not in any way remove the impact in the immediate future of dumped HFCS imports on the domestic sugar industry.

5.553 In response to a question from the Panel, Mexico stated that, out of the 81 per cent of the sales of HFCS imports accounted for by the beverages industry, 68 percentage points are attributable to the soft drink bottlers while the remaining 13 percentage points are attributable to other beverage producers.<sup>441</sup>

5.554 Mexico concludes that SECOFI's affirmative determination of threat of injury to the domestic industry complied with the requirements of AD Agreement Article 3.7(i) by analysing even the possible repercussions of the alleged restraint agreement.

5.555 According to the United States, Mexico acknowledges that SECOFI did not resolve whether the restraint agreement existed. Mexico contends, however, that SECOFI was not obliged to decide the issue because it concerned a matter outside its jurisdiction. Mexico further asserts that resolution of the issue was unnecessary because SECOFI concluded that even assuming that the restraint agreement was effective, the agreement would not eliminate the threat of injury to the Mexican sugar industry caused by imports of HFCS from the United States. The United States submits that Mexico's argument cannot be sustained because it mischaracterizes both SECOFI's final determination and the nature of the evidence before SECOFI.

5.556 The United States notes that, as an initial matter, it agrees with Mexico that SECOFI would have discharged its responsibilities under Article 3.7(i) if SECOFI had established that, notwithstanding the restraint agreement, there would be a likelihood of substantially increased importation of HFCS from the United States.<sup>442</sup>

5.557 In the view of the United States, Mexico's argument that SECOFI conducted the required analysis does not accurately summarize SECOFI's actual findings.<sup>443</sup> Contrary to Mexico's

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<sup>440</sup>See *Final Determination*, para. 460, which mentions that the exporters' information indicated that the alleged agreement was reached in September 1997; in the period January-September of that year, HFCS imports rose 75 per cent over the same period in 1996, MEXICO-6.

<sup>441</sup>See Answer of Mexico to question no. 23 (a) by the Panel, 6 May 1999.

<sup>442</sup>Nevertheless, the United States does not agree with SECOFI that resolution of the importers' argument that a restraint agreement existed was "not an obligation incumbent on the investigating authority". Mexico first submission, para. 225. Article 3.4 of the AD Agreement, which Mexico has acknowledged is pertinent to determinations involving threat of material injury, *see* Mexico first submission, paras. 233, 245, requires investigating authorities to conduct "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry". Surely an agreement under which purchasers commit to purchasing specific volumes of the like product produced by the domestic industry is a "relevant economic factor ... having a bearing on the state of the industry". Moreover, Article 3.5 of the AD Agreement directs authorities to examine "trade restrictive patterns of and competition between the foreign and domestic producers". SECOFI's own actions indicate that it recognized this. *See Final Determination*, para. 95. These actions also belie SECOFI's current argument that the argument concerning the restraint agreement was not asserted to it until the eve of publication of the final determination in the *Diario Oficial*. SECOFI's own determination indicates that arguments concerning the restraint agreement were asserted in briefs of the parties submitted well before issuance of the final determination. *See Final Determination*, para. 28L.

<sup>443</sup>The United States also argues that SECOFI's final determination of the likelihood of increased imports focuses exclusively on the likelihood of continued substitution of HFCS for sugar in the production of soft drinks, and that this determination does not support the conclusion that there was a likelihood of

contention,<sup>444</sup> SECOFI did not find that there would likely be increased purchases of HFCS for use in products other than soft drinks. It instead concluded that the restraint agreement "does not rule out the possibility of these bottling plants and other industries using HFCS for a number of different applications, continuing to purchase the imported product at discriminatory prices as a sugar substitute".<sup>445</sup> The United States also argues that SECOFI's final determination of the likelihood of increased imports focuses exclusively on the likelihood of continued substitution of HFCS for sugar in the production of soft drinks, and that this determination does not support the conclusion that there was a likelihood of substantially increased imports of HFCS for use in applications other than soft drinks.

5.558 The United States submits that SECOFI's finding that increased purchases for non-soft drink applications was "possible" is insufficient to support a finding of threat of material injury. Under Article 3.7(i) of the AD Agreement, the investigating authority is supposed to consider whether there is a "likelihood of substantially increased imports" - not merely a possibility. Article 3.7 of the AD Agreement also states that a "determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture, or remote possibility". Yet SECOFI's findings in its final determination -- and Mexico's arguments in its first submission -- are based on the conjecture that purchasers would purchase increasing volumes of HFCS for non-soft-drink applications even in the presence of a restraint agreement.<sup>446</sup>

5.559 The United States holds that Mexico's assertion that demand for HFCS in non-soft-drink applications would be likely to increase is another example of its reliance upon *post hoc* reasoning. The finding of a likelihood of increased exports in SECOFI's determination concerned the likelihood of increased demand for use of HFCS in "soft drinks" -- not "beverages" generally, and not other applications.<sup>447</sup> The United States notes that, although quarrelling with the United States' use of data from SECOFI final determination, and introducing its own data of dubious relevance,<sup>448</sup> Mexico never disputes the United States' contention that soft drink bottlers were by far the largest purchasers of HFCS from the United States.<sup>449</sup>

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substantially increased imports of HFCS for use in applications other than soft drinks. Mexico disputes both assertions. See Answers of Mexico to questions no. 6(a) and 6(b) by the United States, 6 May 1999.

<sup>444</sup> See Mexico's first submission, para. 274.

<sup>445</sup> *Final Determination*, para. 546 (emphasis added by the United States), US-1.

<sup>446</sup> The United States reiterated this view in response to a question from Mexico as to whether the United States recognizes that SECOFI did analyse the possible effects that the alleged restraint agreement might have in relation to the imminence of dumped imports. See Answer of the United States to question no. 71 by Mexico, 6 May 1999.

<sup>447</sup> See *Final Determination*, paras. 481, 486, US-1.

<sup>448</sup> Mexico argues the United States' use of the 81 per cent figure cited in para. 464 of the *Final Determination* is erroneous because this figure encompasses purchases of all beverages, not merely soft drinks. However, in para. 465 of the *Final Determination*, SECOFI broke out industrial consumption of sugar into use "for bottling plants" and other uses. It was reasonable to expect that the categories SECOFI used to report HFCS consumption in para. 464 of the *Final Determination* would conform to those it used for sugar consumption in para. 465. Additionally, SECOFI's citation that 46 per cent of sugar consumed in the industrial sector went to applications other than soft drinks, Mexico first submission, para. 269(c), bears little relevance to the issue of the proportion of HFCS consumed in such applications. SECOFI's own data show that patterns of HFCS consumption differ markedly from those of sugar consumption. See *Final Determination*, paras. 464, 465, US-1. Indeed, SECOFI acknowledged that HFCS cannot serve as a substitute for sugar in all commercial and industrial applications. *Id.* para. 418, US-1.

<sup>449</sup> Indeed, other information submitted by Mexico tends to corroborate the United States' assertions. See MEXICO-37 (indicating that 82 per cent of total imports of HFCS were consumed by the soft drinks industry).



5.560 The United States asserts that, in light of this information, there was no basis for any finding that overall purchases of HFCS would be likely to increase significantly if the restraint agreement served to restrict the amount of imported HFCS that could be used in the soft drink market. Indeed, SECOFI made no finding to this effect. Accordingly, because it failed to resolve whether the restraint agreement existed, SECOFI failed properly to analyse whether future increased dumped imports are clearly foreseen and imminent. Because it did not properly establish or objectively evaluate the facts concerning the likelihood of further dumped imports, SECOFI had insufficient evidence to support a finding of threat of material injury under Article 3.7 of the AD Agreement.

5.561 Mexico disputes the argument by the United States that SECOFI's threat determination is defective in its treatment of the alleged restraint agreement in that SECOFI declined to resolve whether that agreement existed. Mexico argues that SECOFI could not, and indeed it was not within SECOFI's powers as the anti-dumping authority, to resolve whether the alleged restraint agreement existed. In any case, the alleged agreement was a private one, apparently intended to limit purchases of HFCS by Mexican soft drink bottlers, which constrained SECOFI to analyse the probable effects of the alleged agreement based upon a presumption of its existence given that, it should be stressed, no adequate evidence of this was ever presented. Moreover, the alleged agreement took place outside the investigation period. Mexico's anti-dumping practice consists of analysing the information corresponding to the period established as the period of investigation. In cases where the investigating authority has information or is given information on events subsequent to that period, SECOFI does examine that information to assess whether it could be relevant to the determination of threat of injury, and in particular in evaluating the imminence of further dumped imports. It goes without saying that if the assessment reveals that the information is not relevant because it does not affect the change of circumstances, the determination of threat of injury remains unchanged.

5.562 Mexico also states that, in this particular case, although the alleged agreement took place outside the period of investigation, and exporters and importers merely presented arguments without any adequate evidence of the existence of the alleged agreement during the investigation, SECOFI assumed the existence of such agreement and went on to analyse its possible impact on the likelihood of a substantial increase in dumped imports, as required by Article 3.7(i) of the AD Agreement.

5.563 According to Mexico, SECOFI's concluded from the above analysis that, even if there was such an agreement, this would not remove the threat of injury to the domestic sugar industry. In fact, the United States acknowledges that the purpose of the alleged restraint agreement was to limit future HFCS purchases by Mexican soft drink bottlers. Limiting such purchases, however, is not at all the same thing as eliminating them. SECOFI found that, if the alleged agreement existed, it would not remove the likelihood that soft drink bottlers, as well as other sectors of the beverage industry and other industries using HFCS in many applications, continued to purchase the dumped product.

5.564 Mexico observes that the basis for SECOFI's conclusions is set forth in Mexico's first submission. Given that the United States' arguments regarding this matter reflect a lack of understanding of Mexico's position, Mexico provided the following clarifications:

- (a) The industrial users that could possibly consume both sugar and HFCS are, on the one hand, the producers of beverages of all kinds, i.e. producers of bottled soft drinks, juices, tonics for athletes and prepared infusions, concentrates, and even alcoholic beverages, and on the other hand, the producers of processed foods, preserves, confectionery, bakery products and dairy products.
- (b) The producers of bottled soft drinks form part of the beverage industry, and the arguments presented by the exporters and importers indicated that such producers would allegedly limit their consumption of HFCS.

- (c) Although during the period of investigation, the producers of bottled soft drinks were the main consumers of HFCS, this does not mean that they were the only consumers of HFCS, nor that consumption by other industries was either negligible or less important.
- (d) When evaluating the arguments concerning the alleged agreement, SECOFI considered, in particular, the situation of the soft drink bottlers, not because it had any special interest in those producers, but because the arguments made by the exporters and importers focused on consumption by soft drink bottlers.
- (e) However, for the analysis of threat of injury, SECOFI, in conformity with the AD Agreement and with the rest of its analysis, assessed the situation of other industrial users in the light of the possible existence of the agreement, and concluded that these users would not modify their behaviour in the market. Thus, making an overall evaluation of the situation of all industrial users, SECOFI concluded that even if the alleged agreement existed, it would not remove the likelihood of an increase in HFCS imports.

5.565 Mexico also observes that SECOFI concluded that dumped imports were imminent by determining, among other factors, that HFCS imports increased by 112 per cent during the period of investigation (1996) as compared to the previous period (1995). Furthermore, as of September 1997, date of the alleged agreement, imports showed an additional increase of 75 per cent over the period January to September 1996. In other words, the increase in imports predicted in the period of investigation had already taken place at the time of the alleged agreement, so that the alleged limitation in the consumption of HFCS by the soft drink bottlers was already based on a level of imports substantially higher than the consumption observed during the investigation period.

5.566 Mexico argues that the above consideration, added to the fact that in Mexico industrial users other than the soft drink bottlers were replacing their consumption of sugar with HFCS in increasing amounts,<sup>450</sup> placed the volume of HFCS imports at a level at which the threat of injury persisted.

5.567 In response to a question from the Panel, Mexico provided information available to SECOFI of the degree of technical substitutability between HFCS and sugar with respect to non soft drink beverage producers and other industries using sweeteners. This information had been referred to in paragraph 523 of *Final Determination* but the Panel wished to have Mexico expand upon it. Mexico provided estimates from two sources: (a) a market survey commissioned by Almex, and (b) a market survey undertaken by SECOFI in the course of the investigation.

5.568 Mexico stated that, according to the Almex market survey, the degree of technical substitutability between HFCS and sugar varied per application as follows:

Industrial users	Degrees of substitutability of sugar with HFCS (percentage)
Non-soft drink beverage producers	100
Other products:	
Bread	100
Ketchup	50
Yoghurt	50

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<sup>450</sup>This is due to the particular situation of the Mexican market, in which the use of HFCS is not yet well established, since substantial imports of HFCS only began in 1994. In 1996 certain industrial users had not yet begun to substitute HFCS for sugar, and in other cases, products of the same brand used HFCS for part of their production and sugar for the rest, gradually substituting HFCS for sugar.

Industrial users	Degrees of substitutability of sugar with HFCS (percentage)
Marmalades	33
Biscuits, pastries and desserts	10

Mexico also stated that the market survey referred to above reflected conditions in 1996, when the development of the HFCS market in Mexico was at a stage of product introduction; therefore, the degrees of substitutability quoted in this market study should not be considered as a technical limitation, but rather as the level of substitutability that had been reached up to that point.

5.569 Mexico asserted that, according to the market survey conducted by SECOFI, the degree of technical substitutability varied per application as follows:

Products	Degrees of substitutability of sugar with HFCS (percentage)
Juices	100
Wines	100
Liquid caramel	100
Glazes	100
Whipped cream	100
Frozen fruit	100
Syrups	99
Seasonings	96
Marmalade	70
Fruits in syrup	52
Ice-cream	36

Mexico observed that this market study referred the use of HFCS in production processes during 1996.<sup>451</sup>

5.570 The Panel inquired whether Mexico took the view that, even in event of the alleged agreement, imports of HFCS would have continued (or increased) in such quantities as to threaten material injury, notwithstanding that (a) only a minority of HFCS imports are consumed by industrial users other than soft drink bottlers and that (b) these producers cannot fully switch to consuming HFCS instead of sugar. Mexico replied that producers consuming HFCS other than soft-drink bottlers cannot be considered to be a minority, since during the period of investigation alone, they consumed nearly one third of the HFCS imported from the United States into Mexico. In addition, Mexico stated that even though such producers could not completely switch to consumption of HFCS, it was reasonable to expect an increase in their share of HFCS consumption during the period subsequent to period of investigation. Lastly, Mexico noted in this regard that, by September 1997 (the date of the alleged agreement), HFCS imports had increased by 75 per cent, so that even if the use of HFCS by soft drink bottlers had been limited by the alleged agreement, both consumption and imports of HFCS had already reached such a level that the threat of injury to the domestic sugar industry would remain.<sup>452</sup>

5.571 Thus, Mexico disputes the United States' statement that SECOFI's final determination did not support the conclusion that there was a likelihood of increased imports of HFCS. Through this simplistic assertion, the United States attempts to distract the Panel's attention from the extensive

<sup>451</sup> See Answer of Mexico to question no. 23(c) by the Panel, 6 May 1999.

<sup>452</sup> See Answer of Mexico to question no. 23(d) by the Panel, 6 May 1999.

analysis conducted by SECOFI of all of the factors set forth in Article 3.7 of the AD Agreement for determining the imminence of further dumped imports.<sup>453</sup> The analysis of these factors shows that SECOFI did not base its determination of threat of injury on possibilities, but on the substantiated likelihood that in the immediate future there would be a substantial increase in dumped HFCS imports.

5.572 Finally, Mexico also disputes the United States argument that, by declining to resolve whether the alleged agreement existed, SECOFI failed to analyse the restrictive trade practices of domestic producers. On the contrary, SECOFI did analyse this issue by considering the possible effects of the alleged agreement on the situation of the Mexican sugar industry, assuming that such agreement existed. In particular, SECOFI discussed the trade practices of the domestic sugar producers in paragraphs 511 to 517 of the *Final Determination*, with respect to the economic behaviour of the mills and the determination of sugar prices by the mills. Thus, Mexico's affirmative determination of threat of injury to the domestic industry did comply with the requirements of Article 3.5 and Article 3.7 of the AD Agreement by analysing the possible impact of the alleged restraint agreement.

#### E. PERIOD OF APPLICATION OF PROVISIONAL MEASURES

5.573 As described below, the United States withdrew its claim regarding SECOFI's alleged lack of justification for extending the provisional measure from four to six months (SECOFI's alleged failure to conduct a lesser-duty inquiry) at the first meeting of the Panel with the parties. The relevant arguments and counter-arguments are described herein, however, for the sake of completeness.

5.574 The United States observes that SECOFI published its affirmative preliminary determination imposing provisional anti-dumping measures on 25 June 1997. The preliminary determination reflects the anti-dumping duties on HFCS calculated for four named United States exporters and for all other U.S. exporters at specified U.S. dollar amounts.<sup>454</sup> It further directed the Secretariat of Finance and Public Credit, General Customs Administration, to impose the anti-dumping duties on imports and to allow a bond to be posted to cover payment of the additional duties, effective on 26 June 1997.<sup>455</sup>

5.575 The United States asserts that, nearly four months after the effective date of SECOFI's imposition of provisional measures, CRA filed, on 24 October 1997, letters requesting that SECOFI terminate the provisional measures as of 26 October 1997.<sup>456</sup> They cited the requirement of Article 7.4 of the AD Agreement that provisional measures be limited to as short a period as possible, not to exceed four months. That period would expire on 26 October four months following the effective date of SECOFI's imposition of provisional measures on 26 June 1997. Attorneys for CRA and Almex met with officials at SECOFI on 24 October 1997, to express their concerns about this issue.<sup>457</sup> None of the U.S. exporters requested SECOFI to extend the application of provisional measures by two months, pursuant to Article 7.4 of the AD Agreement.

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<sup>453</sup>In its final determination of threat of injury, SECOFI carried out an analysis of all of the factors indicated in Article 3.7 of the AD Agreement, which were included in the notice of imposition of the definitive anti-dumping duties in the sections entitled: imports subject to price discrimination, export capacity, price analysis and inventories of the investigated product.

<sup>454</sup>*Preliminary Determination*, paras. 307-308, US-2.

<sup>455</sup>*Id.* paras. 310-11, 314, 316.

<sup>456</sup>Annexed at US-15 as follows: (a) Letters from Lic. Luis Bravo Aguilera, Counsel for CRA, Progold Limited Liability Co. (Progold), and Minnesota Corn Processors, to Lic. Gustavo Uruchurtu Chavarin of SECOFI (24 October 1997); (b) letter from David Hurtado Badiola, Counsel for Almex, to Lic. Gustavo Uruchurtu Chavarin of SECOFI (24 October 1997); (c) letter from Javier Pandal Perez, Counsel for ADM, to Lic. Gustavo Uruchurtu Chavarin of SECOFI (24 October 1997).

<sup>457</sup>SECOFI Communication Report (24 October 1997)( handwritten), US-17.

5.576 The United States also asserts that, in response to U.S. exporters' and an importer's requests, SECOFI determined, in an agency memorandum on the record, that, in accordance with Article 7.4 of the AD Agreement, it was necessary to examine if the imposition of an anti-dumping duty less than the margin of dumping would be sufficient to eliminate the threat of injury to the domestic industry, so that the period of provisional measures could be extended from four to six months from the publication date of the preliminary determination.<sup>458</sup> SECOFI also responded by letters dated 29 October 1997, to CRA and others, informing them that the agency had "determined the necessity to examine if the imposition of an anti-dumping duty on the importation of high fructose corn syrup, grades 42 and 55, at a level inferior to the dumping margin, would be sufficient to eliminate the threat of injury to domestic production, such that the effective period for provisional measures would be extended to six months ... in conformity with Article 7.4 of the Agreement on the Application of Article VI of GATT 1994".<sup>459</sup>

5.577 The United States observes that, in accordance with its determination, SECOFI continued the application of provisional measures two more months, or until 26 December 1997, six months after the effective date of their imposition. That date came and went, however, with the result that SECOFI continued the application of provisional measures for almost an entire additional month, or until 24 January 1998, the date following the date of publication of the final determination.<sup>460</sup> In its final determination, SECOFI stated:

[Duration of the provisional measures]

"In accordance with Article 7.4 of the [AD Agreement], the Ministry decided to extend the duration of the provisional measures imposed under the Preliminary Determination referred to in paragraph 19 of this determination in order to determine whether a definitive anti-dumping duty below the level of the corresponding dumping margin would suffice to eliminate the threat of injury to domestic sugar production, extending the effective period of the provisional measures established under paragraphs 307 and 308 of the aforementioned preliminary decision to six months" (para 149).

5.578 The United States maintains that, nowhere in the final determination, did SECOFI provide any explanation of its supposed determination whether a definitive duty below the level of the dumping margin would suffice to eliminate the threat of injury to domestic sugar production. Likewise, SECOFI's record is devoid of any documents that substantiating that it examined whether a lesser duty would be sufficient to remove injury. In the 12 June 1998 consultations, SECOFI mentioned a "government confidential" memorandum allegedly providing this explanation. However, no such document was ever made available to the U.S. industry or Mexican HFCS importers or any other U.S. party during the administrative proceeding, and no such document has been produced to the United States in this dispute.

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<sup>458</sup> See US-18 as follows: (a) SECOFI Memorandum, "Extension of the Effective Period of Provisional Anti-dumping Duties", initialed by Director General, Legal Technical Attachment, Juan Manuel Saldana Perez (24 October 1997); (b) SECOFI Memoranda concerning the CRA, Progold, Minnesota Corn Processors, Almex, and ADM, stating the same determination regarding Article 7.4, initialed on behalf of the Directorate General, Legal Technical Attachment (28 October 1997).

<sup>459</sup> See US-19: (a) Letter from SECOFI, signed by Juan Manuel Saldana Perez, to Lic. Luis Bravo Aguilera, Counsel for CRA, Progold, and Minnesota Corn Processors (29 October 1997); (b) letters from SECOFI, signed by Juan Manuel Saldana Perez, to counsel for Almex, ADM, A.E. Staley (29 October 1997). See also (c) letter from SECOFI, signed by Juan Manuel Saldana Perez, to Director General of Customs (29 October 1997).

<sup>460</sup> Actually, the extension of the provisional measures probably did encompass a full third month, or until 26 January 1998, because 24 January was a Saturday. The final determination was published on a Friday, 23 January 1998.

5.579 The United States also maintains that nowhere in the final determination did SECOFI provide any explanation for its extension of provisional measures for a third month, from 26 December 1997, to 24 January 1998. Instead, SECOFI ordered the Ministry of Finance and Public Credit to collect the bonds posted by the importers of HFCS from the U.S. to assure the payment of anti-dumping duties.<sup>461</sup>

5.580 The United States holds, finally, that SECOFI's final injury determination was a "threat" determination, finding that the Mexican sugar industry was threatened with material injury by reason of dumped imports, rather than that material injury was actually occurring.<sup>462</sup> Nowhere in the final determination, however, did SECOFI make a finding that the effect of the dumped imports would, in the absence of the provisional measures imposed, have led to a determination of injury to the domestic industry. Nevertheless, SECOFI imposed provisional measures retroactive to the date of the preliminary determination.

5.581 The United States recalls that Article 7.4 of the AD Agreement limits the application of provisional measures to the shortest period possible, not to exceed four months except in specified circumstances:

"The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively".

5.582 The United States notes that, according to Article 7.4, provisional measures cannot be extended beyond a four-month period unless one of three exceptions applies. The first exception allows a two-month extension for a total provisional measures period of six months, if exporters representing a significant percentage of the trade involved in the case request an extension. None did in the investigation in question. The second exception allows a similar two-month extension for a total provisional measures period of six months, when the investigating authority examines whether a duty lower than the margin of dumping would be sufficient to remove injury - - the lesser-duty rule. The United States asserts that SECOFI did not conduct the requisite examination. The third exception applies if both exporters representing a significant percentage of the trade involved in the case have requested an extension and the authority examines whether to apply a lesser-duty. In this case, Article 7.4 allows the investigating authority to maintain provisional measures for a total of nine months. Since the U.S. exporters never requested an extension in this case, this exception does not apply. All three of these exceptions deviate from the general rule, which is to impose provisional measures for "as short a period as possible, not exceeding four months".<sup>463</sup>

5.583 The United States observes that SECOFI relied on the lesser-duty provision of Article 7.4 as its reason for continuing the application of provisional measures beyond the four-month limit. SECOFI failed, however, to conduct any substantive examination, based on factual information and critical analysis, of whether a lesser duty would, in fact, be sufficient to remove injury, as required by Article 7.4.<sup>464</sup> SECOFI did respond to the requests of U.S. exporters and an importer to terminate the provisional measures at the four-month mark by stating that it would examine whether a lesser-

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<sup>461</sup> *Final Determination*, para. 562, US-1.

<sup>462</sup> *Id.* para. 552.

<sup>463</sup> AD Agreement, Article 7.4. *See also* GATT, Anti-dumping and Countervailing Duties, Report of Group of Experts, GATT Sales No. GATT/1961-2 (1961) at 18, advising that provisional measures "should be used sparingly and for the shortest possible time in order to interfere as little as possible with normal trade and in order that they should not assume a protectionist character". This excerpt is quoted in Stewart at 34, US-21.

<sup>464</sup> *See* United States first submission, paras. 43-44 (citing US-16 to US-19).

duty would be sufficient. SECOFI repeated this response in the final determination when it stated that it had determined "to extend the duration of the provisional measures imposed under the preliminary determination ... in order to determine whether a definitive anti-dumping duty below the level of the corresponding dumping margin would suffice to eliminate the threat of injury to domestic sugar production".<sup>465</sup> However, the final determination as well as the agency record is devoid of any analysis of the results of this supposed investigation. No requests by SECOFI were ever issued to the parties for information to aid in this investigation, no argument was ever received or held, and no agency memorandum was ever included in the record explaining SECOFI's analysis.<sup>466</sup> SECOFI's failure properly to examine whether to apply a lesser-duty necessarily had the consequence that it did not determine "whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less..., if such lesser duty would be adequate to remove the injury to the domestic industry".<sup>467</sup>

5.584 The United States argues that SECOFI may not now claim that it conducted this examination "in its head". The *Guatemala-Cement Panel* recently recognized the importance of including critical facts and analysis on the record so that they may be evaluated by the reviewing Panel. That Panel sustained Mexico's claim that Guatemala failed to provide sufficient evidence to justify initiation of its investigation, as required by Article 5.3 of the AD Agreement. The Panel stated:

"We note that Guatemala asserted that the Ministry "knew" certain information [regarding threat of material injury] ... and that such knowledge was brought to bear on its evaluation of the information ... While such facts may have been known to the Ministry, there is no reference to them in the application, in the evaluation prepared by the two advisors, or in the resolution itself. Indeed, there is no reference whatsoever...Thus, we cannot consider such facts in evaluating whether the Ministry properly concluded that there was sufficient evidence to justify initiation in this case".<sup>468</sup>

The United States contends that, similarly, in this case a reviewing body cannot be expected to read SECOFI's mind as to what it might have "known" about facts which might have substantiated that it conducted a proper examination of the lesser-duty rule. SECOFI must state those facts on the record, either in the final determination or in a separate report in sufficient detail to explain its findings of facts and to support the conclusions of law it drew on the basis of those facts.

5.585 The United States maintains that, in fact, SECOFI is capable of such investigation and sophisticated analysis, according to an extensive discussion Mexico recently provided to the WTO about its lesser-duty methodology.<sup>469</sup> Mexico outlined two approaches: (1) the unitary international

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<sup>465</sup> *Final Determination*, para.149, US-1.

<sup>466</sup> According to the United States, Mexico indicated at the 12 June 1998 consultations that a "government confidential" document exists which explains its application of the lesser-duty rule. A two-page hand-written document, the SECOFI "Communication Report", US-17, provides no such explanation. It merely records the meeting of counsel for CRA and Almex with SECOFI officials, at which meeting counsel expressed their concern that provisional measures not be extended beyond the four-month period allowed by Article 7.4. This document contains no SECOFI evaluation of the facts and no SECOFI analysis of whether to apply a lesser-duty. It therefore does not substantiate that SECOFI undertook the examination required by Article 7.4. Were there to be another explanatory document, whatever its status, it was not available in SECOFI's record to the U.S. producers or importers in Mexico (See AD Agreement, Article 6.4) and can have no relevance at this stage. See *Guatemala-Cement Panel Report*, footnote 242.

<sup>467</sup> AD Agreement, Article 9.1.

<sup>468</sup> *Guatemala-Cement Panel Report*, footnote 242. See also *Brazil-Milk Powder Panel Report*, para. 294.

<sup>469</sup> See *Compilation of Information Provided by Members Regarding Lesser-Duty Rule* (WTO Compilation) G/ADP/AHG/W/43, 16 April 1998 pp. 5-6, US-22.

price approach or exogenous price method; and (2) the endogenous production cost or price approach.<sup>470</sup> Mexico further discussed the cases in which it has applied this sophisticated analysis.<sup>471</sup> Yet nowhere in SECOFI's final determination nor in its administrative record is there any evidence of such analysis in this case. SECOFI simply failed to apply the requirement of Article 7.4 that it "examine whether a duty lower than the margin of dumping would be sufficient to remove injury" (emphasis added by the United States). Accordingly, SECOFI's extension of provisional measures from four to six months violated Article 7.4 of the AD Agreement.

5.586 The United States submits that SECOFI further violated Article 7.4 of the AD Agreement by continuing provisional measures nearly another full month beyond the two-month extension period allowed for application of the lesser-duty rule – from 26 December 1997 to 24 January 1998.<sup>472</sup> There can be no justification under any provision of the AD Agreement for this unwarranted extension of provisional measures. Indeed, SECOFI offered none. Accordingly, SECOFI's extension of provisional measures for a third month beyond the four-month period also violated Article 7.4.

5.587 Mexico disputes the argument by the United States that SECOFI violated Article 7.4 of the AD Agreement. Mexico asserts that United States is in error when suggesting that in extending the period of application of provisional measures from four to six months SECOFI did not consider the possibility of applying a lesser duty. Mexico also disputes the argument by the United States that there is no documentation on the record showing that SECOFI engaged in an examination of the application of a lesser duty that would permit it to extend the period of the provisional measure.

5.588 Mexico asserts that, in the course of the investigation, SECOFI determined to examine whether the establishment of a duty lower than the margin of dumping would be enough to remove the threat of injury to the domestic sugar industry. To this end, SECOFI extended the period of application of the provisional measure from four to six months, in view of the possibility afforded to the investigating authority by the second part of Article 7.4 of the AD Agreement. This determination appears in a memorandum by SECOFI dated 24 October 1997, which is in the administrative record.<sup>473</sup> It was reiterated in paragraph 149 of the *Final Determination*.

5.589 Mexico notes that paragraphs 542 through 544 and 552 of the *Final Determination*<sup>474</sup> explain the methodology, the results and the final conclusions of SECOFI's examination of the possibility to apply an anti-dumping duty lower than the margin of dumping. In particular, SECOFI established that:

"542. In this connection, on the basis of the preliminary determination referred to in paragraph 19 of this determination and the anti-dumping duties established therein, the Ministry decided to consider the possibility of establishing duties lower than the margin of price discrimination. On the basis of the margins of dumping determined in the final stage of the investigation, the prices of imports inclusive of the application

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<sup>470</sup>*Id.* p. 5.

<sup>471</sup>*Id.* p. 6.

<sup>472</sup>*Final Determination*, para. 562, US-1. The United States points out that, since 24 January 1998 was a Saturday, the provisional measures most likely extended until Monday, 26 January 1998.

<sup>473</sup>See the SECOFI Memorandum of 24 October 1997, showing the investigating authority's determination to extend the period of application of the provisional measure pursuant to Article 7.4. of the AD Agreement, MEXICO-41.

<sup>474</sup>It should also be noted that these are included in the preambular section which, in the case of notices of imposition of definitive anti-dumping duties, includes all relevant information on issues of fact and law and the reasons behind the imposition of definitive anti-dumping measure, in keeping with the requirements of AD Agreement Article 12, MEXICO-6.



of possible anti-dumping duties were calculated and then compared against the prices of refined and standard sugar.

543. The Ministry observed from the results of this comparison that, even by eliminating the margin of dumping through definitive anti-dumping duties, the prices of HFCS imports in the domestic market would be below the price of the domestic product. Thus, the weighted average price of HFCS-42 would be 17 per cent below the weighted average price of standard sugar, while the price for HFCS-55 would be 16 per cent below the price of refined sugar.

544. Accordingly, the Ministry considered that the purpose of establishing anti-dumping duties is not to restrict HFCS imports or to avoid trade substitution of sugar by HFCS but to restore fair trading conditions".

5.590 According to Mexico, from reading these paragraphs it can be inferred that, in fulfilment of the requirement posed by Article 7.4 of the AD Agreement, SECOFI conducted an examination to determine the appropriateness of applying a lower anti-dumping duty that would be sufficient to remove the threat of injury to domestic production or whether it was appropriate to apply anti-dumping duties for the total amount of the margin of dumping.

5.591 In Mexico's view, SECOFI's findings indicated that, even including an anti-dumping duty equal to the margin of dumping determined in the final stage of the investigation, the price of competing HFCS imports from the United States would still have been below the price of domestic sugar. Therefore, SECOFI stated in its *Final Determination* that it was:

"552. ... appropriate to impose an anti-dumping equal to the margin of price discrimination calculated in the course of the investigation".<sup>475</sup>

Mexico concludes that SECOFI acted in accordance with the rights and obligations incumbent on it under the AD Agreement when it extended the application of the provisional measure, since it was fully entitled to do so and did actually conduct the examination required under Article 7.4 of the AD Agreement.

5.592 Mexico argues that paragraphs cited above demonstrate the irrelevance of the United States' complaint about the alleged violations of Articles 7.4 of the AD Agreement, as well as the irrelevance of United States' assertion that "... in this case, a reviewing body cannot be expected to read SECOFI's mind as to what it might have 'known' about the facts which might have substantiated that it conducted an examination of whether to apply a lesser duty ...".<sup>476</sup> Such paragraphs also disprove the statement by the United States that "... Nowhere in the final determination did SECOFI provide any explanation of its supposed determination whether a definitive duty below the level of the dumping margin would suffice to eliminate the threat of injury to domestic sugar production ...".<sup>477</sup> In addition, Mexico contends that the United States is in error when stating that SECOFI did not carry out "... an appropriate examination of the lesser duty rule ...", that it "... failed...to conduct any substantive examination, based on factual information and critical analysis ...", and that such an examination could have been expected to have been conducted on the basis of the methodology recently presented by Mexico as part of its contribution to the discussions at the Ad Hoc Group on Implementation of the Committee on Anti-Dumping Practices on the subject of the lesser duty rule.<sup>478</sup>

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<sup>475</sup> See MEXICO-6.

<sup>476</sup> United States first submission, para. 150.

<sup>477</sup> *Id.* para. 46.

<sup>478</sup> See United States first submission, paras. 145 and 149, referring to the WTO Compilation.

5.593 Mexico asserts that comments made in the course of meetings at the Ad Hoc Group of the Committee on Anti-Dumping Practices cannot create obligations that are not established in the AD Agreement. Mexico's obligations under Article 7.4 of the AD Agreement are confined exclusively to carrying out an examination of applying a duty lower than the margin. This Article does not set out any kind of indicator, guideline or methodology to perform an examination of a lesser duty that would be sufficient to remove injury; up to now this has been left to the discretion of each importing Member.

5.594 Mexico also notes in this respect that, when introducing its contribution on the subject of the lesser duty rule at the meeting of the Ad Hoc Group in October 1997, Mexico made it perfectly clear that the methodology presented in its contribution did not in any way represent its practice and said so specifically in its document:

"While the explanation that follows does not in any way represent Mexico's practice with respect to this matter, it does provide general guidelines which Mexico considers of interest in trying to arrive at a common stance".<sup>479</sup>

5.595 Mexico observes that, while it was very much interested in contributing comments on the application of the lesser duty rule that could help develop clearer and more uniform criteria in this regard, it also recognized that for an examination of the lesser duty rule it is important to take account of the conditions of each particular case. Indeed, in every investigation in which such an examination takes place, such examination must be performed in light of the actual characteristics and circumstances of the case in question. Mexico also observes that, although it was under no obligation to do so, in its examination of the lesser duty rule SECOFI did act in accordance with its comments submitted to the Ad Hoc Group's document.

5.596 With regard to the continuation of the provisional measure for 28 days beyond the six-month period established in conformity with Article 7.4 of the AD Agreement, Mexico states that SECOFI was aware at all times of the 6-month limit imposed by the AD Agreement for the duration of provisional measures. For this reason, before this period expired, SECOFI made every possible effort to complete the investigation and issue the appropriate public notice in due course. Mexico also asserts that, when the six-month period ended and the foregoing objective was not achieved because of the complexity involved in conducting the final stage of the investigation, SECOFI faced the dilemma of suspending the provisional measure or continue to apply it for a short period.

5.597 Mexico holds that, faced with this dilemma, SECOFI considered that there were no reasons to suppose that the circumstances that had motivated the application of the provisional measure imposed in conformity with Article 7.1 of the AD Agreement had ceased. On the contrary, SECOFI now had weightier evidence about the existence of dumping, threat of injury and a causal link between the two. Mexico argues that, in this context, SECOFI concluded that the suspension of the provisional measure would not only further expose the domestic industry threatened by dumped imports, but that such suspension would also favour the continuation of dumping, even if only for a short period. Mexico argues further that SECOFI decided to continue applying the provisional measure, bearing in mind the spirit of Article VI of the GATT 1994, namely, to condemn dumping if it causes or threatens to cause injury to a domestic industry, and knowing that all the conditions conferring the right to impose an anti-dumping measure still prevailed.<sup>480</sup> This decision was taken with the certainty that in a very short

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<sup>479</sup>See WTO Compilation, p. 5.

<sup>480</sup>In *Brazil – Measures Affecting Desiccated Coconut (Brazil-Desiccated Coconut)*, WT/DS/22/R (*Brazil-Desiccated Coconut Panel Report*), WT/DS/22/AB/R (*Brazil-Desiccated Coconut AB Report*), adopted 20 March 1997, even though countervailing duties were involved, the Appellate Body confirmed that Article VI and the interpretative agreements not only impose "obligations" but also confer "rights". It said:

"... Article VI and the relevant Agreements ... impose on those who apply countervailing duties obligations that take the form of conditions which they have to discharge in order to impose a duty, but they also

time the final determination would be adopted and the corresponding notice published, and for this reason the provisional measure was continued for the shortest possible period.<sup>481</sup>

5.598 In addition, Mexico contends that, while the provisional duties lasted 28 days longer than the six-month period established in conformity with Article 7.4 of the AD Agreement, it is also true that SECOFI conducted the investigation in a shorter time than that mentioned in Article 5.10 of the AD Agreement as the ideal time for completing an investigation. This shows Mexico's genuine concern in this case, as well as in others, to make sure that investigation periods are as short as possible. Finally, Mexico states that the continuation of the application of the provisional measure for a further 28 days was for the shortest possible time, and hence it cannot be construed as an attempt to set up a barrier to normal trade or an attempt to adopt a protectionist stance.<sup>482</sup>

5.599 In response to a question from the United States, Mexico confirmed its view that the extension of provisional measures beyond 6 months is grounded on Article VI of the GATT 1994 and the AD Agreement interpreting this Article.<sup>483</sup>

5.600 The United States acknowledges that SECOFI has provided a permissible interpretation of its reasons for extending provisional measures two extra months – from four to six months – in order to perform a lesser-duty rule analysis under Article 7.4 of the AD Agreement. The United States has therefore decided not to pursue further the lesser-duty rule aspect of the provisional measures issue.

5.601 The United States notes that Mexico effectively concedes that SECOFI continued its provisional measures an extra month (twenty-eight days) beyond the maximum period of six months which could apply under Article 7.4 in this case. In the view of the United States, Mexico can cite to no specific provisions of the provisional measures rules of the AD Agreement to justify this extension. Instead, Mexico claims that the "spirit" of the AD Agreement - to protect domestic industries against injury caused by unfair competition - is sufficient to justify this minor slip, and notes that it completed its investigation in less than the twelve-month minimum time specified in Article 5.10.

5.602 The United States submits that these reasons cannot justify SECOFI's deviation from the strict time limitations for provisional measures of the AD Agreement. There is no provision for the "spirit" of the AD Agreement with regard to those measures. In addition, SECOFI's admirable hard

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confer the right to impose a countervailing duty when such conditions are fulfilled" (emphasis added by Mexico). *Brazil-Desiccated Coconut AB Report*, p. 19, confirming what had been established by the Panel in the same case. *Brazil-Desiccated Coconut Panel Report*, para. 246.

<sup>481</sup>The application of the provisional measure ended with the publication of the final determination on 23 January 1998.

<sup>482</sup>In this regard, Mexico refers to the report of the Group of Experts, GATT Sales No. GATT/1961-2 (1961) on anti-dumping duties and countervailing duties, quoted in Stewart, p. 34, US-21.

<sup>483</sup>See Answer of Mexico to question no. 26 by the United States, 6 May 1999. Specifically, Mexico noted that towards the end of the investigation there was no evidence suggesting that the circumstances under which the provisional measure imposed pursuant to Article 7.1 of the AD Agreement had ceased to exist. On the contrary, there was already firmer evidence of dumping, threat of injury and causal link between the two. Thus, the provisional measures continued to be applied for a further period of 28 days, pursuant to Article VI of the GATT 1994 and the AD Agreement itself interpreting that Article, and considering that Article VI condemns dumping when it causes or threatens to cause injury to a domestic industry and that, in this case, all of the conditions conferring the right to impose an anti-dumping measure continued to exist. Mexico also noted that, during the final stage of the investigation, the activities of SECOFI were temporarily suspended by the "Agreement Suspending the Work of the International Trade Practices Unit of the Ministry of Trade and Industrial Development during the Indicated Period".<sup>483</sup> This Agreement established the days from 22 December 1997 to 6 January 1998 as non-working days and this, together with the procedures involved in the signing and publication of the final determination in the Official Journal, which took several days, resulted in a delay in the issue of the corresponding public notice.

work and efficiency in completing a massive anti-dumping investigation in less than twelve months from initiation to final determination cannot relieve it of its responsibility to comply with the rules regarding the length of time over which provisional measures may be imposed. To do otherwise would allow an investigating authority to re-arrange its internal schedule, between the initiation and final, to suit its needs, without regard to the carefully constructed rules, so long as it met the final target deadline. Finally, it is well established, that pursuant to Article 31 of the *Vienna Convention*, a treaty must be read in accordance with the ordinary meaning to be given to its terms. It cannot be interpreted flexibly to allow the "spirit" of the overall treaty -- however that could possibly be interpreted -- to override the carefully spelled out and specific provisions of the treaty. The United States therefore reiterates its view that SECOFI's extension of provisional measures for a seventh month beyond the six-month period violated Article 7.4.

5.603 Mexico disputes what it views as the United States' allegations that the extension of provisional measures for 28 days past the six-month deadline reflected a desire on the part of SECOFI to impede normal trade and a protectionist stance. On the contrary, SECOFI's administrative procedures tended to reduce the time periods involved, as shown by the fact that SECOFI went beyond what could be expected under the AD Agreement and concluded the investigation in less than one year, despite the well-known complexity thereof, particularly in the final stage. Mexico states that the suspension of the provisional measures until the conclusion of the threat of injury investigation came to an end could only have been harmful to the domestic industry and favoured the dumped imports which were indisputably taking place. The United States' argument overlooks the importance of Article VI of the GATT 1994 which condemns dumping if it causes or threatens to cause injury to a domestic industry. Finally, Mexico argues that the only possible conclusion with respect to this matter is that SECOFI acted in conformity with the principles of Article VI of the GATT 1994. An insignificant extension of 28 days can in no way be described as a barrier to normal trade or a protectionist instrument.

#### F. RETROACTIVE LEVYING OF ANTI-DUMPING DUTIES FOR THE PERIOD OF APPLICATION OF THE PROVISIONAL MEASURE

5.604 The United States argues that, in finding threat of material injury in the final determination, SECOFI failed to examine whether the effect of the dumped imports would, in the absence of provisional measures, have led to a determination of injury. In so doing, SECOFI violated Articles 10.2 and 10.4 of the AD Agreement, which provide a special rule for imposing anti-dumping measures in threat cases on imports during the period of application of provisional measures. Article 10.2 provides that anti-dumping measures cannot be applied retroactively, to the date of imposition of provisional measures, without such an examination and determination:

"[I]n the case of a final determination of...threat of injury, where the effect of the dumped imports would, in the absence of provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied".

In other words, anti-dumping duties may not be applied retroactively to the date of the preliminary determination in a threat of injury case, such as this one, without a finding that the dumped imports would have led to a determination of injury if there had not been the preliminary measures.

5.605 In the view of the United States, this is a way of allowing anti-dumping duties to be assessed only from the date of the final determination forward in threat of injury cases, unless this special finding is made. Article 10.4 makes this clear:

"Except as provided in paragraph 2 above [*i.e.*, Article 10.2], where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination

of threat of injury or material retardation and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner".

5.606 The United States contends that SECOFI also violated - and continues to violate - Article 10.4 by failing expeditiously to release the bonds posted and/or return the cash deposits paid on entries of HFCS into Mexico between the effective dates of SECOFI's preliminary and final determinations.

5.607 Mexico disputes the argument by the United States that SECOFI infringed the provisions of Article 10.2 when levying anti-dumping duties retroactively. Mexico notes that SECOFI's determination concerning the retroactive application of anti-dumping duties is contained in paragraph 562 of the *Final Determination*. While this notice did not set out SECOFI's determination regarding this matter in precisely the terms the United States would have liked, the fact is that SECOFI's analysis and examination of the issue of the impact of material injury caused by dumped HFCS imports in the absence of provisional measures are evidenced through various inquiries undertaken in the course of the investigation and recorded in the administrative file.

5.608 Mexico points out that the findings of fact and conclusions of law in this respect are contained in the *Final Determination*, particularly in paragraphs 446 to 552,<sup>484</sup> which set out the factors which led SECOFI to determine that, in the face of substantially increased imports of the product at dumped prices, the circumstances that prevailed in the period under investigation would change in such a way as to create a situation in which dumping would cause injury. It is apparent from a perusal of these paragraphs that injury would actually have been caused to the domestic sugar industry in the absence of provisional anti-dumping duties. These findings and conclusions validly enabled the investigating authority to make a final determination of threat of injury and decide to apply anti-dumping duties retroactively, under Article 10.2 of the AD Agreement, thereby complying with the requirements of Article 12.2 and Article 12.2.2.

5.609 Mexico observes that, at the time of the preliminary determination, the increase in imports of HFCS at dumped prices was already a reality. Accordingly, the situation referred to in Article 10.2 of the AD Agreement had been witnessed by SECOFI since the preliminary stage of the investigation, as was pointed out in the notice of imposition of provisional anti-dumping measures,<sup>485</sup> particularly in paragraphs 294 and 306, which state:

"294. Furthermore, the import statistics of the Ministry's Mexican Trade Information System indicate that, for tariff headings 1702.40.99 and 1702.60.01 of the Tariff of the General Import Duty Act alone, imports of high fructose corn syrup from the United States of America rose by 71 per cent in the first quarter of 1997 over the first quarter of 1996, confirming the rising trend and the increased demand for further imports".

"306. On the basis of Article 57.1 of the Foreign Trade Act, Articles 80 and 83 of the Regulations thereto and Article 7 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 and in keeping with paragraph 294 of this determination, the investigating authority deems it necessary to establish provisional countervailing duties to prevent injury being caused during the investigation ..." (emphasis added by Mexico).

5.610 The Panel asked Mexico what specific documentation was available on the record to substantiate SECOFI's conclusion that "the effect of the dumped imports would, in the absence of provisional measures, have led to a determination of injury". Mexico replied that, above all,

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<sup>484</sup>See MEXICO-6.

<sup>485</sup>See MEXICO-2.

consideration must be given to the documentation submitted to the Panel concerning SECOFI's analysis of the factors covered by Articles 3.2, 3.4 and 3.7, as well as the information on imports subsequent to the investigation period. The analysis of all the information concerning the factors set forth in Articles 3.2, 3.4 and 3.7, and the analysis of imports subsequent to the investigation period, brought out the specific fact that, if provisional anti-dumping measures had not been applied, injury would have been caused to the domestic sugar industry given the growing volume of dumped imports. SECOFI found that, during the period January-September 1997, HFCS imports had increased by 75 per cent compared with the same period of 1996 (see paragraph 460 of the *Final Determination*). Consequently, if there was a substantial increase in imports after the application of provisional anti-dumping duties, the increase would have been even greater if no such anti-dumping duties had been applied, with consequentially adverse effects on domestic production.<sup>486</sup>

5.611 Mexico also disputes the argument by the United States that SECOFI has failed to comply with Article 10.4 of the AD Agreement by failing to release bonds or cash deposits guaranteeing payment of anti-dumping duties during the period of application of the provisional measure. Mexico contends that the United States' position is mistaken, since SECOFI acted under the terms of Article 10.2 of the AD Agreement itself. According to the information available to SECOFI, it was justified to decide on the retroactive application of anti-dumping duties given that, in the absence of a provisional measure, the effect of imports at dumped prices would have been such as to lead to a determination of material injury. Mexico notes that it is compulsory to return the cash deposits and release the bonds posted during the application of the provisional measures only when the retroactive application of definitive duties is not justified; or put another way, when the situation described in AD Agreement Article 10.2 has not occurred. That was not the case in the investigation under review. Hence, there is no basis to argue that such cash deposits and bonds should have been released nor to argue that there was a possible infringement of Article 10.4.

5.612 The United States submits that, because of the prospective nature of threatened, rather than actual, injury, definitive anti-dumping duties for the period of provisional measures cannot be finally imposed, unless the investigating authority makes a special determination, pursuant to Article 10.2 of the AD Agreement, that, in the absence of provisional measures, imports would have led to a determination of injury. SECOFI failed to make this finding. If the special finding is not made, as in this case, Article 10.4 requires that the investigating authority refund any cash deposits collected and release any bonds imposed for the period of provisional measures, in an expeditious manner.

5.613 In the view of the United States, Mexico responds that its finding may be divined by reading paragraph 562 of its *Final Determination*, as well as by reviewing over a hundred paragraphs in that determination regarding threat of injury. None of these paragraphs specifically addresses this issue, however.

5.614 The United States notes that paragraph 562 of the *Final Determination* merely authorizes the appropriate ministry to collect the definitive anti-dumping duties; it does not provide any explanation concerning the period of provisional measures. The paragraph states:

"562. The Ministry of Finance and Public Credit shall be entrusted with collecting the aforesaid definitive countervailing [*sic*, anti-dumping] duties and encashing corresponding guarantees furnished by importers to protect the government's financial interests in the event of the non-payment of any established countervailing [*sic*, anti-dumping] duties under the provisions of Article 65 of the Foreign Commerce Act, as well as with releasing or modifying the terms of such guarantees or, where applicable, refunding the value of payments or overpayments of corresponding penal sums".

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<sup>486</sup>See Answer of Mexico to question no. 25 by the Panel, 6 May 1999.

There is no discussion or analysis in this paragraph about Articles 10.2 and 10.4 of the AD Agreement and the rationale for collecting definitive anti-dumping duties retroactively, in a case where the final injury finding is one of threat.

5.615 The United States observes that, likewise, there is no such analysis in the more than one hundred paragraphs (paragraphs 446-552) which Mexico cites as constituting its findings and conclusions of fact and law regarding this issue. To the contrary, these paragraphs fall under the section of the final determination entitled "analysis of the threat of injury and causal connection".<sup>487</sup> They all lead to SECOFI's conclusion that the domestic sugar industry is threatened with material injury by reason of the dumped imports. They do not address the question whether the industry would have experienced actual material injury if the provisional measures had not been imposed.

5.616 According to the United States, Mexico nevertheless claims that it is "apparent from a perusal of these paragraphs" that it performed the proper Article 10.2 analysis. To the contrary, such analysis is not at all apparent from even a close reading of these paragraphs. Mexico simply cannot expect a reviewing body, including this Panel, to do its work for it by studying over a hundred paragraphs analysing complex factual and legal material. The *Guatemala-Cement* Panel recognized the importance of including critical facts and analysis on the record so that they may be evaluated by the reviewing panel:

"We note that Guatemala asserted that the Ministry "knew" certain information [regarding threat of material injury]...and that such knowledge was brought to bear on its evaluation of the information...While such facts may have been known to the Ministry, there is no reference to them in the application, in the evaluation prepared by the two advisors, or in the resolution itself. Indeed, there is no reference whatsoever...Thus, we cannot consider such facts in evaluating whether the Ministry properly concluded that there was sufficient evidence to justify initiation in this case".<sup>488</sup>

The United States contends that, similarly, the Panel cannot be expected to divine what SECOFI might have "known" about facts which might have substantiated that it conducted a proper Article 10.2 examination of retroactive application of definitive anti-dumping duties.

5.617 The United States further contends that Mexico's argument that SECOFI's analysis is "evidenced throughout the various proceedings carried out in the course of the investigation and [is] shown in the administrative file" likewise commits the very type of error which the *Guatemala-Cement* panel condemned. The investigating authority must state its facts on the record - either in the final determination or in a separate report - in sufficient detail to explain its findings of facts and to support the conclusions of law it drew on the basis of those facts. Only such an explicit analysis will enable the reviewing panel to make a judgment as to the authority's determination.

5.618 According to the United States, Mexico points to two isolated statements in SECOFI's *Preliminary Determination* as further justification for its imposition of definitive anti-dumping duties for the period of provisional measures. These paragraphs are similarly off point. The first, paragraph 294, merely notes that imports of HFCS from the United States rose by 70 per cent in the first quarter of 1997, as opposed to the first quarter of 1996, thereby establishing a rising trend in imports. This does not tie the impact of that rising trend to the many other factors, elucidated in

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<sup>487</sup> *Final Determination*, paras. 426-427, US-1.

<sup>488</sup> *Guatemala-Cement Panel Report*, footnote 242. See also *Brazil-Milk Powder Panel Report*, para. 294.

Article 3 of the AD Agreement, which are necessary to determine whether material injury would have occurred to the domestic industry in the absence of provisional measures.

5.619 The United States asserts that the second paragraph which Mexico cites, paragraph 306, merely announces SECOFI's preliminary finding that provisional measures are being imposed, in order to prevent injury being caused during the investigation. Again, the paragraph provides nothing in the way of the analysis which would be needed to meet the Article 10.2 requirement. Indeed, it could not, because Article 10.2 requires the retroactive analysis to be done at the final determination. This is only logical, because one cannot determine whether to collect definitive anti-dumping duties retroactively, unless one is looking backwards in time, to analyse whether there would have been material injury to the domestic industry, but for the provisional measures. In other words, because these paragraphs are in the preliminary determination, they cannot anticipate and constitute the type of analysis which Article 10.2 requires, in the context of the final determination of threat of injury.

5.620 Mexico asked the United States how Mexico could have acted inconsistently with AD Articles 10 and 12 in applying anti-dumping duties retroactively to the period of application of the provisional measures, given that the facts motivating this decision were duly established and adequately recorded in the notice of imposition of the definitive measure. Mexico also asked the United States how the United States reconciled their position on this issue with the provisions of AD Article 17.6. The United States responded that SECOFI had failed to examine, as required by Article 10, whether, but for the imposition of provisional measures, there would have been material injury to the Mexican sugar industry. The United States' position reconciled fully with Article 17.6 of the AD Agreement, since the latitude which that Article allowed the Panel to grant SECOFI "permissible" legal interpretations, "proper" factual establishment, and "unbiased and objective" factual evaluation, did not extend to wrong interpretations, a lack of factual establishment, and a biased or un-objective evaluation of what facts Mexico had tried to cite in support of its improper application of provisional measures.<sup>489</sup>

5.621 Mexico notes that, when an investigating authority imposes a provisional measure, it does so for the sole purpose of preventing injury to the domestic industry during the course of the investigation. SECOFI already recognized this when it issued the preliminary determination, by stating that there was a need to establish such measures in order to ensure that dumped HFCS imports from the United States did not cause injury to domestic sugar production. According to Mexico, the fact that SECOFI had already indicated in the preliminary determination the reasons why there would have been injury to the domestic industry had it not applied those measures,<sup>490</sup> added to the fact that the investigation period was not modified in the course of the investigation, necessarily leads to the conclusion that the justification for imposing the provisional duties was to be found in Article 10.2 of the AD Agreement, which states that the effect of the dumped imports, in the absence of the provisional measures, would have led to a determination of injury.

5.622 In response to a question from the United States as to why Mexico had cited paragraphs in its preliminary determination in connection with an Article 10.2 finding, Mexico stated that the reference to paragraphs 294 and 306 of the preliminary determination was intended simply as evidence that, from the preliminary stage of the investigation, the accelerating growth of imports was already a reality and that the circumstances which made the application of a provisional measure necessary to ensure that HFCS imports did not cause injury to the domestic sugar industry during the investigation pursuant to Article 7.1 of the AD Agreement were already foreseen. This reference was in no way intended to suggest that these were the findings required by Article 10.2, which were included in the final determination. The final determination contained the relevant findings and the reasons why in

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<sup>489</sup>See Answer of the United States to question no. 69 by Mexico, 6 May 1999.

<sup>490</sup>See *Preliminary Determination*, para. 306.



the absence of provisional measures there would have been injury to the domestic industry as required by Article 10.2 of the AD Agreement.<sup>491</sup>

5.623 In Mexico's view, Article 10.2 of the AD Agreement implies that a number of aspects should be considered to justify the likelihood that the effect of the dumped imports would have led to a determination of injury during the period in which the provisional measures were applied. Owing to the variety of factors to be considered, this analysis is complex. SECOFI examined all of the factors that it considered to be relevant and reached the conclusion that, if the dumped imports were to continue, as was clearly foreseeable and imminent, such imports would cause injury to the domestic sugar industry. To avoid this situation SECOFI imposed provisional anti-dumping measures. In so doing, SECOFI met the requirements of Article 10.2 of the AD Agreement, as recorded in paragraphs 446 to 552 of the *Final Determination*.<sup>492</sup> None of these paragraphs could by itself establish the circumstances set forth in the second part of Article 10.2, but all of them taken together established the facts constituting those circumstances.

5.624 Mexico contends that, as it is clear that the circumstances set forth in Article 10.2 of the AD Agreement existed, the question of refunding of cash deposits and releasing the bonds posted during the period of application of the provisional duties does not arise.

#### G. INSUFFICIENCIES IN THE FINAL NOTICE RELATING TO THE DURATION OF THE PROVISIONAL MEASURE AND THE RETROACTIVITY OF DEFINITIVE ANTI-DUMPING DUTIES

5.625 The United States submits that SECOFI failed to provide its findings and conclusions of fact and law for its extension of provisional measures beyond the four-month time limitation, in violation of Articles 12.2 and 12.2.2 of the AD Agreement. Article 12.2 provides:

"Public notice shall be given of any preliminary or final determination, whether affirmative or negative ... Each such notice shall set forth or otherwise make available through a separate report in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities".

In turn, Article 12.2.2 provides:

"A public notice of conclusion ... of an investigation ... providing for the imposition of a definitive duty ... shall contain or otherwise make available through a separate report all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures ... The notice of report shall in particular contain ... the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers".

5.626 According to the United States, nowhere in the final determination does SECOFI set forth or otherwise make available its factual findings and legal conclusions regarding its extension of provisional measures beyond the four-month maximum allowed under Article 7.4. Moreover, no separate report exists providing sufficient detail for such findings and conclusions. SECOFI simply asserted that it had examined whether to apply a lesser duty; it provided no reasoning as to the conduct of that examination and the resulting decision to impose duties in the full amount of the margins of dumping determined for the companies investigated.<sup>493</sup> Furthermore, it failed to provide any authority or reasoning whatsoever for extending provisional measures a seventh month beyond

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<sup>491</sup> See Answer by Mexico to question no. 25 by the United States, 6 May 1999.

<sup>492</sup> See MEXICO-6.

<sup>493</sup> See United States first submission, paras. 43-44 (citing US-16 to US-19).

the maximum six-month period which proper application of the lesser-duty rule would have allowed, where no exporters representing a significant percentage of the trade requested an extension. Finally, SECOFI failed to provide any reasons for its rejection of the U.S. exporters' arguments, made in writing and in a meeting with SECOFI, that the measures not be extended beyond four months, as required by Article 12.2.2.

5.627 In the view of the United States, SECOFI is fully capable of providing sophisticated and high-quality reasoning and analysis about application of the lesser-duty rule, as its submission for discussion in the Ad Hoc Group shows.<sup>494</sup> In light of that submission, one might expect that in this case SECOFI would have explained which methodology it considered - the unitary international or exogenous price method, or the endogenous production cost or price approach - and then issued findings of fact accordingly. This would have included, under the first method, international HFCS prices, and, under the second method, cost of production and profit information from Mexican HFCS producers. Yet none of these facts are set forth in the final determination or in a separate report. One would also expect that, based on these facts, SECOFI would have discussed its application of its methodology to the facts and have issued its conclusion of law about whether an anti-dumping duty lower than the margin would be sufficient to remove injury, as provided in Article 7.4. Nowhere in the final determination or in a separate report are such conclusions to be found.

5.628 The United States maintains that any reading of Articles 12.2 and 12.2.2 which obviates an investigating authority's responsibility to explain the reasons for its actions - including its findings and conclusions of law and fact - would allow anti-dumping authorities to conceal the bases upon which they make their determinations. This would prevent all parties from becoming aware of authorities' bases for anti-dumping decisions and interested parties from taking positions with respect thereto. Similarly, in this case a reviewing body cannot be expected to read SECOFI's mind as to what it might have "known" about facts which might have substantiated that it conducted an examination of whether to apply a lesser-duty.<sup>495</sup> SECOFI must state those facts on the record, either in the final determination or in a separate report in sufficient detail to explain its findings of facts and to support the conclusions of law it drew on the basis of those facts. That determination, or report, must as well address the U.S. exporters' stated opposition to extension of the provisional measures beyond the four-month period, as required by Article 12.2.2.

5.629 The United States contends that, as in this instance SECOFI failed to provide "all relevant information ... and reasons which have led to the imposition of final measures ... as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters", it violated both Articles 12.2 and 12.2.2 of the AD Agreement.

5.630 The United States also submits that SECOFI's failure to provide any findings of fact and conclusions of law for its retroactive application of anti-dumping duties in this threat of injury case violated Articles 12.2 and 12.2.2 of the AD Agreement. These provisions obligated SECOFI to provide public notice and justification of its determination, as well as analysis of the comments of exporters and importers, and SECOFI failed to do so.<sup>496</sup>

5.631 Mexico disputes the United States' claim that SECOFI violated Articles 12.2 and 12.2.2 of the AD Agreement. In particular, Mexico contends that the United States is in error when asserting that the notice of imposition of definitive anti dumping duties does not show that SECOFI engaged in an examination of the application of a lesser duty that would permit it to extend the period of the

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<sup>494</sup>See US-22.

<sup>495</sup>In this regard, the United States refers to *Guatemala-Cement Panel Report*, footnote 242, and *Brazil-Milk Powder Panel Report*, para. 294.

<sup>496</sup>The United States asserts that the importers brought this issue to SECOFI's attention and it was not dealt with, at least not in the final determination.

provisional measure. According to Mexico, SECOFI determined that it would examine whether the establishment of a duty lower than the margin of dumping would be enough to remove the threat of injury to the domestic sugar industry and, to this end, extended the duration of the provisional measure from four to six months, in view of the possibility afforded to the investigating authority by the second part of Article 7.4 of the AD Agreement. This determination is in a memorandum of SECOFI in the administrative file,<sup>497</sup> and was reiterated in paragraph 149 of the *Final Determination*.

5.632 Mexico holds that in paragraphs 542 through 544 and 552 of the *Final Determination*,<sup>498</sup> SECOFI explained the methodology, the results and the final conclusions reached in its examination of the possibility of applying an anti-dumping duty lower than the margin of dumping. In particular, SECOFI established:

"542. In this connection, on the basis of the preliminary determination referred to in paragraph 19 of this determination and the countervailing duties established therein, the Ministry decided to consider the possibility of establishing duties lower than the margin of price discrimination. On the basis of the margins of dumping determined in the final stage of the investigation, the prices of imports inclusive of the application of possible anti-dumping duties were calculated and then compared with the prices of refined and standard sugar.

543. The Ministry observed from the results of this comparison that, even by eliminating the margin of dumping through definitive anti-dumping duties, the prices of HFCS imports on the domestic market would be below the price of the domestic product. In this way, the weighted average price of HFCS-42 would be 17 per cent below the weighted average price of standard sugar, while the price for HFCS-55 would be 16 per cent below the price of refined sugar".

5.633 Mexico asserts that, from reading these paragraphs it can be inferred that, in fulfilment of the requirement posed by Article 7.4 of the AD Agreement, SECOFI conducted an examination to determine the appropriateness of applying a lower anti-dumping duty that would be sufficient to remove the threat of injury to domestic production, or whether it was appropriate to apply anti-dumping duties in the full amount of the dumping margin. Mexico notes that SECOFI's findings indicated that, even with an anti-dumping duty equal to the margins of dumping determined in the final stage of the investigation, the prices of competing HFCS imports from the United States would have still been below the price of the domestic sugar. Therefore, SECOFI concluded in its *Final Determination* that it was:

"552. ... appropriate to impose a countervailing duty equal to the margins of price discrimination calculated in the course of the investigation".<sup>499</sup>

Mexico submits that SECOFI set out in sufficient detail in the final determination the findings and conclusions that it had reached as a result of the above examination, in full conformity with the terms of Articles 12.2 and 12.2.2 of the AD Agreement.

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<sup>497</sup>See the SECOFI Memorandum of 24 October 1997, showing the investigating authority's determination on extending the period of the provisional measure pursuant to Article 7.4. of the AD Agreement, MEXICO-41. See also United States first submission, footnote no. 66, US-18.

<sup>498</sup>It should also be noted that these are included in the preambular section which, in the case of notices of imposition of definitive anti-dumping duties, includes all relevant information on issues of fact and law and the reasons behind the imposition of the definitive anti-dumping measure, in keeping with the requirements of AD Agreement Article 12, MEXICO-6.

<sup>499</sup>See MEXICO-6.

5.634 According to Mexico, the United States also alleges a supposed failure of SECOFI to comply with Articles 12.2 and 12.2.2. of the AD Agreement by means of misrepresenting the arguments made before SECOFI by the United States exporters' and the importing firm Almx. To disprove this allegation, Mexico notes that:

- (a) Before the date of expiry of the four-month period of application of the provisional measure, a number of United States' exporters (CRA, Progold, Minnesota Corn Processors and ADM) and an importing firm (Almx) asked SECOFI to terminate the application of the provisional measure as from 26 October 1997.<sup>500</sup>
- (b) Contrary to the assertion of the United States, neither the exporters nor Almx, the importer, "stated opposition to [the] extension".<sup>501</sup>
- (c) Their arguments were confined exclusively to requesting SECOFI to terminate the duration of the provisional measures because the four-month period was completed and reference was made to Article 7.4 of AD Agreement. At no time was there any kind of challenge to the possibility that SECOFI decided, as it had, to extend the duration of the provisional measures from four to six months, pursuant also to the second part of Article 7.4 of the AD Agreement, in order to analyse whether a duty lower than the margin would remove the threat of injury.
- (d) SECOFI acknowledged the right of exporters and importers to request an extension of the period of application of the provisional measures, pursuant to Article 7.4 of the AD Agreement, and even to request termination of that period, as happened in this case. Indeed, SECOFI officials held a meeting with lawyers for CRA and Almx at which they submitted their request. However, neither in their letters nor at that meeting did those representatives state anything of any kind that implied opposition to the extension.<sup>502</sup>
- (e) The above argument disregards the possibility open to the investigating authority under Article 7.4 AD Agreement to extend the application of the provisional measures with a view to determine whether the imposition of a duty lower than the margin of dumping would be sufficient to remove the threat of injury to the domestic industry.

5.635 Mexico argues that at no time did SECOFI fail to respond to the exporters' and importers' request to terminate the provisional duties. In fact, SECOFI directly informed the exporters and Almx of its determination, as set out in the memorandum of 24 October 1997, to examine whether a duty lower than the margin would be sufficient to remove the threat of injury and the consequent extension of the application of the provisional measure for a further two months, in conformity with Article 7.4 of the AD Agreement. SECOFI did so at the meeting held on that same date.

5.636 Mexico observes that on 29 October 1997 SECOFI issued several official letters<sup>503</sup> addressed to the exporters and the importer, Almx, where it explained to these parties that it had determined a

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<sup>500</sup>See letters dated 24 October 1997 addressed to Gustavo Uruchurtu, of SECOFI, sent by CRA, Progold Limited Liability Company and Minnesota Corn Processors (signed by Luis Bravo Aguilera); Almx (signed by David Hurtado Badiola); ADM (signed by Javier Pandal Pérez) and Staley (Javier Gallardo Guzmán, submitted on 28 October 1997). The corresponding Memorandum was attached to each letter and SECOFI's earlier determination was repeated. These are in the administrative file, MEXICO-42.

<sup>501</sup>See United States first submission, paras. 139 and 150.

<sup>502</sup>See report of SECOFI submission, 24 October 1997 (handwritten), US-17 and letters contained in MEXICO-42.

<sup>503</sup>In this respect Mexico asserts that the United States is wrong in stating that SECOFI's determination recorded in the memorandum dated 24 October 1997 was in response to the exporters and at the request of an

need to examine whether a definitive measure lower than the margin of dumping would be sufficient to remove the threat of injury to the domestic sugar industry, *i.e.* the reason why the application of the provisional measure was being extended to six months in accordance with Article 7.4 of the AD Agreement.

5.637 According to Mexico, it is clear then that the statement by the United States that SECOFI infringed Article 12.2.2. of the AD Agreement by failing to discuss in a public notice the requests made by the certain parties with respect to the termination of the provisional measures is groundless. The United States disregards the fact that the above provision allows the investigating authority to set out the reasons for the acceptance or rejection of parties' arguments in a separate report. In this case an explanation was provided in official letters to each of the parties concerned, setting out SECOFI's reasons for deciding to extend the duration of the provisional measures in conformity with Article 7.4 of the AD Agreement. This explains why the final determination does not specifically refer to SECOFI's consideration of the application to terminate the provisional measures, submitted by the exporters and one importer.

5.638 In addition, Mexico observes that paragraphs 542, 543, 544 and 552 of the *Final Determination* record the findings and conclusions that SECOFI reached as a result of the lesser-duty duty examination. Thus, in conformity with Articles 12.2 and 12.2.2 of the AD Agreement, this public notice contains in sufficient detail all the issues of fact and law and the reasons that led SECOFI to impose the final measure, including the reasons why the authority imposed duties equal to the margins of dumping calculated in the course of investigation, in view of the fact, *inter alia*, that even by removing the margins of dumping through the final measure import prices of HFCS would continue to be below domestic sugar prices, which made it inappropriate to apply a duty lower than the margins of dumping calculated.

5.639 The United States responds that it has decided not to pursue the lesser-rule aspect of the provisional measures, including the issue of SECOFI's public notice and explanation of its determination regarding this aspect.<sup>504</sup>

5.640 The United States reiterates its view that SECOFI's retroactive application of provisional measures violated Articles 12.2 and 12.2.2. of the AD Agreement. In the view of the United States, Mexico fails to explain how SECOFI satisfactorily met the obligations of Article 12.2 and 12.2.2 of the AD Agreement with regards to this issue, which require the investigating authority to set forth its findings and conclusions of law and fact in support of its determinations.<sup>505</sup> This is the essence of transparency and an essential requirement for effective panel review. A reviewing body cannot be expected to read SECOFI's mind as to what it really meant about a host of complex and interrelated facts. SECOFI must state those facts on the record, either in the final determination or in a separate

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importer. Hence it is equally incorrect to assert that "SECOFI also answered CRA and other firms in letters dated 29 October 1997" (emphasis added by Mexico). A distinction should be drawn between the memorandum of 24 October 1997, which was the earlier determination of the authority, and the official letters from SECOFI to CRA, Almex, ADM and Staley, which actually explained the reasons for SECOFI's decision, contrary to their request, to extend the duration of the provisional measure in order to conduct a lesser duty examination, in conformity with AD Agreement Article 7.4. *See* letters issued by SECOFI on 29 October 1997 addressed to the representatives of CRA, Progold and Minnesota Corn Processors, Almex, ADM and Staley, MEXICO-43 and United States first submission, para. 44. and footnote 67, citing US-19.

<sup>504</sup> *See* the oral statement by the United States at the first meeting of the panel with the parties, para. 52, and the United States second submission, footnote 159.

<sup>505</sup> The United States cites Article 12.3 of the Agreement, which makes clear that the obligations of Article 12 apply to Article 10. Article 12.3 states that "[t]he provisions of this Article shall apply *mutatis mutandi* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively".

report, in sufficient detail to explain its findings of facts and to support the conclusions of law it drew on the basis of those facts. It cannot leave the matter to guesswork.

5.641 In Mexico's opinion, the United States argues that Articles 12.2 and 12.2.2 of the AD Agreement require final determinations to express any conclusions of the investigating authority concerning the applicability of Article 10.2 of the AD Agreement through a specific formula or in specific terms. Mexico holds that Article 12.2.1 of the AD Agreement clearly does not specify the form in which the applicability of Article 10.2 must be expressed. Nor does Article 12.2.2 provide any specific indications concerning the second part of Article 10.2 of the AD Agreement. What is required is that public notices contain all relevant information on the matters of fact and law and the reasons which have led to the imposition of final measures.

5.642 Mexico maintains that the argument put forward by the United States to allege violations of Articles 12.2 and 12.2.2 of the AD Agreement is excessive. None of these provisions imposes any precise formula or specific terms for the investigating authority to express its conclusions concerning the applicability of Article 10.2 of the AD Agreement. Rather, the investigating authority is required to establish in the final determination, in sufficient detail, all of the facts, circumstances and conclusions showing that the circumstances described in Article 10.2 have materialized.

5.643 Mexico argues that, in the present case, paragraphs 446 through 552 and 562 of the *Final Determination* record in sufficient detail the findings, conclusions and reasons which led SECOFI to apply anti-dumping duties retroactively under Article 10.2 of the AD Agreement. Again, while no single paragraph of the final determination can alone establish the facts of the situation provided for in the second part of Article 10.2, the paragraphs cited above, taken together, establish the facts constituting the materialization of the situation foreseen in Article 10.2.

5.644 Mexico also argues that, in trying to invalidate SECOFI's final determination on the matter of the retroactivity, the United States focuses on purely formal aspects and loses sight of the fact that, according to the facts and conclusions established in the final determination, SECOFI was perfectly justified to apply anti-dumping duties retroactively in order to avoid injury to the domestic sugar industry, as provided by Article 10.2 of the AD Agreement. A purely formal approach would overlook the substantial purpose of the second part of Article 10.2, which is to try to avoid an injury situation caused by the effect of the increase in dumped imports.

5.645 Mexico submits that, in any case, even if one were to go to the extreme of considering it relevant that the situation described in Article 10.2 of the AD Agreement should be set out in the form that the United States would like, this would not be a sufficient reason to invalidate SECOFI's action, since in the final determination the facts are properly established and there is a record of an unbiased and objective evaluation in conformity with Article 17.6 of the AD Agreement.

5.646 The Panel asked the parties whether one could argue that a negative conclusion regarding the issue arising under Article 10.2 of the AD Agreement requires less explanation than an affirmative conclusion under that Article, since the affirmative is the unusual case, allowing the unusual remedy of retroactive levying of final anti-dumping duties.

5.647 The United States said that they would agree that this is a permissible interpretation of the above provision.<sup>506</sup>

5.648 Mexico stated that it did not agree with this interpretation of Article 10.2, since it is incorrect to consider that an affirmative conclusion under Article 10.2 is the unusual case. In Mexico's view, Article 10.2 establishes the authority to apply anti-dumping duties retroactively in the case of a determination of material injury and in the case of a determination of threat of material injury; the two

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<sup>506</sup>See Answer of the United States to question no. 5 by the Panel, 22 June 1999.

hypotheses lie on the same level, merely laying down the circumstances required in a threat of injury case. In other words, Article 10.2 establishes an authority to levy anti-dumping duties retroactively both in the case of material injury and in the case of threat of material injury, simply establishing a qualified standard for cases of threat of material injury: *i.e.* where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of material injury. There is no basis in the language of this provision for the interpretation that in either of the two cases raised, a negative conclusion regarding the issue arising under Article 10.2 is the usual case, and an affirmative conclusion the unusual case. According to Mexico, the AD Agreement does not recognize the exercise of the authority established (*i.e.* an affirmative conclusion) in Article 10.2 as an unusual case, nor is there any suggestion that refraining from exercising that authority (*i.e.* a negative conclusion) should be construed as the general rule; it simply provides for two hypotheses at the same level for the decision to levy or not to levy retroactive anti-dumping duties according to the particular circumstances of the case. Thus, Mexico argues that, whatever the conclusion adopted under Article 10.2, an explanation is required since either a negative or an affirmative determination could affect the interests of the different parties (exporters, importers, domestic producers, consumers and the governments involved).<sup>507</sup>

5.649 The Panel also asked the parties the following question. Article 10.2 of the AD Agreement allows in certain circumstances the retroactive levying of anti-dumping duties for the period for which provisional measure were applied. However, the text of Article 10.2 does not explicitly require a determination that those circumstances are found to exist. On the other hand, Article 12.2 requires that a public notice (or separate report) of a final determination must set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". In light of these requirements, would the parties please explain precisely what they consider is required in order to comply with these requirements?

5.650 According to the United States, in threat of injury cases, the provisions the Panel references require investigating authorities to determine that injury would occur in the absence of the imposition of provisional measures (Article 10.2), and publish public notice of this determination in accordance with Articles 12.2 and 12.3. Article 12.3 of the public notice provisions states that "[t]he provisions of this Article [regarding public notice] shall apply ... to decisions under Article 10 to apply duties retroactively" (emphasis added). By referring to "decisions" under Article 10, the authors of the Agreement were explicitly requiring that "decisions", or determinations, regarding retroactivity be reflected in the public notice.<sup>508</sup> Article 10.2 makes clear that its provisions relating to retroactive application apply in the case of final determinations of injury, "but not of a threat thereof" unless "the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury..". (emphasis added by the United States). Although this may be a hypothetical determination, set in the past conditional, the text of the Article still requires that a "determination" be made that those circumstances would have existed.

5.651 The United States argues that, given that a determination must be made under Article 10.2, and published according to the requirements of Articles 12.2 and 12.3, this requires that some meaningful explanation must be given of the authority's finding, pursuant to Article 10.2, that "the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury". Precisely what is considered to comply with these requirements is a matter for the Panel's judgment, consistent with what it deems to be a permissible interpretation of those requirements under Article 17.6(ii) of the Agreement. The United States has argued that Mexico's interpretation of these requirements as applied to this case is impermissible, because Mexico has been unable to cite to any reasonable explanation of SECOFI's alleged Article 10.2 finding in its final determination. Instead, Mexico has cited to virtually the entire injury finding – an impossibly and impermissibly vague notice by any standard. A lack of specificity in Article 12 as to the exact format

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<sup>507</sup> See Answer of Mexico to question no. 5 by the Panel, 22 June 1999.

<sup>508</sup> See United States second submission, footnote 158.

of the required notice does not mean that no notice or impossibly vague notice will suffice. That argument is not credible even under a generous interpretation of Article 12.2 and its requirements. Some reasonable explanation, with specific reference to the Article 10.2 requirement, must be given, either in the final determination or in a separate report.<sup>509</sup>

5.652 Mexico replied to the same question from the Panel by noting that, indeed, Article 10.2 of the AD Agreement does not explicitly require a determination that the circumstances for the retroactive application of anti-dumping duties are found to exist. Nor does Article 12.2 explicitly require a determination that the circumstances allowing the retroactive levying of anti-dumping duties are found to exist in a threat of injury case, and although it does indeed require the notice of final determination to set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities", it does not establish any precise or specific form or terms in which they must be recorded. Thus, Mexico considers that in order to use the authority provided for in Article 10.2 in a threat of injury case, the notice of final determination must simply contain the findings and conclusions of the authority in support of the existence of the circumstances set forth in Article 10.2 for a threat of injury case, but does not need to do so in the precise terms or language of that Article.

5.653 Mexico also asserted that, while this question makes no specific reference to the case at issue, in this investigation under review, the behaviour of imports was analysed over a period following the investigation and they were found to have grown, not only as a trend, but also as a factual situation (see paragraphs 459 and 460 of the *Final Determination*); and this, added to the comprehensive analysis of threat of injury to the sugar industry conducted with respect to the investigation period and the corresponding findings and conclusions (see the conclusions in paragraphs 551 and 552 of the *Final Determination*) showing, in particular, that had the dumped imports continued to grow, they would have resulted in material injury, provided a sufficiently detailed basis for concluding that the circumstances set forth in Article 10.2 of the AD Agreement existed, thereby supporting SECOFI's decision to apply anti-dumping duties retroactively even though that decision was not expressed in the terms of Article 10.2 of the AD Agreement.<sup>510</sup>

#### H. ARGUMENTS PRESENTED BY THIRD PARTIES

5.654 Jamaica and Mauritius, as third parties in this dispute, made a joint oral statement before the Panel in order to set forth their interest arising from the dispute between Mexico and the United States; in particular, to highlight the potential impact this dispute may have on the trade in sugar by Jamaica, Mauritius and many other WTO Members in securing continued, predictable and increased opportunities for access to the United States market in accordance with the provisions of Article XIII of the GATT 1994.<sup>511</sup>

5.655 Jamaica and Mauritius state that, as third parties, they are cognisant of the fact that the issue at hand concerns imports of High Fructose Corn Syrup (HFCS) into the market of Mexico. Under the terms of reference established by the Dispute Settlement Body, the panel is required to determine whether Mexico has, through improper procedures, imposed duties in violation of the AD Agreement. They submit, however, that the issue should also be examined in the broader context in which this dispute is taking place, namely in relation to the North American Free Trade Agreement (NAFTA), a regional trade agreement notified to the WTO, and one which is alleged by the parties to be in conformity with the relevant WTO Rules.

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<sup>509</sup> See Answer of the United States to question no. 6 by the Panel, 22 June 1999.

<sup>510</sup> See Answer of Mexico to question no. 6 by the Panel, 22 June 1999.

<sup>511</sup> A written version of their oral statement was submitted to the Panel. The third parties made no separate submissions.



5.656 Jamaica and Mauritius also state that the present dispute is but one facet of a much broader disagreement over sweetener trade between these two countries. This broader controversy involves not only HFCS exports from the United States to Mexico, but also sugar imports by the United States from Mexico pursuant to NAFTA. According to Jamaica and Mauritius, the broader disagreement between Mexico and the United States has spawned several other international dispute resolution proceedings, namely:

- (i) this current dispute within the WTO.
- (ii) a NAFTA dispute proceeding initiated by Mexico to challenge the limits imposed on its sugar exports to the United States during the implementation of the NAFTA.
- (iii) a proceeding initiated by the United States Corn Refiners Association under the so-called Section 301 procedures of United States law to challenge, as an unfair trade practice, an agreement between the Mexican Sugar Industry and the Mexican soft-drink bottlers pursuant to which the soft-drink industry has allegedly agreed to limit its consumption of imported HFCS. In the Section 301 proceeding, the United States Corn Refiners Association has requested that the United States impose sanctions on Mexico for its alleged unfair trade practice, and it has been suggested that an appropriate sanction would be to limit or ban sugar imports from Mexico.

These related proceedings are currently ongoing.

5.657 Jamaica and Mauritius observe that the interrelation between these disputes is clearly underscored by the fact that the initiation of the anti-dumping investigation in question was initiated in response to a request by the Mexican sugar industry. In addition, in various statements in the press and other public fora, representatives of the Mexican sugar industry have clearly and repeatedly stated that HFCS and sugar disputes are interrelated and that one cannot be resolved without resolving the other.

5.658 Jamaica and Mauritius note that, prior to the entry into force of the NAFTA Agreement in 1994, Mexico was a net importer of sugar. The NAFTA Agreement provided for a gradual increase in the duty-free access of sugar from Mexico, over its GATT 1994 Article XIII share of the United States tariff rate quota of 7,258 tonnes per annum, but only on the basis that Mexico became a net surplus producer. Mexico therefore has taken advantage of the preferential provisions of NAFTA to expand its domestic production, and thereby its market share in the United States market. Mexico has seen its initial market share of 7,258 tonnes per annum for the period 1994 – 96 grow to 25,000 tonnes until the 2000-2001 quota year, and this may increase to as much as 250,000 tonnes per annum thereafter until 2008, at which time NAFTA would allow Mexico unlimited access at zero tariff for its sugar exports.

5.659 Jamaica and Mauritius note further that United States sugar imports have gradually declined since 1985 and the United States tariff rate quota on sugar is today only slightly above the minimum level bound by the United States in the Uruguay Round. Access by the traditional suppliers has been reduced correspondingly.

5.660 Jamaica and Mauritius equally note that the United States has given assurances in responding to queries at the WTO Committee on Agriculture that,

- (i) The raw cane sugar tariff quotas are allocated according to Article XIII of GATT 1994;
- (ii) Mexico's NAFTA allocation of 25,000 tonnes does not count in a country's share allocation (G/AG/N/USA/15 at page 22 of G/AG/R/16) in the TRQ; and

- (iii) Mexico does not receive additional access if there are subsequent tariff quota allocations (G/AG/N/USA/13 at page 18 of G/AG/R/14).

5.661 Jamaica and Mauritius express concern that their share as traditional sugar suppliers in the United States market in strict compliance of Article XIII of GATT 1994 may be seriously eroded as from the year 2000 as a result of the substantial increase of Mexico's access of 250,000 tonnes per annum until 2008 and without restriction thereafter.

5.662 Jamaica and Mauritius argue that any further increase in Mexico's sugar exports to the United States - as a direct or indirect result of the resolution of this present dispute or other proceedings between Mexico and the United States - will not only undermine the undertakings given by the United States, but possibly exacerbate the existing prejudice to the other WTO members who have been traditional sugar suppliers to the United States. It is in this broader context that the dispute may prejudice the interests of Jamaica, Mauritius and 37 other countries that are traditional suppliers of sugar to the United States. Many of these suppliers are WTO Members with small developing economies whose trade, finance and development needs depend on sugar exports. Jamaica and Mauritius submit that it is of vital importance that the resolution of the present dispute does not prejudice the legitimate interests of these WTO Members by not upsetting the balance of benefits which ensures continued, predictable and increased opportunities for access to the US sugar market.

5.663 In addition, Jamaica and Mauritius assert that their interest in this dispute also coincides with the issue at the heart of any anti-dumping investigation - that of 'like products' and the unfair competition that any dumped product may have on domestic production - Although the concept of 'like products' within the meaning of Article 2.6 of the AD Agreement is not the primary focus of this Panel, in reviewing the merits of the case, the Panel may deem it necessary to examine the meaning of this concept in the context of this dispute. According to Jamaica and Mauritius, the concept of 'like products' spans a range of interpretation depending on the context of the WTO Agreement being invoked and the particular case involved. In this regard, Jamaica and Mauritius refer to an extract from the Appellate Body Report on *Japan-Alcoholic Beverages* which states that:

"The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply".

In the view of Jamaica and Mauritius, the Appellate Body acknowledged the variable interpretation to be given to the concept of "like products" within the context of the applicable WTO Agreements on a case by case basis. They also draw the attention of the Panel to the Appellate Body Report on *Japan-Alcoholic Beverages* wherein it is stated that adopted panel reports are "not binding except with respect to resolving the particular dispute between the parties to that dispute".

5.664 Thus, Jamaica and Mauritius submit that, should the Panel make a determination that HFCS and sugar are "like products" within the meaning of Article 2.6 of the AD Agreement, such a finding should be seen only in the context of this specific case and should be without prejudice to the rights of WTO Members if a similar issue involving the same products arises in the context of this and any other WTO Agreement.

5.665 Jamaica and Mauritius conclude that, while fully recognising the need for a mutually satisfactory solution between the Parties in this case, they wish also to remind the Panel and the Parties that the outcome in this case and any finding of this Panel should not be applied in a manner which could result in any negative or adverse effects on the trade of Jamaica, Mauritius or any of the other 37 suppliers to the US market.

## VI. INTERIM REVIEW

6.1 On 20 October 1999, the United States and Mexico submitted comments requesting review of parts of the interim report issued to the parties on 6 October 1999. In addition, Mexico requested a meeting with the Panel. Such a meeting, originally scheduled for 12 November 1999, was held on 9 December 1999, having been postponed due to the inability of the Chairman to travel to Geneva for the originally scheduled meeting.

6.2 In our approach to interim review, we are governed by Article 15.2 of the DSU, which states that "a party may submit a written request for the panel to review **precise aspects** of the interim report prior to circulation of the final report to Members" (emphasis added). The purpose of the interim review, in our view, is not to provide the parties with an opportunity to introduce new legal issues.

6.3 Mexico requests that we reconsider most of Section VII.B of the Report. In Mexico's view, this entire section is unbalanced. Given that it is Mexico that is objecting, Mexico maintains that it makes no sense that its objections should be presented only very briefly, while the counter arguments of the United States are set forth in much greater detail and given more specific emphasis in the findings.

6.4 Moreover, Mexico considers that many of its arguments have been distorted, great emphasis having been given to unimportant aspects without addressing the substantial elements. Mexico asserts that an example of this can be found in the objections relating to the violation of Article 17.5 of the AD Agreement and the references to consultations.

6.5 Mexico also calls our attention to what it considers the carelessness with which certain of its comments on the descriptive part were treated, ranging from typographical errors to the omission of complete arguments. For example, Mexico asserts that its objections relating to Article 17.6 of the AD Agreement were totally omitted, and the title of SECOFI's final resolution incorrectly transcribed, and contends that some of these errors and omissions were incorporated in the findings.

6.6 Considering, *inter alia*, the likelihood of this Report ultimately forming part of the WTO's legal precedent and of these arguments being used in future disputes, Mexico asks that its comments on the descriptive part be re-examined with particular care, together with the corresponding parts of the findings section.

6.7 We note that the arguments of the parties are set out in detail in Section V of the Report, and we made no attempt to repeat them in drafting our findings. We have considered the parties' comments on the descriptive part again on interim review, and as detailed below, have made changes to more completely reflect the arguments of the parties. In addition, we have made changes to the descriptions of the parties' arguments in our findings, in order to ensure that the parties' positions are accurately reflected. However, our references in our findings to the arguments of the parties are intended to set a background for our analysis and conclusions by introducing the issue to be resolved. The suggestion that the length of the reference to any party's arguments in the findings somehow indicates the consideration we have given that party's position in reaching our conclusions is without basis.

6.8 We considered with care and attention all the arguments of the parties to this dispute, and made our decisions after having taken them into account. We do not, however, feel obliged to specifically address all the arguments of the parties. Rather, our task in this dispute is to examine the matter referred to us and to make such findings as will assist the DSB to make recommendations or rulings aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations of Members under the DSU and the AD Agreement. *See* Articles 3.4 and 7.1 of the DSU.

6.9 The United States made a number of comments regarding the descriptive part of the report. These comments included substantive suggestions intended to ensure that its arguments were accurately reflected, and corrections of typographical and stylistic inconsistencies. After reviewing the United States' submissions to ensure that arguments were not being changed, expanded upon, added or deleted, we made clarifying comments and corrections to paragraphs 5.1, 5.2, 5.3, 5.4, 5.5, 5.6, 5.7, 5.8, 5.9, 5.10, 5.32, 5.38, 5.46, 5.50, 5.60, 5.73, 5.81, 5.118, 5.135, 5.137, 5.159, 5.160, 5.161, 5.162, 5.163, 5.164, 5.264, 5.290, 5.291, 5.292, 5.293, 5.297, 5.298, 5.308, 5.326, 5.350, 5.391, 5.395, 5.409, 5.428, 5.524, 5.580, 5.584, 5.608 and 5.639, and footnotes 16, 24, 52, 252, 253, 255, 281, 299 and 501. However, we did not make changes which would, in our view, have changed in some material respect the arguments presented by the United States in its written and oral submissions, which related to Mexico's arguments, or which requested stylistic changes which were inconsistent with other parts of the report. Thus, requested changes were not made to paragraphs 5.31, 5.38, 5.48, 5.76, 5.114, 5.267, 5.327, 5.403, 5.476, 5.482, 5.483, 5.484, 5.485 and 5.486, and footnotes 41, 44, 221, 353, 356, 365, 366 and 444.

6.10 Mexico made a number of comments regarding the descriptive part of the report. These comments included substantive suggestions intended to ensure that its arguments were accurately reflected, comments requesting corrections to translations, corrections of typographical and stylistic inconsistencies. After reviewing Mexico's submissions to ensure that arguments were not being changed, expanded upon, added, or deleted, and having consulted with experts in the Secretariat regarding translation, we made clarifying changes and corrections to paragraphs 5.192, 5.202, 5.254, 5.256, 5.278, 5.290, 5.335, 5.413, 5.471, 5.553, 5.572, 5.589 and 5.561, and footnotes 6, 466, 476 and 478. However, we did not make changes which would, in our view, have changed in some material respect the arguments as originally presented by Mexico in its written and oral submissions. Thus, requested changes were not made to paragraphs 5.198, 5.208, 5.241, 5.260, 5.334, 5.344, 5.376, 5.444, 5.567 and 7.4, and footnotes 362 and 433.

6.11 The United States also requested changes to the findings in order to more accurately reflect its arguments. After reviewing the United States' submissions in this regard, we made changes to more accurately reflect the United States' arguments in paragraphs 7.58, 7.76, 7.79, and 7.80. We also made a clarifying punctuation change to footnote 555.

6.12 The United States requested that we change paragraph 7.2 in order to prevent the last sentence of this paragraph from being misread to mean that parties only filed submissions in April and May 1997. We made a clarifying change in this regard.

6.13 The United States requested changes to paragraph 7.57, asserting that "relevant" domestic industry is not wording from the text of Article 4.1 of the Antidumping Agreement, and that use of the word "relevant" in this context connotes that a proper assessment has been conducted. Therefore, for consistency with the AD Agreement, and to avoid misinterpretation, the United States suggested different terminology. We made clarifying changes to paragraph 7.57 in this regard. The United States also argues that it is an undisputed fact that there were only two companies in Mexico that could have been producing HFCS prior to initiation, but that paragraph 7.57 did not make this clear. We have made a change in order to clarify this point.

6.14 Mexico also commented that its arguments were not accurately reflected in our findings. After reviewing Mexico's submissions in this regard, we made changes to more accurately reflect Mexico's arguments in paragraphs 7.19, 7.25, 7.35–7.37, and footnote 535.

6.15 Mexico requested that we re-examine our findings in Section VII.B.1 of the Report, alleged failure to assert claims under Article 6.2 of the DSU and Article 17.4 of the AD Agreement.

6.16 Mexico notes that paragraph 7.11 indicates that the Panel considered the issue before it in this dispute to be whether the United States' request set forth, with sufficient specificity, claims regarding

the anti-dumping measure identified in the request. Mexico argues that, the Panel's findings do not deal adequately with the issue before it and should be re-examined. In particular, Mexico disagrees that the United States' request for the establishment of a panel can be said to fulfil the requirements of Article 6.2 of the DSU and 17.4 of the AD Agreement merely on the basis of the criterion established in the *European Communities-Bananas* case, i.e. that "it identifies the measure in question, the final anti-dumping measure, and lists the provisions of the WTO Agreements alleged to have been violated in paragraph 4 of the request" (paragraph 7.14), or by referring to the requests in both cases as brief and sufficient.

6.17 Mexico does not agree that the Panel, in paragraph 7.14, should base its conclusions merely on the criterion or "minimum threshold"<sup>512</sup> established in this single precedent<sup>513</sup> because this completely ignores the arguments and precedents presented by Mexico. Mexico asserts that it is important to bear in mind that:

- (a) During these proceedings, Mexico has stressed that the United States' request not only did not present the matter clearly, but that it did not contain any "claims" in that it did not indicate the basis for each one of its assertions, and consequently, it did not properly submit a "matter". Particularly relevant in this connection is the *EC-Yarn* case, in which the Panel considered that "there could be more than one legal basis for alleging a breach of the same provision of the Agreement and that, accordingly, a claim in respect of one of these would not also constitute a claim in respect of the other. A separate and distinct claim would be required", adding that "a claim was the specification of the particular legal and factual basis upon which it was alleged that a provision of the Agreement had been breached".<sup>514</sup>
- (b) As a second step in its examination, after having shown that the United States request did not contain "claims", Mexico recalled in these proceedings that the "claims" were one of the essential elements of the "matter". It was important to refer to the report of the Appellate Body in *Guatemala-Cement*, which stands out for its interpretations of the dispute settlement provisions in the context of anti-dumping cases. In this case, the Appellate Body stated (paragraph 77) that "the word 'matter' ('cuestión' or 'asunto') has the same meaning in Article 17 of the AD Agreement as it has in Article 7 of the DSU. It consists of two elements: the specific 'measures' and the 'claims' relating to it, both of which must be properly identified in a panel request as required by Article 6.2 of the DSU".

6.18 In short, Mexico does not agree that the Panel, particularly in paragraphs 7.13 and 7.14, should fail to recognize that the "claims" ("*alegaciones*" or "*reclamaciones*") are an essential element that must be included in a request for the establishment of a Panel, and that it should consider that the United States complied with Article 6.2 of the DSU merely because it listed the allegedly violated WTO provisions without commenting on Mexico's basic arguments and without even mentioning the WTO precedents put forward by Mexico which are of equal if not even greater relevance in anti-dumping cases.

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<sup>512</sup> Mexico notes that paragraph 7.13 states that the *European Communities-Bananas* case "sets the minimum threshold for an acceptable request for establishment under Article 6.2 of the DSU".

<sup>513</sup> Mexico argues that, according to the rules of public international law, the *European Communities-Bananas* case, as a WTO precedent, is a secondary source without any binding force, and as such has no more authority than other GATT/WTO decisions or precedents that were also adopted and disregarded.

<sup>514</sup> In this regard, Mexico refers, in particular, to Mexico's first submission, paragraphs 23 and 24; Mexico's second submission, paragraphs 12-13 and 20-24; and Mexico's replies to questions 1 and 2 of the Panel on 6 May 1999. Mexico maintains that it is important to note that in its reply to question 8 of Mexico on 6 May 1999, the United States was unable to identify the number of "claims" in its request.

6.19 The same applies to Mexico's argument that the United States' request for the establishment of a panel did not present the problem clearly. In Mexico's view, the Panel simply observed that the equally brief request submitted in the *European Communities-Bananas* case was considered sufficient and decided that in this case the request was also sufficient in that respect. Mexico cannot agree with this finding because it does not take account of the arguments or of the bases presented by Mexico.

6.20 Mexico recalls that although in paragraph 7.15, the Panel states that "we do not consider that Mexico was prejudiced in its ability to defend its interests in this dispute", the lack of clarity in the presentation of the problem in the United States' request did in fact affect Mexico's ability to defend its interests in this dispute. Mexico had argued that it had been unable to find out what the United States' complaints were before reading the first written submission of the United States. Before that, Mexico maintains that it did, in fact, encounter considerable practical difficulties in understanding what the specific complaints of the United States were with respect to the various provisions of the AD Agreement governing the application of definitive measures. More importantly, Mexico argues, for months the lack of clarity in presenting the problem and specifying the factual and legal basis for the assertions contained in the United States' request engendered an expenditure or squandering of resources that could otherwise have been devoted to preparing a timely defence.

6.21 In Mexico's view, further evidence of this emerged from the first substantive meeting of the Panel with the Parties, at which Mexico asserts that the United States itself proved unable to state how many claims its request contained. Thus, Mexico insists on the fact that the United States' request is so extraordinarily confused that neither the United States itself, nor Mexico, nor the Panel could say how many claims it contained.

6.22 Mexico considers that if the Panel had taken account of the above reasoning and bases, it would inevitably have reached a different conclusion. It therefore requests that we re-examine Mexico's arguments concerning the failure to comply with Article 6.2 of the DSU and 17.4 of the AD Agreement.

6.23 After considering Mexico's arguments in this regard, we have made changes to paragraph 7.12-7.14 in order to clarify our reasoning.<sup>515</sup>

6.24 Mexico asks that we re-examine our findings in Section VII.B.2 of the Report, alleged insufficiency of the request for establishment under Article 17.5(i) of the AD Agreement.

6.25 In Mexico's view, this entire section of the Interim Report is imbalanced. Mexico argues that it clearly makes no sense that although Mexico is the objecting party, its objection is reduced to a few lines, while the counter arguments of the United States fill the next two paragraphs. How, Mexico inquires, can anyone possibly appreciate in Section V.A.2 of the Interim Report that Mexico's arguments were considerably more detailed and diverse than those set forth in paragraph 7.19? Mexico asserts that both its objection and its arguments must be included in this part of the Report, albeit in a summarized form.

6.26 Moreover, Mexico argues that its objection was not properly reported, in that paragraphs 7.19 and 7.25 do not reflect Mexico's objection, which was not that the United States request did not "allege" that there was nullification or impairment of benefits, but that the request did not indicate "how a benefit has been nullified or impaired". In Mexico's view, it is this difference that led the Panel to the erroneous conclusion that "it must be clear from the request that an allegation of nullification or impairment is being made" (paragraph 7.26 of the Report). Mexico argues that Article 17.5 does not establish that nullification or impairment must be "alleged" but rather, that the request must indicate "how a benefit [...] has been nullified or impaired". These are two different notions which lead to two different conclusions. In the first case, what counts is whether nullification

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<sup>515</sup> But see note 530, *infra*.

was alleged, while in the second case, which is the correct case, what counts is whether there is an indication of how the nullification or impairment took place.

6.27 Mexico asserts that it did not argue that Article 17.5 of the AD Agreement required a "specific" allegation of nullification or impairment, but that that requirement must be fulfilled "explicitly", and not implicitly as, in Mexico's view, the United States had contended. Proceeding on the basis of this distortion of Mexico's argument, Mexico asserts that the Panel failed to explain how it was possible for a "special or additional provision" of the DSU to be complied with implicitly regardless of the fact that it is special or additional.

6.28 Nor did Mexico limit its arguments to whether the United States had used the "magic words" nullification or impairment. What it objected to and argued was that the United States request contained no indication of how a benefit was nullified or impaired. The fact that these magic words were not included in the United States' request was simply mentioned as one example among many others in support of Mexico's objection, which is very different from the Panel's conclusion that Mexico's objection boils down to the failure by the United States to use the magic words.

6.29 Mexico asserts that, as regards the rest of Mexico's arguments, the Panel failed to explain why those contained in paragraphs 5.64, 5.65, 5.66, 5.68, 5.69, 5.70, 5.71 and 5.76 were inadmissible. In Mexico's view, the failure to consider these arguments led the Panel to mistaken conclusions with respect to the relationship between Article 3.8 of the DSU and Article 17.5 of the AD Agreement. As indicated, for example, in paragraphs 5.69 and 5.70, Article 3.8 of the DSU speaks of a presumption of nullification or impairment which in most cases may be corroborated subsequently, while Article 17.5 contains an obligation to indicate how a benefit "has been" nullified or impaired. In other words something which has already happened.

6.30 In Mexico's view, the conclusion in paragraph 7.28 that "a request for establishment that alleges violations of the AD Agreement which, if demonstrated, will constitute a prima facie case of nullification or impairment under Article 3.8 of the DSU, contains a sufficient allegation of nullification or impairment for purposes of Article 17.5(i)" wrongly implies that:

- (a) All requests for the establishment of a panel containing allegations of violation of the provisions of the AD Agreement would automatically comply with Article 17.5(i) of the AD Agreement, which would mean that this special or additional provision would have no *raison d'être*, except in cases of non-violation;
- (b) the only cases in which it would be necessary to comply explicitly with Article 17.5(i) of the AD Agreement would be those involving a request for the establishment of a panel in which it is alleged that benefits have been nullified or impaired as a result of a measure which does not violate the AD Agreement (non-violation complaints) which makes no sense, since the actual language of Article 17.5(i) contains no indication in this respect and there are no non-violation precedents in the anti-dumping area to suggest that the drafters of this provision had any such concern;
- (c) the United States request would partially violate Article 17.5(i), since for all of the allegations of violation in which it was found that there was no violation, there would not be any nullification or impairment of benefits either (which shows that paragraph 7.30 is incorrect, since in accordance with the overall results of the Report the most that could be concluded was that the United States request was proper only where there were, in fact, violations);
- (d) although Article 17.5(i) of the AD Agreement establishes a requirement that clearly concerns the complaining Member, the Panel not only failed to take this requirement

into consideration, but in fact transferred it to the defending Member, since according to the second paragraph of Article 3.8 of the DSU, it is up to the Member against whom the complaint has been brought to rebut the charge (of adverse impact, and not of nullification or impairment);

- (e) Article 17.5(i) is poorly drafted, since (i) it should refer to "allegations of violation" rather than to the obligation to indicate "how a benefit [...] has been nullified or impaired", and (ii) the verbs should be in the future tense, and not the past tense, to allow for subsequent checking of whether a presumption can ultimately be corroborated;
- (f) the "additional requirements" referred to by the Appellate Body in respect of Article 17 of the AD Agreement in the *Guatemala-Cement* case do not exist, since they can be fulfilled at the same time and in the same way as the DSU requirements. In other words, there is nothing special or additional in the AD Agreement with respect to Article 6.2 of the DSU.

6.31 Furthermore, Mexico argues that while it is true that in the *Guatemala-Cement* case the Appellate Body concluded that Articles 6.2 of the DSU and 17.5 of the AD Agreement were complementary, in this case the Panel did not examine the relationship between Article 3.8 of the DSU and Article 17.5(i) of the AD Agreement before concluding that the former replaced the latter. Nowhere in the Interim Report is there any indication or mention of the discrepancy or complementarity between these two provisions, why there is such a relationship and the legal consequences thereof.

6.32 Mexico considers that over and above any GATT/WTO precedents pointing to one thing or another, in any dispute within the context of the AD Agreement it is necessary to interpret the general rules of dispute settlement set forth in the DSU (in this case Articles 6.2 and 3.8) in direct connection with the special dispute settlement provisions of the AD Agreement (in this case Articles 17.4 and 17.5). And it is on the basis of that interpretation only that compliance with the dispute settlement provisions of the AD Agreement and the DSU should be examined, including the requirements for requests for the establishment of a panel, in accordance with the particular circumstances of each case. What would be the point or purpose of Article 17 of the AD Agreement if not to provide rules or requirements that are additional or supplementary or, where applicable, different from the general rules of the DSU (i.e. in case of inconsistency with the DSU). If this were not the purpose, then this special dispute settlement provision of the AD Agreement would be pointless.

6.33 In view of the above considerations, Mexico requests that we re-examine our findings with respect to the interpretation of Articles 6.2 and 3.8 of the DSU and 17.4 and 17.5(i) of the AD Agreement, and with respect to the request for the establishment of a panel submitted by the United States in this dispute.

6.34 As noted above, we made changes to paragraphs 7.19 and 7.25 in order to more accurately reflect Mexico's arguments. In addition, after careful consideration of Mexico's comments, we have made changes to paragraphs 7.24 and 7.26-7.29 in order to clarify our reasoning and conclusions.

6.35 Mexico requested that we re-examine the structure of Section VII.B.4 of the Report, allegedly improper references to consultations. As noted above, we made changes to paragraphs 7.35-7.37 in order to more accurately reflect Mexico's argument. We also made a change to paragraph 7.43 in order to clarify our reasoning and conclusions.

6.36 Mexico requested that we re-examine our conclusions in Section VII.B.5 of the Report, claims addressing the provisional measure.



6.37 In Mexico's view, the Panel overstepped its authority by ruling on a measure that does not come under its terms of reference. Consequently, Mexico asserts, the finding contained in Part VII.B.5 of the Report is out of place, and should be deleted from the Report.

6.38 Mexico asserts that, as can be seen from the Report itself and as confirmed by the United States, the request for the establishment of a panel by the United States contains only one "specific measure at issue", i.e., the definitive anti-dumping measure. Consequently, in Mexico's view, the Panel should not have addressed in any way the issue of the consistency of the provisional measure applied by Mexico with the provisions of the AD Agreement on provisional measures.

6.39 In Mexico's view, the argument according to which the United States did not challenge the provisional measure as such, but rather as one of its "legal claims" (paragraph 7.46) neither settles nor obviates the obligation whereby the request for the establishment of a panel must contain the specific measures at issue if they are to come under the terms of reference of the panel.

6.40 Mexico argues that the quotation from the Appellate Body report in the *Guatemala-Cement* case in paragraph 7.51 does not imply that the terms of reference of a panel can be expanded through the claims brought. All that this quotation says is that "there is a difference between the specific measures at issue – in the case of the AD Agreement, one of the three types of anti-dumping measure described in Article 17.4 – and the claims or the legal basis of the complaint referred to the DSB relating to those specific measures". Thus, Mexico asserts, the Panel's conclusion in the case at issue should have been that if the provisional measure was not included in the request for the establishment of a panel, it would have to reject all of the claims and legal bases relating to the provisional measure.

6.41 Mexico maintains that, instead of proceeding as indicated in the last sentence of the previous paragraph, the Panel preferred to examine whether a complaint concerning the period of application of a provisional measure was related to the definitive anti-dumping duty. Mexico does not agree with the Panel's reasoning, since as indicated in the first sentence of paragraph 7.53, "a claim regarding the period for which a provisional measure was applied does not, on its face, constitute a challenge to the definitive anti-dumping duty in this dispute".

6.42 In Mexico's view, the Panel's statement that the United States' claim under Article 7.4 of the AD Agreement was "nevertheless related to Mexico's definitive anti-dumping duty" not only contradicts the first sentence of paragraph 7.53 without any explanation, but is also wrong. The only thing that the references to Article 10 of the AD Agreement show is that a claim regarding the duration of a provisional measure is related to the provisional anti-dumping duty, and not, as the Panel erroneously contends, to the definitive duty.

6.43 Mexico asserts that this becomes clear when it is borne in mind that the fact that there is a relationship between the retroactive application of definitive anti-dumping duties and the duration of the provisional measure does not mean that there is also necessarily a relationship between the duration of the provisional measure and the application of definitive anti-dumping duties. The first relationship exists in all cases, while the second relationship may or may not exist depending on the circumstances. Paragraph 7.53 confuses the relationship between the retroactive application of duties and the duration of the provisional measure, on the one hand, with the relationship which is not even stipulated in Article 10 of the AD Agreement between the duration of the provisional measure and the application of definitive anti-dumping duties, on the other.

6.44 Mexico argues that the Panel's conclusion is so obvious that in paragraph 7.54 of the report, the Panel itself felt obliged to interpret the scope of Article 17.4 of the AD Agreement incorrectly by asserting that although Article 17.4 "literally" refers to Article 7.1 of the AD Agreement "(and not a claim under Article 7.4 of the AD Agreement)", "a ruling that a claim under Article 7.4 could not be pursued in a dispute where the specific measure challenged is a definitive anti-dumping duty would mean that a Member would never be able to pursue an Article 7.4 claim". In Mexico's view, this

conclusion is so flawed that the Panel itself recognizes, in the same paragraph of the Report, that it cannot be correct by introducing it with the words "if this conclusion is correct".

6.45 Mexico asserts that this shows that in spite of what was said by the Appellate Body in *Guatemala-Cement*, Article 17.4 of the AD Agreement is a timing provision (which indicates when a matter may be referred to the Dispute Settlement Body) and not a coverage provision (which establishes in a restrictive manner the measures which may be challenged as specific measures at issue in the dispute in anti-dumping cases). If Article 17.4 of the AD Agreement refers expressly to Article 7.1 neither the Appellate Body nor any panel has the authority to conclude that it also covers Article 7.4.

6.46 Having carefully considered Mexico's arguments in this regard, we have concluded that no changes to our findings are necessary, but have made a clarifying change in paragraph 7.53.

6.47 Mexico comments that the United States wishes the Panel to infringe the provisions of Article 17.6 of the AD Agreement. In this regard, Mexico asserts that the Interim Report completely ignored this objection, not only in the findings section, but also in the descriptive part. In Mexico's view, this is yet another example of the observations that were disregarded in the examination stage of the descriptive part. Mexico states that it does not understand the reasoning which lead to the elimination of an entire portion of its arguments, as if they had never been made. Indeed, it notes that it expressly referred to this aspect in its two written submissions.<sup>516</sup> Mexico requests that this argument be included in the descriptive part and that the Panel issue a ruling on the matter.

6.48 We have made several changes to the descriptive part in order to more clearly reflect Mexico's arguments in this regard, and have made a change to footnote 535 to clarify our reasoning.

6.49 Mexico comments that the Panel has mistaken the relevance of the Panel report in *Guatemala-Cement*. Mexico notes the Panel's statement in footnote 556, that the decision on the merits of the Panel in *Guatemala-Cement* (WT/DS60/R) has no legal status and thus does not create legitimate expectations, and makes the following observations in this connection:

- (a) The report of the Appellate Body and the report of the Panel in the *Guatemala-Cement* case were adopted at the meeting of the Dispute Settlement Body of 26 November 1998.
- (b) The report of the Appellate Body in *Guatemala-Cement* did not overrule any of the conclusions of the Panel concerning the violations of Articles 5.3 and 5.5 of the AD Agreement committed by Guatemala during the investigation or any of the recommendations and suggestions of the Panel under Article 19.1 of the DSU.
- (c) Contrary to footnote 556, footnote 1 of the first written submission of the United States<sup>517</sup> shows that the United States recognized that the report of the Panel in *Guatemala-Cement* had been adopted by the DSB, indicating that it was not adopted "on other grounds". In Mexico's view, this means that in the opinion of the United States, the conclusions of the Panel that were overruled by the decision of the Appellate Body were overruled because the latter had reached the conclusion that the anti-dumping dispute had not been properly brought before the Panel by Mexico.

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<sup>516</sup> See in particular Mexico's first written submission, paragraphs 64-68, and its second written submission, paragraphs 70 to 74. It should be recalled that this objection was also discussed in the first substantive meeting with the parties.

<sup>517</sup> In footnote 1 to its first written submission, the United States refers to the Panel report in *Guatemala-Cement* as follows: "WT/DS60/R, Report of the Panel circulated 19 June 1998 ("*Guatemala-Cement*"), not adopted on other grounds ..." (Emphasis added by Mexico).

- (d) According to the report of the Appellate Body in *Japan-Taxes on Alcoholic Beverages*, "adopted panel reports are an important part of the GATT *aquis* (...). They create legitimate expectations among WTO Members, and, therefore, should be taken into account when they are relevant to any dispute". The same report recognizes that unadopted panel reports have no legal status.<sup>518</sup>
- (e) Consequently, apart from the findings of the Panel that were overruled by the Appellate Body regarding the question of whether the dispute had been properly brought before the Panel, and which in this respect only have no legal status, the Panel report in *Guatemala-Cement*, having been adopted by the DSB, has the same legal status as any other report adopted by the DSB.<sup>519</sup>

6.50 Having considered Mexico's argument, we have made changes to footnote 556 of the Report to clarify our reasoning.

6.51 Mexico makes the following comments or clarifications concerning paragraphs 7.176 (on the basis of Mexico's reply to question 15 of the Panel on 22 June 1999) and 7.177:

- (a) To begin with, when Mexico points out "that the alleged restraint agreement was made after the period of investigation, and thus any limitation on imports started from the already significantly increased levels that had been reached", it is not trying to substantiate its determination on the basis of anything other than the likelihood of increased imports. On the contrary, in determining that there was such a likelihood in the future, the analysis of the behaviour of imports beyond the period investigated (from January to September 1997) was particularly significant in that it revealed not only the growth trend in imports, but also confirmed those trends starting from levels of demand and substitution that had actually been reached during and outside the period investigated, in addition to a confirmed dynamism of those levels.
- (b) In the circumstances of an anti-dumping investigation, the analysis conducted by the investigating authority with respect to imports beyond or outside the period investigated clearly cannot go on indefinitely and must stop somewhere (in this case in September 1997), although the AD Agreement does not contain any clear indications in this respect. When the analysis of the imports within the period investigated and outside the period investigated shows not only growth trends, but already confirmed substantial increases, the levels already reached are relevant for the purposes of determining the likelihood of substantially increased imports.
- (c) As regards the Panel's inferences that the alleged restraint agreement "would at least slow any further increases in imports", since it "affected purchasers accounting for 68 per cent of imports", and that if the agreement existed "any further increases in imports would be less than they had been in the past", since "most other purchasers' ability to substitute HFCS for sugar was limited", their importance is undercut by two important aspects of the analysis and conclusion:
  - (i) Firstly, to infer a slowdown on the grounds that the soft drink bottlers represented 68 per cent of the demand for imports would be to presume that the alleged agreement was truly binding on the soft drink industry. However, it should be recalled that SECOFI never received evidence concerning the scope and specific content of the alleged agreement which would have

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<sup>518</sup> See *Japan-Taxes on Alcoholic Beverages* (WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R), adopted 1 November 1996, page 13.

<sup>519</sup> As recognized in paragraph 7.94.

enabled it to be aware of its binding nature and true scope. On the other hand, the dynamism of the demand for imports and the degree of substitution of HFCS observed during and outside the period investigated did constitute sufficient evidence of the fact that beverage producers, other industrial users and the soft drink bottlers themselves had increased and could have continued, in the future, to increase their consumption of HFCS in an amount sufficient to cause a further substantial increase in imports.

(ii) Nor is it by any means true that SECOFI concluded that HFCS imports would have continued increasing "by inertia". The likelihood of a substantial increase in imports was based, as we said before, on the analysis of the levels of demand for imports and for domestic HFCS by soft drink bottlers, manufacturers of other beverages and other industrial users, and on the observation that these levels of demand were not static, but that on the contrary, not only did they show an upward trend, but there had been a confirmed increase within and outside the period investigated. Similarly, the study concerning the degree of substitution of HFCS for sugar, on which the conclusion that there was a likelihood of a substantial increase in imports was based as well, also showed a significant growth, including for other industrial users (which could be considered more limited in an initial stage), even though at that point substitution was not in full swing.

(d) Finally, the fact that the final determination did not address in detail the elements supporting SECOFI's analysis of the potential impact of the alleged restraint agreement in relation to its conclusion concerning the likelihood of a substantial increase in HFCS imports, or that this conclusion was not worded in the best possible way, does not imply any violation of Article 3.7(i) of the AD Agreement.

6.52 Mexico asks that we re-examine our conclusions in this regard.

6.53 Having carefully considered Mexico's arguments in this regard, we have concluded that no changes to our findings are necessary.

## VII. FINDINGS

### A. INTRODUCTION

7.1 This dispute involves the imposition of a definitive anti-dumping measure by the Mexican Ministry of Trade and Industrial Development (SECOFI) on imports of high-fructose corn syrup (HFCS) from the United States. The United States raises claims concerning the initiation of the investigation, the final determination imposing the measure, the period of application of the provisional measure, and the retroactive application of the final anti-dumping measure for the period during which the provisional measure was in effect.

7.2 On 14 January 1997, Mexico's National Chamber of Sugar and Alcohol Industries (Sugar Chamber) filed an application for an anti-dumping investigation with SECOFI alleging that imports of HFCS from the United States were being exported to Mexico at dumped prices and threatened Mexico's sugar industry with material injury. On 27 February 1997, SECOFI published a notice in Mexico's *Diario Oficial* announcing the initiation of an anti-dumping investigation on imports of HFCS, grades 42 and 55, originating in the United States.<sup>520</sup> SECOFI established the period from

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<sup>520</sup> *Resolución por la que se acepta la solicitud de parte interesada y se declara el inicio de la investigación antidumping sobre las importaciones de jarabe de maíz de alta fructosa, mercancía clasificada en las fracciones arancelarias 1702.40.01, 1702.40.99, 1702.60.01 y 1702.90.99 de la Tarifa de la Ley del*

1 January 1996 to 31 December 1996 as the period of investigation. Parties filed responses to investigation questionnaires and to requests for supplementary information in April and May 1997, and also filed other submissions throughout the investigation.

7.3 On 25 June 1997, SECOFI published a notice announcing a preliminary determination imposing provisional anti-dumping duties ranging from 66.57 to 125.30 U.S. dollars per metric ton in the case of imports of HFCS grade 42, and 65.12 to 175.50 U.S. dollars per metric ton in the case of imports of HFCS grade 55.<sup>521</sup> The provisional measures remained in place until the final determination was published.

7.4 On 23 January 1998, SECOFI published a notice announcing the final determination that dumped imports of HFCS from the United States threatened material injury to the Mexican sugar industry. The final determination imposed definitive anti-dumping duties ranging from 63.75 to 100.60 U.S. dollars per metric ton in the case of imports of HFCS grade 42, and 55.37 to 175.50 U.S. dollars per metric ton in the case of imports of HFCS grade 55.<sup>522</sup> The notice provides that the Ministry of Finance and Public Credit was entrusted with collecting the definitive anti-dumping duties, and the latter was directed to collect such duties retroactively to the date of the imposition of the provisional measure.

#### B. PRELIMINARY ISSUES

7.5 Mexico argues, on two separate bases, that the United States' request for establishment of this Panel is not consistent with the requirements of Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Articles 17.4 and 17.5(i) of the Agreement on Implementation of Article VI of GATT 1994 (AD Agreement), and therefore argues that we must terminate the proceeding without reaching the substance of the United States' claims. Mexico also raises two issues relating to the admissibility of certain evidence referred to by the United States, arguing that we must reject this evidence. Finally, Mexico argues that the United States' claim concerning the period of application of the provisional measure is not within our terms of reference, and therefore may not be considered.

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*Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia.* (Decision to accept the request of the interested parties and to start the antidumping investigation of high fructose corn syrup imports, merchandise classified in tariff classifications 1702.40.01, 1702.40.99, 1702.60.01 and 1702.90.99 of the Schedule to the General Import Duties Act, originating in the United States of America, irrespective of the country of export). US-3, MEXICO-1 (*Initiation Notice*).

<sup>521</sup> *Resolución preliminar de la investigación antidumping sobre las importaciones de jarabe de maíz de alta fructosa, mercancía clasificada en las fracciones arancelarias 1702.40.01, 1702.40.99, 1702.60.01 y 1702.90.99 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia.* (Preliminary determination in the antidumping investigation of high fructose corn syrup imports, merchandise classified in tariff classifications 1702.40.01, 1702.40.99, 1702.60.01 and 1702.90.99 of the Schedule to the General Import Duties Act, originating in the United States of America, irrespective of the country of export). US-2, MEXICO-2 (*Preliminary Determination*).

<sup>522</sup> *Resolución final de la investigación antidumping sobre las importaciones de jarabe de maíz de alta fructosa, mercancía clasificada en las fracciones arancelarias 1702.40.99 y 1702.60.01 de la Tarifa de la Ley del Impuesto General de Importación, originarias de los Estados Unidos de América, independientemente del país de procedencia.* (Final determination in the antidumping investigation of high fructose corn syrup imports, merchandise classified in tariff classifications 1702.40.01, 1702.40.99, 1702.60.01 and 1702.90.99 of the Schedule to the General Import Duties Act, originating in the United States of America, irrespective of the country of export). US-1, MEXICO-6 (*Final Determination*).

**1. Alleged Failure to Assert Claims under Article 6.2 of the DSU and Article 17.4 of the AD Agreement**

7.6 Mexico argues that the United States' request for the establishment of a panel does not fulfil the requirements laid down in Article 6.2 of the DSU and Article 17.4 of the AD Agreement. Mexico asserts that the United States' request for establishment (a) does not set forth any claims, and (b) fails to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly, contrary to the requirements of Article 6.2 of the DSU.

7.7 With respect to its first argument, Mexico maintains that the United States' request does not contain any "claims", as it fails to indicate the legal basis corresponding to the alleged violations of the AD Agreement. Mexico asserts that, at the most, the United States' request contains "assertions" or "reasonings". In the absence of "claims", an essential element of the "matter" referred to in Article 7 of the DSU and Article 17.4 of the AD Agreement, Mexico asserts that the United States failed to bring a "matter" before the DSB and this Panel.

7.8 With respect to its second argument, Mexico asserts that it is not possible to discern from the United States' request for establishment the relationship between the facts and events cited as violations of the AD Agreement and the cited provisions of the AD Agreement. Mexico argues that, as a result, the request for establishment is confused and fails to "present the problem clearly" and therefore fails to comply with Article 6.2 of the DSU. Mexico maintains that the obligation to present the problem clearly is not a mere formality, as it is intended to provide notice to the opposing Member of the substance of the dispute, establish the terms of reference of a panel, and safeguard the rights of WTO Members to decide whether they should participate as third parties.

7.9 The United States contends that its request for the establishment of a panel is sufficient under the DSU and the AD Agreement. Citing the report of the Appellate Body in *European Communities–Bananas*<sup>523</sup>, the United States asserts that the *minimum* requirement of Article 6.2 is that a request for establishment set forth the measure in question, and identify the legal claims. The United States asserts that its request in this case does at least this much: the measure in question is set forth (the final anti-dumping measure) and the request identifies legal claims (alleged violation of Articles 1-7, 10 and 12 of the AD Agreement, and Article VI of GATT 1994).

7.10 Moreover, the United States asserts that its request for establishment exceeds these minimum requirements, as the request links the specific measure and the various claims, describing in detail the United States' problems with the Mexican measure, using the language of the cited provisions of the AD Agreement, in paragraphs (a)-(k), thereby stating the problem clearly. The United States further maintains that Mexico's arguments concerning the notice function of the request, and confusion resulting from the asserted inadequacy of the request, are not credible. The United States, relying on the Appellate Body report in *European Communities–Computer Equipment*,<sup>524</sup> argues that a panel request fails to be "sufficient to state the problem clearly" in accordance with DSU Article 6.2 if the request is so flawed that the defending party's rights of defense are prejudiced, and maintains that Mexico cannot demonstrate that any imperfections in the United States' request for establishment rise to this level.

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<sup>523</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas (European Communities-Bananas)*, WT/DS27/AB/R (*European Communities-Bananas AB Report*), adopted 25 September 1997, para. 18.

<sup>524</sup> *European Communities – Customs Classification of Certain Computer Equipment (European Communities-Computer Equipment)*, WT/DS62/AB/R (*European Communities-Computer Equipment AB Report*), adopted 22 June 1998, paras. 68-70.

7.11 In considering this issue, we note first that the Appellate Body has stated that Article 6.2 of the DSU and Article 17.4 of the AD Agreement are complementary and should be applied together in disputes under the AD Agreement.<sup>525</sup> It has further stated that:

"the word "matter" has the same meaning in Article 17 of the *Anti-Dumping Agreement* as it has in Article 7 of the DSU. It consists of two element: The specific "measure" and the "claims" relating to it, both of which must be properly identified in a panel request as required by Article 6.2 of the DSU".<sup>526</sup>

Moreover, it has specified that:

"in disputes under the *Anti-Dumping Agreement* relating to the initiation and conduct of anti-dumping investigations, a definitive anti-dumping duty, the acceptance of a price undertaking or a provisional measure must be identified as part of the matter referred to the DSB pursuant to the provisions of Article 17.4 of the *Anti-Dumping Agreement* and Article 6.2 of the DSU".<sup>527</sup>

The United States' request for establishment identifies the measure in question – the final anti-dumping measure on HFCS imposed by Mexico. The issues before us in this dispute are whether the United States' request sets forth claims regarding that measure, and whether it does so with sufficient specificity to present the problem clearly.

7.12 Mexico argues that the request for establishment does not contain any claims within the meaning of Article 6.2 of the DSU because it does not indicate the basis for each assertion.<sup>528</sup> It is clear on the face of the United States' request for establishment that violations of the AD Agreement are alleged. In our view, these allegations of violations present "claims" within the meaning of Article 6.2 of the DSU.

7.13 The issue which we must then decide is whether the summary of the legal basis of the complaint – the claims - is "sufficient to present the problem clearly". The Appellate Body addressed this question most recently in *Korea-Dairy Safeguard*,<sup>529</sup> stating that:

"Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all. But it may not always be enough. There may be situations where the simple listing of the articles of the agreement involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple

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<sup>525</sup> *Guatemala – Anti-Dumping Investigation regarding Portland Cement from Mexico (Guatemala-Cement)*, WT/DS60/AB/R (*Guatemala-Cement AB Report*), adopted 25 November 1998, para. 75.

<sup>526</sup> *Id.*, para 76.

<sup>527</sup> *Id.*, para. 80.

<sup>528</sup> In this regard, Mexico relies on the report of the Panel in *EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil (EC-Yarn)*, ADP/137 (*EC-Yarn Panel Report*), adopted 30 October 1995.

<sup>529</sup> *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, circulated 14 December 1999 (*Korea-Dairy Safeguard AB Report*). This decision, like others by the Appellate Body and panels considering Article 6.2 of the DSU, was in the context of considering whether the request for establishment presented specific claims with sufficient clarity, rather than in the context of determining whether the request for establishment set forth any claims at all.

obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2. ...

Whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated".<sup>530</sup>

7.14 In considering the arguments relating to Article 17.4 of the AD Agreement, we note first that Article 17.4 does not, in our view, set out any further or additional requirements with respect to the degree of specificity with which claims must be set forth in a request for establishment challenging a final anti-dumping measure.<sup>531</sup> Therefore, a request for establishment that satisfies the requirements of Article 6.2 of the DSU in this regard also satisfies the requirements of Article 17.4 of the AD Agreement.

7.15 The United States' request for establishment in this case does not merely list the articles alleged to have been violated. The request also sets forth facts and circumstances describing the substance of the dispute. In our view, the request is sufficiently detailed to set forth the legal basis of the complaint so as to inform the defending Member, Mexico, and potential third parties of the claims made by the United States.

7.16 We find that Mexico has not demonstrated to us that it was prejudiced in its ability to defend its interests in the course of the proceedings in this dispute. Mexico asserts that it had to wait until the first written submission of the United States, more than four months after the request for establishment, to have a clear idea of what the United States' arguments in support of its assertions were. Mexico argues that as a result of the failure of the United States to present the problem clearly and specify the factual and legal basis for the request, it was obliged to spend that time working "in the dark". In its comments on interim review, Mexico asserts that this resulted in the expenditure or squandering of resources that could otherwise have been devoted to preparing a timely defence.

7.17 In our view, the totality of the United States' request for establishment sets out claims with sufficient specificity to present the problem clearly and allow Mexico to defend its interests. Mexico's assertions as to the effect of the alleged inadequacies in the request for establishment do not, in our view, rise to the level of demonstrating that Mexico's rights of defense in this panel proceeding were affected, given the actual course of the panel proceedings.<sup>532</sup> Similarly, we do not find that that the

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<sup>530</sup> *Korea-Dairy Safeguard AB Report*, paras. 124 and 127 (footnote omitted, emphasis in original).

We recognize that the Appellate Body's decision *Korea-Dairy Safeguard* was circulated after the interim review stage of this proceeding, and hence could not be taken into account by the parties in formulating their arguments. As the decision directly addresses the legal issue under Article 6.2 of the DSU which is before us in this dispute, we have made our findings on this issue in light of that decision. We note, however, that this course of action did not affect our conclusion regarding the sufficiency of the United States' request for establishment under Article 6.2 of the DSU and Article 17.4 of the AD Agreement, which would have been the same had we not taken that decision into account.

<sup>531</sup> We note that Article 17.4 does not refer to "claims".

<sup>532</sup> In this regard, we recall the decision of the Appellate Body in *European Communities-Bananas* that "Article 6.2 of the DSU requires that the *claims*, and not the *arguments*, must be specified sufficiently in the request for establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint". *European Communities-Bananas AB Report*, para. 143 (emphasis in original).



interests of any Members as potential third parties were prejudiced by a lack of detail in the request for establishment.<sup>533</sup>

7.18 We therefore reject Mexico's arguments and determine that the United States' request for establishment satisfies the requirements of Article 6.2 of the DSU and Article 17.4 of the AD Agreement.

## **2. Alleged Insufficiency of the Request for Establishment under Article 17.5(i) of the AD Agreement**

7.19 Mexico also contends that the United States' request for establishment is insufficient under Article 17.5(i) of the AD Agreement because it does not indicate how Mexico's final anti-dumping measure nullifies or impairs benefits accruing to the United States under the AD Agreement, and does not indicate how the achieving of the objectives of the AD Agreement was being impeded by that measure.

7.20 The United States asserts that Mexico's argument is inconsistent with the text and context of Article 17.5(i) in interpreting that provision to require an explicit statement alleging nullification or impairment, or that the achieving of the objectives of the AD Agreement has been impeded. The United States, referring to Article 3.8 of the DSU, argues that an allegation of violation of a covered agreement constitutes an allegation of nullification or impairment of benefits accruing to it under the AD Agreement, and that it alleged such violations in its request for establishment.

7.21 Moreover, the United States points out that Article 17.5(i) requires that complaining parties provide a written statement "**indicating how** a benefit has been directly or indirectly nullified or impaired, or the achieving of the objectives of the Agreement is being impeded" (emphasis added by the United States). In the United States' view, an "indication" is distinct from a detailed discussion and suggests that examination of the entire request is important, not simply determining whether certain magic words have been used. The phrase "indicating how", the United States asserts, requires a description of "how" benefits have been nullified or impaired. The United States asserts that its request contains the required description "indicating how" benefits accruing to the United States under the AD Agreement have been nullified or impaired, in the fourth paragraph of the request, and in particular in the detailed information and summary arguments found in indents (a)-(k).

7.22 In considering this issue, we note Article 17.5(i) of the AD Agreement, which provides:

"The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

- (i) A written statement of the Member making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement, has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded;"

7.23 The United States' request for establishment does not use the words "nullified or impaired", nor the words "the achieving of the objectives of the Agreement is being impeded". However, it does allege specific violations of its rights and Mexico's obligations under the AD Agreement, which is a "covered agreement" under the DSU.

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<sup>533</sup> The fact that the third parties presented arguments largely directed at issues other than the specific claims in dispute is, in our view, not a function of any confusion on their part, but rather relates to the nature of their interest in the dispute, as expressed in their joint oral statement.

7.24 The Appellate Body has ruled that the provisions of the DSU must be read together with the provisions of special or additional rules for dispute settlement in covered agreements, such as those set forth in Article 17.5 of the AD Agreement, unless there is a difference between them. The Appellate Body has further ruled, in *Guatemala-Cement*, that:

"there is no *inconsistency* between Article 17.5 of the *Anti-Dumping Agreement* and the provisions of Article 6.2 of the DSU. On the contrary, they are complementary and should be applied together. A panel request made concerning a dispute brought under the *Anti-Dumping Agreement* must therefore comply with the relevant dispute settlement provisions of both that Agreement and the DSU".<sup>534</sup>

We have already concluded that the United States' request for establishment satisfies the requirements of Article 6.2 of the DSU. The questions we must now resolve are, first, what (if anything) is required by Article 17.5(i) of the AD Agreement in addition to what is required under Article 6.2 of the DSU, and second, assuming there are additional requirements under Article 17.5(i), whether the United States' request for establishment satisfies those further requirements.

7.25 With respect to the first question, Mexico argues that Article 17.5(i) requires an explicit statement indicating how benefits accruing to the complaining Member have been nullified or impaired or the achieving of the objectives of the Agreement has been impeded, in order for a request for establishment of a panel alleging violations of the AD Agreement to be sufficient. Mexico argues that the concepts of nullification or impairment, or impeding the achieving of the objectives of the Agreement, appear nowhere in the United States' request for establishment. Mexico argues that the requirements of Article 17.5(i) cannot be satisfied "implicitly", and maintains that the United States' request for establishment contains no indication of how a benefit was nullified or impaired. We do not agree with Mexico's conclusion.<sup>535</sup>

7.26 In our view, Article 17.5(i) does not require a complaining Member to use the words "nullify" or "impair" in a request for establishment. However, it must be clear from the request that an allegation of nullification or impairment is being made, and the request must explicitly indicate how benefits accruing to the complaining Member are being nullified or impaired.

7.27 In interpreting the requirements of Article 17.5(i), we note Article 3.8 of the DSU, which serves as context for our understanding of Article 17.5(i). Article 3.8 provides:

"In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on the other Members parties to that covered agreement".

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<sup>534</sup> *Guatemala-Cement AB Report*, para. 75 (emphasis in original).

<sup>535</sup> In our examination of the AD Agreement, we act in accordance with the principles of interpretation of public international law (Article 3.2 of the DSU) which include Articles 31 and 32 of the Vienna Convention on the Law of Treaties. As provided in these articles and as applied by panels and the Appellate Body, we shall interpret the provisions of the AD Agreement on the basis of the ordinary meaning of the terms of its provisions in their context, in the light of the object and purpose of the AD Agreement, the GATT 1994 and the WTO Agreement. We note also Article XVI:1 of the WTO Agreement which provides that "... the WTO shall be guided by the decisions, procedures and customary practices followed by CONTRACTING PARTIES to GATT 1947 and the bodies established in the framework of GATT 1947". Finally, we note that Article 17.6 of the AD Agreement establishes the standard of review to be applied by panels in disputes under that Agreement. In this regard, Mexico argued that the United States "invited" us to "infringe" the provisions of Article 17.6 of the AD Agreement, and in its comments on interim review specifically asked the Panel to rule on this question. In our view, there is no basis for such a ruling, as we have scrupulously followed the requirements of Article 17.6 of the AD Agreement in reviewing Mexico's determination and in considering the interpretation of the provisions of the AD Agreement that are before us.

7.28 At least one GATT Panel has described the presumption of nullification or impairment arising from a violation of GATT provisions "in practice as an irrefutable presumption".<sup>536</sup> In our view, a request for establishment that alleges violations of the AD Agreement which, if demonstrated, will constitute a *prima facie* case of nullification or impairment under Article 3.8 of the DSU, contains a sufficient allegation of nullification or impairment for purposes of Article 17.5(i). In addition, as noted above, the request must indicate how benefits accruing to the complaining Member are being nullified or impaired.

7.29 Turning to the second question, the United States' request does contain allegations of violation of the AD Agreement which, if demonstrated, will constitute a *prima facie* case of nullification or impairment under Article 3.8 of the DSU. In addition, the statements in paragraphs (a) through (k) of the request for establishment describe the factual and legal circumstances alleged to constitute the asserted violations of the cited provisions of the AD Agreement in some detail. These statements, in our view, suffice to "indicate how" benefits accruing to the United States under the AD Agreement have been nullified or impaired, as required by Article 17.5(i).

7.30 Based on our consideration of the entirety of the United States' request for establishment, we conclude that it is consistent with the requirements of Article 17.5(i) of the AD Agreement.<sup>537</sup>

### **3. Allegedly Improper References to SECOFI's Submission in on-going NAFTA Proceedings**

7.31 Mexico asserts that we may not take into account in our examination of this dispute various references by the United States to SECOFI's submission in a proceeding presently being conducted under Chapter XIX of the North American Free Trade Agreement (NAFTA). In Mexico's view, the arguments SECOFI made in a pending case in a different forum subject to different procedural and substantive rules are irrelevant to this dispute. Mexico also argues that the standard of review in NAFTA proceedings is different from that in this dispute, and that while the AD Agreement is controlling law in Mexico, there are additional elements of Mexican law that are relevant in NAFTA proceedings that are not relevant here. Moreover, Mexico argues that the arguments put forth by SECOFI against the positions of private parties (importers and exporters) in the NAFTA proceeding, under Mexican law, are not intended to demonstrate that its final measure is consistent with the AD Agreement. Mexico points out that the NAFTA panel is an on-going procedure, with no decision as yet. Finally, Mexico notes that our terms of reference are confined to the AD Agreement and GATT 1994, and argues that we should adhere to the GATT/WTO practice of not examining other agreements except in cases where they are *per se* violations of the WTO Agreements.<sup>538</sup>

7.32 The United States argues that the Panel should accept and give significant weight to this evidence. In the United States' view, consideration of this evidence is appropriate because the measure at issue in the two proceedings is the same, many of the issues are the same, and the same determination, based on the same record, is before us and the NAFTA panel. The United States

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<sup>536</sup> *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, adopted 17 June 1987, paragraph 5.1.3.

<sup>537</sup> The two elements of Article 17.5(i), nullification or impairment of benefits, and impeding the achieving of the objectives of the Agreement, are expressed in the disjunctive in Article 17.5(i), meaning that only one of these elements must be satisfied. In view of our conclusion with respect to the consistency of the United States' request with the first element of Article 17.5(i), we do not address the question of its consistency with the second element.

<sup>538</sup> In this regard, Mexico cites the Guide to GATT Law and Practice (Volume 2, page 720), which refers to an arbitration award between Canada and the European Communities in which the arbitrator found that "In principle a claim based on a bilateral agreement cannot be brought under the multilateral dispute settlement procedures of the GATT". In our view, this argument is inapposite, as the United States has not presented any claims based on the NAFTA in this dispute, it has merely cited arguments made by SECOFI in a NAFTA proceeding as evidence.

maintains that while the referenced portions of SECOFI's brief to the NAFTA panel do not represent evidence which we can or may consider in evaluating SECOFI's factual determinations, under the applicable standard of review set forth in Article 17.6(i), they are highly relevant, as they reflect legal positions of the Government of Mexico that differ from those taken in this dispute. The United States asserts that there is no WTO rule or jurisprudence in support of the conclusion that all references to the NAFTA submissions should be excluded from WTO dispute settlement proceedings. The United States refers to the Appellate Body's statement regarding the fact-finding role of panels in *United States – Shrimp*, that "[i]t is particularly within the province and the authority of a panel ... to ascertain the **acceptability and relevancy** of information and advice received, and to decide **what weight to ascribe to that information or advice** or to conclude that no weight at all should be given to what has been received".<sup>539</sup> In the United States' view, it is clear that we have the power to consider this evidence pursuant to Article 13 of the DSU, and the only question is the weight to be accorded it.<sup>540</sup> The United States suggests that we may take into account the discrepancies between the positions revealed in the briefs filed with the NAFTA panel, and those submitted to us, according substantial weight to those discrepancies in evaluating Mexico's arguments in this proceeding regarding these issues.

7.33 Article 11 of the DSU provides, in pertinent part, that

"The function of panels is to assist the DSB in discharging its responsibilities under [the DSU] and the covered agreements. Accordingly, a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements ...".

7.34 The Appellate Body has made it clear, in *United States – Shrimp*, that it is for a panel to determine the admissibility and relevance of evidence proffered by the parties to a dispute. In this case, we conclude that there is no basis to **exclude** the references to SECOFI's NAFTA brief. Mexico does not challenge its authenticity, and there is no rule in the WTO that would preclude us from considering it. We therefore decline to exclude references to SECOFI's NAFTA brief from our consideration of this dispute. That said, however, we do not ascribe any significance to possible differences in SECOFI's legal arguments in the NAFTA proceeding and the arguments Mexico has made to the Panel.

#### 4. Allegedly Improper References to Consultations

7.35 Mexico asserts that the descriptions in the United States' first written submission of statements allegedly made by Mexico during the June 1998 consultations in this dispute are untrue, or at best incorrect interpretations of Mexico's statements. It adds that the United States presented no evidence to support its assertions, and invoking the principle that the burden of the proof lies with the party making the assertion, requests that we not take into account any information from the June 1998 consultations cited by the United States.

7.36 Mexico also argues that the inclusion of those references in the United States' first written submission violate the confidentiality of those consultations, since there are third parties to this panel proceeding who did not participate in the June 1998 consultations, but received the submission

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<sup>539</sup> See *United States-Import Prohibition of Certain Shrimp and Shrimp Products (United States-Shrimp)*, WT/DS58/AB/R (*United States- Shrimp AB Report*), adopted 6 November 1998, paras. 104-106, (emphasis added by the United States).

<sup>540</sup> Indeed, the United States argues that, consistent with the Appellate Body's decision in *United States-Shrimp*, it could attach as an Exhibit to its submission the phonebook of Mexico City. The issue would not be its admissibility, but rather what evidentiary weight the Panel should attach to the information in the phone book.

containing the challenged references. Mexico argues that the fact that the requirements for third party participation in consultations are more limiting than for third party participation in panel proceedings, and that parties can veto third party participation in consultations but not in panel proceedings, allows for great flexibility in discussions during consultations. Mexico argues that there are aspects of consultations that only those with the right to participate in those consultations are entitled to know. Mexico recognizes that the United States was obliged to present its first written submission to the third parties, but argues that the references to the consultations violate the requirement of confidentiality. On this basis as well, Mexico requests that we not take into account any information from the June 1998 consultations cited by the United States.

7.37 Mexico also asserts that the United States improperly included information obtained in earlier consultations that are not part of the present dispute. In the questions put to Mexico in the June 1998 consultations in this dispute, the United States incorporated by reference questions put to Mexico on 8 October 1997, in consultations carried out concerning the provisional measure imposed by Mexico on HFCS imported from the United States. Mexico points out that those consultations were carried out pursuant to a different and distinct request (WT/DS101/1) from the consultations underlying this dispute, and therefore any information from those consultations cannot be used in this dispute.

7.38 The United States acknowledges that there may be issues of fact as to what was said at the consultations, but maintains that neither the DSU nor the Working Procedures preclude parties from submitting information to panels regarding what occurred at the consultations. In the United States' view, the Panel should, if necessary, resolve issues of fact regarding what occurred at consultations,<sup>541</sup> and accord to the evidence regarding the consultations the weight it considers appropriate.

7.39 With regard to the issue of confidentiality, the United States argues that the Panel in *Korea-Alcohol*<sup>542</sup> addressed the substantive need for parties to be able to disclose information acquired during the consultations in ensuing dispute settlement proceedings, stating "it would seriously hamper the dispute settlement process if the information acquired during consultations could not subsequently be used by any party in the ensuing proceedings".<sup>543</sup> The United States also points out that the Appellate Body in *India-Patents* emphasized that fact-finding is a major function of the consultation process.<sup>544</sup>

7.40 The United States argues that Mexico's approach, which would preclude references to information obtained in the consultations (even in cases where the information was in written form, and thus there was no question of fact), is inconsistent with past panel and Appellate Body rulings. On the one hand, it is clear that parties are to freely disclose facts in consultations. In the United States' view, they cannot then be prohibited from using the information thus obtained during panel proceedings. Moreover, third parties cannot be excluded from access to facts and information provided during consultations. In this regard, the United States notes that Article 10.1 of the DSU provides that third party interests "be fully taken into account", and the Working Procedures of the Panel facilitate this by instructing parties to serve their submissions on third parties and allow third parties to be present "during the entirety of the session".<sup>545</sup> Finally, third parties, like parties to panel proceedings, are required to maintain the confidentiality of the proceedings. Thus, the United States argues that there is no breach of confidentiality in disclosing facts to third parties to the panel proceeding who were not third parties to the consultations.

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<sup>541</sup> The United States notes that in at least one previous dispute, the Panel asked the parties written questions in order to resolve issues of fact relevant to events that occurred at the consultations. See *United States-Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of one Megabit or Above from Korea*, WT/DS99/R, adopted 19 March 1999, paras. 6.7-6.8.

<sup>542</sup> *Korea-Taxes on Alcoholic Beverages (Korea-Alcohol)*, WT/DS75/R, WT/DS84/R (*Korea-Alcohol Panel Report*), adopted 17 February 1999.

<sup>543</sup> *Korea-Alcohol Panel Report*, para. 10.23.

<sup>544</sup> *India-Protection for Pharmaceutical and Agricultural Chemical Products (India-Patents)*, WT/DS50/ABR (*India-Patents AB Report*), adopted 2 September 1998, para. 94.

<sup>545</sup> See DSU, Appendix 3, para. 6.

7.41 In our view, it would seriously hamper the dispute settlement process if a party could not use information obtained in the consultations in subsequent panel proceedings merely because a third party which did not participate in the consultations chooses to participate in the panel proceedings.<sup>546</sup> As Mexico points out, third party participation in the panel proceedings cannot be vetoed by the parties to the proceeding. In our view, it would be anomalous if the decision of a Member to participate in a panel proceeding as a third party when it did not, or could not, participate as a third party in the underlying consultations had the effect of limiting the evidence that could be relied upon in the panel proceeding by precluding the introduction of information obtained during the consultations. Third parties are subject to the same requirement to maintain the confidentiality of panel proceedings as are parties. We therefore conclude that the requirement to maintain the confidentiality of consultations is not violated by the inclusion of information obtained during consultations in the written submission of a party provided to a third party in the subsequent panel proceeding even if that third party did not participate in the consultations.

7.42 Concerning Mexico's objections to the references to the questions put during the October 1997 consultations in a different dispute, DS101, we note that there are no allegations concerning Mexico's responses or positions taken in those consultations. It appears that the United States asked the same questions again in the June 1998 consultations by incorporating the October 1997 questions, rather than explicitly asking them again. We conclude that there was no violation of the requirement of confidentiality of consultations in these circumstances.

7.43 We note, however, that the "information" obtained during the consultations consists of written questions put to Mexico, and the United States' recollection as to the answers given orally. The United States' view of these answers is that Mexico presented arguments in consultations that are inconsistent with the positions it is taking before us, and that certain facts were disclosed in consultations that have not been addressed before us. It is unclear what, if any, information from the consultations is relevant to the issues before the Panel. Regarding facts allegedly disclosed in consultations, we are required to consider this dispute on the basis of the facts before the investigating authority, pursuant to Article 17.5(ii) of the AD Agreement. The relevant facts have been brought before us directly by the parties in their submissions and oral statements. With respect to legal arguments which are asserted to be inconsistent with arguments put forward by Mexico before us, we will base our decision on the arguments made before us. We do not consider it significant to our evaluation of those arguments that Mexico may have made different arguments during the consultations. Consequently, a finding regarding the accuracy of the United States' descriptions of Mexico's statements during the consultations is not necessary to our decision in this dispute, since we did not rely on those assertions in our analysis and conclusions.

## **5. Claims Addressing the Provisional Measure**

7.44 Mexico argues that the United States did not identify the provisional measure imposed by Mexico as a "specific measure at issue" in its request for establishment, as required by Article 17.4 of the AD Agreement and the Appellate Body's decision in *Guatemala–Cement*, and hence any claims or

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<sup>546</sup> See *Korea–Alcohol Panel Report*, para. 10.23 (issue not raised on appeal). In *Korea–Alcohol*, the Panel faced the question that is raised by Mexico in this dispute – whether a party in a panel proceeding may refer to or rely on information it obtained during the consultations preceding the request for establishment of a panel. That Panel concluded that "[i]t would seriously hamper the dispute settlement process if the information acquired during consultations could not subsequently be used by any party in the ensuing proceedings". *Id.* We note the Panel's statement that the confidentiality requirement of Article 12.7 extends only so far as to require "parties to the consultations not to disclose any information obtained in the consultations to any parties that were not involved in those consultations". *Id.* However, *Korea–Alcohol* involved the same factual circumstances as this dispute with respect to the involvement of a third party to the Panel proceeding which had not participated in the consultations. The same "due process" considerations that underlie the Panel's decision in *Korea–Alcohol* are, in our view, relevant here.

references to the provisional measure lie outside our terms of reference. Mexico argues that the provisional measure is a "measure" in itself, and must be dealt with on the basis of a separate challenge, if at all. Mexico points out that the Panel's terms of reference are limited by the United States' request for establishment. Because that request does not challenge the provisional measure, any claims or arguments referring to that measure lie outside our terms of reference.

7.45 In Mexico's view, the reference to "actions by SECOFI preceding [the final measure]" in the United States' request for establishment does not suffice to identify the provisional measure for purposes of Article 17.4. Mexico argues that actions are not measures, and that the measure challenged must be specifically identified in a request for establishment. Mexico points out that the United States had requested consultations with Mexico concerning the provisional anti-dumping measure (WT/DS101/1) but decided not to pursue that dispute, as it did not request establishment of a panel pursuant to those consultations.

7.46 The United States asserts that Mexico appears to misunderstand the nature of the United States' case. The United States maintains that it is asserting a violation of Article 7 not with reference to the provisional measure as a "measure" in dispute, but rather as one of its "legal claims" related to the measure at issue in this dispute – the final anti-dumping measure. The United States' claim does not concern the decision to apply the provisional measure, or the determination on which it is based. The United States' claim is that Mexico applied the provisional measure for a period longer than six months, and thereby violated Article 7.4 of the AD Agreement.

7.47 The United States argues that Mexico's reading of Article 17.4 of the AD Agreement, on which its argument is based, is incorrect. In the United States' view, Article 17.4 allows for specific challenges to provisional measures only where the complaining party alleges that a provisional measure was taken in violation of Article 7.1 of the AD Agreement, and the provisional measure has a significant impact. Therefore, when a complaining Member considers that another Member has violated Article 7.4 by applying a provisional measure beyond the time limits allowed by the AD Agreement, the complaining Member can only refer a matter concerning this claim to the DSB under Article 17.4 in the context of a challenge to the final measure or a price undertaking. The United States argues that this structure is clear from the text of Article 17.4, and that it is also logical. Violations of Article 7.4 do not occur at but rather after the imposition of provisional measures. Thus, a Member would not know that there is a claim under Article 7.4 of the AD Agreement at the time the provisional measure is imposed, but only much later, around the time that the final measure is imposed.

7.48 As a threshold matter, we note that the only claim now being pursued by the United States that relates to the provisional measure is the United States' claim that the provisional measure remained in effect for longer than six months, in violation of Article 7.4 of the AD Agreement.<sup>547</sup> Accordingly, our examination of Mexico's preliminary objection will focus on the admissibility of that claim.<sup>548</sup>

7.49 In considering Mexico's preliminary objection, we note that the situation under consideration by the Appellate Body in *Guatemala-Cement* was different from that in this dispute. In *Guatemala-Cement*, the complainant had not specifically identified any measure among the three types of

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<sup>547</sup> The United States originally raised another claim concerning imposition of the provisional measure for a period of six months instead of four months. However, the United States explicitly withdrew this claim at our first meeting with the parties.

<sup>548</sup> Mexico further contends that any *arguments* relating to the provisional measure are outside our terms of reference. While our terms of reference define the scope of the matter before us, they do not limit the scope of *arguments* that may be made with respect to that matter. See *European Communities-Bananas AB Report*, para. 141. Accordingly, we cannot rule that any arguments referring to the provisional measure are outside our terms of reference.

measures set forth in Article 17.4 of the AD Agreement in its request for establishment. The Panel nonetheless concluded that it could consider the "matter" in dispute. The Appellate Body reversed, finding that the Panel had erred in concluding that the complaining Member did not need to identify the specific measure at issue.<sup>549</sup> It noted that the "matter referred to the DSB" under Article 6.2 of the DSU and Article 17.4 of the AD Agreement "consists of two elements: the specific measure at issue and the legal basis of the complaint (or claims)".<sup>550</sup> It further stated that:

"We find that in disputes under the *Anti-Dumping Agreement* relating to the initiation and conduct of anti-dumping investigations, **a definitive anti-dumping duty, the acceptance of a price undertaking or a provisional measure must be identified** as part of the matter referred to the DSB pursuant to the provisions of Article 17.4 of the AD Agreement and Article 6.2 of the DSU".<sup>551</sup>

7.50 The United States' request for establishment of a panel in this dispute specifically identifies "SECOFI's final anti-dumping measure".<sup>552</sup> Thus, the United States has properly identified a definitive anti-dumping duty as the specific measure challenged in this dispute. However, the United States did not in its request for establishment identify Mexico's provisional measure as a specific measure challenged in this dispute, although it did note the imposition of a provisional measure and referred to "actions by SECOFI preceding" the imposition of the final measure. Consequently, we must consider whether, in a dispute where the specific measure challenged is a definitive anti-dumping duty, the United States may assert a claim of violation of Article 7.4 of the AD Agreement, which establishes maximum time periods for which provisional measures may be imposed, or whether, as Mexico contends, the United States' claim under Article 7.4 relates to the provisional measure and can only be addressed in the context of a dispute where that measure has been identified in the request for establishment as a specific measure being challenged.

7.51 In *Guatemala – Cement*, the Appellate Body, after finding that, in the case of a dispute under the AD Agreement, the request for establishment must identify a definitive anti-dumping duty, the acceptance of a price undertaking or a provisional measure as a specific measure at issue, went on to address the question of the claims that might be included in a dispute under the AD Agreement.

"This requirement to identify a specific anti-dumping measure at issue in a panel request in no way limits the nature of the **claims** that may be brought concerning alleged nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the *AD Agreement*. As we have observed earlier, there is a difference between the specific measures at issue -- in the case of the *Anti-Dumping Agreement*, one of the three types of anti-dumping measure described in Article 17.4 -- and the claims or the legal basis of the complaint referred to the DSB **relating to those specific measures**".<sup>553</sup>

7.52 The Appellate Body Report in *Guatemala-Cement* indicates that a complainant may, having identified a specific anti-dumping duty in its request for establishment, bring any claims under the AD Agreement **relating to** that specific measure. That there should be a relationship between the measure challenged in a dispute and the claims asserted in that dispute would appear necessary, given that Article 19.1 of the DSU requires that, "where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned

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<sup>549</sup> *Guatemala-Cement AB Report*, para. 79.

<sup>550</sup> *Id.*, para. 72.

<sup>551</sup> *Id.*, para. 80 (emphasis added).

<sup>552</sup> WT/DS132/2 ("[t]he United States considers that SECOFI's final anti-dumping measure, including actions by SECOFI preceding this measure, is inconsistent with the obligations of Mexico under Articles 1, 2, 3, 4, 5, 6, 7, 10 and 12 of the Antidumping Agreement and Article VI of GATT 1994").

<sup>553</sup> *Guatemala-Cement AB Report*, para. 79 (emphasis added).



bring the measure into conformity with the agreement" (footnotes omitted). Accordingly, we must consider whether the United States' claim under Article 7.4 of the AD Agreement relates to Mexico's definitive anti-dumping duty or whether the United States, having failed to identify the provisional measure as a specific measure being challenged in its request for the establishment of a panel, is now precluded from pursuing this claim.

7.53 A claim regarding the period for which a provisional measure was applied does not, at first glance, constitute a challenge to the definitive anti-dumping duty in this dispute. However, we consider that the United States' claim under Article 7.4 of the AD Agreement is nevertheless **related to** Mexico's definitive anti-dumping duty. In this regard, we recall that, under Article 10 of the AD Agreement, a provisional measure represents a basis under which a Member may, if the requisite conditions are met, levy anti-dumping duties retroactively. At the same time, a Member may not, except in the circumstances provided for in Article 10.6 of the AD Agreement, retroactively levy a definitive anti-dumping duty for a period during which provisional measures were not applied. Consequently, because the period of time for which a provisional measure is applied is generally determinative of the period for which a definitive anti-dumping duty may be levied retroactively, we consider that a claim regarding the duration of a provisional measure relates to the definitive anti-dumping duty.

7.54 In arriving at this conclusion, we are cognisant that, under Article 17.4 of the AD Agreement, in light of the Appellate Body's decision in *Guatemala–Cement*, any other conclusion could leave Members without the possibility of bringing a claim under Article 7.4 of the AD Agreement. In this respect, we note that Article 17.4 provides that a provisional measure may be the subject of a panel proceeding

"[w]hen a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of **paragraph 1** of Article 7" (emphasis added).

Read literally, this provision could be taken to mean that in a dispute where the specific measure being challenged is a provisional measure, the **only** claim that a Member may pursue is a claim under Article 7.1 of the AD Agreement (and not a claim under Article 7.4 of the AD Agreement). If this conclusion is correct, a ruling that a claim under Article 7.4 could not be pursued in a dispute where the specific measure challenged is a definitive anti-dumping duty would mean that a Member would never be able to pursue an Article 7.4 claim. In our view, it would be incorrect to interpret Article 17.4 of the AD Agreement in a manner which would leave Members without any possibility to pursue dispute settlement in respect of a claim alleging a violation of a requirement of the AD Agreement.

7.55 For the foregoing reasons, we deny Mexico's request for a ruling that any claims or arguments relating to the provisional measure are outside our terms of reference.

## C. ALLEGED VIOLATIONS REGARDING THE INITIATION OF THE INVESTIGATION

### 1. Overview

7.56 The United States raises a series of related claims regarding the initiation of the investigation. Our consideration of these issues requires us to address various provisions of the AD Agreement which establish requirements for the initiation of anti-dumping investigations. Specifically, we must address the requirements established for the contents of applications in Article 5.2. We must also address the nature of the obligation imposed on the investigating authority under Article 5.3, and in particular whether Article 5.3 requires the investigating authority to make specific determinations in initiating an investigation. Finally, we must consider what, if anything, the investigating authority must make known regarding the substance of the decision to initiate, and what, if anything, it must

include in the public notice of initiation concerning the substance of the decision to initiate. In order to address these questions, we must interpret the relevant provisions of the AD Agreement, and their relationship to one another, in order to arrive at a coherent understanding of the obligations pertaining to the initiation of an anti-dumping investigation.

7.57 The investigation underlying the definitive anti-dumping measure at issue in this dispute was initiated by SECOFI based on an application filed by the Sugar Chamber, representing Mexican sugar producers, alleging that dumped imports of HFCS from the United States threatened material injury to the domestic industry producing sugar. SECOFI found that the Sugar Chamber had "standing" to file the application – that is, that it represented the relevant domestic industry, sugar producers, and that the application had the support of those producers.<sup>554</sup> The AD Agreement defines the term "domestic industry" for purposes of an anti-dumping investigation in Article 4. In general, the term "domestic industry" refers to the domestic producers of the "like product". However, Article 4.1 provides that the domestic industry may be interpreted as not including certain domestic producers of the like product, and specifically includes in the category of producers which may thus be "excluded" from the domestic industry those domestic producers who are themselves importers of the allegedly dumped product. A central question underlying the United States' claims concerning the initiation is SECOFI's exclusion of two Mexican companies from consideration as the domestic industry.

7.58 The United States argues that the application contained contradictory information concerning whether there was production of HFCS in Mexico by two importers of HFCS from the United States. The United States maintains that, in examining the accuracy and adequacy of the information in the application as required by Article 5.3, and in determining that the Sugar Chamber had standing as required by Article 5.4, SECOFI failed to resolve the question of whether there was such production. Without deciding whether there was, in fact, production of HFCS in Mexico by the two companies in question, the United States argues, SECOFI could not properly have made a decision to exclude them from the domestic industry. The United States asserts that the record available to the parties in the proceeding does not contain evidence establishing that SECOFI made a proper determination as to the domestic industry, and thus SECOFI initiated the investigation in violation of Articles 5.3 and 5.8 of the AD Agreement. Moreover, the United States alleges, the notice of initiation does not state that SECOFI determined to exclude these two companies from the domestic industry, in violation of Article 12.1 of the AD Agreement.

7.59 Mexico, on the other hand, argues that SECOFI considered the question whether there was production of HFCS in Mexico, and found that there was, but also found that the two companies in question accounted for the vast majority of the allegedly dumped imports. Therefore, SECOFI concluded that these producers could not be considered as the relevant domestic industry, and further found that the Sugar Chamber, representing Mexican producers of sugar, a "like product" to HFCS,<sup>555</sup> had standing to file an application for anti-dumping relief on behalf of the domestic sugar industry. Thus, Mexico argues, SECOFI carefully carried out its obligation to examine the accuracy and adequacy of the information in the application, properly defined the relevant domestic industry, and concluded that there was sufficient evidence to justify initiation of the investigation.

7.60 Mexico argues that SECOFI considered the definition of the relevant domestic industry and reached its conclusions **prior** to initiation, and that Article 12.1 of the AD Agreement does not require

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<sup>554</sup> See Article 5.4 of the AD Agreement.

<sup>555</sup> We note that the United States does not challenge SECOFI's conclusion that sugar was the "like product" at issue in this case under Article 2.6 of the AD Agreement, which sets forth the definition of "like product" in anti-dumping investigations. The United States does argue that given that the like product, sugar, and the imported product, HFCS, are not identical, the question of production of HFCS in Mexico was a critical one which SECOFI was required to resolve and address in defining the relevant domestic industry, and that its decision in this regard was required to be reflected in the notice of initiation.

an investigating authority to include information or explanations concerning such prior determinations in the notice of initiation.

7.61 The United States also alleges that the application filed by the Sugar Chamber did not contain information concerning the consequent impact of allegedly dumped imports on the domestic industry, which it argues is required to be included in applications under Article 5.2 of the AD Agreement. In particular, the United States asserts that the application did not contain information relating to the factors set forth in Article 3.4 concerning the impact of imports on the domestic industry. The United States further asserts that SECOFI did not carry out its obligation under Article 5.3 to examine the accuracy and adequacy of the information in the application with respect to both the question of the domestic industry, and the question of the impact of imports on the domestic industry. Therefore, the United States alleges that SECOFI's conclusion that there was sufficient evidence to justify initiation is inconsistent with Article 5.3.

7.62 Mexico disputes the United States' assertions regarding the contents of the application, maintaining that the Sugar Chamber's application contained the information reasonably available to it concerning dumping, injury, and causal link, including information relating to relevant factors having a bearing on the state of the domestic industry such as those set forth in Articles 3.2 and 3.4. Mexico argues that SECOFI carefully examined the accuracy and adequacy of the information in the application, and obtained additional information, such that in total, the conclusion that there was sufficient evidence to justify initiation was justified under Article 5.3.

## **2. Alleged insufficiency of the information in the application**

7.63 The United States notes that Article 5.2 of the AD Agreement provides that an application requesting the initiation of an investigation "shall include evidence of ... injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and ... a causal link between the dumped imports and the alleged injury". Relying on the Panel's decision in *Guatemala-Cement*<sup>556</sup>, the United States argues that because the AD Agreement defines the term "injury" to include threat of material injury,<sup>557</sup> evidence both of threat of material injury and of a causal link between the allegedly dumped imports and the alleged threat of material injury is required where, as here, an application alleges threat of material injury.

7.64 The United States asserts that, contrary to the requirements of Article 5.2 of the AD Agreement, the application filed by the Sugar Chamber requesting the initiation of an anti-dumping investigation did not contain sufficient evidence of threat of material injury, because it lacked sufficient information regarding the likely impact of allegedly dumped imports of HFCS on the domestic industry, and the attendant relevant economic factors and indices bearing on the likely state of the domestic industry. In addition, the United States argues that, because the application did not

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<sup>556</sup> *Guatemala-Cement*, WT/DS60/R (*Guatemala-Cement Panel Report*), para. 7.76. The United States recognizes that the Panel's decision on the merits in *Guatemala-Cement* has no legal status and thus does not create "legitimate expectations" within the meaning of *Japan-Alcohol*. See *Japan-Taxes on Alcoholic Beverages (Japan-Alcohol)*, WTDS8/AB/R (*Japan-Alcohol AB Report*), adopted 1 November 1996, pages 14-15. However, the United States argues that we may take it into account if we consider its reasoning persuasive on any point. See *id.* The Appellate Body reversed the *Guatemala-Cement* Panel's ruling on its authority to consider the dispute in that case, finding that no "matter" had been presented to the Panel. Consequently, the Appellate Body found that the Panel should never have considered the substance of the dispute, and further stated that it could not, itself, rule on the substantive issues raised on appeal. It is this decision that was adopted by the Dispute Settlement Body, together with the Panel's report "as reversed by the Appellate Body report". WT/DS60/12. Thus, we are of the view that the Panel's ruling on the substance of the dispute in *Guatemala-Cement* has no legal status, but that we may take the reasoning of the Panel in that case into account in our decision, to the extent we consider it persuasive.

<sup>557</sup> See AD Agreement, footnote 9.

contain sufficient evidence regarding the alleged threat of injury, it did not contain sufficient evidence of the causal link between the allegedly dumped imports and the alleged threat of injury.

7.65 The United States notes that the Sugar Chamber alleged in the application that it represented all but two domestic sugar mills, and, as stated in the initiation notice, its membership collectively accounted for 98 per cent of domestic sugar production. Accordingly, the United States maintains that information regarding the likely impact on the domestic industry and relevant economic factors was clearly and uniquely within the applicant's control. Nonetheless, the United States asserts, the Sugar Chamber did not even respond to the pertinent questions in SECOFI's application form requesting such information, responding "N/A" (not applicable) to the relevant portions of the application form. The United States contends that, by answering "N/A", the Sugar Chamber was stating to SECOFI its belief that the likely impact on the industry and the factors set forth in Article 3.4 were not relevant to the initiation of an investigation on the basis of allegations of threat of material injury. Similarly, the United States maintains that the Sugar Chamber did not respond to the specific questions in the application form regarding causal link, but again responded "N/A", effectively stating to SECOFI its belief that information regarding causal link was not relevant to the initiation of an investigation on the basis of allegations of threat of material injury. Accordingly, the United States maintains that the application contains no explanation or discussion of causal link.

7.66 Mexico considers that the application submitted by the Sugar Chamber contained the information that was reasonably available to it and that it included sufficient information concerning dumping, threat of injury and a causal relationship between the two as well as evidence concerning the factors and indices mentioned in Article 5.2(i) to (iv) of the AD Agreement. Mexico points out that Article 5.2(iv) of the AD Agreement expressly stipulates that the application must contain information on "the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, **such as** those listed in paragraphs 2 and 4 of Article 3" (emphasis added by Mexico). In Mexico's view, the ordinary meaning of the terms "relevant" and "such as" in Article 5.2(iv) makes it clear that the requirement is not a strict one as regards the factors and indices. The reference to Articles 3.2 and 3.4 of the AD Agreement is simply illustrative.

7.67 Furthermore, Mexico stresses that Article 3.7 is a specific provision which sets forth the factors which an investigating authority must take into account in determining whether there is a threat of injury. In the case of an application for initiation of an investigation specifically relating to threat of injury, the investigating authority must consider, in particular, the factors in Article 3.7 of the AD Agreement. Thus, in Mexico's view, the presence of information in the application concerning the Article 3.7 factors is extremely important, and the Sugar Chamber's application contained such information.<sup>558</sup>

7.68 Mexico sets forth the asserted correlation between the information in the application and the requirements of Article 5.2(i) - (iv) of the AD Agreement in its submissions as follows:

(a) Article 5.2(i) of the AD Agreement:

- Identity of the applicant: paragraphs 2.1, 2.2 and 2.3 of the application;<sup>559</sup>

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<sup>558</sup> The United States does not dispute that the application contained information concerning the Article 3.7 factors.

<sup>559</sup> See the Application for initiation of the investigation submitted by the Sugar Chamber (Application), MEXICO-16.

- description of the volume and value of the domestic production of the like product: paragraphs 4.15 and 4.16 of the application and Annex 6A thereto;<sup>560</sup>
- list of domestic producers of the like product: paragraph 2.4 of the application and Annex 2.4.<sup>561</sup>

(b) Article 5.2(ii) of the AD Agreement:

- complete description of the dumped product: Section B3 of the application and Annexes 2.10, 2.15 and 4.3(iii) thereto. See also a comparative study conducted by an academic institution of the characteristics and composition of HFCS and sugar, and various specialized publications in the field of sweeteners which reveal a diversity of uses and applications among the product investigated as well as their commercial substitutability;<sup>562</sup>
- the names of the country or countries of origin or export in question: Section B3, paragraph 2.13 of the application and Annexes 3.4 and 3.6;<sup>563</sup>
- identity of each known exporter or foreign producer and list of importers of the investigated product: Section B2, paragraphs 2.7, 2.8 and 2.9 of the application and Annexes 2.15, 3.15, 3.16 and 4.3(i) as well as Table 2.9.<sup>564</sup>

(c) Article 5.2(iii) of the AD Agreement:

- data concerning the normal value and the export price of the like product: paragraph 2.6 and Section C of the application, Annexes 3.1, 3.4 and 3.6, 3.12, 3.15 and 3.16;<sup>565</sup>
- information on prices at which the investigated product is sold when destined for consumption in the domestic markets of the country of origin or export and information on export prices: paragraph 2.6 and Section C of the application, and Annexes 3.4 and 3.6, 3.12, 3.15 and 3.16 thereto.<sup>566</sup>

(d) Article 5.2(iv) of the AD Agreement:

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<sup>560</sup> Application, MEXICO-16. See Annex 6A and the monthly national balance, MEXICO-17.

<sup>561</sup> See Application, MEXICO-16. See Annex 2.4 to Application, MEXICO-18.

<sup>562</sup> See Application, MEXICO-16, Annex 2.10 to Application, MEXICO-19, Annex 2.15 to Application, MEXICO-20 and Annex 4.3 (iii) to Application, MEXICO-21.

<sup>563</sup> See Application, MEXICO-16 and Annexes 3.4 and 3.6 to Application, MEXICO-10.

<sup>564</sup> See Application, MEXICO-16, Annex 2.15 to Application, MEXICO-20, Annexes 3.15 and 3.16 to Application, MEXICO-22, Annex 4.3(i) to Application, MEXICO-23 and Table 2.9 to Application, MEXICO-24.

<sup>565</sup> See Application for the initiation of the investigation submitted by the Sugar Chamber, MEXICO-16, Annex 3.1(i) to Application, MEXICO-25, Annexes 3.4 and 3.6 to Application, MEXICO-10, Annex 3.12 to Application, MEXICO-26 and Annexes 3.15 and 3.16 to Application, MEXICO-22.

<sup>566</sup> See Application, MEXICO-16, Annexes 3.4 and 3.6 to Application, MEXICO-10, Annex 3.2 to Application, MEXICO-26 and Annexes 3.15 and 3.16 to Application, MEXICO-22.

- information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry: Section D of the application, and Annexes 3.4 and 3.6, 4.3(i), 4.3(ii), 4.3(iii), 4.3(v), 4.9, 4.12 and 4.14, 4.22, 4.23, 4.24 and 6-A to the same document;<sup>567</sup>
- in addition to the above, Mexico points out that the application by the Sugar Chamber contained such information as was reasonably available to it concerning the relevant factors and indices having a bearing on the domestic sugar industry some of which are among those listed in Articles 3.2 and 3.4 of the AD Agreement: (i) domestic sugar market indicators, in thousands of tonnes, for production, sales, exports, imports, consumption, inventories and employment<sup>568</sup>; (ii) financial indicators (cash flow statement, financial statement, income statement, statement of production costs and financial ratios)<sup>569</sup>; (iii) installed capacity of each mill and the methodology used to determine the installed capacity<sup>570</sup>; (iv) investment projects in the sugar industry<sup>571</sup>; (v) HFCS import statistics and annual statement of imports drawn up by the applicant with information from the SHCP<sup>572</sup>; (vi) list of average weighted market prices according to the category of sugar and the supply centre.<sup>573</sup>

7.69 In Mexico's view, Article 5.2(iv) leaves the investigating authority with the authority to determine the relevant indices and factors by which the consequent impact of the dumped imports can be evaluated.<sup>574</sup> Thus, it is up to the investigating authority to decide whether the information submitted with the application for the investigation deals with relevant factors and indices. Mexico asserts that SECOFI carried out a comprehensive analysis of the information submitted, as is clear from paragraphs 24 to 99 of the notice of initiation, in order to reach the conclusion that the application submitted by the Sugar Chamber met the requirements of Article 5.2 of the AD Agreement. Mexico acknowledges that in parts of the questionnaire the Sugar Chamber indicated that the question was not applicable ("N/A"). However, Mexico asserts that this was not because the required information was irrelevant in supporting the alleged threat of injury, but because the Sugar Chamber, following the order of the questionnaire, incorporated the information in other sections.

7.70 In addressing this issue we must consider first, what information Article 5.2 requires to be in an application, and second, whether SECOFI's conclusion that the Sugar Chamber's application

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<sup>567</sup> Application, MEXICO-16, Annexes 3.4 and 3.6 to Application, MEXICO-10, Annex 4.3(i) to Application, MEXICO-23, Annex 4.3(ii) to Application, MEXICO-7, Annex 4.3(iii) to Application, MEXICO-21, Annex 4.3(v) to Application, MEXICO-27, Annex 4.9 to Application, MEXICO-28, Annexes 4.12 and 4.14 to Application, MEXICO-29, Annex 4.22 to Application, MEXICO-30, Annex 4.23 to Application, MEXICO-31, Annex 4.24 to Application, MEXICO-32 and Annex 6-A to Application, MEXICO-17.

<sup>568</sup> See Application, MEXICO-16 and Annex 6-A to Application, and the national balance for sugar, MEXICO-17.

<sup>569</sup> See Application, MEXICO-16 and Annexes 4.19, 4.20 and 4.21 to Application, MEXICO-33.

<sup>570</sup> See Application, MEXICO-16 and Annex 4.22 to Application, MEXICO-30.

<sup>571</sup> See Application, MEXICO-16 and Annex 4.24 to Application, MEXICO-32.

<sup>572</sup> Application, MEXICO-16, Annex 4.3(i) to Application, MEXICO-23 and Annex 3.16 to Application, MEXICO-22.

<sup>573</sup> See Application, MEXICO-16, Annex 4.3(iii) to Application, MEXICO-21 and the information collected by SECOFI which appears in the injury investigation file, MEXICO-34.

<sup>574</sup> The United States does not argue that information reasonably available to the applicant on **all** of the Article 3.4 factors must be included in the application, but rather argues that the application did not contain information on **relevant** factors which was reasonably available to the Sugar Chamber.

contained the information reasonably available to the Sugar Chamber on those elements was consistent with the AD Agreement. The main issue in dispute between the parties is, in a case where threat of injury is alleged, what is the information concerning the factors set forth in Article 3.4 of the AD Agreement, and what is the information regarding the existence of a causal link, that must be provided in the application, pursuant to Article 5.2(iv).

7.71 We turn first to the text of Article 5.2, which provides in pertinent part:

"An application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following: ...

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

7.72 It is clear from the text of the provision that an application must contain "information", in the sense of evidence, regarding the consequent impact of the (allegedly dumped) imports on the domestic industry. It is also clear from the text that this "information" must "demonstrate" the consequent impact of the imports on the domestic industry.<sup>575</sup>

7.73 However, the inclusion in Article 5.2(iv) of the word "relevant" and the phrase "such as" in the reference to the factors and indices in Articles 3.2 and 3.4 in our view makes it clear that an application is **not** required to contain information on **all** the factors and indices set forth in Articles 3.2 and 3.4. Rather, Article 5.2(iv) requires that the application contain information on factors and indices relating to the impact of imports on the domestic industry, and refers to Articles 3.2 and 3.4 as illustrative of factors which may be relevant.<sup>576</sup> Which factors and indices are relevant to demonstrate the consequent impact of imports on the domestic industry will vary depending on the nature of the allegations made by the industry, and the nature of the industry itself. If the industry provides information reasonably available to it concerning factors which are relevant to the allegation of injury (or threat of injury) it makes in the application, and the information concerning those factors demonstrates, that is, "shows evidence of", the consequent impact of dumped imports on the domestic industry, we believe that Article 5.2(iv) is satisfied.<sup>577</sup>

7.74 Obviously, the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination of injury. Moreover, the applicant need only provide such information as is "reasonably available" to it with respect to the relevant factors. Since information regarding the factors and indices set out in Article 3.4 concerns the state of the domestic industry and its operations, such information would generally be available to

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<sup>575</sup> We do not understand "demonstrate" in this context to mean "prove", but rather to mean "show evidence of; describe or explain by help of specimens...". *Concise Oxford Dictionary*, 1976.

<sup>576</sup> However, as discussed in section VII.D.1. below, the requirements of Article 3.4 are not merely illustrative in the context of final determinations.

<sup>577</sup> This does not mean that such an application is or would necessarily be sufficient for purposes of initiation. That is a separate issue, which is addressed further below.

applicants. Nevertheless, we note that an application which is consistent with the requirements of Article 5.2 will not necessarily contain sufficient evidence to justify initiation under Article 5.3.<sup>578</sup>

7.75 The application submitted by the Sugar Chamber on its face contains information on relevant Article 3.4 factors, and that information shows evidence of the allegations of threat of injury and causal link in the application. Some of this information is contained in confidential Annexes to the application. Some of this information is requested in sections of the SECOFI application form to which the Sugar Chamber responded "N/A".<sup>579</sup> However, we do not consider that whether the Sugar Chamber filled out the application form provided by SECOFI in the clearest and best manner is in any way dispositive of whether the application satisfied the requirements of Article 5.2. Rather, we look to whether the necessary information was actually provided.

7.76 The Sugar Chamber alleged that dumped imports of HFCS threatened the domestic industry with material injury. The application contained information showing increases in imports, and information showing that market prices for sugar did not reach the maximum price level, while HFCS was priced below sugar, HFCS substitutes for sugar, and producers in the United States could reduce their prices. The application also contained information, *inter alia*, on the Mexican sugar producers' production, sales, exports, imports, consumption, inventories and employment<sup>580</sup>; cash flow, financial situation, income, production costs and financial ratios<sup>581</sup>; installed capacity<sup>582</sup>; and investment projects in the sugar industry<sup>583</sup>. The United States argues that an application alleging only threat of material injury must contain some "meaningful analysis" of the likely impact of allegedly dumped imports on the domestic industry, and that the Sugar Chamber's application in this case did not. However, Article 5.2 does not require an application to contain analysis, but rather to contain information, in the sense of evidence, in support of allegations. While we recognize that some analysis linking the information and the allegations would be helpful in assessing the merits of an application, we cannot read the text of Article 5.2 as requiring such an analysis in the application itself.<sup>584</sup>

7.77 This information, if read in the light of the allegations, provides evidence in support of the allegation that dumped imports of HFCS from the United States threatened material injury to the Mexican sugar industry. The United States has concentrated much of its argument on the proposition that the application should have contained information concerning "potential negative effects" on

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<sup>578</sup> *Guatemala-Cement Panel Report*, para. 7.49–7.51. As the Panel noted in that case, the investigating authority may, but is not required to, obtain additional information which, together with that provided in the application, constitutes sufficient evidence to justify initiation under Article 5.3. *Id.* para. 7.53.

<sup>579</sup> We note in this regard that SECOFI's application form instructs applicants, in para. 4.4 "It is important to mention that an antidumping investigation cannot be initiated for injury and threat of injury simultaneously, given that the two concepts are mutually exclusive". US-5(a) & (b). This instruction may be the reason the Sugar Chamber responded "N/A" to section 4.2 of the application form, which sets out the information SECOFI requires for applications alleging injury, but provided information in response to section 4.3 of the application, which sets out the information SECOFI requires for applications alleging threat of injury. Section 4.3 of the application form requests information on the Article 3.7 factors, and on expected return on investments, but does not specifically mention information concerning consequent impact on the domestic industry, or refer to the Article 3.2 and 3.4 factors. The Sugar Chamber's application includes information on these latter as annexes to its response under section 4.3 of the application.

<sup>580</sup> See Application, MEXICO-16 and Annex 6-A to Application, and the national balance for sugar, MEXICO-17.

<sup>581</sup> See Application, MEXICO-16 and Annexes 4.19, 4.20 and 4.21 to Application, MEXICO-33.

<sup>582</sup> See Application, MEXICO-16 and Annex 4.22 to Application, MEXICO-30.

<sup>583</sup> See Application, MEXICO-16 and Annex 4.24 to Application, MEXICO-32.

<sup>584</sup> Of course, the investigating authority must examine the accuracy and adequacy of the information in the application to determine whether there is sufficient evidence to justify initiation, pursuant to Article 5.3, a question which is addressed further below. However, this obligation falls on the investigating authority, and does not imply a requirement for analysis resting on the applicant.



various of the Article 3.4 factors. In this regard, we note that information, in the sense of evidence, concerning the future is at best a calculated estimate based on past experience. While we agree that specific projections concerning a domestic industry's sales, output, profits, market share, employment, etc., would certainly be relevant in an application alleging threat of material injury, we cannot conclude that the absence of such projections constitutes a fatal flaw which demands rejection of the application.

7.78 We therefore conclude that the Sugar Chamber's application was consistent with the requirements of Article 5.2(iv) of the AD Agreement.

### **3. Alleged Insufficiency of the Notice of Initiation**

7.79 The United States asserts that SECOFI's initiation notice did not meet the requirements of Articles 12.1 and 12.1.1 of the AD Agreement because it failed to set forth the actual basis of the definition of the relevant domestic industry, since it did not state that SECOFI had excluded two companies from consideration as the domestic industry. The United States notes that a notice of initiation must contain "a summary of the factors on which the allegation of injury is based". In the United States' view, the identity of the relevant domestic industry is an essential factor on which any allegation of injury must be based. Therefore, the United States maintains, when an investigating authority excludes companies producing the like product from the domestic industry pursuant to Article 4.1(i) of the AD Agreement, the notice of initiation must include a statement of the investigating authority's conclusions in this regard. This is particularly important in a case such as this one where the applicant industry does not produce a product identical to the allegedly dumped imports, and there is contradictory information in the application as to whether there is domestic production of the identical product. The United States argues that the information in that notice both failed to summarize the factors on which the allegation was based and failed to provide adequate information thereon.

7.80 Moreover, in the United States' view, the failure of the initiation notice to set forth this information meant that it was misleadingly silent on the factors that led SECOFI to conclude that there was sufficient information to initiate an investigation. The notices of the preliminary and final determinations state that SECOFI knew that there was domestic production of HFCS, but excluded the Mexican producers of HFCS from consideration as the relevant domestic industry because they were also the principal importers of the allegedly dumped HFCS from the United States. However, in the United States view, the inclusion of this information in the notices of preliminary and final determinations cannot make up for Mexico's failure to make this information available to the parties at the time of initiation. The United States asserts that, in a case such as this, in which the complaining industry admittedly does not produce a product identical to the imported product under investigation, and there are domestic producers who do, it is imperative that the investigating authority define the domestic industry and make decisions concerning exclusion of producers who are themselves importers of the allegedly dumped products with care, and must provide adequate information about what it did. In the United States' view, the initiation notice provided no information -- let alone adequate information -- summarizing the factors upon which SECOFI excluded the two Mexican HFCS producers.

7.81 Mexico asserts that the United States' argument rests on an excessive interpretation of Article 12.1.1(iv) of the AD Agreement, is based on a misreading of the notice of initiation, and demonstrates a failure to grasp the distinctions between the requirements of Article 12.1, governing notices of initiation, and Article 12.2, governing notices of preliminary and final determinations.

7.82 Mexico argues that Article 12.1.1(iv) of the AD Agreement requires that public notices of initiation contain information summarising the factors on which the allegation of injury or threat of injury are based, but does not require that such notices contain information concerning the factors relevant to the definition of the relevant domestic industry, let alone specific information concerning

the basis on which SECOFI excluded Mexican HFCS producers from consideration as the relevant domestic industry. Although the investigating authority must define the relevant domestic industry in respect of which the allegation of injury must be made, this does not, in Mexico's view, mean that Article 12.1.1 of the AD Agreement can be interpreted as requiring that the notice of initiation must contain information concerning "factors relevant to the allegations concerning the relevant domestic industry". Mexico asserts that the definition of the relevant domestic industry is established prior to the initiation of an investigation, and it is in accordance with this prior determination that it is decided to initiate the investigation and issue the corresponding notice of initiation, which must include the information summarising the grounds for the allegation of injury to the domestic industry previously defined as relevant.

7.83 Mexico asserts that SECOFI had other evidence, in addition to the Sugar Chamber's allegations that there was no Mexican production of HFCS, which led it, prior to deciding to initiate, to conclude that the domestic industry was the sugar producers. Mexico asserts that the United States has misread the notice of initiation, which repeats the Sugar Chamber's allegation that there was no production of HFCS in Mexico, in paragraph 7. However, Mexico maintains that this paragraph does not represent SECOFI's views, but merely restates the applicant's allegation. Mexico also points to paragraphs 89 and 90 of the notice of initiation as showing that SECOFI, prior to the initiation of the investigation, examined the evidence and information establishing the existence of HFCS producers in Mexico. Mexico argued that it was obvious that the two Mexican producers were excluded because they were the principal importers of HFCS from the United States. Mexico observed during the second meeting with the parties that, if one is giving a party, one does not inform those not invited of the fact that they have not been invited.

7.84 Our decision regarding this issue requires us to consider Article 12.1, which governs the contents of public notices of the initiation of anti-dumping investigations. It provides:

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

12.1.1 A public notice of the initiation of an investigation shall contain, or otherwise make available through a separate report<sup>23</sup>, adequate information on the following:

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

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

7.85 In considering this issue, we are faced with the questions whether Article 12.1.1(iv) requires that the notice of initiation contain (1) information concerning the allegations in the application regarding the relevant domestic industry, and/or (2) the factors and analysis underlying, and the investigating authority's conclusion regarding, the definition of the relevant domestic industry.<sup>585</sup>

7.86 In our view, the text of Article 12.1 and 12.1.1 is clear with respect to the first question. Article 12.1 requires that a public notice of initiation shall be given "[w]hen the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5". It then goes on to require, in Article 12.1.1, that the notice (or separate report) contain "adequate information" on specific items, set forth in sub-parts (i)-(vi). Article 12.1.1(iv), which is specifically relied upon by the United States, requires "a summary of the factors on which the allegation of injury is based". We do not consider that the phrase "a summary of the factors on which the allegation of injury is based" can reasonably be read to encompass a requirement that the notice of initiation contain a summary of the allegations pertaining to the specific issue of the definition of the relevant domestic industry.<sup>586</sup> Still less can it reasonably be read to establish a requirement that the notice of initiation contain a summary of the allegations on the even more particular point of exclusion of some producers from consideration as the relevant domestic industry.

7.87 However, the United States' claim under Article 12.1 goes further, as the United States argues that the notice of initiation must set forth the investigating authority's conclusion regarding the relevant domestic industry, and the bases on which that conclusion was reached. We recall, however, that Article 12.1.1(iv) merely requires that the notice of initiation contain "a **summary** of the factors on which the **allegation** of injury is based" (emphasis added). It does not require a summary of the **conclusion** of the investigating authority regarding the definition of the relevant domestic industry. Nor does it require a summary of the factors and analysis on which the investigating authority based that conclusion. Still less does it require a summary of the factors and analysis on which the investigating authority based its conclusion regarding exclusion of some producers from consideration as the relevant domestic industry. In other words, in our view, Article 12.1.1 cannot reasonably be read to require that the notice of initiation contain an explanation of the factors underlying, or the investigating authority's conclusion regarding, the definition of the relevant domestic industry.<sup>587</sup>

7.88 Our interpretation of the plain meaning of the text of Article 12.1 is bolstered by consideration of the remainder of Article 12, which serves as context for Article 12.1. Article 12.2, which governs the contents of public notices of preliminary and final determinations, requires the investigating authority to set forth "in sufficient detail the findings and conclusions on all issues of fact and law considered material by the investigating authorities". Article 12.1, on the other hand,

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<sup>585</sup> There is no dispute that the notice contained the information required under sub-headings (i)-(iii) and (v)-(vi) of Article 12.1.1.

In considering the interpretation of Article 12.1, as well as other provisions of the AD Agreement, we are mindful of the requirements of Article 17.6(ii) of the AD Agreement, which provides in pertinent part:

"Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations".

<sup>586</sup> In any event, we note that, in this case, the notice of initiation could in fact be viewed as containing a summary of the factors on which the allegation of injury is based. It reflects the Sugar Chamber's position that the Mexican sugar producers constitute the relevant domestic industry, as that is the industry on behalf of which the application was submitted, and it reflects the allegations that there is no production of HFCS in Mexico, and that sugar is a product with characteristics closely resembling those of HFCS.

<sup>587</sup> Of course, an investigating authority is free to include in a notice of initiation information and explanations that are not specifically required to be included under Article 12.1. Such practice, in our view, adds to the transparency of the proceeding, and the ability of parties and the public to understand, and in the case of parties, participate effectively in the proceeding.

requires "adequate information" on a defined set of factors, listed in the sub-parts of Article 12.1.1. In addition, Article 12.2.1 requires that a public notice of a preliminary determination provide "sufficiently detailed explanations for the preliminary determinations on dumping and injury and shall refer to the matters of fact and law which have led to arguments being accepted or rejected. ... in particular...(v) the main reasons leading to the determination". Similarly, Article 12.2.2 requires that a public notice of a final determination imposing a definitive duty shall contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures...In particular, [it] shall contain the information described in Article 12.2.1...". By contrast, Article 12.1 does not require that the notice of initiation contain explanation of or reasons for conclusions reached by the investigating authority in the process of satisfying itself that there is sufficient evidence to justify initiation. Thus, while information and explanation concerning all material aspects of an investigating authority's preliminary and final determinations are required to be included in the respective notices, this is not the case with respect to notices of initiation.

7.89 Thus, on the basis of the plain meaning of the text of Article 12.1, and its context, we conclude that the notice of initiation need not contain a summary of the factors or analysis underlying, or a statement of the investigating authority's conclusion regarding, the exclusion of some producers from consideration as the relevant domestic industry by the investigating authority in satisfying itself that there is sufficient evidence of injury to justify initiation.

7.90 The notice of initiation issued by SECOFI in this case contained adequate information concerning a summary of the factors on which the allegation of threat of injury was based. The allegations concerning threat of injury in the Sugar Chamber's application, and the supporting evidence for those allegations, are summarized in the notice. While we believe that the interests of the parties and the public in transparency of anti-dumping proceedings would be better served by a notice of initiation which included information concerning such aspects of a decision to initiate as the investigating authority's conclusion concerning the relevant domestic industry, we can find no requirement to do so in the Agreement. We therefore conclude that the notice of initiation was consistent with the requirements of Articles 12.1 and 12.1.1 of the AD Agreement.

#### **4. Alleged Insufficiency of the Examination of the Accuracy and Adequacy of the Evidence and Alleged Insufficiency of the Evidence to Justify Initiation**

7.91 The United States argues that the application did not contain sufficient evidence regarding the impact on the domestic industry of allegedly dumped HFCS imports and the causal link between the allegedly dumped imports and the alleged threat of injury, and SECOFI did not independently gather sufficient evidence to justify initiation of the investigation or request that the Sugar Chamber submit additional information. Consequently, the United States asserts that SECOFI did not have sufficient evidence of threat of material injury to the Mexican sugar industry or of a causal link between the allegedly dumped imports of HFCS from the United States and the alleged threat of injury to justify initiation of the investigation. Therefore, the United States argues that the initiation was inconsistent with Article 5.3 and that the application should have been rejected under Article 5.8.

7.92 Mexico maintains that the application did contain relevant information which, together with information obtained by SECOFI itself, was considered sufficient to justify initiation of the investigation. Mexico asserts that SECOFI conducted an extensive analysis of the information in accordance with Article 5.3 of the AD Agreement, which is set forth in paragraphs 61 to 98 of the notice of initiation. Moreover, Mexico argues that the information concerning causal link is discussed throughout the notice of initiation, and specifically and extensively in paragraphs 61 to 98 of that notice.

7.93 As discussed above, we have concluded that the application filed by the Sugar Chamber was consistent with the requirements of Article 5.2. However, this does not dispose of the question whether the initiation was consistent with the requirements of Article 5.3 of the AD Agreement, to

which we now turn. We begin our consideration of this issue by noting the text of Article 5.3 of the AD Agreement, which provides:

"The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation".

7.94 With respect to the question of whether the evidence may be deemed sufficient under the AD Agreement for purposes of initiation, we note the findings of the Panel in *Guatemala-Cement*, which took into account the reasoning of the Panel in *United States-Softwood Lumber*.<sup>588</sup> We recognize that, because the Appellate Body reversed the *Guatemala-Cement* Panel's conclusion on the issue of whether the dispute was properly before it, that Panel's conclusions in this regard have no legal status.<sup>589</sup> However, the Panel's report sets out a standard that we consider instructive in this case:

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

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

7.55 The Panel in United States - Measures Affecting Imports of Softwood Lumber From Canada considered much the same question as faces us here in a dispute challenging the self-initiation of a countervailing duty investigation, on the basis, *inter alia*, of allegedly insufficient evidence to warrant initiation.<sup>235</sup> The Panel observed:

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

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<sup>588</sup> *Guatemala-Cement Panel Report, United States-Measures affecting Import of Softwood Lumber from Canada*, SCM/162, BISD40S/358, adopted 27-28 October 1993.

<sup>589</sup> *See Japan-Alcohol AB Report*, pages 14-15.

initiation nonetheless had to be relevant to establishing these same Agreement elements".<sup>236</sup>

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

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

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

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

<sup>236</sup> *Id.*, para. 332.

<sup>237</sup> *Id.*, para. 335.

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

<sup>239</sup> *Softwood Lumber* at para. 332".<sup>590</sup>

7.95 Our approach in this dispute will similarly be to examine whether the evidence before SECOFI at the time it initiated the investigation was such that an unbiased and objective investigating authority evaluating that evidence, could properly have determined that sufficient evidence of dumping, injury, and causal link existed to justify initiation. We base our analysis principally on the notice of initiation, but also take into account information that was before SECOFI at the time of its determination, to the extent that consideration of it can be discerned from the notice.

7.96 SECOFI had before it information provided by the applicant, as well as information it obtained itself, concerning increases in imports, price effects of imports, and the condition of the domestic sugar industry. SECOFI, in the notice of initiation, observed that HFCS was used as a sweetener, substituting for sugar, had almost entirely replaced sugar as a sweetener in soft-drinks in the United States over a ten year period, was priced significantly below sugar, and that imports from the United States had increased significantly since 1994, and accounted for an increasing share of consumption in the industrial sector of the sugar market in Mexico. SECOFI also noted that US producers had significant available capacity, and that Mexico was an attractive market for US producers of HFCS. SECOFI observed that there was information concerning the adverse effects the industry could suffer should the growing trend of low-priced HFCS imports continue. The notice of initiation does not proceed to analyze or discuss the information concerning factors relevant to assessing the consequent impact of imports on the domestic industry under Article 3.4. However, this information is contained in the application, and is explicitly referred to in the notice at paragraph 23. We see no basis to conclude that SECOFI ignored this information.

7.97 As the Panel in *Guatemala-Cement* stated, "There is clearly a different standard applicable to making a preliminary or final **determination** of material injury, including threat of material injury, than to determining whether there is sufficient evidence of material injury, including threat of material injury to justify initiation of an investigation,...the subject-matter, or **type** of evidence needed to justify initiation is the same as that needed to make a preliminary or final determination of threat of injury, although the quality and quantity is less".<sup>591</sup> Moreover, as we concluded regarding the need to provide information on the Article 3.4 factors in the application, in our view, the AD Agreement does not require the investigating authority to have or consider information on all the Article 3.4 factors in order to determine that there is sufficient evidence to justify initiation. While we would certainly have found it preferable had SECOFI proceeded further to analyse the likely future impact of imports on the condition of the domestic sugar industry, we cannot conclude that it failed to comply with the obligation to examine the evidence in this regard to determine that there was sufficient evidence to justify initiation.

7.98 Nor can we conclude that an unbiased and objective investigating authority, considering the information that was before SECOFI, could not properly have determined that there was sufficient evidence that dumped imports of HFCS threatened injury to the Mexican sugar industry to justify the initiation of the investigation. We therefore conclude that the initiation of the investigation was consistent with the requirements of Article 5.3 of the AD Agreement.

7.99 Regarding the United States' claim of a violation of Article 5.8 of the AD Agreement, we note that Article 5.8 provides that:

"[a]n application ... shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case".

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<sup>590</sup> *Guatemala-Cement Panel Report*, paras. 7.54–7.57 (footnotes in original).

<sup>591</sup> *Id.* para. 7.77 (emphasis in original).

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

7.100 The United States has raised an additional issue concerning the initiation in this dispute. The United States argues that SECOFI failed to resolve a conflict in the evidence concerning whether there was domestic production of HFCS, which was an essential element of the conclusion that the relevant domestic industry for purposes of considering injury was the Mexican sugar industry, and consequently an essential element underpinning the initiation. In the United States' view, SECOFI failed to examine, as required by Article 5.3, the accuracy and adequacy of the evidence provided in the application concerning the domestic industry because it failed to resolve this conflict, and thus did not make a proper decision concerning the relevant domestic industry. Mexico points to a privileged staff working paper, made available in this panel proceeding as Exhibit MEXICO-13, as demonstrating the information relied on by SECOFI in resolving this issue and the exclusion of Mexican producers of HFCS from consideration as the relevant domestic industry.

7.101 It is true, as the United States asserts, that this question of fact is not specifically resolved in the notice of initiation. We have interpreted Article 12.1, which sets out the requirements for public notices of initiation, as **not** requiring the notice of initiation to contain information concerning the factors on the basis of which the domestic industry is defined, or the investigating authority's conclusion in that regard. The question facing us under Article 5.3, however, goes further than this. It requires us to consider whether the investigating authority is required to resolve **all** questions of fact regarding issues inherent to initiation, such as the relevant domestic industry, in particular those relating to the exclusion of certain domestic producers from consideration as the relevant domestic industry, in the context of carrying out its obligation to determine whether there is sufficient evidence of injury under Article 5.3. We must also consider whether, and if so how, the investigating authority is required to make the resolution of **all** such questions of fact, and the consequent disposition of the issue, in this case the exclusion of producers from consideration as the relevant domestic industry, known to the parties. Finally, we must consider on what basis it may be demonstrated that the investigating authority complied with the obligations of Article 5.3 in the event its actions are challenged before a WTO dispute settlement panel.

7.102 Article 5.3 requires investigating authorities to "examine the accuracy and adequacy of the evidence provided in the application". This examination of the evidence has a purpose – "to determine whether there is sufficient evidence to justify the initiation of an investigation". However, in our view, Article 5.3 only requires the investigating authority to determine whether there is sufficient evidence to justify initiation. As discussed above, we have concluded that SECOFI made such a determination consistently with the requirements of Article 5.3. In our view, Article 5.3 does not impose an obligation on the investigating authority to set out its resolution of **all** underlying issues considered in making that determination.

7.103 Our conclusion in this regard is bolstered by consideration of the differences between the public notices required at the initiation of an investigation, and following a preliminary or final determination. As noted above, in notices of preliminary and final determinations, pursuant to Articles 12.2 and 12.2.2, the investigating authority is required to set forth findings and conclusions reached on all issues of fact and law considered material, as well as respond to the arguments of parties. That is, a notice of preliminary or final determination must set forth explanations for **all** material elements of the determination. A notice of initiation, on the other hand, pursuant to Article 12.1, must set forth specific information regarding certain factors, but need not contain



explanations of or reasons for the resolution of **all** questions of fact underlying the determination that there is sufficient evidence to justify initiation.

7.104 This distinction, in our view follows from the fact that the notice of initiation merely begins the process of investigation, putting the public on notice of the fact of initiation, and the product, countries, parties, and allegations involved. The interested parties, in addition to the notice of initiation, are provided a non-confidential version of the application pursuant to Article 6.1.3, which provides more detailed information relevant to their participation in the investigation. During the investigation, parties are entitled to participate in the proceeding, make their arguments to the investigating authority, and have access to certain information developed in the investigation. However, at the point of preliminary or final determination, when a stage of the process of investigation is completed, the investigating authority reaches its conclusions based on the information and arguments developed to that point in the investigation, and preliminary or definitive anti-dumping measures are either imposed or not. The parties', and the public's, interest in a full understanding of the reasons for the imposition of measures, or of a negative determination, is much greater, and the requirement in Article 12.2 that the investigating authority set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material" is directed at that interest.<sup>592</sup>

7.105 Thus we conclude that Article 5.3 does not establish a requirement for the investigating authority to state specifically the resolution of questions concerning the exclusion of certain producers involved in defining the relevant domestic industry in the course of examining the accuracy and adequacy of the evidence to determine whether there was sufficient evidence to justify initiation. Of course, when SECOFI's actions in this regard were challenged in this dispute settlement proceeding, it became incumbent upon Mexico to show that it had exercised its rights consistently with its obligations under the AD Agreement.<sup>593</sup> In addition to relying on the notice of initiation, Mexico has produced a document, Exhibit MEXICO-13, which it proffers as demonstrating SECOFI's analysis and conclusion regarding the definition of the relevant domestic industry. Mindful of the standard of review and Article 17.5(ii), we note that we may consider in our examination of this issue only what was actually available to the investigating authority at the time of the initiation in evaluating the consistency of the initiation with Article 5.3, and must consider whether SECOFI's establishment of the facts was proper and its evaluation of those facts was unbiased and objective.

7.106 The United States objects to our consideration of MEXICO-13, arguing that it is not part of the record before SECOFI, and may therefore not be taken into account, that it is a privileged document<sup>594</sup> that was not, and could not have been, available to the parties to the investigation, and that in any event, its substance fails to demonstrate that SECOFI resolved the question of the existence of Mexican production of HFCS. The United States argues that, in the absence of a clear resolution of this issue, made available to the parties to the investigation at the time of initiation, either in the public notice thereof or some other form, the parties are deprived of their right to see, in a timely fashion, information relevant to the presentation of their case, in violation of Article 6.4 of the AD Agreement.

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<sup>592</sup> See *Korea-Anti-Dumping Duties on imports of Polyacetal Resins from the United States* (Korea-Resins), ADP/92, adopted 27 April 1993, BISD 40S (Korea-Resins Panel Report), paras. 209-210, where the Panel noted that the purpose of the requirement for explanations of final determinations in public notices under Article 8:5 of the Tokyo Round Anti-Dumping Code was transparency, that this purpose would be frustrated if, in dispute settlement, the country imposing the measure could rely on reasons not set forth in the public notice, which latter would be inconsistent with orderly dispute settlement, because a full statement of reasons "enabled Parties to the Agreement to assess whether recourse to the dispute settlement mechanism...was appropriate...".

<sup>593</sup> See *Swedish Anti-Dumping Duties*, BISD 3S/81, adopted 26 February 1955, paras. 15 & 23.

<sup>594</sup> Mexico does not claim that MEXICO-13 contains confidential information in the sense of Article 6.5 of the AD Agreement.

7.107 Article 6.4 provides:

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

7.108 We note the United States' contention that MEXICO-13 was never disclosed to the parties to the investigation, does not appear on the index of the administrative record of the on-going NAFTA proceeding, is therefore not part of SECOFI's record, and thus not within the scope of the "facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member", which constitute the basis for our examination of this matter under Article 17.5(ii). During the course of this proceeding, Mexico explained that MEXICO-13 was a privileged working paper prepared by SECOFI staff, to which the parties to the investigation could not have had access<sup>595</sup>, but asserted that it was included in the administrative record in the NAFTA proceeding. Mexico contended that the document demonstrated SECOFI's consideration of the evidence on the question of the existence of domestic production of HFCS, and the decision to exclude related Mexican HFCS producers from consideration as the relevant domestic industry. We are satisfied, based on Mexico's arguments and submissions in this proceeding, that MEXICO-13 is genuine, and may be considered in this dispute under Article 17.5(ii). We draw no conclusions as to whether MEXICO-13 was or was not omitted, properly or improperly, from the record submitted in the NAFTA proceeding – that question arises under the NAFTA rules, and is not within the scope of our terms of reference.

7.109 Concerning the question whether SECOFI should have made the substance of MEXICO-13 known to the parties at initiation, pursuant to Article 6.4, in our view, the obligation imposed on the investigating authority under that provision must take into account the stage of the proceeding, and the substantive obligations of the investigating authority at that point. As we have concluded above, at initiation the investigating authority is not required to set out its resolution of questions of fact relating to the exclusion of some producers from consideration as the domestic industry the investigating authority deems relevant in determining whether there is sufficient evidence of injury to justify initiation. Pursuant to Article 6.1.3, the investigating authority is required to provide the parties with a copy of the application, due regard being paid to the requirement to protect confidential information as provided for in Article 6.5. The parties in this case were provided with a non-confidential version of the application, which, it has not been contested, included information relied upon in MEXICO-13.<sup>596</sup> Moreover, while not addressed in any detail, the notice of initiation does refer, in paragraphs 89 and 90, to the information on HFCS production capacity, which is referred to in MEXICO-13. It is clear from the fact that SECOFI found that the Sugar Chamber had standing, and initiated the investigation, that SECOFI was satisfied that the sugar producers comprised the relevant domestic industry. We agree that the information concerning the domestic industry is relevant to the presentation of the parties' cases. We also consider that, in this case, the parties had sufficiently timely opportunities to see the information.<sup>597</sup> This is particularly true since SECOFI's preliminary determination sets out in more detail the underlying information, and explains SECOFI's

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<sup>595</sup> Answer of Mexico to Question No. 5 by the Panel, 22 June 1999.

<sup>596</sup> We have no reason to believe that the relevant information was not provided to the parties with it. The United States has not disputed this point. The United States has acknowledged that the parties received a non-confidential version of the application, including the non-confidential annexes, and Mexico does not claim that the document contains confidential information in the sense of Article 6.5.

<sup>597</sup> We note that Article 6.4 states a requirement to allow parties to see "information" that is relevant to the parties' presentation of their cases, that is not confidential, and that is used by the authorities. It is thus not clear whether Article 6.4 necessarily applies to conclusions drawn by the authority on the basis of information, or only applies to the information itself. However, we need not resolve this question, as in this case we find that the Article 6.4 obligation was not violated by Mexico.

actions regarding the exclusion of Mexican HFCS producers in a sufficiently timely manner to allow the parties to present their cases regarding this issue. Moreover, we do not believe that Article 6.4 can be interpreted to impose an independent obligation on the investigating authority to issue explanations or conclusions that are not required to be issued under Article 5.3.

7.110 Turning to the substance of MEXICO-13, we note that it reflects the information on domestic production capacity of Mexican producers of HFCS provided in the annexes to the Sugar Chamber's application, contains information on these producers' imports of HFCS, and states that pursuant to the relevant legislation, it could be considered that the two companies in question were not domestic producers of the identical product. Thus, MEXICO-13 is relevant to a particular question of fact at issue – the existence of domestic production of HFCS – the resolution of which permitted the exclusion of two HFCS producers from consideration as the relevant domestic industry. MEXICO-13 pertains only to this question, which is a subsidiary underlying issue that is not, in our view, dispositive of the determination whether there was sufficient evidence to justify initiation required by Article 5.3. That determination is reflected in the notice of initiation, as we have noted above.<sup>598</sup> We conclude that MEXICO-13, together with the notice of initiation, does demonstrate that SECOFI examined the evidence concerning this underlying question of fact, and resolved the issue of whether there was domestic production of HFCS, and concluded that the two Mexican producers of HFCS should not be considered the relevant domestic industry based on their status as importers of HFCS. The United States' arguments relating to SECOFI's consideration of the exclusion of the two producers do not persuade us that SECOFI's determination of the sufficiency of the evidence to justify initiation fails to meet the requirements of Article 5.3. In our view, Article 5.3 cannot be interpreted to require the investigating authority to issue an explanation of how it has resolved **all** underlying questions of fact at initiation. That is a requirement that arises at later stages of the proceeding, and is explicitly set forth in Article 12.2. Although we consider it would be beneficial for investigating authorities to consider and decide such questions explicitly, and make their reasons known at initiation, at least to the parties to the investigation, we can find no requirement to do so in the text of the AD Agreement.

#### D. ALLEGED VIOLATIONS REGARDING THE FINAL DETERMINATION

##### 1. Consideration of Impact of Dumped Imports in a Threat of Injury Determination

7.111 The United States contends that SECOFI's final determination of threat of material injury is insufficient to satisfy the requirements of Article 3 of the AD Agreement. In the United States' view, a determination of threat of injury cannot be based only on an examination of the factors set forth in Article 3.7 of the AD Agreement, which is what the United States contends SECOFI did in this case. Rather, the United States argues, a determination of threat of injury also requires an assessment of the impact of imports on the domestic industry through an examination of the relevant economic factors set forth in Article 3.4.

7.112 The United States draws attention to the fact that footnote 9 to the AD Agreement defines the term "injury" to include threat of material injury. In the United States' view, Article 3.4, which sets forth the factors to be considered in examining the impact of imports on the domestic industry applies on its face to a determination of threat of injury. The United States also argues that, even if Article 3.4 addressed only "material injury", rather than "injury" defined to include threat, and even if Article 3.4 did not on its face address "potential" impact with respect to certain factors, Article 3.7 itself would still require an examination of the likelihood of future "material injury" and the imminent prospects for the kinds of effects that would give rise to a current material injury determination. The United States points out that Article 3.7 provides that: (1) "[t]he change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and

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<sup>598</sup> We note, moreover, that the resolution of this question of fact would not have been determinative of the sufficiency of the evidence of threat of injury to the domestic industry to justify initiation.

imminent", and (2) the investigating authorities must conclude that "further dumped exports are imminent and that, unless protective action is taken, material injury would occur".<sup>599</sup> In the view of the United States, SECOFI could not properly reach either of these conclusions without considering the economic factors set forth in Article 3.4.

7.113 In addition, the United States argues that limiting threat of injury analysis to an examination of Article 3.7 factors ignores the nonexclusive terms of Article 3.7 itself. Article 3.7 only states that in making a threat determination the investigating authority "should consider, inter alia, such factors as" the enumerated factors set forth in Article 3.7(i)-(iv). The use of permissive, rather than mandatory, language (i.e., "should consider"), and of the term "inter alia" (i.e., "among other things"), clearly implies that a number of factors other than those specifically enumerated may also be relevant to a threat determination.

7.114 The United States concludes that the AD Agreement clearly intended an assessment of the likely impact of imports and the relevant economic factors set forth in Article 3.4. Otherwise, an investigating authority could merely evaluate the likely trends in, and projections of, volume increases, capacity increases, prices, and increases in inventories with respect to the dumped imports (i.e., the four specific threat factors set forth in Article 3.7(i)-(iv)), without ever considering whether those imports would have any impact whatsoever on the pertinent domestic industry. Such a result is contrary to the plain language of both Articles 3.4 and 3.7.

7.115 The United States also argues that a failure to consider the likely effect of dumped imports on the pertinent domestic industry in determining threat of material injury violates Article VI:6(a) of GATT 1994.

7.116 Mexico maintains that SECOFI's final determination of threat of injury was based on an assessment of the impact of dumped HCFS imports on the domestic sugar industry, including an assessment of the relevant factors set forth in Articles 3.2, 3.4 and 3.7. In particular, Mexico asserts that the final determination addressed the following:

- (a) The rate of increase of dumped imports, their effect on the domestic market, and the likelihood of an increase in such imports in the future;
- (b) the exporter's freely disposable capacity and the likelihood and imminence of further exports to Mexico, considering the availability of other markets to absorb such exports;
- (c) the prices of the imports, their likely effect on domestic prices and the likelihood that in the future the dumped prices would increase the demand for future imports;
- (d) HFCS inventories;
- (e) domestic sales;
- (f) increasing market share of the imports under investigation;
- (g) factors affecting domestic prices;

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<sup>599</sup> The United States cites in this connection *Korea-Resins Panel Report*, para. 271 ("a proper examination of whether threat of material injury was caused by dumped imports necessitated a **prospective analysis of a present situation** with a view to determining whether a 'change in circumstances' was 'clearly foreseen and imminent'") (emphasis added by the United States); *id.* para. 273 (noting that "the Panel... examined whether the [investigating authority's] determination [of threat of material injury] included an analysis of **relevant future developments regarding the condition of the domestic industry** and the volume and price effects of the imports under investigation") (emphasis added by the United States).

- (h) magnitude of the margin of dumping;
- (i) return on investments; and
- (j) cash flow.

7.117 Mexico asserts that SECOFI properly established the factors to be considered in examining the impact of the dumped imports. In doing so, SECOFI gave greater weight to the Article 3.7 factors, because they were fundamental in concluding that imports of HFCS at dumped prices would substantially increase in the immediate future, thus creating a situation in which such imports would cause injury. Mexico argues that SECOFI's comprehensive examination of all the factors deemed relevant demonstrated that there was a threat of injury to the domestic industry and that, unless anti-dumping measures were imposed, imports at dumped prices would continue and cause material injury to such industry.

7.118 Consideration of this issue requires us to interpret the provisions of Article 3 of the AD Agreement, and establish what, if any, are the interrelationships between them.<sup>600</sup> Article 3 is entitled "Determination of Injury". Footnote 9 is appended to the title of Article 3, and provides "Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article". Article 3.1 is a general provision, and establishes that a determination of "injury"

"shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products".

7.119 The succeeding sections of Article 3 provide more specific guidance on the determination of injury. Article 3.2 sets forth factors to be considered with regard to the volume and price effects of imports which Article 3.1 requires be examined ("With regard to the volume of the dumped imports, the investigating authorities shall consider... With regard to the effect of the dumped imports on prices, the investigating authorities shall consider ..."). Article 3.3 establishes the requirements for cumulative analysis. Article 3.4 sets forth factors to be considered in examining the impact of dumped imports on the domestic industry, as required by Article 3.1 ("The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of..."). Article 3.5 establishes requirements for the analysis of the causal link, and Article 3.6 allows for the possibility of analysing a "product line" broader than the like product if information specific to the domestic production of the like product is not obtainable. Article 3.7 establishes specific factors to be considered in determining threat of injury ("In making a determination regarding the existence of a threat of material injury, the authorities should consider, inter alia, such factors as..."). Article 3.8 specifies that special care must be used in deciding cases of threat of material injury.

7.120 It is undisputed in this case that Mexico considered the factors set out in Article 3.7 in making its final determination of threat of injury.<sup>601</sup> The parties are also in general agreement that some consideration of the impact of the dumped imports on the domestic industry is required in making a final determination of threat of material injury. The difference between the parties centers on how this consideration is to be conducted, and whether in fact SECOFI undertook such consideration.

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<sup>600</sup> We keep in mind, of course, the applicable standard of review, set forth in Article 17.6(ii) of the AD Agreement.

<sup>601</sup> As discussed further below in section VII.D.3, the United States claims that Mexico's consideration under Article 3.7(i) was inconsistent with the requirements of that provision.

7.121 The United States argues that SECOFI was required to examine Article 3.4 factors in assessing the likely impact of dumped imports on the domestic industry. Although the United States does not argue that consideration of all the Article 3.4 factors is required, it does argue that SECOFI could not consider only those Article 3.4 factors that supported an affirmative finding of threat of material injury, but was required to consider such factors as profits, sales, output or capacity utilization, which the United States asserts are essential to any understanding of the condition of the Mexican industry. In the absence of such an understanding, the United States asserts that SECOFI's determination failed to articulate how future HFCS imports would affect the condition of the domestic industry so as to cause material injury.

7.122 Mexico argues that the AD Agreement does not require, in a threat of injury analysis, consideration of all the factors set forth in Article 3.4, or of any of them in particular. In Mexico's view, the investigating authority has the discretion to examine the impact of the dumped imports on the condition of the domestic industry by considering those of the factors enumerated in Article 3.2, Article 3.4 and Article 3.7 it deems relevant based on the circumstances of the case, without explaining why some factors are not addressed, or the basis on which some factors are deemed relevant and others not. In this case, Mexico asserts that SECOFI examined domestic sales, the market share of imports, factors affecting domestic prices, return on investments, and cash flow, as relevant factors, but that SECOFI gave greater weight to the Article 3.7 factors, as fundamental to the finding that dumped HFCS imports would increase in the immediate future, creating a situation in which material injury would occur.

7.123 Thus, the dispute before us requires us to determine whether a specific analysis of the impact of the dumped imports on the domestic industry is required in a threat of injury determination, and if so, what is the nature of the analysis required.

7.124 In our view, the text of the AD Agreement is clear on the first point. Article 3.7 sets forth several factors which must be considered, **among others**, in making a determination regarding the existence of threat of injury. Article 3.7 then concludes: "No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur". This language, in our view, recognizes that factors other than those set out in Article 3.7 itself will necessarily be relevant to the determination.

7.125 Moreover, it is clear that in making a determination regarding the threat of material injury, the investigating authority must conclude that "**material injury would occur**" (emphasis added) in the absence of an anti-dumping duty or price undertaking. A determination that material injury would occur cannot, in our view, be made solely on the basis of consideration of the Article 3.7 factors. Rather, it must include consideration of the likely impact of further dumped imports on the domestic industry.

7.126 While an examination of the Article 3.7 factors is required in a threat of injury case, that analysis alone is not a sufficient basis for a determination of threat of injury, because the Article 3.7 factors do not relate to the consideration of the impact of the dumped imports on the domestic industry. The Article 3.7 factors relate specifically to the questions of the likelihood of increased imports (based on the rate of increase of imports, the capacity of exporters to increase exports, and the availability of other export markets), the effects of imports on future prices and likely future demand for imports, and inventories. They are not, in themselves, relevant to a decision concerning what the "consequent impact" of continued dumped imports on the domestic industry is likely to be. However, it is precisely this latter question – whether the "consequent impact" of continued dumped imports is likely to be material injury to the domestic industry - which must be answered in a threat of material injury analysis. Thus, we conclude that an analysis of the consequent impact of imports is required in a threat of material injury determination.

7.127 Turning to the question of the nature of the analysis required, we note that Article 3.4 of the AD Agreement sets forth factors to be evaluated in the examination of the impact of dumped imports on the domestic industry. Nothing in the text or context of Article 3.4 limits consideration of the Article 3.4 factors to cases involving material injury. To the contrary, as noted above, Article 3.1 requires that a determination of "injury", which includes threat of material injury, involve an examination of the impact of imports, while Article 3.4 sets forth factors relevant to that examination. Article 3.7 requires that the investigating authorities determine whether, in the absence of protective action, material injury would occur. In our view, consideration of the Article 3.4 factors in examining the consequent impact of imports is required in a case involving threat of injury in order to make a determination consistent with the requirements of Articles 3.1 and 3.7.

7.128 The question which next must be answered is what is the nature of the consideration of the Article 3.4 factors required in a threat of injury determination. The text of Article 3.4 is mandatory:

"The examination of the impact of the dumped imports on the domestic industry concerned **shall include** an evaluation of **all relevant economic factors** and indices having a bearing on the state of the industry, **including...**" (emphasis added).

In our view, this language makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. In a threat of injury case, for instance, the AD Agreement itself establishes that consideration of the Article 3.7 factors is also required. But consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority.<sup>602</sup>

7.129 A decision in the area of special safeguard measures for textiles under the Agreement on Textiles and Clothing (ATC), as well as two recently circulated panel reports addressing Article XIX safeguard measures imposed under the Safeguards Agreement, have reached the same conclusion in analogous contexts. These Panels held that in addressing the question of injury in the respective safeguards contexts, the responsible authorities are required to consider, and their determination must reflect the consideration of, all the factors concerning injury set out in the relevant provisions of the relevant WTO Agreements.<sup>603</sup> Moreover, the Panels concluded that, while the authorities may determine that some factors are not relevant to or do not weigh significantly in the decision, the authorities may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors. Thus, for example, the Panel in *United States–Shirts and Blouses*<sup>604</sup>, observed that the wording of Articles 6.2 and 6.3 of the ATC makes it clear that all

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<sup>602</sup> In this regard, we note the text of Article 12.2.2, which provides:

"A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures..."

<sup>603</sup> We are aware that the standard for injury determinations in safeguards cases (serious injury or serious damage) is different from that applied to injury determinations in the anti-dumping context (material injury). However, the same type of analysis is provided for in the respective agreements – evaluation, or examination, of a listed series of factors to be considered in determining whether the necessary injury exists.

<sup>604</sup> *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India* (*United States – Shirts and Blouses*), WT/DS33/R (*United States – Shirts and Blouses Panel Report*), WT/DS33/ABR (*United States – Shirts and Blouses AB Report*), adopted 23 May 1997, para. 7.25.

relevant economic factors, namely all those factors listed in Article 6.3 of the ATC, had to be addressed by the authority, whether subsequently discarded or not, with an appropriate explanation. The relevant language of the ATC is quite similar to that of Article 3.4, providing in pertinent part:

"the Member **shall examine** the effect of those imports on the state of the particular industry, as reflected in changes in such relevant economic variables as output, productivity, utilization of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment".<sup>605</sup>

The Panel concluded that the use of the phrase "shall examine" "makes clear that each of the listed factors is not only relevant but must be examined".<sup>606</sup>

7.130 In *Korea-Dairy Safeguard*, the Panel was considering Article 4.2 of the Agreement on Safeguards, which provides, in language much like that of Article 3.4 of the AD Agreement, that the competent authority, in making a determination of serious injury or threat thereof:

"**shall evaluate** all relevant factors of an objective and quantifiable nature having a bearing on the situation of that industry, **in particular**, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment" (emphasis added).

The Panel concluded that the text of this provision made it clear that:

"among "all relevant factors" that the investigating authorities "shall evaluate", the consideration of the factors listed is always relevant and therefore required, even though the authority may later dismiss some of them as not having a bearing on the situation of that industry".<sup>607</sup>

The Panel continued to note that in reviewing the Korean authorities' determination, it would examine

"whether at the time of the determination all factors listed in Article 4.2 were appropriately considered; whether the Korean authorities explained how each factor considered supports (or detracts from) a finding of serious injury; and whether valid reasons have been put forward for dismissing a considered factor as not being relevant to the serious injury determination in this case".<sup>608</sup>

7.131 In sum, we consider that Article 3.7 requires a determination whether material injury would occur, Article 3.1 requires that a determination of injury, including threat of injury, involve an examination of the impact of imports, and Article 3.4 sets out the factors that must be considered, among other relevant factors, in the examination of the impact of imports on the domestic industry. Thus, in our view, the text of the AD Agreement requires consideration of the Article 3.4 factors in a threat determination. Article 3.7 sets out additional factors that must be considered in a threat case, but does not eliminate the obligation to consider the impact of dumped imports on the domestic industry in accordance with the requirements of Article 3.4.

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<sup>605</sup> Article 6.3 of the Agreement on Textiles and Clothing (emphasis added).

<sup>606</sup> *United States-Shirts and Blouses Panel Report*, para. 7.25.

<sup>607</sup> *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products (Korea-Dairy Safeguard)*, WT/DS98/R (*Korea-Dairy Safeguard Panel Report*), circulated 21 June 1999, para. 7.55. See also *Argentina-Safeguard Measures on Imports of Footwear (Argentina-Footwear Safeguard)*, WT/DS121/R (*Argentina-Footwear Safeguard Panel Report*), circulated 25 June 1999, para. 8.123.

<sup>608</sup> *Korea-Dairy Safeguard Panel Report*, para. 7.55.



7.132 In our view, this conclusion is mandated by the language of Article 3.7 of the AD Agreement itself. Moreover, the entirety of Article 3, which serves as context for the interpretation of Article 3.7, supports this conclusion. Article 3 as a whole deals with the determination of injury in anti-dumping investigations, which is defined as material injury, threat of material injury, or material retardation of the establishment of a domestic industry. With respect to the question of threat of material injury, we believe an investigating authority cannot come to a reasoned conclusion, based on an unbiased and objective evaluation of the facts, without taking into account the Article 3.4 factors relating to the impact of imports on the domestic industry. These factors all relate to an evaluation of the general condition and operations of the domestic industry – sales, profits, output, market share, productivity, return on investments, utilization of capacity, factors affecting domestic prices, cash flow, inventories, employment, wages, growth, ability to raise capital. Consideration of these factors is, in our view, necessary in order to establish a background against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective action, as required by Article 3.7.

7.133 Moreover, even if a consideration of all the Article 3.4 factors were not required in a threat of injury determination by the text of the AD Agreement, in our view Article 3.7 would nonetheless require that the investigating authorities consider relevant economic factors concerning the impact of imports on the domestic industry, in order to reach a reasoned conclusion regarding threat of material injury. Such an analysis would be necessary in order to explain the present, and anticipated future, condition of the domestic industry sufficiently to support the conclusion that "material injury would occur", as provided in Article 3.7, unless protective action is taken. Moreover, that analysis could not take into account only factors which support an affirmative determination, but would have to account for all relevant factors, including those which detract from an affirmative determination, and explain why the particular factors considered were deemed relevant.

7.134 The question we turn to next is whether SECOFI's conclusion of threat of material injury, specifically with respect to analysis of the impact of dumped imports on the domestic industry, as reflected in its final determination, satisfies the requirements of Articles 3.7 and 3.4.<sup>609</sup>

7.135 SECOFI's analysis of threat of injury is developed in paragraphs 427 through 550 of the final determination. Paragraphs 427 through 447 describe the international and Mexican markets for HFCS. Of particular relevance to our consideration of the issues in this case are the following:

- (a) paragraphs 448 through 470, which address the rate of increase of the dumped imports during the period of investigation (1996) and through September 1997,
- (b) paragraphs 471 through 487, which address freely disposable export capacity by U.S. suppliers,
- (c) paragraphs 488 through 527, which address the price effects of the dumped imports on domestic prices of the like product during the period of investigation,
- (d) paragraph 528, which addresses the inventories of the investigated product,
- (e) paragraphs 529 through 531, which address other indicators of threat of injury,
- (f) paragraphs 532 and 533, which discuss factors other than the dumped imports that might threaten injury, and

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<sup>609</sup> In this regard, we bear in mind the standard of review applicable to the investigating authorities' assessment of the facts, as set forth in Article 17.6(i). We base our analysis of the consistency of SECOFI's determination with Mexico's obligations under the AD Agreement on the Notice of *Final Determination*, US-1, MEXICO-6. See Articles 12.2 and 17.5(ii) of the AD Agreement.

(g) paragraphs 534 through 550, which address other injury issues.

7.136 Paragraphs 529 and 530 concern investment projects by the domestic industry. SECOFI specifically acknowledges that "it did not have sufficient information at its disposal to evaluate the general situation of investment projects in the sugar industry". Paragraph 531 states SECOFI's conclusion that in the event of continuing dumped imports the cash flow and the capacity to pay of the sugar mills would be adversely affected. However, there is no analysis of the state of the domestic industry's finances, or its ability to generate funds in order to pay off debts.

7.137 Paragraph 532 describes arguments made by the exporters attributing the threat of injury to factors other than the dumped imports; in particular, excessive indebtedness, excess inventories, and domestic production surpluses. These arguments are dismissed by SECOFI in paragraph 533, which concludes that such problems do not "eliminate or exclude" threat of injury being caused by the dumped imports. There is no analysis of the actual or projected level of indebtedness of the industry, or its ability to service its debt, either in the past, or projected for the future.

7.138 Paragraphs 534 through 550 address other injury issues, chiefly the impact of eventual anti-dumping measures on imports of HFCS upon the economy as a whole, whether a lesser-duty should be applied (paragraphs 542 through 544) and the effect of an alleged agreement between soft-drink bottlers and sugar producers to limit the former's imports of HFCS (paragraphs 545 through 547).

7.139 Paragraphs 551 through 556 set forth the conclusions of SECOFI, and paragraphs 557 through 566 set forth the decision concerning the amount of anti-dumping duties and instructions for collection.

7.140 The final determination reflects no meaningful analysis of a number of the Article 3.4 factors: the Mexican sugar industry's profits, output, productivity, utilization of capacity, employment, wages, growth, or ability to raise capital.<sup>610</sup> Moreover, there is no analysis of the condition of the Mexican sugar industry during the period of investigation, or projected for the near future. It is therefore not possible, by reading the final determination, to understand the overall condition of the domestic industry with respect to the Article 3.4 factors. Yet without an understanding of the condition of the industry, it is not possible, in our view, for SECOFI to have come to a reasoned conclusion, based on an objective evaluation of the facts, concerning the likely impact of dumped imports. Such a conclusion must, in our view, reflect the projected impact of further imports on the particular domestic industry, in light of its condition. In order to conclude that there is a threat of material injury to a domestic industry that is apparently not currently injured, despite the effects of dumped imports during the period of investigation, it is necessary to have an understanding of the current condition of the industry as a background.

7.141 Merely that dumped imports will increase, and will have adverse price effects, does not, *ipso facto*, lead to the conclusion that the domestic industry will be injured – if the industry is in very good condition, or if there are other factors at play, dumped imports may not threaten injury. Such a conclusion thus requires the investigating authority to analyze, based on the information before it, the likely impact of further dumped imports on the domestic industry. SECOFI concluded that imports were likely to increase, based on the increases during the period of investigation, and the available

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<sup>610</sup> There is some information concerning some of these elements reflected in the determination. However, the mere recitation of data does not constitute explanation, or findings and conclusions, sufficient to satisfy the requirements of Article 12.2 of the AD Agreement. Mexico also pointed to certain working papers in the administrative file which contain information on certain of the Article 3.4 factors. However, unless consideration of a factor is reflected in the final determination, we do not take cognizance of underlying evidence in the record. See *Korea-Resins Panel Report*, paras. 210, 212, *Argentina-Footwear Safeguard Panel Report*, para. 8.126. Moreover, as discussed further below, SECOFI's references to this information are limited to a discussion of that part of domestic production of sugar sold in the industrial market.

capacity of the exporting producers, but there is no meaningful analysis, based on facts, concerning the likely impact of further dumped imports on the domestic industry in the final determination, e.g., whether such increased imports are likely to account for an increased share of the growing Mexican market, have an effect on production or sales of sugar, or affect the profits of the domestic producers, etc, in such a manner as to constitute material injury. SECOFI also concluded that the dumped imports undersold the domestic product during the period of investigation, and that the dumping margins were responsible for the low prices of the dumped imports. SECOFI therefore concluded that a jump in demand for dumped imports could be expected, forcing sugar prices downward. However, there is no discussion of movements in prices of either Mexican sugar or the dumped imports – that is, there is no discussion of whether sugar prices had been "forced downward" during the period of investigation, which in our view leaves the conclusion that dumped imports in the future would force prices down in the realm of speculation. Merely that imports are likely to continue to be priced below the domestic product does not necessarily lead to the conclusion that there is a threat of injury.<sup>611</sup> If the price level of the domestic product generates sufficient revenues and profits, injury may be unlikely.

7.142 In sum, SECOFI's determination of threat of material injury fails to adequately address the factors set forth in Article 3.4 concerning the impact of the dumped imports on the domestic industry. We therefore conclude that SECOFI's determination of threat of material injury is inconsistent with Mexico's obligations under Article 3.1, 3.4 and 3.7 of the AD Agreement.<sup>612</sup>

## **2. Determination of Threat of Injury on the Basis of Consideration of the Industry as a Whole**

7.143 The United States notes that SECOFI concluded in the final determination that the relevant domestic industry for purposes of its threat of injury determination consisted of Mexican sugar producers. The United States argues that SECOFI's analysis of threat of injury was fundamentally flawed, because SECOFI considered only a portion of the industry's production, that serving the industrial market for sugar, and never considered the impact of dumped imports on the domestic industry as a whole. In the United States' view, while the AD Agreement does not preclude an analysis of a particular market served by a domestic industry in the context of an examination of "all relevant economic factors and indices having a bearing on the state of the industry" (Article 3.4), it does not permit a determination of material injury or threat thereof to a part of the domestic industry's production to be equated with injury or threat to the industry as a whole.

7.144 Rather, the United States argues, the AD Agreement requires an assessment of material injury or threat thereof to be based upon the impact of dumped imports on the entire domestic industry (or a substantial portion thereof). The AD Agreement explicitly provides for only two circumstances in which it may be relevant and permissible to examine less than the entire domestic industry: (1) exclusion of related parties and (2) division of the Member's territory into smaller competitive regions.<sup>613</sup> Neither of these circumstances justified SECOFI's decision in this case to focus its threat analysis in the final determination solely on the part of the domestic industry's production serving the industrial sugar market.

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<sup>611</sup> This is particularly true since it appears that there is a "natural" price difference between sugar and HFCS, with HFCS priced below sugar. Notice of Initiation, US-3, MEXICO-1, para. 79. Although this price difference was mentioned in the preliminary determination, US-2, MEXICO-2, para. 277, there is no mention of it in the final determination. Nor is there any analysis as to the extent of any such "natural" price difference as compared with the observed price undercutting.

<sup>612</sup> In light of our conclusion, we consider it unnecessary to address whether Mexico's determination is inconsistent with Article VI:6(a) of GATT 1994 in this respect.

<sup>613</sup> See Article 4.1(i)-(ii) of the AD Agreement.

7.145 The United States also contends that Article 3.6 of the AD Agreement, relied on by Mexico, does not permit an examination of less than the whole domestic industry. Rather, that Article only permits the assessment of a broader base of production that includes the domestic production of the like product, when it is impossible to obtain financial and production information that is specific to production of the like product. The United States maintains that information concerning the entire domestic industry – the domestic industry "as a whole", or information concerning producers accounting for a major proportion of domestic production, must therefore form the foundation of an assessment of material injury or threat thereof under Articles 3.2, 3.4, and 3.7 of the AD Agreement. In the United States' view, by focussing only on domestic producers' production of sugar sold in the industrial market, SECOFI simply failed to address the question of threat of injury to the industry it had defined as the relevant industry.

7.146 Mexico maintains that SECOFI considered in its analysis all sugar producers and thus made a determination of threat of injury to the domestic industry as a whole. Mexico acknowledges that SECOFI separately identified the production consumed by the industrial sector from production consumed by the household sector, in view of the specific competition of the former with HFCS imports, and considered that information particularly relevant. Mexico argues that SECOFI had sufficient information for separate identification of domestic sugar production sold in the industrial sector and production sold in the household sector, which allowed it to consider the threat of injury to production sold in the industrial sector of the market, relying on Article 3.6 of the AD Agreement. Moreover, Mexico asserts that the affirmative threat of injury determination would not have involved a substantial change if household consumption had also been taken into consideration.

7.147 In considering this issue, we note that Article 4.1 defines the term "domestic industry" as "referring to the **domestic producers as a whole** of the like products or to **those of them** whose collective output of the products constitutes a major proportion of those products" (emphasis added).<sup>614</sup> An anti-dumping duty may only be applied if there is an affirmative determination of "injury", which as previously noted is defined in footnote 9 as "material injury to a **domestic industry**, threat of material injury to a **domestic industry**, or material retardation of the establishment of **such an industry**" (emphasis added). In our view, the definition of the domestic industry in an anti-dumping investigation has unavoidable consequences for the conduct of the investigation and the determination that must be made. These two provisions inescapably require the conclusion that the domestic industry with respect to which injury is considered and determined must be the domestic industry defined in accordance with Article 4.1, that is, the domestic producers of the like product as a whole, or those of them whose collective output of the like product constitutes a major proportion of the domestic production of the like product.

7.148 In the case before us, SECOFI defined the domestic industry as "manufacturers of cane sugar".<sup>615</sup> Thus, SECOFI was required, by the explicit terms of the AD Agreement, to consider and determine the question of threat of material injury with respect to that industry.<sup>616</sup> The question before us is whether SECOFI did so.

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<sup>614</sup> There are two situations set out in Article 4.1 in which the definition of domestic industry may be modified: exclusion of related parties (Article 4.1(i)), and a case involving a regional industry (Article 4.1(ii)). It is undisputed that this case does not involve either of these situations.

<sup>615</sup> *Final Determination*, para. 441.

<sup>616</sup> There is no dispute that SECOFI had information enabling it to distinguish sugar sold in the industrial market from that sold in the household market, and thus had information specific to sales in the industrial market. Mexico insists on the reliability of the information concerning the industrial market. Even assuming its reliability, however, merely that the information was reliable does not constitute a legal justification for basing a determination of threat of injury to the sugar industry on information regarding only part of that industry's production of the like product.

7.149 In determining threat of injury, SECOFI concluded that there was a significant rate of increased imports of HFCS from the United States, indicating the likelihood of substantially increased importation, based on a finding that dumped imports had increased substantially both absolutely and in relative terms. SECOFI found that imports of HFCS from the United States had increased from 61,000 tons in 1994, to 91,000 tons in 1995 (49% above the previous year) and 193,000 tons in 1996 (112% above the previous year).<sup>617</sup>

7.150 SECOFI also found that the increased market share of imports supported the conclusion that increased imports were likely. Specifically, SECOFI found that subject imports had increased from 3% of sugar consumption in 1994, to 4% in 1995 and 9% in 1996.<sup>618</sup> However, SECOFI excluded sales to household users from sugar consumption for purposes of calculating market share. This is clearly stated in the final determination:

"[T]he petitioner argued that all imports of HFCS are destined to the industrial sector and not to the household sector, and thus **the Ministry calculated the apparent domestic consumption that corresponds specifically to the former sector**" (emphasis added).<sup>619</sup>

7.151 Likewise, SECOFI concluded that imports were entering at prices that will have a significant depressing effect on domestic prices, likely increasing demand for further imports, on the basis of a finding that the prices of subject imports were significantly below Mexican sugar prices during the period of investigation. In particular, SECOFI found that, during the period of investigation, on average, the price of imported HFCS-42 was 40 per cent below the price of standard sugar, and the price of imported HFCS-55 was 33 per cent below the price of refined sugar.<sup>620</sup>

7.152 However, SECOFI calculated the average domestic prices of standard and refined sugar once again excluding sales to household users:

"For calculating the domestic price of refined and standard sugar ...the Ministry ... considered the information of domestic producers concerning **sales invoices for refined and standard sugar, corresponding to their main clients in the industrial sector**" (emphasis added).<sup>621</sup>

7.153 Sales to the industrial sector of the Mexican sugar market accounted for 53 per cent of total Mexican sugar consumption.<sup>622</sup> Thus, SECOFI's analysis and findings concerning market share and prices<sup>623</sup> are based on information accounting for only 53 per cent of the production of the domestic industry, and not on information regarding the domestic industry as a whole, and thus are not consistent with the requirements of Article 3.1, 3.2 and 3.7 of the AD Agreement.

7.154 It is important to differentiate the consideration of factors relevant to the injury analysis on a sectoral basis, so as to gain a better understanding of the actual functioning of the domestic industry and its specific markets and thus of the impact of imports on the industry, from the **determination** of injury or threat of injury on the basis of information regarding only production sold in one specific market sector, to the exclusion of the remainder of the domestic industry's production. There is certainly nothing in the AD Agreement which precludes a sectoral analysis of the industry and/or market. Indeed, in many cases, such an analysis can yield a better understanding of the effects of

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<sup>617</sup> *Final Determination*, para. 453

<sup>618</sup> *Id.*, para. 469.

<sup>619</sup> *Id.*, para. 461.

<sup>620</sup> *Id.*, para. 499.

<sup>621</sup> *Id.*, para. 496.

<sup>622</sup> *Id.*, para. 465

<sup>623</sup> *See also Id.*, paras. 480 (available capacity of US exporters compared to demand in the industrial sector) and 521 (sales to industrial consumers down in 1996 compared to 1995).

imports, and more thoroughly reasoned analysis and conclusion. However, this does not mean that an analysis limited to that portion of the domestic industry's production sold in one market sector is sufficient for establishing injury or threat of injury to the domestic industry, consistently with the AD Agreement. It is undisputed in this case that SECOFI defined the domestic industry as consisting of all sugar producers. What SECOFI failed to do, however, was assess the question of injury to those producers on the basis of their production of the like product, sugar. Instead, it assessed the question of threat of injury only with reference to that portion of sugar producers' production that was sold in the industrial market, and took no account of the fact that almost half of production was sold in the household market.<sup>624</sup>

7.155 We recognize that a conclusion that there is injury or threat of injury to a specific sector could be indicative of injury or the threat of injury to the industry, as long as the sector in question were sufficiently representative of the industry concerned as a whole. However, if this is the basis of the investigating authority's determination, there must be an explanation of why the information and conclusions relating to the specific market sector are considered by the investigating authority to be representative of the domestic industry as a whole.<sup>625</sup> There is nothing in the final determination to suggest that SECOFI considered that the situation of the domestic industry with regard to the portion of its production sold in the industrial market to the situation of the sugar industry represented the situation of the domestic industry with regard to its production of the like product, sugar. There is no consideration of the impact of the household sector of the market on the situation of the industry.

7.156 SECOFI justified its focus on production for the industrial sector on the basis of Articles 65 and 66 of the Regulations of the Mexican Foreign Trade Law, which it concluded allowed the Ministry to study industries on a sectoral basis and to "separately identify" the domestic production of the like product on the basis of sales to different market sectors.<sup>626</sup> Article 66 of those Regulations reflects Article 3.6 of the AD Agreement, and Mexico relied on Article 3.6 in making its argument before us. Article 3.6 provides:<sup>627</sup>

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<sup>624</sup> Mexico argues that sugar sold in the industrial market constitutes a "major proportion" of the domestic production within the meaning of Article 4. However, we note that there is no explicit discussion of this in the final determination. In any event, this aspect of the definition of domestic industry allows the consideration of **producers** whose collective output of the like product constitutes a major proportion of domestic production of that product as the domestic industry. It does not allow a finding of injury, or threat of injury, on the basis of the effects of imports on a major proportion of the **production** of the like product of all producers.

<sup>625</sup> A similar conclusion has been reached in the context of the serious injury determination in safeguards investigations in two recently circulated Panel reports, *Korea-Dairy Safeguard Panel Report*, *Argentina-Footwear Safeguard Panel Report*. The issue addressed in each report is similar to that raised by this case. In both instances, the investigating authorities considered separate sectors of domestic production and the domestic market in conducting their analysis of whether there was serious injury to the domestic industry. Article 4.1(c) of the Safeguards Agreement defines the domestic industry in terms almost identical to those of the AD Agreement, as "the producers as a whole of the like or directly competitive products ..., or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products". Both Panels concluded that the failure of the investigating authorities to either consider all sectors, or to relate their conclusions concerning specific sectors to the industry as a whole, resulted in injury determinations that were not based on injury to the industry "as a whole", inconsistent with the requirements of the Safeguards Agreement. *Korea-Dairy Safeguard Panel Report*, para. 7.58, *Argentina-Footwear Safeguard Panel Report*, para. 8.137 & fn. 514.

<sup>626</sup> *Final Determination*, para. 463. It should be noted that, when discussing this issue in its first submission, Mexico omitted all references to Mexican law, but did rely on Article 3.6 of the AD Agreement.

<sup>627</sup> Article 66 of Mexico's Regulations provides:

"The effect of imports subject to unfair practices shall be evaluated in relation to domestic production of the identical or like product when the available data allow its separate identification on the basis such criteria as the production process, sales by producers and their

"The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which necessary information can be provided".

7.157 Article 3.6 does not, on its face, allow the determination of injury or threat of injury on the basis of the portion of the domestic industry's production sold in one sector of the domestic market, rather than on the basis of the industry as a whole. Indeed, Article 3.6 relates to a situation different from that at issue here. Article 3.6 provides for the situation where information concerning the production of the like product, such as producers' profits and sales, cannot be separately identified. In such cases, Article 3.6 allows the authority to consider information concerning production of a **broad**er product group than the like product produced by the domestic industry, which includes the like product, in evaluating the effect of imports. Nothing in Article 3.6 allows the investigating authority to consider information concerning production of a product sub-group that is **narrow**er than the like product produced by the domestic industry. In particular, nothing in Article 3.6 allows the investigating authority to limit its examination of injury to an analysis of the portion of domestic production of the like product sold in the particular market sector where competition with the dumped imports is most direct.

7.158 It is clear that the type of analysis provided for in Article 3.6 is not the analysis that was undertaken in this case. There is nothing in the final determination (or any of the other public notices issued) to suggest that it was not possible to separately identify the domestic industry's production of the like product sugar, and Mexico did not argue to the contrary.<sup>628</sup> Moreover, SECOFI **explicitly stated** that it excluded from its consideration sugar sold in the household market, and limited its

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profits. If it is not possible to identify production separately, the effect of such imports shall be assessed by analysing production of the narrowest group or range of products which includes the identical or like product for which all the necessary information to show injury can be provided".

Article 65 of Mexico's Regulations , which has no analogue in the AD Agreement, provides:

"The Ministry shall evaluate the economic factors described in the preceding Article in the context of the economic cycle and conditions of competition specific to the industry affected. For that purpose, the requesting parties shall submit information on the relevant factors and indicators and characteristics of the industry covering at least the three years preceding the submission of the request, including the period under investigation, unless the enterprise concerned had not been established for the whole of this period. In addition, domestic producers making a request or the organizations representing them shall submit economic studies, case studies, technical literature and national and international statistics on the performance of the market concerned, or any other documentation permitting identification of economic cycles and conditions of competition specific to the industry affected".

There is nothing in this provision which refers to or justifies consideration of injury to the domestic industry on the basis of information concerning a particular market segment.

<sup>628</sup> The fact that SECOFI was able to identify the portion of the domestic industry's production of the like product sold in the industrial market is irrelevant to the question whether the AD Agreement permits an injury determination on the basis of only the portion of the industry's production of the like product sold in that market.

examination to sugar sold in the industrial market, despite the fact that it had determined that there was only one like product at issue, sugar, and one industry, cane sugar producers.<sup>629</sup>

7.159 In the course of the proceeding, this approach, which was reflected in the notice of initiation, and was explicit in the preliminary determination, was challenged by certain of the parties. In the final determination, SECOFI dismissed the arguments of the importers in this regard, and explained its decision to exclude sales to the household user sector of the market from its analysis of threat of material injury:

"assessing the threat of injury to all sugar production would mean including production earmarked for household consumption, which was never threatened by imports of HFCS from the United States..."

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"[T]he Ministry decided to assess the impact of the imports under investigation taking into account the specific nature of competition within this industry and, thus, to pinpoint domestic production threatened by the presence of imports of HFCS from the United States of America, finding that it had sufficient information at its disposal to isolate the industrial segment of the domestic market for purposes of its investigation".<sup>630</sup>

That is, in order to determine whether there was threat of injury to the domestic industry, SECOFI deliberately excluded from its analysis production sold in the household market **because** that portion of the industry's market, accounting for 47 per cent of sugar consumption, would not be affected by the imports. However, Mexico acknowledged before us that events in the household market would have an impact on the domestic industry.<sup>631</sup> Absent consideration of production sold in the household market, or an explanation of why the production sold in the industrial market represented the industry as a whole, SECOFI could not make a conclusion regarding threat of injury to the domestic industry consistent with the requirements of the AD Agreement.

7.160 SECOFI's approach amounts to determining threat of injury to a sector of the domestic industry, that producing sugar for the industrial market, rather than on the basis of the domestic industry as a whole, despite the fact that the sugar sold in one market is indistinguishable from that sold in the other (except by the identity of the purchaser) and all sugar producers apparently sold sugar in both markets. SECOFI's reasoning for undertaking this approach was basically that sugar production destined for household consumption cannot be hurt by dumped imports of HFCS.<sup>632</sup> In SECOFI's view, injury or threat of injury should be determined only for that segment of domestic production which directly competes with subject imports. As noted above, while an analysis of the particular sector in which the competition between the domestic industry and dumped imports is most direct is certainly allowed under the AD Agreement, such an analysis does not excuse the investigating authority from making the determination required by that Agreement – whether dumped imports injure or threaten injury to the domestic industry as a whole. By limiting its analysis to the portion of the domestic industry's production sold in the industrial market, SECOFI ignored possible effects of imports on the portion of the domestic industry's production sold in the household sector, and ignored the effect of the household sector on the condition of the domestic producers of sugar.

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<sup>629</sup> Mexico argues that SECOFI considered information from all sugar producers, and therefore complied with the requirements of Article 3. However, the requirement to determine injury to the domestic industry as a whole cannot be satisfied by examining information regarding all producers, but only part of their production.

<sup>630</sup> *Final Determination*, paras. 463, 467.

<sup>631</sup> Answer of Mexico to Question No. 15 of the Panel, 22 June 1999.

<sup>632</sup> *Final Determination*, para. 463.



Thus, SECOFI failed to make a determination of threat of material injury to the domestic industry as a whole consistently with the requirements of the AD Agreement.

7.161 Mexico argued before us that threat of injury would have been found even if consumption by the household sector had been taken into consideration. However, we can find nothing in the final determination to suggest that such an analysis was undertaken by SECOFI in reaching its determination.

7.162 We therefore conclude that Mexico's determination of threat of injury is inconsistent with its obligations under Article 3.1, 3.2, 3.4 and 3.7 of the AD Agreement.

### **3. Determination of Likelihood of Substantially Increased Importation**

7.163 The United States contends that SECOFI did not consider the likelihood of substantially increased imports, as required by Article 3.7(i) of the AD Agreement, because it failed to take into consideration an alleged agreement between Mexican sugar refiners and soft-drink bottlers to restrain the bottlers' use of HFCS. The importers had argued before SECOFI that there was no basis for finding a threat of material injury in light of the alleged agreement.<sup>633</sup>

7.164 The United States notes that in the final determination, SECOFI declined to find that a restraint agreement existed solely on the basis of the importers' contentions.<sup>634</sup> However, the United States asserts that the record contained more than simple assertions by the importers. In this regard, the United States referred to a statement made by SECOFI Secretary Herminio Blanco, referring to the agreement and characterizing it as restraining purchases of fructose.<sup>635</sup>

7.165 The United States also notes that in the final determination SECOFI stated that, assuming it existed, such an agreement would not eliminate the threat of injury to the Mexican sugar industry. SECOFI explained that the existence of a restraint agreement "does not rule out the possibility of these bottling plants and other industries using HFCS for a number of different applications, continuing to purchase the imported product at discriminatory prices as a sugar substitute".<sup>636</sup> The United States argues that a possibility of continued imports does not support a conclusion of likelihood of increased imports.

7.166 In the United States' view, SECOFI's conclusion that the use of imported HFCS was likely to increase substantially assumed that the bottlers had taken no action that would restrict their future use of HFCS. This conclusion rested, inter alia, on findings that the beverage industry accounted for 81 per cent of the subject imports during the period of investigation, that the Mexican beverage industry was an attractive market for US exporters of HFCS, and that the Mexican soft-drink industry was growing steadily.<sup>637</sup> However, the United States argues, if a restraint agreement did exist, it would severely limit, if not eliminate, bottlers' ability to increase their HFCS purchases. There would be no reason for bottlers to purchase HFCS if they could not use it to sweeten beverages. Moreover, in light of SECOFI's finding that the beverage industry accounted for 81 per cent of consumption of HFCS imports from the United States, if bottlers' purchases of HFCS did not increase significantly, SECOFI's own findings indicated that it would be very unlikely that overall purchases of HFCS in Mexico would increase significantly.

7.167 In the United States' view, SECOFI's finding that Mexican users of HFCS would continue to purchase dumped imported HFCS whether or not a restraint agreement was in effect cannot be

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<sup>633</sup> *Id.*, para. 28L.

<sup>634</sup> *Id.*, para. 546.

<sup>635</sup> US-13.

<sup>636</sup> *Final Determination*, para. 547.

<sup>637</sup> *Id.*, paras. 464, 481, 486

reconciled with SECOFI's rationale concerning why the imports were likely to increase. Therefore, the United States argues, SECOFI's determination of threat of material injury by reason of the allegedly dumped HFCS imports does not satisfy the requirements of Article 3.7(i) of the AD Agreement.

7.168 Mexico maintains that, although the importers and exporters argued in the final stage of the investigation that there was an alleged restraint agreement potentially limiting HFCS consumption, the supporting documentation concerning this alleged agreement was submitted too late, on 22 January 1998, not only after the public hearing, but after the decision to impose a final anti-dumping measure had been made and the Final Decision had been prepared and sent for publication in the *Diario Oficial*, which publication occurred on 23 January 1998.

7.169 Furthermore, Mexico asserts that the United States is mistaken in contending that SECOFI decided that there was no need to determine whether such a restraint agreement actually existed. Mexico argues that SECOFI did, in fact, analyse the possible effects of the alleged agreement. SECOFI analyzed the potential effects of such an agreement, assuming it existed, on the likelihood of an imminent substantial increase in dumped imports. In this regard, Mexico points in particular to paragraph 547 of the final determination, in which SECOFI refers to the alleged agreement, and concludes that the arguments submitted by the importers and exporters were not sufficient to determine that an imminent and substantial increase in dumped HFCS imports would be avoided.

7.170 Mexico asserts that SECOFI concluded that, even if Mexican soft-drink bottlers limited their consumption of HFCS, threat of injury to the domestic industry still remained. Mexico argues that this conclusion was based on the following considerations:

- (a) imports during the period of investigation showed a significant rate of increase, which together with other factors - such as low prices, increasing substitution, freely disposable and increasing capacity in the United States, and the genuine importance of Mexico as a destination for United States' exports - indicated a likelihood that there would be a substantial increase in the future,<sup>638</sup>
- (b) SECOFI's threat of injury determination was based on information for 1996. However, SECOFI also considered import information for the period January to September 1997, which showed that imports of HFCS rose 75 per cent over the same period in 1996,<sup>639</sup> further demonstrating a likelihood of a substantial increase in imports,
- (c) Other industries, in addition to the soft-drinks industry, use imported HFCS in their activities and they would not be subject to the restrictions in the alleged restraint agreement. These industries accounted for approximately 46 per cent of the industrial sector's total sugar consumption.<sup>640</sup>
- (d) Both the soft-drinks industry and the other industries could purchase the imported product at low prices as a result of dumping, thereby causing sugar prices to shift and deteriorate.

7.171 In Mexico's view, the United States wrongly asserts that SECOFI did not identify the various applications, other than soft-drinks, for which the bottlers could purchase HFCS. Moreover, the United States confuses the soft-drink bottlers with the beverage industry as a whole, and fails to take into consideration that the latter consists both of manufacturers of bottled soft-drinks and

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<sup>638</sup> *Id.*, paras. 449-470.

<sup>639</sup> *Id.*, para. 460, *see* import statistics, MEXICO-40.

<sup>640</sup> *Final Determination*, para. 465.

manufacturers of other products such as juices, tonics for athletes and prepared infusions. SECOFI found that it was the beverage industry – not merely soft-drink bottlers – that accounted for 81 per cent of HFCS imports.<sup>641</sup> Mexico argues that in reaching its conclusion regarding likelihood of increased imports, SECOFI also considered HFCS consumption by other industries using HFCS in applications such as processed foods, preserves, confectionery, bakery products, dairy products, etc. In Mexico's view, these users would also continue to purchase imported HFCS, gradually displacing their consumption of sugar, thus indicating that imports would continue to increase even assuming the existence of an agreement between soft-drink bottlers and the sugar refiners.

7.172 Accordingly, Mexico maintains that SECOFI's affirmative determination of threat of injury to the domestic industry complied with the requirements of AD Agreement Article 3.7(i), given that SECOFI analyzed the possible repercussions of the alleged restraint agreement in finding a likelihood of substantially increased importation.

7.173 Our consideration of this issue requires us to determine whether SECOFI properly evaluated the facts concerning, and explained its conclusions regarding, the effects of the alleged restraint agreement in its consideration of the likelihood of substantially increased importation under Article 3.7(i). Mexico acknowledged that allegations concerning the alleged restraint agreement were made by the parties during the course of the final proceeding, but asserted that no supporting documentation was submitted until 22 January 1998, one day before the final determination was published. Mexico did, in response to the allegations, inquire of the Sugar Chamber whether such an agreement existed, to which the response was that there was no such agreement. Mexico asserts that it was not within SECOFI's authority to determine whether the alleged restraint agreement actually existed, but that in any event, SECOFI did consider the arguments on this issue, on the assumption that there was such an agreement. In the final determination, SECOFI noted that it had been unable to confirm the existence of such agreement and stated that, in any event, the alleged agreement "does not eliminate the possibility that bottlers as well as other sectors that use HFCS in multiple applications continue importing it under conditions of price discrimination to replace sugar".<sup>642</sup>

7.174 A first question in this regard is whether the existence of the alleged agreement could, or should, have been determined by SECOFI as a matter of fact on the basis of the investigative record. Mexico asserts that SECOFI lacks authority to make determinations in this regard. In our view, the question for purposes of an anti-dumping investigation is not whether an alleged restraint agreement in violation of Mexican law existed, an issue which might well be beyond the jurisdiction of an anti-dumping authority to resolve, but whether there was evidence of and arguments concerning the effect of the alleged restraint agreement<sup>643</sup>, which, if it existed, would be relevant to the analysis of the likelihood of increased dumped imports in the near future. If the latter is the case, in our view, the investigating authority is obliged to consider the effects of such an alleged agreement, assuming it exists. This is the analysis Mexico argues SECOFI undertook.

7.175 The question before us is whether SECOFI's analysis provides a reasoned explanation for its conclusion that, assuming such an agreement existed, there was nonetheless a likelihood of substantially increased importation.

7.176 Mexico asserts that SECOFI concluded that the existence of the restraint agreement did not affect the conclusion that there was a likelihood of substantially increased dumped imports, given that both soft-drink bottlers and other industrial users could have continued importing dumped HFCS.

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<sup>641</sup> *Id.*, para. 464. See Working Papers on the Analysis of Sales of HFCS Imports on the Mexican Market, MEXICO-39.

<sup>642</sup> *Final Determination*, paras. 545-47.

<sup>643</sup> We note in this regard that Article 12.2.2 of the AD Agreement requires that the notice of final determination contain "the reasons for the acceptance of relevant arguments or claims made by the exporters and importers". It is clear that the arguments concerning the alleged restraint agreement were relevant.

However, it is not apparent from the final determination that this was SECOFI's analysis and conclusion. The final determination merely states that

"In any event, the argument advanced by Almidones Mexicanos, S.A. de C.V. and the Corn Refiners Association [that the existence of the restraint agreement effectively eliminated the alleged threat of injury] does not rule out the possibility of these bottling plants as well as other industries using HFCS for a number of different applications, continuing to purchase the imported product at discriminatory prices as a sugar substitute. Thus, their contention that the situation described above eliminates the threat of injury to the sugar industry is invalid".<sup>644</sup>

In response to a question by the Panel, Mexico clarified that the record indicated that 68 per cent of imported HFCS was consumed by soft-drink bottlers, 13 per cent by other beverage producers, and 19 per cent by other industrial users. Mexico also clarified that other beverage producers are fully able to substitute HFCS for sugar, while the substitutability in other industrial uses varies from 10 per cent to 100 per cent. Thus, it is clear that soft-drink and other beverage manufacturers, who can freely substitute HFCS for sugar, accounted for the lion's share of imports, and that the possibilities of substituting HFCS for sugar in goods other than soft-drinks and other beverages, which accounted for less than 20 per cent of HFCS imports, are more limited. This suggests that the alleged restraint agreement would have had at least some, and potentially a significant, effect on future levels of imports, and does not support the conclusion that substantially increased importation is likely. Mexico's references to the increasing trend of HFCS imports suggest that somehow SECOFI concluded that such imports would have continued increasing by inertia, given the significant increases recorded during the period of investigation and through September 1997, even if they were not demanded in significantly increased amounts by the soft-drink bottlers, the leading consumers of imported HFCS. Mexico points out that the alleged restraint agreement was made after the period of investigation, and thus any limitation on imports started from the already significantly increased levels that had been reached. However, the question for purposes of analysis of threat of material injury is not the level of imports already reached, but the likelihood of **increased** imports.

7.177 Mexico's contention that users of imported HFCS other than soft-drink bottlers could have increased their consumption in amounts sufficient to constitute a substantial increase in imports is in our view questionable.<sup>645</sup> However, even assuming this to be the case, there is no discussion in the final determination of the share of imports and domestic production consumed by soft-drink bottlers, other beverage manufacturers, and other industrial users, and the degree of substitutability of HFCS and sugar in their products. Moreover, the alleged restraint agreement affected purchasers accounting for 68 per cent of the imports, suggesting that it would at least slow any further increases in imports. In addition, most other purchasers' ability to substitute HFCS for sugar was limited, suggesting that, if the alleged restraint agreement existed, any further increases in imports would be less than they had been in the past. None of these elements is addressed in SECOFI's final determination. We note, moreover, that the final determination states that the alleged restraint agreement does not "rule out the **possibility**" (emphasis added) that bottlers and other users would continue their purchases of imported HFCS. However, not ruling out the possibility that imports would continue does not support the conclusion that there is a "**likelihood** of substantially **increased** importation" (emphasis added), as provided for in Article 3.7(i).

7.178 We conclude that SECOFI's consideration of the potential effects of the alleged restraint agreement was inadequate. Therefore, we determine that SECOFI's conclusion that there was a

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<sup>644</sup> *Final Determination*, para. 547.

<sup>645</sup> We note that the distinction between soft-drink bottlers and other beverage producers is not clear from the final determination. However, we have relied on the information Mexico provided from the underlying record in this regard.

"likelihood of substantially increased importation" is inconsistent with the requirements of Article 3.7(i) of the AD Agreement.

E. PERIOD OF APPLICATION OF THE PROVISIONAL MEASURE

7.179 The provisional anti-dumping measure imposed by SECOFI on imports of HFCS from the United States on 25 June 1997 was not terminated until 24 January 1998, more than six months later.<sup>646</sup> The United States claims that the extension by SECOFI of the period of application of the provisional measure beyond six months violated Article 7.4 of the AD Agreement, and notes that there is nothing in the final determination explaining this action. In the United States' view, there can be no justification under any provision of the AD Agreement for this extension of the provisional measure.<sup>647</sup>

7.180 Mexico admits that the provisional measure was applied for longer than the six-month period provided for in Article 7.4 of the AD Agreement. However, Mexico asserts that it applied the provisional measure for the shortest possible period in the spirit of Article VI of the GATT 1994. Mexico maintains that SECOFI considered that suspension of the provisional measure at the end of the six month period would not only further expose the domestic industry threatened by dumped imports but would also favour dumping, even if only for a short period. Since Article VI condemns dumping if there is a threat of injury to the domestic industry, Mexico argues that the choice not to terminate the provisional measure was justified. Moreover, Mexico asserts this choice was made with the certainty that the final determination would be adopted shortly.<sup>648</sup> Mexico points out SECOFI conducted the investigation in a shorter time than that provided for in Article 5.10 of the AD Agreement. Therefore, Mexico asserts that the application of the provisional measure for the additional period cannot be construed as an attempt to set up a barrier to normal trade.

7.181 In considering this issue, we note that Article 7.4 of the AD Agreement provides:

"The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively".

7.182 The language of Article 7.4 is clear and explicit on the question of the allowable duration of a provisional measure. Unless exporters representing a significant percentage of the trade involved request an extension of the period of application, a situation which undisputedly did not arise in this case, Article 7.4 limits the period of application of a provisional measure to a period no longer than six months, and provides no basis for extension of that period. Indeed, Mexico has made no legal argument to the contrary, relying instead on general assertions of its good intentions and that the additional period of application of the provisional measure was for the shortest time possible.

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<sup>646</sup> The United States asserts that the extension of the provisional measures encompassed a full third month, or until 26 January 1998, because 24 January was a Saturday. The *Final Determination* was published on a Friday, 23 January 1998. The additional days are not relevant to our legal analysis.

<sup>647</sup> The United States originally also claimed that the application of the provisional measure for six months, rather than four, violated Article 7.4, asserting that Mexico did not, in fact, consider whether the application of a lesser duty would be sufficient to remove the injury, as required by that Article to justify the longer period. The United States expressly withdrew this claim at our first meeting with the parties, and therefore it is no longer before us.

<sup>648</sup> Mexico also notes that SECOFI's activities were suspended from 22 December 1997 to 6 January 1998, which together with the procedures involved in signing and publication of the *Final Determination*, which took several days, resulted in a delay in the issuance of the notice of the final determination.

7.183 The AD Agreement contains specific rules for the implementation of Article VI of GATT 1994 with respect, *inter alia*, to the period of application of provisional measures.<sup>649</sup> Those rules are binding on all Members, and arguments based on references to the "spirit" of the GATT 1994 are unavailing to justify a failure to comply with those rules. We conclude that, in light of the specific limitation on the period of application of provisional measures contained in Article 7.4, the application of the provisional measure beyond the six month period is inconsistent with Mexico's obligations under Article 7.4 of the AD Agreement.

F. RETROACTIVE LEVYING OF ANTI-DUMPING DUTIES FOR THE PERIOD OF APPLICATION OF THE PROVISIONAL MEASURE

**1. Failure to make a Determination under Article 10.2 of the AD Agreement**

7.184 The United States points out that SECOFI found threat of material injury in its final determination. In such a case, the United States argues that, pursuant to Article 10.2 of the AD Agreement, Mexico was entitled to levy anti-dumping duties for the period of application of the provisional measure only if it made a finding that the effect of the dumped imports would, in the absence of the provisional measures imposed, have led to a determination of injury to the domestic industry. The United States asserts that SECOFI failed to make such a finding, but nonetheless imposed provisional measures retroactive to the date of the preliminary determination, thereby violating Article 10.2.

7.185 The United States further contends that SECOFI also violated - and continues to violate - Article 10.4 of the AD Agreement by failing expeditiously to release the bonds posted and/or return the cash deposits paid on entries of HFCS into Mexico between the effective dates of SECOFI's preliminary and final determinations. The United States argues that, having failed to make a finding that the effect of the dumped imports would, in the absence of the provisional measure imposed, have led to a determination of injury to the domestic industry, SECOFI was precluded from imposing anti-dumping duties for the period of application of the preliminary measure, and therefore was required by Article 10.4 to release any bonds posted and/or return any cash deposits paid pursuant to the provisional measure.

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<sup>649</sup> We note in this regard that Article 1 of the AD Agreement provides:

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

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<sup>1</sup> The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5".

We also note Article 18.1 of the AD Agreement, which provides:

"No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."<sup>24</sup>

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<sup>24</sup> This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate".

7.186 Mexico argues that it applied anti-dumping duties for the period of application of the provisional measure in order to prevent injury to the domestic industry, in conformity with Article 10.2 of the AD Agreement. Consequently, Mexico argues that the question of the release of bonds and/or return of cash payments under Article 10.4 does not arise.

7.187 Mexico asserts that, while SECOFI may not have set out its determination in precisely the terms the United States would have liked, SECOFI's analysis and examination of the issue of material injury caused by dumped HFCS imports in the absence of a provisional measure are evidenced throughout the various proceedings carried out in the course of the investigation and are shown in the administrative file. Moreover, Mexico asserts that it is apparent from the findings of fact and conclusions of law in this case that injury would actually have been caused to the domestic sugar industry in the absence of provisional anti-dumping duties. In Mexico's view, the entirety of the findings and conclusions enabled SECOFI to make a final determination of threat of injury and decide to levy anti-dumping duties retroactively. Mexico also points out that at the time of the preliminary determination, the increase in imports of dumped HFCS was already a reality. Accordingly, the situation referred to in Article 10.2 of the AD Agreement had been considered by SECOFI since the preliminary stage of the investigation, when it determined that it was necessary to apply a provisional measure to prevent injury being caused during the investigation. Mexico argues that it applied anti-dumping duties for the period of application of the provisional measure in order to prevent injury to the domestic industry, in conformity with Article 10.2 of the AD Agreement.

7.188 In considering this issue, we note that Article 10 of the AD Agreement governs the retroactive application of anti-dumping duties. Article 10.2, which is at issue here, provides:

"Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied".

Article 10.4 complements Article 10.2, providing:

"Except as provided for in [Article 10.2], where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner".

7.189 The United States argues, in essence, that there must be some specific examination of and conclusion regarding the issue of whether "the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury" before final anti-dumping duties can be applied retroactively for the period of application of a provisional measure in a case where the final determination is one of threat of injury. Mexico, on the other hand, asserts that the entire analysis in the final determination, and indeed, the preliminary determination concluding that a provisional measure was necessary, demonstrate that in the absence of the provisional measure, there would have been a determination of material injury, rather than threat of material injury. Therefore, Mexico asserts that retroactive levying of final anti-dumping duties was justified in this case.

7.190 We cannot agree with Mexico's position. Mexico's interpretation of Article 10.2, would, as a practical matter, effectively allow the retroactive levying of final duties in every case in which a provisional measure is imposed and there is a final determination of threat of material injury. However, it is clear from the language of Article 10.2 itself, and its context (in particular

Article 10.4), that retroactive imposition of anti-dumping duties is permissible only in those instances in which the particular conditions set forth in Article 10.2 of the Agreement exist.<sup>650</sup>

7.191 Moreover, while Article 10.2 does not explicitly require a "determination" that "the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury", there must be some specific statement in the final determination of the investigating authority from which a reviewing panel can discern that the issue addressed in Article 10.2 was properly considered and decided. Article 12.2 of the AD Agreement requires that the public notice of any final determination "set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". Article 12.3 further specifies that the "provisions of [Article 12] shall apply *mutatis mutandis* to ... decisions under Article 10 to apply duties retroactively". Thus, it is clear to us that the investigating authority must set out in sufficient detail its findings and conclusions on the issue of whether "the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury" before final anti-dumping duties may, consistently with Article 10.2 of the AD Agreement, be levied for the period during which a provisional measure was in place.

7.192 In this case, it is undisputed that the only discussion concerning the retroactive application of anti-dumping duties is contained in paragraph 562 of SECOFI's final determination. That paragraph provides, in its entirety:

"562. The Ministry of Finance and Public Credit shall be entrusted with collecting the aforesaid definitive countervailing duties and encashing corresponding guarantees furnished by importers to protect the government's financial interests in the event of the non-payment of any established countervailing duties under the provisions of Article 65 of the Foreign Commerce Act, as well as with releasing or modifying the terms of such guarantees or, where applicable, refunding the value of payments or overpayments of corresponding penal sums".

There is no analysis of the situation that would have existed in the domestic industry in the absence of provisional measures in this statement. Article 17.6(i) of the AD Agreement specifies that, in assessing the facts of the matter, a panel "shall determine whether the authorities establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective". In this case, we have no record of SECOFI's establishment or evaluation of the facts concerning this issue. The directive to another Governmental body to collect final anti-dumping duties cannot reasonably be read as findings and conclusions by SECOFI establishing and evaluating facts leading to the conclusion that in the absence of provisional measures, material injury to the Mexican sugar industry would have occurred. Moreover, we cannot agree that it is our task to discern the necessary findings and conclusions from the entirety of the analysis in the final determination, the preliminary determination, or the entire case record. Therefore, we conclude that the retroactive levying of final anti-dumping duties in this case is inconsistent with Article 10.2 of the AD Agreement.

7.193 Having reached the foregoing conclusion, we further conclude that the failure expeditiously to release bonds and/or cash deposits collected under the provisional measure is inconsistent with Article 10.4 of the AD Agreement.

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<sup>650</sup> Or, of course, if any of the other circumstances justifying retroactive application of anti-dumping duties set forth in Article 10 exist. These are a final determination of material injury (Article 10.2) and the circumstances set forth in Article 10.6, as limited by Article 10.8. There is no contention that these circumstances existed in this case.



## 2. Claim under Article 12<sup>651</sup>

7.194 The United States argues that SECOFI failed to provide any findings of fact and conclusions of law for its retroactive application of anti-dumping duties in this threat of injury case. As SECOFI failed to provide "all relevant information...and reasons which have led to the imposition of final measures...as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters", the United States maintains that it violated both Articles 12.2 and 12.2.2 of the AD Agreement.

7.195 Mexico asserts that the findings of fact and conclusions of law underlying SECOFI's determination that, in the face of substantially increased imports of the product at dumped prices, the circumstances that prevailed in the period under investigation would change in such a way as to create a situation in which dumping would cause injury, satisfy the requirements of Article 12.2 and Article 12.2.2 with respect to the decision to retroactively apply the final anti-dumping duty.

7.196 Articles 12.2 and 12.2.2 set forth the requirements for a public notice of an affirmative final determination providing for the imposition of anti-dumping duties. They provide:

"12.2 Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. Each such notice shall set forth, or otherwise make available through a separate report, **in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities**. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein". (Emphasis added).

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"12.2.2. A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information. **In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers**, and the basis for any decision made under subparagraph 10.2 of Article 6". (Emphasis added).

7.197 The question that faces us in this case is whether Mexico's public notice of final determination adequately explained its conclusion of law that the retroactive application of the final anti-dumping measure was justified under Article 10.2.

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<sup>651</sup> The United States asserted in its first submission that SECOFI failed to provide findings and conclusions of fact and law for its extension of provisional measures beyond the four-month time limitation, in violation of Articles 12.2 and 12.2.2 of the AD Agreement. However, the United States withdrew its claim of violation of Article 7.4 with respect to the extension of the provisional measure from four to six months. Therefore, its claim of violation of Article 12.2 and 12.2.2 in this respect has also been abandoned. We therefore make no conclusions on this issue.

7.198 We have decided above that Mexico's decision to retroactively apply the final anti-dumping duty was inconsistent with the substantive requirements of Article 10.2. In so doing, we found that there was **no** explanation of the facts and conclusions underlying Mexico's decision in this regard in the final notice. Article 12.3 specifically provides "The provisions of [Article 12] shall apply *mutatis mutandis* to ... decisions under Article 10 to apply duties retroactively". Consequently, the lack of any findings or conclusions on this issue is inconsistent with Mexico's obligations under Article 12.2 and Article 12.2.2.

## VIII. CONCLUSION AND RECOMMENDATION

8.1 In light of the findings above, we conclude that Mexico's initiation of the anti-dumping investigation on imports of HFCS from the United States was consistent with the requirements of Articles 5.2, 5.3, 5.8, 12.1 and 12.1.1(iv) of the AD Agreement.

8.2 In light of the findings above, we conclude that Mexico's imposition of the definitive anti-dumping measure on imports of HFCS from the United States is inconsistent with the requirements of the AD Agreement in that:

- (a) Mexico's inadequate consideration of the impact of dumped imports on the domestic industry, its determination of threat of material injury on the basis of only a part of the domestic industry's production, that sold in the industrial sector, rather than on the basis of the industry as a whole, and its inadequate consideration of the potential effect of the alleged restraint agreement in its determination of likelihood of substantially increased importation are not consistent with the provisions of Articles 3.1, 3.2, 3.4, 3.7 and 3.7(i) of the AD Agreement,
- (b) Mexico's extension of the period of application of the provisional measure is not consistent with the provisions of Article 7.4 of the AD Agreement,
- (c) Mexico's retroactive levying of anti-dumping duties for the period of application of the provisional measure is not consistent with the provisions of Article 10.2 of the AD Agreement,
- (d) Mexico's failure expeditiously to release bonds and/or cash deposits collected under the provisional measure is not consistent with the provisions of Article 10.4 of the AD Agreement, and
- (e) Mexico's failure to set forth findings or conclusions on the issue of the retroactive application of the final anti-dumping measure is not consistent with the provisions of Articles 12.2 and 12.2.2 of the AD Agreement.

8.3 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent Mexico has acted inconsistently with the provisions of the AD Agreement, it has nullified or impaired benefits accruing to the United States under that Agreement.

8.4 We recommend that the Dispute Settlement Body request Mexico to bring its measure into conformity with its obligations under the AD Agreement.

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