

**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 60 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

I. INTRODUCTION

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.¹ 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 1994.²

1.3 At its meeting on 25 November 1998, the Dispute Settlement Body (DSB) established a panel pursuant to the above request.³ 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.

¹ WT/DS132/1.

² WT/DS132/2.

³ 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.⁴ 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 55.⁵

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 55.⁶ The notice entrusted the Ministry of Finance and Public Credit with collecting the

⁴ *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).

⁵ *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).

⁶ *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.

[Parties' arguments in Section V deleted from this version]

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"⁵¹² established in this single precedent⁵¹³ 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".⁵¹⁴
- (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.

⁵¹² 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".

⁵¹³ 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.

⁵¹⁴ 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.⁵¹⁵

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

⁵¹⁵ *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.⁵¹⁶ 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 States⁵¹⁷ 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.

⁵¹⁶ 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.

⁵¹⁷ 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.⁵¹⁸
- (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.⁵¹⁹

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

⁵¹⁸ 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.

⁵¹⁹ 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.⁵²⁰ SECOFI established the period from

⁵²⁰ *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 55.⁵²¹ 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 55.⁵²² 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.

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*).

⁵²¹ *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*).

⁵²² *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*⁵²³, 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*,⁵²⁴ 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.

⁵²³ *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.

⁵²⁴ *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.⁵²⁵ 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 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".⁵²⁶

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".⁵²⁷

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.⁵²⁸ 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*,⁵²⁹ 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

⁵²⁵ *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.

⁵²⁶ *Id.*, para. 76.

⁵²⁷ *Id.*, para. 80.

⁵²⁸ 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.

⁵²⁹ *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".⁵³⁰

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.⁵³¹ 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.⁵³² Similarly, we do not find that that the

⁵³⁰ *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

⁵³¹ We note that Article 17.4 does not refer to "claims".

⁵³² 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.⁵³³

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.

⁵³³ 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".⁵³⁴

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.⁵³⁵

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".

⁵³⁴ *Guatemala-Cement AB Report*, para. 75 (emphasis in original).

⁵³⁵ 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".⁵³⁶ 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.⁵³⁷

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.⁵³⁸

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

⁵³⁶ *United States - Taxes on Petroleum and Certain Imported Substances*, BISD 34S/136, adopted 17 June 1987, paragraph 5.1.3.

⁵³⁷ 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.

⁵³⁸ 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".⁵³⁹ 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.⁵⁴⁰ 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

⁵³⁹ 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).

⁵⁴⁰ 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,⁵⁴¹ 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*⁵⁴² 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".⁵⁴³ 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.⁵⁴⁴

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".⁵⁴⁵ Finally, third parties, like parties to panel proceedings, are required to maintain the confidentiality of the proceedings. Thus, the United States

⁵⁴¹ 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.

⁵⁴² *Korea-Taxes on Alcoholic Beverages (Korea-Alcohol)*, WT/DS75/R, WT/DS84/R (*Korea-Alcohol Panel Report*), adopted 17 February 1999.

⁵⁴³ *Korea-Alcohol Panel Report*, para. 10.23.

⁵⁴⁴ *India-Protection for Pharmaceutical and Agricultural Chemical Products (India-Patents)*, WT/DS50/ABR (*India-Patents AB Report*), adopted 2 September 1998, para. 94.

⁵⁴⁵ See DSU, Appendix 3, para. 6.

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.

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.⁵⁴⁶ 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.

⁵⁴⁶ 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.

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 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.⁵⁴⁷ Accordingly, our examination of Mexico's preliminary objection will focus on the admissibility of that claim.⁵⁴⁸

⁵⁴⁷ 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.

⁵⁴⁸ 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*

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 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.⁵⁴⁹ 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)".⁵⁵⁰ 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".⁵⁵¹

7.50 The United States' request for establishment of a panel in this dispute specifically identifies "SECOFI's final anti-dumping measure".⁵⁵² 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**".⁵⁵³

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

Report, para. 141. Accordingly, we cannot rule that any arguments referring to the provisional measure are outside our terms of reference.

⁵⁴⁹ *Guatemala-Cement AB Report*, para. 79.

⁵⁵⁰ *Id.*, para. 72.

⁵⁵¹ *Id.*, para. 80 (emphasis added).

⁵⁵² 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").

⁵⁵³ *Guatemala-Cement AB Report*, para. 79 (emphasis added).

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 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.⁵⁵⁴ 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,⁵⁵⁵ 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.

⁵⁵⁴ See Article 5.4 of the AD Agreement.

⁵⁵⁵ 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.

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 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*⁵⁵⁶, the United States argues that because the AD Agreement defines the term "injury" to include threat of material injury,⁵⁵⁷ 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

⁵⁵⁶ *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.

⁵⁵⁷ See AD Agreement, footnote 9.

of the domestic industry. In addition, the United States argues that, because the application did not 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.⁵⁵⁸

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;⁵⁵⁹

⁵⁵⁸ The United States does not dispute that the application contained information concerning the Article 3.7 factors.

⁵⁵⁹ 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;⁵⁶⁰
 - list of domestic producers of the like product: paragraph 2.4 of the application and Annex 2.4.⁵⁶¹
- (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;⁵⁶²
 - 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;⁵⁶³
 - 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 2.9.⁵⁶⁴
- (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;⁵⁶⁵
 - 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.⁵⁶⁶
- (d) Article 5.2(iv) of the AD Agreement:

⁵⁶⁰ Application, MEXICO-16. See Annex 6A and the monthly national balance, MEXICO-17.

⁵⁶¹ See Application, MEXICO-16. See Annex 2.4 to Application, MEXICO-18.

⁵⁶² 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.

⁵⁶³ See Application, MEXICO-16 and Annexes 3.4 and 3.6 to Application, MEXICO-10.

⁵⁶⁴ 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.

⁵⁶⁵ 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.

⁵⁶⁶ 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;⁵⁶⁷
- 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 employment⁵⁶⁸; (ii) financial indicators (cash flow statement, financial statement, income statement, statement of production costs and financial ratios)⁵⁶⁹; (iii) installed capacity of each mill and the methodology used to determine the installed capacity⁵⁷⁰; (iv) investment projects in the sugar industry⁵⁷¹; (v) HFCS import statistics and annual statement of imports drawn up by the applicant with information from the SHCP⁵⁷²; (vi) list of average weighted market prices according to the category of sugar and the supply centre.⁵⁷³

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.⁵⁷⁴ 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

⁵⁶⁷ 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.

⁵⁶⁸ See Application, MEXICO-16 and Annex 6-A to Application, and the national balance for sugar, MEXICO-17.

⁵⁶⁹ See Application, MEXICO-16 and Annexes 4.19, 4.20 and 4.21 to Application, MEXICO-33.

⁵⁷⁰ See Application, MEXICO-16 and Annex 4.22 to Application, MEXICO-30.

⁵⁷¹ See Application, MEXICO-16 and Annex 4.24 to Application, MEXICO-32.

⁵⁷² Application, MEXICO-16, Annex 4.3(i) to Application, MEXICO-23 and Annex 3.16 to Application, MEXICO-22.

⁵⁷³ 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.

⁵⁷⁴ 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.⁵⁷⁵

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.⁵⁷⁶ 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.⁵⁷⁷

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

⁵⁷⁵ 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.

⁵⁷⁶ 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.

⁵⁷⁷ 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 5.3.⁵⁷⁸

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".⁵⁷⁹ 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 employment⁵⁸⁰; cash flow, financial situation, income, production costs and financial ratios⁵⁸¹; installed capacity⁵⁸²; and investment projects in the sugar industry⁵⁸³. 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.⁵⁸⁴

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 various of the Article 3.4 factors. In this regard, we note that information, in the sense of evidence,

⁵⁷⁸ *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.

⁵⁷⁹ 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.

⁵⁸⁰ See Application, MEXICO-16 and Annex 6-A to Application, and the national balance for sugar, MEXICO-17.

⁵⁸¹ See Application, MEXICO-16 and Annexes 4.19, 4.20 and 4.21 to Application, MEXICO-33.

⁵⁸² See Application, MEXICO-16 and Annex 4.22 to Application, MEXICO-30.

⁵⁸³ See Application, MEXICO-16 and Annex 4.24 to Application, MEXICO-32.

⁵⁸⁴ 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.

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 report²³, 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.

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

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.⁵⁸⁵

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.⁵⁸⁶ 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.⁵⁸⁷

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,

⁵⁸⁵ 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".

⁵⁸⁶ 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 industry 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.

⁵⁸⁷ 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*.⁵⁸⁸ 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.⁵⁸⁹ 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.²³⁵ 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

⁵⁸⁸ *Guatemala-Cement Panel Report, United States-Measures affecting Import of Softwood Lumber from Canada*, SCM/162, BISD40S/358, adopted 27-28 October 1993.

⁵⁸⁹ See *Japan-Alcohol AB Report*, pages 14-15.

initiation nonetheless had to be relevant to establishing these same Agreement elements".²³⁶

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".²³⁷

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 Ministry²³⁸ 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.²³⁹ 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.

²³⁵ 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.

²³⁶ *Id.*, para. 332.

²³⁷ *Id.*, para. 335.

²³⁸ 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.

²³⁹ *Softwood Lumber* at para. 332".⁵⁹⁰

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".⁵⁹¹ 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".

⁵⁹⁰ *Guatemala-Cement Panel Report*, paras. 7.54–7.57 (footnotes in original).

⁵⁹¹ *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.⁵⁹²

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.⁵⁹³ 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 document⁵⁹⁴ 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.

⁵⁹² 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...".

⁵⁹³ See *Swedish Anti-Dumping Duties*, BISD 3S/81, adopted 26 February 1955, paras. 15 & 23.

⁵⁹⁴ 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 access⁵⁹⁵, 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-13.⁵⁹⁶ 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.⁵⁹⁷ This is particularly true since SECOFI's preliminary determination sets out in more detail the underlying information, and explains SECOFI's

⁵⁹⁵ Answer of Mexico to Question No. 5 by the Panel, 22 June 1999.

⁵⁹⁶ 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.

⁵⁹⁷ 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.⁵⁹⁸ 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

⁵⁹⁸ 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".⁵⁹⁹ 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;

⁵⁹⁹ 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.⁶⁰⁰ 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.⁶⁰¹ 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.

⁶⁰⁰ We keep in mind, of course, the applicable standard of review, set forth in Article 17.6(ii) of the AD Agreement.

⁶⁰¹ 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.⁶⁰²

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.⁶⁰³ 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*⁶⁰⁴, observed that the wording of Articles 6.2 and 6.3 of the ATC makes it clear that all

⁶⁰² 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...".

⁶⁰³ 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.

⁶⁰⁴ *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".⁶⁰⁵

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".⁶⁰⁶

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".⁶⁰⁷

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".⁶⁰⁸

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.

⁶⁰⁵ Article 6.3 of the Agreement on Textiles and Clothing (emphasis added).

⁶⁰⁶ *United States-Shirts and Blouses Panel Report*, para. 7.25.

⁶⁰⁷ *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.

⁶⁰⁸ *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 3.4.⁶⁰⁹

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

⁶⁰⁹ 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.⁶¹⁰ 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

⁶¹⁰ 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.⁶¹¹ 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.⁶¹²

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.⁶¹³ 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.

⁶¹¹ 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.

⁶¹² 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.

⁶¹³ 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).⁶¹⁴ 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".⁶¹⁵ 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.⁶¹⁶ The question before us is whether SECOFI did so.

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

⁶¹⁴ 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.

⁶¹⁵ *Final Determination*, para. 441.

⁶¹⁶ 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.

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).⁶¹⁷

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 1996.⁶¹⁸ 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).⁶¹⁹

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.⁶²⁰

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).⁶²¹

7.153 Sales to the industrial sector of the Mexican sugar market accounted for 53 per cent of total Mexican sugar consumption.⁶²² Thus, SECOFI's analysis and findings concerning market share and prices⁶²³ 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 imports, and more thoroughly reasoned analysis and conclusion. However, this does not mean that an

⁶¹⁷ *Final Determination*, para. 453

⁶¹⁸ *Id.*, para. 469.

⁶¹⁹ *Id.*, para. 461.

⁶²⁰ *Id.*, para. 499.

⁶²¹ *Id.*, para. 496.

⁶²² *Id.*, para. 465

⁶²³ *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).

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.⁶²⁴

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.⁶²⁵ 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.⁶²⁶ 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:⁶²⁷

⁶²⁴ 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.

⁶²⁵ 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.

⁶²⁶ *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.

⁶²⁷ 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 profits. If it is not possible to identify production separately, the effect of such imports shall

"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 **broader** 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 **narrower** 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.⁶²⁸ Moreover, SECOFI **explicitly stated** that it excluded from its consideration sugar sold in the household market, and limited its 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.⁶²⁹

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.

⁶²⁸ 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.

⁶²⁹ 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

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..."

"[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".⁶³⁰

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.⁶³¹ 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.⁶³² 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. 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

industry as a whole cannot be satisfied by examining information regarding all producers, but only part of their production.

⁶³⁰ *Final Determination*, paras. 463, 467.

⁶³¹ Answer of Mexico to Question No. 15 of the Panel, 22 June 1999.

⁶³² *Final Determination*, para. 463.

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.⁶³³

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.⁶³⁴ 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.⁶³⁵

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".⁶³⁶ 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.⁶³⁷ 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 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.

⁶³³ *Id.*, para. 28L.

⁶³⁴ *Id.*, para. 546.

⁶³⁵ US-13.

⁶³⁶ *Final Determination*, para. 547.

⁶³⁷ *Id.*, paras. 464, 481, 486

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,⁶³⁸
- (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 1996,⁶³⁹ 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.⁶⁴⁰
- (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 manufacturers of other products such as juices, tonics for athletes and prepared infusions. SECOFI found that that it was the beverage industry - not merely soft-drink bottlers - that accounted for 81 per cent of HFCS imports.⁶⁴¹ Mexico argues that in reaching its conclusion regarding likelihood of

⁶³⁸ *Id.*, paras. 449-470.

⁶³⁹ *Id.*, para. 460, *see* import statistics, MEXICO-40.

⁶⁴⁰ *Final Determination*, para. 465.

⁶⁴¹ *Id.*, para. 464. *See* Working Papers on the Analysis of Sales of HFCS Imports on the Mexican Market, MEXICO-39.

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".⁶⁴²

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 agreement⁶⁴³, 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. 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

⁶⁴² *Final Determination*, paras. 545-47.

⁶⁴³ 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.

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".⁶⁴⁴

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.⁶⁴⁵ 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 "likelihood of substantially increased importation" is inconsistent with the requirements of Article 3.7(i) of the AD Agreement.

⁶⁴⁴ *Final Determination*, para. 547.

⁶⁴⁵ 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.

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.⁶⁴⁶ 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.⁶⁴⁷

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.⁶⁴⁸ 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.

⁶⁴⁶ 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.

⁶⁴⁷ 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.

⁶⁴⁸ 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.⁶⁴⁹ 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.

⁶⁴⁹ 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 initiated¹ 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.

¹ 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."²⁴

²⁴ 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 in any bonds released in an expeditions 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.⁶⁵⁰

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.

⁶⁵⁰ 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 12⁶⁵¹

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).

"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.

⁶⁵¹ 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.